



# MILITARY LAW REVIEW

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## **MILITARY LAW REVIEW—VOLUME 167**

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# MILITARY LAW REVIEW

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Volume 167

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## FOURTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW<sup>1</sup>

### A NEGOTIATOR'S PERSPECTIVE ON THE INTERNATIONAL CRIMINAL COURT

AMBASSADOR DAVID J. SCHEFFER<sup>2</sup>

Thank you, Colonel Lederer, both for the introduction and for the opportunity to address such a distinguished audience of military lawyers, faculty, and other guests. I also want to thank Brigadier General Thomas Romig for his hospitality and encouragement to be here today. Lieutenant Colonel Tia Johnson, the Chair of your International and Operational Law Department, merits special praise for her hard work to bring me here for the Solf Lecture.

One of the most dynamic fields of international law today is the law of armed conflict, or what is increasingly referred to as international humanitarian law and international criminal law in multilateral negotiations and in scholarly treatises. As JAG officers, you above all others recognize the importance of the U.S. military's role in developing the law of armed conflict and in complying with it. We are all guided by a remark-

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1. This article is an edited transcript of a lecture delivered on 28 February 2001 by David J. Scheffer to members of the staff and faculty, distinguished guests, and officers attending the 49th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Solf who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful effort in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

ably rich tradition of American engagement in the development and enforcement of the law of armed conflict. Well-trained forces that understand the law of armed conflict will demonstrate professionalism and compliance that cannot be seriously questioned. The lawyers who train and deploy and fight with our soldiers, sailors, and airmen are a vital line of defense. Judge advocates must know, with precision, the law of armed conflict, and they must protect their commanders throughout the cycle of operations and in any operational environment. That is a very tough job for which I believe you deserve our respect and our full support in every possible way. I have always told your superiors to sign me up for any testimony before Congress to increase your salaries and benefits. Believe me, it is a humbling experience for this lawyer to stand before so many professional military lawyers who shoulder so much responsibility.

During my tour as Ambassador-at-Large, we drew upon your profession's heritage daily as we supported the work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, negotiated the establishment of the Extraordinary Chambers in Cambodia and the Independent Special Court for Sierra Leone, and assisted with establishing credible mechanisms of justice to respond to atrocities in East Timor, Sri Lanka, the Great Lakes region of Africa, Kosovo, Iraq, and other war zones. I am proud to have had JAG officers work for me in the Office of War Crimes Issues in the State Department and on the U.S. delegation to

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2. Former Ambassador-at-Large for War Crimes Issues. David John Scheffer was nominated by President William J. Clinton to serve as the first-ever Ambassador-at-Large for War Crimes Issues on 22 May 1997. Following Senate confirmation, he was sworn into office on 5 August 1997. The appointment carried an ambassadorial rank. This newly created post addresses serious violations of international humanitarian law anywhere in the world. Ambassador Scheffer coordinated support for the functions of the Yugoslav and Rwandan War Crimes Tribunals, headed the Atrocities Prevention Inter-Agency Working Group, and led U.S. participation in United Nations negotiations for the establishment of a permanent International Criminal Court. He also coordinated U.S. efforts to establish international records and mechanisms of accountability for past or on-going violations of international humanitarian law in conflict areas, and assisted Secretary of State Madeleine Albright in addressing the needs of victims of such atrocities. Ambassador Scheffer reported directly to Secretary Albright. During the first term of the Clinton Administration, Ambassador Scheffer was Senior Advisor and Counsel to then-Ambassador Albright. His duties included war crimes issues and national security and peacekeeping policies. He also served as the Washington representative for the United States Mission to the United Nations, as a member of the Deputies Committee of the National Security Council, and as the Alternative Representative on the United States delegation to the United Nations talks on the proposal for a permanent International Criminal Court.

the ICC talks. One of them, Lieutenant Colonel Michael Newton of the U.S. Army, a former instructor here, joins us today.

My subject today is the permanent International Criminal Court, which does not yet exist but will, within probably a few years, and thus will deeply influence much of your work as judge advocates. In approaching this opportunity, I struggled with a more classic legal analysis of the Rome Treaty regime that will govern the International Criminal Court and some general propositions that speak to the purpose and consequences of the Court. While I will emphasize some key legal points today, I also want to elevate your own thinking about this issue to its larger context in international politics and international security.

I spoke publicly often about the ICC as head of the U.S. delegation to the United Nations talks on the Court from 1997 until last month, and before then as deputy head of the delegation. You can access most of my remarks that are on the public record and in the State Department's Web site,<sup>3</sup> now under "Archives," probably to the satisfaction of some of my critics on the right. Since I had droves of critics on the left as well through the years, you can appreciate that I sometimes considered myself a lone warrior on this subject: someone who walked a fine line between our deeply held concerns about the impact the ICC may have on American service members and our firm resolve to lead in the application of international justice and the enforcement of the laws of war. Building, achieving, and then advancing an inter-agency consensus on ICC issues were tasks that consumed a significant portion of my job. It became common practice that I devoted far more time debating and achieving consensus within our own government, even while international negotiations were underway, than was required of any of our foreign negotiators. There was no agency I listened to more carefully, and represented under the most difficult negotiating circumstances, than the Department of Defense, including therein the Joint Chiefs of Staff. Judge advocates and Defense lawyers populated my delegation; indeed no other delegation included so many military counsels as did the U.S. delegation. They made critical contributions and protected U.S. military interests every step of the way.

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3. U.S. State Department, *Remarks, Testimony, and Briefings*, at [http://www.state.gov/www/policy\\_remarks/](http://www.state.gov/www/policy_remarks/).

The Rome Statute of the International Criminal Court was finalized on July 17, 1998.<sup>4</sup> The treaty embodying the Rome Statute will enter into force when sixty states have ratified it, and I will henceforth refer to it as the Rome Treaty. One hundred and thirty-nine states have signed the Rome Treaty; of those, twenty-nine have ratified it. The ratifiers are our allies and friends, including France, Germany, Italy, Spain, Belgium, Norway, Canada, Finland, Ghana, Iceland, Austria, New Zealand, and South Africa. Many other states are moving towards ratification, including the United Kingdom, Switzerland, the Netherlands, Ireland, Chile, and Australia. Russia signed the Rome Treaty last September. The United States signed the Rome Treaty on December 31, 2000, the last possible day the treaty permitted signature, after which any non-signatory state would have to accede to the treaty. Iran and Israel also signed the treaty on December 31st. The significant states that did not sign the Rome Treaty are Japan, China, India, Pakistan, Indonesia, Ethiopia, and Saudi Arabia, and such outcast states as Iraq, North Korea, Cuba, Libya, Myanmar (or Burma), and Afghanistan.

The U.S. decision to sign the Rome Treaty was and remains controversial. I strongly believe that President Clinton's decision was the right one. That may come as a surprise to those who followed my public statements and negotiating positions since 1995, because I often articulated the Clinton Administration's serious concerns about flaws in the Rome Treaty, particularly the flaw that military and civilian personnel of a non-party to the treaty could be ensnared by the Court's jurisdiction without the non-party's consent. But we worked that problem very hard during the negotiations over the Rules for Procedure and Evidence and the Elements of Crimes, which were adopted by consensus at the Preparatory Commission on the ICC last June, and we continued to work it at the November-December 2000 session of the Preparatory Commission.

Anyone who analyzes the Rome Treaty without also examining the Rules and Elements will reach flawed conclusions about the manner in which the ICC will be governed. That is why I speak of the "treaty regime," meaning the Rome Statute, the Rules, the Elements, and the other supplemental documents that are now being negotiated in the Preparatory Commission in New York. Still on deck in New York are the Relationship Agreement between the United Nations and the ICC, privileges and immu-

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4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998) [hereinafter Rome Statute].

nities for the Court, financial regulations and rules, the headquarters agreement between the Court and The Netherlands, the all-important rules of procedure of the Assembly of States Parties, and the trigger, definition, and elements for the crime of aggression. All of these supplemental documents contain critical provisions of direct relevance and opportunity for U.S. interests, and they all offer the chance to enhance the overall effectiveness and universal acceptability of the ICC. We ignore them at our own risk.

The dilemma we had to wrestle with late last year was whether we best confronted the treaty's remaining flaws, and I emphasize "remaining" subsequent to our work in the Rules and Elements negotiations, as a signatory working the issues hard from within the tent, or as a non-signatory protesting the Court's legitimacy. Knowing full well that the United States has a significant impact when engaged in such negotiations, I recommended signature and other senior officials joined me in that recommendation. Other views pointed towards non-signature as the preferred policy decision. The President deliberated with a full set of views and recommendations, and a lot of tough questions were asked. In fact, the difficulties and risks of the Rome Treaty were emphasized and described in great detail to him.

Well-meaning patriots, including some members of Congress, appear determined to derail the Rome Treaty. That would be folly. Declaring war on the treaty or just monitoring further talks with studied indifference, which appears to be the Bush Administration's chosen course for the present, would undermine U.S. interests. As a signatory, the United States now is well armed to improve the treaty regime and advance our commitment to international justice.

In the Clinton Administration we negotiated this controversial treaty, as well as the Rules of Procedure and Evidence and Elements of Crimes that we insisted be added to it, for worthwhile objectives. America's advocacy of the rule of law abroad as well as at home needs backbone, and a permanent court that we lead in shaping will advance justice. In the twenty-first century, perpetrators of heinous crimes like genocide, crimes against humanity, and war crimes must be prosecuted and punished. We proudly stand for that proposition as a nation born out of the struggle for freedom, for democracy, and for a rule of law that protects and does not trample the legitimate rights of all humankind.

Cynics overseas, and some at home, argue that this will be victor's justice alone, just as, they argue, the International Criminal Tribunals for

the Former Yugoslavia and Rwanda have been conceived. They overlook, of course, that the Yugoslav Tribunal was established long before the Dayton Accords, which could hardly be described as a traditional victory in war for any side of the Balkans conflict, and that defendants from all sides of that conflict have and will continue to stand trial. The Rwanda Tribunal has nothing to do with victory or defeat—just internal mass slaughter, and the Prosecutor has publicly made it clear that she is investigating Tutsi officials suspected of crimes in 1994.

Some critics, particularly at home, seek only victor's justice in our own image in the pursuit of international justice, and they view the ICC as a threat to that proposition. But we must be engaged constructively with the Court to ensure that international justice coexists compatibly with the requirements of international peace and security and our own self-defense and that of our alliance partners and friends. Fear of prosecution can become a self-fulfilling prophecy if we are shortsighted enough to let that fear intimidate and then conquer us. In this struggle for the law, we will prevail if we demonstrate the will to persevere through all of the detailed negotiations and all of the political maneuvering that is associated with any treaty negotiation.

My advice is blunt: Get over it. The world is changing. The International Criminal Court will be established, soon. We have to decide whether we stand for the rule of law or squirm in the face of it. If we cannot stand for the proposition that heinous crimes against humankind will be answered and build the institutions to do that job in a very complex world, then our leadership in promoting the rule of law abroad will decline rapidly and the value of our own principles will erode. Others will take the lead. The United States must have the courage to embrace change if it presumes to retain the mantle of leadership. The last decade was the beginning of an age of accountability that the United States must continue to lead, both in the interests of humanity and to ensure that justice is rendered fairly and globally in a manner that advances U.S. interests.

The alternatives—ad hocism or nothing at all—will burden future generations with inefficient and costly means to manage accountability for atrocities. The existence of the International Court will spur national courts to do the job they should be doing to bring alleged war criminals to justice and thus avoid international litigation. The Court's potential for

deterrence—problematic even in domestic law enforcement—cannot be disproved.

Let me emphasize that our remaining legal objections to the International Criminal Court were not overcome or cast aside with U.S. signature. President Clinton made that clear in his December 31st statement.<sup>5</sup> But those objections never dictated non-signature either. The first objection is the presumption, embodied in Article 12 of the Rome Treaty, that official personnel of a non-party state can be investigated and prosecuted by the Court provided either the state where the crime occurred or the state of nationality of the perpetrator is already party to the Rome Treaty or, as a non-party, consents to ICC jurisdiction. We based our objection on our interpretation of customary international law, namely that it does not yet entitle a state, whether as a party or as a non-party to the Rome Treaty, to *delegate* to an *international criminal court* its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory, without the consent of that individual's state of nationality either through ratification of the Rome Treaty or by special consent.<sup>6</sup> However, we made it crystal clear in the negotiations, and I hope we continue to make it clear, that as a practical matter the United States is prepared to examine circumstances where individuals can be prosecuted before the International Criminal Court without either requirement—ratification or special consent—having been first obtained.

We sought to negotiate some of those circumstances and in effect violate our own rule of interpretation so as to create a realistic and effective mechanism for international justice. We otherwise had a very tough sell, because we would have had to argue for the rights of all manner of non-party states when most of our negotiating partners were signatory states that either had already ratified the Rome Treaty or were moving towards ratification. Imagine yourself in the shoes of one of our staunch NATO allies and supporters of the Rome Treaty, listening to an argument that, while it would benefit the United States military, also would immunize an aggressor state's military personnel from any action by the International Criminal Court. The objective of our allies is to promote ratification, not insulate non-party states. The simple negotiating reality is that it was not plausible to argue that a non-party state whose military forces are respon-

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5. President William J. Clinton, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), 2000 WL 6008.

6. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, LAW & CONTEMP. PROBS. 13 (2001).

sible for heinous crimes could avoid the Court absent a Chapter VII enforcement referral by the U.N. Security Council, a body in disfavor with many of the governments in the negotiating room, including some of our closest allies.

The methodologies we examined with other governments were creative, realistic, and relevant for the real culprits. We proposed provisions that focused only on the status of official personnel before the Court, without seeking any particular protection for other individuals, such as mercenaries, rebels, or other non-official combatants. We sought to distinguish between the “good guys” and the “bad guys” of non-party states thrashing about in the cauldron of international security challenges that define modern warfare and human rights. Although we had the reality of the international system and sheer logic on our side in these debates, we could not prevail last year with a formula that would achieve consensus among so many disparate governments engaged in the negotiations. After all, each government had to ask itself whether it was one of the good guys, or one of the bad guys.

Despite the difficulty of sustaining our interpretation of customary international law, even with pragmatically drawn exceptions, we helped negotiate Rule 44(2) of the Rules of Procedure and Evidence, the importance of which is often overlooked. One of our primary concerns about the jurisdiction of the Court has been its preconditions to jurisdiction set forth in Article 12, that conceivably could permit Iraq, as a non-party, to trigger the Court’s jurisdiction over U.S. pilots engaged in defensive actions in the skies over Iraq without requiring the Court to scrutinize Iraq’s conduct as well. Rule 44(2) addresses that problem and requires that any declaration by a non-party state triggering the Court’s jurisdiction under Article 12 has the consequence of accepting the jurisdiction of the Court with respect to all of the crimes covered by the Rome Treaty that are relevant to the situation, a term used elsewhere in the treaty to mean the overall conflict. Thus, Iraq would have to invite the Court’s scrutiny of its own illegal conduct, which is massive, in order to trigger investigation of the U.S. pilots. In its own self-interest, Iraq would avoid that opportunity.

On the larger issue of overall protection for the U.S. military, however, we finally had to face the fact that we were barking up the wrong tree, and our military services were not being well-served with losing arguments. I spent many years seeking full immunity for our military forces and their civilian leadership in negotiations that quite frankly sometimes seemed the theater of the absurd. I was given nothing to offer—certainly



not signature or ratification—in return for an absolutist carve-out that other governments, particularly our closest allies, found arrogant and hypocritical. I finally successfully lobbied my colleagues in Washington to permit me to offer a “good neighbor” pledge towards the Court in return for full protection. Since the next administration could reverse that political pledge, however, it proved unconvincing.

We constantly focused on the extreme circumstance where the International Court could theoretically pursue an American soldier even if the United States has not yet become a party to the treaty. In the eight years of my deliberations in Washington on the International Criminal Court—beginning with the work of the International Law Commission in 1993 and 1994—I do not recall hearing any senior Defense Department official refer to the core purpose of the Court, namely to advance international justice and enforce the law of armed conflict. Every single discussion was dominated by how the Court would impact the United States military. Fair enough; it was our duty as public servants to put that concern front and center, and we did year after year. I am also exceptionally aware of the sacrifices our service members have made, particularly with their lives, throughout our history. I wondered sometimes, though, what the mutilated children of Sierra Leone would think of such discussions if they could only fathom them. I imagined parading them and the thousands of other victims and carcasses I witnessed in atrocity zones around the world through the wood paneled rooms of Washington, just as a reality check.

But short of one hundred percent protection, for which there is no plausible multilateral formula, we successfully negotiated into the treaty regime an impressive body of safeguards that critics continue to overlook in their zeal to trash the treaty. When we pursued our objectives with a degree of humility, we succeeded.

There is a tendency in negotiations of this character that involve our military services and international security, to arrive at hard and fast positions within the Washington bureaucracy that are either too self-protective or too tardy, or both, to be successful in multilateral negotiations, and to stick with those positions long after their futility is obvious to all. Let me be frank: Military lawyers advising their superiors about such negotiations, and I have in mind both the Land Mines Treaty and the Rome Treaty on the International Criminal Court, need to be careful not to succumb to what will sound gutsy and All-American within the JCS Tank but will fail miserably when presented to other governments. A negotiating room is not a conventional battlefield, but it is a theater of diplomatic conflict and

cooperation. Within the negotiating arena, as in the courtroom, overwhelming force is defined by the logic and persuasiveness of one's argument and your ability to understand and then capitalize upon the other government's perspective. Our superpower status and the magnitude of our military forces mean very little in these settings. That is the hard reality today. We need to adjust and turn that reality to our own advantage with winning strategies and not self-righteous tactics that impress no one but ourselves.

During the November-December 2000 negotiations of the Preparatory Commission, our friends recommended that we should focus on our greatest strength—the principle of complementarity—as our first line of defense. The U.S. delegation worked hard in the ICC talks to ensure that there are safeguards in the treaty regime so that the Court does not hit American service members with unwarranted actions. We built into the treaty procedures by which countries with strong legal systems can investigate and, if merited, prosecute their own citizens and thus require the court to back off. The principle of complementarity, or primary deferral to national courts, is an extraordinary and somewhat complex protective mechanism that manifests itself in the treaty and in the supplemental documents. Much of the complementarity regime originated with us and we prevailed in its adoption. Indeed, in some circumstances the Rome Treaty regime offers military personnel greater protection from foreign prosecution than do current law and practice.

If the Court disregards or abuses the complementarity regime, it will quickly lose its legitimacy in the eyes even of the treaty parties. We know from the negotiations and the ratification proceedings undertaken so far that a vibrant complementarity practice by the Court is essential to the Court's survival and to its acceptance by its strongest supporters, who have no intention of being hauled before the Court themselves! The expectation of complementarity reaches back far in the evolution of the Court. I commend to you Lieutenant Colonel Mike Newton's forthcoming article on complementarity in Volume 167 of the *Military Law Review*<sup>7</sup> for a refresher course and for insightful analysis of how complementarity

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7. Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

indeed would work, and how, as with all matters of law, there are some gray areas that will have to be worked out in the practice of the Court.

In December, the U.S. delegation introduced a treaty-friendly proposal for the Relationship Agreement between the United Nations and the Court now being debated in New York.<sup>8</sup> There are numerous provisions in the Relationship Agreement that describe the need for cooperation between the United Nations and the Court. This proposal joins that list of provisions.

States that are contributing to U.N. peacekeeping operations or other necessary international missions outside their own borders will be encouraged to continue making such contributions if they know that any case brought against their personnel in the ICC is indeed an admissible case. Acting strictly in accordance with the provisions of the Rome Statute, the Court has the authority to ensure that admissibility indeed is examined. The Statute's preamble emphasizes the importance of complementarity, and Articles 17, 18, and 19 reinforce that objective, as do the Rules of Procedure and Evidence.<sup>9</sup> A state's knowledge that admissibility will be examined in certain cases will encourage that state and others to properly and faithfully investigate and prosecute genocide, crimes against humanity, and war crimes in domestic courts as envisaged by the principle of complementarity.

The U.S. proposal focuses the Court's attention on admissibility at a critical moment, namely when the request for surrender is made. For contributors to international peace and security to know that the Court is using its authority at that time to ensure fairness in the process will add greatly to the confidence of all states to contribute to U.N. peacekeeping and other international efforts to maintain or restore peace and security.

We crafted the provision in consultation with several of our allies. It would require the Court, on its own motion as provided pursuant to Article 19(1) of the treaty, to review the admissibility of a case in accordance with Article 17 when there is a request for the surrender of a suspect who is charged in such case with a crime that occurred outside the territory of the suspect's state of nationality. Why the latter requirement? Because the pri-

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8. See U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000).

9. See *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) [hereinafter Draft Rules].

mary concern of the United Nations, and indeed of the United States, is to ensure that their deployments abroad to maintain or restore international peace and security are properly balanced with the Court's jurisdiction, whereas military forces that commit internal atrocities cannot be considered as pursuing any viable objective of international peace and security. Internal atrocities are such an important focus of the Court's mission that it would be futile, particularly with our European friends, and contrary to our own interests to introduce additional procedures into the investigation and prosecution of indigenous perpetrators of internal atrocities.

Our proposal would ensure that the Court would examine the admissibility of any case involving an American service member. United States federal and military courts have several opportunities to seize a case against an American service member and thus avoid ICC jurisdiction. If, by the time the International Criminal Court has investigated an American service member and indicted him or her and then requested his or her surrender, our own authorities have not exercised their complementarity rights to investigate and adjudicate that individual's alleged crime and thus void any ICC scrutiny, then we have only ourselves to blame.

The new proposal erects a final firewall, meaning that whether or not the admissibility of a case has been reviewed in the past, the Court must, on its own motion, review admissibility at the critical moment when the request for surrender is being framed. The state of nationality thus will have one more opportunity to demonstrate its performance of the complementarity criteria in an effort to prevent such surrender. Since the Court can review admissibility on its own motion at any time, the U.S. proposal simply articulates a procedural agreement between the United Nations and the Court, binding on the Court, to ensure that a final admissibility review occurs before the suspect arrives in The Hague. The proposal is reasonable and compatible with and in accordance with the treaty itself. We would be foolish not to pursue it vigorously in the on-going talks, although I fear the march of folly has already begun. Multilateral negotiations are as much about missed opportunities and bad timing as they are about anything else.

Critics have charged that there are inadequate due process protections in the Rome Treaty. Guided by career lawyers from the Justice, Defense, and State Departments, the U.S. delegation negotiated procedures and definitions of crimes consistent with our constitutional and military law practice. Monroe Leigh, Secretary of State Henry Kissinger's Legal Adviser, believes the treaty regime, including its rules, "contains the most detailed list of due process protections which has so far been promulgated; not bet-

ter than the Bill of Rights, but somewhat more comprehensive and detailed.”<sup>10</sup> Among those protections are rights to a speedy and public trial and to confront witnesses. Neither double jeopardy nor the use of anonymous witnesses are permitted.

The fact that the treaty requires trial by judges and not by jury is not surprising in an international criminal court that merges common and civil law practice. It is well settled extradition practice to accept trial without jury outside the United States. The difficulty that the treaty’s procedures arguably present under the U.S. Constitution, namely the Sixth Amendment, is if the United States were to become a party to the treaty and an American citizen commits *on U.S. territory* genocide, crimes against humanity, or war crimes that meet the court’s rigorous test of admissibility—a highly unlikely event.

The reality is that our own prosecutors would pounce on that individual so fast the International Criminal Court would never have a right under the Rome Treaty to investigate him. We successfully negotiated the procedures that grant our own justice system maximum discretion to seize a case against any U.S. citizen, even if the crime is committed overseas, and if merited indict and prosecute him before an American jury. We have it within our power not to permit extradition of an American citizen to the Court in violation of the Constitution. Nor would the United States tolerate the International Court’s misuse of its powers against American service members.

Imagine the long-term consequences for the Court if it were to leap over the safeguards already locked into the treaty regime and abuse its authority against our service members. Anyone can paint a worst-case scenario that defies the entire construct of the treaty regime and the international political system; but no one can discount the significance of the probable consequences of an extreme course of action on those who must make the decisions and then live with them.

Where do we go from here? There are some who believe we should bluntly oppose or at least be belligerent towards the Rome Treaty and effectively nullify the U.S. signature. I have heard it said that my signature of the treaty on behalf of the United States should be scratched out. It is

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10. Letter from Monroe Leigh, Former Legal Advisor to Secretary of State Henry Kissinger, to Editor, *The Washington Times* (Dec. 30, 2000), in *Proposed International Court Will Protect Civil Liberties*, *WASH. TIMES*, Dec. 30, 2000, at A12.

certainly possible that Washington could emphasize the treaty's flaws, discourage others from signing or ratifying it, and punish those that are or will be parties to the treaty. But we would look foolish and intimidated, discredit our proud allegiance to the laws of war, and invite a firestorm of foreign counterattacks that would needlessly undermine the Bush Administration's evolving foreign policy. Our friends and allies would stare down any American effort to kill the treaty. Given other overseas challenges, particularly with Europe and Russia, the Administration would be wasting valuable political capital. Its own human rights initiatives, wherever they may be targeted, would suffer from an initial credibility gap.

The current Administration strategy is to sustain a small, technical presence in the New York talks solely for the purpose of engaging in discussions on the crime of aggression as they affect our own interests. I respectfully submit that the rest of the world will not be impressed and will soldier on drafting documents of central importance to the operation of the Court. The effectiveness of our voice in the aggression discussions may be degraded by our lack of commitment to the myriad of other issues before the Preparatory Commission, so many of which in fact are critical to U.S. interests. Pursuing our own interests in multilateral negotiations means paying attention to and facilitating the interests of others when those interests do not undermine ours. I sometimes found my colleagues from other agencies proposing strategies that would be suitable for bilateral negotiations, where the United States might have considerable leverage, but would be of limited relevance in multilateral settings.

I believe we should engage constructively in the Preparatory Commission negotiations to protect our interests, build a credible court, and overcome flaws by pressing reasonable proposals that other governments can embrace without having to reverse their long-standing support for the treaty. A major aim of U.S. signature of the treaty was to strengthen our negotiating hand, not immobilize it. In coming months talks will continue on the crime of aggression and how parties to the treaty will oversee the operation of the Court. On the crime of aggression, we must prevail. We have repeatedly stated our position, which we are not alone in expressing, and we must continue to press for the proper definition and trigger for the crime of aggression. I thought last December we were making progress, but it was tough going. Every effort to specify some other delegation's preferred laundry list of acts of aggression evoked equally important efforts to list the exceptions to the crime. Months and perhaps years of talks confront governments on this issue. We will far better protect our sol-

diers and citizens by engaging on all fronts in this often-tedious struggle for law than we will if we sit on the sidelines or futilely hector our allies.

The United States should leverage its new status as a signatory nation to prevail with the treaty-friendly proposals, one of which I have already discussed, that the United States already introduced last year and can be debated in the Preparatory Commission this year, if not for the Relationship Agreement then perhaps for another supplemental agreement. Other governments have not rejected them and they hold considerable promise. If the United States exhibits an anemic presence at the U.N. talks, we will forfeit perhaps the last opportunity we have in the Preparatory Commission to better protect our interests.

There are other steps that the United States should take unilaterally. First, both critics and supporters of the Court should find common cause in amending the federal criminal code (Title 18) and the Uniform Code of Military Justice (Title 10) to ensure that crimes under the treaty can be fully prosecuted in U.S. courts. Current codes are simply out-dated and may deprive us of our first line of defense. An inter-agency task force was reviewing U.S. law to draw up recommendations when I left office. I sincerely hope that its work continues and results in legislation creating greater symmetry between U.S. law and the crimes and punishments specified in the Rome Treaty. We do not want to invite a situation where the ICC concludes that the United States is unable to investigate and prosecute a particular individual because our legal codes do not include that individual's alleged offense as a crime punishable under U.S. law.

The U.S. delegation negotiated and accepted only what we, as a government, believe are actionable crimes under international criminal law. We insisted on the Elements of Crimes, and led the negotiations of that document for two years to a successful conclusion last June, because we had to be certain the crimes are legitimate, actionable crimes. But now we must be certain we can easily turn either to Title 18 or to the UCMJ and identify therein an identical or near-identical crime. We must be able to represent credibly that we have the ability to exercise our complementarity right and, if the evidence so requires, prosecute our own in our own courts. In this vein, serious academic work has already begun, including important scholarship by Northwestern University Law Professor Douglass Cassel, who has set the stage for serious work on Title 18 and the UCMJ in his publications.<sup>11</sup>

The Uniform Code of Military Justice does not specifically address crimes against humanity or genocide as crimes, but it does allow for prosecution of the underlying criminal conduct.<sup>12</sup> Nor does all positive international humanitarian law reside in the UCMJ as war crimes. I have serious concerns whether that will be sufficiently persuasive to the judges or the prosecutor of the International Criminal Court, each of whom will be looking for more explicitly stated crimes analogous to those set forth in Articles 5, 6, 7, and 8 of the Rome Treaty.

Regarding federal law, the crime of genocide covers only U.S. nationals (committing genocide anywhere) or genocide within the United States (by anyone).<sup>13</sup> Crimes against humanity are the least effectively implemented by domestic law. There is no substantive criminal statute for crimes against humanity per se, though various federal and state criminal statutes would allow punishment of criminal conduct constituting crimes against humanity (for example, torture, rape, kidnapping, or various assaults).

With respect to war crimes, the rule generally has been that only when Congress declares war are civilians accompanying the U.S. Armed Forces subject to the UCMJ.<sup>14</sup> The Military and Extraterritorial Jurisdiction Act of 2000 now provides jurisdiction over felonies committed by civilians accompanying the Armed Forces outside the United States at all times, even when Congress has not declared war.<sup>15</sup>

There are also statutes of limitations under Titles 10 and 18 that are far too limited and could compel the International Criminal Court to con-

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11. See, e.g., Douglas Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 393 (2001); Douglas Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378 (1999); Douglas Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF. 41 (1999).

12. See Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

13. 18 U.S.C. § 1091 (2000).

14. See Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 24-26.

15. Military and Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2000). See generally Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW. Dec. 2000, at 1.



clude that investigation is warranted simply because our domestic statute of limitations has run its course.<sup>16</sup> These sections of the federal codes must be revised to reflect the crimes that need to be more explicitly stated in the codes and the reality of Article 29 of the Rome Treaty, which states: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”<sup>17</sup>

In a related initiative, when the Court begins to operate, the President should appoint a commission of experts to monitor federal and military courts exercising our rights under the treaty to investigate and prosecute our own. This may shock those of you who would balk at any so-called oversight of our military court system. What I have in mind is fairly modest. There would be no power to intervene in or question the actions of military courts. But the commission should have the authority to advise federal and military prosecutors, and perhaps through a transparent process the judges, about the experts’ own views on whether the United States is properly exercising its complementarity rights under the Rome Treaty, even as a non-party. Demonstrating our competence and willingness to exercise national obligations would discourage scrutiny by the International Court, and the commission of experts would heighten that sense of confidence in our system by the ICC prosecutor and judges.

Further unilateral steps we should take include exploring the protections our Status of Forces Agreements (SOFA) already provide consistent with the treaty. I am not speaking here of re-opening SOFAs to accomplish this objective. Nor do I underestimate the argument that treaty proponents may make that ICC jurisdiction is a freestanding, independent right that the Receiving State could exercise in its own discretion by transferring persons to the ICC, even in the face of a SOFA provision. But when the U.S. delegation successfully negotiated the inclusion of Article 98(2) in the Rome Treaty, we had in mind our own SOFAs and their applicability. Article 98(2) states: “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”<sup>18</sup> There are arguments waiting to

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16. *See, e.g.*, 10 U.S.C. § 843(b) (2000) (five years); 18 U.S.C. § 3282 (five years for non-capital offenses).

17. Rome Statute, *supra* note 4, art. 29.

18. *Id.* art. 98(2).

be plucked in our SOFAs and in Article 98(2) that would ensure American service members are not surrendered to the Court.

Perhaps more importantly, even as a non-party, under Article 98(2) we can negotiate agreements with other governments that would prevent any American being surrendered to the ICC from their respective jurisdictions without our consent. As a signatory state, we are now in a much stronger position to negotiate such freestanding agreements.

I would further suggest that a time may well arrive when the United States could negotiate with the Court directly an Article 98(2) agreement that would protect American service members from surrender provided, most likely, the United States made certain commitments to the Court in terms of the proper and complete exercise of complementarity by American authorities and in terms of support for and cooperation with the Court, including, perhaps, ratification of the Rome Treaty that would lock in the all-important U.S. financial support. Rule 195(2) of the Rules of Procedure and Evidence,<sup>19</sup> which we proposed and which was adopted by consensus last June, in my opinion offers the possibility of such an agreement.

We should not lose sight of the further protections that the treaty grants governments that ratify it. These include avoiding any exposure whatsoever to war crimes charges for an initial seven years, which if chosen by the United States would afford us more time to evaluate the competency and fairness of the Court as its most powerful State Party.<sup>20</sup> As a State Party, the United States would be entitled to opt out of any exposure by the Court to the crime of aggression forever.<sup>21</sup> Given the reality of the use of U.S. military force, a reality that typically evokes groundless but nonetheless troublesome charges of aggression from our detractors, this right to opt out is significant. Ratification also would permit the United States to participate in the oversight, staffing, and management of the International Criminal Court, as well as enable a U.S. citizen to serve as a judge. Given our experience with the ad hoc International Criminal Tribunals, these are not insubstantial privileges.

In conclusion, there are many who understandably fear misuse of the International Criminal Court against the United States despite our strong judicial system, our compliance with the laws of war, and the leverage we

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19. Draft Rules, *supra* note 7, R. 195(2).

20. Rome Statute, *supra* note 4, art. 124.

21. *Id.* art. 121(5).

have when we lead. Whether this fear is real or illusory, the United States has renewed credibility as a signatory to play a major role in preventing misuse and in achieving the international justice we so firmly uphold. We forfeit that opportunity at our peril. Thank you.

**COMPARATIVE COMPLEMENTARITY:****DOMESTIC JURISDICTION CONSISTENT WITH THE  
ROME STATUTE OF THE INTERNATIONAL CRIMINAL  
COURT**LIEUTENANT COLONEL MICHAEL A. NEWTON<sup>1</sup>

*The crimes you committed, General Blaskic, are extremely serious. The acts of war carried out with disregard for international humanitarian law and in hatred of other people, the villages reduced to rubble, the houses and stables set on fire and destroyed, the people forced to abandon their homes, the lost and broken lives are unacceptable. The international community must not tolerate such crimes, no matter where they may be perpetrated, no matter who the perpetrators are and no matter what the reasons for them may be. If armed conflict is unavoidable, those who have the power to take decisions and those who carry them out must ensure that the most basic rules governing the law of nations are respected. International courts, today this Tribu-*

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1. Judge Advocate General's Corps, United States Army. Presently participating in the Advanced Civil Schooling program as a student at the University of Virginia School of Law. B.S., 1984, United States Military Academy; J.D., 1990, University of Virginia School of Law; LL.M. 1996, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Served as Special Advisor to the United States Ambassador-at-Large for War Crimes Issues, United States Department of State. As a member of the United States delegation to the Preparatory Commission on the Establishment of an International Criminal Court after adoption of the Rome Statute, Lieutenant Colonel Newton assisted with drafting and negotiating the Elements of Crimes for each offense required by Article 9 of the Rome Statute. Currently assigned to the United States Army Student Detachment, Fort Jackson, South Carolina. Formerly assigned as Professor, International and Operational Law Department, The Judge Advocate General's School, Charlottesville, Virginia, 1996-1999; Brigade Judge Advocate, 194th Armored Brigade (Separate), Fort Knox, Kentucky, 1993-1995; Chief, Operations and International Law, Administrative Law Attorney, United States Army Special Forces Command (Airborne), Fort Bragg, North Carolina, 1990-1993; Group Judge Advocate, 7th Special Forces Group (Airborne), Fort Bragg, North Carolina, 1992; Funded Legal Education Program, 1987-1990; Battalion Support Platoon Leader, Company Executive Officer, Platoon Leader, 4th Battalion, 68th Armor, Fort Carson, Colorado, 1984-1987. This article is based on a work submitted by the author to satisfy, in part, the Master of Laws requirements for the University of Virginia School of Law. The author is particularly grateful for the comments of Paul Stephan and Kimberly Shaw on the draft of this article. Lieutenant Colonel Newton may be reached by e-mail at newtonmj@msn.com.

*nal, tomorrow the International Criminal Court, must appropriately punish all those, and especially those holding the highest positions, who transgress these principles.*

*—Judge Claude Jorda’s statement announcing the findings and sentencing of General Tihomir Blaskic<sup>2</sup>*

## I. Introduction

The ongoing diplomatic and political efforts to create the International Criminal Court (ICC) are forever altering the landscape of the international community and the face of international law. The Chairman of the Drafting Committee working on the negotiations towards the Rome Statute of the International Criminal Court<sup>3</sup> (Rome Statute) proclaimed that

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2. Prosecutor v. Blaskic, No. IT-95-14, para. 103 (Mar. 3, 2000) (Summary of Judgment), at <http://www.un.org/icty/judgement.htm>. General Blaskic was sentenced to forty-five years for his crimes, which is the longest sentence adjudged by the International Criminal Tribunal for the Former Yugoslavia at the time of this writing. *Id.*

3. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), reprinted in 37 I.L.M. 998 (1998) [hereinafter Rome Statute]. The Chairman of the Drafting Committee was the distinguished professor of law at DePaul University and renowned commentator on international criminal law, M. Cherif Bassiouni. The concept of a “statute,” termed as such in international law, is in itself a recent and noteworthy development. During recent testimony to Congress, Ambassador David J. Scheffer, head of the United States delegation to the ICC negotiations and the subsequent Preparatory Commission negotiations on the Rules of Evidence and Procedure and Elements of Crimes, explained the term as follows:

When one speaks of creating a court on an international level, it has to have to some governing document for the functioning of that court. And as with the Yugoslav tribunal and the Rwanda tribunal, the Security Council adopted statutes or a statute for each tribunal, which is its constitution, basically, the court’s own constitution, the basic principles by which the court must function. It is simply a term of art that has arisen in the international sphere, and during the talks for the ICC, it is that basic constitutional document of the court itself which is described as the statute. The treaty itself, when ratified, embodies that statute. And I guess that the best I can say is that it’s simply, in U.N. practice, once you have ratified the treaty per se, you are also, of course, adopting as part of that ratification practice or package the statute of the court itself.

Ambassador David J. Scheffer, Statement Before the House International Relations Committee (July 26, 2000), available at LEXIS, Federal News Service.

“[t]he world will never be the same after the establishment of an international criminal court.”<sup>4</sup> Indeed, as the Rome Conference began, formal adoption of a foundational document was widely considered to be impossible.<sup>5</sup> After five weeks of intense debate, the final text emerged as a take-it-or-leave-it “package” that had been cobbled together behind closed doors during the middle of the night. The leaders of the Rome Conference completed the final text at two o’clock in the morning of the last day of the conference, Friday, 17 July 1998.<sup>6</sup> Far from achieving consensus, the final text postulated solutions to some drafting questions that delegates had been unable to resolve, and went so far as to include a number of provisions that the conference Bureau<sup>7</sup> selected and presented to the floor without open debate on either the text itself or its substantive merits.<sup>8</sup>

Seeking to prevent a collapse of the conference without a completed document, the delegates voted down amendments that the United States and India proposed to the Bureau’s textual “package,” whereupon the del-

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4. Professor M. Cherif Bassiouni, Address to the Ceremony for the Opening of Signature of the Treaty on the Establishment of an International Criminal Court, at *Il Campidoglio*, Rome (July 18, 1988).

5. The starting point for the negotiations was a complex text of 116 articles, 173 pages containing about 1300 bracketed and often-competing texts interspersed throughout, which included numerous options within each article. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/ Add.1 (1998) (Draft Statute and Draft Final Act).

6. M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1, 31 (1998) [hereinafter *Historical Survey*].

7. The officers formally responsible for running the Rome Conference were collectively known as the Bureau. The Bureau included the President of the Conference, the Chairman of the Committee of the Whole, the Chairman of the Drafting Committee, and the various vice-presidents responsible for discrete components of the negotiations. The late evening discussions that produced the Bureau text did not include all of the members of the Bureau (as they excluded the United States), but included some participants who were not members of the Bureau. The Bureau proposal emerged as U.N. Doc. A/CONF.183/C.1/L.76 (1998), and was presented to the Committee of the Whole without further meetings of the Drafting Committee. The Committee of the Whole adopted the Bureau-sponsored “package” without modification. For a discussion of some of the inconsistencies and contradictions that this highly unusual process produced in the Rome Statute, see Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute*, 41 VA. J. INT’L L. 164 (2000), and Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT’L L. 204 (2000).

8. William K. Lietzau, *Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS 512, 514 (2000).

legates burst into spontaneous applause, which transitioned into rhythmic applause that continued for some time.<sup>9</sup> By the late evening of 17 July 1998, the delegates in Rome were caught up in a wave of jubilation and euphoria as they adopted the Rome Statute by a vote of 120 to seven, with twenty-one abstentions.<sup>10</sup>

For the proponents of the Rome Statute, the reality that it was adopted only by abandoning the historic diplomatic practice of consensus is immaterial. Many ardent treaty supporters and the non-governmental organizations (NGOs) that pushed for the Rome Statute ignore its structural flaws and view it as a triumph of international aspiration over the political and pragmatic realities of the international system that have prevented the evolution of an effective and permanent international criminal court since the end of World War I.<sup>11</sup> Seen in the best possible light, the Rome Statute represents the hope of governments from all around the world that the force of international law can restrain the evil impulses that have stained history with the blood of millions of innocent victims.<sup>12</sup> Thus, from this perspective, its hasty adoption in the last hours of the Rome Conference was warranted despite the fact that the complex substantive interface of treaty provisions was never wholly debated or analyzed in depth until after the adoption of the Rome Statute.

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9. *Historical Survey*, *supra* note 6, at 31.

10. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381 (2000). For an excellent summary of the negotiating dynamic in Rome that resulted in the current Statute, see Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. 20 (Nov.-Dec. 1998).

11. See generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997); *Historical Survey*, *supra* note 6; Leila Sadat Wexler, *The Proposed International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665 (1996); BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980).

12. Some observers estimate 170 million dead in 250 conflicts since the end of World War II. Sadat & Carden, *supra* note 10, at 384. See, e.g., RUDOLPH J. RUMMELL, DEATH BY GOVERNMENT (1994); RUDOLPH J. RUMMELL, POWER KILLS: DEMOCRACY AS A METHOD OF NON-VIOLENCE (1997); JOHN NORTON MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD (1974).

In a very real sense, the proscriptions against genocide, crimes against humanity, and violations of the laws and customs of war contained in Article 5 of the Rome Statute<sup>13</sup> embody the highest ideal of all legal systems that law can replace raw power as the defining norm of international relations. Nevertheless, the Rome Statute elevates principle above practicality because its adoption was not accompanied by any resolution of the details for establishing an effective supranational judicial forum. For example, in adopting the Rome Statute without the support of the United States, treaty proponents failed to consider a viable formula for funding the ICC. Thus, without an active policy of support to the ICC and funding from both the United States and Japan, one NGO estimates that the European Union could be responsible for funding up to 78.17% of the total cost of the ICC.<sup>14</sup>

Furthermore, the last-minute adoption of the Rome Statute glossed over the inherent tension between an international forum with compulsory criminal jurisdiction over individuals who commit crimes at the express command of national authorities, or at the very least while functioning under the official authority of a sovereign state, and the political necessity for sovereign states to support such a court. Though the concept of an international criminal court can be traced back to the Middle Ages, and evolved through the thinking of the classical international writers and jurists of the seventeenth and eighteenth centuries,<sup>15</sup> the stone walls of sovereign rights and state consent served as “constraining factors,” which restricted the “prescribing, invoking, and applying of international norms.”<sup>16</sup> Although the delegates to the Rome Conference unanimously agreed that national jurisdictions have primary responsibility for investigating and prosecuting the crimes enumerated in Article 5 of the Rome Statute, they strove to establish an international judicial institution that

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13. Rome Statute, *supra* note 3, art. 5.

14. Project on International Courts and Tribunals, Financing of the International Criminal Court, annex III (undated discussion paper distributed at the meeting of the Preparatory Commission in June 2000) (on file with author) (Hypothetical Scale of Assessment for the ICC). It is difficult to envision the day when the governments of the European Union will meet this huge financial obligation, despite their stated fidelity to the goals of the ICC.

15. Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952).

16. JUSTICE ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).



would allow supranational justice and accountability to pierce the shield of unconstrained sovereignty.<sup>17</sup>

Indeed, the very impetus for a permanent ICC arose from the numerous instances in which powerful perpetrators<sup>18</sup> ignored established international norms with impunity. The penultimate votes at the Rome Conference came about only as a reaction against the historic practice of tyrants who warped domestic legal mechanisms into tools for imposing their will. Adolf Hitler, for example, imposed the *Fuehrerprinzip* (leadership principle) in order to exercise his will as supreme through the police, the courts, and all other institutions of civilized society.<sup>19</sup> Through the lens of absolute state sovereignty, efforts by one state to establish individual accountability over nationals of another state for violations of international crimes were frequently derided for using the figleaf of justice to legitimize the expressions of raw political power over the perpetrator. Thus, when given a copy of his indictment before the International Military Tribunal at Nuremberg, Herman Göring stroked the phrase “[t]he victor will always be the judge and the vanquished the accused” across its cover.<sup>20</sup>

Logically, an effective supranational court should function as a fallback forum to prosecute individuals who commit crimes while in the service of authoritarian regimes that ignore the binding norms of international law. Those regimes are the most prone to commit the crimes within the jurisdiction of the ICC, and yet those same states could previously invoke principles of sovereignty to protect their nationals from prosecution in their domestic judicial forums. At the conclusion of the Rome Conference, treaty supporters concluded that an effective ICC could not rest the full

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17. Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 113, 115 (M. Cherif Bassiouni ed., 1999) [hereinafter Broomhall, *Checklist*].

18. After extensive debate over the relative merits of the terms “perpetrator” or “accused,” the delegates to the Preparatory Commission (PrepComm) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

19. DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT 1037-38. According to this principle, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This principle required absolute and unconditional obedience to the superior and extended to all areas of public and private life. The oath of the Nazi Party stated: “I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me.” *Id.* at 157.

20. JOSEPH E. PERSICO, INFAMY ON TRIAL 83 (1994). For another articulation of this highly debatable proposition, see RICHARD H. MINEAR, VICTORS’ JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

extent of its judicial power on the consent of a state because regimes that ignore the rule of law would be virtually certain not to submit their nationals to the jurisdiction of the court. Hence, the final “package” that became the Rome Statute bypassed the traditional rule of international law that a treaty “does not create obligations or rights for a third [s]tate without its consent.”<sup>21</sup>

To attain the goal of international justice, Article 1 of the Rome Statute promulgates in simple language that the court will “be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be *complementary* to national criminal jurisdictions.”<sup>22</sup> The Rome Statute nowhere defines the term “complementarity,” but the plain text of Article 1 compels the conclusion that the International Criminal Court is intended to supplement the foundation of domestic punishment of international violations, rather than supplant domestic enforcement of international norms. Indeed, the principle that states are obligated to use domestic forums to punish violations of international law has roots that run back to the ideas of Hugo Grotius.<sup>23</sup> As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation’s sovereignty also entails “the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.”<sup>24</sup>

The complementarity principle is the fulcrum that prioritizes the authority of domestic forums to prosecute the crimes defined in Article 5 of the Rome Statute. Phrased another way, the complementarity principle is intended to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balances that supranational power against the sovereign right of states to

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21. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, art. 34, *reprinted in* 8 I.L.M. 679 (1969). The logical corollary to this rule (which the Rome Statute disregards) is that a multilateral instrument binds a state that does not ratify the treaty only when the third party “expressly accepts that obligation in writing.” *Id.* art. 35.

22. Rome Statute, *supra* note 3, art. 1 (emphasis added). Article 1 echoes the preambular language of the Rome Statute in which the signatories affirm that effective prosecution of international crimes “must be ensured by taking measures at the national level and by enhancing international cooperation.”

23. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 108, 228 (1999). See *infra* notes 47-49 and accompanying text.

24. JOHN BASSETT MOORE, *1 A DIGEST OF INTERNATIONAL LAW* 5-6 (1906).

prosecute their own nationals without external interference. The complementarity principle is therefore the critical node in ascertaining whether the ICC will trample on the sovereign prerogatives of states, or will coexist in a constructive and beneficial relationship with all nations.

The monumental and controversial development in the Rome Statute is that the proponents of international justice established a framework for a supranational court that enshrines the principle that state sovereignty can on occasion be subordinated to the goal of achieving accountability for violations of international humanitarian law.<sup>25</sup> Indeed, one commentator in Rome declared that “outmoded notions of state sovereignty must not derail the forward movement” which seeks to achieve international peace and order.<sup>26</sup> The complex blend of civil law, common law, customary international law, and *sui generis* that combine in the Rome Statute is held together by the notion that the sovereign nations of the world are joined, not as competitors in the pursuit of sovereign self interest, but as interde-

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25. See Rome Statute, *supra* note 3, arts. 12-19. The extension of unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons the United States remains unwilling to go forward with the Rome Statute “in its present form.” David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 14, 21 (1999). The United States has rejected a policy of benign neglect, and at the time of this writing is engaged in a good faith effort to address its fundamental underlying jurisdictional concerns with the Rome Statute. The United States participated fully in the Preparatory Commissions subsequent to the Rome Conference, and it joined international consensus on the Final Draft Rules of Evidence and Procedure and the Final Draft Elements of Crimes on 30 June 2000. Draft Rules of Evidence, U.N. Doc. PCNICC/20001/Add.1; Draft Elements of Crimes, U.N. Doc. PCNICC/2001/Add.2, available at <http://www.un.org/law/icc/index.html>.

On 31 December 2000, which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. See Rome Statute, *supra* note 3, art. 125(1) (stipulating that states may accede to the Statute at a later time, but that signatures to the treaty are permitted only until 31 December 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to “remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.” President William J. Clinton, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), 2001 WL 6008. The President’s statement makes clear that the United States signature should not be interpreted as an abandonment of concerns “about significant flaws in the Treaty.” *Id.* Rather, the signature reflects a strategic decision that the United States “will be in a position to influence the evolution” of the remaining documents in the treaty regime, while “[w]ithout signature, we will not.” *Id.*

26. Benjamin Ferencz, Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (June 16, 1998), at <http://www.un.org/icc/speeches/616ppc.htm>.

pendent components of a larger global civil society.<sup>27</sup> In other words, treaty proponents see the creation of a supranational court empowered to override the unfettered discretion of some states as an overdue step towards a uniform system of responsibility designed to “promote values fundamental to all democratic and peace-loving states.”<sup>28</sup>

As noted above, the Rome Conference concluded with a rush of momentum towards an international court empowered to impose international law on individual citizens of sovereign nations, even when that state does not consent to the exercise of supranational power over its nationals. The term “complementarity” is a newly minted phrase that builds on the well-established practice of nations enforcing international law. Part II of this article assesses these jurisprudential roots. Part II also examines the practice of the two ad hoc tribunals established by the United Nations Security Council in recent years. These currently functioning international tribunals are built on the foundations laid by domestic legal systems, and their experience helps clarify the implementation of complementarity in a functioning, effective International Criminal Court.

The International Criminal Court is intended to be an autonomous supranational institution that possesses international legal personality.<sup>29</sup> As such, it will be required to work alongside sovereign states in a wide array of investigative, prosecutorial, and administrative activities.<sup>30</sup> Part III of this article highlights the process and dynamic in Rome that undergirds the formulation of Article 1, and will examine the provisions of the Rome Statute designed to make complementarity a viable approach to international justice. Part III concludes with an analysis of the recently completed Final Draft Rules of Evidence and Procedure that impact on the complementarity principle.

Having examined the textual formulations revolving around the concept of complementarity, Part IV discusses the potential gaps and unre-

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27. Sadat & Carden, *supra* note 10, at 386.

28. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT'L L. 383, 436 (1998) [hereinafter Brown, *Primacy or Complementarity*].

29. Rome Statute, *supra* note 3, art. 4(1). Formal recognition of international legal personality will allow the ICC as an organization created by states to enter into negotiations on its own behalf, conclude binding international agreements, claim immunity for its officials in the same manner as accredited diplomats, and appear as a plaintiff or defendant before the International Court of Justice. GERHARD VON GLAHN, *LAW AMONG NATIONS* 86 (4th ed. 1981).

solved procedural issues that could thwart the actual practice of the ICC prosecutor. One of the most important benchmarks in any future prosecution before the International Criminal Court will be the actual decision to transfer responsibility for prosecuting a particular perpetrator to the standing supranational institution from a domestic system that could otherwise exercise jurisdiction over the crime. Despite its simple formulation, the concept of complementarity represents the focal point of tension between the proponents of the Rome Statute and those who regard its provisions as an unjustified and illegal subversion of sovereign rights.

The principle of complementarity is the linchpin for assessing whether the “last major international institution established in this century”<sup>31</sup> will become a functioning reality or an international absurdity. It is plain that the Rome Statute stands for the proposition that accountability for war crimes “cannot be achieved without impinging upon the traditional criminal jurisdiction of states.”<sup>32</sup> The principle of complementarity is therefore the bridge that carries the weight of the Rome Statute. The next ten to twenty years will demonstrate whether the International Criminal Court can erode the principles of state sovereignty without itself being swept away by a backlash of indifference and outright opposition from sovereign states. This article concludes that implementation of the complementarity principle will be the decisive factor in either preventing or enhancing the concept of permanent supranational justice that coexists with state sovereignty in the interests of international peace and security.

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30. See generally Rome Statute, *supra* note 3, arts. 86-102 (termed Part 9 International Cooperation and Judicial Assistance, this section of the Rome Statute sets out complex procedural and substantive standards for the relations between states and the ICC in such matters as arrests, transfer of suspects, evidentiary matters, and the interface between state obligations pursuant to binding international agreements and the ICC). Complementarity in the ICC Statute is intended to apply beyond the mere allocation of jurisdictional authority by giving effect to this whole range of sovereign choices as a limit to the unchecked power of the ICC and prosecutor. Brown, *Primacy or Complementarity*, *supra* note 28, at 417 (citing a United Kingdom position paper for the proposition that the “intention is that all proper decisions by national authorities in connection with matters of interest to the ICC should be respected by the ICC and that no action should be taken in such cases.” *Id.* at 417 n.177). See also Broomhall, *Checklist*, *supra* note 17.

31. See Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A5 (quoting William Pace, Head of the NGO Coalition for an International Criminal Court).

32. Brown, *Primacy or Complementarity*, *supra* note 28, at 434.

## II. Jurisprudential Roots of Complementarity

The discipline of international criminal law<sup>33</sup> springs from the intersection of two legal traditions that are separate yet interrelated. The criminal aspects of international law are historically and juridically intertwined with the international aspects of national criminal law. The criminal aspects of international law can be traced to a variety of sources in which the nations of the world united to criminalize certain conduct under established international norms.<sup>34</sup> Prohibitions against piracy<sup>35</sup> and slavery<sup>36</sup> are two of the earliest substantive international crimes that over time became subject to the universal jurisdiction of all states.<sup>37</sup> Crimes typically evolved as a matter of customary international law, which in turn was codified in binding international conventions.

Since discussions concerning a permanent International Criminal Court began,<sup>38</sup> the challenge to the international community has been to distill a practical formula for reconciling or prioritizing the jurisdictional claims between an emerging supranational institution and the domestic

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33. Though commonly used by scholars and practitioners in this field, the concept of a distinct discipline termed "international criminal law" is not universally accepted across the world. See, e.g., Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983). In the context of negotiating the Elements of Crimes required by Article 9 of the Rome Statute, some delegations vehemently argued that the concept of "international criminal law" itself was too ill-defined to warrant inclusion in a document designed to "assist the Court in the interpretation and application" of the norms defined in the Rome Statute. Rome Statute, *supra* note 3, art. 9(1). Despite these concerns, the Final Draft Elements of Crimes, which were adopted by international consensus, includes the reminder in the chapeau language to the Article 7 crimes that the crimes against humanity provisions relate to "international criminal law" and accordingly "should be strictly construed." U.N. Doc. PCNICC/2000/INF/3/Add.2.

34. M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, in INTERNATIONAL CRIMINAL LAW AND PROCEDURE 27 (John Dugard & Christine van den Wyngaert eds., 1996) (summarizing some twenty different acts and types of conduct criminalized under binding international conventions and discussing the differing approaches to enforcing international criminal norms).

35. See ALFRED P. RUBIN, *THE LAW OF PIRACY* (1988); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 515 (2d ed. 1999) [hereinafter BASSIOUNI, *CRIMES AGAINST HUMANITY*].

36. Though piracy had been established as an international crime by the middle of the sixteenth century, the pecuniary advantages that the slave trade provided hindered the development of slavery from a moral prohibition to the status of a binding international crime. M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. 445 (1991). The 1890 Convention Relative to the Slave-Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors was the major watershed in formalizing the criminal prohibition of slavery. 27 Stat. 886, 1 BEVANS 134.

forums that would otherwise have jurisdiction. Paradoxically, the substantive norms of international criminal law did not develop as a coexistent component of the early efforts to develop the framework for an international criminal court.<sup>39</sup> The articulation of a defined set of international offenses proceeded in separate negotiations for different reasons than the discussions over the development of an international criminal institution. This lack of synchronization helps explain why the crimes proscribed in the Rome Statute do not replicate every act that is prohibited as a matter of international law. Nevertheless, the judicial authority of domestic forums to impose criminal responsibility for serious violations of international law is an essential underpinning of the jurisprudential framework of the complementarity principle. Similarly, the practice of the two currently functioning ad hoc tribunals empowered to prosecute serious violations of international humanitarian law<sup>40</sup> helps foreshadow the reality of the difficulty that the ICC prosecutor will face in transforming the principle of complementarity into a pragmatic reality.

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37. Universal jurisdiction entails that class of activities that are the result of “universal condemnation” and “general interest in cooperating to suppress them.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1986). For a useful discussion of the debates (and ultimate rejection in Rome) over universal jurisdiction as a grounds for ICC authority to adjudicate certain cases, see Sadat & Carden, *supra* note 10, at 410-16. Speaking of piracy, but clearly articulating the ideas underlying the basis for universal jurisdiction, the Permanent Court of International Justice wrote in the S.S. *Lotus* case:

Piracy, by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate’s operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish . . . .”

1927 P.C.I.J. (series A) No. 10, at 70 (1927).

38. See, e.g., Convention for the Creation of an International Criminal Court, *opened for signature at Geneva*, Nov. 16, 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. No. C.547(I).M.384(I) (1937) (this early discussion focused on an international court limited to enforcing the crime of terrorism, but this convention was only ratified by Italy and never entered into force). See also Finch, *Draft Statute for an International Court*, 46 AM. J. INT’L L. 60 (1952).

39. *Historical Survey*, *supra* note 6, at 15.

## A. Domestic Enforcement of International Crimes

### 1. *Legal foundations*

The ICC is intended to reinforce rather than overturn the well-established right of sovereign states to enforce international humanitarian law; the principle of complementarity embodies this linkage. The legal authority of domestic states to proscribe and adjudicate cases involving violations of humanitarian law is so firmly rooted in the international legal regime that the Rome Statute makes no distinction between states party and non-states party with respect to complementarity. Put simply, for every single act by every single accused that could theoretically be subject to the jurisdiction of the ICC, there would be one or more sovereign states that have legal authority to investigate and prosecute the case.

On its face, the Rome Statute makes no distinction between states that have ratified the treaty and those that have not with respect to the complementarity principle or the procedures for assessing the proper forum to adjudicate a particular case or perpetrator. In this light, the Preamble categorically states that “it is the duty of every State to exercise its jurisdiction over those responsible for international crimes.”<sup>41</sup> Prosecution of every serious violation of humanitarian law in domestic forums could, in theory, be viewed as having attained the goal of ICC supporters who hope that the movement towards a permanent supranational court will help guarantee respect for and enforcement of international justice. Complementarity is therefore a fundamental underpinning of the ICC regime that could also be an important incidental means for achieving the worthy goals of treaty proponents. At the same time, the complementarity principle preserves the

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40. The author prefers to use the term “international humanitarian law” merely as a linking phrase to associate the laws of armed conflict with the other substantive bodies of norms that may also apply to a particular conflict. The phrase is quite commonly used as a shorthand reference to the entire corpus of law that governs the conduct of hostilities, in addition to offenses such as genocide and crimes against humanity which carry the weight of international authority by virtue of their clear status as substantive prohibitions recognized under customary international law. The phrase should not imply that the law of armed conflict is indistinct or merged with the field of human rights law. Among many other differences, the laws of armed conflict are *lex specialis* and apply in limited circumstances to reverse the normal patterns of peacetime. In other words, under the laws of armed conflict, conduct that would normally be unlawful by definition is presumed to be lawful unless it contravenes the established norms regulating conflicts. See, e.g., Steven R. Ratner, *Why Only War Crimes? Delinking Human Rights Offenses from Armed Conflict*, 3 HOFSTRA L. & POL'Y SYMP. 75 (1999).

41. Rome Statute, *supra* note 3, pmb., para. 6.



prosecutorial prerogative of responsible states that are prepared to use domestic forums to enforce international law.

The comprehensive scope of jurisdiction enjoyed by sovereign states in enforcing international humanitarian law arose in part because domestic military codes presaged the body of rules that later ripened into international humanitarian law. Military commanders promulgated the earliest articulations of recognizable formal codes regulating conflict based on pragmatic hopes for reciprocal treatment by the adversary and because they realized that properly disciplined soldiers were more focused on achieving the military objectives of the conflict. In the midst of the Thirty Years' War, for example, Gustavus Adolphus of Sweden promulgated a punitive military code that contained a general warning that "no Colonel or Captain shall command his soldiers to do any unlawful thing; which so does, shall be punished according to the discretion of the Judge."<sup>42</sup> Similarly, in May 1863, the Union Army issued a disciplinary code governing the conduct of hostilities (known worldwide as the Lieber Code) as "General Orders 100: Instructions for the Government of the Armies of the United States in the Field."<sup>43</sup> Military codes of discipline established guidelines for gauging the scope of permissible conduct during conflicts that later evolved into the detailed codifications of international humanitarian law that underlie the proscriptions found in the Rome Statute.

Over time, these military codes and the more thorough military manuals that followed served to communicate the "gravity and importance" of behavioral norms to commanders and soldiers.<sup>44</sup> Because the substantive prohibitions on conduct during conflict became the benchmark for measuring military professionalism, military operations executed outside the established framework brought disgrace to the profession of arms, and

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42. GUSTAVUS ADOLPHUS, ARTICLES OF MILITARY LAWS TO BE OBSERVED IN THE WARS (1621), cited in BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 59. For a succinct yet sweeping description of the role that military practice and doctrine played in the development of the law of armed conflict, see Leslie C. Green, *What Is—Why Is There—The Law of War*, in 71 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 141 (1998).

43. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3-23 (Dietrich Schindler & Jiri Toman eds., 1988). For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224 (1998), and George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

stained national honor.<sup>45</sup> The widespread international recognition of these norms, in turn, led to frequent international efforts to codify the precise parameters of the law. Since 1854, there have been over sixty international conventions regulating various aspects of armed conflicts and a recognizable body of international humanitarian law has emerged from this complex mesh of conventions and custom.<sup>46</sup>

Not coincidentally, the international conventions describing the legal norms for regulating conflict embody the unquestioned recognition of a legal right of a sovereign to prosecute enemy citizens who violate those norms, as well as its own nationals.<sup>47</sup> With respect to cases of genocide<sup>48</sup> or grave breaches of the 1949 Geneva Conventions,<sup>49</sup> the black letter rules of international law go so far as to require that the perpetrator be prosecuted or extradited to another “concerned” nation.<sup>50</sup>

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44. W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 5-6 (Horace B. Robertson, Jr. ed., 1991). In the wake of the Lieber Code, other states issued similar manuals: Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893. Doty, *supra* note 43, at 230.

45. See Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4.

46. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 56.

47. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, arts. 85, 99, 102 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929). In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court stated this principle as follows:

From the very beginning of its history, this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.

*Id.* at 27-28 & n.5 (noting sixteen such cases applying the law of war). For a discussion of the customary international law regarding the right of military forces occupying foreign soil to prosecute civilians and the subsequent recognition of this right in binding conventions, see Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996).

48. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. VI, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 179, 181-82 (Roberts & Guelff eds., 3d ed. 2000) [hereinafter Genocide Convention].

Furthermore, as a mirror image of the fact that the complementarity principle applies to all states in the international community and all crimes within the jurisdiction of the ICC, international law today justifies universal jurisdiction for any state to adjudicate the crimes of genocide, crimes against humanity, and serious war crimes.<sup>51</sup> This facet of international law developed despite the practice of some states that used the pretext of war crimes prosecutions for the purpose of political repression or psychological manipulation.<sup>52</sup> Today, every state possesses the juridical ability to proscribe and prosecute the crimes detailed in the Rome Statute. Accordingly, since the end of World War II, there have been a substantial number

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49. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 49, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 195 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 50, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 221 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 47, art. 129, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 243 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 146, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 299 (Roberts & Guelff eds., 3d ed. 2000).

50. Writing in 1625, Hugo Grotius articulated the classic formulation of this concept as *aut dedere aut punire*, which has been modernized and frequently cited as *aut dedere aut judicare* (based on the general principle of law that the presumption of innocence applies in a criminal trial and subsequent punishment is contingent upon successful prosecution). BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 218.

51. See *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (allowing extradition of an accused to Israel on the basis of universal jurisdiction); *Regina v. Finta*, [1994] 1 S.C.R. 701; Cr. C. (Jm.) 40/61, *Attorney General of Israel v. Eichmann*, 45P.M. 3 (1961), *aff'd*, 16 P.D. 2033 (1962); SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 98-50, at 12 (1984); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/1405 (1994) (Rwanda Commission of Experts); BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 227-41.

52. For example, the Soviet Union enacted Decree Number 270 in 1942 that classified any soldier captured by the enemy *ipso facto* a traitor. The Allies repatriated more than 332,000 Russian prisoners to the Soviet Union, many of whom were summarily executed as soon as they were in Soviet custody. Russians who had been repatriated were held in camps and this period saw the first use of the term “filtration camps” (now used in connection with camps in Chechnya). STEPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 319-22 (1999). Similarly, the Indochinese Communist Party considered all French prisoners of war to be war criminals unless they “repented” and took on the values of their captors so that they could be a useful part of propaganda campaigns. *Id.* at 568.

of prosecutions involving the core ICC crimes in nations as diverse as Canada, France, Denmark, Switzerland, Australia, Croatia, Rwanda, the United Kingdom, Israel, and Belgium.<sup>53</sup>

As a logical corollary, domestic prosecutions form the basis for deducing that international law permits individual criminal responsibility for those who commit heinous crimes under the color of state authority. The field of international humanitarian law developed around the notion that the legal norms were not just theoretical matters between states, but actual restraints to guide the conduct of individuals. There can be no remaining doubt that the Rome Statute does not stretch the bounds of established legal principle with the sweeping declaration that a “person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment.”<sup>54</sup> As Justice Jackson observed in his oft-quoted opening statement to the International Military Tribunal (IMT) seated in the ruins of Nuremberg, Germany: “[T]he idea that a State, any more than a corporation, commits crimes, is a fiction.”<sup>55</sup> Based on the finding that “international law imposes duties and liabilities on individuals as well as upon States has long been recognized,” the IMT rejected defense arguments that international law governs only states, as well as the contention that the doctrine of state sovereignty shields perpetrators from personal responsibility for their actions.<sup>56</sup>

In addition, with regard to genocide and crimes against humanity, customary international law permits individual responsibility for crimes

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53. The United States position remains that the “crimes within the court’s jurisdiction . . . go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create ‘new’ and unacceptable crimes.” Scheffer, *supra* note 25, at 18. For analysis of the proper scope, substance, and rationale behind universal jurisdiction, see *Historical Survey*, *supra* note 6, at 4-14; Douglas Cassel, *The ICC’s New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 *FORDHAM INT’L L.J.* 378, 380-81 (1999); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *AM. J. INT’L L.* 554, 577 n.121 (1995); BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 35, at 543-6.

54. Rome Statute, *supra* note 3, art. 25(2). This principle is reinforced by the declaration that the Rome Statute applies “equally to all persons without any distinction based on official capacity.” Rome Statute, *supra* note 3, art. 27(1).

55. Opening Statement of Justice Robert Jackson to the International Military Tribunal (Nov. 21, 1945), in 1-3 *INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF GERMAN MAJOR WAR CRIMINALS* 83 (1946). He further admonished the IMT to recognize that any court adjudicating individual criminal cases, rather than imposing collective accountability, must respect the principle that “it is quite intolerable to let such legalism become the basis for personal immunity.” *Id.*

committed in times of peace as well as during armed conflict.<sup>57</sup> Article 8 of the Rome Statute accordingly comports with established international law imposing criminal liability for war crimes committed during either international war or internal armed conflict (technically termed armed conflict not of an international character).<sup>58</sup> Therefore, the mesh of customary and conventional international law against which the ICC will operate provides a comprehensive basis for domestic enforcement of the same acts that could otherwise be subject to the jurisdiction of the supranational institution.

## 2. *Crimes Beneath the ICC Threshold*

Against this backdrop of international law and practice, the Rome Statute implicitly concedes that states will remain responsible for prosecuting the vast majority of offenses even in a mature ICC regime. History shows that the overwhelming number of prosecutions for violations of

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56. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) (Judgement). The practice of states imposing individual criminal liability for war crimes dates back at least to third century B.C. Greek practice. ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW, WITH A POSTLUDE ON THE EICHMANN CASE 17-18* (1962). In one of the national proceedings following the Nuremberg Trials, the court expressed this principle as follows: "International law operates as a restriction and limitation on the sovereignty of states. It may also limit the obligations which are binding upon them to the extent that they must be carried out even if to do so violates a positive law or directive of the state." *United States v. von Leeb*, XI TRIALS OF WAR CRIMINALS 462 (1950) (The High Command Case). See also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

57. Hermann von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS* 89, 92 (Roy S. Lee ed. 1999). For a detailed discussion of the evolution of this proposition under the practice of states see BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 35, at 510-56.

58. Rome Statute, *supra* note 3, art. 8(1). Article 8 uses the simple phrase "war crimes" to cover the "whole field of norms applicable to armed conflict." Hebel & Robinson, *supra* note 57, at 103. The substantive war crimes prohibitions are detailed in Article 8(2)(a) (Grave breaches of the Geneva Conventions of 1949), Article 8(2)(b) (Other Serious Violations of the laws and customs applicable in armed conflict, within the established framework of international law), Article 8(2)(c) (Violations of Common Article 3 to the four Geneva Conventions of 1949), and 8(2)(e) (Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law). See also *Prosecutor v. Tadic*, No. IT-94-AR72, ¶ 134 (Oct. 2, 1995) (Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (discussing the range of conduct punishable in both international and non-international armed conflict) [hereinafter *Tadic Appeal on Jurisdiction*].

international humanitarian law have come in domestic forums as opposed to international tribunals. In contrast to the original twenty-four defendants charged before the International Military Tribunal at Nuremberg,<sup>59</sup> thousands of war criminals were prosecuted in the Allied zones of occupation by courts exercising sovereign power on German soil.<sup>60</sup> Similarly, from 1946 to 1948, Australian, American, Filipino, Dutch, British, French, Chinese, and Australian courts convicted several thousand war criminals in the Pacific theater.<sup>61</sup> The drafters in Rome recognized the reality that the ICC will have limited resources and political capital. Accordingly, the Rome Statute includes a number of subjective thresholds designed to ensure that domestic forums will continue to adjudicate the vast majority of cases, while the ICC itself focuses on a smaller number of more severe or difficult prosecutions.

As a fundamental check on its power, the substantive jurisdiction of the ICC is restricted to only “the most serious crimes of concern to the international community as a whole.”<sup>62</sup> Article 5(1) requires that the jurisdiction of the ICC “shall be limited” by the “most serious crimes of concern” threshold.<sup>63</sup> This textual limit on the scope of ICC jurisdiction has both a descriptive and subjective component. Indeed, the myriad of offenses detailed in Articles 6, 7, and 8 are tragic and inherently serious from a humanitarian perspective. In order to fall within the jurisdiction of the ICC, however, the offense must be on the high end of a scale of relative severity, and must have some quality that warrants the subjective assessment that the crime is of “concern to the international community as a whole.” This limitation applies to every crime detailed in the substantive provisions of Articles 6, 7, and 8. The bedrock “most serious crimes of

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59. Of the original twenty-four accused, one committed suicide before trial, one was tried in absentia, and one had charges dismissed by the court due to mental incapacity to stand trial. The Tribunal handed down twelve death sentences, seven prison terms, and three acquittals (all of whom were later convicted in German domestic courts). BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 35, at 528-29.

60. Bassiouni, *supra* note 11, at 20. The United States convicted 1814 (with 450 executions); the French convicted 2107 (109 executed); the British convicted 1085 (240 executed); there are no reliable numbers for the thousands tried and executed by the Russians. BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 35, at 532.

61. Bassiouni, *supra* note 11, at 36 n.14 (citing R. John Pritchard, *The Quality of Mercy: Appellant Procedures, the Confirmation and Reduction of Sentences and the Exercise of the Royal Prerogative of Clemency towards Convicted War Criminals*, in 8 *BRITISH WAR CRIMES TRIALS IN THE FAR EAST, 1946-48* (R. John Pritchard ed., 21 vols.) (documenting 2248 trials, involving 5596 accused, which resulted in 4654 convictions)).

62. Rome Statute, *supra* note 3, pmb., para. 9.

63. *Id.* art. 5(1).

concern” threshold is an up-front textual device that restricts the reach of the ICC, which in turn preserves the de facto latitude of sovereign criminal forums.

The “most serious crimes of concern” threshold is intellectually distinct from the complementarity regime. As discussed below,<sup>64</sup> the complementarity principle (and its accompanying mechanism governing the admissibility of a given case) serves to allocate power between the ICC and domestic forums over cases that could properly be prosecuted either in the ICC or in one or more domestic forums. If a case is sufficiently minor, which is an admittedly subjective inquiry, the “most serious crimes of concern” threshold means that the ICC does not have substantive jurisdiction over the conduct, even if the activity could possibly meet the criteria as one of the detailed offenses proscribed by Articles 6 (Genocide), 7 (Crimes Against Humanity), or 8 (War Crimes).<sup>65</sup> Phrased another way, there will be criminal offenses that could theoretically meet the complementarity test for admissibility, yet remain beyond the scope of permissible ICC jurisdiction because of their minor or isolated nature and scope. Article 15(1) reinforces this limitation, as the prosecutor is empowered to initiate an investigation *proprio motu* only on the basis of information on “crimes within the jurisdiction of the court.”<sup>66</sup> Moreover, because Article 19 distinguishes between jurisdiction and admissibility by requiring the court to “satisfy itself that it has jurisdiction in any case brought before it,” a judicial assessment of the prosecutor’s determination of admissibility remains discretionary.<sup>67</sup>

While representing a substantive check on the court’s jurisdiction, the “most serious crimes” threshold also establishes the ICC as a supranational institution working within a system of sovereign states. This precludes the misconception that the Rome Statute enacts some new regime of international federalism where sovereign states are deemed to be subordinate to

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64. See *infra* notes 91-106 and accompanying text.

65. In the case of war crimes, Article 8 contains the additional injunction that the court has jurisdiction 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.” Rome Statute, *supra* note 3, art. 8(1). Unlike the mandatory restriction on jurisdiction found in Article 5, this clarification is characterized as an illustrative, advisory caveat.

66. *Id.* art. 15(1). The United States position regarding the power of the prosecutor is best summarized by the official who noted that the *proprio motu* prosecutor cannot become “the independent counsel for the universe.” Sadat & Carden, *supra* note 10, at 447 n.407.

67. Rome Statute, *supra* note 3, art. 19(1).

the authority of the ICC. The Rome Statute envisions an enforcement regime based on overlapping power between territorial sovereigns (states) and non-territorial sovereigns (the international community as a whole, represented by the ICC prosecutor).<sup>68</sup> As an initial hurdle to restrict jurisdiction, the “most serious crimes of concern” threshold of Article 5 is a subtle, yet distinct and powerful, limit on the reach of the ICC vis à vis sovereign forums.

#### B. The Practice of the Ad Hoc Tribunals

The jurisdictional framework for the two currently operating ad hoc international tribunals offers a striking and important contrast to the complementarity regime of the ICC. Building on the moral legacy of Nuremberg,<sup>69</sup> the United Nations Security Council decided to take action in 1993 and 1994 to create the first truly international tribunals since World War II, designed to prosecute individuals responsible for the horrendous acts of genocide, crimes against humanity, and massive war crimes that took place in the territory of the former Yugoslavia<sup>70</sup> and Rwanda.<sup>71</sup>

Because the Security Council has “primary responsibility for the maintenance of international peace and security,”<sup>72</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) are both grounded on a finding that judicial

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68. Sadat & Carden, *supra* note 10, at 408. *See infra* notes 154-60 and accompanying text (discussing the *ne bis in idem* principle of Article 20 as it relates to complementarity).

69. The first prosecutor for the International Criminal Tribunal for the Former Yugoslavia, Judge Richard Goldstone of South Africa, visited the aging Telford Taylor (former Nuremberg prosecutor and U.S. Army brigadier general who served as the chief prosecutor for the subsequent proceedings in Nuremberg) in New York as a sign of respect and admiration. Benjamin Ferencz, *Telford Taylor: Pioneer of International Law*, 37 COLUM. J. TRANSN'T'L L. 661, 663 (1999).

70. *See* S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993). The Secretary-General prepared a detailed report on the scope of the crimes, including a draft statute pursuant to Resolution 808. *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/2507 (1993) [hereinafter Secretary General's Report]. The Security Council adopted the draft statute in Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].

71. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

72. U.N. CHARTER art. 24(1).



accountability for crimes facilitates the restoration and maintenance of international peace and security.<sup>73</sup> The Security Council has authority under Chapter VII of the United Nations Charter to decide upon enforcement measures that all members “agree to accept and carry out.”<sup>74</sup> The Security Council has additional specific authority to create “such subsidiary organs as it deems necessary for the performance of its functions.”<sup>75</sup>

From the perspective of Charter legal authority, the ICTY and ICTR are best understood as enforcement measures of a judicial nature; both the ICTY and ICTR draw their lifeblood from the political process of the Security Council, yet each must perform judicial functions in a non-political manner that is “not subject to the authority and control of the Security Council with respect to those judicial functions.”<sup>76</sup> The use of Chapter VII authority in this manner was both unprecedented and ingenious. By virtue of the absolute authority of the Security Council with respect to maintaining international peace and security,<sup>77</sup> the ad hoc tribunals enjoyed legitimacy and authority vis à vis sovereign states immediately upon their inception.

Furthermore, all members of the United Nations, through a binding treaty obligation in the form of the Charter, agree that the Security Council “acts on their behalf” in carrying out its responsibility to maintain and restore international peace and security.<sup>78</sup> The Charter regime is the dominant feature of the normative international legal landscape, and its legal force imbues the ICTY and ICTR with binding authority over established state actors. As a consequence of this relationship with Security Council authority, both the ICTY and ICTR Statutes specify that the national courts and the international tribunals “shall have concurrent jurisdiction.”<sup>79</sup> Each

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73. Secretary General’s Report, *supra* note 70, ¶ 26.

74. U.N. CHARTER art. 25.

75. *Id.* art. 29.

76. Secretary General’s Report, *supra* note 70, ¶ 28.

77. See, e.g., *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, *Advisory Opinion*, *International Court of Justice*, 1962, I.C.J. REPORTS 151 (1962) (holding in part that the Security Council has plenary authority under the Charter to take decisions and order enforcement measures under the Charter regime), *reprinted in* 56 AM. J. INT’L L. 1053 (1962).

78. U.N. CHARTER art. 24(1).

79. ICTY Statute, *supra* note 70, art. 9(1); ICTR Statute, *supra* note 71, art. 8(1).

international tribunal nevertheless has explicit jurisdictional “primacy over national courts.”<sup>80</sup>

The jurisdictional primacy of the ICTY and ICTR springs logically from the preeminent authority granted to the Security Council in pursuit of its plenary role in restoring international peace and security. The legal and common sense of the term “primacy” necessarily conveys a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an “inherent supremacy” for the international tribunal.<sup>81</sup> As a result, if a domestic court is proceeding with a case that is otherwise within the jurisdictional competence of the ICTY and ICTR, the international tribunal has unbounded legal discretion to order the national courts to defer to the international tribunal “at any stage of the proceeding.”<sup>82</sup>

Applying this right of primacy, the first case brought to trial before the ICTY involved an accused named Dusko Tadic who had been facing trial in Germany on charges of murder, aiding and abetting genocide and causing grievous bodily harm.<sup>83</sup> Though the ICTY only had one court room at the time, its trial court ordered the pending German case transferred to The Hague despite the fact that the Office of the Prosecutor had not yet indicted Tadic (that indictment was confirmed and issued four months after the transfer).<sup>84</sup> Tadic appealed this transfer on jurisdictional grounds. The ICTY Appeals Chamber upheld the implementation of ICTY primacy that denied Tadic a German trial on the rationale that the Security Council had acted “on behalf of the community of nations” by endowing a judicial organ with authority to address “transboundary matters” which affect international peace and security.<sup>85</sup> This legal reasoning also justifies the principle that—because the ICTY and ICTR enjoy derivative power

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80. ICTY Statute, *supra* note 70, art. 9(2) (the ICTY “shall have primacy over national courts”); ICTR Statute, *supra* note 71, art. 8(2) (containing the slightly stronger text “shall have primacy over the national courts of all states”). For an explanation of contemporary statements made to the Security Council regarding primacy, and a plausible explanation for the textual addition to the ICTR Statute see Brown, *Primacy or Complementarity*, *supra* note 28, at 398-402.

81. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 n.378 (1995).

82. ICTY Statute, *supra* note 70, art. 9(2); ICTR Statute, *supra* note 71, art. 8(2).

83. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 97 (1997).

84. *Id.* at 100. While investigating other cases, Tadic’s name repeatedly surfaced and the ICTY Deputy Prosecutor reported that “our investigators and the German authorities were starting to trip all over each other.” *Id.* at 98.

springing from the Article 25 Charter obligation of states to obey Security Council mandates—the tribunal rules require domestic jurisdictions to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the arrest or detention of persons.”<sup>86</sup>

As opposed to the Security Council mandates that created the ICTY and ICTR, the Rome Statute, upon its entry into force,<sup>87</sup> will establish a multilateral treaty regime that purports to allow ICC jurisdictional authority even over individuals acting pursuant to the sovereign authority of non-state parties. The complementarity principle is an essential cornerstone of the Rome Statute, which on its face represents a radical retreat from the theoretical primacy of the ICTY and ICTR. A system based on following the complementarity principle ineluctably leads to a system in which domestic courts have primary authority to adjudicate violations of international humanitarian law. In theory, pure primacy for the international tribunal is the diametric opposite of complementarity where primary authority resides with domestic courts. In reality, the gap between primacy and complementarity as organizing jurisdictional principles may not be so expansive; there is to date no clear evidence that either primacy or complementarity claim inherent functional superiority as a core organizing principle.<sup>88</sup>

In point, both ad hoc international tribunals often face “total defiance” from states regarding orders to transfer indictees and to provide evidence,

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85. Tadic Appeal on Jurisdiction, *supra* note 58, ¶¶ 58, 62. The court opined in dicta that:

it would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of law and as a protection for those who trample underfoot the most elementary rights of humanity.

*Id.*

86. ICTY Statute, *supra* note 70, art. 29 (including an obligation by states to respond to requests for identification and location of persons, take testimony and produce evidence, serve documents, and surrender or transfer the accused to the International Tribunal).

87. The Rome Statute will enter into force on the first day of the month after the sixtieth day following the sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations. Rome Statute, *supra* note 3, art. 126(1).

88. Brown, *Primacy or Complementarity*, *supra* note 28, at 430.

thereby undercutting the legal force of the primacy principle.<sup>89</sup> When states have trampled upon the international tribunals' authority by ignoring such orders, the Security Council has not aggressively reinforced the primacy principle by compelling state compliance. Moreover, domestic jurisdictions have maintained their central role in enforcing international humanitarian law in spite of the jurisdictional primacy of the ad hoc international tribunals. Rwanda, for example, is currently holding over 100,000 citizens pending trial in connection with the 1994 genocidal rampages that destroyed approximately eighty percent of the Tutsi population.<sup>90</sup>

In practice, the gap between the primacy approach of the ICTY and ICTR and the diametrically opposed complementarity principle of the ICC will likely be minimal. Nevertheless, the primacy principle has reinforced the procedural and legal impact of Security Council action regarding the relative authority of international and domestic judicial systems. As a result, the ICC prosecutor will confront a conceptual dilemma generated by the interface between the complementarity principle and Security Council actions under its Chapter VII authority.<sup>91</sup> This issue will be analyzed in Part III, in the context of examining the textual formulations that the Rome Statute employs to implement the complementarity principle.

### III. Textual Implementation of Complementarity in the Rome Statute

#### A. Complementarity at the Rome Conference

The balance of penal prerogative between sovereign states in the international community and a permanent supranational criminal court has been a prominent issue of concern since the beginning of serious diplomatic efforts towards creating such an institution.<sup>92</sup> The detailed progres-

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89. Remarks to the Security Council by Madame Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (Nov. 10, 1999) (copy on file with author) (pleading for the "active support" of the Security Council, noting the fact that the Federal Republic of Serbia has become a safe haven for indicted war criminals, and noting the fact that Croatia's unilateral decision to withdraw its support to ongoing investigations erodes the "fundamental power" of the Prosecutor that "must be preserved.").

90. Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & PUB. POL. SYMP. 203 (1999); see also Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997).

91. See *infra* notes 109-15 and accompanying text.

sion of diplomatic negotiations towards the text that eventually became the Rome Statute documents a complex, contentious, and incremental process, which ultimately produced a treaty adopted by an emotional vote rather than by international consensus. The progress was painstaking and, at times, meandering. The negotiating texts are riddled with brackets and often-contradictory proposals for further negotiations.<sup>93</sup>

Nevertheless, the principle of complementarity represents one golden thread of consensus that runs through every documentary step along the road towards the supranational criminal court. This axiom, that the ICC is “neither designed nor intended” to supplant independent and effective domestic judicial systems, served as a guiding principle found throughout the long series of diplomatic interchanges culminating in the Rome Statute.<sup>94</sup>

Complementarity is an intellectually simple principle that cannot be distilled into one snippet of isolated treaty text. Despite widespread agreement over the complementarity principle during the Preparatory Committee meetings prior to the Rome Conference, its textual manifestation was deeply interconnected with the many other highly contentious fundamental issues. Debates in Rome raged over vital issues related to complementarity such as the definitions of crimes, the precise scope of substantive jurisdiction, the conceptual basis for ICC jurisdiction over individuals (whether territorial, national, universal, or some combination thereof), the trigger mechanism for beginning investigation or initiating prosecution of an individual or group of offenses, and the mechanism for preventing prosecutorial abuse of discretion for political purposes.

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92. See *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 12, at 21, U.N. Doc. A/26645 (1954). This document was redrafted from the earlier 1951 Draft Statute in order to soften the prospect of compulsory jurisdiction of the international court by allowing more flexibility and voluntary participation in an international criminal court, to include the right to withdraw from the court's jurisdiction following one year's notice. *Historical Survey*, *supra* note 6, at 13 n.72. See generally Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, in 5 *GLOBAL GOVERNANCE* 1 (1999).

93. See generally *STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (1998).

94. *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the S. Comm. on Foreign Relations*, 105th Cong. 76 (1998) (statement for the record submitted by the Lawyer's Committee for Human Rights) [hereinafter *International Criminal Court Hearing*], available at <http://www.access.gpo.gov/congress/senate/senate11sh105.html>.

The overarching debate that touched political nerves and directly affected state sovereignty centered on the degree to which the Security Council would direct or control the preconditions for the exercise of jurisdiction by the ICC.<sup>95</sup> One treaty proponent summarized this difficult dynamic by observing:

Rome represented a tension between the United States that wanted a Security-Council controlled court, and most of the other countries of the world which felt no country's citizens who are accused of war crimes, crimes against humanity, or genocide should be exempt from the jurisdiction of the international criminal court.<sup>96</sup>

According to this view, Security Council control over ICC investigative and judicial authority would endanger the court's independence and give de facto immunity to citizens of the permanent members (whose nations could exercise the veto to thwart ICC judicial authority).<sup>97</sup>

As noted above,<sup>98</sup> the most controversial issues associated with jurisdiction—state consent as a requirement for ICC jurisdiction over its nationals<sup>99</sup> and the allocation of power between the Security Council and the ICC—were not resolved until the last day of the Rome Conference. These issues were so intertwined that compromises in one area would impact other ongoing debates. Hence, states were reluctant to compromise on each critical point in succession without “having a clear sense of how the total picture would appear.”<sup>100</sup> Complementarity, on the other hand,

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95. Elizabeth Wilmshurst, *Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS* 127 (Roy S. Lee ed., 1999).

96. *International Criminal Court Hearing, supra* note 94, at 73 (prepared statement of Professor Michael P. Scharf, New England School of Law). See also John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45 (2000) (claiming that U.S. objections are grounded in U.S. provincialism, triumphalism, and exceptionalism). For a more detailed discussion of the relationship between U.S. objections and current treaty provisions, see Sadat & Carden, *supra* note 10, at 447-59.

97. Michael N. Schmitt & Major Peter J. Richards, *Into Uncharted Waters: The International Criminal Court*, NAVAL WAR C. REV. 122 (Winter 2000).

98. See *supra* notes 4-10 and accompanying text.

99. The penultimate vote rejected a United States proposal that the ICC would not have personal jurisdiction over an individual absent the consent of the state in which the crimes were committed and the state of nationality of the accused. This proposal was tabled by the United States delegation on 14 July 1998. U.N. Doc. A/CONF.183/C.1/L.70 (1998).

enjoyed a unique role in the negotiating history of the Rome Statute because debate centered not on its merits or appropriateness, but on perfecting the most agreeable textual approach that would gain state consensus.<sup>101</sup> All delegations understood the meaning of complementarity as an organizing principle, but the articulation of its substantive and descriptive parameters required sustained negotiations.

Rather than serving as the point of initial consensus in one isolated text, the complementarity principle became the cornerstone for many other debates, much like the first domino in a series, to begin the process of negotiation and agreement. As a result, the Rome Statute emerged with a complex, layered procedural structure, but one in which the complementarity principle was preserved. To illustrate, once a particular offense rises above the “most serious crimes of concern” threshold,<sup>102</sup> the case must meet the preconditions for jurisdiction outlined in Articles 12 through 16 (which were not finalized until the last day of the Rome Conference).<sup>103</sup> The complementarity principle is further embedded as an additional procedural requirement found in Article 17, which requires the ICC to “determine that a case is inadmissible” where certain criteria are met.<sup>104</sup> Logically, cases failing to meet these admissibility criteria are reserved to the judicial authority of one or more sovereign states.

In order to implement the complementarity principle implemented by the Rome Statute, the ICC prosecutor and judicial chambers must respect and adhere to the statute’s admissibility criteria. Article 17 represents the most direct mechanism for allocating responsibility for a certain prosecution between the ICC and one or more domestic sovereigns that may have jurisdictional authority. Where the textual criteria of Article 17 are satisfied such that a case is “inadmissible,” the Rome Statute constrains the authority of the ICC prosecutor and judicial chambers. These admissibility criteria, therefore, establish the critical bulwark protecting the power of

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100. John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS* 41, 43 (Roy S. Lee ed., 1999) [hereinafter Holmes, *The Principle of Complementarity*].

101. *Id.*

102. *See supra* notes 59-68 and accompanying text.

103. Article 16 requires that an investigation or prosecution cannot commence or proceed for a period of twelve months following a request from the Security Council adopted under its Chapter VII authority. Rome Statute, *supra* note 3, art. 16. The United States objects to this approach because it turns the Charter role of the Security Council upside down, and nullifies the effect of a veto since the Security Council only has negative authority to stop a case.

104. *Id.* art. 17(1).

sovereign states to prosecute cases in their national courts as opposed to relying on the ICC. Pursuant to this statutory constraint, the complementarity principle is further preserved through a detailed procedure for states to challenge admissibility.<sup>105</sup> Finally, the entire structure is limited by the *ne bis in idem* principle of Article 20, which protects perpetrators from repetitive trials, with some caveats based on the complementarity principle. Analysis of the potential pitfalls for the ICC prosecutor in implementing the complementarity principle is therefore dependent on a holistic view of the provisions of the Rome Statute that bear its fingerprints.

## B. Relevant Treaty Provisions

### 1. Articles 12-16, Jurisdictional Competence

The jurisdictional patchwork of the ICC represents its most central and controversial component. This series of provisions did not emerge until the final day of the Rome Conference.<sup>106</sup> The concept of ICC jurisdiction involves much more than a simple assessment of whether a particular act fits the definition of a substantive crime within the meaning of the Statute (as defined by Articles 6, 7, and 8 using the interpretive filter of the Elements of Crimes).<sup>107</sup> The Rome Statute is unique in the field of international law because it commingles the jurisdiction to prescribe, the jurisdiction to adjudicate, and the jurisdiction to enforce international norms into one quasi-legislative treaty.<sup>108</sup> This necessarily produces a complex web of provisions, each affecting the complementarity principle. The Trial Chamber is accordingly required to “satisfy itself that it has jurisdiction in any case brought before it.”<sup>109</sup>

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105. *Id.* art. 19(2). The additional right to make preliminary challenges to admissibility and jurisdiction originated in a United States proposal made to the March Preparatory Committee, which was subsequently renegotiated and expanded during later deliberations, and became Article 18 of the Rome Statute. See U.N. Doc. A/AC.249/1998/WG.3/DP.2 (introduced by the United States on 25 March 1998 to the Working Group on Complementarity and Trigger Mechanism).

106. Wilmshurst, *supra* note 95, at 138.

107. See Rome Statute, *supra* note 3, art. 9(1) (requiring elements of crimes that “shall assist the Court in the interpretation and application of Articles 6, 7, and 8”).

108. Sadat & Carden, *supra* note 10, at 406.

109. Rome Statute, *supra* note 3, art. 19(1). This mandatory language contrasts with the looser provision that the “Court may, on its own motion, determine the admissibility of a case in accordance with Article 17.” *Id.*



The final package that became the Rome Statute is structured around a dual track system of jurisdiction.<sup>110</sup> Article 13 implicitly rejects a simple assertion of universal ICC jurisdiction by limiting the court's jurisdictional authority to cases referred either by the United Nations Security Council or to those referred using carefully described jurisdictional competence. This delegated grant of jurisdictional authority to the ICC and its prosecutor necessarily reserves to states the discretion to prosecute any cases that fall outside the established Article 13 parameters.

As a check on the power of states, and hence a limit to complementarity, Article 13(b) is particularly relevant. Article 13(b) allows the Security Council to refer a case to the ICC prosecutor acting under its Chapter VII authority. This path was embodied in the 1994 Draft Statute prepared by the International Law Commission<sup>111</sup> and represents the simplest and least controversial track towards ICC adjudication of a particular case. The Security Council has absolute authority to define the territorial, temporal, or normative scope of the prosecutor's license to proceed based on its plenary power with regard to actions designed to maintain or restore international peace and security.<sup>112</sup>

With regard to the complementarity principle, a Chapter VII referral would override a state's inherent national authority to insist on using its own judicial processes. Even though jurisdiction under Article 13 is a legal inquiry distinct from admissibility under Article 17 (which implements complementarity via the admissibility regime), a Security Council referral would supersede the state's right to use its own courts as the forum of first resort. While the text of the Rome Statute ostensibly preserves a state's authority to implement complementarity following a Security Council referral, the obligation of all states to "accept and carry out the decisions of the Security Council"<sup>113</sup> effectively nullifies this right of complementarity. Furthermore, all members of the United Nations are obligated to comply with orders of the Security Council, even if the Rome

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110. *International Criminal Court Hearing*, *supra* note 94, at 73 (prepared statement of Professor Michael P. Scharf, New England School of Law).

111. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc A/49/10, art. 23 (1994) [hereinafter *ILC Draft Statute*].

112. *See supra* notes 69-91 and accompanying text. In the context of a case referred to the prosecutor under the Chapter VII authority of the Security Council, the ICC should also benefit from specific enforcement measures designed to enhance state cooperation with the ICC prosecutor and judicial chambers.

113. U.N. CHARTER art. 25.

Statute or any other international agreement would impose conflicting obligations.<sup>114</sup> A Security Council referral, therefore, has the practical effect of creating jurisdictional primacy for the ICC similar to that enjoyed by the ICTY and ICTR.

In contrast, the second jurisdictional track under Article 13 invokes the very principles of state consent and territorial jurisdiction that the complementarity principle was intended to protect. Article 13 allows either a state party<sup>115</sup> or the prosecutor proceeding *proprio motu*<sup>116</sup> to refer a case to the ICC. The *proprio motu* power of the prosecutor was adopted over the opposition of the United States<sup>117</sup> and has significant implications for the complementarity principle that will be discussed in Part IV. For cases referred by either a state party or the prosecutor (that is, cases not dependent on Security Council referral under Chapter VII authority), Article 12 implements a consent regime based on the territory on which the crime was committed<sup>118</sup> or the nationality of the perpetrator.<sup>119</sup> Thus, a case is subject to ICC jurisdiction if the crime was committed on territory that belongs to a state party or another state that consents to the jurisdiction of the court. Similarly, a case may be referred to the ICC if the accused is the

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114. *Id.* art. 103

115. Rome Statute, *supra* note 3, art. 13(a). A state becoming a party to the Rome Statute thereby accepts jurisdiction over the crimes contained therein. Rome Statute, *supra* note 3, art. 12(1). A state party may only refer a case purporting to be within the jurisdiction of the ICC to the prosecutor specifying the relevant circumstances and providing available supporting documentation for the crimes. Rome Statute, *supra* note 3, art. 14.

116. Rome Statute, *supra* note 3, art. 15. The prosecutor's *proprio motu* power to self-initiate investigations is subject only to the approval of two judges in a Pre-Trial Chamber. *Id.* art. 15(4). This *proprio motu* power was a departure from the earlier draft by the International Law Commission. *ILC Draft Statute*, *supra* note 111, art. 25. *See also* Rome Statute, *supra* note 3, art. 53 (specifying factors for the prosecutor to consider in opening or deferring an investigation).

117. Ambassador David J. Scheffer, the head of the United States delegation, summarized the concern over the prosecutor's *proprio motu* power by testifying that it "will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decisionmaking, and confusion." *International Criminal Court Hearing*, *supra* note 94, at 14 (prepared statement of Ambassador David J. Scheffer, United States Ambassador-at-Large for War Crimes).

118. Rome Statute, *supra* note 3, art. 12(2)(a) (the territoriality principle includes a vessel or aircraft registered to that state).

119. *Id.* art. 12(2)(b). A state exercising its right to opt out of ICC jurisdiction over war crimes committed by its nationals or on its territory for a period of seven years, Rome Statute, *supra* note 3, art. 124, would probably also prevent a referral by a state party on whose territory that national committed a war crime. Wilmschurst, *supra* note 95, at 140.

national of a state party or of a state that consents to the jurisdiction of the court.

The consent regime embodied in Article 12 marks the fault line between the rights of states under the Rome Statute and the residual right of sovereign states to use domestic forums to prosecute violations of international humanitarian law committed by their nationals. The consent regime makes no reference whatsoever to the sovereign prosecutorial rights of non-state parties. The consent regime is also silent regarding the case of the so-called “traveling tyrant,”<sup>120</sup> and would not grant ICC jurisdiction based only on the consent of a state that happens to have custody of the perpetrator.<sup>121</sup> Article 12 on its face permits the anomaly in which a non-state party commits heinous crimes on its own territory, but consents to the exercise of ICC jurisdiction only over the members of other nations, such as a United Nations coalition, that enter its territory to prevent further violations. Despite the right of the non-state party to consent to crimes committed by some but not all persons on its soil, the non-state party retains the primary presumption of jurisdiction under the complementarity principle.<sup>122</sup>

In light of the complementarity principle, the provisions for nationality and territoriality jurisdiction can be considered as a set of “conflicts of jurisdiction rules.”<sup>123</sup> For example, in the case of a crime committed by the national of a non-state party on the territory of another non-state party that consents to the jurisdiction of the court, both states would have jurisdiction under the established norms of international law. Although the case could meet the Article 12 preconditions for jurisdiction by the ICC, the complementarity principle operates to delay an assertion of ICC jurisdiction. Furthermore, many states have domestic legislation allowing extraterritorial jurisdiction over violations of international humanitarian law committed against nationals belonging to that state,<sup>124</sup> which could

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120. Sadat & Carden, *supra* note 10, at 414 (attributing the source of the term to the head of the Lawyer’s Committee for Human Rights delegation to the Rome Conference, Jelena Pejic).

121. Note, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 836-40 (1999). This limitation actually represents a retreat from the earlier text of the ILC draft that would have allowed the custodial state to consent to ICC jurisdiction. *ILC Draft Statute*, *supra* note 111, art. 21.

122. This statement is true, subject to the caveat that the non-state party can always consent to the exercise of ICC jurisdiction. Rome Statute, *supra* note 3, art. 12(3).

123. Sadat & Carden, *supra* note 10, at 413.

124. *See, e.g.*, 18 U.S.C. § 2441(b) (1999) (War Crimes Act of 1996 as amended).

give a third state (the state of the victim's nationality) a valid legal basis for instigating a prosecution of the perpetrator.

To help remedy the clash of jurisdictional competency, the Rome Statute implements the complementarity principle through a specified regime of admissibility. Applying the complementarity principle to the above hypothetical, all three states "would normally exercise jurisdiction over the crimes concerned," and the admissibility criteria require the prosecutor to notify those three states when commencing an investigation following either a referral by a state party (Article 13(a)) or *proprio motu* (Articles 13(c) and 15).<sup>125</sup> The jurisdictional competence of the three states would be resolved through normal political and legal mechanisms. Accordingly, the admissibility criteria work in conjunction with the circumscribed jurisdictional competence of the ICC to mark the line of authority between the ICC and domestic legal systems.

## 2. Articles 17-19, Admissibility Criteria

The admissibility mechanism provides the most direct implementation of the complementarity principle in the Rome Statute. Article 17 compels the link between admissibility and complementarity by explicitly referring to the two statutory provisions that articulate the complementarity principle.<sup>126</sup> Following this reference to the complementary nature of ICC practice, Article 17 mandates that the court "shall determine that a case is inadmissible" where the admissibility criteria are not met.<sup>127</sup> This is phrased as a mandatory limitation on the reach of the court. The admissibility criteria implement the complementarity principle by providing the textual basis for evaluating whether domestic authority over a particular case limits ICC authority over that case. Furthermore, the procedures for obtaining preliminary rulings regarding admissibility<sup>128</sup> and challenging the prosecutor's assertion of admissibility<sup>129</sup> provide the mechanism for translating complementarity from a theoretical principle to an enforceable check on the power of the ICC and prosecutor.

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125. Rome Statute, *supra* note 3, art. 18(1).

126. *Id.* art. 17(1) ("Having regard to paragraph 10 of the Preamble and article 1 . . .").

127. *Id.*

128. *Id.* art. 18.

129. *Id.* art. 19.

The earliest articulation of the admissibility criteria dates to the 1943 Draft Convention for the Creation of an International Criminal Court, which simply stated that, “[as] a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.”<sup>130</sup> The 1994 International Law Commission (ILC) Draft Statute preempted ICC authority in cases that were the subject of investigation by a state that produced an “apparently well-founded” decision not to proceed to prosecution.<sup>131</sup> This limited concession to domestic authority was grounded on a statement in the Preamble of the ILC Draft Statute that the ICC was to be complementary to domestic legal systems in cases where trials “may not be available or may be ineffective.”<sup>132</sup>

Based on concerns that the ILC formulation was both too narrow (in the sense that even a sham prosecution could render a case inadmissible) and too vague,<sup>133</sup> Article 17 expanded the scope of the earlier text to specify that the court shall determine that a case is inadmissible in the following circumstances: (1) the case is “being investigated or prosecuted by a State that has jurisdiction over it;” (2) the case was the subject of a prior investigation and the state with jurisdiction “decided not to prosecute the person concerned;” (3) the person was already tried for conduct which is the sub-

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130. Draft Convention for the Creation of an International Criminal Court (London International Assembly), art. 3, LONDON INTERNATIONAL ASSEMBLY—REPORTS ON PUNISHMENT OF WAR CRIMES 225-346 (1943), reprinted in *Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General*, U.N. Doc. A/CN.4/7Rev.1 (1949).

131. *ILC Draft Statute*, *supra* note 111, art. 35. The ILC Draft also prevented admissibility in cases where “there is no reason for the Court to take further action for the time being” and cases “not of such gravity to justify further action by the Court.” *Id.*

132. *Id.* pmbl., para. 3.

133. Holmes, *The Principle of Complementarity*, *supra* note 100, at 45 (helping to explain why the Rome Statute broadens ICC jurisdiction to cases that have already been prosecuted in sham trials and why the text attempts to articulate detailed, relatively objective criteria for the subjective assessments underlying a determination of ICC admissibility).

ject of ICC interest;<sup>134</sup> or (4) the case is “not of sufficient gravity to justify further action by the Court.”<sup>135</sup>

The Rome Statute amended the subjective ILC admissibility criteria in two significant ways. A case is admissible before the ICC only where a domestic sovereign is “unwilling or unable to genuinely” carry out the investigation or prosecution.<sup>136</sup> The delegates in Rome rejected a vague concept of effectiveness and agreed upon “genuinely” as the most objective modifier that preserves a large degree of flexibility for the ICC prosecutor and court.<sup>137</sup> The ICC prosecutor and court must make a subjective assessment whether the sovereign state is “genuinely unwilling” or “genuinely unable” to take action on the case. This new standard also allows the supranational institution to review, and potentially reverse, the disposition of the case following prior judicial or investigative action in the domestic system. The potential for direct and deliberate ICC infringement over unchecked state sovereignty resulted in extensive debate about the best articulation of the criteria for determining whether a state is “unwilling”<sup>138</sup> or “unable”<sup>139</sup> to take action on a particular case.”<sup>140</sup>

The Rome Statute also includes detailed procedural guidance for implementing the complementarity principle. In order to clearly describe the effect of complementarity when matters are first referred to the ICC, the United States introduced a proposal in March 1998 that was later negotiated and included in the Rome Statute as Article 18.<sup>141</sup> Prior to taking action on a case referred by a state party or initiating a *proprio motu* investigation, the prosecutor is required to “notify all States and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.”<sup>142</sup> The ability of any state party to refer a case to the prosecutor for investigation extends to situations in which “one or more” of the crimes proscribed in the Rome Statute “appears to have been committed.”<sup>143</sup> Thus, a state party can ask the

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134. This principle is implemented procedurally in Article 20, *Ne bis in idem*. See *infra* notes 153-59 and accompanying text.

135. Rome Statute, *supra* note 3, art. 17(1). This final ground for inadmissibility always operates as a restriction on the scope of ICC authority in all cases, and its inclusion in the admissibility criteria just reinforces this intentional limitation. See *supra* notes 59-68 and accompanying text.

136. *Id.* But see JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 70 (1998) (Human Rights Watch advocated a return to the “ineffective” or “unwilling” standard on the basis that the agreed language set “an unduly high threshold which may prevent ICC jurisdiction even in cases where there is no effective investigation and prosecution at the national level.”).

137. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50.

prosecutor to initiate an investigation over acts committed anywhere in the world, over which several other states could legitimately exercise jurisdiction. The prosecutor's duty to notify any state with a potential jurisdictional basis serves as the cue for that state to elect whether to exercise its jurisdictional rights. The admissibility criteria obligate the ICC prosecutor

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138. Rome Statute, *supra* note 3, art. 17(2). Article 17(2) prescribes the criteria for evaluating "unwilling" as follows:

(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 for crimes within the jurisdiction of the Court referred to in article 5;

(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

(d) conducted in a manner which, under the circumstances, is inconsistent with an intent to bring the person concerned to justice.

*Id.*

139. *Id.* art. 17(3).

In order to determine inability in a particular case, the Court shall consider whether, due to partial or total 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.

*Id.*

140. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50. Some observers believe that this effort was inspired by determined effort to allocate ICC authority based on "neutral and principled" criteria. Sadat & Carden, *supra* note 10, at 415.

141. U.N. Doc. A/AC.249/1998/WG.3/DP.2 (introduced by the United States on March 25, 1998 to the Working Group on Complementarity and Trigger Mechanism). *See also International Criminal Court Hearing*, *supra* note 94, at 143 (providing Ambassador Scheffer's description of the U.S. motivation in introducing the proposal).

142. Rome Statute, *supra* note 3, art. 18(1).

143. *Id.* art. 14(1).

and court to respect that state's right to exercise complementarity, even in cases where the state only took action following a notification.

Notably, the requirement for prosecutorial notification to states—designed to permit the exercise of domestic jurisdiction that would preempt ICC authority—does not include cases referred to the ICC prosecutor by the Security Council acting under its Chapter VII authority. In practice, the process of generating a Chapter VII resolution would almost certainly give notice to the affected states. In theory, a Security Council referral of a situation to the ICC would not prevent state investigation or prosecution of that case. Notwithstanding the normal functioning of the complementarity mechanism, the presumption of state jurisdictional precedence vis à vis the ICC would not trump the Security Council's legal authority to override domestic discretion.

Unless the Security Council has referred the case, the complementarity principle allows any state, including non-state parties, to notify the court that a domestic investigation is underway or has been concluded; in such cases, the prosecutor “shall defer” to a domestic investigation.<sup>144</sup> Despite the obligation to respect a valid invocation of sovereign judicial authority, the ICC prosecutor may still request the state to provide information to the prosecutor on the progress of any investigations or trials.<sup>145</sup> The prosecutor subsequently has the right to review a deferral to domestic investigation of the case after six months, or “at any time when there has been a significant change of circumstances based on the State's unwillingness or inability to genuinely carry out the investigation.”<sup>146</sup> These provisions implement complementarity as a procedural mandate for the ICC in its dealings with all states, including those that have not ratified the Rome Statute.

Aside from the effect of complementarity at the onset of an investigation, any state that has jurisdiction over a particular case may challenge admissibility on the ground that it has completed or is pursuing an investigation or prosecution of a particular case.<sup>147</sup> Challenges made before the

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144. *Id.* art. 18(2) (the obligation of the prosecutor to defer to the domestic process can be overridden by the Trial Chamber based on the “application of the Prosecutor” or, in the case of a *proprio motu* investigation, on the basis of a prosecutorial request pursuant to Article 15(3)). The prosecutor or state concerned may file an expedited appeal against the decision of the Pre-Trial chamber. *Id.* art. 18(4).

145. *Id.* art. 18(5).

146. *Id.* art. 18(3).

147. *Id.* art. 19(2).



confirmation<sup>148</sup> of a case are to be filed with the Pre-Trial Chamber; challenges following confirmation are heard by the Trial Chamber.<sup>149</sup> Complementarity is a right accruing to all states; however, a specified class of individuals may invoke complementarity on behalf of a state with jurisdiction. Article 19 permits an accused or a person “for whom a warrant of arrest or a summons to appear has been issued” to challenge the admissibility or jurisdiction of a case before the ICC.<sup>150</sup> Decisions made by the

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148. Within a “reasonable time after the person’s surrender or voluntary appearance before the Court,” the Rome Statute requires that the Pre-Trial Chamber hold a hearing to “confirm the charges on which the Prosecutor intends to seek trial” *Id.* art. 61(1). The so-called confirmation hearing is closely akin to an investigation under Article 32 of the Uniform Code of Military Justice in that the prosecutor must produce “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” *See id.* art. 61(7). After this step, the Pre-Trial Chamber rules on the validity of continuing the case. *Id.* art. 61(7).

149. *Id.* art. 19(6). At the time of this writing, the United States has introduced a proposal to add an additional safeguard into the complementarity mechanism. On 7 December 2000, the United States submitted a formal proposal that would add a requirement to the Relationship Agreement between the ICC and the United Nations. Despite the permissive language of Article 19(1) of the Rome Statute, *see supra* note 109, the United States proposal requires the court to determine the admissibility of a case “when there is a request for surrender of a suspect who is charged with a crime that occurred outside the territory of the suspect’s State of nationality.” U.N. Doc. PCNICC/2000/WGICC-UN/DP.17. In the words of Ambassador Scheffer, this new proposal “erects a final firewall, meaning that whether or not the admissibility of a case has been reviewed in the past, the Court must, on its own motion, review admissibility at the critical moment when the request for surrender is being framed.” Ambassador David J. Scheffer, Address at the Judge Advocate General’s School, Waldemar A. Solf Lecture in International Law: A Negotiator’s Perspective on the International Criminal Court (Feb. 28, 2001). In his address, Ambassador Scheffer explained the importance of the admissibility proposal in the Relationship Agreement as follows:

The state of nationality thus will have one more opportunity to demonstrate its performance of the complementarity criteria in an effort to prevent such surrender. Since the Court can review admissibility on its own motion at any time, the U.S. proposal simply articulates a procedural agreement between the United Nations and the Court, binding on the Court, to ensure that a final admissibility review occurs before the suspect arrives in The Hague. The proposal is reasonable and compatible with and in accordance with the treaty itself. We would be foolish not to pursue it vigorously in the on-going talks, although I fear the March of Folly has already begun. Multilateral negotiations are as much about missed opportunities and bad timing as they are about anything else.

*Id.*

150. Rome Statute, *supra* note 3, art. 19(6).

Trial Chamber or prosecutor regarding admissibility or jurisdiction may be appealed on an interlocutory basis.<sup>151</sup>

As a general rule, a state is permitted only one challenge to a determination of admissibility or jurisdiction, which should be made prior to the start of the trial in the ICC Trial Chamber.<sup>152</sup> The text is vague as to whether this means one appeal as to jurisdiction with an additional appeal regarding admissibility, or whether both grounds for removing the case from ICC authority should be combined in one appeal. However, even after the beginning of the trial, the Rome Statute permits challenges to the admissibility of a case based on the fact that the person concerned has already been tried for the conduct that is the subject of the complaint.<sup>153</sup> As the sole basis for challenging admissibility after the start of a trial, this provision further preserves complementarity by placing a premium on domestic procedures that yield speedy dispositions. This is true because a previously completed trial would logically have prevented admissibility at an earlier stage. The state with jurisdiction could theoretically try the accused in absentia, even if a domestic trial began after the ICC prosecutor started presentation of the case to the Trial Chamber.

The complementarity principle dictates in these circumstances that a completed domestic trial would stop an ongoing ICC prosecution. The right of a state to end an ICC proceeding based on complementarity does not depend on a specified trial verdict or a particular level of punishment. Nevertheless, Article 20 outlines the substantive requirements for sustaining a claim based on a prior prosecution, consequently removing that case from the judicial power of the ICC Trial Chamber.

### 3. Article 20, *Ne Bis in Idem*

The principle of *ne bis in idem* reflects basic notions of fairness and judicial economy. The statement that a person “shall not be tried before the [ICC] with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the [ICC]” seems eminently reasonable on its surface.<sup>154</sup> With respect to cases adjudicated by the ICC, this prohibition stands on its own formulation in Article 20.

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151. *Id.*

152. *Id.* art. 19(4).

153. *Id.*

154. *Id.* art. 20(1).

Regarding the interface with national courts, the delegates in Rome found that agreement on the *ne bis in idem* principle was much easier than the broader admissibility criteria under Article 17,<sup>155</sup> even though they embedded it as an additional ground for inadmissibility under Article 17.<sup>156</sup>

Article 20 sets out the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC. The discussions over *ne bis in idem* in Rome came in the wake of the hard-fought compromises on the complementarity provisions related to national investigations or ongoing prosecutions.<sup>157</sup> In contrast to the parallel “unwilling or unable genuinely” standard applicable to investigations or ongoing prosecutions by states, the provisions for completed trials only amplify the “unwilling” prong. The appropriate domestic courts were obviously able to handle a trial that was in fact completed. The *ne bis in idem* standards applicable to domestic trials focus on domestic systems that have used the façade of legal proceedings to thwart the ends of justice.

Unless the domestic trial purposefully shielded the accused from ICC authority,<sup>158</sup> or the previous trial was conducted in a manner which was inconsistent with an intent to bring the person to justice,<sup>159</sup> the ICC prosecutor or court have no authority to impose supranational criminal accountability. The blanket protection granted by Article 20 extends over a person for “conduct” that was the subject of the earlier domestic trial. Any state’s criminal proceedings shield the accused from further accountability before the ICC for any charges based on the same conduct (which in this context might be better conceived as misconduct).

Even as it preserves the right of domestic state courts to supersede ICC punishment based on complementarity, Article 20 does not erect a rigid or unreasonable barrier to ICC admissibility of a particular case. The *ne bis in idem* provisions of Article 20 are the logical capstone to the entire array of procedural and substantive provisions related to implementing complementarity in the practice of the ICC and prosecutor. The complementarity principle applies to domestic investigations, prosecutions, and completed trials, and the Rome Statute mandates the procedures for states to claim the right of complementarity. The standards and procedural rules for recognizing a state’s right to use its domestic forums are complex and

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155. Holmes, *The Principle of Complementarity*, *supra* note 100, at 59.

156. Rome Statute, *supra* note 3, art. 17(1)(3).

157. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50.

158. Rome Statute, *supra* note 3, art. 20(3)(a).

159. *Id.* art. 20(3)(b).

interrelated. Taken together, they provide a solid textual basis for nations with competent, functioning legal systems to adjudicate cases within their jurisdiction rather than being shoved aside by the ICC prosecutor or court.

This is the essence of the complementarity principle as it protects the right of sovereign states to resolve criminal cases. Nevertheless, an ICC prosecutor, functioning under the international scrutiny that will be a normal facet of any supranational investigation or prosecution under the provisions of the Rome Statute, bears the burden of translating the provisions of the statute into actual practice. Toward that endeavor, the Final Draft Rules of Procedure and Evidence set forth requirements relating to the realization of complementarity.

### C. Complementarity in the Final Draft Rules of Procedure and Evidence

In contrast to the Rome Statute itself, the Final Draft Rules of Procedure and Evidence were adopted by consensus on 30 June 2000. Although the Rules are “subordinate in all cases” to the Rome Statute, they are intended to facilitate the application of the statute in actual practice.<sup>160</sup> The negotiations leading to the Draft Rules were in one sense a microcosm of the Rome Conference. A complex document emerged from the conflicting approaches of lawyers and diplomats arguing from both civil and common law perspectives, flavored with heavy lobbying from non-governmental organizations focused on parochial interests, and spiced with a heavy dose of divergent personalities. The weighty undertones of idealistic aspiration and raw politics that accompanied the Draft Rules discussions added to the intensity of the negotiations. Given the political dimension of these debates, it is unsurprising that the Final Draft Rules include several provisions that may affect the ability of states to invoke the complementarity principle.

One notable clarification in the Final Draft Rules limits the ability of states to selectively misuse the principle of complementarity.<sup>161</sup> Although national jurisdiction should enjoy a “presumption of regularity,”<sup>162</sup> the Rome Statute operates on a presumption that states will not politicize the

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160. *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) (Explanatory Note) [hereinafter Draft Rules].

161. *See supra* notes 122-24 and accompanying text.

162. Brown, *Primacy or Complementarity*, *supra* note 28, at 426 n.212 (quoting Jamison Borek, Deputy Legal Advisor, U.S. Department of State).

domestic adjudication of cases within the scope of potential ICC jurisdiction. The text of Article 12(3) allows a non-state party to consent to ICC authority “with respect to the crime in question.”<sup>163</sup> In theory, a non-state party could consent to ICC jurisdiction over the conduct of the international forces deployed to its territory, while exempting its own armed forces from ICC authority. Even though such selective consent would accord with the text of the Rome Statute, the state would thereby pervert the complementarity principle into a deliberate shield to deflect accountability for its citizens while using the ICC process as a political weapon against its adversary.

In order to remedy this anomaly and prevent such disparate justice, the Draft Rules provide specific guidance regarding a declaration under Article 12(3). The delegates agreed to clarify the meaning of a state declaration by making an interpretive statement of principle. Under the consensus rule, a state declaration to accept jurisdiction includes “as a consequence the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation.”<sup>164</sup> In other words, a declaration of consent by a non-state party to crimes committed on its territory means that the ICC prosecutor can investigate any acts of genocide, crimes against humanity, or war crimes that were committed by any individual in connection with the “situation.”<sup>165</sup> The ICC prosecutor has that broad investigative authority even if the non-state party intended that consent to be directed against a specified set of individuals or a particular criminal violation. As a result, this rule prevents an abuse of the complementarity that could otherwise have discredited the very notion of domestic trials under the supranational ICC umbrella.

The rules also include some notification provisions that could significantly impact on the exercise of state domestic authority to prosecute perpetrators. In order to protect the rights of victims, the rules require that known victims or their legal representatives receive information at several critical procedural junctures. The prosecutor, for instance, “shall inform victims” when submitting a *proprio motu* investigation to the Pre-Trial Chamber for authority to proceed.<sup>166</sup> The victims in turn “may make rep-

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163. Rome Statute, *supra* note 3, art. 12(3).

164. Draft Rules, *supra* note 160, R. 44(2).

165. The consent of the non-state party would confer jurisdiction over all of the criminal acts, which would in turn allow the prosecutor to “initiate investigations *proprio motu* on the basis of information within the jurisdiction of the Court.” Rome Statute, *supra* note 3, art. 15(1).

166. Draft Rules, *supra* note 160, R. 50(1).

representations in writing” to the Pre-Trial Chamber that would presumably assist the court in making its determination whether the prosecutor has a reasonable basis to proceed with an investigation.<sup>167</sup> In addition, when the prosecutor seeks a ruling from the court regarding any question of jurisdiction or admissibility,<sup>168</sup> the rules require notification to both the state that referred the case and “victims who have already communicated with the court in relation to that case.”<sup>169</sup> As a logical corollary, either the state or interested victims “may make representation to the competent Chamber.”<sup>170</sup> The Rules specify that decisions over the commencement of an investigation by the Pre-Trial Chamber shall include the court’s underlying reasons, and the ICC “shall give notice of the decision to victims who have made representations.”<sup>171</sup>

In the abstract, these rules make sense from the perspective that the ICC is intended to promote values that are fundamental to all the world’s citizens. A greater flow of information between the ICC prosecutor, affected states, and concerned victims may facilitate the pursuit of justice. On the other hand, the rules nowhere mention any cross-examination or filtering of the “representations” made to the court. Furthermore, the court itself has complete autonomy and responsibility for determining the applicable procedures for assessing issues of admissibility. Alerting every identified victim will almost certainly result in personal, deeply moving pleas to the court. Such representations are the antithesis of a process that rationally applies the legal norms of the statute to protect the sovereign authority of states to exercise complementarity. An ICC judicial chamber that failed to apply the jurisdictional or admissibility criteria because of the emotional impact of a victim’s evidence would subvert the complementarity principle. However, the Draft Rules provide this potential basis for eroding complementarity based on extrinsic victim testimony that is not relevant to the grounds for determining admissibility under the Rome Statute. Conversely, victims may generate intense political pressure against the domestic state that would otherwise have authority to adjudicate the

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167. *Id.* R. 50(3).

168. *See* Rome Statute, *supra* note 3, art. 19(3).

169. Draft Rules, *supra* note 160, R. 59(1).

170. *Id.* R. 59(3).

171. *Id.* R. 50(5). The rules provide a parallel provision that a state requesting a deferral of investigation by the ICC prosecutor is also entitled to the “decision and the basis for the decision of the Pre-Trial Chamber.” *Id.* R. 55(3).

case, thereby distorting that state's decision whether to defer to the ICC prosecutor or proceed with a domestic investigation or trial.

Finally, the rules contain explicit guidance for the court as it considers whether the state is genuinely unwilling to take action against the perpetrator. This determination is a central element in the decision regarding whether the case is inadmissible before the ICC.<sup>172</sup> In assessing the degree of state unwillingness to prosecute, along with the genuine character of a perceived unwillingness, the court may consider information tendered by the state that is seeking to invoke complementarity. The rules specifically permit the state invoking complementarity to provide information showing that "its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct."<sup>173</sup> The ICC authority to override state jurisdiction is a serious matter. The consensus rule allows the affected state to have the opportunity to present evidence related to its own justice system which may explain procedural or substantive issues that the court could incorrectly assess as manifesting genuine unwillingness or genuine inability sufficient to warrant ICC admissibility. In addition, information provided by a domestic state with jurisdiction will generate international interest in the case that is quite likely to force the ICC to define and articulate the factors that make the case admissible. This rule, in conjunction with the other Rules of Procedure related to admissibility determinations, demonstrates that the principle of complementarity is one of the cornerstones of the ICC investigative and judicial process.

Despite the significant guidance in the Rome Statute and the Rules of Procedure that seek a balance between complementarity and the effectiveness of the ICC, there are outstanding issues that will not be resolved until the court begins to function. Section IV highlights some of the gaps and unresolved questions that could undermine the actual practice of the ICC regarding the principle of complementarity. If the ICC and its prosecutor do not adhere to provisions for respecting the complementarity principle, the political backlash could eviscerate the ICC as a functioning institution with international credibility and support.

#### IV. Obstacles to Implementing Complementarity

##### A. The *Proprio Motu* Problem

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172. See *supra* notes 123-48 and accompanying text.

173. Draft Rules, *supra* note 160, R. 51.

As shown above, the Rome Statute includes a comprehensive set of provisions and procedures that are designed to insulate sovereign authority to prosecute from unreasonable extension of ICC authority over sovereign judicial systems. Some treaty proponents argue that the web of protections inspired by the complementarity principle gives “ample assurance” that the ICC will minimally curtail sovereign authority only by displacing domestic trials in “exceptional circumstances.”<sup>174</sup> At the same time, the Rome Statute contains absolutely no institutional constraints on the power and discretion of the ICC and prosecutor. In fact, a key reason that the complementarity regime is so thorough and detailed in the Rome Statute lies in the recognition by treaty proponents that the “interpretation and application” of those provisions and standards is left solely to the ICC.<sup>175</sup>

Since complementarity is built on the premise that the ICC is not inherently superior to sovereign states, the supranational court is not supreme in theory. The very autonomy that proponents sought for the ICC and its prosecutor, however, prevents external review or resolution of disputes over the court’s implementation of the Rome Statute.<sup>176</sup> Arguably, the lack of any external checks and balances limiting the discretion of the ICC manifests a structural flaw creating de facto ICC superiority over sovereign states. From this perspective, the mandatory phrasing of the complementary provisions<sup>177</sup> and their binding nature fail to guarantee realization of the complementarity principle. The prosecutor is accountable only to the trial chambers of the ICC itself, and the Rome Statute reinforces this unprecedented reallocation of power by providing that “any dispute concerning the judicial functions of the Court shall be settled by the

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174. JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 71 (1998).

175. Holmes, *The Principle of Complementarity*, *supra* note 100, at 74.

176. The one slight caveat to this statement that in practice may prove to be very exceptional is the fact that the Security Council can pass a resolution under Chapter VII that requests the ICC to defer an investigation or prosecution for a period of twelve months. Rome Statute, *supra* note 3, art. 16. This grant of authority to the Security Council in the Rome Statute was arguably unnecessary in view of the plenary authority of the Security Council with regard to threats to international peace and security. As noted above, the intense debate over the proper role for the Security Council *vis à vis* the initiation of cases within ICC jurisdiction was a matter of international contention until the final hours of the Rome Conference.

177. *See, e.g., id.* art. 17(1) (“court shall determine that a case is inadmissible where . . .”), art. 17(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 . . .”).



decision of the Court.”<sup>178</sup> The Rules of Procedure further specify that the ICC chamber reviewing issues of admissibility “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings.”<sup>179</sup>

One of the hallmarks of the complementarity regime is that it protects the prosecutorial and investigative prerogatives of all states without distinction based on membership in the ICC club. While the Rome Statute provides that an unresolved dispute between two or more parties to the Rome Statute will be referred to the Assembly of States Parties,<sup>180</sup> the Rome Statute is strikingly silent regarding any similar right of non-state parties. This discrepancy could be viewed as an incentive to become a party to the Rome Statute. It could also create a strong incentive for the ICC to avoid disputes with states that are represented in the Assembly of States Parties, thus creating the potential for a tiered system of complementarity in which non-state parties are not accorded the same degree of deference. Nevertheless, the prosecutor’s unconstrained authority, coupled with the control of the ICC judicial chambers, has the potential to erode complementarity to its vanishing point as a mechanism for allocating prosecutorial power between states and the ICC.

The provisions implementing complementarity are complex and often call for difficult subjective assessments by the court and prosecutor. For instance, in reviewing a state’s unwillingness, the prosecutor bears the burden of showing sufficient circumstantial evidence to warrant a finding that a delayed movement towards domestic prosecution “in the circumstances is inconsistent with an intent to bring the person to justice.”<sup>181</sup> The Rome Statute is silent on the need for any direct evidence of unwillingness in this case, and there is no provision for review of the court’s decisions outside the ICC itself.

Article 17(2)(a) further requires the prosecutor to show that the domestic disposition of the case “was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”<sup>182</sup> In this endeavor, the Rome Statute is structured

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178. *Id.* art. 119(1). See generally Paul D. Marquardt, *Law Without Borders, The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73 (1995) (opining that the lack of checks and balances does not fatally undermine ICC authority).

179. Draft Rules, *supra* note 160, R. 58(2).

180. Rome Statute, *supra* note 3, art. 119(2).

181. *Id.* art. 17(2)(b).

182. *Id.* art. 17(2)(a).

to allow the ICC prosecutor a wide margin of error. If circumstantial evidence fails to establish the improper domestic purpose, a further provision allows admissibility if the ICC prosecutor persuades the ICC chamber to find a lack of independence or impartiality in the domestic court coupled with a manner of conducting the proceedings that was “inconsistent with an intent to bring the person concerned to justice.”<sup>183</sup> These grounds for asserting ICC authority despite domestic action are all laced with subjective assessments by the court and prosecutor that are not subject to any external review outside the ICC.

The very criteria that establish the prosecutorial burden of proof and specify the requisite evidentiary standards designed to implement complementarity may hold the seeds of its unchecked erosion. The ICC prosecutor and court always bear the burden of showing that the standards have been met, but there is no external check to monitor adherence to the standards. The ICC prosecutor must assess the admissibility criteria in light of undefined “principles of due process recognized by international law.”<sup>184</sup> These standards are themselves defined by the ICC, which allows wide latitude for the ICC prosecutor to meet the “objective” admissibility criteria. Moreover, if an ICC investigation is originally deferred to national jurisdiction, the ICC prosecutor is not restricted from taking later actions, subject to the requirement that “he or she shall notify the State to which deferral of the proceedings has taken place.”<sup>185</sup>

Finally, the *proprio motu* power of the prosecutor allows abuse of the complementarity principle because the admissibility criteria invite ICC intrusion into the domestic processes of sovereign states. Because the ICC and its prosecutor can reasonably be expected to develop some guidelines and standards for evaluating domestic systems, the Rome Statute sets up an essentially circular paradox. If a state does not meet the standards that the ICC announces through its internal procedures and court decisions, the domestic state may be deemed “genuinely unwilling” to handle the case by the ICC. Furthermore, states with scarce resources may be unable to reshape their entire domestic judicial systems in response to subjective ICC standards, thereby warranting an ICC finding that any trial that the

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183. *Id.* art. 17(2)(c). One treaty supporter argues that this is a loophole that will become the most frequently used path to admissibility. Broomhall, *Checklist*, *supra* note 17, at 145.

184. Rome Statute, *supra* note 3, art. 17(2).

185. *Id.* art. 19(11).

ICC prosecutor wants to take over is admissible because the state is unable “genuinely to prosecute.”

#### B. Properly Describing Jurisdiction

Aside from the dispositive power of an unconstrained supranational court and prosecutor, the complementarity principle could be corroded by the very jurisdictional mindset of the ICC. The concept of complementarity does not logically lead to a scheme of national and supranational concurrent jurisdiction. Properly understood and implemented in accordance with the Rome Statute, the jurisdictional allocation of power between the ICC and states is best thought of as a tiered allocation of authority to adjudicate. The ICC does not have authority to take a case or initiate an investigation until the issues associated with domestic jurisdictional criteria and admissibility standards are resolved.

The complementarity principle was the motivating force behind a court built around a limited and defined authority to take jurisdiction that operates when needed to supplement domestic court systems. From the prosecutor’s point of view, jurisdiction under the provisions of Article 13 and admissibility under Article 17 are both mandatory prerequisites for ICC authority.<sup>186</sup> This scheme is a significant evolution from earlier drafts that allowed an “inherent” ICC jurisdiction over some crimes.<sup>187</sup> The United States was on record as supporting such an inherent jurisdictional scheme for the genocide offenses.<sup>188</sup> In fact, the 1994 International Law Commission Draft included a provision that allowed the ICC to have automatic jurisdiction over the crime of genocide, which would have created a truly concurrent jurisdiction, at least over these offenses.<sup>189</sup>

A system built on a straight assertion of supranational primacy was not a “politically viable alternative for a permanent ICC.”<sup>190</sup> A scheme of concurrent jurisdiction would have almost certainly resulted in jurisdictional clashes between the ICC and one or more states with valid claims based on established principles such as nationality, territoriality, or passive personality.<sup>191</sup> Rather than a flawed system of inherent or explicit concurrent jurisdiction, the Rome Statute’s jurisdictional scheme requires the progressive factual inquiries and judicial findings that implement

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186. Sadat & Carden, *supra* note 10, at 417.

187. Brown, *Primacy or Complementarity*, *supra* note 28, at 417-28 (describing the advantages and disadvantages of such an inherent supranational scheme).

complementarity. Over time, the complementarity provisions may chafe an ICC prosecutor that sees them as an overly restrictive manifestation of arcane sovereignty principles. The ICC prosecutor may begin to think of jurisdiction as concurrent rather than tiered, and thereby minimize the complementarity requirements. Because the ICC does not have any external checks and balances, there is no institutional mechanism for controlling a court and prosecutor that seeks to expand supranational power over domestic forums in order to vindicate considerations of international justice.<sup>192</sup>

If the ICC prosecutor begins to view supranational jurisdiction as concurrent with sovereign state jurisdiction, the importance of the complementarity provisions as the trigger mechanism for ICC jurisdiction would obviously begin to erode. This would produce more than just the technical

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188. *International Criminal Court Hearing*, *supra* note 94, at 13 (Ambassador Scheffer referred to a regime of “automatic acceptance” in describing the inherent regime of the ILC Draft.). *See also* Genocide Convention, *supra* note 48, art. VI (persons “shall be tried by a competent tribunal of the State in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”). In the 1948 debates over the Genocide Convention, the United States actually made a proposal that sounded remarkably close to the modern formulation of complementarity in the ICC context. The proposal would have added an additional paragraph to Article VII of the Genocide Convention to read as follows: “Assumption of jurisdiction by the international tribunal shall be subject to a finding that the State in which the crime was committed has failed to take adequate measures to punish the crime.” *Report and Draft Convention Prepared by the Ad Hoc Committee on Genocide*, U.N. Doc. E/794 (1948), *reprinted in Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General 142*, U.N. Doc. A/CN.4/7Rev.1 (1949). The proposal was rejected by a vote of five votes to one with one abstention (the USSR) on the basis that such a paragraph would prejudice the question of the court’s jurisdiction. *Id.*

189. *ILC Draft Statute*, *supra* note 111, arts. 21(1)(a), 25(1).

190. Brown, *Primacy or Complementarity*, *supra* note 28, at 431.

191. M. Cherif Bassiouni & Christopher Blakesly, *The Need for an International Criminal Court in the New International World Order*, 25 *VAND. J. TRANSNAT’L L.* 151, 170 (1992).

192. For an indication that this temptation on the part of a constrained ICC prosecutor to seek an expansion of power in relation to states may be inevitable, see the comments of the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, based on her long experience working within the structure of politics and power in seeking international justice. Justice Louise Arbour, Address to the Preparatory Committee on the Establishment of an International Criminal Court (8 Dec. 1997) (warning that the ICC should not become a “weak and powerless institution that would lack legitimacy,” and telling delegates that “there is more to fear from an impotent than from an overreaching prosecutor”), available at <http://www.un.org/icty/p271-e.html> (ICTY Press Release, CC/PIO/271-E).

undermining of abstract treaty provisions; it would minimize the ability of states to exercise their courts as proper forums for prosecuting violations of international humanitarian law. Additionally, the ICC prosecutor might begin to assert jurisdiction in cases where one state with a jurisdictional claim consented to ICC adjudication of a particular case, but other states with equally valid claims were either not consulted or mooted based upon the prosecutor's unilateral assessment of inadmissibility. Though a fair reading of the Rome Statute indicates that admissibility can be waived by a state,<sup>193</sup> no state should be allowed to waive the complementarity right of another state.

Finally, the Rome Statute is silent on the proper allocation of ICC authority in cases involving national amnesties or executive pardons. A supranational court based on concurrent jurisdiction would in theory enjoy absolute authority to prosecute a case without regard for domestic legislative or political action. In the negotiations leading to the Rome Statute, the delegates rejected a proposal that would have allowed ICC authority even in the situation where a state pardoned or paroled an accused following conviction in domestic courts.<sup>194</sup> Similarly, the criteria for assessing whether a state is "genuinely unable" to take action in a particular case revolve around the functioning structure and factual ability of the domestic judicial system to "carry out its proceedings."<sup>195</sup> In contrast, a domestic amnesty or pardon would create a legal "inability" to prosecute in the domestic forums that the ICC should not use as a springboard over the

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193. Sadat & Carden, *supra* note 10, at 417.

194. Holmes, *The Principle of Complementarity*, *supra* note 100, at 76. Human Rights Watch argued against the lacunae in the Rome Statute on the basis that "there can be no legitimate amnesty for these crimes; rather, the application of an amnesty law to these offenses would be a clear contravention of established principles of international law." JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 72 (1998).

195. Rome Statute, *supra* note 3, art. 17(3).

In order to determine inability in a particular case, the Court shall consider whether, due to partial or total 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.

*Id.*

complementarity principle in the absence of persuasive evidence that it was intended solely to shield the accused from criminal responsibility.<sup>196</sup>

Holding that the potential for ICC jurisdiction over cases that fall within an amnesty or a domestic statute of limitations infringes on the “essential conditions for the exercise of national sovereignty,” the French *Conseil Constitutionnel* found that ratification of the Rome Statute would require revision of the French constitution.<sup>197</sup> With respect to complementarity, therefore, it is evident that the Rome Statute is not dispositive over the precise resolution of every situation that the ICC will encounter. Despite this, the ICC prosecutor, operating from the mistaken perspective of concurrent jurisdiction, may seek to exert supranational jurisdiction at will without regard for the defined constraints of complementarity.

### C. Character of Crimes

The ICC prosecutor’s ultimate position on the concept of “ordinary crimes” may well be the hidden weakness in the complementarity regime as an effective limit to supranational power. If the ICC prosecutor dictates to states the “acceptable” charges for particular conduct, the vitality of complementarity as a functional component of ICC practice will be severely weakened. Put simply, many states have criminal provisions that penalize the same conduct that would fall under one of the substantive definitions of crimes proscribed by the ICC, but which do so under different legal characterizations. The presumption in favor of domestic judicial action does not depend on strict compliance with the crimes articulated in the Rome Statute, or with charging those offenses using the precise terms and conditions outlined therein. The jurisprudence or practice of the ICC should not evolve to the point that domestic prosecutors make charging decisions based on the hope that the ICC will accept the form of the

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196. *Id.* art. 20(3)(a).

197. Beate Rufolf, *Statute of the International Criminal Court, Decision No. 98-408 DC, 1999 J.O. 1317*, 94 AM. J. INT’L L. 391, 394 (1999). The French ultimately added a constitutional provision, Article 53-2, which provides that “[t]he Republic may recognize the jurisdiction of the International Criminal Court under the conditions contained in the treaty signed on July 18, 1998.” *Id.* at 394 n.8. The original decision is available at [www.conseil-constitutionnel.fr/decision/1998/9808dc.htm](http://www.conseil-constitutionnel.fr/decision/1998/9808dc.htm).

charges. Such a practice would turn the principle of complementarity on its head.

In a regime based on concurrent jurisdiction between domestic forums and an international court, the international court would have had preexisting jurisdiction in its own right regardless of the characterization of the crime under domestic law. Under a regime of concurrent jurisdiction, even if the domestic courts decide a particular case, the principle of *ne bis in idem*<sup>198</sup> would not preclude a subsequent trial before the international tribunal if “the characterization of the act by the national court did not correspond to its characterization” in the international forum.<sup>199</sup> In fact, the ICTY wrote in dicta that an international criminal tribunal “*must* be endowed with primacy over national courts” because human nature will create a “perennial danger of international crimes being characterized as ordinary crimes.”<sup>200</sup>

In contrast, the Rome Statute does not make any distinction regarding the nature of the charge in the provisions implementing the principle of complementarity. The form of the charge in domestic states does not affect the latitude that the supranational court must accord national processes. The detailed admissibility criteria apply regardless of the form of the charges in the domestic forum or their precise symmetry with the words of the Rome Statute. At the same time, if a state does not have a criminal code that exactly replicates the range of offenses under the Rome Statute, the ICC prosecutor could be at liberty to simply consider that the state is unable to prosecute the crimes. It is conceivable that in egregious cases the ICC itself would informally ask a particular state to fill perceived gaps in its domestic legislation, and then determine that the delay in doing so manifested a “genuine unwillingness” to prosecute or investigate a particular accused.

In this vein, states implementing the Rome Statute through domestic legislation face an additional dilemma. Legislation pending in several national legislatures to implement the Rome Statute makes general reference to the “crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute.”<sup>201</sup> The Rome Statute allows the prosecutor to

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198. See *supra* notes 150-56 (describing *ne bis in idem* as it relates to complementarity within the ICC structure).

199. Secretary General’s Report, *supra* note 70, ¶ 66 (describing the overlap of domestic prosecutorial authority with the concurrent jurisdiction and presumption of primacy under the International Criminal Tribunal for the Former Yugoslavia).

200. Tadic Appeal on Jurisdiction, *supra* note 58, ¶ 58 (emphasis added).

select from a wide array of criminal charges, and includes some offenses that could be charged under several overlapping provisions. States that duplicate the range of offense in the Rome Statute may very well face pressure to charge an accused in the precise manner that the ICC prosecutor will accept in order to “get credit” for using the domestic judicial system. Again, such a practice would violate the principle of complementarity contained within the Rome Statute.

The distinction between ordinary offenses and ICC crimes is more than simply a terminological exercise. If the ICC and prosecutor begin to base admissibility decisions on the precise articulation of the domestic criminal charge, the principle of respecting national processes would be severely undermined. Indeed, the complementarity principle was designed to preclude such micromanagement by the supranational institution and the accompanying interference with national judicial processes. In theory, complementarity would require the ICC to recognize the discretion of the domestic authorities regarding the scope and form of the domestic charges. In reality, complementarity may be an incomplete restraint on a zealous ICC prosecutor, motivated by a strong awareness of moral and legal obligations to serve the needs of international accountability, who could use the form of domestic charges as a pretext to exert ICC authority.

## V. Conclusion

“Complementarity” is an intellectually simple concept that masks the deep philosophical and political difficulties that the International Criminal Court must overcome if it is ever to become a functioning institution. The drafters of the Rome Statute and the delegates who negotiated the Rules of Evidence and Procedure clearly understood that the ICC should not be the court of first resort. One of the Preparatory Committee Reports prior to the Rome Conference noted that, “[t]aking into account that under international law, the exercise of police power and penal law is a prerogative of

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201. See Crimes Against Humanity and War Crimes Act, R.S.C., ch. 24, § 4(4) (2000) (Can.). Legislation pending in several other jurisdictions to implement the Rome Statute domestically is available at [files.fco.uk/und/draftbill.pdf](http://files.fco.uk/und/draftbill.pdf) (applies the criminal provisions of Article 6, 7, and 8(2) to crimes committed in the England, Wales, or Northern Ireland, as well by persons subject to United Kingdom nationals on an extraterritorial basis); [www.eda.admin.ch/sub\\_dipl/g/home/info/trdisc.html](http://www.eda.admin.ch/sub_dipl/g/home/info/trdisc.html) (German legislation); [www.eda.admin.ch/sub\\_dipl/f/home/info/trdisc.html](http://www.eda.admin.ch/sub_dipl/f/home/info/trdisc.html) (French legislation); and [www.eda.admin.ch/sub\\_dipl/i/home/info/trdisc.html](http://www.eda.admin.ch/sub_dipl/i/home/info/trdisc.html) (Italian legislation).



States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative.”<sup>202</sup>

If it can function effectively as an apolitical supranational institution with autonomous legal personality, the ICC can fulfill an important function in buttressing domestic justice by serving as an additional forum for dispensing justice when domestic forums are inadequate. Despite the well-intentioned goals of the Rome Statute, the ICC will survive and thrive only if it manages to balance the reality of sovereign political and legal competition between states with the aspiration for international justice. The complementarity provisions are the designated mechanism for balancing enforcement of international norms against protection of state sovereignty.

Complementarity is in theory an impartial, reliable, and de-politicized process for identifying the cases of international concern, and hence international jurisdiction. However, the thicket of subjective provisions designed to implement complementarity allows treaty opponents to argue that national justice systems are threatened with displacement at the hands of an unrestrained international prosecutor. Indeed, one of the fiercest critics of the ICC testified: “Complementarity, like so much else associated with the ICC is simply an assertion, utterly unproven and untested. Since no one has any actual experience with the Court, of course, no one can say with any certainty what will happen.”<sup>203</sup>

Complementarity will be an essential component of a functioning ICC within a system of sovereign states, but the new institution will face the difficult challenge of eroding the historic reality of unrestrained state discretion without generating a tidal wave of hostility and outright opposition from the community of states. Complementarity in practice, as distinct from complementarity in principle, will be an essential feature of an ICC that earns a respected role that warrants state support and assistance towards the goal of enhancing the prospects for international accountability and justice. Time will tell how this important principle is implemented through the decisions and opinions of the ICC and its prosecutor.

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202. *1 Report of the Preparatory Committee on the Establishment of the International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 155, U.N. Doc. A/51/22 (1996), reprinted in *STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 385 (1998).

203. *International Criminal Court Hearing*, *supra* note 94, at 63 (testimony of John Bolton before the Senate Foreign Relations Committee).

**AUTHORITY TO COURT-MARTIAL NON-U.S. MILITARY PERSONNEL FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED DURING INTERNAL ARMED CONFLICTS**

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WITH CONTRIBUTIONS BY

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I. Introduction

*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*<sup>3</sup>

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1. Judge Advocate General's Corps, United States Army. Presently assigned as Chief, Criminal Law, I Corps and Fort Lewis, Washington. B.S., 1988, State University of New York at Albany, Albany, New York; J.D., 1991, Fordham University School of Law, New York, New York; LL.M., 2000, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Previous assignments include Chief, Military Justice Division, Office of the Staff Judge Advocate, Joint Readiness Training Center and Fort Polk, Fort Polk, Louisiana, 1997-1999; Administrative Law Attorney and Officer in Charge, Task Force Eagle – Rear, Office of the Staff Judge Advocate, 1st Armored Division, Baumholder, Germany, and Slavonski Brod, Croatia, 1996-1997; Trial Defense Counsel, Trial Defense Services Headquarters Attached to 1st Armored Division and Task Force Eagle, Baumholder, Germany, Slavonski Brod, Croatia, and Lukovac, Bosnia-Herzegovina, 1995-1996; and Chief, Claims Division, and Trial Counsel, Office of the Staff Judge Advocate, United States Army Infantry Center and Fort Benning, Fort Benning, Georgia, 1992-1994.

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3. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 223 (1947).

*The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult, but threatens the fabric of international society.*<sup>4</sup>

The two preceding quotations reflect what has become a fundamental precept of international law: that individuals can and should be held accountable for conduct which violates fundamental norms of international law. The first quotation, from the Nuremberg War Crimes Tribunal, reflects the basic doctrine of individual responsibility—that although international law generally regulates the conduct of states, it has developed certain proscriptions applicable to individuals. This doctrine has become well-settled in international law, and is a basic tenet of the law of war. The second quote, written by General MacArthur when he approved the death sentence for Japanese General Yamashita, reflects the concept that, when a member of the profession of arms transgresses fundamental restrictions on warrior conduct, the misconduct disgraces the entire profession of arms. This notion, although solidly grounded in the history of the law of war, seems less understood today than at any time in the history of our armed forces. Yet it is a critical component of the law of war, for throughout history it has served as the motivation for calling upon warriors to sit in judgment of the misconduct of other warriors.

The issue of war crimes, and the appropriate venue for holding those who commit them individually responsible, recently became a major interest for the international community. The result has been an almost myopic focus on the creation and utilization of international criminal tribunals to sit in judgment of warrior misconduct. Unfortunately, the lack of understanding of the basic sentiment expressed by General MacArthur has resulted in virtually no consideration of the propriety of using military tribunals to perform this function. While the conflicts in the former Yugoslavia and Rwanda have been the scene of widespread law of war violations, the primary response by the international community has been the use of international criminal tribunals, with no participation from the profession of arms. This stands in stark contrast with the post-World War II response to war crimes.

Although the international war crimes tribunals were the most visible venues for conducting war crimes trials, military courts-martial and other

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4. WAR, MORALITY, AND THE MILITARY PROFESSION 223 (Malham M. Wakin ed., 1979) (quoting TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970)).

military tribunals accounted for the vast majority of such trials. According to Telford Taylor:

But [the usual channels of military justice] remained open and, numerically, the Nuremberg and Tokyo trials were a small part of a very large picture. In Europe, the United States Army judge advocate was made responsible for the prosecution of crimes committed against American troops, or in Nazi concentration camps that had been overrun and “liberated” by American forces. Under this authority, some 1,600 German war crimes defendants (as compared with 200 at Nuremberg) were tried before Army military commissions and military government courts, and over 250 death sentences (as compared with 21 at Nuremberg) were carried out. About an equal number were tried by British, French, and other military courts established by the countries that had been occupied by Germany.

Precise figures are lacking, but by the spring of 1948 some 3,500 individuals had been tried on war crimes charges in Europe, and 2,800 in the Far East, taking no account of trials held by the Soviet Union or China. It would be a conservative estimate that some 10,000 persons were tried on such charges from 1945-1950.<sup>5</sup>

These numbers clearly suggest that, had the international community not relied upon the use of military tribunals to sit in judgment of war criminals at the end of World War II, it would have been impossible to bring them all to justice. During the course of post-conflict peace support operations, U.S. forces might be confronted with the similar issue of how to deal with individuals accused of committing war crimes who come under the control of U.S. forces. This article proposes that the United States should once again place war criminals before general courts-martial under the control of a U.S. commander, allowing warriors to sit in judgment of such conduct. Of course, cases tried during the post-World War II era involved crimes committed during international armed conflicts with the victors sitting in judgment of their vanquished enemies. Although the proposed use of U.S. courts-martial would involve crimes committed in a purely internal conflict not involving U.S. forces, this article demonstrates that developments in international law provide the necessary legal predicate for invoking the jurisdiction of a general court-martial to try individ-

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5. *Id.* at 370.

uals who committed certain war crimes during the course of such a conflict.

In July 1999, U.S. forces entered the Yugoslav province of Kosovo under the authority of a United Nations resolution authorizing the use of all necessary means to restore order and stability to that province. This was the culmination of a NATO-led military campaign designed to compel Yugoslavia to respect certain fundamental rights of Kosovar Albanians. This campaign, coupled with intense diplomatic pressure, resulted in a Yugoslav grant of authority for the presence of NATO forces in Kosovo. Thus began another ground force operation that—although conducted in response to an “invitation” to enter the territory of another sovereign state—took on all the traditional characteristics of a military occupation.

During the course of the U.S. presence in Kosovo, it is likely that U.S. forces might detain individuals who participated in some of the atrocities that characterized the conflict between the Serbian Armed Forces and the Kosovo Liberation Army. Because the fighting between these two organizations was considered an armed conflict within the purview of the International Criminal Tribunal for Yugoslavia (ICTY), the current wisdom is that offenders should be detained pending indictment by that tribunal. Another option is to subject these individuals to the jurisdiction of local criminal tribunals that will be eventually established by the United Nations authority in Kosovo. But is there a third option? Could these individuals be subjected to a general courts-martial pursuant to the Uniform Code of Military Justice (UCMJ)? This article suggests that such a course might not be as radical as it first appears. Instead, a close analysis of the UCMJ, recent developments in the customary law of war, and the tradition of providing remedies for violations of the law of war, reveals that the time may be right to pursue this course of action.

Consider the following hypothetical. An infantry squad, deployed as part of the American contingent of the NATO forces in Kosovo (KFOR), conducts a routine patrol in the American sector of Yugoslavia and apprehends a Yugoslav lieutenant accused of numerous atrocities. The alleged crimes include the murder of twenty innocent Kosovar Albanians during the Kosovo conflict, a non-international armed conflict<sup>6</sup> to which the United States was not a party. The KFOR commander orders the suspect detained pending an investigation. The investigation substantiates the allegations.<sup>7</sup>

After he is briefed on the investigation's findings, the KFOR commander asks his legal advisor: "Can I court-martial the lieutenant? If so, at what level of court and for what offenses?" This article proposes the following answer by the legal advisor: "Yes sir, you can court-martial the

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6. "[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4339 (Yves Sandoz et al. eds., 1987) [hereinafter OFFICIAL COMMENTARY, PROTOCOL II].

The expression "armed conflicts" gives an important indication . . . since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within a territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new state.

*Id.* at ¶ 4341. Although Serbia was involved in the fighting, alongside the Federal Republic of Yugoslavia, their involvement did not change the character of the conflict from non-international to international. Serbia's involvement was at the behest and with the consent of the Yugoslav government, the legitimate government, and was directed at the Kosovar Albanians, not Yugoslavia. Thus, there was no state on state conflict, which would cause the conflict to be characterized as an international armed conflict. The same rationale was used to justify Operation Just Cause, the United States invasion of Panama, as a non-international, as opposed to international armed conflict. This "invasion" on 20 December 1989 was at the request and invitation of Panama's legitimately-elected president, President Guillermo Endara. "The United States government never recognized Noriega as Panama's legitimate, constitutional ruler." *United States v. Noriega*, 117 F.3d 1206, 1211 (1997); *see also* Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 *POLITICAL SCIENCE QUARTERLY* 539, 539 n.4 (1995). Thus, the conflict between the United States and Manuel Noriega, the Panamanian Defense Force, and the forces loyal to Noriega was not State on State; rather, it was a non-international armed conflict between the legitimate Government of Panama and forces assisting the Panamanian Government against insurgents commanded by Manuel Noriega. *But cf.* *United States v. Noriega*, 808 F. Supp. 791 (1992) (holding Manuel Noriega was entitled to Prisoner of War status based on the court's analysis of the invasion of Panama as an Article 2 conflict—that is, an international armed conflict—despite evidence to the contrary by the Departments of State and Defense). "The Court finds that General Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty, regardless of the type of facility in which the Bureau of Prisons chooses to incarcerate him." *Id.* at 796.

lieutenant at a general court-martial for violating the law of war.”<sup>8</sup>

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7. Assume for purposes of this hypothetical that investigation reveals the following: (1) murders did in fact occur; (2) the murders occurred after 1991; (3) witnesses, as well as physical evidence to include mass graves, have been located; (4) the suspect, at the time of the murders, was a lieutenant in the Yugoslav Army; and (5) faced with overwhelming evidence, the lieutenant confessed. Additionally: (1) the Kosovo conflict is a non-international armed conflict, also known as an internal armed conflict; (2) the United States was not a party to the conflict; (3) the atrocities were committed prior to KFOR’s arrival; (4) KFOR’s presence in Yugoslavia is not an occupation for purpose of the law of war; and (5) the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) has jurisdiction over the offenses. The non-occupation determination means that the United States is not acting in the role of occupier enforcing local laws or occupation rules mandated by the occupying force. Occupation occurs when “territory is actually placed under the authority of a hostile army [and] extends only to the territory where such authority has been established and can be exercised.” DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 351 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

The relevance of the date of offense and mention of the ICTY is that it provides the commander with the option of sending the case (that is, the lieutenant and the completed investigation) to the ICTY for prosecution. The ICTY was created pursuant to United Nations Security Council Resolution 827 for the purpose of “prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.” S.C. Res. 827, U.N. SCOR, 48 Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute]; *see infra* note 20. Article 2 of the ICTY Statute prohibits “grave breaches of the Geneva Conventions of 1949” and lists at Article 2(a), “willful killing.” ICTY Statute, art. 2. Article 3 prohibits violations of the laws or customs of war. *Id.* art. 3. Article 9 limits the court’s jurisdiction to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. *Id.* art. 9. The ICTY would have jurisdiction over the hypothetical lieutenant for violating either Article 2 or Article 3 of the statute, depending on whether the conflict was characterized as international or internal.

8. Rule for Courts-Martial 201 provides:

*Cases under the law of war.* (i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against: (a) The law of war; or (b) The law of the territory occupied as an incident of war or belligerency . . . [which] includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(1)(B) (2000) [hereinafter MCM]. *But see id.* R.C.M. 201(d) (concerning exclusive and nonexclusive jurisdiction for violations of the law of war). “Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.” *Id.* R.C.M. 307(c)(2) discussion.

Although many judge advocates, legal scholars, and perhaps even members of Congress might disagree with this conclusion,<sup>9</sup> analysis of recent developments in the law shows that this conclusion is legally sound. Thus, although there might be compelling policy objections to exercising jurisdiction in such a situation, the predicate issue of legality would be satisfied.

The resolution of the issue created by this hypothetical turns on determining the authority of a general court-martial convening authority (GCMCA) to convene a general court-martial to prosecute non-U.S. service members<sup>10</sup> for serious violations of international humanitarian law<sup>11</sup> committed during an internal armed conflict in which the United States did not participate. While any GCMCA could convene such a court, the jurisdiction of the court would certainly be challenged by the accused. Thus,

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9. See H.R. REP. NO. 104-698, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2170 (discussing, during the War Crimes Act debate, the viability of court-martialing non-U.S. service members for war crimes and determining that this was not a viable option).

10. United States service members are commonly referred to as “persons subject to the code,” meaning the UCMJ. Such persons are listed in the general provisions of the UCMJ as “persons subject to this chapter.” UCMJ art. 2 (2000). Those listed are usually referred to as people in a “Title 10 status.” Those in a Title 10 status are subject to general court-martial under the first sentence (clause 1) of UCMJ Article 18, which states:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.

*Id.* art. 18. Article 17 states, in part: “Each armed force has court-martial jurisdiction over all persons subject to this chapter.” *Id.* art. 17. Foreign nationals and U.S. citizens not listed in UCMJ Article 2(a)(1) through 2(a)(12) are not subject to the code, and therefore are not subject to general court-martial under the first sentence of UCMJ Article 18.

The second sentence (clause 2) of UCMJ Article 18, however, is not limited by UCMJ Article 2. It extends general courts-martial jurisdiction to persons not subject to the code by stating: “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” *Id.* art. 18. As used throughout this article, “non-U.S. service members” refers to those persons not listed in UCMJ Article 2, and thus not in a Title 10 status.



resolution of this issue will ultimately depend upon a judicial determination of the jurisdiction of the court over the accused.

The authority to subject such an accused to a general court-martial is found in Article 18 of the UCMJ, which governs the jurisdiction of general courts-martial. Article 18 provides in relevant part: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."<sup>12</sup> As evident from this language, the grant of jurisdiction is not limited by the nationality of the accused, the nationality of the victim, the military status of the accused, the parties to the conflict in which the offense was committed, or the time when the offense was committed. The only requirements to trigger this grant of jurisdiction are that

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11. International humanitarian law is more commonly known as the law of war or law of armed conflict, applicable to both international and non-international or internal armed conflicts. McCoubrey defines the concept as:

That branch of the laws of armed conflict which is concerned with the protection of the victims of armed conflict, meaning those rendered *hors de combat* by injury, sickness or capture, and also civilians. . .found primarily in the four 1949 Geneva Conventions, the two 1977 Additional Protocols and associated materials.

HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS* 1 (1990). "This body of law can be defined as the principles and rules which limit the use of violence in times of armed conflict." THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 13, *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS* (July 1991), available at <http://www.unhcr.ch/html/menu6/2/fs13.htm>.

The expression "violations of the laws or customs of war" [referring to Article 3 of the ICTY Statute] is a traditional term of art used in the past, when concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict," essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict," or the more recent and comprehensive notion of "international humanitarian law," which has emerged as a result of influence of human rights doctrine on the law of armed conflict. . . . In other words, the [United Nations] Secretary-General concedes that the traditional laws of warfare are now, more correctly termed "international humanitarian law."

Prosecutor v. Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 87 (Oct. 2, 1995) (Appeal on Jurisdiction) [hereinafter Tadic Appeal], reprinted in 35 I.L.M. 32 (1996). Violations of international humanitarian law are by definition war crimes. FM 27-10, *supra* note 7, para. 499.

12. UCMJ art. 18 (2000).

the act in question must be a violation of the law of war, and the law of war must provide for individual criminal responsibility for such a violation. As will be illustrated, developments in the law of war during the past decade place into this category the violation of certain fundamental law of war prohibitions applicable to internal armed conflict. Such violations would satisfy the Article 18 jurisdictional prerequisites, and a jurisdictional basis therefore exists to court-martial the accused in the hypothetical above.

## II. Overview

This article examines the jurisdiction granted by UCMJ Article 18 and the law of war applicable to purely internal armed conflicts to determine whether Article 18 establishes jurisdiction to prosecute non-U.S. participants in such conflicts for serious violations of international humanitarian law. It illustrates that the proscriptions of the law of war, those which result in individual criminal responsibility when violated during an internal armed conflict, fall within the jurisdictional purview of Article 18. Such violations constitute violations of paragraph 1 of Common Article 3 of the Geneva Conventions of 1949<sup>13</sup> (Common Article 3(1)) and paragraphs 1 and 2 of Article 4 of Protocol II to the 1977 Protocols Additional to the Geneva Conventions of 1949 (Protocol II).<sup>14</sup> By demonstrating that these law of war proscriptions are fundamental prohibitions that have attained customary international law status, this article will show that they fall under the umbrella of universal jurisdiction. It also examines the relationship between Article 18 and the War Crimes Act of 1996,<sup>15</sup> concluding that—although Congress has provided for the federal criminal prosecution of certain war crimes committed during internal armed conflict—the War Crimes Act should not be regarded as preempting the jurisdiction granted by Article 18. Finally, after establishing the authority granted by Article 18, and therefore the permissibility of relying on this source of jurisdiction to subject a non-U.S. service member to a general court-martial, this article considers policy concerns related to any decision to exercise such jurisdiction, focusing on the potential advantages and disadvantages.

Any person who commits a serious violation of the law of war, a violation resulting in individual criminal responsibility under existing international law, is subject to prosecution at a general court-martial. Violations of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), qualify as serious violations of the law of war that subject the violator to prosecution at a general court-martial. Pursuant to the plain meaning of Article 18 of

the UCMJ, the jurisdiction of a general court-martial to prosecute an individual charged with such a law of war violation is not dependent upon the violator's or victim's citizenship or nationality, the location of the violation, or whether the United States was a party to the conflict.<sup>16</sup> Instead, the

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13. Article 3 common to the four Geneva Conventions of 1949 states:

Article 3 - Conflicts Not Of An International Character

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention No. III); Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Geneva Convention No. IV), (art. 3 common in all four conventions) [hereinafter Geneva Conventions I-IV].

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14. Article 4 of Protocol II states:

Article 4 - Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

critical predicate fact is that international law, in the form of the law of war, imposes criminal responsibility on the offender for the law of war violation. If this fact can be established by the prosecution, then there is no *legal* impediment to subjecting the accused to the jurisdiction of the general court-martial.<sup>17</sup>

Through recent examples, Part III of this article illustrates the types of misconduct, committed during internal armed conflicts, that violate fundamental law of war prohibitions applicable to such conflicts. A commander would be authorized to use a general court-martial to prosecute the offenders in these examples. Part IV traces the history of Article 18, demonstrating that its application to individuals with no connection to the U.S. armed forces, in order to punish war criminals, is grounded in the history of military jurisprudence. Having established that the scope of Article 18 extends to any individual who is subject to trial by a military tribunal for violating the law of war, this article next endeavors to establish that such offenses may occur during the course of an internal armed conflict. This requires a showing that certain law of war provisions are customary in nature and include an individual criminal responsibility component. Part V reviews the process by which a norm evolves into customary international law and the impact of such norms on the international community. Part VI examines the applicability of Common Article 3 and Article 4 of Protocol II to internal armed conflicts. Part VII concludes that these law of war provisions have evolved into customary international law status.

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15. 18 U.S.C.S § 2441 (LEXIS 2000).

16. If the person committing the serious violation or the victim is "a member of the Armed Forces of the United States or a national of the United States," he is also subject to criminal prosecution in federal district court under the War Crimes Act of 1996. *See id.* The Act does not affect general court-martial jurisdiction and is a separate and distinct basis for criminal prosecution. *See* H.R. REP. No. 104-698, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2177. If the individual is in a Title 10 Status when prosecution commences, the individual is subject to prosecution under the first sentence of Article 18, for violations of the punitive articles of the UCMJ. UCMJ art. 18 (2000); *see also* MCM, *supra* note 8, R.C.M. 307(c)(2) discussion (establishing a UCMJ preference for charging specific violations of the code rather than violations of the law of war); *United States v. Calley*, 46 C.M.R. 1131 (1973) (a pre War Crimes Act case in which 1LT William Calley was convicted at a general court-martial for three specifications of premeditated murder and one specification of assault with intent to commit murder, violations of UCMJ Articles 118 and 134, respectively, in connection with the massacre of noncombatant civilians at My Lai, Vietnam).

17. Of course, there may be multiple *policy* considerations that counsel against using a court-martial in such a situation. These considerations, however, are secondary considerations to the initial issue of whether the exercise of such jurisdiction is lawful, and should only be considered after this initial issue is resolved.

Based on this conclusion, the article next analyzes whether violation of these provisions constitutes a serious violation of international humanitarian law and, if so, whether such violations subject the actor to individual criminal responsibility. Part VIII discusses the War Crimes Act of 1996, the rationale for its passage and amendment, and whether this rationale was valid. It then assesses whether the Act, providing a federal forum for the prosecution of war crimes committed by aliens, preempts the jurisdiction of a general court-martial over the same offenses under Article 18, UCMJ. Finally, Part IX addresses the policy considerations that may affect a decision to exercise UCMJ authority in these cases.

### III. The Relevance of Article 18 Authority in the 21st Century

On 28 July 1997, Representative Lofgren, addressing the atrocities visited upon innocent civilians during armed conflict, be it international or internal, stated the following:

I think that every Member of this body agrees that we must actively and aggressively support civility, that we must oppose oppression and war crimes and that we need to bring those to justice who commit crimes against humanity. During the Holocaust, the killing fields of Cambodia, the civil war in Bosnia and the massacres in Rwanda, many perpetrators acted without fear of retribution, and we must do more to change this attitude.<sup>18</sup>

Although the statement was made in the context of expanding the offenses covered by the War Crimes Act of 1996,<sup>19</sup> it highlights the need to change attitudes and aggressively prosecute war criminals. Prosecuting suspected war criminals under Article 18 will change existing notions while bringing these criminals to justice. Article 18 and the War Crimes Act of 1996 are

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18. 143 CONG. REC. H5865-66 (daily ed. July 28, 1997) (statement of Rep. Lofgren).

19. 18 U.S.C. S. § 2441 (LEXIS 2000). As initially passed, the War Crimes Act did not apply to crimes committed in internal armed conflicts and was limited in scope to grave breaches of the Geneva Conventions of 1949, which can occur only during an international armed conflict. The 1997 amendments, the hearings from which Representative Lofgren's statement is taken, expanded the scope of the Act solely from violations of the grave breaches provisions of the Geneva Conventions of 1949 to: violations of Hague Regulation IV, Articles 23, 25, 27 and 28; violations of Common Article 3 applicable to internal armed conflicts; and willful killing or causing serious injury to persons "in relation to an armed conflict and contrary to the provisions on the Protocol on Prohibitions and Restrictions on the Use of Mines, Booby-Traps and Other Devices . . . when the United States is a party to such Protocol." *Id.*

not mutually exclusive; rather, they are separate tools available to the United States in dealing with war criminals. Article 18 permits a commander to exercise authority initiating prosecution based on international law; the War Crimes Act allows federal prosecutors to address war crimes based on domestic law.

A review of recent atrocities committed during the conflicts in Bosnia-Herzegovina, Rwanda, Yugoslavia, and even Chechnya—conflicts all occurring within the last ten years with the latter still ongoing—highlights the need for a change in attitudes and aggressive prosecution of war criminals. In Bosnia-Herzegovina, both captured combatants and civilians were raped, tortured, mutilated, and killed, while their property was stolen or destroyed. One need only review the indictments from the ICTY<sup>20</sup> to comprehend the horrific nature of the war crimes committed during the Bosnian civil war. For example, the Tadic indictment states, in part:

About late June 1992, a group of Bosnian Serbs, from outside the camp, including Dusan [sic] Tadic, entered the large garage building known as the “hangar” and called prisoners out of their rooms by name, including Emir Karabasic, Jasmin Hrnica, Enver Alic, Fikret Harambasic and Emir Beganovic. The prisoners were in different rooms and came out separately. The group of Serbs, including Dusan Tadic, severely beat the prisoners with various objects and kicked them on their heads and bodies. After Fikret Harambasic was beaten, two other prisoners, “G” and “H”, were called out. A member of the group ordered “G” and “H” to lick Fikret Harambasic’s buttocks and genitals and then to sexually mutilate Fikret Harambasic. “H” covered Fikret Harambasic’s mouth to silence his screams and “G” bit off one of Fikret Harambasic’s testicles. Emir Karabasic, Jasmin Hrnica, and Fikret Harambasic died from the attack. Enver Alic, who

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20. The ICTY was created pursuant to United Nations Security Council Resolution 827 for the purpose of “prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.” See S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal for the former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993) (including a proposed statute for an International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia); ICTY Statute, *supra* note 7 (establishing the International Criminal Tribunal for the Prosecution of War Crimes in the Former Yugoslavia and adopting the statute recommended in the Secretary-General’s report).

was severely injured, was thrown onto the back of a truck with the dead and driven away.<sup>21</sup>

This excerpt from the Tadic indictment is but one example of the many atrocities committed by all sides in the Bosnian civil war, atrocities reminiscent of those committed by the Nazis and Japanese forces during World War II. Unlike the World War II offenses, however, with the Bosnian-like atrocities found in the conflicts in Rwanda<sup>22</sup> and Yugoslavia,<sup>23</sup> there is no treaty-based provision for the prosecution of analogous crimes committed during the course of an internal armed conflict. This limitation

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21. Prosecutor v. Tadic, No. IT-94-1, para. 5.1 (Feb. 10, 1995) (Indictment).

22. The atrocities committed by Tadic upon Bosnian Muslims and Croats are mirrored in the indictment of Jean Paul Akayesu by the International Criminal Tribunal for Rwanda (ICTR). Prosecutor of the Tribunal Against Jean Paul Akayesu, No. ICTR-96-4-I, (June 17, 1997) (Amended Indictment), *available at* <http://www.un.org/ict/acta-mond.htm>. An excerpt from the Akayesu indictment states:

On or about April 19, 1994, the men who, on Jean Paul Akayesu's instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Ephrem Karangwa's three brothers there. The three brothers—Simon Mutijima, Thadee Uwanyiligira and Jean Chrysostome Gakuba—tried to escape, but Jean Paul Akayesu blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean Paul Akayesu ordered and participated in the killings of the three brothers.

*Id.* para. 18.

Rwanda is divided into 11 prefectures, each of which is governed by a prefect. The prefectures are further subdivided into communes which are placed under the authority of bourgmestres. The bourgmestre of each commune is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*. [Para. 2]. Jean Paul Akayesu, born in 1953 in Murehe sector, Taba commune, served as bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.

*Id.* paras. 2-3.



also applies to atrocities committed during the ongoing conflict in Chechnya.<sup>24</sup>

On 12 November 1999, Mr. James Rubin, U.S. State Department spokesman, stated that “for many weeks people who were trying to escape the conflict [in Chechnya] were not treated humanely by being allowed to leave.”<sup>25</sup> Then Russian Prime Minister Vladimir Putin rebutted this statement by claiming: “Russia is strictly complying with its obligations con-

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23. An excerpt from the indictment of Slobodan Milosevic highlights the viciousness of atrocities committed during the conflict in Yugoslavia:

Beginning on or about 1 January 1999 and continuing until the date of this indictment [22 May 1999], forces of the FRY [Federal Republic of Yugoslavia] and Serbia, acting at the direction, with the encouragement, or with the support of Slobodan Milosevic, . . . , have murdered hundreds of Kosovo Albanian civilians. These killings have occurred in a widespread or systematic manner throughout the province of Kosovo and have resulted in the death of numerous men, women, and children. Included among the incidents of mass killings are the following: a. On or about 15 January 1999, in the early morning hours, the village of Racak (Stimlje/Shtime municipality) was attacked by forces of the FRY and Serbia. After shelling by the VJ units, the Serb police entered the village later in the morning and began conducting house-to-house searches. Villagers, who attempted to flee from the police, were shot throughout the village. A group of approximately 25 men attempted to hide in a building, but were discovered by the Serb police. They were beaten and then removed to a nearby hill, where the policemen shot and killed them. Altogether, the forces of the FRY and Serbia killed approximately 45 Kosovo Albanians in and around Racak.

Prosecutor v. Milosevic et al., No. IT-99-37, para. 98 (May 24, 1999) (Indictment) (charging Slobodan Milosevic with a violation of Article 3 of the ICTY Statute for murder in violation of Common Article 3 of the Geneva Conventions of 1949), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.

24. Noted scholars in the field of international law agree the conflict in Chechnya is an internal armed conflict governed by Common Article 3. According to A.P.V. Rogers, a noted expert in international law, “[t]here is no doubt that an internal armed conflict is going on in Chechnya to which Common Article 3 of the Geneva Conventions applies.” A.P.V. Rogers, *Russia’s War in Chechnya is an Internal Armed Conflict Governed by International Conventions on War, Top Experts Say*, CRIMES OF WAR PROJECT (n.d.) (survey response), at <http://www.crimesofwar.org/chechnya/rogers.html> (last visited Feb. 14, 2001). See also Bakhtiyar Tuzmukhamedov, *Russia’s War in Chechnya is an Internal Armed Conflict Governed by International Conventions on War, Top Experts Say*, CRIMES OF WAR PROJECT (n.d.) (survey response) (citing statement made by Vladimir Putin and reported by the on-line edition of the 11 December 99 Financial Times), at <http://www.crimesofwar.org/chechnya/tuzmukhamedov.html> (last visited Feb. 14, 2001).

25. James P. Rubin, Noon Briefing at the U.S. State Department (Nov. 12, 1999).

cerning the provisions of international humanitarian law."<sup>26</sup> To date, atrocities such as those seen in the Tadic indictment are not yet apparent in Chechnya. However, this may be due in large part to an inability to investigate allegations during the ongoing conflict.

What is apparent from reviewing the atrocities committed in Bosnia-Herzegovina, Rwanda, and Yugoslavia is that internal armed conflicts are often horrific in nature with much of the violence directed at non-combatants or civilians. These conflicts emphasize the need for an effective system to punish the perpetrators of these horrors.<sup>27</sup> Article 18 provides such a system: a general court-martial with authority to try serious violations of international humanitarian law. Exercising Article 18 jurisdiction over these offenders would alter their sense of impunity and impose the accountability that these crimes demand.

#### IV. Article 18, Uniform Code of Military Justice

##### A. Overview

The modern day UCMJ originated from numerous military codes, formerly known as the Articles of War,<sup>28</sup> promulgated since the American Revolution. The authority to promulgate the Articles of War and finally the UCMJ derives from Congress's authority under Article I of the Consti-

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26. Tuzmukhamedov, *supra* note 24.

27. The atrocities visited upon innocent civilians during these conflicts highlight the need for commanders to exercise their authority under Article 18, UCMJ, especially in light of the current limitations placed on the two current international tribunals established to prosecute war criminals. The ICTY's jurisdiction is limited to "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, *supra* note 7, art. 9. The ICTR, like the ICTY, was created pursuant to United Nations Resolution. S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) (establishing the ICTR and adopting the statute of the tribunal which is annexed to the Security Council Resolution) [hereinafter ICTR Statute]. Article 8 of the ICTR Statute limits the court's jurisdiction to "serious violations of international humanitarian law committed in the territory of Rwanda [and offenses committed by Rwandan citizens] in the territory of neighbouring States, between 1 January 1994 and 31 December 1994." *Id.* art. 8. In addition to jurisdictional limitations placed on the respective international tribunals, the tribunals also lack independent funding beyond that provided by the United Nations through the contributions of member states. See generally The International Criminal Tribunal for the Former Yugoslavia, *ICTY Key Figures*, at <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Jan. 23, 2001); The International Criminal Tribunal for Rwanda, *About the Tribunal*, at <http://www.ictcr.org/> (last visited Feb. 14, 2001) (General Information, Budget and Staff).

tution, which gives Congress the power to “make Rules for the Government and Regulation of the land and naval forces.”<sup>29</sup> Moreover, Article I vests in Congress the power to “define and punish . . . [o]ffenses against the Law of Nations,”<sup>30</sup> a power arguably exercised through Article 18 of the UCMJ.<sup>31</sup> Although numerous changes and amendments have been made to the UCMJ since 1956,<sup>32</sup> for purposes of analyzing general court-martial jurisdiction, the last relevant change occurred with the passage of the Military Justice Act of 1968.<sup>33</sup> One must look to the origins of the UCMJ to fully understand the significance of these changes made in 1968.

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28. See The Honorable Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); see also, Colonel Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment—A Short History of Military Justice*, 11 A. F. JAG L. REV. 212 (1969); Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

29. U.S. CONST. art I, § 8, cl. 14.

30. *Id.* art. I, § 8, cl. 10.

31. The Continental Congress drafted the first Articles of War in 1775, which were subsequently replaced the following year by the Articles of War of 1776. See The Honorable Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 6 (1987); see also Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 12 n.44 (1996). In 1806, new Articles of War were passed, which, among other things, established authority to convene courts-martial, listed the personnel subject to courts-martial jurisdiction, and provided for various punitive offenses. 1806 Articles of War, 2 Stat. 359 (1806) (establishing Rules and Articles for the government of the Armies of the United States). The next significant change occurred in 1916 when Congress passed the Articles of War of 1916. 1916 Articles of War, 39 Stat. 650 (1916). This was replaced four years later by the Articles of War of 1920. 1920 Articles of War, 41 Stat. 787 (1920). This statute remained in effect until replaced by the Uniform Code of Military Justice of 1950. 1950 Uniform Code of Military Justice, Pub. L. No. 81-506, 1950 U.S.C.C.A.N. (64 Stat.) 2222 (“An act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.”). In 1956, the Uniform Code of Military Justice was codified as part of Title 10 of the United States Code. 1956 Uniform Code of Military Justice, Pub. L. No. 84-1028, 1956 U.S.C.C.A.N. (70a Stat.) 4613 (“An act to revise, codify, and enact into law, title 10 of the United States Code, entitled ‘Armed Forces’, and title 32 of the United States Code, entitled ‘National Guard.’”).

32. The Uniform Code of Military Justice has been amended numerous times since 1956 including amendments in 1968, 1984, 1995, 1996, 1997, 1998, and 2000. The last amendment to Article 18, however, was in 1968.

33. Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

## B. 1806 Articles of War

The 1806 Articles of War (1806 statute) provided for courts-martial jurisdiction in limited circumstances. The relevant portions were Articles 96 and 97, and Section 2. Article 96 stated:

All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts martial, in the like manner with the officers and soldiers of the other troops in the service of the United States.<sup>34</sup>

Article 97 stated:

The officers and soldiers, of any troops, whether militia or others, being mustered and in pay of the United States, shall at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts martial, in like manner with the officers and soldiers in the regular forces, save only that such courts martial shall be composed entirely of militia officers.<sup>35</sup>

Articles 96 and 97 limited courts-martial jurisdiction to individuals with a service connection. Article 96 authority was limited to those persons “receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States”<sup>36</sup> and Article 97 authority was limited to those “being mustered and in pay of the United States.”<sup>37</sup> With the exception of Section 2 of the statute, there had to be, for lack of a better term, an employer-employee relationship for courts-martial jurisdiction to attach.<sup>38</sup> Section 2 of the 1806 statute provided for general courts-martial jurisdiction over

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34. 1806 Articles of War, 2 Stat. 359, art. 96 (1806).

35. *Id.*

36. *Id.*

37. *Id.* art. 97.

38. Worth noting is that Articles 96 and 97 of the 1806 statute addressed “courts martial” generally with no limitation on the level or type of court-martial. *Id.* arts. 96-97. Section 2 of the 1806 statute, however, specifically addressed general court-martial jurisdiction. *Id.* sec. 2. This article focuses on authority to convene general courts-martial and does not address the jurisdiction of inferior courts.

civilian, non-members of the force in very limited circumstances. Section 2 stated:

That in time of war, all persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.<sup>39</sup>

Therefore, as early as 1806, Congress envisioned situations where civilians with no connection to the force might be subject to courts-martial jurisdiction. Court-martial jurisdiction over civilians existed, however, only for a limited class of persons and a single offense. The class of persons extended only to “persons not citizens of, or owing allegiance to the United States.” Owing allegiance to the United States is undefined. Foreign nationals apparently were not excluded from jurisdiction, provided they did not owe allegiance to the United States. Clearly citizens of the United States were specifically excluded from court-martial jurisdiction in 1806.<sup>40</sup> Furthermore, Section 2 limited general court-martial jurisdiction to the offense of spying, but only if committed “in time of war.”<sup>41</sup> Thus, if a foreign national not owing allegiance to the United States committed a law of war violation—other than spying<sup>42</sup>—during time of war, he was not subject to general court-martial jurisdiction under Section 2 of the 1806 statute.<sup>43</sup>

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39. *Id.* sec. 2.

40. The same is not true for Article 12 of the 1916 Articles of War, or its successor article of the same number in the 1920 Articles of War, the precursor to Article 18 of the Uniform Code of Military Justice. Neither Article 12 of the Articles of War nor its successor, Article 18, UCMJ, makes any distinction based on citizenship or nationality of the individual to be tried at a general court-martial. *See* 1916 Articles of War, 39 Stat. 650, art. 12 (1916); 1920 Articles of War, 41 Stat. 787, art. 12 (1920); Military Justice Act of 1968, Pub. L. No. 90-632, art. 18, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

41. 1806 Articles of War, sec. 2.

42. Until at least 1942, spying was considered a war crime by the United States. *See Ex Parte Quirin*, 317 U.S. 1 (1942) (concluding that espionage during time of war constituted a war crime). However, at some point between 1942 and 1956, spying was removed from the category of war crimes. *See* FM 27-10, *supra* note 7, para. 77 (indicating that the employment by belligerents of spies “involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible.”).

Articles 96 and 97, and Section 2 of the 1806 statute indicate that Congress knew how to distinguish between those persons who were and were not “subject to the code.” They also understood that Article I, section 8, clause 10, of the Constitution empowered them to establish courts-martial jurisdiction for military members as well as civilians. In Articles 96 and 97, Congress limited courts-martial jurisdiction to persons “governed by the aforesaid articles and rules”<sup>44</sup> or persons “governed by these rules and articles of war.”<sup>45</sup> Although Congress must have concluded the Constitution authorized the general court-martial of civilians, Congress limited jurisdiction to a certain class of persons, specifically “all persons not citizens of, or owing allegiance to the United States.”<sup>46</sup> The 1806 statute’s limitation on civilian jurisdiction was self-imposed, however, and Congress chose to do away with it in Article 12 of both the 1916 and 1920 Articles of War and all subsequent versions of Article 18 of the UCMJ.

### C. 1916 Articles of War

The next significant change for the Articles of War occurred in 1916. Article 12 of the 1916 Articles of War (1916 statute) states:

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.<sup>47</sup>

This article specifically grants general courts-martial jurisdiction over “any other person who by the law of war is subject to trial by military tribunals.”<sup>48</sup> Significantly, Article 12 of the 1916 statute lacks the limitations

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43. Neither Article 12 of the Articles of War of 1916 or 1920, nor its successor, Article 18, UCMJ, makes any distinction based on “time of peace” or “time of war.” Furthermore, neither Article 12 of the Articles of War nor Article 18, UCMJ, limit court-martial jurisdiction to the offense of spying. *See* 1916 Articles of War, art.12; 1920 Articles of War, art. 12; Military Justice Act of 1968, art. 18.

44. 1806 Articles of War, 2 Stat. 359 (1806).

45. *Id.* art. 97.

46. *Id.* sec. 2.

47. 1916 Articles of War, art.12.

48. *Id.*

on courts-martial jurisdiction present in the 1806 statute: the distinctions based on class of persons and type of offense.

This change is noteworthy because other provisions of the 1916 statute still invoked “time of war” distinctions. For example, Article 2, entitled “Persons Subject to Military Law,” states that “in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States . . . .”<sup>49</sup> In contrast, the only jurisdictional limitation in Article 12 of the 1916 statute is that a person committed an offense subjecting him, by the law of war, to “trial by military tribunal.”<sup>50</sup> The offense need not be committed in “time of war.”<sup>51</sup> Furthermore, the military tribunal referenced in Article 12 is not required to convene during time of war. In fact, no military tribunal need convene at all. Rather, the focus is on the offense, which must be of a nature such that the person “by the law of war is subject to trial by military tribunal.”<sup>52</sup> To read Article 12 in any other manner ignores the plain meaning of the 1916 statute and, more importantly, ignores the modifications made by Congress from the 1806 statute. Doing so would suggest that the changes made by Congress were inadvertent; it is more reasonable to conclude that the 1916 changes were intended.<sup>53</sup>

#### D. 1920 Articles of War

In 1920, the Articles of War were again modified.<sup>54</sup> Article 12 of the 1920 Articles of War (1920 statute) stated:

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That no officer shall be brought to trial before a general

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49. *Id.* art. 2(d).

50. *Id.* art. 12.

51. Unless, of course, this is a jurisdictional predicate to the lawful use of a military tribunal.

52. 1916 Articles of War, art. 12.

53. The legislative history provides no indication of congressional intent regarding this issue. However, no evidence of a contrary intention has been discovered. As a result, the plain meaning of this provision should prevail. *See id.*

54. 1920 Articles of War, 41 Stat. 787 (1920).

court-martial appointed by the Superintendent of the Military Academy: *Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgement the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.*<sup>55</sup>

The italicized language was added in the 1920 statute, although the non-italicized language is virtually identical to the 1916 version of Article 12. This is significant because Article 12 from the 1920 statute is cited as the precursor to Article 18, UCMJ.<sup>56</sup> Thus, jurisdiction over non-members of the force, that is, persons not “subject to military law” was unchanged. The key to exercising general court-martial jurisdiction over a non-member of the force remained the commission of an offense in violation of the law of war, subjecting the person to “trial by a military tribunal.”<sup>57</sup>

#### E. The Uniform Code of Military Justice

In 1950, the Articles of War were codified in the UCMJ.<sup>58</sup> Article 12 of the Articles of War was replaced by Article 18 of the UCMJ, which stated:

Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.<sup>59</sup>

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55. *Id.* art. 12 (emphasis added).

56. INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1363 (1985).

57. 1920 Articles of War, art. 12.

58. 1950 Uniform Code of Military Justice, Pub. L. No. 81-506, 1950 U.S.C.A.N. (64 Stat.) 2222.



The 1956 codification of the UCMJ also included Article 18, which provided:

Subject to section 817 of this title [article 17], general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter [clause 1]. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war [clause 2].<sup>60</sup>

Finally, as the result of the Military Justice Act of 1968, Article 18 underwent a final revision:

Subject to section 817 of this title [article 17], general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter [clause 1]. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war [clause 2]. *However, a general court-martial of the kind specified in section 816(1)(B) of this title [article 16(1)(B)] shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case [clause 3].*<sup>61</sup>

This 1968 version of Article 18 is identical to the current version of Article 18.

What is most significant about the foregoing history is the language of the current Article 18, clause 2, which is almost identical to the language

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59. *Id.* art. 18.

60. 1956 Uniform Code of Military Justice, Pub. L. No. 84-1028, art. 18, 1956 U.S.C.C.A.N. (70a Stat.) 4613.

61. Military Justice Act of 1968, art. 18, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335 (emphasis added).

of Article 12 of the 1916 and 1920 Articles of War. Under all three provisions, general court-martial jurisdiction may be exercised over a non-member of the force that committed an offense in violation of the law of war, thereby subjecting the person to trial by military tribunal. Unlike the first clause of Article 18, which permits a general court-martial only for persons subject to the code, the second clause of Article 18 does not impose a similar restriction on personal jurisdiction.<sup>62</sup> A plain reading of Article 18 and its predecessors demonstrates that the grant of jurisdiction contained in the second clause is irrespective of whether the individual is subject to the code. This interpretation was essential to the decision of the United States Supreme Court in *Ex Parte Quirin*.<sup>63</sup>

In *Ex Parte Quirin*, the Court applied the 1920 Articles of War to non-service-member aliens and one non-service-member citizen of the United States. According to the Court:

Article 2 [Persons Subject to Military Law] includes among those persons subject to military law the personnel of our own military establishments. But this, as Article 12 provides, does not exclude from that class “any other person who by the law of war is subject to trial by military tribunals” and who under Article 12 may be tried by court martial or under Article 15 by military commission.<sup>64</sup>

This statement, made by the Supreme Court in 1942, is equally valid when interpreting the relationship between UCMJ Article 2<sup>65</sup> and UCMJ Article 18, clause 2. Specifically, Article 2 limits the first clause of Article 18—authorizing general courts-martial jurisdiction over persons subject to the code—but it has no effect on the second clause of Article 18—authorizing general courts-martial jurisdiction over certain law of war offenses.<sup>66</sup>

Assuming Article 18, clause 2, provides general courts-martial jurisdiction over certain war crimes committed by non-U.S. service members, the jurisdiction of the military tribunal may still be limited. Historically,

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62. See discussion *supra* note 10 and accompanying text.

63. *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that the use of a military commission to try German and U.S. national agents of the German Intelligence Service who had been captured in the United States while planning to conduct sabotage missions was authorized by the Articles of War precursor to Article 18).

64. *Id.* at 27; see also *In re Yamashita*, 327 U.S. 1 (1946).

65. Like Article 18, this article was derived from the 1920 Articles of War. INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1342 (1985).

adjudication of law of war violations by military tribunals or commissions occurred at or near the close of the conflict in which the violation occurred, suggesting that jurisdiction is restricted temporally. However, there is no basis in law for this conclusion. Indeed, this temporal link is refuted by contemporary military tribunals that have heard cases stemming from the Bosnian conflict in the early 1990s. For example, in 1997, a Swiss military tribunal acquitted a Bosnian Serb charged with violations of the laws and customs of war during the civil war in Bosnia-Herzegovina.<sup>67</sup> Thus,

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66. A review of the legislative history of the Uniform Code of Military Justice, its codification in Title 10, and the Military Justice Act of 1968, reveals nothing to contradict the plain meaning of Article 18, UCMJ, clause 2. See 1950 Uniform Code of Military Justice, Pub. L. No. 81-506, 1950 U.S.C.C.A.N. (64 Stat.) 2222; 1956 Uniform Code of Military Justice, Pub. L. No. 84-1028, 1956 U.S.C.C.A.N. (70a Stat.) 4613; Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335. Clause 2 provides an independent jurisdictional basis to convene a general court-martial, independent from any other provisions of the code, provided the accused is a "person who by the law of war is subject to trial by a military tribunal." For jurisdiction to attach, it is irrelevant whether the person is or is not "a person subject to [the code]" as defined in Article 2, UCMJ. See Robinson O. Everett, *Symposium: War Crimes: Bosnia and Beyond: Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. INT'L L. 289 (1994); Robinson O. Everett & Scott Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994). The predicate for exercising general court-martial jurisdiction under Article 18, UCMJ, clause 2, is the commission of a law of war offense that subjects the violator to individual criminal responsibility at a military tribunal. In addressing jurisdiction and the exercise thereof, Department of the Army Field Manual 27-10 states:

Military jurisdiction is of two kinds: first, that which is conferred by that branch of a country's municipal law which regulates its military establishment; second, that which is derived from international law, including the law of war. In the Army of the United States, military jurisdiction is exercised through the following military tribunals: a. Courts-martial. b. Military commissions. c. Provost courts. d. Other military tribunals.

FM 27-10, *supra* note 7, para. 13. Examples of the use of military tribunals to prosecute serious violations of the law of war abound in World War II with the prosecution of the Germans in Nuremberg. See GEORGE GINSBURG & V.N. KUDRIAVTSEV, *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* (1990); Newton, *supra* note 31, at 45-53 (discussing war crimes trials in Nuremberg and Tokyo). Article 18, UCMJ, clause 2, jurisdiction is therefore premised on the exercise of international law.

67. See International Committee for the Red Cross, *International Humanitarian Law, National Implementation* (detailing the 17 April 1997 Swiss Military Tribunal case, as well as two Swiss Military Court of Cassation cases), at <http://www.icrc.org/ihl-nat.nsf/WebCASE?OpenView> (National Case Law, Switzerland). In the 8 July 1996 Court of Cassation case, Switzerland complied with a request by the ICTR for the transfer of a case of a Rwandan citizen to its jurisdiction. The accused had unsuccessfully appealed his transfer to the ICTR. *Id.*

although past military tribunals were held typically at or near the close of conflict, this fact imposes no express or implied limitation on the jurisdiction granted by Article 18.

In *Ex Parte Quirin*,<sup>68</sup> the Supreme Court observed that “[w]e have no occasion now to define with meticulous care the ultimate boundaries of jurisdiction of military tribunals to try persons according to the law of war.”<sup>69</sup> Three years later, in the case of *In Re Yamashita*,<sup>70</sup> the Court could have defined the temporal boundaries of military authority regarding law of war violations, but instead indicated:

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before the cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and principal ones be apprehended and subjected to trial.”<sup>71</sup>

Although *Yamashita*<sup>72</sup> involved war crimes committed during World War II, the logic and rationale supporting the Court’s conclusion in 1946 applies equally today, perhaps even more so when dealing with internal armed conflicts. Thus, the jurisdiction of military tribunals is not limited to the duration of the underlying conflict.

If Article 18, clause 2, authorizes the general court-martial of non-U.S. service members, it is critical to define which crimes are encompassed by the military tribunal’s jurisdiction. Essentially, the crimes must be serious offenses of the law of war that entail individual criminal responsibility. Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), are treaty provisions that have developed into customary international law. Furthermore, violation of these provisions, now part of the law of war, results in individual criminal responsibility. As a result, a violation of

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68. *Ex Parte Quirin*, 317 U.S. 1 (1942).

69. *Id.* at 45-46.

70. *In re Yamashita*, 327 U.S. 1 (1946).

71. *Id.* at 12.

72. *Id.*

these treaty provisions would be an offense that satisfies the jurisdictional requirement of Article 18.<sup>73</sup>

## V. Customary International Law

The law of war is a branch of public international law, that “body of rules governing the relations between states.”<sup>74</sup> The law of war, often referred to as international humanitarian law,<sup>75</sup> regulates the decision by nations to use force, the means and methods of the use of force, and the treatment of victims of war. This law is derived primarily from two sources, conventional and customary international law.<sup>76</sup> Conventional international laws are those obligations assumed by states through treaties or other international agreements.<sup>77</sup> Customary international law “is based upon the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of con-

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73. The customary nature of these provisions as well as criminal liability for violations thereof are discussed in Part VII *infra*.

74. WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 3 (3d ed. 1971).

75. *See supra* note 11.

76. *See, e.g.*, BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 19 (2d ed. 1995). “Most international law is found either in international agreements or in rules based on custom.” *Id.* Note also the Martens Clause, “which can be found in the 1907 Hague Convention Respecting the Laws and Customs of War on Land and subsequent humanitarian law conventions.” Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *COLUM. J. TRANSNAT’L L.* 787, 795 (1999). The clause

first articulated the notion that international law encompassed transcendental humanitarian principles that existed beyond conventional law. This clause provides that: Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

*Id.* at 795-96. The Martens clause was a formal recognition that principles of humanity restricted actions and options of military commanders. *See* Theodor Meron, *Francis Lieber’s Code and Principles of Humanity*, 36 *COLUM. J. TRANSNAT’L L.* 269, 280-81. The Martens clause, in short, recognized formally that civilized society and humanity dictate that conflicts are governed by certain rules and that victory, regardless of how obtained, is no longer a valid principle of war or conflict.

duct.”<sup>78</sup> “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>79</sup>

Once a concept or principle becomes customary, it is generally binding on all nations.<sup>80</sup> This rule applies with full force to the United States. The Supreme Court, in *The Paquete Habana*,<sup>81</sup> noted that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.”<sup>82</sup> In *Filartaga v. Pena-Irala*,<sup>83</sup> a seminal U.S. case on international law jurisprudence, the Court of Appeals for the Second Circuit cited *The Paquete Habana* to support the binding nature of customary international law and its sources. The court then noted the evolutionary nature of international law when it stated “courts must interpret international law not as it was in 1789, but as it has

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77. BISHOP, *supra* note 74, at 33-34.

Conventional international law, so called, is not to be confused with customary international law. While a convention—such as certain of the Hague conventions—may, and often does, embody well established international law, it may at the same time include provisions which are not established international law but which the contracting parties agree should govern the relations between them. The convention as such is binding only on the contracting parties and ceases to be binding upon them when they cease to be parties to it. Those provisions of a convention that are declaratory of international law do not lose their binding effect by reason of the abrogation of or withdrawal from the convention by parties thereto, because they did not acquire their binding force from the terms of the convention but exist as a part of the body of the common law of nations. Provisions of conventions that are not international when incorporated therein may develop into international law by general acceptance by the nations.

*Id.*

78. *Id.*

79. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT (THIRD)].

80. *Id.* § 102(2). “A principle of customary law is not binding on a state that declares its dissent from the principle during its development.” *Id.* cmt. b. See generally, F. Giba-Matthews, *Customary International Law Acts as Federal Common Law in U.S. Courts*, 20 FORDHAM INT’L L.J. 1839 (1997); Beth Stephens, *Human Rights on the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Mark J.T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance Over Conventional Form*, 20 B.C. ENV’T L. REV. 479 (1993).

81. *The Paquete Habana*, 175 U.S. 677 (1900).

82. *Id.* at 700; see also CARTER & TRIMBLE, *supra* note 76, at 247.

83. *Filartaga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

evolved and exists among the nations of the world today.”<sup>84</sup> While it is often difficult to determine when a rule or practice becomes customary in nature, U.S. courts clearly undertake the necessary analysis when customary international law is at issue in a case.<sup>85</sup> In a court-martial involving a charge based on a violation of the law of war, and therefore clause 2 of Article 18, a determination of applicable customary international law would be essential to establish that the jurisdictional predicate of Article 18 was satisfied.<sup>86</sup>

The key issue related to such a determination is the nature of the obligations created by Common Article 3<sup>87</sup> and Protocol II.<sup>88</sup> If these provisions are binding only in their capacity as treaties, the obligations created therein extend only to signatory states. However, if these provisions have ripened into customary international law obligations, either in their entirety or portions thereof, their obligations extend to all nations.

The scope of application of these provisions is significant. Because these treaties are almost universally ascribed to by members of the international community, determining that they have not attained customary international law status would seem to have minimal impact on their scope of applicability. However, such a determination is significant for discerning the gravity of the prohibitions contained therein, and the corresponding serious nature of any violation thereof. Widespread acceptance of such provisions, necessary to attain customary international law status, also furnishes evidence of their serious nature. As discussed below, the serious nature of the alleged war crime is a critical element to trigger the jurisdic-

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84. *Filartaga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). See also *CARTER & TRIMBLE*, *supra* note 76, at 252.

85. See *RESTATEMENT (THIRD)*, *supra* note 79, § 102 cmt. c.

*Opinio Juris.* For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.

*Id.*

tion of Article 18. Because of this, Part VI addresses the customary international law status of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2).

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86. Customary status may be achieved in various ways, ranging from diplomatic relations between states, state practice, practice of international organs, state laws, decisions of state and international courts, and state military and administrative practices. See CARTER & TRIMBLE, *supra* note 76, at 142. Other sources include United Nations resolutions, *id.* at 147; unratified treaties, *id.* at 153; and “works of jurists and commentators,” *id.* at 247. See also *The Paquete Habana*, 175 U.S. 677 (1900) (regarding works of jurists and commentators).

International law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.* at 700. Lastly, concepts contained within ratified treaties may evolve from conventional law into customary international law. “Provisions of conventions that are not international law when incorporated therein may develop into international law by general acceptance by nations.” BISHOP, *supra* note 74 at 34.

87. As of 31 March 2000, 194 nations had either ratified or acceded to Geneva Conventions I-IV, *supra* note 13. International Committee for the Red Cross, *International Humanitarian Law*, at <http://www.icrc.org/ihl> (last visited 21 February 2001) (State Parties and Signatories—by Treaties, Geneva Conventions of 12 August 1949, States parties).

88. As of 31 March 2000, 154 nations had either ratified or acceded to Protocol II, *supra* note 14. International Committee for the Red Cross, *International Humanitarian Law*, at <http://www.icrc.org/ihl> (last visited 21 February 2001) (State Parties and Signatories—by Treaties, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, States parties). The United States has signed but not ratified Protocol II. David J. Scheffer, Ambassador-at-Large for War Crimes Issues, recently stated:

I am pleased to report that a few weeks ago President Clinton reiterated his support to the Senate for prompt approval of Protocol II Additional to the Geneva Conventions of 1949, which former President Reagan transmitted to the Senate for advice and consent to ratification in 1987 but which has not been acted upon.

David J. Scheffer, Fifth Hauser Lecture on International Humanitarian Law, New York University School of Law (3 Feb. 1999), available at <http://www.un.int/usa/99sch203.htm>.



## VI. Common Article 3, Protocol II, and Customary International Law

## A. Common Article 3

Common Article 3<sup>89</sup> was established to provide fundamental humanitarian norms for the treatment of civilians and non-combatants, those placed *hors de combat* either due to injury or sickness, in internal armed conflicts.<sup>90</sup> During the debates surrounding Common Article 3, the concern was balancing the rights of innocent victims of internal armed conflict against the need to preserve state sovereignty.<sup>91</sup> Some States feared that recognition of certain fundamental humanitarian rights in an internal conflict would result in giving formal, international recognition to a belligerent group, thus infringing upon the sovereignty of the State trying to quell the belligerency.<sup>92</sup> As a result, the “non-effect” clause inserted at the close of Common Article 3 reads: “The application of the preceding provisions shall not affect the legal status of the Parties to the conflicts.”<sup>93</sup> This allowed State signatories to agree that certain basic principles of protection applied to non-international armed conflicts while preserving their State sovereignty.<sup>94</sup>

Common Article 3 emerged to guarantee “humane treatment”<sup>95</sup> in an internal armed conflict.<sup>96</sup> Common Article 3’s humane treatment standard is a “compulsory minimum.”<sup>97</sup> At the close of the twentieth century, 194 states, including the United States, had ratified or acceded to the four Geneva Conventions of 1949.<sup>98</sup> Arguably, Common Article 3 was conventional international law binding only upon those nations who ratified the Conventions when initially passed. Over time, however, the protections found in Common Article 3 have risen to the level of customary international law applicable to all non-international armed conflicts.<sup>99</sup> Today, no

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89. Geneva Conventions I-IV, *supra* note 13.

90. Common Article 3 is the only provision in the four Geneva Conventions of 1949 dealing with internal armed conflict. See David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L L. 37 (1979).

91. COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31 (Jean S. Pictet et al. eds., 1958) [hereinafter OFFICIAL COMMENTARY, PROTOCOL IV].

92. *Id.*

93. *Id.* at 44.

94. OFFICIAL COMMENTARY, PROTOCOL II, *supra* note 6, ¶ 4361.

95. OFFICIAL COMMENTARY, PROTOCOL IV, *supra* note 91, at 38.

96. *Id.*

97. *Id.* at 37.

98. See *supra* note 87.

state could assert with any degree of legitimacy that during an internal armed conflict it is permissible for state actors to murder or torture those not taking an active part in the hostilities.<sup>100</sup>

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99. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14 (June 27) (Merits), *reprinted in* 15 I.L.M. 1023 (1986); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Tadic Appeal*, *supra* note 11; *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1401 (1998); *Prosecutor v. Kambada*, No. ICTR-97-23-S (Sep. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1413 (1998). See also Newton, *supra* note 31, at 56-59.

Recent developments have reinforced the status of Common Article 3 as customary international law. In the context of an internal armed conflict in Rwanda, the Independent Commission of Experts concluded that Common Article 3 supports the principle of individual criminal liability. As a result, the Statute for the International Tribunal for Rwanda conveyed prosecutorial power over violations and threatened violations of Common Article 3. Arguing for the Statute of the International Tribunal for the Former Yugoslavia, the representatives of the United States, of the United Kingdom, and of France all asserted that violations of Common Article 3 are punishable international crimes. The Joint Chiefs of Staff and the American Bar Association also recognize that the customary international law character of Common Article 3 supports international criminal prosecution.

*Id.* (citations omitted). Even when initially passed, Jean Pictet, the official reporter for the commentary, seemed to imply that the protections in Common Article 3 had already risen to the level of customary international law. In discussing the non-effect clause, Pictet stated:

It [the non-effect clause] makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider valid everywhere and under all circumstances and as being outside war itself.

OFFICIAL COMMENTARY, PROTOCOL IV, *supra* note 91, at 44.

100. Both murder and torture are specifically prohibited by Common Article 3(1)(a) of the Geneva Conventions of 1949. Geneva Conventions I-IV, *supra* note 13, art. 3(1)(a).

## B. Protocol II

Protocol II to the 1977 Protocols Additional to the Geneva Conventions was enacted to “supplement and develop Common Article 3.”<sup>101</sup> It was drafted in response to allegations that Common Article 3, while establishing the minimum humane treatment standard applicable in non-international armed conflicts, was difficult to apply in practice, in part due to its brevity and lack of detail.<sup>102</sup> Like Common Article 3, Protocol II has no legal effect concerning recognition of the belligerents or insurgents.<sup>103</sup>

Protocol II expands and further develops the protections found in Common Article 3. Significant to the issue of customary law is Article 4 of Protocol II, entitled “fundamental guarantees”<sup>104</sup> and the protections

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101. See OFFICIAL COMMENTARY, PROTOCOL II, *supra* note 6, ¶¶ 4424-4426.

[4424] This paragraph [the preamble] reaffirms the great importance of common Article 3, the ‘parent provision’, thus presenting Protocol II as an extension of it. [4425] The humanitarian principles enshrined in that article are recognized as the foundation of the protection of the human person in cases of non-international armed conflict. What are these principles? [4426] They can be summarized by stating that they are fundamental guarantees of humane treatment (physical and mental integrity) for all those who do not, or who no longer participate in hostilities, and of the right to a fair trial. Respect for such humanitarian principles implies in particular protection of the civilian population, respect for the enemy hors de combat, assistance for the wounded and sick, and humane treatment for those deprived of their liberty. Protocol II reaffirms or develops these principles on the basis of these fundamental tenets[,] which remain unchanged. The conditions under which they are to be applied are laid down in Article 1 (*Material field of Application*).

*Id.*

102. See *id.* ¶ 4361. “Although common Article 3 lays down the fundamental principles of protection, difficulties of application have emerged in practice, and this brief set of rules has not always made it possible to deal adequately with urgent humanitarian needs.” *Id.*

103. See *id.* ¶ 4440.

Like common Article 3, Protocol II has a purely humanitarian purpose and is aimed at securing fundamental guarantees for individuals in all circumstances. Thus, its implementation does not constitute recognition of belligerency even implicitly nor does it change the legal nature of the relations between the parties engaged in the conflict.

*Id.*

therein, specifically those in Articles 4(1) and 4(2). At the close of the twentieth century, 154 states had ratified or acceded to Protocol II.<sup>105</sup> As with Common Article 3, Protocol II, Articles 4(1) and 4(2), began as conventional international law binding only upon those nations ratifying the Protocol. Over the twenty-three years since its inception, however, the protections found in Protocol II, Articles 4(1) and 4(2), have arguably risen to the level of customary international law applicable to non-international armed conflicts.<sup>106</sup> Furthermore, recent developments also demonstrate that serious violations of these provisions are violations of the law of war giving rise to individual criminal responsibility,<sup>107</sup> thus becoming cognizable under Article 18 of the UCMJ.

#### VII. Evolution of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2) into Customary International Law Giving Rise to Individual Criminal Responsibility

This section examines the evolution of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), from conventional international law into customary international law. It also establishes that violations of these provisions are serious violations of international humanitarian law giving rise to individual criminal responsibility.

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104. Protocol II, *supra* note 14, art. 4.

105. The United States has not ratified Protocol II. *See supra* note 88. However, as a signatory of this treaty, the United States remains bound to refrain from any action that would defeat the object and purpose of this treaty. *See* RESTATEMENT (THIRD), *supra* note 79, § 102.

106. *See, e.g.*, Tadic Appeal, *supra* note 11; Prosecutor v. Akayesu, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1401 (1998); Prosecutor v. Kambada, No. ICTR-97-23-S (Sep 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1413 (1998).

107. Whether the remaining provisions of Common Article 3 and Article 4, Protocol II, are customary in nature for which serious violations give rise to individual criminal responsibility remains to be seen. For example, the statement that Common Article 3, in its entirety, has risen to the level of customary international law is generally accepted. *See supra* note 99. Despite this acceptance, there is no evidence to support the proposition that violation of paragraph 2 of Common Article 3, the duty to collect and care for the wounded, is a serious violation of international humanitarian law giving rise to individual criminal responsibility. In short, "every violation of the law of war is a war crime," but not every war crime is a serious violation of international humanitarian law subjecting the violator to criminal prosecution. Tadic Appeal, *supra* note 11, para. 94.

A. International Organ—ICRC Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts

One source in evaluating whether conventional international law has evolved into customary international law is the position taken by international organs. Perhaps the most significant institution when dealing with armed conflict is the International Committee of the Red Cross (ICRC). The subject of the binding nature of Common Article 3 and Protocol II has been a significant issue for the ICRC. In 1978, the International Committee for the Red Cross along with the League of Red Cross Societies published the Fundamental Rules of International Humanitarian Law Applicable in Armed Conflict.<sup>108</sup> The rules were developed by a “small working group of experts from the International Committee of the Red Cross, the League of Red Cross Societies, and National Red Cross Societies,” the purpose of which was the “dissemination of knowledge of international humanitarian law.”<sup>109</sup> The rules “express in useful condensed form some of the most fundamental principles of international humanitarian law governing armed conflicts.”<sup>110</sup> The rules, informal in nature, are based on the four Geneva Conventions of 1949, the two Protocols Additional to the Geneva Conventions of 1977, the Hague Regulations, and customary international law.<sup>111</sup> The results of the work of experts from these noted international relief organizations lend significant support to the

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107. (continued)

[T]he violation must be “serious,” that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling afoul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by an army occupying an enemy territory.

*Id.* A review of the current indictments from the International Tribunals for Yugoslavia and Rwanda fail to reveal anyone who is charged with a violation of the law or customs of war for either failing to collect and care for the sick and wounded or to educate local children. Common Article 3(2) requires that the “wounded and sick shall be collected and cared for.” Geneva Conventions I-IV, *supra* note 13, art. 3(2). For the full text of Protocol II, Article 4(3), see *supra* note 14.

conclusion that the provisions of Common Article 3 and Article 4 of Protocol II should today be considered customary international law.

Another significant source of authority related to the status of these provisions is the Appellate Chamber of the ICTY. In its *Tadic* decision, the court specifically noted the role played by the ICRC in the evolution of

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108. 206 INTERNATIONAL REVIEW OF THE RED CROSS 246 (1978) (Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts), *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 469-70 (1989). The rules provide:

Fundamental rules of humanitarian law applicable in armed conflicts[:]

(1) Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.

(2) It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.

(3) The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *materiel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.

(4) Captured combatants and civilians under authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

(5) Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

(6) Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

(7) Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

*Id.*

109. *Id.*

110. *Id.*

111. *Id.*

humanitarian principles into customary international law. The Chamber stated:

When the parties [to a conflict], or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.<sup>112</sup>

#### B. United Nations Resolutions and Establishment of International Tribunals

Since 1991, the United Nations has been extremely active in attempting to reduce the violence in the former Yugoslavia and Rwanda.<sup>113</sup> Through its resolutions and subsequent establishment of two international tribunals, the United Nations has helped to develop the law in the area of non-international or internal armed conflicts. More importantly, the resolutions, the International Tribunal statutes, and the decisions of the International Tribunals have arguably solidified the conclusion that Common Article 3(1) and Articles 4(1) and 4(2) of Protocol II have attained customary international law status. Perhaps more importantly, these resolutions, statutes, and decisions have established that violations of these provisions are serious violations of international humanitarian law that subject the violator to criminal prosecution.

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112. *Tadic Appeal*, *supra* note 11, para. 109.

113. Since Security Council Resolution 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991), the Security Council has promulgated over twenty-five resolutions dealing with the conflicts in the former Yugoslavia and Rwanda. *See* United Nations, *Security Council Resolutions*, at <http://www.un.org/documents/scres.htm> (last visited 22 Feb. 2001).

*1. United Nations Resolutions Regarding the Former Yugoslavia and the International Criminal Tribunal for the Former Yugoslavia*

Between 1991 and 1993, the United Nations addressed the fighting in Bosnia-Herzegovina on at least fifteen occasions. This attention ultimately led to the adoption of United Nations Security Council Resolution 827,<sup>114</sup> which established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and adopted the tribunal's statute.<sup>115</sup>

Through these many resolutions addressing the violence in the former Yugoslavia, the Security Council repeatedly noted: its grave alarm at the "continuing reports of widespread violations of international humanitarian law . . . including reports of mass killings and the continuance of the practice of 'ethnic cleansing;'"<sup>116</sup> the obligation of all parties to the conflict "to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949;"<sup>117</sup> the need to "put an end to such crimes and to take effective measures to bring to justice the persons responsible for them;"<sup>118</sup> and that the situation in the former Yugoslavia constituted a "threat to international peace and security."<sup>119</sup>

By noting the threat to international peace and security, the Security Council triggered its Chapter VII authority under the United Nations Charter to take measures necessary to restore peace and stability to the region.<sup>120</sup> It was under this authority that the Security Council established the ICTY and its statute. Although international law and the Charter of the United Nations allow for the establishment of the ICTY,<sup>121</sup> the United

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114. U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993).

115. *Id.*

116. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992), *reprinted in* 31 I.L.M. 1476 (1992).

117. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992) (reaffirming all prior resolutions related to violations of international humanitarian law in the former Yugoslavia), *reprinted in* 31 I.L.M. 1470 (1992).

118. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal for the former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, U.N. Doc. S/25704 (1993) (Report and Annex) (including a proposed statute for an International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia), *reprinted in* 32 I.L.M. 1159 (1993).

119. *Id.*



Nations has no authority to make criminal what is not already criminal.<sup>122</sup> Thus, creation of the ICTY Statute via Security Council Resolution 827 did not result in a new body of substantive criminal law or an international penal code. Rather, it simply created a forum in which to enforce conventional and customary international law existing at the time the tribunal was created, and it established criminal penalties for violations thereof. Therefore, authorizing prosecution for specified offenses must be interpreted as an assertion by the Security Council that, prior to adoption of Resolution 827, international law prohibited those offenses.

According to the ICTY Statute, the crimes falling within the jurisdiction of the court under international law include grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>123</sup> Article 3 of the ICTY Statute is relevant to an analysis of the customary nature of Common Article 3(1) of the Geneva Conventions of 1949 and Articles 4(1) and 4(2) of Protocol II. It provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.<sup>124</sup>

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120. Chapter VII of the United Nations Charter entitled—Action With Respect To Threats Of Peace, Breaches Of The Peace, And Acts Of Aggression—authorizes the Security Council, under Article 39 of Chapter VII, to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. CHARTER ch. 7, arts. 39, 41-42. Both the ICTY as well as the ICTR are tribunals established pursuant to the Security Council’s Chapter VII authority.

121. *See* Tadic Appeal, *supra* note 11, paras. 28-48.

122. *Id.*

123. ICTY Statute, *supra* note 7.

124. *Id.* art. 3.

Article 3 further grants the court jurisdiction over all violations of the laws or customs of war occurring in the former Yugoslavia since 1991, the temporal limitation placed on the tribunal's jurisdiction by Article 1 of the ICTY Statute.<sup>125</sup> In the landmark case of *Prosecutor v. Dusko Tadic*,<sup>126</sup> as well as the separately issued *Tadic* final judgment,<sup>127</sup> the ICTY concluded its jurisdiction encompassed violations of Common Article 3 of the Geneva Conventions.

Article 7 of the ICTY Statute addresses individual criminal responsibility for the offenses referred to in Articles 2 through 5 of the statute. Article 7 defines the scope of this responsibility by stating:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and rea-

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125. Article 1 of the ICTY Statute limits the court's jurisdiction to "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1991." *Id.* art. 1. The court's jurisdiction is further limited by Article 8 which states: "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991." *Id.* art. 8.

126. *Tadic* Appeal, *supra* note 11.

127. *Prosecutor v. Tadic*, No. IT-94-1-AR72 (May 7, 1997) (Opinion and Judgment), reprinted in part in 36 I.L.M. 908 (1997). *Tadic* was found guilty of eleven counts of a thirty-four count indictment, five counts of which alleged violations of the laws or customs of war under Article 3 of the ICTY Statute. The substantive bases of the Common Article 3 charges were murder and cruel treatment. *Tadic* was convicted of "cruel treatment" in violation of Common Article 3(1)(a) of the Geneva Conventions of 1949, which prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." *Tadic* was found not guilty of the murder charges, the court finding that the prosecutor failed to prove these charges beyond a reasonable doubt. *Id.*

sonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.<sup>128</sup>

This article of the ICTY Statute merely expresses the concept that people, not nations, commit violations of the laws or customs of war. Therefore, individual persons are accountable for their actions. "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."<sup>129</sup> When coupled with the jurisdictional breadth of the tribunal, which will be analyzed in depth below, this provision supports the conclusion that, as a matter of customary international law, individuals who violate Common Article 3 or Protocol II are subject to individual criminal liability for their misconduct.

## *2. United Nations Resolutions Regarding Rwanda and the International Criminal Tribunal for Rwanda*

Approximately eighteen months after adopting Security Council Resolution 827,<sup>130</sup> the Security Council adopted Security Council Resolution 955.<sup>131</sup> As with Resolution 827, this action established an international tribunal, but for prosecution of war crimes committed during the internal conflict in Rwanda. Specifically, it created the International Tribunal for Rwanda and adopted the statute for this tribunal.<sup>132</sup>

Like Security Council Resolution 827, Security Council Resolution 955 was preceded by numerous other resolutions addressing the conflict in Rwanda. In these resolutions, the Security Council expressed its concern

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128. ICTY Statute, *supra* note 7, art. 7.

129. Thomas Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, 322 INT'L REV. RED CROSS 29 (1998) (citing THE TRIAL OF MAJOR GERMAN WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY pt. 22, at 47 (1950)).

130. S.C. Res. 827, *supra* note 114.

131. S.C. Res. 955, *supra* note 27.

132. ICTR Statute, *supra* note 27.

for the ongoing violations of international humanitarian law and stated that persons committing these violations were “individually responsible.”<sup>133</sup> In Resolution 955, the Security Council noted “its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda”<sup>134</sup> and determined the situation in Rwanda constituted a “threat to international peace and security.”<sup>135</sup> As with the situation in Bosnia-Herzegovina, the Security Council determined it was necessary “to put an end to such crimes and take effective measures to bring to justice those responsible . . . for them.”<sup>136</sup> The mechanism to “bring to justice” those responsible was the International Criminal Tribunal for Rwanda (ICTR).<sup>137</sup>

The crimes in violation of international law made subject to the jurisdiction of the ICTR include genocide, crimes against humanity, and violations of Common Article 3 and Protocol II.<sup>138</sup> However, because the conflict in Rwanda was purely internal, unlike the conflict in the former Yugoslavia which had characteristics of both internal and international armed conflict,<sup>139</sup> grave breaches of the Geneva Conventions of 1949 were not included within the jurisdiction of the ICTR.<sup>140</sup> These offenses had been specifically included within the jurisdiction of the ICTY.<sup>141</sup> Other-

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133. S.C. Res. 955, *supra* note 27, art. 6(1).

134. *Id.* pmbl.

135. *Id.*

136. *Id.*

137. As with the ICTY, the ICTR was created pursuant to Chapter VII of the Charter of the United Nations. *See* ICTR Statute, *supra* note 27; U.N. CHARTER ch. 7, arts. 39, 41-42. Therefore, creation of the ICTR and its statute in no way created any new source of international penal law. Instead, as with the ICTY, by creating the ICTR the Security Council simply created another forum to enforce the international law prohibitions that already existed when the underlying offenses were committed.

138. ICTR Statute, *supra* note 27.

139. *See* Tadic Appeal, *supra* note 11, para. 77.

We conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the security council clearly had both aspects of the conflicts in mind when they adopted the statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

*Id.*

140. ICTR Statute, *supra* note 27.

wise, the two statutes are substantially similar with one significant distinction: the ICTR Statute,<sup>142</sup> unlike the ICTY Statute,<sup>143</sup> specifically mentions violations of Common Article 3 and Protocol II as crimes within the jurisdiction of the ICTR.<sup>144</sup> This enhanced jurisdiction is articulated by Article 4 of the ICTR Statute, which states:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
- h) Threats to commit any of the foregoing acts.<sup>145</sup>

This article of the ICTR Statute encompasses all of the prohibitions of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2).<sup>146</sup> The statute also addresses the individual criminal responsibility that attaches to the violation of these provisions in Article 6.<sup>147</sup> This article is almost identical to the ICTY Statute individual criminal responsibility provision, Article 7.<sup>148</sup>

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141. ICTY Statute, *supra* note 7.

142. ICTR Statute, *supra* note 27.

143. ICTY Statute, *supra* note 7.

144. ICTR Statute, *supra* note 27, art. 4.

145. *Id.*

As with the ICTY, in establishing the ICTR the United Nations created a forum for the prosecution of serious violations of international humanitarian law. The United Nations resolutions, the tribunals, and the statutes concerning the ICTY and ICTR represent Security Council manifestations articulating what United Nations member states recognized as existing international law. This is powerful evidence of the customary international law status of Common Article 3 and Article 4 of Protocol II. Both statutes created, either expressly or through interpretation, forums in which individuals could be held criminally responsible for crimes of universal jurisdiction, genocide, crimes against humanity, and violations of Common Article 3 and Article 4 of Protocol II.<sup>149</sup> The creation of these tribunals, and the inclusion within their jurisdiction of violators of Common Article 3 and Protocol II, serves as clear evidence that the member states of the United Nations consider violations of these law of war provisions during an internal armed conflict as a legitimate basis for “trial, by the law of war.”

### C. State Legislation

As previously discussed, state practice is an essential aspect of assessing the international law status of Common Article 3 and Protocol II. State

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146. The ICTR’s authority to prosecute violations of Common Article 3 and Protocol II is limited temporally to offenses committed between 1 January 1994 and 31 December 1994. Article 1 of the ICTR Statute states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

*Id.* art. 1. Article 7 of the Statute states:

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

*Id.* art. 7.

recognition is evidenced by the treatment of violations of these provisions in domestic legal systems. An analysis of this evidence further supports the conclusion that Common Article 3 and Protocol II have attained the status of customary international law, and that violators are subject to individual criminal responsibility.

*1. The United States and the War Crimes Act of 1996*

Perhaps the most significant development in the treatment of war crimes by the United States was enactment of the War Crimes Act of 1996.<sup>150</sup> This Act makes the commission of a war crime a violation of U.S. domestic law when the “person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.”<sup>151</sup> Of most significance to the analysis

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147. Article 6 of the ICTR Statute states:

Individual Criminal Responsibility[:]

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

ICTR Statute, *supra* note 27, art. 6. The only significant difference between Article 6 of the ICTR Statute and Article 7 of the ICTY Statute is that the latter encompasses an additional crime, “grave breaches.” The only other difference is paragraph 4, Article 6, of the ICTR Statute which inserted the words “for Rwanda” after the word Tribunal. Otherwise, the two articles addressing individual responsibility are identical.

148. ICTY Statute, *supra* note 7, art. 7.

149. The ICTY Statute goes one step farther in reaching conflicts that are international in nature, providing for the prosecution of grave breaches of the Geneva Conventions of 1949. *Id.* art. 2.

150. 18 U.S.C.S. § 2441 (LEXIS 2000).

of whether a violation of the law applicable to an internal armed conflict subjects the violator to punishment under the law of war, the Act includes within its definition of war crime “violation of common Article 3” and violation of “any protocol to such convention to which the United States is a party and which deals with non-international armed conflict.”<sup>152</sup>

By including within its scope violations of Common Article 3, which occur in a purely internal armed conflict, the War Crimes Act of 1996 demonstrates that the United States considers criminal accountability for violation of this article as customary international law.<sup>153</sup> Although the offense must involve a national of the United States, when jurisdiction is based on victim nationality, there is no requirement in the Act that the perpetrator’s state be bound to the Geneva Conventions as a treaty party. Thus, a non-U.S. national may be subjected to a federal prosecution for committing an act against a U.S. national in violation of Common Article 3, even if the actor’s state is not bound to the Geneva Conventions. This can only be interpreted as evidence that all states are bound to comply with Common Article 3 as a matter of customary international law. Should the United States ratify Protocol II, the same logic would also extend this conclusion to that treaty.

The War Crimes Act of 1996 provides significant evidence that the United States considers Common Article 3 and Protocol II customary international law.<sup>154</sup> It could be argued that the Act has minimal impact because it merely executes certain provisions of the four Geneva Conventions of 1949.<sup>155</sup> However, the legislative history of the Act clearly contradicts such a narrow interpretation. This history indicates the purpose of the Act was to provide for a federal forum in which to prosecute war criminals.<sup>156</sup> If the Act was passed merely as implementing legislation for the “prosecute or extradite” provisions of the four conventions,<sup>157</sup> it would not have addressed the Hague Regulations or Common Article 3.<sup>158</sup> Therefore, owing to the scope of the Act, it must be accorded significance beyond that of a pure treaty-execution statute. Instead, it serves as evidence that both the legislative and executive branches of the U.S. government considered Common Article 3 a customary international law basis for imposing criminal liability on any individual who violates that article. As such, it reflects the state practice of the United States—arguably, the sole

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151. *Id.* The War Crimes Act of 1996, when initially passed, did not cover internal armed conflicts and violations of Common Article 3. The Act was subsequently amended in 1997 to address these situations. *See* H.R. REP. NO. 105-204 (1997).



remaining superpower—which historically influences the development of international law and the law of war in particular.

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152. The Act defines war crimes as any conduct:

- (1) defined as a grave breach in any of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a violation of common article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C.S. § 2441(c) (LEXIS 2000).

Although the scope of this Act could potentially overlap with the jurisdiction of the criminal tribunals established by the United Nations, it is important to note that the jurisdictional basis for the War Crimes Act of 1996 differs from that of the ICTY. *See* ICTY Statute, *supra* note 7; ICTR Statute, *supra* note 27. As noted above, jurisdiction under the War Crimes Act is limited to incidents where either the accused or the victim is a national of the United States. Therefore, this Act is an exercise of domestic legislation based on the jurisdictional doctrines of either nationality or passive personality. *See* RESTATEMENT (THIRD), *supra* note 79, § 402(2), cmt. a. “International law recognizes links of . . . nationality, Subsection (2), as generally justifying the exercise of jurisdiction to prescribe.” *Id.* cmts. a., g. “The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.” *Id.* cmt. g.

In contrast, the jurisdiction of the tribunals is clearly based on the exercise of international law pursuant to the concept of universal jurisdiction. *See* RESTATEMENT (THIRD), *supra* note 79, § 404.

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

*Id.* The reporter’s note to Section 404 states, in part: “That genocide and war crimes are subject to universal jurisdiction was accepted after the Second World War.” *Id.*

## 2. *The Practice of Other States*

The United States is not the only nation to address law of war violations committed during the course of an internal armed conflict through domestic criminal law. Domestic legislation reflecting that individual criminal liability attaches to violators of Common Article 3, Protocol II, or both, exists in the criminal codes of the following countries: Belgium, Spain, Finland, Sweden, the Netherlands, Nicaragua, Germany, Russia, Portugal, Ethiopia, Yugoslavia, and Slovenia.<sup>159</sup> This varied domestic leg-

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153. Because this treaty article does not include any criminal liability component, the inclusion of violation of this article in the War Crimes Act transcends a mere execution of treaty obligation.

154. Recall, customary international law evolves from state practice, legislation, treaties, the opinion of scholars, and other sources. Legislation by the United States defining war crimes is some evidence bearing on the customary nature of Common Article 3(1) and Protocol II, Articles 4(1) and 4 (2). *See supra* note 88.

155. Ratified by the United States in 1955. Geneva Conventions I-IV, *supra* note 13.

156. H.R. REP. NO. 104-698 (1996), *reprinted in* 1996 U.S.C.C.A.N 2166.

157. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, *opened for signature* Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 50, *opened for signature* Aug 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, *opened for signature* Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention No. III); Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, *opened for signature* Aug 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Geneva Convention No. IV) [hereinafter Geneva Conventions I-IV, Grave Breach Provisions]. The Geneva Conventions require that "signatory countries enact appropriate legislation criminalizing the commission of grave breaches." *Id.* The conventions also impose an obligation on the signatories to prosecute or extradite persons guilty of grave breaches regardless of their nationality, stating:

The High Contracting Parties [signatory countries] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

*Id.*

islation serves as further evidence of state practice regarding the criminal nature of violation of these law of war provisions. These nations, along with the United States, view the provisions of Common Article 3, Protocol II, or both, as a source of obligation under international law, the violation of which entails individual criminal responsibility.

#### D. The Rome Statute of the International Criminal Court, 1998

The evidence of state practice cited above reflects the positions of a limited number of states. However, in 1998, the opening of a multi-lateral treaty for ratification provided the opportunity for virtually every state in the international community to express a position on the consequences of violating the law applicable to internal armed conflict. On 17 July 1998,

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158. "Grave breaches" defines serious violations of the law of war committed against "protected persons" under the Geneva Conventions of 1949. *See* The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 4, *opened for signature* Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 4, *opened for signature* Aug 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, *opened for signature* Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention No. III); Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, *opened for signature* Aug 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Geneva Convention No. IV). Protected persons are defined in terms of the respective conventions only and is not connected to Common Article 3 or the Hague Regulations. Violations of Common Article 3 or the Hague Regulations, as such, trigger no obligation to extradite or prosecute. Regarding simple breaches of the respective conventions, all four conventions contain the following language: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than grave breaches defined in the following Article." Geneva Conventions I-IV, Grave Breach Provisions, *supra* note 157. Breaches other than grave breaches do not trigger a prosecute or extradite obligation. *Id.* Therefore, the United States could have met its international obligation under the Geneva Conventions by limiting the scope or reach of its legislation to grave breaches of the Conventions only. By broadening the scope of the War Crimes Act of 1996 to cover violations of Common Article 3, the United States recognized the universal nature of these violations and passed domestic legislation to allow for prosecution in domestic courts. Although serious violations of Common Article 3 are crimes of universal jurisdiction, absent domestic legislation, there would be no mechanism in which to bring the case into Federal District Court. The War Crimes Act has provided for such a mechanism. *See* War Crimes Act of 1996, 8 U.S.C.S § 2441 (LEXIS 2000).

159. *See* Graditzky, *supra* note 129 (citing domestic legislation for Belgium, Spain, Finland, Sweden, the Netherlands, Nicaragua, Germany, Russia, Portugal, Ethiopia, Yugoslavia, and Slovenia).

the United Nations Security Council adopted the Rome Statute of the International Criminal Court (Rome Statute).<sup>160</sup> The Rome Statute's primary purpose was to create a forum for prosecuting crimes of international concern.<sup>161</sup> Article 5 limits the International Criminal Court's jurisdiction to "the most serious crimes of concern to the international community as a whole."<sup>162</sup> The inclusive crimes are genocide (Article 6), crimes against

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160. Rome Statute of the International Criminal Court arts. 5(a)-(d), U.N. Doc. A/CONF.183/9 (1998) (adopting a statute for an international criminal court to prosecute crimes of genocide, crimes against humanity, war crimes, and the crime of aggression) [hereinafter *The Rome Statute*], reprinted in 37 I.L.M. 999 (1998). "As it concluded in Rome five weeks of deliberations, the Conference adopted by a vote of 120 in favour to 7 against, with 21 abstentions, the Statute for the Court. The non-recorded vote was requested by the United States." Press Release, United Nations, U.N. Doc. L/ROM/22 (July 17, 1998), available at <http://www.un.org/icc/pressrel/lrom22.htm>. The press release summarized the position of the United States as follows:

The United States does not accept the concept of jurisdiction in the Statute and its application over non-States parties. It voted against the Statute. Any attempt to elaborate a definition of the crime of aggression must take into account the fact that most of the time it was not an individual act, instead wars of aggression existed. The Statute must also recognize the role of the Security Council in determining that aggression has been committed. No State party can derogate from the power of the Security Council under the United Nations Charter, which has the responsibility for the maintenance of international peace and security. The United States will not support resolution "e" in the final act. Including crimes of terrorism and drug crimes under the Court will not help the fight against those crimes. The problem is not one of prosecution but of investigation, and the Court will not be well equipped to do that.

*Id.* [hereinafter U.S. Position]. As of 12 February 2001, the statute was signed by 139 nations and ratified by twenty-nine. On 31 December 2000, Ambassador Scheffer signed the statute for the United States. United Nations, *Rome Statute of the International Criminal Court* (Feb. 12, 2001) (Ratification Status), at <http://www.un.org/law/icc/statute/status.htm>.

161. The preamble to the Rome Statute states, in part, that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," and that the "International Criminal Court established under this statute shall be complementary to national criminal jurisdictions." Rome Statute, *supra* note 160, at 1002. As evident from its preamble, the Rome Statute recognizes a states right to prosecute individuals for international crimes, that international crimes entail individual criminal responsibility, and prosecution by an international court is separate and distinct from prosecution in a national court. *Id.*

162. *Id.* art. 5, at 1003-04.

humanity (Article 7), war crimes (Article 8), and the crime of aggression.<sup>163</sup>

The war crimes provision, Article 8,<sup>164</sup> defines war crimes in four sub-categories: grave breaches of the Geneva Conventions of 1949; “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;” “serious violations” of Common Article 3 during internal armed conflicts; and “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”<sup>165</sup> Each defined sub-category of war crimes provides specific examples of prohibited acts.

Articles 8(c) and 8(e) of the Rome Statute cover Common Article 3 and Article 4 of Protocol II, respectively.<sup>166</sup> Article 8(c) explicitly addresses Common Article 3 and its prohibitions, whereas Article 8(e) addresses Protocol II, Article 4, and its prohibitions by implication. For example, where Protocol II, Article 4, explicitly prohibits rape,<sup>167</sup> Article 8(e) of the Rome Statute lists rape and other sexual offenses at Article 8(e)(vi) as examples of “other serious violations of the laws and customs applicable in [internal armed conflicts].”<sup>168</sup> All prohibited acts mentioned in Common Article 3(1)<sup>169</sup> and Protocol II, Articles 4(1) and 4(2),<sup>170</sup> are prohibited by Articles 8(c)<sup>171</sup> and 8(e)<sup>172</sup> of the Rome Statute, respectively.

The Rome Statute, in addition to mirroring the prohibitions of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), by its plain language limits Article 8(e) war crimes to those offenses that have achieved

163. *Id.* However, the Rome Statute does not define the crime of aggression in a specific article.

164. *Id.* art. 8, at 1006-09.

165. *Id.* arts. 8(a)-(c), 8(e), at 1006-09.

166. *Id.* arts. 8(c), 8(e), at 1008-09.

167. Protocol II, Article 4(2)(e) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.” Protocol II, *supra* note 14, art. 4.

168. Article 8(e)(vi) prohibits “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, and any other form of sexual violence constituting a serious violation of article 3 common to the four Geneva Conventions.” Rome Statute, *supra* note 160, art. 8(e), at 1008-09.

169. Geneva Conventions I-IV, *supra* note 13, art. 3(1).

170. Protocol II, *supra* note 14, art(s). 4(1) and 4(2).

171. Rome Statute, *supra* note 160, art. 8(c), at 1008.

172. *Id.* art. 8(e), at 1008-09.

customary international law status. Article 8(e) addresses “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”<sup>173</sup> The phrase “serious violations” is qualified or limited to violations “within the established framework of international law.”<sup>174</sup> Therefore, the violation must be customary in nature to be cognizable under this provision. By listing those offenses deemed serious offenses “within the established framework of international law,”<sup>175</sup> Article 8(e) defines them as offenses under customary international law.

This international legislation is perhaps the most comprehensive evidence of both state practice and *opinio juris* indicating the customary international law status of these offenses. It represents the position of 139 nations that have signed the Rome Statute, twenty-nine of which have already ratified it.<sup>176</sup> Although the United States expressed reservations before signing the Rome Statute on 21 December 2000,<sup>177</sup> this should not be interpreted as meaning the United States disagreed with treating the underlying acts as violations of customary international law. Rather, the United States supported the creation of an International Criminal Court and was generally supportive of the Rome Statute.<sup>178</sup> Likewise, the United States never opposed the idea of a court to prosecute the international crimes of genocide, crimes against humanity, and war crimes, crimes generally viewed as crimes of universal jurisdiction. Instead, the United

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173. *Id.*

174. *Id.*

175. *Id.*

176. *See supra* note 161.

177. *See supra* note 160.

178. *See* Ambassador Bill Richardson, Statement Before the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (June 17, 1998), available at <http://www.un.org/icc/index.htm> (Speeches, 17 June 1998).

The nations of the world are gathered to complete an important piece of unfinished business: the creation of an International Criminal Court. It is time that we make real the aspirations of the past fifty years: the establishment of a Court to ensure that the perpetrators of the worst criminal assaults on humankind—genocide, serious war crimes, and crimes against humanity—do not escape from justice. That is why President Clinton has repeatedly called for the establishment of a permanent International Criminal Court by the end of this century. Today, we are within reach of that goal.

*Id.*

States opposed the procedural mechanism in which a case was brought before the court and questioned the independence of the prosecutor from the Security Council.<sup>179</sup> There was also some criticism because the Rome Statute left undefined the crime of aggression.<sup>180</sup>

#### E. Court Decisions (*Nicaragua* Decision, 2d Circuit, ICTY, ICTR)

In addition to state practice and multi-lateral treaties, domestic and international court decisions have also played a significant role in the evolution of customary international law.<sup>181</sup> These decisions significantly impact the evolution of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), from purely conventional law to customary international law binding on all nations. Notable decisions include: the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*);<sup>182</sup> the United States Court of Appeals for the Second Circuit decisions in *Kadic v. Karadzic*;<sup>183</sup> the ICTY in *Prosecutor v. Tadic*,<sup>184</sup> which challenged the ICTY's jurisdiction; and the post-*Tadic* decisions of the ICTY and ICTR.<sup>185</sup> The cases decided after *Nicaragua* establish, beyond any doubt, that violations of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), are serious violations of international humanitarian law resulting in universal jurisdiction and giving rise to individual criminal responsibility.

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179. *Id.*

180. See U.S. Position, *supra* note 160.

181. See *supra* note 86.

182. *Military and Paramilitary Activities* (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27) (Merits), *reprinted in* 15 I.L.M. 1023 (1986).

183. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

184. *Tadic Appeal*, *supra* note 11.

185. See, e.g., *Prosecutor v. Jelusic*, No. IT-95-10 (Dec. 14, 1999) (Judgment); *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1399 (1998).

In the *Nicaragua* case, Nicaragua sued the United States in the ICJ for numerous alleged violations of customary international law. The claims initiated by Nicaragua stemmed from United States support to the “contras” against the government of Nicaragua.<sup>186</sup>

In order to adjudicate the allegations made by Nicaragua, the ICJ had to determine: whether the conflict was internal or international; the law applicable to such conflicts; and the extent to which activities of the Contras could be attributed to the U.S. government.<sup>187</sup> The ICJ relied on customary international law to adjudicate the dispute.<sup>188</sup> It determined that the conflict between the Contras and Nicaragua was internal, and therefore governed by Common Article 3, and that the conflict between the United States and Nicaragua was international.<sup>189</sup> The court noted, however, that Common Article 3 applied to both conflicts, commenting that Common Article 3 established “a minimum yardstick” of treatment for both types of armed conflict:

Article 3 which is common to all four Geneva Conventions of 12 August 1949, define certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which also apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel, Merits, I.C.J. Reports 1949, p.22; paragraph 215 above). The Court may find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.<sup>190</sup>

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186. *Nicaragua*, 1986 I.C.J. at 19. For example, one allegation made by the Nicaraguan Government claimed “the United States . . . has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.” *Id.*, reprinted in 15 I.L.M. at 1026.

187. *Id.* at 114, reprinted in 15 I.L.M. at 1073.

188. “The effect of the majority view [reference interpretation of the multilateral treaty reservation by the United States regarding the ICJ’s compulsory jurisdiction] is to regard the reservation as precluding direct application of the United Nations and Organization of American States Charters. As a result, the content of international law in this dispute before the Court must be derived exclusively from customary international law.” *Appraisal of the ICJ’s Decision: Nicaragua v. United States (Merits)*, 81 A.J.I.L. 106 (1987).

189. *Nicaragua*, 1986 I.C.J. at 114, reprinted in 15 I.L.M. at 1073.

190. *Id.*



The *Nicaragua* court determined that under customary international law, Common Article 3 established the minimum treatment afforded non-combatants regardless of whether the conflict was characterized as an international or internal armed conflict.<sup>191</sup> The court noted that Common Article 3 evinces “general principles of humanitarian law . . . accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not.”<sup>192</sup> Because Common Article 3, as a matter of treaty law, is applicable only during “conflicts not of an international nature,”<sup>193</sup> the only possible basis for this holding was that the mandate of this article has attained the status of customary international law. Thus, by the court’s rationale, Common Article 3(1) is binding on all states regardless of whether they are signatories to the Geneva Conventions of 1949.

Nine years later, the United States Court of Appeals for the Second Circuit also had the opportunity to comment on the customary nature of Common Article 3 in *Kadic v. Karadzic, Doe I and Doe II v. Karadzic*.<sup>194</sup> The case arose in the context of a civil suit brought under the Alien Tort Act,<sup>195</sup> a law which allows for “any civil action by an alien for a tort . . . committed in violation of the law of nations or treaty of the United States.”<sup>196</sup> The plaintiffs, “two groups of victims from Bosnia-Herzegovina,”<sup>197</sup> sued Radovan Karadzic, president of the self-proclaimed Republic of Srpska, for alleged war crimes and atrocities committed during the Bosnian civil war.<sup>198</sup> The plaintiffs’ claims were based on violations of the “law of nations” and not on any treaty of the United States.<sup>199</sup> As such, the

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191. *Id.*

192. *Id.* at 129, reprinted in 15 I.L.M. at 1081.

193. See Geneva Convention I-IV, *supra* note 13, art. 3.

194. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

195. 28 U.S.C.S § 1350 (LEXIS 2000).

196. Under the Alien Tort Act “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

197. *Karadzic*, 70 F.3d at 232.

198. *Id.* at 237 (plaintiffs sought compensatory damages, punitive damages, attorneys fees, and injunctive relief under the Alien Tort Act).

199. See *id.* at 238-40. The Court noted: “As in *Filarataga*, plaintiffs in the instant case ‘primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law.’” *Id.* at 238 n.1 (quoting *Filarataga v. Pena-Irala*, 630 F.2d 876, 880 n.7 (2d Cir. 1980)).

Second Circuit interpreted the claims under customary international law and not treaty law.<sup>200</sup>

The allegations made by the plaintiffs included “genocide, rape, forced prostitution and impregnation, torture and other cruel treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.”<sup>201</sup> The district court, pursuant to a defense motion, dismissed the case for lack of subject matter jurisdiction under the Alien Tort Act stating that “acts committed by non-state actors do not violate the laws of nations,”<sup>202</sup> an essential element of the plaintiffs’ claim under the Act.<sup>203</sup> The plaintiffs appealed, again citing the Alien Tort Act as the basis for subject matter jurisdiction.<sup>204</sup>

In analyzing the jurisdictional issue under the Alien Tort Act, the Court of Appeals for the Second Circuit applied the three-part test used by the Supreme Court in *Filartaga v. Pena-Irala*.<sup>205</sup> Subject matter jurisdiction exists under the three-part test if: “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law).”<sup>206</sup> The Second Circuit noted: “The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.”<sup>207</sup> Thus, the critical issue was whether the plaintiffs alleged a violation of customary international law.<sup>208</sup> In evaluating the customary nature of Common Article 3, the court noted the observation made in *Filartaga* that international law evolves over time, and therefore, “courts ascertaining the content of the law of nations ‘must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.’”<sup>209</sup> The court then focused on

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200. *Id.*

201. *Id.* at 237.

202. *Id.* (citing *Doe I v. Karadzic*, 866 F. Supp. 734, 738-39 (S.D.N.Y. 1994)).

203. *Id.*

204. *Id.* at 238.

205. 630 F.2d at 887; *see also Karadzic*, 70 F.3d at 238.

206. *Karadzic*, 70 F.3d at 238 (citing *Filartaga v. Pena-Irala*, 630 F.2d 876, 887 n.22 (2d Cir. 1980)).

207. *Id.*

208. *Id.* at 238-40.

209. *Id.* at 238 (noting some of the sources of customary international law cited in *Filartaga*). “We find the norms of contemporary international law by ‘consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law.’” *Id.* (quoting *Filartaga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820))).

whether violations of Common Article 3 are violations of the “law of nations” such that subject matter jurisdiction exists under the Alien Tort Act and whether such violations require “state actor” status. The court concluded that violations of the law of nations are not limited to state actors.<sup>210</sup> Instead, atrocities such as those alleged by the appellants “have been long recognized in international law as violations of the law of war,”<sup>211</sup> and Common Article 3 establishes the “most fundamental requirements of the law of war.”<sup>212</sup> The court found:

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which bind parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law. . . . The District Court has jurisdiction pursuant to the Alien Tort Act over appellants’ claims of war crimes and violations of international humanitarian law.<sup>213</sup>

As a result of this finding, the court held that “subject matter jurisdiction exists[;] Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.”<sup>214</sup> Thus, this case illustrates that U.S. federal courts consider Common Article 3 to be customary international law, the violation of which subjects the violator to individual criminal responsibility.

Although afforded an opportunity to address Protocol II and its protections, the *Kadic* court declined in light of its findings with respect to Common Article 3.<sup>215</sup> However, the analysis and rationale for the Common Article 3 holding is equally applicable to Protocol II, Articles 4(1) and

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210. *Id.* at 239.

211. *Id.* at 242 (citing *In re Yamashita*, 327 U.S. 1 (1946)).

212. *Id.* at 243.

213. *Id.*

214. *Id.* at 236.

215. *Id.* at 243 n.8. “At this stage in the proceedings [case remanded for action consistent with the court’s holding reversing the district court’s dismissal], however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law . . . .” *Id.*

4(2). That is, under the law of nations, individuals can be held individually responsible for violations of customary international law designed to provide the most fundamental guarantees in conflict, such as the protections found in Articles 4(1) and 4(2) of Protocol II, even if the acts occurred during internal armed conflict.

The next and perhaps most significant case in the evolution of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), was also the first major law of war decision by an international criminal tribunal since the World War II trials: *Prosecutor v. Dusko Tadic a/k/a "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*.<sup>216</sup> This case, decided 2 October 1995, involved the criminal prosecution of a member of the Bosnian Serb militia for the brutal treatment he inflicted on Bosnian Muslim detainees while he was serving as a guard at a makeshift detention facility.<sup>217</sup>

During his trial, the defendant Tadic brought a motion challenging the jurisdiction of the ICTY to hear his case for alleged war crimes or atrocities committed during the civil war in Bosnia-Herzegovina.<sup>218</sup> Specifically, he challenged jurisdiction on three grounds: the ICTY was improperly established;<sup>219</sup> the ICTY had wrongfully assumed "primacy" over the national court system;<sup>220</sup> and the ICTY lacked subject matter jurisdiction over the alleged offenses.<sup>221</sup> The ICTY Trial Chamber denied Tadic's motion resulting in his appeal to the Appellate Chamber.<sup>222</sup> On appeal, Tadic

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216. Tadic Appeal, *supra* note 11 (decided eleven days prior to the 2d Circuit *Karadzic* decision). Dusko Tadic was indicted in the ICTY on thirty-four counts for violating: Article 2 (grave breaches of the Geneva Conventions of 1949); Article 3 (violations of the laws or customs of war); and Article 5 (crimes against humanity) of the ICTY Statute. His indictment and ultimate conviction on some, but not all, of the charges in the indictment stemmed from his role in the war crimes committed during the armed conflict in Bosnia-Herzegovina. Of the thirty-four count indictment, ten alleged murder or cruel treatment in violation of Common Article 3. Of those ten, Tadic was found guilty of five counts of cruel treatment in violation of Common Article 3. In total, Tadic was convicted on eleven of the thirty-four counts with sentences ranging from as little as six years to as high as twenty years per count, with the sentences to run concurrently. *See* *Prosecutor v. Tadic*, No. IT-94-1-AR72 (May 7, 1997) (Opinion and Judgment), *reprinted in part in* 36 I.L.M. 908 (1997).

217. *Id.*

218. Tadic Appeal, *supra* note 11, para. 2.

219. *Id.* Tadic alleged that the Security Council lacked authority to convene the tribunal and as such, the tribunal lacked authority to hear his case.

raised the same issues,<sup>223</sup> but the Appellate Chamber dismissed all three jurisdictional challenges.<sup>224</sup>

Contrary to Tadic's assertions, the Appellate Chamber found that the ICTY was lawfully established,<sup>225</sup> and that "Appellant's second grounds of appeal, contesting the primacy of the International Tribunal, [was] ill founded."<sup>226</sup> In addressing Tadic's third basis for appeal, subject matter jurisdiction, the court focused on Articles 2, 3 and 5 of the ICTY statute.<sup>227</sup> The court's conclusion regarding Article 3 of the ICTY Statute<sup>228</sup> is most relevant to the analysis of UCMJ jurisdiction over violators of the law of war. In upholding the jurisdiction of the tribunal to hear the case, the Appellate Chamber first noted that Article 3 of the ICTY Statute dealing with violations of the laws or customs of war refers in modern terms to violations of international humanitarian law.<sup>229</sup> Accordingly, it noted that Article 3 covers all "serious violations of international humanitarian law" not covered by other provisions of the ICTY Statute.<sup>230</sup> In determining Article 3's relationship to Common Article 3 violations, the Appellate

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220. *Id.* Article 9(1) of the ICTY Statute gives the ICTY concurrent jurisdiction with domestic courts for "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, *supra* note 7, art. 9(1). Article 9(2) of the Statute gives the tribunal "primacy" over national courts, stating: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." *Id.* art. 9(2).

221. Tadic Appeal, *supra* note 11, para. 2.

222. *Id.* paras. 2-3.

223. *Id.* para. 8.

224. *Id.* para. 146.

225. *Id.* paras. 47-48.

226. *Id.* para. 64. The court also found that it had subject matter jurisdiction over the offenses in the indictment. *Id.* para. 145.

227. *See* ICTY Statute, *supra* note 7, arts. 2, 3, 5.

228. *Id.* art. 3.

229. Tadic Appeal, *supra* note 11, para. 87.

230. *Id.* para. 91.

Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4, or 5. Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the international tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

*Id.*

Chamber found that Article 3 of the ICTY Statute specifically covers “violations of Common Article 3 and other customary rules on internal conflicts.”<sup>231</sup>

Regarding the customary nature of Common Article 3, the Appellate Chamber resolved any doubt regarding this issue when it stated:

The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and as that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice [in the *Nicaragua* case], but also applies to Article 19 of the Hague Convention . . . , and, as we shall show below, to the core of Additional Protocol II of 1977.<sup>232</sup>

In arriving at its conclusion that Common Article 3 reflects customary international law, the Appellate Chamber considered statements by government officials,<sup>233</sup> military manuals,<sup>234</sup> the role of international organs in furthering principles of international humanitarian law,<sup>235</sup> United Nations resolutions regarding international humanitarian law,<sup>236</sup> and governmental action.<sup>237</sup> As noted by the *Nicaragua*<sup>238</sup> and *Karadzic*<sup>239</sup> decisions, and affirmed by the decision of the Appellate Chamber, Common Article 3

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231. *Id.* para. 89.

232. *Id.* para. 98 (citations omitted).

233. *Id.* para. 105 (citing a statement made by the Prime Minister of the Democratic Republic of Congo regarding his government’s adherence to the laws of war, expecting the same from the rebel forces).

234. *Id.* para. 106 (citing the Operational Code of Conduct for Nigerian Armed Forces and its mandate that Nigerian troops were bound to respect the rules of the Geneva Conventions and were to abide by a set of rules protecting civilians and civilian objects in the theater of military operations).

235. *Id.* para. 109.

236. *Id.* para. 110.

237. *Id.* para. 107.

238. *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 129 (June 27) (Merits), *reprinted in* 15 I.L.M. 1023, 1081 (1986).

239. *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

establishes “minimum mandatory rules applicable to internal armed conflicts.”<sup>240</sup>

After determining the customary international law status of Common Article 3, the Appellate Chamber addressed Protocol II and its status as customary international law.<sup>241</sup> The Appellate Chamber found: “Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.”<sup>242</sup> In arriving at its conclusion that Protocol II, or at least the core thereof, is customary in nature, the Appellate Chamber noted the position taken by the government of El Salvador during its civil war.<sup>243</sup> El Salvador, after concluding that Protocol II did not technically apply to its internal conflict,<sup>244</sup> chose to apply the provisions of the Protocol out of the belief that they reflected customary international law. The Salvadorian government, the Appellate Chamber noted, “considered that such provisions [of Protocol II] developed and supplemented” Common Article 3, “which in turn constitute[d] the minimum protection due to every human being at any time and place.”<sup>245</sup>

More significant to the issue of the customary status of Protocol II, the Appellate Chamber also examined the U.S. position articulated in 1986 by Mr. M.J. Matheson, Deputy Legal Adviser of the State Department. While

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240. Tadic Appeal, *supra* note 11, para. 102.

241. *Id.* para. 117.

242. *Id.*

243. *Id.*

244. *Id.* The conflict in El Salvador did not meet the Protocol II, Article 1, criteria for application of the protocol; nevertheless, the Salvadoran government chose to apply the Provisions of Protocol II as reflective of customary international law. For a conflict to meet the application criteria of Protocol II, Article 1, there must be:

conflict in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which [are], [1] under responsible command, [2] exercise such control over a part of its territory as to enable them to carry out [3] sustained and concerted military operations and [4] to implement [the] Protocol.

Protocol II, *supra* note 14, art. 1.

245. Tadic Appeal, *supra* note 11, para. 102.

discussing the view of the United States on Common Article 3, Mr. Matheson also stated:

[T]he basic core of Protocol II is, of course, reflected in Common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process.<sup>246</sup>

Therefore, the Appellate Chamber, the government of El Salvador, and the United States all arrived at the same conclusion when evaluating the customary nature of Common Article 3 and Protocol II. It was agreed that Common Article 3 provides minimum protection for civilians and non-combatants in internal armed conflicts. Additionally, the provisions of Common Article 3 have achieved customary international law status. Finally, all three found that those protections in Protocol II that mirror the Common Article 3 protections—that is, Articles 4(1) and 4(2) of Protocol II—are likewise customary in nature.<sup>247</sup>

After finding that Common Article 3 and the core of Protocol II were customary international law, the Appellate Chamber in *Tadic* inquired whether violation of these customary provisions triggered individual criminal responsibility.<sup>248</sup> The Appellate Chamber observed that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>249</sup> Therefore, it held:

Applying the foregoing criteria [the Nuremberg factors]<sup>250</sup> to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether committed

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246. *Id.* (quoting M.J. Matheson, Deputy Legal Advisor, U.S. State Department, speaking before the Humanitarian Law Conference in 1987).

247. For example, the provision prohibiting murder of innocent civilians during an internal armed conflict in Common Article 3 is customary international law. *See supra* notes 99, 107. The same provision found in Article 4 of Protocol II is likewise prohibited. Protocol II, *supra* note 14, art. 4(2)(a). To hold otherwise would be analogous to saying that the fundamental rights protected by Common Article 3 and viewed as fundamental under customary international law are no longer fundamental under Protocol II, a conclusion which defies logic.

248. *Tadic Appeal*, *supra* note 11, para. 128.

249. *Id.*



in internal or international armed conflicts. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.<sup>251</sup>

These profound excerpts from the *Tadic* opinion serve as perhaps the most powerful evidence to date that the provisions of Common Article 3, as well as the core provisions of Protocol II, are customary international law,<sup>252</sup> and that serious violations of these customary provisions entail individual criminal responsibility.<sup>253</sup> Finally, the Appellate Chamber provided a useful definition of serious violations: “a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.”<sup>254</sup>

#### F. Military Manuals

Military manuals may also indicate that a principle has evolved into customary international law. As demonstrated by the *Tadic* appellate decision, military manuals and operational guidelines can be a critical source

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250. *Id.* In addressing the Nuremberg factors, the court stated:

[T]he International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibitions, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible, because as the Nuremberg Tribunal concluded: “crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

*Id.* (citing THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY pt. 22, at 445-47, 467 (1950)).

251. *Id.* para. 129.

252. The core provisions of Protocol II are those provisions whose purpose is identical to that of Common Article 3, protection of fundamental rights for non-combatants during armed conflict. Protocol II, *supra* note 14.

in determining whether a law of war provision has reached customary status, and whether a violation of the provision entails individual criminal responsibility.<sup>255</sup> While not dispositive on the issue, the fact that a military conforms its conduct to the provisions of Common Article 3(1) of the Geneva Conventions of 1949 and Articles 4(1) and 4 (2) of Protocol II, to include punishing those who violate these provisions, illustrates the customary nature of the provisions and the acceptance of individual criminal responsibility for violations.

In *Tadic*,<sup>256</sup> the Appellate Chamber looked at several military examples, including the Operational Code of Conduct for Nigerian Forces and

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253. See *Prosecutor v. Jeliscic*, No. IT-95-10 (Dec. 14, 1999) (Judgment), available at <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.htm>. Commenting on the customary nature of Common Article 3, the Jeliscic court stated:

Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary. The charges for murder and cruel treatment are based on Article 3 common to the Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda. As a rule of customary international law, Article 3 common to the Geneva Conventions is covered by Article 3 of the Statute as indicated in the *Tadic Appeal Decision*. Common Article 3 protects “[p]ersons taking no active part in the hostilities” including persons “placed *hors de combat* by sickness, wounds, detention, or any other cause.” Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.

*Id.* paras. 33-34. See also *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), reprinted in 37 I.L.M. 1399 (1998); *Prosecutor v. Kambanda*, No. ICTR-97-23-S (Sep. 4, 1998) (Judgment and Sentence), reprinted in 37 I.L.M. 1411 (1998); *Prosecutor v. Furundzija*, No. IT-95-17/1-T 10 (Dec. 10, 1998) (Judgment), reprinted in 38 I.L.M. 317 (1999).

254. As noted by the Appellate Chamber, technical violations of Common Article 3 or Protocol II that are not serious, although violations of international humanitarian law, are not offenses subjecting the individual to criminal prosecution under Article 3 of the statute for violating the laws or customs of war. *Tadic Appeal*, *supra* note 11, para. 94. A review of the indictments from both courts, the International Criminal Tribunals for Yugoslavia and Rwanda, fails to reveal any charged offense such as the technical violation addressed above. The charged offenses all involve “felony” type offenses, such as rape, murder, torture, forced prostitution, and assault.

255. See *id.* paras. 106, 118 (discussing the Operational Code of Conduct for Nigerian Forces and the German Military Manual of 1992, respectively).

256. *Id.*

the conduct of rebel forces in El Salvador as evidence of the customary nature of Common Article 3 and Protocol II.<sup>257</sup> Nigeria required that federal troops comply with the Geneva Conventions and, in addition, “abide by a set of rules protecting civilians and civilian objects in the theater of military operations.”<sup>258</sup> In El Salvador in 1988, the Secretary for the Promotion and Protection of Human Rights, a member of the rebel Farabundo Martí para la Liberación Nacional (FMLN), stated: “The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II.”<sup>259</sup> Similarly, the German Military Manual mandated compliance with “the rules of international humanitarian law in the conduct of military operations in all armed conflicts.”<sup>260</sup> On the issue of individual criminal responsibility, the Appellate Chamber considered the military manuals of Germany, New Zealand, Great Britain, and the United States as evidence that violations of Common Article 3 and Protocol II result in individual criminal responsibility.<sup>261</sup>

#### G. Government Statements

Statements by government officials are yet another source in determining whether a rule or provision has reached customary status and if so, whether violations thereof entail individual criminal responsibility. The United States, since the mid 1980s, has referred to Common Article 3 and the fundamental protections of Protocol II as customary international law. As previously discussed, Mr. M.J. Matheson, Deputy Legal Adviser of the State Department, commented that: “The basic core of Protocol II is, of course, reflected in Common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law.”<sup>262</sup> This U.S. position was further defined in a 1998 statement, sub-

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257. *Id.* paras. 106-107.

258. *Id.* para. 106.

259. *Id.* para. 107.

260. *Id.* para. 118. Although not considered by the Tadic Appellate Chamber, the United States Law of War program, Department of Defense (DOD) Directive 5100.77, is additional evidence regarding the customary nature of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2). DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998). The directive states, in part: “The heads of DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” *Id.* paras. 5.1, 5.3.

261. Tadic Appeal, *supra* note 11, para. 131; *see also*, Graditzky, *supra* note 129, at 29.

mitted to the Preparatory Committee on the Establishment of an International Criminal Court, wherein the United States representative stated:

The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section . . . covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.<sup>263</sup>

H. The Restatement (Third) of the Foreign Relations Law of the United States (1986)

The Restatement (Third) of the Foreign Relations Law of the United States,<sup>264</sup> another source in evaluating the customary international law status of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), recognizes the concept of individual responsibility for offenses against international law as well as universal jurisdiction. Under Section 404 of the Restatement, universal jurisdiction exists for war crimes such as serious violations of Common Article 3 and Protocol II.<sup>265</sup> Section 404 of the Restatement provides:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402<sup>266</sup> is present.<sup>267</sup>

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262. Tadic Appeal, *supra* note 11, para. 117 (quoting M.J. Matheson, Deputy Legal Advisor, U.S. State Department, speaking before the Humanitarian Law Conference in 1987).

263. Theodor Meron, *War Crime Law Comes of Age*, 92 A.J.I.L. 462, 466-67 (1998) (quoting United States Statement Submitted to the Preparatory Committee on the Establishment of an International Criminal Court (March 23, 1998)).

264. RESTATEMENT (THIRD), *supra* note 79.

265. *Id.* § 404.

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266. Restatement § 402, Bases of Jurisdiction to Prescribe, states:

Subject to § 403, a state has jurisdiction to prescribe laws with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interest in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

*Id.* § 402.

Restatement § 403, Limitations on Jurisdiction to Prescribe, states:

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe laws with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including where appropriate:
  - (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
  - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
  - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
  - (d) the existence of justified expectations that might be protected or hurt by the regulation;
  - (e) the importance of the regulation to the international, political, legal, or economic systems;
  - (f) the extent to which the regulation is consistent with the traditions of the international system;
  - (g) the extent to which another state may have an interest in regulating the activity; and
  - (h) the likelihood of conflict with regulation by another state.
- (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescription by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

*Id.* § 403.

## I. Conclusion

As evident from the preceding paragraphs, Common Article 3(1) of the Geneva Conventions of 1949 and Articles 4(1) and 4(2) of Protocol II are now considered to be customary international law. As such, their provisions are binding on all nations and parties to a non-international—that is, internal—armed conflict, irrespective of whether the state is a signatory to the Geneva Conventions or Protocol II. Likewise, the provisions are equally binding on non-state belligerents, regardless of whether they have agreed to be bound by the Conventions and Protocols. Furthermore, violations of these customary law provisions trigger individual criminal responsibility subjecting the violator to prosecution for a crime of universal jurisdiction. As noted by the Court of Appeals for the Sixth Circuit in *Demjanuk v. Petrovsky*,<sup>268</sup> “[i]nternational law recognizes a ‘universal jurisdiction’ over certain offenses . . . [a principle] based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people.”<sup>269</sup>

Unfortunately, the courts lack a comprehensive listing of those serious violations of international humanitarian law, applicable to internal armed conflicts, which would authorize criminal prosecution. What the courts should follow, in the absence of such a list, is the test established by the *Tadic* Appellate Chamber: a serious violation occurs when “a breach of a rule protecting important values involve[s] grave consequences for the victim.”<sup>270</sup> Obvious examples of serious violations under this standard would be murder, rape, torture, physical abuse, and sexual abuse.<sup>271</sup> What is certain is that the fundamental, minimum protections contained in Common Article 3(1)<sup>272</sup> and Protocol II, Articles 4(1) and 4(2),<sup>273</sup> are customary international law, and violations subject the individual to criminal responsibility.<sup>274</sup> Lastly, violators of these minimum protections are, under the concept of universal jurisdiction, subject to prosecution by any

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267. *Id.* § 404.

268. *Demjanuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

269. *Id.* at 582 (citing RESTATEMENT (THIRD), *supra* note 79, § 404).

270. *Tadic* Appeal, *supra* note 11, para. 94.

271. Failing to collect and care for the wounded or failing to educate children under your control, to include religious and moral education, may rise to the level of a serious violation, but that is a question of fact for resolution by the tribunal or body convened to hear the case. *See supra* note 107.

272. Geneva Conventions I-IV, *supra* note 13, art. 3(1).

273. Protocol II, *supra* note 14, art(s). 4(1) and 4(2).

state because, in prosecuting crimes of universal jurisdiction, the prosecuting authority is acting on behalf of all states under international law and not pursuant to domestic law.<sup>275</sup>

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274. See *Prosecutor v. Kambanda*, No. ICTR-97-23-S (Sep. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1411 (1998); *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1399 (1998); *Prosecutor v. Jelusic*, No. IT-95-10 (Dec. 14, 1999) (Judgment), *available at* <http://www.un.org/icty/brcko/trialc1/judgment/jel-tj991214e.htm>; *Prosecutor v. Furundzija*, No. IT-95-17/1-T 10 (Dec. 10, 1998) (Judgment), *reprinted in* 38 I.L.M. 317 (1999); Graditzky, *supra* note 129; Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421 (1994); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554 (1995); Meron, *supra* note 263; Kristijan Zic, *The International Criminal Tribunal for the Former Yugoslavia: Applying International Law to War Criminals*, 16 B.U. INT'L L.J. 507 (1998); *see also* Beth Ann Isenberg, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Action*, 60 ALB. L. REV. 1051 (1997); Marie-Claude Roberge, *Jurisdiction of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda Over Crimes Against Humanity and Genocide*, 321 INT'L REV. RED CROSS 651 (1997).

275. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

This "universality principle" is based on the assumption that some crimes are so universally condemned that the perpetrators are enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses . . . . Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial. Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the laws of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interests of all nations by seeking to punish the perpetrators of such crimes.

*Id.* at 582-83. *See also* Roberge, *supra* note 274.

VIII. The War Crimes Act of 1996 and its Relationship to Article 18, UCMJ: Preemption or Co-existence?

The War Crimes Act of 1996<sup>276</sup> was passed to implement, at least in part, the obligation of the United States under the Geneva Conventions of 1949<sup>277</sup> to “enact appropriate legislation criminalizing the commission of grave breaches”<sup>278</sup> and to “provide criminal penalties for certain war crimes.”<sup>279</sup> However, the Act, as amended,<sup>280</sup> is limited to those circumstances where “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.”<sup>281</sup> Thus, the Act does not fully implement the obligation under the Geneva Conventions to prosecute or extradite<sup>282</sup> persons guilty of grave breaches because, as written, the Act does not extend to foreign nationals committing grave breaches against non-nationals of the United States.

Despite recommendations by both the State Department and the Department of Defense, the War Crimes Act of 1996 failed to provide for universal jurisdiction.<sup>283</sup> The House Judiciary Committee, in addressing this concern, stated: “[E]xpansion of H.R. 3680 to include universal jurisdiction would be unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight.”<sup>284</sup> A review of the legislative history of the Act, including statements by members of Congress, reveals that it was passed based in part on the belief that current legislation, to include the Uniform Code of Military Justice, created “gaps” in the forums available to prosecute individuals for war crimes.<sup>285</sup> Additionally, the House Judiciary Committee and the sponsor of the bill, Congressman Walter Jones, Jr., of North Carolina, noted that a certain class or group of individuals were beyond the reach of any United

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276. 18 U.S.C.S. § 2441 (LEXIS 2000).

277. Geneva Conventions I-IV, *supra* note 13.

278. H.R. REP. NO. 104-698, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2168 (referring to Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; and Geneva Convention IV, Article 146).

279. *Id.* at 1.

280. 18 U.S.C.S. § 2441 (LEXIS 2000) (amended in 1997 to replace the term “grave breaches” with “war crimes” and to include violations of Common Article 3 within the definition of war crimes).

281. *Id.*

282. The conventions impose an obligation on the signatories to prosecute or extradite persons guilty of grave breaches regardless of their nationality. *See supra* notes 157-58.



States courts. The Judiciary Committee observed that, although some war crimes recognized as grave breaches were covered by federal statute, such as 18 U.S.C. § 2340a and 18 U.S.C. § 1091 prohibiting torture<sup>286</sup> and genocide,<sup>287</sup> certain gaps in the law existed. The Committee stated:

The conduct these statutes proscribe would in many instances be considered grave breaches of the conventions if they took place in the context of armed conflict. However, many crimes [that] would be considered grave breaches are not encompassed by these statutes. For instance, the simple killing of a prisoner of war would not be covered by any of the statutes.<sup>288</sup>

Congressman Jones expressed a similar concern on the ability to prosecute war criminals, commenting that “it is difficult to believe, in the absence of a military commission or an international criminal tribunal, the United

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283. H.R. REP. NO. 104-698, at 13.

We believe . . . that the jurisdictional provisions should be broadened from the current focus on the nationality of the victims of war crimes. Specifically, we suggest adding two additional jurisdictional bases: (1) where the perpetrator of a war crimes is a United States national (including a member of the Armed Forces); and (2) where the perpetrator is found in the United States without regard to the nationality of the perpetrator or victim.

*Id.* (statement by Judith Miller, General Counsel of the U.S. Department Defense, 17 May 1996, concerning House Report 2587, the precursor to House Report 3680 (The War Crimes Act of 1996)). The Department of Defense urged broader jurisdiction than was either proposed in House Report 2587 or passed in House Report 3680. Additionally, the current version of the War Crimes Act of 1996 as amended in 1997, falls short of the expansive jurisdiction recommended by the Department of Defense.

284. *Id.* at 8.

285. *Id.* at 5-7. “Military commissions might be able to fill these gaps, at least when the United States is involved in hostilities. However, the extent to which commissions can be employed is unclear.” *Id.* at 7 (discussing the viability of using military commissions to close the perceived gap in authority to prosecute war criminals). “H.R. 3680 would also fill another gap in current law. The ability to court martial members of our armed forces who commit war crimes ends when they leave military service. H.R. 3680 would allow for prosecution even after discharge.” *Id.*

286. 18 U.S.C.S. § 2340a (LEXIS 2000).

287. *Id.* § 1091.

States currently has no means, by which we can try and prosecute perpetrators of war crimes in our courts.”<sup>289</sup>

Both the House Judiciary Committee and Congressman Jones reached their conclusions after considering application of the Uniform Code of Military Justice and courts-martial as a mechanism to prosecute. Unfortunately, the Committee and all persons dealing with the issue seem to have misread Article 18 of the UCMJ.<sup>290</sup> The Committee first noted: “The Uniform Code of Military Justice grants court-martial jurisdiction [under Article 18] to try individuals for violations of the laws of war.”<sup>291</sup> It went on to say: “Since the Geneva Conventions are considered parts of the laws of war, courts-martial would seem to be a powerful mechanism for punishment of war crimes.”<sup>292</sup> Had the Committee stopped here in its analysis it would have properly concluded that courts-martial jurisdiction does exist for serious violations of international humanitarian law. Instead, the Committee noted a perceived limitation on courts-martial jurisdiction, one that ignores the plain text of Article 18.<sup>293</sup> The Judiciary Committee continued: “Their limitation [regarding courts-martial jurisdiction], however, is that they apply to very circumscribed groups of people: generally, members of the United States armed forces, persons serving with or accompanying armed forces in the field, and enemy prisoners of war.”<sup>294</sup>

The flaw in the Judiciary Committee’s analysis is that it ignores the plain meaning of Article 18. It further ignores the Supreme Court’s decisions in *Quirin*<sup>295</sup> and *Yamashita*<sup>296</sup> where, in interpreting Article 12 of the

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288. H.R. REP. NO. 104-698, at 5. The official legislative history of the 1996 statute is limited to grave breaches limiting it to those conflicts of an international nature also known as Common Article 2 conflicts. The 1997 amendments extended the statute to violations of Common Article 3. The 1996 legislative comments, however, are still applicable since none of the comments regarding the need for the War Crimes Act of 1996 were limited by or dependent on the nature of the conflict (that is, international versus internal). Rather, the legislative history discusses the need to pass the War Crimes Act to close a perceived gap in criminal jurisdiction that existed at the time, a gap existing irrespective of the conflict classification, and to provide for prosecutorial authority to prosecute war crimes in U.S. domestic courts.

289. 142 CONG. REC. H8620, H8621 (daily ed. July 29, 1996).

290. UCMJ art. 18 (2000).

291. H.R. REP. NO. 104-698, at 5.

292. *Id.*

293. UCMJ art. 18.

294. H. REP. NO. 104-698, at 5 (citing UCMJ art. 2).

295. *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that a military commission was authorized by the Articles of War to prosecute enemy aliens who were not enemy prisoners of war for violations of the law of war).

1920 Articles of War,<sup>297</sup> the precursor to Article 18, the Court concluded that Article 12 of the Articles of War provided for two separate bases of jurisdiction.<sup>298</sup> The *Yamashita* Court properly noted that Article 12 [now Article 18], clause 1 jurisdiction was connected to then Article 2 of the Articles of War (the precursor to Article 2 of the UCMJ), which listed persons subject to the code.<sup>299</sup> Under clause 1, persons subject to the code were and still are subject to general court-martial jurisdiction.<sup>300</sup> However, clause 2 jurisdiction under Article 12 of the Articles of War (or its successor, Article 18, UCMJ) established jurisdiction based purely on violations of the law of war, regardless of whether the person was or is subject to the code at the time of the act.<sup>301</sup> Interestingly, the Committee later cites *Yamashita* for Congress's authority to enact federal criminal laws relating to war crimes, yet fails to recognize the importance of *Yamashita* in differentiating between jurisdiction under clauses 1 and 2 of Article 18, UCMJ.<sup>302</sup>

Although the House Judiciary Committee properly noted a limitation on the exercise of Article 18, clause 1 jurisdiction, no such limitation is placed on clause 2. Instead of concluding, "courts-martial *would seem* to be a powerful mechanism for punishment of war crimes,"<sup>303</sup> the more

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296. *In re Yamashita*, 327 U.S. 1 (1946) (holding that an enemy prisoner of war may be tried by a military commission pursuant to the Articles of War for violations of the law of war).

297. 1920 Articles of War, 41 Stat. 787 (1920).

298. *See Ex Parte Quirin*, 317 U.S. at 27-28; *see also Yamashita*, 327 U.S. at 7.

299. *Yamashita*, 327 U.S. at 7.

300. *See* UCMJ art. 18 (2000) (clause 1); *see also Ex Parte Quirin*, 317 U.S. at 27-28; *Yamashita*, 327 U.S. at 7.

301. *See Ex Parte Quirin*, 317 U.S. at 27-28; *see also, Yamashita*, 327 U.S. at 7.

302. H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

303. *Id.* at 6 (emphasis added). The House Judiciary Committee also considered the use of military commissions but noted:

Many gaps in federal law relating to the prosecution of grave breaches of the Geneva Conventions could in principle be plugged by the formation of military commissions. However, the Supreme Court condemned their breadth of jurisdiction to uncertainty in *Ex Parte Quirin*, where it stated that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the laws of war."

*Id.* (citation omitted).

accurate conclusion is that courts-martial *are* a powerful mechanism for punishment of war crimes.

One other possible explanation for the limited scope of the War Crimes Act<sup>304</sup> is that it is an exercise of domestic legislation, creating domestic criminal law. Thus, the offenses it creates are separate and apart from that body of international law, the violations of which are commonly referred to as war crimes and violative of customary international law. For example, the prohibition against genocide has been recognized by all nations since the Nuremberg Trials as customary international law.<sup>305</sup> The crime of genocide is one that is subject to universal jurisdiction,<sup>306</sup> and, if committed during an armed conflict, would be a war crime.<sup>307</sup> Therefore, genocide is an international law offense subjecting the violator to prosecution for violating the laws of war. Genocide is also a crime under U.S. domestic law, 18 U.S.C. § 1091.<sup>308</sup> As a result, a genocide prosecution at a court-martial would be an exercise of international criminal law, whereas a genocide prosecution in federal district court is an exercise of domestic law. This same logic applies to all war crimes cognizable under Article 18, UCMJ.<sup>309</sup> The War Crimes Act is instead an exercise of “nationality jurisdiction”<sup>310</sup> and “passive personality jurisdiction.”<sup>311</sup> The former authorizes a state to exercise jurisdiction over its nationals and arguably those persons residing or domiciled in the state.<sup>312</sup> The latter authorizes a state to exercise jurisdiction and apply its domestic law to an act committed out-

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304. 18 U.S.C.S. § 2441 (LEXIS 2000).

305. *See supra* note 152; *see also* Isenberg, *supra* note 274; Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425 (1999).

306. RESTATEMENT (THIRD), *supra* note 79, § 404 (Reporter's Note); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

307. Violations of international humanitarian law are by definition war crimes. FM 27-10, *supra* note 7, ¶ 499.

308. H.R. REP. NO. 104-698, at 4.

309. UCMJ art. 18 (2000).

310. RESTATEMENT (THIRD), *supra* note 79, § 402(2), cmt. a (“International law recognizes links of . . . nationality . . . as generally justifying the exercise of jurisdiction to prescribe.”); *Id.* cmt. e (discussing nationality, domicile and residence as bases to exercise jurisdiction).

311. RESTATEMENT (THIRD), *supra* note 79, § 402, cmt. g (“The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.”).

312. *See supra* note 152.

side its territory by a person not its national where the victim of the act, generally criminal in nature, was its national.<sup>313</sup>

This distinction between international law and domestic law is highlighted by the comment in the section-by-section analysis of the legislative history, where the House Judiciary Committee stated:

The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations.<sup>314</sup>

Although apparently mistaken in the belief that the Act was closing a “gap” which really did not exist and which ignored the plain meaning of Article 18, UCMJ,<sup>315</sup> Congress correctly concluded that no mechanism existed in which to prosecute war crimes in federal district court.<sup>316</sup> From a federal criminal prosecution standpoint, a gap did exist. However, to say that no criminal forum existed before passage of the War Crimes Act was inaccurate. In any event, since the conclusions about the limits on Article 18, UCMJ, clause 2, jurisdiction were mistaken, this passage confirms that the War Crimes Act of 1996 does not bar prosecution of war criminals pursuant to Article 18, UCMJ.

This forum-enabling conclusion was highlighted by Senator Jesse Helms, who came closest to accurately stating the real need for the War Crimes Act of 1996 when he said:

Many have not realized that the U.S. cannot prosecute, in federal court, the perpetrators of some war crimes against American servicemen and nationals. Currently, if the United States were to find a war criminal within our borders—for example, one who had murdered an American POW—the only option would be to deport or extradite the criminal or to try him or her before an international war crimes tribunal or military commission. Alone, these options are not enough to ensure that justice is done.<sup>317</sup>

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313. *Id.*

314. H.R. REP. NO. 104-698, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2176-2177.

315. UCMJ art. 18 (2000).

316. H.R. REP. NO. 104-698, at 12.

317. 142 CONG. REC. S9648 (daily ed. August 2, 1996).

As his statement indicates, the War Crimes Act of 1996 was passed to allow for prosecution under domestic law in federal district courts. Senator Helms recognized the existence of other forums, to include a military commission, but noted that “these options are not enough.”<sup>318</sup> What Senator Helms and the House Judiciary Committee overlooked was that a general court-martial has been a viable option for prosecuting serious violations of the laws of war since the 1916 Articles of War, and that since the Bosnia-related prosecutions, this jurisdiction extends to war crimes committed during an internal armed conflict.

The War Crimes Act as written does not reach the conduct of a Tadic, Akayesu, or Milosevic unless the atrocities or war crimes committed by them are directed against United States nationals. However, Article 18, UCMJ, does reach these individuals and, contrary to the legislative history and committee reports, always did.

#### IX. Policy Considerations Regarding the Exercise of Article 18 Authority

Although Article 18 of the UCMJ establishes court-martial jurisdiction over the Serb lieutenant in the opening hypothetical, no rule requires the exercise of such jurisdiction. As with any authority that exists under law, particularly international law, the decision to exercise that authority is made based on multiple policy considerations. There certainly would be sound policy considerations both for and against the assertion of such jurisdiction over the lieutenant in the hypothetical. Therefore, prior to exercising such jurisdiction, a commander deployed as part of a peacekeeping or peace enforcement force will have to evaluate the pros and cons of court-martialing a local national, non-U.S. service member for war crimes—serious violations of international humanitarian law—committed against a member of the local national’s own country. From a legal perspective, however, the first task is to establish that there are no legal impediments to convening a general court-martial and prosecuting a non-U.S. service member for such violations of international humanitarian law committed during an internal armed conflict.<sup>319</sup>

Once it is established that the UCMJ authorizes the exercise of jurisdiction, a multitude of policy considerations would have to be considered. It is easy to identify possible factors that weigh against such an exercise of jurisdiction. Some of these include the possible adverse affect on a coali-

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318. *Id.*

tion or joint mission, international policy implications, and U.S. policy. However, there may be strong policy reasons supporting such a course of action. In the hypothetical presented, these reasons might include limited resources at the ICTY and ICTR, lack of an international forum, accountability, deterrence, and the presumption that soldiers are best suited to hear cases involving alleged war crimes.

Despite the existence of the ICTY and ICTR, their resources, specifically financial resources, are limited and preclude prosecution of all persons guilty of war crimes in the tribunals' jurisdiction.<sup>320</sup> As with any prosecutorial function, when given limited resources, the prosecutor must pick and choose which cases to try and which cases to let go. Since war crimes are crimes of universal concern, the United States should, on a case-by-case basis, consider trying war criminals at general courts-martial, especially when the criminal is within the reach of forward-deployed U.S. forces and it appears that the ICTY or ICTR is unable or unwilling to prosecute.

In addition to the limited resources of the two current international tribunals, both have temporal and geographic limitations on jurisdiction. The ICTY's jurisdiction is limited to "the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters. The temporal jurisdiction . . . shall extend to a period beginning on 1 January 1991."<sup>321</sup> The ICTR's jurisdiction is similarly limited:

The territorial jurisdiction . . . shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighboring states in respect of serious violations of international humanitarian law committed by Rwandan citizens.

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319. A commander can prosecute a U.S. service member under Article 18, clause 2, for violating the law of war. Generally, however, service members are prosecuted for violating the punitive provisions of the UCMJ under Article 18, clause 1, as persons subject to the code. *See supra* note 10; *see e.g.*, *United States v. Calley*, 46 C.M.R. 1131 (1973) (prosecution under the UCMJ of First Lieutenant William Calley, U.S. Army, for the murder and attempted murder of innocent civilians in My Lai during Vietnam, both offenses under the code and war crimes under the laws of war).

320. *See generally* The International Criminal Tribunal for the Former Yugoslavia, *ICTY Key Figures*, at <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Jan. 23, 2001); The International Criminal Tribunal for Rwanda, *About the Tribunal*, at <http://www.ict.rw/> (last visited Feb. 14, 2001) (General Information, Budget and Staff).

321. ICTY Statute, *supra* note 7, art. 8.

The temporal jurisdiction . . . shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.<sup>322</sup>

A general court-martial convened under Article 18, UCMJ, would have authority to prosecute the same offenses covered by the ICTY<sup>323</sup> and ICTR<sup>324</sup> without the temporal or geographic constraints placed on both tribunals.

A general court-martial convened under Article 18, UCMJ, could further prosecute war crimes committed in areas not covered by an international tribunal. For example, the ongoing conflict in the Russian Republic of Chechnya is not subject to the jurisdiction of either the ICTY or ICTR. As previously noted, a Russian soldier or member of the Chechnyan belligerency is not subject to prosecution under the War Crimes Act for violations of the law of war directed at another Russian or Chechnyan nor is the Chechnyan conflict covered by either the ICTY or ICTR. In these circumstances, Article 18, UCMJ, provides a viable forum beyond the local domestic courts in which to prosecute individuals for war crimes.

Finally, a general court-martial is arguably the forum best suited to prosecute individuals suspected of war crimes. At a general court-martial, either a military judge or panel of officers or officers and enlisted personnel, all of which are senior to the accused, decides guilt.<sup>325</sup> The concept is simple—soldiers should sit in judgment of other soldiers. Indeed, the law of war includes a strong tradition that warriors should decide the fate of

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322. ICTR Statute, *supra* note 27, art. 7.

323. ICTY Statute, *supra* note 7, arts. 2-5 (authorizing the prosecution of grave breaches, violations of laws or customs of war, genocide, and crimes against humanity respectively).

324. ICTR Statute, *supra* note 27, arts. 3-5 (authorizing the prosecution of crimes against humanity, violations of common Article 3 and Protocol II, and genocide respectively).

325. Under the Rules for Courts-Martial, except in a capital case, the accused can request to be tried by a military judge alone or by a panel of officers or officers and enlisted personnel if the soldier is enlisted. No member of the panel can be junior to the accused. Whether judge alone or panel, the person or persons deciding the accused's guilt or innocence would be another soldier or soldiers. Regardless of the accused's status as someone not subject to the code, the Article 18 court-martial would follow court-martial procedures as found in the 2000 Manual for Courts-Martial. *See* MCM, *supra* note 8.



other warriors. Perhaps the Supreme Court in *Yamashita*<sup>326</sup> best summed up this concept of warriors judging warriors when it stated:

We do not consider what measures, if any, petitioner [Yamashita] took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide.<sup>327</sup>

The Supreme Court, in 1945, noted the special skill and expertise soldiers have and the common sense and simple logic of allowing soldiers to stand in judgment of other soldiers. Under the War Crimes Act, instead of being judged by soldiers, persons with the “peculiar competence of the military officers”<sup>328</sup> necessary to evaluate law of war issues, the persons judging soldiers will be those persons randomly selected according to federal district court procedures.

There are, of course, equally compelling policy considerations against such exercise of jurisdiction. These include: the adverse effect or impact such a decision might have on the mission; the breakdown of coalition cohesion; international criticism; and resource diversion.<sup>329</sup> How-

326. *In re Yamashita*, 327 U.S 1 (1946).

327. *Yamashita*, 327 U.S at 17; *see also* *Smith v. Whitney* 116 U.S. 167, at 178 (1886) (“Of questions not depending upon the construction of the statutes, but upon unwritten military law or usages, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.”).

328. *Yamashita*, 327 U.S at 17.

329. A decision to prosecute might, for political or other considerations, cause coalition forces to withdraw from the operation. For example, in Operation Joint Endeavor, the Implementation Force (IFOR) was comprised of military forces from numerous countries to include the United States, France, Britain, Germany, Russia, Poland, Denmark, and Sweden. What if a soldier from the Russian Brigade, a unit in the American sector of Bosnia-Herzegovina, was accused of war crimes during the pre-1994 Chechnyan conflict? Although the Commander of Task Force Eagle, the American Task Force in sector had authority to convene a general court-martial under Article 18, UCMJ, he might choose not to based on the potential impact the decision to court-martial would have on the mission and IFOR.

ever, by simply acknowledging the legality of Article 18 jurisdiction, policy makers gain a previously unrecognized option.

Finally, as previously discussed, Congress expressed its concern with a “universal jurisdiction” approach to handling war crimes when it evaluated the War Crimes Act of 1996.<sup>330</sup> The Judiciary Committee specifically rejected proposals that would expand jurisdiction “into conflicts in which this country has no place and where our national interests are slight.”<sup>331</sup> As evident from this passage, the authority to prosecute is perhaps a simpler question to answer than whether to prosecute. Can the commander do it? Yes. Should he do it? That question needs to be answered on a case-by-case basis taking into account all policy aspects and ramifications associated with deciding for or against prosecution.

## X. Conclusion

The prosecution of individuals responsible for committing war crimes is a major component in the machinery of enhancing respect for and compliance with the law of war. Such prosecutions are viewed by the international community as being directly linked to the restoration of peace and security in war torn nations. The importance of providing mechanisms for such prosecutions has led to unprecedented developments in international criminal law, exemplified by the creation of international criminal tribunals devoted exclusively to the adjudication of such crimes, even when committed in a purely internal conflict.

As World War II came to a close, the obvious focus of international lawyers, diplomats, and leaders concerned with dealing with war crimes was on crimes committed during the course of state versus state warfare. Today, however, encouraging respect for the fundamental humanitarian protections established to apply to internal armed conflicts seems more urgent than focusing on major international armed conflicts. As the international community has demonstrated, war crimes prosecutions related to

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330. *See supra* note 283.

331. H.R. REP. NO. 104-698, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

internal conflicts are an integral component for encouraging respect for the law.

As is clear from the plain meaning of Article 18, UCMJ, as traced from its origin in 1806, Article 18 authorizes a general court-martial for violations of the law of war if the violator “by the law of war is subject to trial by a military tribunal.” Serious violations of the law of war subject violators to prosecution by U.S. military, international criminal tribunals, and non-U.S. military tribunals,<sup>332</sup> as well as national courts. As discussed in Part IV, the language of Article 18, UCMJ, referring to military tribunals does not mean that a tribunal must be ongoing to vest jurisdiction in a general court-martial; rather, this language qualifies the nature of the offense for which a general court-martial has jurisdiction: the violation must be such that the violator or offender is a person who “by the law of war is subject to trial by a military tribunal.”<sup>333</sup>

A review of the varied sources of international law reveals that the provisions of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), have attained customary international law status, thus binding on all states.<sup>334</sup> Furthermore, violations of the prohibitions contained within these provisions are serious violations of the law of war that entail individual criminal responsibility for the violator.<sup>335</sup> As such, the violator is a person “who by the law of war is subject to trial by military tribunal,” thus giving rise to Article 18, clause 2, UCMJ jurisdiction. Prosecution at a general court-martial under Article 18, UCMJ, is an exercise of international law, separate and apart from the War Crimes Act of 1996, and is thus not preempted by this domestic criminal statute. Finally, although policy considerations related to any such exercise of jurisdiction are numerous, these are distinct from the legal issue of whether such prosecution is permitted, and should only be a factor once the legality of such a course of action has been assessed.

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332. Since 1996, Switzerland has held two military tribunals regarding war crimes in Bosnia-Herzegovina and Rwanda, crimes committed by non-nationals. See International Committee for the Red Cross, *International Humanitarian Law, National Implementation*, at <http://www.icrc.org/ihl-nat.nsf/WebCASE?OpenView> (last visited Feb. 21, 2001) (National Case Law, Switzerland) (detailing a 17 April 1997 Swiss Military Tribunal case, as well as two Swiss Military Court of Cassation cases). In the 8 July 1996 Court of Cassation case, Switzerland complied with a request by the ICTR for the transfer of a case of a Rwandan citizen to its jurisdiction. The accused had unsuccessfully appealed his transfer to the ICTR. *Id.*

333. UCMJ art. 18 (2000).

334. See *supra* notes 88, 99.

335. See *supra* note 250.

## THE INTERNATIONAL CRIMINAL COURT: AN EFFECTIVE MEANS OF DETERRENCE?

MAJOR MICHAEL L. SMIDT<sup>1</sup>

*In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in the struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.*<sup>2</sup>

*De Oppresso Liber [To Liberate the Oppressed]*<sup>3</sup>

### I. Introduction

The preceding lines, taken from two very different organizations, demonstrate that many in the world share deep concern and personal commitment for reducing and preventing man-made humanitarian disasters. The first, a vision statement by United Nations (U.N.) Secretary General Kofi Annan, suggests the necessity of an international criminal court to punish the past conduct of oppressors. The second, the motto of the U.S. Army Special Forces, represents a belief that the present application of military force, rather than judicial punishment after the fact, is a legitimate response to rid the world of oppression. Although the respective methodologies of these two organizations vary tremendously, one judicial and the other military, history has shown that both are vital to the preservation of

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1. Professor, International and Operational Law, U.S. Army Judge Advocate General's School. LL.M. 1998, The U.S. Army Judge Advocate General's School; J.D. *magna cum laude*, 1987, California Western School of Law; B.B.A. *cum laude*, 1985, National University. The author would like to thank Professor John Norton Moore of the University of Virginia School of Law for his assistance.

2. Press Release, Statement of Secretary-General Kofi Annan Before the International Bar Association in New York (June 12, 1997), UN. Doc. SG/SM/6257 (1997), *available at* <http://www.un.org/News/Press/docs/1997/19970612.sgsm6257.html>.

3. The regimental motto of the U.S. Army Special Forces (Green Berets). U.S. Army Total Personnel Command, Institute of Heraldry, *Branches of Service: Insignia and Plaques*, at <http://www.perscom.army.mil/TAGD/tioh/branches/sf.htm>.

peace and security. Producing a synergistic effect when combined, both approaches are indispensable in preventing human conflict that requires a very broad-brush stroke to address the numerous facets of human behavior.<sup>4</sup>

Both the U.N. vision and the Special Forces motto imply that tyrants must be thwarted. The judicial approach of the U.N. provides that, through aggressive justice, potential criminals may be deterred from committing acts of aggression or massive human rights violations if they realize they cannot act with impunity. While the military approach would agree that oppressors should not be able to act without consequences, it would add that many tyrants can only be controlled with a credible threat of force.

In reality, both the law enforcement and the military responses add to the concept of system-wide deterrence. However, each modality plays a distinct role, and neither should be permitted to negatively impact the other. This article argues that the present theory, which assumes that the answers for world peace derive primarily from judicial sources, is being overemphasized to the detriment of the potential ability, and occasional requirement, to use military force. First, over-reliance on justice ignores the obvious fact that potential victims are best served if they are not allowed to become victims in the first place. Courts may be effective in handling situations after the fact, but until they possess the deterrent capabilities needed to control rogue regimes, they should not be permitted to displace or weaken the military option. Second, if a court lacks the ability to actually enforce its pronouncements, rogue regimes will simply ignore the court and will not be deterred.

The military remains the most credible and effective form of deterrence in the international arsenal of weapons to prevent war and massive human rights abuses. Within the international military community, the U.S. armed forces are better prepared than any other entity to deter aggressive regimes and their leaders. Therefore, any move by the international community to sacrifice on the altar of justice the deterrent capability of the armed forces of the United States and its allies cannot be accepted.

However well-intentioned advocates for the International Criminal Court (ICC) may be, the proposed court represents a significant threat to the national security of the United States and its allies as currently formu-

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4. See generally THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1999) [hereinafter NATIONAL SECURITY STRATEGY].

lated. There is certainly room, and arguably a need, for a permanent international criminal court. However, the provisions of the ICC<sup>5</sup> simply place too many significant risks on nations and their armed forces that are equally determined to rid the world of oppression. Political prosecutions before the ICC are so probable that the forces of good may be deterred from taking on the forces of evil. Since the forces of evil will recognize the deterrent influence of such politically based prosecutions on potential responders, the leaders of these regimes may make entirely rational decisions to commit acts of aggression, knowing they can act without fear of military intervention from foreign forces.

War is not as clean as we would like it to be, and it defies precise legal scrutiny. It involves the use of force and a level of destruction that would be considered both illegal and immoral during times of peace.

War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, and destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.<sup>6</sup>

However distasteful the use of military force may be, the alternative, allowing rogue regimes to act with impunity, is far more disastrous. The injury to victims of such regimes may far exceed the damage inflicted by military forces defending against oppression. Holding warriors on the battlefield to peacetime-like criminal law standards is simply unrealistic. This is particularly so if the court has the potential of rendering politically-based judgments.

This is not to suggest that rules should not exist on the battlefield. Humanity is certainly better off because of the laws of war.<sup>7</sup> Millions, perhaps billions, have been spared because of their effectiveness.<sup>8</sup> Moreover,

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5. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute].

6. United States v. von Leeb, XI TRIALS OF WAR CRIMINALS 488 (1950) (The High Command Case).

7. Telford Taylor, *War Crimes, in WAR, MORALITY, AND THE MILITARY PROFESSION* 377 (Malham M. Wakin ed., 1986).

8. *Id.* at 375.

these battlefield rules of restraint diminish the “corrosive effect of mortal combat on the participants” themselves.<sup>9</sup> Units adhering to the laws of war have fewer problems with good order and discipline, and when soldiers from these units return home from combat, they are more likely to do so with their societal values still intact.<sup>10</sup>

Humanity has a right to demand that soldiers do all they can to limit the destructive forces of combat. Soldiers must be trained to recognize the difference between proper and improper applications of force. However, it is both unrealistic and dangerous to scrutinize and judge in a court of law their every action on the battlefield.

For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity . . . . You lose your sense of the definite, hence your sense of truth itself . . . .<sup>11</sup>

Holding the common soldier criminally culpable for even the smallest violation of the laws of war may distract the international community from the real threat to society and world peace: aggressive and oppressive regimes.

This article briefly describes current theories in war avoidance. It then focuses on the “democratic peace” and deterrence theory as the most statistically-sound paradigm for avoiding conflict. It next examines international criminal tribunals in an attempt to determine their place and effec-

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9. *Id.* at 377. Taylor explains:

Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.

*Id.*

10. *Id.*

11. TIM O'BRIEN, *THE THINGS THEY CARRIED* 88 (1990).

tiveness in deterring criminal state actors at the international level. Finally, it looks at the proposed International Criminal Court and asks whether the court will contribute to the concept of systemic deterrence. The article concludes that, in its currently proposed format, the court has the potential to deter the wrong parties.

This article maintains that becoming a party to the ICC would run counter to the national security interests of the United States. However, now that the United States has signed the treaty creating the court,<sup>12</sup> this article proposes specific changes to the treaty necessary to adequately protect U.S. interests. Although the United States would be best served if it did not ratify the treaty, at a bare minimum, these absolutely vital changes must be agreed upon by the international community prior to U.S. ratification.

## II. The Prevention of Hostilities

War has been with mankind since man began recording history. In 1968, one scholar estimated that “there had been only 268 years free of war in the previous 3421 years.”<sup>13</sup> To successfully prevent war, one must first examine its causes. Numerous theories have been suggested over the years. Theorists tend to cite one or more of the following as the causes of war:

- (1) Specific disputes among nations;
- (2) Absence of dispute settlement mechanisms;
- (3) Ideological disputes;
- (4) Ethnic and religious differences (a current emphasis);
- (5) Communication failures;
- (6) Proliferation of weapons and arms races;
- (7) Social and economic injustice; and
- (8) Imbalance of power (or paradoxically, balance of power).<sup>14</sup>

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12. Rome Statute, *supra* note 5. On 31 December 2000, President Clinton directed Ambassador David J. Scheffer, on behalf of the United States, to sign the treaty, which seeks to create a permanent standing International Criminal Court. Thomas E. Ricks *U.S. Signs Treaty on War Crimes Tribunal*, WASH. POST, Jan. 1, 2001, at A01.

13. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 4 (1995). Kagan points out that war is caused by a failure of non-aggressive states to take the actions necessary to preserve the peace, and “peace does not keep itself.” *Id.* at 73-74, 212, 567.



Having determined the potential causes, workable responses to these causes must be fashioned. Professor John Norton Moore lists the most commonly accepted theories for preventing war:

- (1) Diplomacy;
- (2) Balance [of] power;
- (3) Third-party dispute settlement;
- (4) Collective security;
- (5) Arms control;
- (6) Functionalism;
- (7) Increasing commercial interactions;
- (8) Advances in military technology, thereby making war more deadly;
- (9) World Federalism;
- (10) Rationalism;
- (11) Pacifism and non-violent sanctions;
- (12) "Second track" diplomacy; and
- (13) Resolving underlying "causes" (poverty, racism, ethnic differences [and others]).<sup>15</sup>

It is beyond the scope of this article to examine all of the causal and response theories of war. However, Professor Moore, who spent years studying the causes of war and the various theories for preventing it,<sup>16</sup> found that all of the above-listed theories regarding the causes of war contain some element of truth. And yet, Moore was convinced that none of these cause and avoidance theories strongly correlated with any of the available empirical data to definitively explain why wars occur.<sup>17</sup> He concluded: "Major wars occur as a synergy between a regime initiating an aggressive attack (typically non-democratic), and an absence of effective system-wide deterrence."<sup>18</sup> In other words, wars happen because of gov-

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14. John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 819 (1997). Professor Moore is the Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia School of Law.

15. *Id.* at 819, 820.

16. In addition to his work at the University of Virginia, among other significant positions in government and in academia, Professor Moore served as the initial Chairman of the Board of Directors of the United States Institute of Peace created by the United States government in 1985. The Institute has funded research producing significant data and analysis that Professor Moore has used in his work.

17. Moore, *supra* note 14, at 820.

18. *Id.* at 840.

ernmental failure at the national level, and a lack of systemic deterrence at the international level.

#### A. The Democratic Peace

Although the idea is not new, there is now significant data supporting the international relations theory commonly referred to as the “Democratic Peace.” This theory holds that democracies are not aggressive, generally, and that the use of force by democracies tends to be defensive in nature.<sup>19</sup> Professor Bruce Russett explains:

[A] striking fact about the world comes to bear on any discussion of the future of international relations: in the modern international system, democracies have almost never fought each other . . . . By this reasoning, the more democracies there are in the world, the fewer potential adversaries we and other democracies will have and the wider the zone of peace.<sup>20</sup>

If proponents of the Democratic Peace theory, such as Professors Moore and Russett, are correct, then any long-term war avoidance strategy should

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19. IMMANUEL KANT, *ETERNAL PEACE* (W. Hastie trans. 1914) (1795); Moore, *supra* note 14, at 822 (citing BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993); SPENCER WEART, *PEACE AMONG DEMOCRATIC AND OLIGARCHIC REPUBLICS* (1994); MICHAEL DOYLE, *KANT, LIBERAL LEGACIES AND FOREIGN AFFAIRS*, *PHIL. PUB. AFF.* (1983); JAMES LEE RAY, *DEMOCRACY AND INTERNATIONAL CONFLICT: AN EVALUATION OF DEMOCRATIC PEACE PROPOSITION* (1994) (unpublished manuscript on file with Professor Moore); SPENCER WEART, *NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER* (1994) (unpublished manuscript on file with Professor Moore)). Professor Moore asserts that the following principle elements are present in true democracies:

- 1) Government of the people, by the people, and for the people (e.g., periodic free elections as the method for selecting government leaders);
- 2) Some form of effective separation of powers or checks and balances;
- 3) Representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom and dignity);
- 4) Limited government and possibly federalism; and
- 5) Preferably review by an independent judiciary as a central mechanism for constitutional enforcement.

Moore, *supra* note 14, at 862 (citing John Norton Moore, *The Rule of Law: An Overview*, Paper Presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR (March 19-23, 1990)).

include attempts to democratize the nations of the world. Although some may view this strategy as a form of *pax Americana* or as a culturally-insensitive response, neither is the case. First, democracy is not a uniquely American concept. Second, if the empirical data supports democracy as a paradigm for war avoidance, then such a model should be followed regardless of its origins.

The data supporting the Democratic Peace theory is powerful and should be considered. For example, Professor Rudy Rummel found that if all major conflicts from 1916 to 1991 are considered, not once did a democracy fight another democracy. In contrast, there were 198 wars between non-democracies and 155 conflicts between non-democracies and democracies.<sup>21</sup> These statistics suggest three conclusions: first, democracies fight significant numbers of wars against non-democracies; second, if large numbers of the world's nations were to move toward democracy, there would be fewer wars; and, third, if the entire world were to democratize, there would be virtually no war. These statistics fail to explain, however, why democracies fight non-democracies, but not other democracies. As will be discussed, the explanation appears to derive from non-democratic regimes' tendency to be aggressive and democratic regimes' tendency to respond with force to such aggression.

Although a detailed explanation as to why democracies are so successful in preventing war is beyond the scope of this article, Professor Moore theorizes that the structure of democratic governmental systems themselves help prevent war. Conversely, in non-democracies there is a lack of proper incentives at the national and international levels for these regimes and their elites to shun war.<sup>22</sup> Some adherents of the Democratic Peace theory argue that democracies are slower to go to war because they have greater institutional restraints through the diffusion of power; some even assert that it is the democratic culture itself that leads to less aggression.<sup>23</sup> Professor Moore contends that non-democracies go to war owing to "government failure" in totalitarian regimes.<sup>24</sup> Based on the theory of "public choice,"<sup>25</sup> the regime elites are able to "externalize the costs" on

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20. Moore, *supra* note 14, at 823 (quoting RUSSETT, *supra* note 19, at 4). Although beyond the scope of this article, it appears that if nations are serious about advancing human rights, increasing the world standard of living, strengthening national and global economies, reducing damage to the environment, and famine avoidance, democracy should become the governmental structure of choice. There is data that suggests that not only are democracies able to have a positive impact on war avoidance; they are particularly well suited to address these other issues as well. *Id.* at 826-32.

21. RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 2 (1994).

others, while reaping all the benefits of aggression.<sup>26</sup> For example, if the international community elects to impose economic sanctions against an aggressor rather than resorting to armed response,<sup>27</sup> such an embargo may cause significant suffering among the aggressor's people, while the regime's elites continue to live comfortably.

If the leader of a totalitarian regime decides to attack a neighboring country because the neighboring country possesses valuable industries and natural resources, the tyrant can externalize the cost of the operation on the actual combatants while avoiding combat himself. Moreover, because a

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22. See generally Moore, *supra* note 14, at 833-38. For an excellent statement on the value of democratic structures of government, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J., concurring). Justice Frankfurter wrote:

A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end, they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. . . .

*Youngstown*, 343 U.S. at 593.

23. Moore, *supra* note 14, at 833.

24. *Id.*

25. *Id.* (citing JAMES M. BUCHANAN, *POLITICS WITHOUT ROMANCE: A SKETCH OF POSITIVE PUBLIC CHOICE THEORY AND ITS NORMATIVE IMPLICATIONS IN THE THEORY OF PUBLIC CHOICE* II 11-22 (James M. Buchanan & Robert D. Tollison eds., 1984).

26. *Id.* at 834.

27. Economic sanctions do not constitute armed attacks. PAUL SZASZ, *THE LAW OF ECONOMIC SANCTIONS*, IN *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 455 (Michael N. Schmitt & Leslie C. Green eds., 1998).

national leader in a totalitarian regime may control or own significant portions of the nation's assets, he stands to gain personally as a result of aggression, thereby converting national gains into personal ones. This holds especially true if his nation's military successfully appropriates the assets of neighboring countries. A tyrant then, might rationally determine that international conquest is more beneficial than international commerce.

In a democracy, the nation's leaders cannot completely externalize the costs of aggression on others. Those who bare the greatest cost of military actions—the nation's warriors, their families, and their supporters—could all exercise their votes to protest the leaders' actions. In addition, if a democratic government were to initiate an aggressive war to grab the industrial resources of a neighboring country, the democracy as a whole may benefit, but the democratic leaders would not. For example, if the President of the United States acts to deploy the American military against another country, he makes the same salary regardless of the number of military actions he takes, and any property the United States might acquire during these operations would not inure to him personally. Therefore, one may argue that national incentives exist in democracies to avoid aggressive acts, whereas the national incentives in non-democracies encourage aggression against other nations.

The United States fully accepts the notion that global democratization leads to peace, a reduction in human rights violations, and an increase in the standard of living.<sup>28</sup> Former President William J. Clinton's National Security Strategy for the year 2000 explained:

Underpinning our international leadership is the power of our democratic ideals and values. In crafting our strategy, we recognize that the spread of democracy, human rights and respect for the rule of law not only reflects American values, it also advances both our security and prosperity. Democratic governments are more likely to cooperate with each other against common threats, encourage free trade, promote sustainable economic development, uphold the rule of law, and protect the rights of their people. Hence, the trend toward democracy and free markets throughout the world advances American interests. The United States will support this trend by remaining actively engaged in the world, bolstering democratic institutions and

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28. See generally NATIONAL SECURITY STRATEGY, *supra* note 4.

building the community of like-minded states. This strategy will take us into the next century.

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The United States works to strengthen democratic and free market institutions and norms in all countries, particularly those making the transition from closed to open societies. This commitment to see freedom and respect for human rights take hold is not only just, but pragmatic. Our security depends upon the protection and expansion of democracy worldwide, without which repression, corruption and instability could engulf a number of countries and threaten the stability of entire regions.<sup>29</sup>

The Democratic Peace theory suggests that the best long-term solution to war is world democratization. However, it is unlikely the world will convert to democracy in the foreseeable future, and there is no reason to believe that aggressive, non-democratic regimes will suddenly drop their weapons and develop a respect for the rule of law. With these principles in mind, this article next examines the fundamental solution for war avoidance: deterrence.

## B. Deterrence as a Backstop

*For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.*<sup>30</sup>

### 1. Deterrence in Theory

“The principle of deterrence is as old as history.”<sup>31</sup> The word deterrence is derived from the Latin phrase, *de terrere*, which literally means “to frighten from” or to “frighten away.”<sup>32</sup> Thus, in its original meaning, fear

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29. *Id.* at 4, 25.

30. SUN TZU: *THE ART OF WAR* 77 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (500 B.C.).

31. BRODIE, INTRILIGATOR, & KOLKOWICZ, *NATIONAL SECURITY AND INTERNATIONAL STABILITY* 65 (1983); Glenn R. Butterson, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 *CATH. U.L. REV.* 51, 56 (1997).

was an integral part of deterrence.<sup>33</sup> Effective deterrence, therefore, is largely based on perceptions rather than the actual application of force.<sup>34</sup>

Deterrence “operates at the physical and mental level.”<sup>35</sup> It is the credible threat of the use of force that becomes the primary weapon in deterrence theory.<sup>36</sup> In fact, deterrence is most successful when actual use of force is not required. The ultimate goal of deterrence is to create a set of conditions—or a set of incentives at the international level—that dissuade a regime from resorting to aggression. However, for deterrence to be effective, it must be based on a credible threat of the use of force, and some sort of action short of the ultimate response usually must follow the threat for it to remain credible.<sup>37</sup>

Deterrence, in one sense, is simply the negative aspect of political power; it is the power to dissuade as opposed to the power to coerce or compel. One deters another party from doing something by the implicit or explicit threat of applying some sanction if the forbidden act is performed, or by the promise of a reward if the act is not performed. Thus conceived, deterrence does not

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32. NORMAN METZGER, *POST COLD-WAR CONFLICT DETERRENCE* 114 (1997). In U.S. deterrence practice, the term “deterrence” was not generally used until the nuclear age. For example, in dealing with the Native American tribes in the eastern part of the United States, George Washington’s approach was “to awe” them. BRODIE ET AL., *supra* note 31, at 102, n.5.

33. The U.S. Department of Defense defines deterrence as: “The prevention from action by fear of the consequences. Deterrence is a state of mind brought about by the existence of a credible threat of unacceptable counteraction.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, *DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 136 (23 Mar. 1994).

34. BRODIE ET AL., *supra* note 31, at 131. Professor Robert Jervis, a contributor to this work, writes:

In the most elemental sense, deterrence depends on perceptions . . . One must understand how the opposite side sees the world. One actor deters another by convincing him that the expected value of a certain action is outweighed by the expected punishment. The latter is composed of two elements: the perceived cost of the punishment that the actor can inflict and the perceived probabilities that he will inflict them. Deterrence can misfire if the two sides have different beliefs about either factor.

*Id.*

35. Butterson, *supra* note 31, at 57.

36. *Id.*

37. FINNIS BOYLE GRISEZ, *NUCLEAR DETERRENCE AND REALISM* 65 (1987).

have to depend on military force. We might speak of deterrence by the threat of trade sanctions, for example. The promise of economic aid might deter a country from military action (or any action) contrary to one's own interests . . . . In short, deterrence may follow, first, from any form of control which one has over an opponent's person and prospective "value inventory;" secondly, from the communication of a credible threat or promise to decrease or increase that inventory; and, thirdly, from the opponent's degree of confidence that one intends to fulfill the threat or promise.<sup>38</sup>

Deterrence theory suggests a potential aggressor will conduct a balancing test, weighing the possible risks against the possible benefits of his planned aggression.<sup>39</sup> As a rational actor, the aggressor will calculate the probability of suffering a net loss as a result of launching an attack or at least the probability of sustaining a higher net loss or lower net gain than by not attacking.<sup>40</sup> One commentator on deterrence theory postulated that there are four factors, which taken together comprise the aggressor's "risk calculus:"

- (1) The valuation of his war objectives;
- (2) The cost which he expects to suffer as a result of various possible responses by the deterror;
- (3) The probability of various responses, including no response; and
- (4) The probability of winning the objectives with each possible response.<sup>41</sup>

This suggests that the party attempting to deter must understand the values of the potential aggressor.<sup>42</sup> However, "[m]isperceptions of what the target

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38. GLENN H. SNYDER, *DETERRENCE AND DEFENSE, TOWARD A THEORY OF NATIONAL SECURITY* 9 (1961).

39. A.L. GEORGE & R. SMOKE, *DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE* 11 (1974).

40. SNYDER, *supra* note 38, at 12.

41. *Id.*

42. BRODIE ET AL., *supra* note 31, at 133. Professor Jervis points out that the aggressor might view an act believed to be a punishment by the deterror as a reward. For example, he asserts that Pol Pot would not have been intimidated by a threat to destroy his cities. After all, he was attempting to return Cambodia to a rural agrarian society. Professor Jervis further explains: "Threats to use brute force do not involve this pitfall, but they require the state to determine how its adversary evaluates the military balance—how it estimates who would win a war." *Id.*



state values and fears probably are less important causes of deterrence-failure than misperceptions of credibility.”<sup>43</sup> Therefore, the credibility of the threat remains the most important aspect of deterrence-based responses.

A potential aggressor must believe that the responding state fully intends to carry out the threatened action. Communications to the potential aggressor of the responder’s intent must be clear, and the responder cannot afford to send mixed signals that dilute the deterrent value of the threat. Furthermore, if the responding state takes actions that weaken its ability to carry out the threat, that will also reduce the credibility of the threat.

Since the power to commit aggression in totalitarian regimes lies with the regime’s elites, and because they can externalize the costs of aggression or the effects of deterrence on others, it stands to reason that they ought to be the target of the deterrence efforts. To accomplish this, Professor Moore suggests:

- (1) Strengthening the use of war crimes trials;
- (2) Response—if forced to carry through with war-fighting (as with allied policy of unconditional surrender which led to the replacement of governments in Germany, Italy, and Japan);
- (3) Government derecognition (including selective loss of membership in international organizations);
- (4) Measures affecting government stature (including publicity and embarrassment);
- (5) Selective civil remedies against the regime elites and their key aides (including seizure of assets abroad, international arrest orders through Interpol, permanent prohibition against foreign travel without arrest, notification of families of victims concerning the location of regime elite travels abroad or assets vulnerable to civil suit, removal of international legal immunities, removal of statutes of limitation, etc.);
- (6) Targeting of command and control leadership during hostilities; and
- (7) International outlawry (with carefully thought out consequences and possibly with authorization of military or covert operations for seizure to stand trial).<sup>44</sup>

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43. *Id.* at 135. Moreover, Professor Jervis writes: “Deterrence can be undercut if the aggressor does not understand the kind of war which the status quo state is threatening to wage.” For example, even though Japan knew there would be a military response to its attack on Pearl Harbor, it did not adequately predict the all-out war effort the United States responded with. *Id.* at 134.

There can be no question that a criminal tribunal has the capability of forcing a regime's elites to internalize the costs of international criminal activity. Therefore, these courts add a significant piece, but only one of many, to the system of international incentives that deter aggressive regimes.

If the world is serious about stopping aggression, non-aggressive countries must be willing to use force and must unequivocally communicate this willingness to potential aggressors. Some commentators have gone so far as to suggest that Western-style democracies have a legal and moral obligation to stand ready to deter those that seek to destroy democratic systems, especially fledgling democracies.<sup>45</sup> "The end—peace and just government—is legitimate. The means—the deterrent system—is probably indispensable for promoting this end."<sup>46</sup> Even after the fall of the Soviet Union, however, security organizations such as the North Atlantic Treaty Organization (NATO) should continue to play a crucial role in conflict prevention.<sup>47</sup> Similarly, "[i]n an age in which peacekeeping has almost become a synonym for U.N. operations, it is easy to forget that an original central purpose of the organization was collective security against aggression in order to end war."<sup>48</sup>

Effective system-wide deterrence includes non-military as well as military modalities. Admittedly, the U.S. military "is not a substitute for other forms of engagement, such as diplomatic, economic, scientific, technological, cultural and educational activities . . ." <sup>49</sup> However, the military

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44. Moore, *supra* note 14, at 876-77.

45. GRISSEZ, *supra* note 37, at 1.

46. *Id.* at 65.

47. RODERICK K. VON LIPSEY, *BREAKING THE CYCLE: A FRAMEWORK FOR CONFLICT INTERVENTION* (1997).

48. Moore, *supra* note 14, at 814 (1997). The preamble to the United Nations Charter reads in part:

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and for these ends . . . to unite our strength to maintain international peace and security . . . .

*Id.* (quoting U.N. CHARTER pmb1.)

49. See generally NATIONAL SECURITY STRATEGY, *supra* note 4, at 11-12.

as a form of deterrence certainly plays a key role in U.S. national security strategy.

Maintaining our overseas presence promotes regional stability, giving substance to our security commitments, helping to prevent the development of power vacuums and instability, and contributing to deterrence by demonstrating our determination to defend U.S., allied, and friendly interests in critical regions. Having credible combat forces forward deployed in peacetime also better positions the United States to respond to crises. Equally essential is effective global power projection, which is key to flexibility demanded of our forces and provides options for responding to potential crises and conflicts even where we have no permanent presence or a limited infrastructure in a region.<sup>50</sup>

## 2. *Deterrence in Practice*

*Since war is not an act of senseless passion but is controlled by its political object, the value of this object must determine the sacrifices to be made for it in magnitude and also in duration. Once the expenditure of effort exceeds the value of the political object, the object must be renounced and peace must follow.*<sup>51</sup>

It is nearly impossible to imagine a democratic country like Switzerland attacking France, or the United States attacking Canada. Yet, some theories of warfare suggest there should be war between these countries because they are contiguously connected, there are huge imbalances in military power,<sup>52</sup> and, at least with Canada and the United States, there are significant disputes in terms of resource ownership.<sup>53</sup> The only theory that adequately explains the lack of warfare between these states is the Democratic Peace theory.<sup>54</sup> The problem with relying solely on this theory to prevent war, however, is that most of the world's governments are not true liberal democracies, and the aggression in the world is being waged by non-democracies. As discussed above, democracies are still involved in numerous armed conflicts with non-democracies. In fact, democracies have been engaged in the two most destructive wars in the twentieth cen-

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50. *Id.* at 11.

51. CARL VON CLAUSEWITZ, ON WAR 95 (Michael Howard & Peter Paret trans. 1976).

52. Moore, *supra* note 14, at 819.

ture. Therefore, in and of itself, nations cannot rely solely on the Democratic Peace theory as a paradigm for avoiding war.

From the foregoing, it appears that wars result from the synergy of government failure and the absence of system-wide deterrence.<sup>55</sup> In such circumstances, deterrence serves as the backstop to the Democratic Peace theory for preventing war. Professor Moore describes deterrence as the “missing link” to the Democratic Peace theory of war avoidance.<sup>56</sup> Deterrence is very broad and is not limited to military force alone.<sup>57</sup> At the present time, however, effective military deterrence is “perhaps the most important single feature of the deterrent concept . . . .”<sup>58</sup> If military deterrence is to work, it is apparent that four elements must be present:

- (1) The ability of the party attempting to deter another to respond;

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53. See generally Scott Phillip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127 (1996); Ted L. McDorman, *The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure*, 17 LOY. L.A. INT'L & COMP. L. REV. 477 (1995); Mike Perry, *Rights of Passage: Canadian Sovereignty and International Law in the Arctic*, 74 U. DET. MERCY L. REV. 657 (1997); Davis R. Robinson, David A. Colson & Bruce C. Rashkow, *The First ICJ Chamber Experiment: Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, A.J.I.L. 578 (1985); J. Owen Saunders, *Trade Agreements and Environmental Sovereignty: Case Studies from Canada*, 35 SANTA CLARA L. REV. 1171 (1995).

54. See generally Moore, *supra* note 14, at 833-38.

55. *Id.* at 840.

56. *Id.*

57. *Id.* Professor Moore explains:

By deterrence, I mean in its broadest sense both negative and positive, and including military and non-military incentives. That is, deterrence here refers to the totality of positive and negative actions influencing expectations and incentives of a potential aggressor, including: potential military responses and security arrangements, relative power, level and importance of economic relations, effectiveness of diplomatic relations, effective international organizations (or lack thereof), effective international law (or lack thereof), alliances, collective security, effects on allies, and the state of political or military alliance structure, if any, of the potential aggressor and target state, etc. Most importantly, of course, there is a critical perception and communication component to deterrence since ultimately, it is the perception of the regime elite contemplating aggression that is most critical.

*Id.*

- (2) The will to respond on the part of the party attempting to deter the another;
- (3) Effective communication of ability and will to the aggressive regime; and
- (4) Perception by the aggressive regime of deterrence ability and will.

To avoid war, therefore, deterrence must fill the gap in the Democratic Peace theory when government structures fail.

Empirical data supports the conclusion that democracies enter wars where there has been a failure to deter aggressors.<sup>59</sup> The Korean Conflict in 1950 and the Iraqi invasion of Kuwait in 1990 are two of many examples where aggressive non-democratic regimes were not adequately deterred.<sup>60</sup> It can be argued that these regimes made rational choices to launch their aggressive wars due to a lack of deterrence. For Kim Il Sung, it was ambiguous whether the “defense perimeter” of the United States extended to South Korea.<sup>61</sup> Furthermore, Kim Il Sung believed his principal ally, the Soviet Union, would have vetoed any proposed U.N. Security Council resolution authorizing force against North Korea.<sup>62</sup>

Regarding the Persian Gulf War, while most believe it was a resounding success for democracy, the greater achievement would have been deterring Saddam Hussein’s invasion of Kuwait in the first place.<sup>63</sup> There

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58. *Id.*

59. *Id.* at 847. In his article, Professor Moore explains how a lack of deterrence may have been the real cause of several twentieth century conflicts. *Id.* at 842-48. *See generally* JOACHIM REMAK, *THE ORIGINS OF WORLD WAR I 1871-1914*, at 89 (1967); FRITZ FISCHER, *GERMANY’S AIMS IN THE FIRST WORLD WAR* 89 (1967); KAGAN, *supra* note 13, at 73-74.

60. STEPHEN J. CIMBALA, *MILITARY PERSUASION, DETERRENCE AND PROVOCATION IN CRISIS AND WAR* 166-69 (1994).

61. *Id.* 166 n.1. United States Secretary of State, Dean Acheson gave a speech in January 1950, where he defined a number of vital U.S. interests. Korea was not specifically mentioned by Secretary Acheson. *Id.*

62. North Korean Troops launched an invasion into South Korea on 25 June 1950. The United Nations Security Council, of which the Soviet Union was a permanent member, called on North Korea to cease its aggression and authorized states to “render every assistance to the United Nations in the execution of this resolution.” S.C. Res. 82, U.N. SCOR, 5th Sess. 473d mtg. at 4, U.N. Doc. S/INF/4/Rev. 1 (1950). The Soviet Union was boycotting the United Nations at the time of the resolution to protest the fact that the Nationalist Chinese were representing China. The Soviet Union would likely have vetoed the resolution but apparently erroneously believed that their abstention was tantamount to a veto. STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW* 290 (1997).

63. KEITH B. PAYNE, *DETERRENCE IN THE SECOND NUCLEAR AGE* 4, 5 (1996).

is no reason to believe that Saddam could have anticipated military success if he knew the United States would come to the aid of Kuwait. He must have also understood that his military fortunes would be further reduced if France, Great Britain, and the Arab allies joined the United States. The only rational explanation for his attack on Kuwait is that Saddam did not believe the world would come to Kuwait's assistance. Indeed, historians have remarked that Saddam mistakenly concluded there would be no international military response for three reasons: first, the United States tended to favor Iraq in its war with Iran; second, Saddam incorrectly believed that he would not be opposed by other Arab states; and finally, the United States was still suffering from the "Vietnam syndrome" when it came to military action outside of Europe.<sup>64</sup>

A single lesson emerges from the Korean Conflict and Persian Gulf War: "[A]pproaching such actions in a deterrent rather than an after-the-fact mode and . . . focusing centrally and clearly on the deterrent effect of such actions"<sup>65</sup> is the best way to deal with aggression. In addition, "[d]eterrence should become the central theme in structuring U.N. actions."<sup>66</sup> In Iraq, ten years after the Gulf War, Saddam Hussein still refuses to respond to diplomacy.<sup>67</sup> Deterrence, therefore, must continue as the primary method used to deal with similar rogue regimes.

It is better to respond to potential acts of aggression and massive human rights atrocities with a "systematic, global preventative regime,"<sup>68</sup> than to create an after-the-fact formal enforcement mechanism. This is true for both major international armed conflicts and low-level internal struggles with international implications. "Credible military intervention by forces overwhelmingly more powerful than the combatant parties (like NATO's bombardment of Serb artillery positions in 1994 and subsequent occupation of Bosnia) has historically been the means to still low-level conflicts."<sup>69</sup> In recognition of this principle, President Clinton recently

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64. CIMBALA, *supra* note 60, at 167-68.

65. Moore, *supra* note 14, at 862.

66. *Id.*

67. Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287 (1999).

68. See, MICHAEL LUND, PREVENTING VIOLENT CONFLICTS: A STRATEGY FOR PREVENTIVE DIPLOMACY (1996).

69. David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 7 (1998).

apologized for the United States' lack of an aggressive and early response in Rwanda.<sup>70</sup>

Deterrence preserved peace during several historical events, or non-events as it were. For example, the fact that the Warsaw Pact and NATO never fought World War III can be directly attributed to the power of deterrence. According to former Secretary of Defense, Casper Weinberger:

What has deterrence done? Again I must stress that it has worked and is working today. There has been 37 years of Peace in Europe. Despite the threat of the Soviet Army; despite the threat of the Soviet nuclear weapons, Western Europe has prospered. Its political freedoms have flourished, and its social institutions have grown stronger. Indeed, there has not been an equal period of uninterrupted peace on the European continent since the Roman Empire fell. At the risk of stating the obvious, the United States and the rest of the world have also avoided the scourge of nuclear fire. Deterrence, this is and remains our best immediate hope of keeping peace.<sup>71</sup>

Even some non-governmental organizations established to reduce the threat of war recognize the ultimate value of deterrence and, as a last resort, the use of force.

The threat of use of forceful measures might seem at odds with the commission's focus on prevention of deadly conflict. But situations will arise where diplomatic responses, even where supplemented by strong economic measures, are insufficient to prevent outbreak or recurrence of major violence. The question is when, where, and how should individual nations and global and regional organizations be willing to apply forceful measures to curb incipient violence and prevent potentially much greater destruction of life and property.<sup>72</sup>

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70. Robert I. Rothberg, *Post-Clinton Africa: The Wait Begins*, CHRISTIAN SCI. MONITOR, Apr. 7, 1998, at 11.

71. Casper Weinberger, *Shattuck Lecture*, 307 NEW ENG. J. MED. 767 (1982). If former Secretary Weinberger had given this lecture ten years later, his support for deterrence theory would have been bolstered even more by the events that transpired in the interim, namely the successful resolution of the Cold War.

72. CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, FINAL REPORT 59 (1997).

Recently, a deployment of peacekeepers to Macedonia may have prevented the conflict in the Former Yugoslavia from spilling over into that country as well.<sup>73</sup> Preventive military deployments, therefore, are also a form of preventative diplomacy.<sup>74</sup> The mere presence of a “thin blue line” appears to have stabilized Macedonia and protected the country from neighboring threats.<sup>75</sup>

“Perhaps the clearest use of a preventive deployment would be its utilization to deter external threats to a country’s territory or violations of some other internationally recognized boundary.”<sup>76</sup> Another potential use would be to deter genocide and large-scale humanitarian violations.

In these situations, any preventive force deployed may be greatly outnumbered, both in terms of personnel and firepower, by the external threat or threats its presence is meant to deter. Yet as a recent study by the Carnegie Commission on Preventing Deadly Conflict has observed, while consisting of: “Only a ‘thin blue line’ of forces, as with classical peacekeeping, the deterrent lies in the fact that the Security Council has expressed its interest in the situation, all the relevant parties are under close international scrutiny, and there is at least an implication of willingness to take action if there is any resort to violence.”<sup>77</sup>

Another tool in the creation of a international system of deterrence strategy might be the creation of a highly-trained and well-equipped U.N. Security Council fighting force.<sup>78</sup> A force of 5,000 troops under the auspices of the Security Council would be able to handle most small-scale contingencies and internal conflicts. A similar option would be the creation of a U.N. police force pursuant to Articles 39 through 41 of the U.N. Charter.<sup>79</sup> A final option would be ad hoc coalitions, similar to the one formed in the Persian Gulf War and acting pursuant to Article 106 of the U.N. Charter. Such coalitions may even be able to operate without Security Council authority.<sup>80</sup> All of these deterrent options may be less expen-

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73. See generally Stephen T. Ostrowski, *Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond*, 30 N.Y.U. J. INT’L L. & POL. 793 (1998).

74. *Id.* at 798.

75. *Id.* at 810, 831.

76. *Id.* at 840.

77. *Id.* at 843-44 (quoting CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, FINAL REPORT 65 (Dec. 1997)).

78. Moore, *supra* note 14, at 864.

79. U.N. CHARTER arts. 39-41.



sive and far more effective than the establishment of ad hoc criminal tribunals.

Despite this potential, the U.N. and regional security organizations have not been completely successful in preventing armed conflict. Some researchers place combatant deaths in the twentieth century as high as thirty-three million.<sup>81</sup> As staggering as this statistic may be, non-combatants killed as a result of atrocities by their own governments may exceed 169 million during the same period.<sup>82</sup> Professor Moore reminds us:

In a period of relative calm following the cold war, it is easy to forget the tragic costs of war. The widespread starvation and killing in Ethiopia and Somalia, the half a million or more Tutsis slaughtered in Rwanda, the widespread destruction of society in Lebanon and Liberia and the systematic genocide in Bosnia however, are unmistakably contemporary. Effective implementation of the goals, for which the United Nations was founded, remains a compelling need for human kind.<sup>83</sup>

Exacerbating these human casualty figures is the almost incalculable negative economic impact armed conflict has had on the international community.<sup>84</sup>

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80. See generally Andrew Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L. J. 773 (1993).

81. Moore, *supra* note 14, at 816 (citing RUDOLPH J. RUMMEL, *THE MIRACLE THAT IS FREEDOM, THE SOLUTION TO WAR, VIOLENCE, GENOCIDE, AND POVERTY* 3 (1995)).

82. *Id.* at 816 (citing RUMMEL, *supra* note 21, at 4). Professor Rummel calls this number a "partial world total." *Id.*

83. *Id.* Since the time of Professor Moore's article, additional humanitarian disasters have occurred, including the violence and misery in Kosovo, East Timor, Sudan, and Sierra Leone.

84. *Id.* at 816-17. Professor Moore writes:

World War I multiplied the national debt of France by a factor of seven and the national debt of Britain by a factor of more than ten. The resulting famine in Germany may have killed as many as 750,000 and led to widespread economic chaos, in turn setting the stage for takeover by the Nazis and World War II. World War II may have cost \$1.6 trillion; again with all future generations deprived of the compound rate of growth that would have forever created increasing wealth on this global asset base.

*Id.* (citing JOHN KEEGAN, *THE SECOND WORLD WAR* 592 (1990); GEORGE WRIGHT, *THE ORDEAL OF TOTAL WAR* 264 (1968)).

The United States has a vital leadership role in international peace and security.<sup>85</sup> No other force has the same capability to protect the world from tyrannical regimes. It does not appear that the United Nations is capable of building the political will necessary in many cases to create a credible threat to aggressor regimes. According to one expert, it would be a mistake to place all the deterrence eggs in the basket of collective security.<sup>86</sup> Therefore, the law must reflect the reality that the United States will provide unilateral leadership and bear the brunt of most international military operations to deter aggression.<sup>87</sup>

Professor Innis Claude asserts that real and effective deterrence is created by a major power taking the leadership role. For example, the successes in mounting military responses in Korea and the Persian Gulf were a result of U.S. leadership.<sup>88</sup> Professor Claude argues:

I reached the conclusion some 30 years ago that the idea of creating a working collective security system had been definitively rejected, and that at most the idea might occasionally receive lip service. I have taken the view that the implementation of collective security theory is not a possibility to be taken seriously, and that the United Nations should be turned to other, more promising because more acceptable, methods of contributing to world order.<sup>89</sup>

### III. Implementation of International Norms

#### A. Various Modalities of Implementation

Other than formal national or international courts, methods of enforcement of international law include the protecting power, reprisals, international military commissions, monitoring, negotiating, fact-finding,

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85. David J. Scheffer, Statement on the Status of Negotiations on the Establishment of an International Criminal Court, Rome, Italy (July 15, 1998), available at [http://www.state.gov/www/policy\\_remarks/1998/980715\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html).

86. INNIS L. CLAUDE, JR., COLLECTIVE SECURITY AFTER THE COLD WAR II, COLLECTIVE SECURITY IN EUROPE AND ASIA 7-28 (Gary L. Guertner ed., 1992).

87. United States Secretary of State Madeline Albright described the United States as the "indispensable nation" for resolving international crises. Samuel P. Untington, *The Lonely Superpower*, 78 FOREIGN AFFAIRS 37 (1999).

88. CLAUDE, *supra* note 86, at 24.

89. *Id.* at 9.

official inquiries, compensation, economic sanctions, and brute military force.<sup>90</sup>

Although virtually all societies have rules for when they are willing to go to war and rules regarding the conduct of warfare,<sup>91</sup> “in the 1980’s and 1990’s there has been an unprecedented degree of international attention to the application of the laws of war to contemporary conflicts.”<sup>92</sup> A natural by-product of this increased sensitivity to the laws of war may include a perceived need for a court to enforce that law. Looking at the domestic criminal law model, the world community is under the impression that the proposed international criminal court will deter war crimes and human rights violations.<sup>93</sup> Moreover, in this century, the lethality of weaponry has increased and there has been an explosion of domestic armed struggles. The fact that the face of warfare is changing, and increasing numbers of civilians are victimized by armed conflict, may be leading some to assume that a permanent court is the answer.<sup>94</sup>

Many commentators look to the success of the post World War II war crimes prosecutions as support for the creation of a standing permanent international criminal court. However, a “questionable part of the legacy of Nuremberg is the creation of the expectations that, in general, trials are an appropriate way to handle war crimes issues.”<sup>95</sup> Telford Taylor, a prosecutor at Nuremberg has stated:

In terms of enforcement, whether the charge is war crimes or crimes against humanity, I think it is a mistake to expect that the device of a criminal trial is the major way in which the enforcement of those limitations and obligations is going to be achieved. As one who has taught criminal law for several years, I always try to instill in my students a basic appreciation that most law enforcement is voluntary. Therefore, in [the] international field

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90. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT’L L. 19-20, 30, 35, 38, 39 (1995).

91. See generally FRIEDMAN, 1 THE LAW OF WAR: A DOCUMENTARY HISTORY (1972).

92. Roberts, *supra* note 90, at 11.

93. See Gerhard Hafner, Statement on Behalf of the European Union Delivered by Acting Head of Australian Delegation of the Whole (July 17, 1998), available at <http://www.un.org/icc/index.htm> (Speeches, July 17, 1998).

94. See David J. Scheffer, *International Judicial Intervention*, FOREIGN POL’Y, Mar. 1, 1996, at 34; Barbara Crossette, *Violation: An Old Scourge of War Becomes Its Latest Crime*, N.Y. TIMES, June 14, 1998, at 4:1.

95. Roberts, *supra* note 90, at 27.

as well, the idea that trials alone (or statutes and treaties) can bring about the reforms and remedies that we hope for is misplaced reliance.<sup>96</sup>

During the early years of the development of the laws of war, warriors developed codes of behavior that were largely self-enforced. However, over the years, these codes of honor have been codified and elevated to the status of law. This transition of the rules from codes of honor to codified law may partially explain why scholars and diplomats tend to support the creation of formal enforcement mechanisms over traditional self-enforcement means of compliance.<sup>97</sup>

The natural tendency in this regard is to look to the creation of formal enforcement mechanisms such as criminal courts.<sup>98</sup> To be sure, there must be some sort of sanction for violations if community expectations are to rise to the level of credible legal norms.<sup>99</sup> However, a formal enforcement mechanism may not be the best forum for achieving the desired results. Hence the observation that the “problems faced by soldiers and decision-makers in armed conflicts have not been explored in depth.”<sup>100</sup>

It may be argued that a standing court offers the world its best hope for deterring large-scale violations of humanitarian law and human rights abuses. While these courts have the potential to deter some illegal actors some of the time, unfortunately, they may not represent a sufficiently credible threat to deter the vast majority of aggressors. In fact, criminal courts may have the tendency to perpetuate the violence in some conflicts.

## B. National and International Criminal Courts

*War is indeed reprehensible, primitive, and threatens universal catastrophe. All true, but it cannot be conjured away by calling it the crime of an individual to be suppressed by a world community of peace loving nations.*<sup>101</sup>

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96. Telford Taylor, *Discussion Panel, Forty Years After Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 70 (1986).

97. Roberts, *supra* note 90, at 16.

98. *Id.* at 15.

99. Robert F. Turner, *Don't Let Saddam Escape Without Trial*, ATLANTA CONST., Aug. 31, 1991, at B2.

100. Roberts, *supra* note 90, at 16.

Traditionally, domestic courts, rather than international tribunals, were relied on as the primary formal method to enforce the laws of war. Even following World War II, “[t]here were many war crimes trials . . . mainly in national courts of the victorious powers and of the countries they had liberated.”<sup>102</sup> However, the most famous and influential of the post-World War II war crimes trials were those before the international military tribunals at Nuremberg and Tokyo, which tried Axis war criminals. These two tribunals constitute the “major precedent for implementation of the laws of war through international trials.”<sup>103</sup>

The most common criticisms of the post-World War II tribunals include:

- (1) The tribunals applied a body of law, some aspects of which, before 1945 had not been clearly enumerated in treaty form, or were in treaties which were not fully applicable to the events under scrutiny;
- (2) The tribunals were one-sided, as possible war crimes committed by the Allies were neither fully considered at either tribunal nor dealt with elsewhere; and
- (3) Large numbers of guilty individuals were either not prosecuted at all, or were treated too leniently.<sup>104</sup>

While these criticisms are well-founded, they do not demonstrate that the trials were of insignificant value.<sup>105</sup> Rather, the “Nuremberg and Tokyo tribunals had taken a bold step beyond the idea that states primarily were responsible for punishing their own nationals.”<sup>106</sup> Although these tribu-

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101. EUGENE DAVIDSON, *THE NUREMBERG FALLACY, WARS AND WAR CRIMES SINCE WORLD WAR II* 296 (1973).

102. U.N. WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* (1948).

103. Roberts, *supra* note 90, at 19-20 (citing Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Annex, arts. 6(a)-(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 286-88 [hereinafter London Charter]).

104. Roberts, *supra* note 90, at 24.

105. *Id.* at 27.

106. *Id.* at 28.

nals did not perfectly administer justice, the world was better off with them than without them.

Since Nuremberg, there has been a growing call for establishing formal criminal law enforcement mechanisms at the international level, the job formerly of domestic criminal law systems.<sup>107</sup> "International criminal law has expanded more in the last fifty years than in the previous five-hundred."<sup>108</sup> However, an international court would not be without limitations:

The idea that acts deemed to be crimes can and should be tried and punished in courts is a feature of all national legal systems; however, its application on the international plane, as a means of enforcing the laws of war, is problematic . . . . Events in some major conflicts of the past two decade confirm the difficulties of the criminal law approach."<sup>109</sup>

There are also "many difficulties with transposing the institutions of domestic criminal justice to the radically different terrain of international politics."<sup>110</sup>

There is no real debate that courts can further very noble and worthwhile goals, such as forcing the elites in corrupt regimes to bear some of the costs of massive violations of international humanitarian law. But,

lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call courts we have solved major problems, we should review the fundamental goals that institutions designed to protect public order seek to fulfill. Goal clarification is especially important when our passions are engaged, as indeed they should be, upon encountering atrocities such as those of Rwanda.<sup>111</sup>

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107. See Scheffer, *supra* note 94, at 34.

108. LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW, DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION* 2 (1997).

109. Roberts, *supra* note 90, at 69.

110. W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 *TUL. J. INT'L & COMP. L.* 5, 46 (1998).

111. M. Michael Reisman, *Institutions and Practices and Maintaining Public Order*, 6 *DUKE J. COMP. & INT'L L.* 175 (1995).

As seen in Rwanda, even the best laid plans to deal with the enforcement of violations of international law do not always work out as hoped for in the real world.<sup>112</sup>

The international community may have unrealistically high expectations for the ICC, just as it did with the International Court of Justice.<sup>113</sup> Treating the war criminal as a common criminal oversimplifies the complexity of the international system. It is questionable whether courts are the most effective places to deal with powerful criminal states and their leaders. The problem may be much larger than a court alone is capable of addressing.

International law is not a criminal law system; it is more akin to constitutional law, where enforcement rests on political counterpressures and foreseeable middle- and long-term reactions. A militarily organized movement that commits atrocities is likely to lose allies, unify its enemies, waste its energy in daring strikes of dubious military or political value, and ultimately turn on itself.<sup>114</sup>

International law is far more complex and intricate than a domestic penal system of laws. International law also includes politics and diplomacy, necessary to maintain the state and its sovereignty as the fulcrum of the international system.<sup>115</sup>

For better or for worse, we live in a world of states, and in most cases, the laws of war, like other parts of international law, must be implemented thorough traditional state mechanisms such as deliberations in governmental departments, national laws, manuals of military law, rules of engagement, government-established commissions of inquiry, and courts and courts-martial. . .

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112. See Ambassador Bill Richardson, Statement Before the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (June 17, 1998), available at <http://www.un.org/icc/index.htm> (Speeches, 17 June 1998).

113. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 484 (1999).

114. See Roberts, *supra* note 90, at 69.

115. Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 *AM. U. INT'L REV.* 321, 349 (2000) (citing Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 *ALB. L. REV.* 571, 577 (1997) (explaining that international law deals more with issues of politics than law)).

. When states and international organizations not directly involved in a particular conflict are moved to demand better application of humanitarian rules in that conflict, they need to be very careful about the manner in which they do so. . . . [Otherwise] their efforts may backfire.<sup>116</sup>

If international law is based primarily on politics and relations between states, then the best method of deterring aggression is the deterrence of the state, not the punishment of a handful of war criminals before an international tribunal.

One problem with globalizing criminal law is that the majority of conflicts in the twentieth century have been internal conflicts. The rules of international armed conflict do not always apply cleanly in these civil war-like settings. As a general rule, the full body of the laws of war apply only in international armed conflict, that is armed conflict between nation-states.<sup>117</sup> This is because “governments usually have been reluctant to create or sign on to a body of law which would bind their freedom of action in dealing with armed rebellion.”<sup>118</sup> However,

[c]ivil wars are notoriously bitter; . . . each side is likely to deny the legitimacy of the other; training in the law of war may be limited; the neat distinction between soldier and civilian frequently breaks down; and the scope for a compromise settlement of the war is usually slight. Trying to secure even a minimal level of

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116. Roberts, *supra* note 90, at 71.

117. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277, Treaty Series N. 539, [hereinafter Hague IV]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWSS]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Other than Article 3 Common to the Geneva Conventions, GWS, GWSS, GPW, and GC, the remainder of the Geneva Conventions do not apply to purely internal armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609 [hereinafter Protocol II], specifically applies in internal armed conflicts.

118. Roberts, *supra* note 90, at 13.



observance of rules is peculiarly difficult in such circumstances.<sup>119</sup>

Owing to the added complexity of internal armed conflicts and the limited reach of the laws of war therein, national courts appear to be a more workable option than international tribunals for trying war criminals—for now at least.<sup>120</sup>

#### IV. Criminal Justice Systems and International Law

##### A. Courts and Deterrence

Systems of criminal justice are designed to do more than merely punish violators of the law. One of their primary goals is to deter potential wrongdoers by punishing those that are unfortunate enough to get caught. In other words, penal systems also seek to specifically and generally deter individuals from participating in future illegal activities.<sup>121</sup> Despite this laudable goal, international criminal tribunals have had little if any deterrent effect. The Nuremberg Tribunal, the first serious international criminal tribunal, met over fifty years ago; since then, however, the world has witnessed almost 100 wars and endured thousands, perhaps even millions, of atrocities committed during those conflicts.<sup>122</sup>

Although many believe the proposed ICC will have a role in the prevention of war, virtually no one believes the court can do that alone.<sup>123</sup> One commentator has opined:

In circumstances in which the international community is prepared to defeat an adversary, application of the criminal law model, through an international tribunal, makes sense. It directs condemnation, of violations of international law, at the defeated

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119. *Id.* at 13.

120. Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. 659 (1996). Martins points out that thousands have been tried in national courts for law of war violations, far more than in international tribunals.

121. Bloch & Weinstein, *supra* note 69, at 1 (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 113-14 (5th ed. 1989)).

122. See DAVIDSON, *supra* note 101.

123. Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 672 (1996).

government officials and legitimizes a process of social reconstruction. In circumstances in which the international community is not prepared to defeat the party deemed in violation of international law but ultimately must negotiate a settlement with that party, the criminal law model makes no sense because it only delays the inevitable negotiation.”<sup>124</sup>

Therefore, some believe that the ICC might actually defer reconciliation by stirring up the participants in a conflict that has ended through its attempt to punish those guilty of violating international law. Sir Graham Bower remarked:

This Court would render a peace impossible. When the soldiers and sailors had finished fighting, when the hostilities were over and the soldiers and sailors on both sides were ready to shake hands with one another, as they are today, the lawyers would begin a war of accusation and counter accusation and recrimination. Such a war would render peace or reconciliation impossible.<sup>125</sup>

In fact, an over-ambitious international court could possibly create conditions that lead to war, rather than prevent it.

The Superpowers, despite their overwhelming collection of nuclear weapons, do not have anything like complete freedom of movement. The war the United States has been fighting in Indochina, and the Russian invasions of Hungary and Czechoslovakia, have been limited by considerations of prudent risk; each superpower attempts to avoid actions that are likely to lead to major confrontation with the other . . . . Thus it may be argued that the uneasy peace that has endured between the major powers since World War II has been kept not because of, but despite Nuremberg. Had the Nuremberg principles of the illegality of aggressive war been maintained as rigorously as many of their proponents would have liked, a world war could have started in Hungary, in the Middle East, in the Far East—in fact, anywhere at all. Fortunately for the human race, statesmen tend to act with a weather eye on realities and its is by ignoring the doctrines of

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124. Reisman, *supra* note 111, at 185.

125. Wexler, *supra* note 123, at 672 (quoting INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-THIRD CONFERENCE 154 (1925)).

Nuremberg rather than by trying to enforce them that the post-war world has lived through the cold war and then peaceful coexistence, which is another stage of the same process.<sup>126</sup>

The International Criminal Tribunal for Yugoslavia (ICTY) has been in existence for over seven years.<sup>127</sup> The existence of the tribunal, however, did “not adequately [deter] the warring factions from committing rape, torture, forced expulsion, forced displacement, genocide, murder and other war crimes.”<sup>128</sup> In Yugoslavia, armed conflict continued to rage even after the establishment of the tribunal. In a similarly tragic vein, “[i]n Rwanda, where the victorious group is enthusiastically in favor of such a tribunal, the exercise is in danger of becoming a technique by which the ruling elites, with international blessing, purges the leadership of the opposition.”<sup>129</sup>

Deterrence of future atrocities through vigorous prosecution is the argument most often made by supporters of the ICC.<sup>130</sup> Using the example of the ICTY, this assertion does not withstand scrutiny.

This argument was regularly advanced as one of the main justifications for the creation of the ICTY. Unwilling in 1993 to take strong military action to control the bitter conflict then tearing Bosnia apart, the U.N. Security Council expressed its hope that the ICTY would “contribute to ensuring that violations of international humanitarian law” are halted and effectively addressed.<sup>131</sup>

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126. DAVIDSON, *supra* note 101, at 290-91.

127. S.C. Res. 827, U.N. SCOR, 48 Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].

128. Penrose, *supra* note 115, at 325 (citing *War With Milosevic*, *ECONOMIST*, Apr. 3, 1999). Penrose points out that as many as one million refugees from Kosovo had been displaced during Serbian ethnic cleansing operations in March and April 1999 alone. As many as 4,000 ethnic Albanians crossed the borders of Albania, Macedonia, and Montenegro per hour. All, of course, after the tribunal had been operating for over five years. *Id.*

129. Reisman, *supra* note 111, at 185.

130. M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 1-2 (1998); Mark J. Osiel, *Ever Again, Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); *Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, 59 *LAW & CONTEMP. PROB.* (1996).

131. Wippman, *supra* note 113, at 477. *See also*, Carroll Bogert, *Pol Pot's Enduring Lesson*, *FIN. TIMES*, Mar. 16, 1998, at 16 (discussing the deterrence theory of an international criminal court).

Unfortunately, however, “the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging.”<sup>132</sup>

Payam Akhavan, Legal Advisor to the Office of the Prosecutor for the ICTY writes, “the evidence of the tribunal’s contribution to deterrence of ongoing humanitarian law violations remains equivocal.”<sup>133</sup> Atrocities continued, at high levels, even after the court was established and had tried its first case.<sup>134</sup> Moreover, the numbers actually tried for crimes in Yugoslavia are “minuscule” in comparison to the numbers of persons that took part in the atrocities.<sup>135</sup> Many of those indicted, many of the senior leaders, remain at large.<sup>136</sup> One cynical observer noted that offenders have about as much chance of being prosecuted as “winning the lottery.”<sup>137</sup>

The majority of the participants in the atrocities in the former Yugoslavia were not ignorant with regard to the laws of war; they understood the rules and accepted the legitimacy of the rules, but did not view their actions as being wrongful.<sup>138</sup> The combatants believed they were in a “total war” and that the lines between civilians and combatants were blurred. They were willing to intentionally target civilians, indiscriminately use land mines, and abuse prisoners of war. They felt they were in a life and death struggle and the limits on warfare had to be suspended.<sup>139</sup> It is unlikely that a court could deter conflict participants with these types of motives. Even after the indictment of Slobodan Milosevic, President of the Federal Republic of Yugoslavia, the atrocities continued.<sup>140</sup> The concern for prosecution in Bosnia may have manifested itself when partici-

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132. Wippman, *supra* note 113, at 474.

133. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 744 (1999).

134. Wippman, *supra* note 113, at 475.

135. *Id.* at 476.

136. *Id.*

137. *Id.* at 477.

138. *Id.* (citing INTERNATIONAL COMMITTEE OF THE RED CROSS, COUNTRY REPORT ON BOSNIA-HERZEGOVINA 13 (n.d.), available at <http://nt.oneworld.org/cfdocs/icrc/pages/reports/pdfs/bosnia.pdf>).

139. Wippman, *supra* note 113, at 476-80.

140. *Id.* at 479.

pants in ethnic cleansing began wearing black ski masks, but the threat of prosecution did not prevent the atrocities themselves from continuing.<sup>141</sup>

#### B. The Current Ad Hoc International Criminal Tribunals

*I would go so far as to say whereas the Nuremberg trials were a symbol of the allies' triumph, the Tribunals for the former Yugoslavia and Rwanda in many ways symbolize failure.*<sup>142</sup>

The goals of the ICTY, as announced in Security Council Resolution 808, were arguably "naively optimistic."<sup>143</sup> As Professor Reisman has explained: "There is no evidence that courts, by their mere existence and operation, create the minimum political order that is necessary for their operation."<sup>144</sup> Nonetheless, many believed the ICTY would do much to facilitate and preserve peace in the region.

The establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.<sup>145</sup>

The original purpose of the ICTY was to restore the peace, not necessarily to prosecute war criminals.<sup>146</sup> And yet, did the court really have anything to do with the attainment of peace in the region? If there is a linkage to peace,<sup>147</sup> now that peace has been restored, does this mean there is no longer a need for the court and that it should shut down?<sup>148</sup> Ironically, like any formal court system, it was only after the real threat had ceased and peace had been restored that the lawyers and judges assigned to the tribunal were fully able to swing into action.<sup>149</sup> Moreover, the court will likely continue in business for years, well after the conflict has concluded. "The

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141. *Id.* at 480 (citing Raymond Whitaker & Andrew Marshall, *Massacre Ordered at Top Level in Belgrade, Says US*, INDEPENDENT, Jan. 29, 1999, at Title Page).

142. Penrose, *supra* note 115, at 329 (citing Tom Gjelten, *Conference on War Crimes Tribunals: Tribunal Justice, the Challenges, the Record, and the Prospects*, 13 AM. U. INT'L L. REV. 1541, 1556 (1998)).

143. Roberts, *supra* note 90, at 58.

144. Reisman, *supra* note 110, at 46.

145. Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 26 (1993) [hereafter Report of the Secretary General].

whole process will take years or decades, not months—a further reason why it is not necessarily wise to suggest that such a process is a preliminary to restoration of peace.”<sup>150</sup>

Some writers have not been convinced that the ICTY has lived up to its billing. Possible reasons suggested for the inability of the ICTY to fully respond to violations of international law in the Former Yugoslavia include:

- (1) The probable need, in efforts to end the war, to negotiate with the very people who are wanted for war crimes, and to agree to some kind of amnesty;
- (2) The problem of getting evidence which proves the guilt of specifically named individuals—a far more difficult matter than proving in a general way that war crimes occurred;
- (3) The difficulty of getting suspects arrested and brought to The Hague—the statute having, probably rightly, ruled out trials in absentia;
- (4) The difficulty of getting witnesses to come to The Hague to give evidence and protecting them thereafter; and
- (5) The difficulty of getting adequate and reliable financial resources for what must be a very extensive process of investigation and trial, especially as the U.N. General Assembly has ultimate control over funding, and is anxious about the gravita-

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146. Is it possible that such a court could find counter to the stated goal of restoring peace and security? If the court is to be effective as a means of keeping the peace, it would seem that the court would have to appear to be neutral by the warring parties. However, the appearance of neutrality is difficult to maintain if the court calls on military forces to arrest alleged war criminals belonging to one of the parties to the conflict. For example, on 10 July 1997, British troops arrested a suspected war criminal and killed another in the Bosnian town of Prijedor. As a result, there was a spat of “retaliatory hand-grenade attacks, stabbings and bombings” directed against NATO units. Chris Hedges, *Dutch Troops Seize Suspects, Wounding One*, N.Y. TIMES, Dec. 18, 1997, at A20. Actions like this might jeopardize the peace process. YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 162-63 (1999).

147. Report of the Secretary General, *supra* note 145, para. 28. The Secretary General explained: “As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.” *Id.*

148. Reisman, *supra* note 110, at 48.

149. *Id.*

150. Roberts, *supra* note 90, at 58.

tion of powers within the United Nations Organization toward the Security Council.<sup>151</sup>

*1. Lack of Enforcement Mechanisms*

*Until we are certain that international crimes will be prosecuted and punished, justice will not be done . . . . This affects us not only because of our values, but also because of the amount of attention and resources that the international community must devote to the man-made tragedies.*<sup>152</sup>

Both the ICTY and the future ICC lack police forces to conduct investigations, arrest indictees, or run penal institutions.<sup>153</sup> The majority of ICTY indictees in custody have voluntarily surrendered themselves to the tribunal and were not forcibly detained.<sup>154</sup> Similarly, because the ICC will not have its own police force, it will be completely dependent on member states for assistance with everything from the investigation, location of evidence, procurement of witnesses, arrest of those suspected, and the recognition of its judgments.<sup>155</sup> The lack of a credible law enforcement agency is completely contrary to the alleged ICC goal of deterrence.

No organization [exists] to enforce an appearance before the Court of the execution of its judgments, and it seems difficult to establish such an organization. The jurisdiction therefore is likely to be limited and brought into action in a haphazard way. There are great risks that culprits will not always be brought before the Court. On the whole this will give the impression that the jurisdiction is being exercised in an arbitrary way. Its deterring effect will thus be very doubtful, if any.<sup>156</sup>

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151. *Id.* at 59.

152. Penrose, *supra* note 115, at 348 (quoting Claudio Grossman, *Conference Convocation*, 13 AM. U. INT'L REV. 1383, 1386 (1998)).

153. Penrose, *supra* note 115, at 361 (citing Anne L. Quintal, *Rule 61: The "Voice of the Victims Screams" Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 734 (1998)).

154. Penrose, *supra* note 115, at 362.

155. Wexler, *supra* note 123, at 703-04.

156. Report of the International Law Commission to the General Assembly, U.N. GAOR Supp. (No. 10), U.N. Doc. A/CN.4/SER.A/1950/Add.1; Summary Records of the 43d Meeting (1950); 1 Y.B. INT'L COMM'N 23, 34 U.N. Doc. A/CN.4/SER.A/1949 (statement by Emil Sandst, Special Rapporteur).

Criminal courts can only have the power to deter when their decisions can actually be enforced. “Unfortunately, the failure to exact retribution will further impair the goal of deterrence.”<sup>157</sup> In Rwanda, the Hutu participants in genocide felt they were immune from prosecution solely as a result of their numbers. They believed that no formal law enforcement mechanism could possibly investigate, arrest, prosecute and confine all the participants involved in the slaughter.<sup>158</sup>

The Rwandan government registered a vote of “no confidence” in the International Criminal Tribunal for Rwanda (ICTR). The government also suggested that it may reconsider its commitment to the ICC, which may only amount to a “permanent version of a temporary failure.”<sup>159</sup> When this statement was made, the Rwandan government emphasized that national courts in Rwanda had issued 20,000 indictments, had conducted 1989 trials, and had accepted 17,847 guilty pleas.<sup>160</sup> Over 100,000 suspects were in custody at the time of the complaint.<sup>161</sup> These numbers must be contrasted with the ICTR’s forty-eight indictments and four completed cases at the time of the vote of no confidence.<sup>162</sup>

The national courts in Rwanda appear far more capable in handling the genocide in Rwanda than the international tribunal. However, if these national court results are seen as a sort of vigilante justice, then the actions of the national courts will not have a tendency to deter either. In fact, astronomically high numbers of trials, where the accused receive no due process, will not be considered “fair trials” and may well incite combatants to commit atrocities rather than deter them. The possibility of a kangaroo court trial meting out capital punishment would only serve to encourage combatants to fight to the death. The best defense in the face of such a corrupt court system is to win at any cost.

Although the current ad hoc international tribunals do not allow for the death penalty, national courts in Rwanda do. Since the tribunals have

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157. Dorinda Lea Peacock, “*It Happened and It Can Happen Again*”: *The International Response to Genocide in Rwanda*, 22 N.C. J. INT’L LAW & COM. REG. 899, 929 (1997).

158. Laurant Bijard, *Can Justice Be Done? Massacred: 1,000,000; Tried: 0*, WORLD PRESS REV., June 1996, at 7.

159. Wippman, *supra* note 113, at 481 (citing Statement of Joseph Mutaboda to the U.N. General Assembly (Nov. 9, 1999)).

160. *Id.*

161. Ann M. Simmons, *Rwanda Mass Execution Set; Critics Decry Penalty in Genocide Case*, CHICAGO SUN TIMES, Apr. 23, 1998, at 27.

162. Wippman, *supra* note 113, at 481.



been established to handle the most serious offenders, the Rwandan government was opposed to the limitation on capital punishment for the ICTR. The Rwandan government was concerned that the most serious offenders would use the tribunal as sort of a safe haven while “lesser” offenders would be put to death by the national courts of Rwanda.<sup>163</sup>

## 2. *Lack of Cooperation*

*Although the political will existed to establish a criminal tribunal for the purpose of trying individuals accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the Tribunals to function as designed.*<sup>164</sup>

There has been a serious lack of cooperation with the ICTY by nations whose cooperation is essential.<sup>165</sup> The United Nations Security Council directed that “all States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of Resolution 827 . . . and shall comply with requests for assistance or orders issued by a Trial Chamber . . .”<sup>166</sup> However, even though Security Council actions and mandates obligate the member states, they do not necessarily flow to the “soldier, the platoon leader, or the commander in the field.”<sup>167</sup>

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163. Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE COMP. & INT’L L. 349, 353 (1997).

164. Penrose, *supra* note 115, at 361.

165. Reisman, *supra* note 110, at 48; Noah Adams, *Relations Between the US and the International War Crimes Tribunal Becoming Strained as US is Accused of Holding Back on Cooperating with the Tribunal’s Investigating of NATO* (NPR broadcast, March 24, 2000), LEXIS, News Library.

166. S.C. Res., U.N. SCOR, 50th Sess., 3607th mtg. para. 4, U.N.Doc. S/RES/1031 (1995).

167. Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia*, 7 DUKE J. COMP. & INT’L L. 411, 445-46 (1997) (quoting John T. Burton, “War Crimes” During Military Operations Other Than War: Military Doctrine and Law 50 Years After Nuremberg and Beyond, 149 MIL. L. REV. 199, 203-04 (1995)). “It is perfectly proper for states or NATO to decide that IFOR will not be assigned the mission to search for and arrest war criminals so long as states take action to give effect to their obligation.” *Id.* The author lists and discusses several reasons why NATO may elect to not search for and arrest war criminals in Bosnia. *Id.* at 444-60.

### 3. *Little Bang for the Buck*

Although one cannot place a price tag on justice, resources are not unlimited. In terms of weighing potential responses to massive man-made humanitarian tragedies, responsible policy makers must weigh the costs of the various options available. With this in mind, the cost to result ratio of the two ad hoc tribunals will now be considered.

Since its inception in 1993, there have been ninety-seven individuals publicly indicted before the ICTY.<sup>168</sup> Thirty-five individuals are currently in custody, twenty-seven are at large, and four have been released pending appeal.<sup>169</sup> Charges against eighteen individuals have been dropped, one has been acquitted, and eight indicted individuals have died. Thirty-nine individuals are currently involved in proceedings.<sup>170</sup> There are sixteen individuals at the pre-trial stage, eleven have appealed and twelve are in on-going trials.<sup>171</sup> Five trials have been completed.<sup>172</sup> With a current annual budget of over \$96,000,000, the total budget for the ICTY since its inception has been over \$470,000,000.<sup>173</sup> This figure does not take into account the indirect financial support the ICTY receives from nations and NATO in the form of arrests, investigations, and intelligence.<sup>174</sup> Because the ICTY has no police force or investigation services of its own, this amount is probably quite high.

In Rwanda, the budget for the year 2000 was \$79,753,900.<sup>175</sup> To date, there have been twenty-nine indictments against fifty individuals.<sup>176</sup> A total of forty-two individuals are in ICTR detention units, and eight individuals have been sentenced in seven judgments.<sup>177</sup>

Perhaps the millions of dollars expended on these tribunals could have been better spent. The victims of these horrific crimes may find some

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168. The International Criminal Tribunal for the Former Yugoslavia, *ICTY Key Figures*, at <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Jan. 23, 2001).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. The International Criminal Tribunal for Rwanda, *About the Tribunal*, at <http://www.icttr.org/> (last visited Jan. 13, 2001) (General Information, ICTR Law).

176. The International Criminal Tribunal for Rwanda, *About the Tribunal*, at <http://www.icttr.org/> (last visited Jan. 13, 2001) (Fact Sheet, The Tribunal at a Glance).

form of compensation more advantageous than eventually seeing the perpetrators placed behind bars. The money might also be used to fund a standing U.N. police force that could respond to and even prevent man-made humanitarian disasters, as opposed to spending the money on expensive court systems after it is too late. It has been said that the use of a military or police force early on may not only have saved thousands of lives in Rwanda, but also “would have cost a fraction of the millions of dollars it took . . . to maintain the . . . refugees.”<sup>178</sup>

Finally, the money spent on the ICTY and ICTR does little for the victims of man-made disasters in other parts of the world, such as Sierra Leone. If these courts did in fact have some power to deter other potential human rights abusers, then the money spent on these tribunals would indirectly assist the abusers’ potential victims. But it is unrealistic to believe that these courts had any deterrent effect outside the scope of their limited jurisdictions.

### C. The Proposed International Criminal Court

*From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law . . . . Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defense that the suspects were not aware of the law will not be permissible.*<sup>179</sup>

At the close of World War I, the international community of states recognized the need for a permanent international criminal court.<sup>180</sup> Over the course of the last fifty years, the international community has established four ad hoc international criminal tribunals to hear cases involving serious

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177. *Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda to the United Nations General Assembly and the United Nations Security Council*, U.N. Doc. A/55/435-S/2000/927, 2 (2000).

178. Peacock, *supra* note 157, at 936.

179. Statement of Hans Corell, United Nations Under Secretary-General for Legal Affairs (unknown origin, n.d.), at <http://www.un.org/law/icc/general/overview.htm>.

180. *See generally* INTERNATIONAL CRIMINAL COURTS FOR THE TWENTY-FIRST CENTURY (Mark W. Janis ed., 1992); M. CHERIF BASSIOUNI, AN INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AND INTERNATIONAL CRIMINAL TRIBUNAL (1987).

violations of international law. These four tribunals included the: (1) International Military Tribunal in Nuremberg;<sup>181</sup> (2) International Military Tribunal for the Far East in Tokyo;<sup>182</sup> (3) International Criminal Tribunal for the Former Yugoslavia at the Hague;<sup>183</sup> and (4) International Criminal Tribunal for Rwanda sitting in Arusha, Tanzania.<sup>184</sup> In addition to the World War II era international tribunals, the four major Allies prosecuted alleged war criminals in their sectors of occupation in Germany pursuant to the document known as Control Council Number 10.<sup>185</sup> The Allies prosecuted Japanese war criminals in their zones of occupation in the Pacific as well.<sup>186</sup>

In 1947, the U.N. General Assembly directed the predecessor to the International Law Commission, the Committee on the Codification of International Law, to begin work on codifying the crimes tried at Nuremberg.<sup>187</sup> In addition to directing the codification of the Nuremberg crimes, the General Assembly also recognized the need for a standing international court to prosecute the crimes undergoing codification.<sup>188</sup>

On 17 July 1998, after more than fifty years of work, a statute creating an international criminal court was finalized in Rome, Italy, and was open for signature until 31 December 2000.<sup>189</sup> By the terms of the Rome Statute (treaty or Statute), the ICC will enter into force on the first day of the month after the sixtieth day after sixty nations ratify the treaty.<sup>190</sup> At the

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181. London Charter, *supra* note 103.

182. Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3; Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589.

183. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

184. S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994).

185. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, 31 Jan. 1946.

186. R. John Pritchard, *War Crimes Trials in the Far East*, in CAMBRIDGE ENCYCLOPEDIA OF JAPAN 107 (Richard Bowring & Peter Kornik eds., 1993).

187. G.A. Res. 174, U.N. GAOR, 2d Sess., U.N. Doc. A/519 (1947).

188. United Nations, *Rome Statute of the International Criminal Court*, at <http://www.un.org/law/icc/> (last modified Jan. 11, 2001) (Overview) (citing G.A. Res. 260 (1948)).

189. Rome Statute, *supra* note 5, art. 125. Of course for countries that wish to become parties after 31 December 2000, accession is available. *Id.* art. 126(2).

190. *Id.* art. 126(1).

time of this writing, 139 nations, including the United States, have signed the treaty and twenty-nine have signed and ratified the document.<sup>191</sup>

Although the United States signed the treaty, its support for the ICC has not always been enthusiastic.<sup>192</sup> In a press briefing soon after the conclusion of the Rome Conference, U.S. Department of State representative James Rubin denounced the Rome Statute as “deeply flawed” and certain to “produce a flawed court.” Rubin pointed out that the court would be weakened without participation by “the leading force for the rule of law . . . and the leading force . . . in the fight against war crimes and crimes against humanity;” the United States. Rubin further questioned the court because: (1) the scope of certain crimes, including aggression, were overly broad; (2) there was a possible inclusion of the use of nuclear weapons as a crime; (3) the independent prosecutor would have an ability to independently investigate crimes; (4) certain of the opt out provisions were not well thought out; and (5) the court would have jurisdiction over non-parties to the treaty.<sup>193</sup> Rubin described the conference as “sort of a festival . . . towards the end for people who didn’t really understand the consequences of words.”<sup>194</sup>

### 1. *The Referral System*

Perhaps the most dangerous aspect of the Rome Statute is its procedure for referring cases to the court. As will be seen, there is significant opportunity for politically-based prosecutions. This possibility subjects the United States and its allies to tremendous risk, so high, in fact, that the forces most likely to be used to prevent or stop massive humanitarian violations may actually be deterred from responding to these man-made disas-

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191. As of 12 February 2001, the statute was signed by 139 nations and ratified by twenty-nine. United Nations, *Rome Statute of the International Criminal Court* (Feb. 12, 2001) (Ratification Status), at <http://www.un.org/law/icc/statute/status.htm>.

192. Ambassador David J. Scheffer, Address Before the Committee of Conscience Holocaust Museum, Washington, DC (Apr. 22, 1998) (Responding to Genocide and Crimes Against Humanity), available at [http://www.state.gov/www/policy\\_remarks/](http://www.state.gov/www/policy_remarks/) (1998, 4/22/98).

193. U.S. Department of State, Daily Press Briefing (July 20, 1998), available at <http://secretary.state.gov/www/briefings/9807/980720db.html>.

194. *Id.*

ters. David Scheffer, former United States Ambassador-at-Large for War Crimes, explained:

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court. Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. Since 1995, the question for the Clinton administration has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. At the same time, the United States has special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.<sup>195</sup>

There are essentially two ways in which the ICC gains jurisdiction over a person. First, the court will have jurisdiction over crimes that occur in the territory of one of the state parties to the Statute and over crimes that occur in the territory of non-state parties where the non-state party consents to jurisdiction over the "crime in question."<sup>196</sup> Second, the court will have jurisdiction over nationals of state parties that violate the Statute no matter where the violation takes place.<sup>197</sup>

Under this jurisdictional scheme, a non-state party could launch an aggressive war into a neighboring state. If other states then responded and attacked the aggressor on the territory of the aggressor, the aggressor could consent to jurisdiction for the crimes allegedly committed by the responders in the aggressor's territory and not consent to jurisdiction for his own alleged crimes.<sup>198</sup> This appears to be a possibility because a non-state party can consent to a "crime in question" rather than an entire incident or conflict.<sup>199</sup>

Not only will traditional uses of military force, such as defense of self or others, be risky, less traditional operations such as peace operations and

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195. David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 A.J.I.L. 12 (1999).

humanitarian intervention will likely be so politically charged as to be avoided at nearly all costs. What non-state party responder would attempt to intervene on a humanitarian basis to stop genocide in a country that is a party to the ICC under the current jurisdictional regime? As Ambassador Scheffer explains:

Equally troubling are the implications of Article 12 [of the Rome Statute] for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international peace or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties of the treaty, will be to limit severely those lawful, but controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.<sup>200</sup>

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196. Rome Statute, *supra* note 5, art. 12(2)(a),(3). Article 12 reads:

Preconditions to the exercise of jurisdiction

1. A State that becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute, or have accepted the jurisdiction of the Court 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 acceptance of a State which is not a party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction of the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

*Id.* art. 12.

197. *Id.* art. 12(2)(b).

198. *Id.* art. 12(2),(3).

199. *Id.* art. 12(3).

200. Scheffer, *supra* note 195, at 19.

It may be asked whether it is “fair to criticize the Rome Statute as leaving peace keepers subject to unreasonable risks of being charged with crimes intended to fulfill a nation’s (or rogue prosecutor’s) political agenda?”<sup>201</sup> However, the potential for politically-based prosecutions is not just some fanciful pipe dream. Politics have certainly played a part in recent actions at the ICTY.<sup>202</sup> Certainly then, there is no reason to be less concerned with the possible politicization of the ICC.<sup>203</sup> There is a genuine concern that the prosecutor’s office could become a sort of human rights advocate, responsive to any and all complaints regardless of the source or seriousness of the allegations.<sup>204</sup> Moreover, both judges and the prosecutor are to be elected by state parties with their inherent political objective.<sup>205</sup>

Under the ICC referral system, the court may exercise its jurisdiction when a case has been referred to it by a state party, by the independent prosecutor, or by the United Nations Security Council.<sup>206</sup> The independent prosecutor may initiate investigations “*proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”<sup>207</sup> When the prosecutor receives information regarding crimes within the jurisdiction of the court:

The prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs or the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.”<sup>208</sup>

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201. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Tribunal and the Commitment to International Law*, 20 MICH. J. INT’L L. 337, 357 (1999).

202. *Id.* at 351.

203. See Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT’L. REV. 805, 833-38 (1999) (citing S. REP. NO. 103-71, at 23-24 (1993) (statement by Edwin D. Williamson) (commenting that in other forums, the United States has been unsuccessful in creating non-politicized agencies)). For example, Rodriguez points out that Cuba, Iran, and Libya all sit on the United Nations Human Rights commission. *Id.*

204. Press Release, James P. Rubin, U.S. Department of State Office of the Spokesman, U.S. Position on Self-Initiating Prosecutor at the Rome Conference on Establishment of an International Criminal Court (June 23, 1998), available at <http://secretary.state.gov/www/briefings/statements/1998/ps980623a.html>.

205. Rome Statute, *supra* note 5, art. 36, 42(4).



There are at least two concerns with regard to this provision of the treaty. First, as to the independence of the prosecutor to investigate and bring cases to the court, this is simply too much power for one person to hold at the international level. Second, because the court will not have its own police force or investigations arm, the prosecutor will be allowed to rely on information provided by non-governmental organizations. While certainly the majority of these organizations are motivated by just and noble causes, there is room for concern that some may become so personally and politically involved, that their collection and presentation of evidence should be suspect. It is foreseeable that groups opposed to all use of military force could tie up military resources and man hours by making allegations of war crimes, no matter how frivolous.<sup>209</sup>

United States policy makers may find themselves before the court having to defend United States actions in the use of force against blatantly aggressive nations. A commentator offered the following example:

If Iraq were to bring charges against U.S. forces related to [the Gulf War], it could present evidence of prima facie violations of the crime of aggression, which outlaws the “invasion or attack” or bombardment of the territory of another state, and war crimes,

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206. *Id.* art. 13(a),(b),(c). Article 13 reads:

Exercise of jurisdiction:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

*Id.* art. 13.

207. *Id.* art. 15(1).

208. *Id.* art. 15(2).

209. For an example of highly suspect allegation of war crimes during the Gulf War, see Howard Kurtz, *Gen. McCaffrey Denies Hersh Allegations*, April 18, 2000, WASH. POST, at C1. Among other allegations, Seymour Hersh, who won a Pulitzer Prize for exposing the 1968 My Lai massacre in Vietnam, claims that U.S. Army soldiers from the 24th Infantry Division commanded by retired General Barry McCaffrey shot Iraqi prisoners of war. *Id.*

including (1) “intentionally directing attacks against the civilian population; and (2) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>210</sup>

This example demonstrates the dilemma an independent prosecutor may face if he is pressured to take action against any and all uses of military force.

Because of the jurisdictional formulation of the Statute, jurisdiction over non-party state citizens is also possible. This is particularly harmful because it means that, if a state elects not to become a party to the treaty, its citizens are still in danger of being hauled before the ICC. This means that even if the United States decides against becoming a party to the treaty, U.S. citizens would continue to be in jeopardy. Ambassador David Scheffer explains that “[a] fundamental principle of international law is that only states that are a party to a treaty should be bound by its terms. Yet Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a non-party state.”<sup>211</sup> Not only does such a system violate international law,

[i]t is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens does not yet recognize. No other country, not even our closest allies, has anywhere near as many troops and military assets deployed globally as does the United States.<sup>212</sup>

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210. David, *supra* note 201, at 376 (citations omitted).

211. Scheffer, *supra* note 192, at 18 (citing Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, arts. 34-38, 1155 U.N.T.S. and Rome Statute, *supra* note 5, art. 12).

212. Scheffer, *supra* note 192, at 18.

The United States suggested two possible alternative formulations for Article 12. The two options were:

- (1) to require the express approval of both the territorial state of the alleged crime and the state of nationality of the alleged perpetrator in the event either was not a party to the treaty; or
- (2) to exempt from the court's jurisdiction conduct that arises from the official actions of a non-party state acknowledged as such by the nonparty.<sup>213</sup>

Obviously, neither formulation was accepted.

## 2. *The Crime of Aggression*

*I think I can anticipate what will constitute a crime of "aggression" in the eyes of this Court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.*<sup>214</sup>

Aggression, or a crime against peace, has been recognized as an international crime since the post-World War II war crimes trials.<sup>215</sup> However, the crime is controversial and difficult to define. For these reasons, aggression is not a crime over which the tribunals in the Former Yugoslavia or in Rwanda have jurisdiction.<sup>216</sup> The ICC drafters took the highly unusual step of including aggression as a crime over which the court will have

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213. *Id.* at 20.

214. *Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. 60 (1998) (statement of Sen. Helms).

215. Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L & TRADE 1 (1998). The "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing," is the crime of aggression. *Id.* n.3 (citing THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 111 (Bruno Simma ed., 1994); NATIONAL SECURITY LAW 85, 369-70 (John Norton Moore et al. eds., 1990); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112, 154 (1963)).

216. See generally Report of the Secretary General, *supra* note 145; ICTY Statute, *supra* note 127; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

jurisdiction, but declined to define the crime. Because the crime of aggression has not been defined but is included as a basis for prosecution by the Rome Statute, it may ultimately be defined broadly enough to make embargoes or economic sanctions against rogue regimes a criminal act. This lack of a definition represents a serious threat to the United States and its allies in future military operations, exercises and weapons testing. Ambassador Scheffer explained:

The final text of the treaty also includes the crime of aggression, a surprise to the United States and other governments that had struggled so hard to define it only to reach an impasse during the Rome Conference. The failure to reach a consensus definition should have required its removal from the final text. Instead, the crime appears in Article 5 as a prospective crime within the court's jurisdiction once it is defined. This political concession to the most persistent advocates of a crime of aggression without a definition and without the linkage to a prior Security Council determination that an act of aggression has occurred deeply concerns the United States. The future definition that may be sought for this crime, and ultimately determined, if at all, only by the states parties through an amendment to the treaty, could be without limit and call into question any use of military force or even economic sanctions."<sup>217</sup>

If the debate as to what should be covered under the crime of aggression is explored, the United States' concern that the crime has been left undefined becomes even more understandable. In 1991, the International Law Commission of the United Nations created the forerunner to the present ICC Statute, the Draft Code of Crimes against Peace and Security of Mankind (1991 Draft Code).<sup>218</sup> Pursuant to the 1991 Draft Code, there were four bases for charging the crime of aggression: (1) aggression; (2) threat of aggression; (3) intervention; and (4) colonial domination.<sup>219</sup>

Aggression was defined as: "The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."<sup>220</sup> One requirement in the 1991 Draft Code that is consistent

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217. Scheffer, *supra* note 192, at 20.

218. Draft Code of Crimes against Peace and Security of Mankind: Titles and Texts of Articles Adopted by the Drafting Committee, UN Doc. A/CN.4L.459/Add.1 (1991), *revised by* UN Doc. A/CN.4/L.464/Add.4 (1991) [hereinafter 1991 Draft Code].

219. *Id.* arts. 15-18.

with U.S. national security interests is that individual responsibility for aggression could only exist if the Security Council first determined that an act of aggression had occurred. Such a formulation would go a long way in stripping the court of its ability to bring political prosecutions with regards to crimes of aggression.

Preservation of the Security Council's pivotal role serves a vital interest of the international community. Aggression needs to be dealt with in a manner allowing for the greatest degree of negotiation, diplomacy and mediation. Judicial proceedings, in contrast, are adversarial in nature. Suppose aggression is committed, and the international criminal court promptly decided that the aggression was unlawful, and further, it determined that the Head of state was criminally responsible. In such a case, the court's decision might only harden the resolve of the country's leaders to "fight to the finish," rather than seek a graceful way to back down.<sup>221</sup>

However, the draft definition of the crime of aggression is very broad. The mere threat of aggression is a crime under the 1991 Draft Code: "An individual, who as a leader or organizer commits or orders the commission of a *threat of aggression* shall, on conviction thereof, be sentenced . . . ."<sup>222</sup> The theory behind including the mere threat of aggression as a crime is that "powerful states may make ostentatious displays of military strength to intimidate smaller, more vulnerable members of the international community."<sup>223</sup> However well-intentioned, criminalizing the threat of aggression creates the potential for significant politically-charged prosecutions. For example, would large-scale exercises or maneuvers be interpreted by some as a threat of aggression? What about testing nuclear weapons or new conventional weapons? Could the mere possession of nuclear weapons be viewed by some as a threat when others are prohibited from obtaining them? What about the maintenance of large standing armies and navies?

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220. *Id.* art. 15(2).

221. SUNGA, *supra* note 108, at 51.

222. 1991 Draft Code, *supra* note 218, art. 16 (emphasis added).

223. SUNGA, *supra* note 108, at 59.

The 1991 Draft Code also criminalizes intervention. The intervention theory of aggression was defined as:

Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.<sup>224</sup>

The 1991 Draft Code is unclear in how to handle situations where an outside power is “invited in” to assist with internal problems, or when an outside state takes action to defend its own nationals in a country unwilling or unable to do so. Making intervention a crime may significantly impact on the international community’s ability to respond where a nation is involved in the wholesale slaughter or abuse of segments of its own population. If aggression is defined to include intervention, the Statute may have the unintended consequences of shielding rogue regimes from humanitarian military responses to massive human rights violations. Arguably, United States actions in Nicaragua could have run afoul of such a broad definition of aggression.<sup>225</sup>

The 1991 Draft Code further criminalized colonialization as a form of aggression. Under the Draft Code, colonial domination and other forms of alien occupation exist when:

An individual who as a leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced to . . .<sup>226</sup>

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224. 1991 Draft Code, *supra* note 218, art. 17.

225. John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT’L L. 43, 44-48 (1986).

226. 1991 Draft Code, *supra* note 218, art. 18.

If the crime of aggression were to include colonial domination, is it possible that someone might assert that the United States is in violation of this article with regards to Puerto Rico or Guam?

As a result of the controversy surrounding the 1991 Draft Code, in 1996 the International Law Commission drafted the Draft Code of Crimes against Peace and Security of Mankind (1996 Draft Code).<sup>227</sup> Crimes in the 1991 Draft Code dropped from the 1996 Draft Code include: threat of aggression; intervention; colonial domination; apartheid; mercenary activity; terrorism; drug trafficking; and willful and severe damage to the environment.<sup>228</sup> The 1991 Draft Code crime of the threat of aggression was strongly opposed by the governments of Australia, the Netherlands, the United Kingdom, the United States, Switzerland, and Paraguay because it did not lend itself to a precise determination for the purposes of criminal responsibility.<sup>229</sup> Similarly, Australia, Belgium, Brazil, The Netherlands, Switzerland, the United Kingdom, and the United States were firmly against criminalizing intervention largely because it was far too ambiguous for criminal law purposes.<sup>230</sup> Australia, Denmark, Finland, Iceland, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States moved to remove the provision regarding colonialization.<sup>231</sup>

If one of the draft code definitions of the crime of aggression is ultimately adopted, the NATO decision to send ground troops into Bosnia, prior to the United Nations approval of the plan, could have met the definition of aggression.<sup>232</sup> Certainly then, Serbia could have alleged aggression on the part of NATO when NATO began its bombing campaign without any Security Council approval.<sup>233</sup> The irony of this is that NATO dispatched forces to put down the real aggressor, a regime apparently involved in massive human rights violations; however that aggressor could

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227. Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Draft Articles, U.N. Doc. A/CN.4/L.522 (1996), U.N. Doc. A/CN.4/L.527/Add.10 (1996) [hereinafter 1996 Draft Code].

228. Compare 1991 Draft Code, *supra* note 218, with 1996 Draft Code, *supra* note 227.

229. SUNGA, *supra* note 108, at 63.

230. *Id.* at 89-90.

231. *Id.* at 104.

232. David, *supra* note 201, at 382 (citing 1991 Draft Code, *supra* note 218, art. 16).

233. *Id.* at 383.

then be protected by an overly broad definition of aggression because a potential respondent may view intervention as overly risky.

Not only is an unauthorized use of force prohibited by the U.N. Charter, so is the mere threat of the use of force.<sup>234</sup> The United States sees North Korea as a significant threat to its ally South Korea. Relying on the twin pillars of forward deployment and power projection,<sup>235</sup> largely through military exercises in Korea, the United States seeks to deter North Korean aggression toward South Korea.<sup>236</sup> With the lack of a definition of aggression in the Statute of the ICC, it is conceivable that a politically-charged court might find that military exercises designed to deter aggression, such as Team Spirit in South Korea, unlawfully threaten the use of force against the political independence or territorial integrity of the target state, North Korea.<sup>237</sup>

Although agreement was not universal during the drafting of the ICC Statute, many members of the International Law Commission believed that it should be up to the Security Council, not the ICC, to determine whether a given incident rises to the level of aggression. These members felt, however, that if the Security Council made such a determination as a condition precedent to the court's jurisdiction, the court should then be able to determine whether individuals are guilty of the crime of aggression.<sup>238</sup>

Although aggression is potentially the most dangerous basis of jurisdiction to leave undefined; there are other crimes within the Statute that are not well defined.<sup>239</sup> For example, murder, rape "or any other form of sexual violence of comparable gravity," and apartheid, are some of the offenses listed as crimes against humanity.<sup>240</sup> Murder, rape and sexual assault may vary so significantly from nation to nation, however, it may be very hard to define when these crimes occur and when they are of such a

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234. U.N. CHARTER art. 2(4).

235. NATIONAL SECURITY STRATEGY, *supra* note 4, at 11.

236. *See generally*, Matthew A. Myers, Sr., *Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 138 (1999).

237. *Id.*

238. *Report of the International Law Commission*, U.N. Doc. A/46/10 (1991); U.N. Doc. A/CN.4/SER.A/1991/Add.1.

239. Rodriguez, *supra* note 203, at 825.

240. Rome Statute, *supra* note 5, art. 7(1)(a), (g).



magnitude to be within the jurisdiction of the ICC rather than a domestic court.

Apartheid is defined in the Statute as “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutional regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”<sup>241</sup> While this definition is somewhat helpful, as will be explained below, apartheid that only occurs within the borders of a non-state party could not be brought before the ICC.<sup>242</sup> So, although the Statute may make people feel good about themselves politically because they have criminalized certain distasteful behavior, the Statue may be without any real teeth in terms of actually enforcing human rights violations that tend to be internal in nature within the territory of non-party states. These problems are more likely to be solved by means other than courts of law, such as diplomacy and economic sanctions.

### 3. War Crimes

Article 8 of the Statute grants to the court jurisdiction over war crimes.<sup>243</sup> One benefit of the Statute is that it specifically defines what war crimes the court will have jurisdiction over. In fact, it explains what crimes can be charged in international armed conflicts,<sup>244</sup> and what war crimes can be charged across the conflict spectrum including internal conflicts.<sup>245</sup> It also defines and grants to the court the authority to try Grave Breaches of the 1949 Geneva Conventions.<sup>246</sup> This article is extremely beneficial in that it clearly explains not only what a war crime is, but it lays out what level of armed conflict is required in order to trigger a potential violation.

However, Article 8, as drafted, risks expansive application and interpretation. For example, in order for the court to have jurisdiction over genocide, the accused must have the requisite specific intent.<sup>247</sup> And for crimes against humanity, there must be widespread and systematic abuses

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241. *Id.* art. 7(2)(h).

242. *See infra* notes 258-68 and accompanying text.

243. Rome Statute, *supra* note 5, art. 8.

244. *Id.* art. 8(2)(b).

245. *Id.* art. 8(2)(c), (d), (e).

246. *Id.* art. 8(2)(a).

247. *Id.* art. 6.

against the civilian population.<sup>248</sup> Therefore, prosecution for crimes against humanity, aggression, and genocide may tend to be limited to high level planners or persons of the most evil character. With regard to war crimes, there is no such limitation because there is no minimum threshold of violence or specific intent required. Article 8 states: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>249</sup> This apparent limitation to serious violations is in reality no limit at all. The “in particular” language would not prevent the prosecution of a one-time relatively minor violation.

This means that technically, even a relatively insignificant crime committed by a low-level operator, rather than just crimes committed on a wide-scale basis or directed by high-level policy makers, could be tried before the court. For example, imagine that a decision is made to use riot control agents in order to rescue hostages in what planners believe to be a purely internal armed conflict. Assume that the purpose for using the riot control agent is to reduce the need to use lethal force and the risk of permanent harm to the innocent hostages. Further suppose that a young U.S. Army infantry captain orders his men to employ the agents. Later, the prosecutor argues that the conflict was not internal, but in fact international in character, making the use of riot control agents as a method of warfare illegal.<sup>250</sup> This might mean that the captain, whose true intentions were to use a humane technique to rescue innocent hostages at the direction of planners after a legal review by U.S. judge advocates, could be subject to prosecution if the prosecutor was politically motivated and opposed to the legitimacy of the operation from the outset. “With approximately 200,000 United States military personnel permanently stationed in forty countries around the world, there are potentially significant consequences to the United States because of this expansive definition of war crimes.”<sup>251</sup>

Moreover, even though the crimes are listed and therefore limited, the court will be tasked with analyzing and applying the law. In applying and interpreting the laws of war, the court will resemble a supralegisature. If the court were to determine, for example, that all land mines, both smart and dumb, anti-armor as well as anti-personnel, violate the principle of

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248. *Id.* art. 7.

249. *Id.* art. 8.

250. *Id.* art. 8(2)(b)(xviii); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, January 13, 1993, 32 I.L.M. 800.

251. Rodriguez, *supra* note 203, at 825.

unnecessary suffering or represent indiscriminate attacks, the court could effectively become a sort of arms control agency, stripping countries of their ability to negotiate arms control issues. If the court were to conclude that the use of cluster bombs or depleted uranium warheads were violations of the law of war principle of humanity, the court could outlaw key weapons systems relied on by the United States in its war fighting doctrine. A handful of civilian judges then stand to be able to significantly impact warfighting doctrine on the battlefield itself, without any traditional international negotiation, diplomacy or agreement by states. The court could potentially tie the hands of the technologically strong forces by taking away their technological advantage, allowing rogue regimes and non-state actors to gain a certain symmetrical parity with organized armies. This would serve to weaken deterrence and pave the way to additional armed conflict because the battlefield would be level.

If the ICC focuses on the humanitarian aspects of the laws of war and ignores military necessity, disastrous results to national security could follow. Concern that the laws of war may be losing their pragmatic appeal has been expressed by some writers.<sup>252</sup> Even referring to the laws of war as international humanitarian law has the tendency to create the false impression that the laws of war are primarily concerned with humanitarianism rather than a professional code of war fighting created by warriors.<sup>253</sup>

As has been recognized in many treaties and manuals on the subject, the laws of war are implemented largely through the medium of individual countries. It is usually through their government decisions, laws, courts and courts-martial, commissions of inquiry, military manuals, rules of engagement, and training and educational systems, that the provisions of international law have a bearing on cases in connection with the laws of war have been in national, not international, courts.<sup>254</sup>

For example, one commentator points out that had the ICC been in existence at the time of Vietnam, many Americans, including some in very high places, may have been hauled into court.<sup>255</sup> Some assert that the Gulf War was one of the most legalistic wars ever fought. However, others argue that the United States was involved in war crimes, allegedly attacking

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252. Roberts, *supra* note 90, at 14.

253. *Id.*

254. *Id.* at 19.

civilian targets, crucial infrastructure, communications, power and water pumping stations.<sup>256</sup>

There is no question; all parties to a conflict should have to answer for their war crimes. However, organized armies are generally ready, willing, and able to prosecute their own war criminals. One of the dangers with the court is the potential vesting of authority to prosecute war crimes in a politically-motivated prosecutor; this creates a real danger that, no matter how well-intentioned the leaders and soldiers of the United States may be, they might find themselves before a criminal court in cases where the real bad actors are protected.

In Mogadishu, U.N. military spokesman, Major David Stockwell stated, "everyone on the ground in that vicinity was a combatant, because they meant to do us harm. In an ambush, there are no sidelines and no spectators."<sup>257</sup> Might a politically-motivated ICC charge all participants that killed civilians with war crimes because of their inability to distinguish combatants from non-combatants? Would this be more likely to occur if the prosecutor or world opinion did not support the overall mission?

The court's exercise of jurisdiction should not be permitted to diminish or prevent critical operations by military forces fighting aggression. Of particular note, the most important means of dealing with violations of the

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255. Rodriguez, *supra* note 203, at 827 n.8 (citing *Taylor Says by Yamashita Ruling Westmoreland May be Guilty*, N.Y. TIMES, Jan. 9, 1971, at A3 (noting that former Nuremberg Chief Prosecutor Telford Taylor stated that General William C. Westmoreland, a former commander of the United States forces in Vietnam, might be convicted as a war criminal if he were held to the same standard established at the Nuremberg and Tokyo trials); Seymour Hersh, *What Happened at My Lai?*, in VIETNAM AND AMERICA 410 (Marvin E. Gettleman et al. eds., 2d ed. 1995). (revealing that the United States had a threefold plan after the Tet offensive: (1) massive assaults from the air; (2) systematic destruction of villages by ground troops; and (3) the CIA-coordinated Phoenix Program of mass arrests, torture, and assassinations)). Although these writers cited by Rodriguez may not have the facts accurately presented, and although no convictions for these incidents may have resulted, it is reasonable to conclude that many Americans may have had to answer for their actions before the ICC had it existed at the time.

256. Michael Walzer, *Justice and Injustice in the Gulf War*, in BUT WAS IT JUST? REFLECTIONS ON MORALITY IN THE PERSIAN GULF WAR (David E. Decosse ed., 1992); RICHARD LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY, AND PRACTICE 879 (3d ed. 1995).

257. Mark Husban, *Spectators Pay High Price in Somalia Theater*, LONDON TIMES OBSERVER, Sept. 12, 1993, at 12.

laws of war in the Former Yugoslavia has probably been the threat and use of force by NATO in conjunction with the United Nations.

Violations of the U.N.-declared "safe areas," repeated obstruction of humanitarian relief, and the atrocities and bragging accompanying the Serb capture of Srebrenica in July 1995, which led to a change in Western policy . . . . The NATO Operation could not be expected to stop all atrocities in a peculiarly vicious war. However, perhaps it did convince the Bosnian Serbs that verbal condemnations by outside bodies could actually lead to serious military actions.<sup>258</sup>

It is ultimately military force, or the credible threat thereof, that is the best prevention of war crimes.

#### 4. *Genocide*

While the crime of aggression may be overly broad and ambiguous, the crime of genocide is overly narrow. Similar to the Genocide Convention,<sup>259</sup> the Rome Statute<sup>260</sup> will not provide for prosecution for genocide involving the wholesale slaughter of political groups. According to the Genocide Convention, genocide is the employment of certain tactics designed to destroy, in whole or in part, "a national, ethnical, racial or religious group."<sup>261</sup> Following the Genocide Convention, prosecution before the ICC can only be had where the destruction involves a national, ethnical, racial or religious group.<sup>262</sup> For example, the slaughter of roughly 2,500,000 Cambodians by the Pol Pot regime was not genocide according to some because it was based on politically-divided groups rather than on ethnicity, religion, or nationality.<sup>263</sup>

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258. Roberts, *supra* note 90, at 62.

259. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

260. Rome Statute, *supra* note 5, art. 6.

261. Genocide Convention, *supra* note 259, art. 2.

262. Rome Statute, *supra* note 5, art. 6.

263. See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSN'L. L. & CONTEMP. PROBS. 199 (1998).

A problem related to the prosecution of genocide exists in the jurisdictional regime laid out in Article 12 of the Statute. It has the tendency of shielding those involved in massive human rights violations that are not parties to the Statute. Since, as a prerequisite to jurisdiction, a given crime must occur in the territory of a state party or involve an accused of a state party;<sup>264</sup> a purely internal genocide would be outside the jurisdiction of the ICC. Therefore, it is unlikely that the ICC will deter any non-signatory bent on brutalizing its own people with impunity. In addition, by protecting non-party genocidal actors and leaving unprotected non-party states responding to such genocide, it is possible that the genocidal actor could consent to the prosecution of the responders before the ICC but not itself.<sup>265</sup>

The genocide in Rwanda was five times faster than the one in Germany, even though the Nazi's employed fairly sophisticated methods of extermination, such as gas chambers. The Hutus, on the other hand, were successful in killing between 5000 to 10,000 people per day using primarily hand held weapons.<sup>266</sup> As many as one million, perhaps as many as 1.5 million were killed in the genocide in Rwanda.<sup>267</sup> "Early intervention could have saved thousands [of Tutsis] . . . who were huddled in churches, schools, and stadiums before being killed."<sup>268</sup> Even though the killing was accomplished on a grand scale, because the weapons involved were primitive, the genocide could have easily been stopped with a relatively small force. And yet, the ICC will not have jurisdiction over a future Rwanda-like episode if it occurs solely within the boundaries of a non-state party.

In domestic courts, when a case involving murder ends up in the courtroom, it is too late for the victim. With genocide as with murder, it would be preferable to have enforcers of the law stop the crime before it starts or while it is in progress: instead of creating courts to allow for after-the-fact prosecutions, the international community should spend its time and resources creating forces to respond to tyrannical aggressors. In the alternative, laws should be instituted so that forces can respond to these man-made humanitarian disasters, confident that they will not later find

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264. Rome Statute, *supra* note 5, art. 12.

265. *Id.* art. 12(2),(3).

266. Bernard Muna, *Conference on War Crimes Tribunals: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L. L. REV. 1469, 1480 (1998).

267. RAYMOND W. COPSON, REPORT ON RWANDA AND BURUNDI: BACKGROUND AND CHRONOLOGY 5 (1994) (Congressional Research Service Report).

268. Alan Destexhe, *The Third Genocide*, FOREIGN POL'Y 9 (Winter 1994-95).

themselves in court. By merely creating a credible force, the force may never have to respond because of the deterrent. This is especially true in dealing with internal genocides since more people are killed by their own governments than are in international armed conflict.<sup>269</sup>

### 5. *Opting Out*

*Perhaps the most universally condemned provision of the Statute is Article 124, the so-called "opt out" provision. Article 124 provides an incentive for reluctant states to participate in the Criminal Court by permitting them to reject, for a period of up to seven years, the jurisdiction of the Court with regard to allegations of war crimes violations against it nationals.*<sup>270</sup>

Consider the following hypothetical. The year is 2020. Saddam Hussein is still alive and has just become a party to the Statute while the United States has not. The crime of aggression has yet to be defined. Because deterrence has once again failed, Saddam invades Kuwait. United States forces respond. A young U.S. Air Force pilot attempts to drop a bomb on an Iraqi command and control bunker in Baghdad. Unfortunately, the smart bomb guidance systems malfunction and the bomb strikes an orphanage killing close to 100 innocent Iraqi children.<sup>271</sup> Meanwhile, because Saddam has opted out of the war crimes article and became a party just prior to his attack, he and his troops are effectively immunized before the court for their war crimes.

Without the fear of prosecution, the Iraqi's intentionally use chemical weapons, abuse captured prisoners of war (POWs) and civilians, and commit all manner of war crimes. Eventually, the United States and its allies are able to remove Saddam from Kuwait, but now he demands that the young U.S. Air Force pilot be prosecuted for his war crime. The pilot is currently stationed at the U.S. Air Force Base in Aviano, Italy. Because

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269. Moore, *supra* note 14, at 852. If Professor Rudy Rummel is correct, over 169 million have been killed in this century primarily by their own governments. That is approximately four times the combatant death rate in combat.

270. David, *supra* note 201, at 371.

271. *See generally* Ambassador David J. Scheffer, Remarks Before the Sixth Committee of the 53d General Assembly in New York (Oct. 21, 1998) (The International Criminal Court), available at [http://www.state.gov/www/policy\\_remarks/](http://www.state.gov/www/policy_remarks/) (1998, 10/21/98).

Italy is a party to the ICC, the Italians, against the will of the United States, extradite the service member to the court.

Saddam then contemplates invading Saudi Arabia. He believes the American public is so upset about the prosecution of the Air Force officer and the immunized barbaric treatment employed by his troops against American POW's, that the Americans no longer have the will to protect Saudi Arabia. After all, grain-based fuels, such as ethanol, have come so far that the United States no longer needs Organization of Petroleum Exporting Countries crude oil. This time, Saddam guesses correctly, the Americans are deterred, and Saudi Arabia becomes the nineteenth province of Iraq.

#### 6. *Complimentarity*

The court will not have jurisdiction over a case when it is being investigated or prosecuted by a state which has jurisdiction over the matter unless the state is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>272</sup> On its face, this provision seems to shield nations such as the United States that are involved in military operations against aggressive and rogue regimes as long as they are willing and able to take care of their own violators. However, the requirement that they be "genuinely" investigated and prosecuted gives pause for concern. Investigations of entirely frivolous allegations of improper conduct on the battlefield may be required in order to avoid being accused of not genuinely addressing potential violations of international law. How is one to know whether a case has been genuinely investigated?

#### 7. *Lack of Enforcement Mechanisms*

Attempting to deter potential war criminals—through the threat of criminal prosecution after the war—is of questionable utility. A soldier in a life and death fight on a battlefield will not likely think of the ICC while under fire. In such a case, a warrior is only likely to adhere to the law that he believes to be appropriate and that has been internalized through training. Even where the laws of war are applicable and understood by both sides, the laws may largely be ignored if the combatants do not view the law as being logical or pragmatic, even where a court exists with poten-

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272. Rome Statute, *supra* note 5, art. 17 (1)(a).



tial jurisdiction. During the Iran/Iraq War from 1980 to 1988, “the laws of war were incontestably applicable though not adhered to by either side. There were violations of fundamental rules in such matters as the treatment of prisoners, the use of gas, and attacks on neutral shipping.”<sup>273</sup> In the Gulf War:

[one side] by and large adhered seriously to the laws of war restraints on a wide range of matters, dealing both with combat and with the treatment of prisoners and civilians under their control. In contrast, the other side, while not in principle rejecting the laws of war, did ignore them on a range of issues.<sup>274</sup>

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However, the failure to take any action against Iraqi leaders exposed a serious problem regarding the laws of war, namely, the difficulty of securing enforcement after clear evidence of violations.<sup>275</sup>

There is no reason to believe that the enforcement mechanisms will be any better with the ICC than with the ad hoc tribunals. In the former Yugoslavia, many indicted war criminals are relatively free to roam certain limited areas. This is the case even though NATO forces are operating in the area and have the authority to round them up.

Regrettably, the Tribunal’s operating charter will most likely mirror the charters of the Yugoslav and Rwandan International War Crimes Tribunals, both of which are currently in operation. In sharp contrast to the war crimes courts convened after World War II, the Yugoslav and Rwandan tribunals have been failures. Any permanent institution modeled after their precedents will most likely fail as well.

The Yugoslav and Rwandan war crimes courts failed for several reasons. First, they do not contribute in the slightest to regeneration of Rwandan or Yugoslavian civil society. When the tribunals cease operation, Yugoslavia and Rwanda will be no better, and quite possibly much worse, than they were before. Second,

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273. Roberts, *supra* note 90, at 45-46.

274. *Id.* at 48-49.

275. *Id.* at 51-52.

these tribunals lack the capacity to apprehend and persecute the major perpetrators of war crimes. Instead, they spend their time desultorily prosecuting prison guards and minor lieutenants, while the Great Powers dither over whether to risk capturing indicted wartime leaders. Third, the tribunals are institutionally incapable of satisfying the retributive needs of the victims of war crimes, even if one of the lead criminals falls into the tribunal's hands. The Yugoslav and Rwandan war crimes tribunals are largely a farce, and have even become mechanisms for major war criminals to escape capital punishment.<sup>276</sup>

Absent cooperation from the various military powers, it is less likely that individuals indicted by the ICC will be arrested, especially in areas where there are no standing "victorious" forces nearby. If Saddam were to be indicted, it is highly unlikely that military forces would be able to get close enough to arrest him without significant risk to the armed forces and innocent individuals caught in the potential crossfire.

#### 8. *Funding and Resources*

"The United States has provided the lion's share of the political, financial, technical, and intelligence assistance for the two existing tribunals."<sup>277</sup> The U.N. has come to the realization that the ad hoc tribunals cost too much money to establish in every situation.<sup>278</sup> However, who will become the primary financier of the ICC if the United States does not become a party? Who will assume the mantle of leadership role in the ICC if the United States does not become a party to the court? As an additional consideration, the ICC will likely be far more costly than the ICTY or ICTR because of its worldwide jurisdiction.<sup>279</sup> Based on the ICTR experience, management of financial resources may be questionable as well.<sup>280</sup> The ICC will be, to a large extent, financed through voluntary contributions.<sup>281</sup> With these constraints, it is not unrealistic to believe that individ-

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276. Bloch & Weinstein, *supra* note 69, at 1.

277. Wippman, *supra* note 113, at 484.

278. SUNGA, *supra* note 108, at 6.

279. Adrian Karatnycky, *Don't Worry War Criminals—New Court Won't Work*, WALL ST. J., July 27, 1998, at A15.

280. Rodriguez, *supra* note 203, at 837.

281. Rome Statute, *supra* note 5, art. 116.

ual countries may be able to exert significant influence if they were to donate large sums of money to the court.

### 9. *Constitutional Rights*

Although the potential constitutional issues with regard to United States support to the ICC are important, they are largely beyond the scope of this article. However, there are some significant domestic constitutional issues that should be examined by others. First, the Constitution grants the sole authority to try U.S. citizens to the federal and state courts.<sup>282</sup> Second, certain Bill of Rights protections will not be present at the ICC.<sup>283</sup> Third, certain procedural and structural protection found in U.S. courts may be absent as well.<sup>284</sup> One has to wonder whether the U.S. Senate will ever consent to the establishment of a court where citizens' constitutional protections are at risk. Arguably, even if the Constitution does not apply as a matter of law to such a court, for policy reasons, the Senate may not consent to such an arrangement. As expressed by one Senator:

We do not take lightly the concerns of our colleagues. A politicized, anti-American international court would be extremely dangerous. We, like they, do not support the creation of a court that infringes on constitutional rights, that pursues vague charges, or that allows terrorists to sit in judgment of our citizens. We are all rightly committed to preventing the creation of any such court . . . .<sup>285</sup>

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282. U.S. CONST. art III, § 1.

283. See Rodriguez, *supra* note 203, at 815. Rodriguez explains that the treaty does not provide basic protections against unlawful searches and seizures and the right to a speedy trial. The right of confrontation, because of relaxed rules of hearsay evidence, may not exist as well. *Id.*

284. *Id.* at 816.

285. S. 123, 103d Cong. (1993). Senator Jesse Helms, chairman of the Senate Foreign Relations Committee, sought an amendment to the Department of State Authorization Act, which would have prevented monetary support for the establishment of ICC. Although the Senate defeated the amendment, they made it unmistakably clear that many in the Senate are quite concerned regarding the establishment of the ICC in its current form. *See id.*

## V. Recent Threats to Proper Deterrence by International Tribunals

Primarily as a result of allegations submitted by anti-war law professors, the chief ICTY prosecutor, Carla Del Ponte looked into complaints regarding NATO's bombing campaign in Yugoslavia. She met with individuals from the Russian Duma, various non-governmental agencies, and international legal experts to discuss NATO's actions in Kosovo.<sup>286</sup> If the ICTY prosecutor, because of political pressure, is willing to review the actions of NATO, the only force capable of stopping the massive humanitarian violations in Kosovo, it seems clear that an ICC prosecutor would be influenced politically to do the same.<sup>287</sup> Senator Rod Grams reminded his colleagues that:

A decision by the International Criminal Court to prosecute Americans for military actions wouldn't be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984 the World Court ordered the U.S. to respect Nicaragua's borders and halt the mining of its harbors by the CIA. In 1986 the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. Needless to say we ignored both rulings.<sup>288</sup>

On 29 April 1999, the government for the Federal Republic of Yugoslavia (FRY) applied to the International Court of Justice (ICJ) requesting

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286. Charles Trudheart, *War Crimes is Looking at NATO*, WASH. POST, Dec. 29, 1999, at 20; Steven Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000; Rowan Scarborough, *U.N. Prosecutor Abandons Probe of NATO Strikes*, WASH. TIMES, Dec. 31, 1999, at 1; Jerome Socolovsky, *U.N. Prosecutor Denies Formal War Crimes Investigation of NATO*, ASSOCIATED PRESS, Dec. 30, 1999, LEXIS, News Library; *NATO's Day in Court?*, RALEIGH NEWS AND OBSERVER, Feb. 6, 2000, at A28; *White House Blasts Kosovo Inquiry*, ASSOCIATED PRESS, Dec. 30, 1999, LEXIS, News Library; *NATO Bombing Drew War Crimes Inquiry*, SAN DIEGO UNION, Dec. 31, 1999, at A22; Robert Siegel, *War Crimes Prosecutor Carla Del Ponte Will Consider Evidence of NATO Violating International Law* (NPR broadcast, Dec. 29, 1999), LEXIS, News Library; *War Crimes Charges Show U.S. Power Has Limits*, NEWSDAY, Jan. 10, 2000, A22; *Anti-War Professors Take NATO to Court for War Crimes*, THE BULLETIN'S FRONTRUNNER, Jan. 20, 2000, LEXIS, News Library; *An International Tribunal Sees a Possibility of Allied Abuses, But its Focus is Distorted*, THE TIMES UNION, Jan. 4, 2000, at A6.

287. John T. Correll and Peter Gray, *UN Tribunal Drops Investigation of NATO for War Crimes*, A.F. MAG., Feb. 2000, at 12.

288. *Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. (1998).

that provisional measures be taken against the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal, and Spain.<sup>289</sup> The Federal Republic of Yugoslavia was asking that the ICJ, in effect, enjoin these countries from the further use of force in FRY.<sup>290</sup> The cases against the United States and Spain were dismissed on 2 June 1999, for lack of jurisdiction.<sup>291</sup> However, with regard to Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom, the case was ongoing as of 23 February 2001.<sup>292</sup>

In its application against the United States and the other listed parties, FRY alleged that the parties named in the applications were:

- (1) Unlawfully using force by bombing in FRY;
- (2) Attacking civilian targets;
- (3) Intervening in the affairs of FRY by training, arming, financing, equipping and supplying the Kosovo Liberation Army;
- (4) Attacking cultural properties;
- (5) Causing unnecessary suffering through the use of cluster bombs;
- (6) Causing considerable environmental damage by attacking oil refineries and chemical plants;
- (7) Causing far reaching health and environmental damage through the use [of] weapons with depleted uranium;
- (8) Killing civilians, destroying enterprises, communications, health and cultural institutions and violating human rights;
- (9) Destroying bridges on international rivers, preventing the free navigation of international rivers;
- (10) Committing acts of genocide by destroying in whole or in part a national group.<sup>293</sup>

Although these parties were all united in attempting to stop the Former Yugoslavia in its pursuit of massive human rights violations and acts of genocide, the rescuing countries must now answer in a court of law for

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289. Legality of Use of Force (Yugo. v. Belg. et al.) (Apr. 29, 1999) (Application of the Federal Republic of Yugoslavia); *see* ICJ Communique 99/17 .

290. *Id.*

291. Legality of Use of Force (Yugo. v. Spain and U.S.) (June 2, 1999) (Order).

292. Press Release 2001/5, International Court of Justice (Feb. 23, 2001) (extending for one year Yugoslavia's deadline for responding to objections raised by Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom).

293. Legality of Use of Force (Yugo. v. Belg. et al.) (Apr. 29, 1999) (Application of the Federal Republic of Yugoslavia); *see* ICJ Communique 99/17.

these acts of humanitarianism. It is Slobodan Milosevic, the leader of the former Yugoslavia, that is the indicted war criminal, and yet NATO countries must now submit themselves to the judgment of a court of law. With this development, it is conceivable that NATO will simply decide that it has become too risky for nations supporting the rule of law and the protection of human rights to participate in future operations against tyrants.

#### VI. Deterrence in Future Warfare

Some have speculated that future wars may involve a level of brutality, savagery, and intimidation that the United States may not be fully prepared to face.<sup>294</sup> In what Colonel Charles Dunlap refers to as a neo-absolutist war, the enemy will likely wage a war employing tactics similar to those used by ruthless warlords such as Genghis Khan.<sup>295</sup> Future opponents of the United States are likely to use “asymmetrical” warfare in order to attempt to defeat the United States and its allies. Asymmetrical warfare involves exploiting the enemy’s weaknesses rather than attacking in a symmetrical, force on force, methodology. This means that the use of highly unconventional tactics by an enemy employing asymmetrical warfare concepts is probable.<sup>296</sup>

Colonel Dunlap explains that neo-absolutist conflicts will be wars “without scruples . . . [and] vicious” in nature.<sup>297</sup> Such wars will likely occur “between civilizations with fundamentally different psychological orientations and value sets than those of the West.”<sup>298</sup> One commentator has speculated that:

[America] will face [warriors] who have acquired a taste for killing, who do not behave rationally according to our definition of rationality, who are capable of atrocities that challenge the

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294. See generally Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 USAFA J. LEG. STUD. 71 (1998).

295. *Id.*

296. *Id.* at 71, 72 (citing CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996); WILLIAM S. COHEN, REPORT OF THE QUADRENNIAL DEFENSE REVIEW, (1997); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (1997)).

297. *Id.* at 74-74.

298. *Id.* at 71 (citing HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996)).

descriptive powers of language, and who will sacrifice their own kind in order to survive.<sup>299</sup>

Warriors involved in asymmetrical warfare will likely be “brought up to fight, think fighting honorable and think killing in warfare glorious,” the kind of fighter that “prefers death to dishonor and kills without pity when he gets a chance.”<sup>300</sup>

It is tempting, but profoundly erroneous, to over-generalize about these groups by concluding that they are wholly morally deprived. . . . Even otherwise virtuous societies (or an analog described as “Streetfighter” nations) may nevertheless participate in appalling (to us) behavior because they deem those they victimize as being outside their favored group and, hence, unworthy of humane treatment.<sup>301</sup>

As a result of the break down of the state in many regions of the world, the world has witnessed the disintegration of “the indigenous warrior codes that sometimes keep war this side of bestiality.”<sup>302</sup>

Some of America’s opponents in a future neo-absolutist war will likely include non-state actors such as transnational criminals and terrorists. Not only will these forces lack any historical connection with the laws of war,<sup>303</sup> it is unlikely that traditional laws will deter individuals motivated to the extent that they are willing to kill themselves if delivering a car bomb. Such an enemy may choose to exploit American morality and will. The North Vietnamese saw early on that America’s warfighting capability was directly linked to America’s “conscience.”<sup>304</sup> In Somalia, local warriors were able to exploit American’s alleged aversion to casualties, including use of the media to show dead Americans being dragged through the streets of Mogadishu. United States forces were removed from Soma-

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299. *Id.* at 75 (citing Ralph Peters, *The New Warrior Class*, PARAMETERS 24 (Summer 1994)).

300. *Id.* at 75-76 (quoting John Keegan, *Warrior’s Code of No Surrender*, U.S. NEWS & WORLD REPORT, Jan. 23, 1995, at 47).

301. *Id.* at 75-76 (citing MICHAEL IGNATIEFF, THE WARRIORS HONOR 116-117 (1997); Dan Cordtz, *War in the 21st Century: The Streetfighter State*, FINANCIAL WORLD, Aug. 29, 1995, at 42).

302. *Id.* at 76 (quoting Cordtz, *supra* note 301, at 42).

303. *Id.* at 76.

304. *Id.* at 77 (quoting *How North Vietnam Won the War*, WALL STREET J, Aug. 3, 1995, at A8).

lia following the deaths of eighteen U.S. Army Rangers despite the fact that U.S. forces inflicted somewhere in the neighborhood of 1000 Somali casualties during the same battle.<sup>305</sup>

It is also predictable that future enemies will ring targets with non-combatants, maybe even U.S. POW's in their custody, as a cheap method of shielding targets.<sup>306</sup> In Iraq, Saddam housed civilians in a command and control bunker. After this became apparent, bombings in downtown Baghdad were called off.<sup>307</sup> Libya threatened to protect an underground chemical weapons plant with a ring of "millions of Muslims."<sup>308</sup> If U.S. forces attacked such a target knowing that non-combatants were present, the U.S. public might lose its will to conduct such warfare and a politically charged ICC might elect to charge U.S. service members with war crimes. Somali warlords used women and children as human shields during attacks knowing that U.S. service members might be hesitant to fire or that United States support may dwindle for the operation.<sup>309</sup> Such tactics may further cement world opinion in favor of an aggressor willing to employ these methods, because they are frequently seen as martyrs when killed by defending forces.

Although these predictions about future warfare may be questioned,<sup>310</sup> some assert that the United States is so averse to taking any casualties that it will hesitate to react in the face of aggression or massive violations of international humanitarian law, unless U.S. interests are directly at risk.<sup>311</sup> Two recent events serve to foster this arguably erroneous perception: the rapid withdrawal of U.S. forces following the death of U.S. Army soldiers in Somalia, and the avoidance of using ground forces in the Former Yugoslavia. Both events may give the impression to regime elites contemplating aggressive action that the United States will not

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305. *Id.* at 77.

306. *Id.* at 78.

307. *Id.* at 78 (citing WALTER J. BOYNE, *BEYOND THE WILD BLUE: A HISTORY OF THE AIR FORCE 1947-1997*, at 7 (1997)).

308. *Id.* at 78 (citing *Libyans to Form Shield at Suspected Arms Plant*, *BALTIMORE SUN*, May 17, 1996, at 14).

309. *Id.* at 78 (citing Lieutenant Colonel Thomas X. Hammes, *Don't Look Back, They're Not Behind You*, *MARINE CORPS GAZETTE* 72, 73 (May 1996)).

310. NORMAN METZGER, *supra* note 32, at 20 n7.

311. *Id.* at 20.



become involved as long as the potential victim does not represent a significant U.S. interest and where U.S. casualties are likely.<sup>312</sup>

In the future, the distinction between international and internal armed conflicts will become more blurred.<sup>313</sup> The use of organized armed forces may decrease, which will make it harder to discriminate between combatants and non-combatants as the laws of war require.<sup>314</sup> It will be more difficult to define legitimate military objectives.<sup>315</sup> Paradoxically, weapons will become more accurate, but at the same time it will be more difficult to separate legitimate targets from improper ones.<sup>316</sup> Combatants will be less likely to carry their arms openly, instead opting to blend in with the civilian populations.<sup>317</sup> As weapons become more accurate and more surgical in nature, acceptable levels of collateral damage are likely to drastically decline for countries with advanced technology.<sup>318</sup> Precision weapons, brilliant weapons, and computer attacks may all create a zero tolerance of collateral damage standard.<sup>319</sup> Would the ICC adopt a system of “norma-

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312. *Id.*

313. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1074 (1998).

314. Protocol I, *supra* note 117, art. 48.

315. *Id.* art. 52.

316. See XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, CDDH/407/Rev. 1, 453 para. 19 (1974-77).

The requirement that combatants distinguish themselves from non-combatants through use of a distinctive emblem dates back to the Brussels Declaration of 1874. With regard to Protocol I, according to the Rapporteur, the “exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself throughout his military operations and still retain any chance of success.”

*Id.* (citation omitted). See also GPW, *supra* note 117, art. 4; Protocol I, *supra* note 117, art. 1.

317. Schmitt, *supra* note 313, at 1075-78.

318. Protocol I, *supra* note 117, arts. 51, 57.

319. Schmitt, *supra* note 313, at 1080.

tive relativism,” where technologically advanced states have to adhere to a higher standard of care, and lower collateral damage?<sup>320</sup>

The use of civilians on the battlefield as weapons and communications systems technicians is likely to increase. This may mean potential liability in that the United States may be accused of trying to immunize targets with the presence of civilians.<sup>321</sup> What about using non-lethal weapons such as “acoustic weapons that induce vomiting, microwaves that cause the human body to heat up, and electromagnetic pulses that will cause an airplane to fall to the earth because its engine shuts down?”<sup>322</sup> Even though some of these weapons are far more humane than lethal uses of force, because they are new, some might consider them to be inhumane. Those without the technology will predictably protest their every use. For example, could technologically superior nations be prohibited from using lasers or land mines by the ICC?<sup>323</sup>

New bases for the use of force are predictable and represent a cause for concern for the participants in light of the fact that aggression has not been defined. “Humanitarian intervention is defined as ‘intervention (in the narrow sense of coercive interference in the internal affairs of another state) in order to remedy mass and flagrant violations of the basic human rights of foreign nationals by their government.’”<sup>324</sup> Humanitarian intervention is not a new theory; it traces its roots to Hugo Grotius.<sup>325</sup> However, it has recently seen a resurgence in acceptance in the post-U.N. Charter world.<sup>326</sup> “Many scholars have stated that the U.N.’s inefficiency and its failure to respond effectively to human rights deprivations justify humanitarian intervention.”<sup>327</sup>

[The] overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: First, the U.N. Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a

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320. *Id.* at 1087.

321. Protocol I, *supra* note 117, arts. 50-52.

322. Schmitt, *supra* note 313, at 1085.

323. *Id.*

324. Michael E. Harrington, *Operation Provide Comfort: A Perspective in International Law*, 8 CONN. J. INT’L L. 635 (1993) (quoting Jack Donnelly, *Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality, and Politics*, J. INT’L AFFAIRS 311, 314 (1984)).

handful of genuine cases of humanitarian intervention, and on most assessments, not at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.<sup>328</sup>

However, such an intervention poses significant risks because the ICC might decide that a specific intervention was a subterfuge even though approved by a regional security coalition.<sup>329</sup>

Responding to terrorism is certainly a difficult dilemma in the modern world. There is some concern for how the court might evaluate responses to terrorism. What will the court consider a necessary and proportional response to terrorism? What will constitute an “armed attack” triggering the right of self-defense? The Statute does not directly protect terrorists, but may have the unintended consequences of protecting them if the crime of aggression is defined in an overly broad manner. This is because,

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325. Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 *LOY. L.A. INT'L & COMP. L.J.* 365, 368 (1995). Grotius argued that if a tyrant “should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded.” *Id.* (quoting HUGO GROTIUS, *DE JURE BELLI AC PACIS*, ch. VII, P 2, at 584 (Francis W. Kelsey trans., 1925)). “[Hugo Grotius] told the monarchs of his day that they were not free to commit crimes and to perpetrate injustice either internally or externally. Tyrannous acts within their own state associations . . . constituted crimes from which these rulers were liable to be punished.” *Id.* (quoting C. S. EDWARDS, *HUGO GROTIUS: THE MIRACLE OF HOLLAND* 136 (1981)). “In 1758, Emmerich de Vattel argued: ‘If a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid.’” *Id.* (quoting EMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 3 (Charles G. Fenwick trans., 1964)).

326. *See generally* W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L.J.* 794 (1995) (arguing that not only is humanitarian intervention lawful, but democracies have a duty to intervene, especially where fledgling democracies are at risk).

327. Nikolai Krylov, *supra* note 325, at 383 (citing THOMAS M. FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* (1985)).

328. *Id.* at 386 (quoting 57 *BRIT. Y.B. INT'L L.* 614 (1986)).

329. Absent a Chapter VII enforcement action, the United Nations is specially prohibited from engaging in acts that are “essentially within the domestic jurisdiction of any state.” U.N. CHARTER art. 2(7).

although the terrorists are not specifically protected, the nations that harbor them may be.

Modern terrorism has salient differences from traditional warfare. The actors are often not states, but rather ideological, political or ethnic factions. States have a host of international commitments and aspirations that create an incentive to avoid all-out warfare and to avoid undermining the rules of war, while a single-purpose terrorist organization may operate without mitigation. A terrorist group often calculates that it will win attention for its cause and undermine a target government by the very atrocity of its tactics. A terrorist group is less vulnerable to international sanctions, as it does not possess a membership and inchoate form, terrorist networks lie outside the web of civil responsibility that contains private and public actors in international society.<sup>330</sup>

Terrorists are not likely to be deterred by the ICC because the court may not have jurisdiction over them. Even if it does, it is hard to believe that a court, through a threat of prosecution, would successfully deter a terrorist that is willing to blow himself up by using a car bomb to achieve his ultimate objective. Such a terrorist would not be deterred by the threat of prosecution, but only by the thought that his mission might be compromised if he was caught. The United States response to terrorism is four-fold:

- (1) Use the tools of criminal justice;
- (2) Seek treaty agreements;
- (3) Disrupt terrorist structures through civil sanctions; and
- (4) The prudent use of military force.<sup>331</sup>

With regard to the criminal law response, Professor Ruth Wedgewood has explained:

The familiar forms of criminal justice should not disguise the fact, though, that the capture or rendition of terrorist suspects may be difficult without extraordinary means. Such cases are often too hot to handle, even for responsible governments,

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330. Ruth Wedgewood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

331. *Id.* at 560-63.

because of the danger of retaliation. There are a surprising number of European governments that have been reluctant to detain suspects in cases of political terrorism, worrying that it will make them an attractive target for retaliatory actions by supporters.<sup>332</sup>

....

There is a patchwork of treaties relating to terrorism, but no enforcement structure to go with them.<sup>333</sup>

....

[As to military force] the suggestion that military targeting decisions should, ex ante or ex post, always be subject to the review of a multilateral body is simply unrealistic . . . . There are those generally rare occasions when such information cannot be shared, at least in the short or medium term, without seriously and even fatally prejudicing protective countermeasures.<sup>334</sup>

Although the United States has responded with military force to terrorism, its actions have not been without controversy.<sup>335</sup> The U.N. Charter prohibits unauthorized threats and uses of force against the political independence and territorial integrity of another country.<sup>336</sup> Certainly the Charter allows for unilateral uses of force in self-defense.<sup>337</sup> However, self-defense is only permitted in the face of an "armed attack."<sup>338</sup> The difficulty with this statutory limitation is that, with hit and run terrorist tactics where the attacks may be few and far between, it can be difficult to argue that you are under "armed attack" once time has passed and there has not been a second attack.

By the time blame can be fixed, some would say the victim-nation is no longer under an armed attack and the remedy is the Security Council, not unilateral action. In attacking terrorists before they strike, many find

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332. *Id.* at 560-61.

333. *Id.* at 562.

334. *Id.* at 567.

335. Schmitt, *supra* note 313, 1070-74.

336. U.N. CHARTER art. 2(4).

337. *Id.* art. 51.

338. *See generally* Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661, 668-74 (Bruno Simma ed., 1994).

that the language in Article 51 has preserved the customary international law doctrine of “anticipatory self-defense.”<sup>339</sup> However, if a significant time has passed since the initial incident, it becomes difficult to argue that the need is “instant and overwhelming.”<sup>340</sup>

The danger in all this is that a politically-motivated ICC may be sympathetic to unconventional warfare groups involved in wars against colonial powers, racist regimes, or alien occupation forces. Such a court may be supportive of national liberation groups as well. This means that a court of this persuasion could be quick to condemn military responses to terrorism.

On August 7, 1998, virtually simultaneous car bombs were detonated at the U.S. embassies located in Nairobi, Kenya and Dar Es Salaam, Tanzania. Because of the location of these facilities in densely populated areas, the casualties were high: in Kenya thousands were injured, including over 150 fatalities; in Tanzania over eighty were injured, including over a dozen fatalities. The vast majority of casualties were African citizens. The international community condemned the bombings, and the United States government variously promised action to retaliate, to bring those responsible to justice, and to defend itself from future attacks. Identified, as the mastermind of the attacks was Saudi dissident turned terrorist, Osama bin Laden. Bin Laden had lived in Sudan before he was expelled by that country at the United States’ request. Bin Laden then moved his operations to Afghanistan where he had assumed control of the training camps built by the American government to train Afghanistan’s resistance during the Soviet occupation, using them as a training camp in the war against the United States.

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339. Anticipatory self-defense is self-defense that proceeds an imminent threat of attack. Most observers construed a letter—written by then U.S. Secretary of State Daniel Webster to the British government following the *Caroline Incident* in 1837—as representative of the standard. Daniel Webster wrote that self-defense, prior to an actual attack, was to “be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” 2 JOHN BASSETT MOORE, A DIGEST OF THE INTERNATIONAL LAW 217 (1906). One modern commentator advocates the standard of “interceptive” self-defense. Professor Dinstein explains that, once an aggressor has gotten to the point of no return in his attack, then defense is acceptable. For example, if an enemy were to launch an air strike against a target state, as soon as the aircraft begin to leave the ground or an aircraft carrier, self-defense is permitted. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 190 (2d ed. 1994).

340. MOORE, *supra* note 339.

On August 20, ten days after the embassy bombings, the United States launched surprise air strikes aimed at the training camps in Afghanistan, claiming the move was in self-defense. Also targeted was a pharmaceutical plant in Khartoum, Sudan, which was first identified by the U.S. as a heavily guarded secret chemical weapons factory for Iraq.<sup>341</sup>

In the wake of such an attack, certainly Sudan and Afghanistan could assert that the unilateral decision to use force by the United States was aggression.<sup>342</sup> With terrorism, unless the state can be directly linked to sponsorship of a particular group, the use of military force against a non-state actor in the territory of another nation could be seen as aggression or unlawful intervention.<sup>343</sup>

There are many other issues related to the modern conduct of war. For example, if the United States were to respond with military force to a crippling computer network attack against the United States where the New York Stock exchange was shut down or where air traffic controller terminals and civilian airline guidance systems went out, causing planes to crash, would the ICC agree that the United States was the victim of an armed attack? Or, would the court demand that actual kinetic energy systems be used against the United States before military force could be used? What if the individual that launched the attack was a nineteen-year-old civilian college student in Yugoslavia (wearing sandals and an earring in his left ear) and the United States had credible intelligence that he was state-supported and a second attack was imminent? Would he be a legitimate military target under the current laws of war?<sup>344</sup>

The question remains: will the court be able to handle these issues in a way that protects a nation's need to defend itself and others or will it tend to take actions that are so restrictive that legitimate responders will be

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341. David, *supra* note 201, at 384-85.

342. *Id.* at 384-85.

343. U.N. CHARTER art. 2(4). The United States considers Sudan to be a state that sponsors terrorism and is not entirely satisfied with the actions of the Taliban government in Afghanistan. *See generally* U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM 1998 (1999).

344. Protocol I, *supra* note 117, arts. 49-52.

irreparably harmed? The risks are simply too great to trust United States security interests to such a judicial body.

## VII. Where Does the United States Go From Here?

The ICC statutory formulation represents a serious threat to United States national security interests in that it creates a real possibility that politically-motivated individuals will seek the indictment of U.S. service members whenever U.S. armed forces are used. Individuals firmly opposed to the use of all military force will certainly seek to use the court as a tool to dissuade and deter the U.S. government. As it stands now, it is very unlikely that the United States will become a party to the ICC in its current form.<sup>345</sup> So the question becomes, what, as a matter of policy, should the United States do?

First, even if the United States elects not to become a party to the treaty, it must continue to remain, as it is, involved in the struggle for law relating to the ICC by participating in the drafting of elements, rules and defenses.<sup>346</sup> This is entirely proper because, even if the United States is not a party, as currently formulated, the court may eventually gain jurisdiction over certain U.S. service members.<sup>347</sup> It is to our advantage to do all we can to ensure a fair trial for our service members that might find themselves before the court by remaining involved in the fashioning of the rules and procedures.

Second, as a world leader, the United States must develop a strategy to enlist the support of its allies in combating the Statute in its current form and seeking a re-negotiation in the U.N. General Assembly.<sup>348</sup> The United States should focus its efforts primarily on other members of the U.N. Security Council, especially Russia and China, and secondarily on the

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345. See generally David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999); Scheffer, *supra* note 94, at 34; Scheffer, *supra* note 194, at 12.

346. See Scheffer, *supra* note 345, at 529; Scheffer, *supra* note 194, at 12.

347. See *supra* notes 210-12 and accompanying text.

348. For a recent example of a treaty being renegotiated or amended by the General Assembly, see Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Law of the Sea: Report of the Secretary General on His Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, U.N.G.A., 49th Sess., Agenda Item 36, U.N. Doc. A/48/950 (1994).



more developed nations of the world. In reality, without significant support from the developed nations of the world, the court will be without an effective enforcement mechanism. The court will depend on the intelligence and investigative resources of member states to put together cases and arrest indicted individuals.<sup>349</sup> At this time, only the developed nations of the world have that capacity and willingness to cooperate at the levels required for an effective court. Although the world can proceed without the United States, based on the ICTY and ICTR experiences, it is clear that the ICC will not be successful without significant financial and indirect support, which will have to come primarily from our European allies if the United States is not a party.<sup>350</sup>

Although many provisions should be reconsidered, two are critical: the United States should not even consider becoming a party unless the crime of aggression is acceptably defined and Article 8 is renegotiated. In fact, if Article 5 and Article 8 are renegotiated, most of the United States' interests can be preserved. Article 5 provides the ICC with jurisdiction over the crime of aggression. There are two options that should be palatable to the United States. The first would be to take away the court's jurisdiction over the crime of aggression altogether, allowing it to focus on genocide, crimes against humanity, and war crimes. These violations alone should give the court plenty to do. The second option, and one that would reduce the potential for politically-based prosecutions for aggression, would be to require that the U.N. Security Council refer a case to the ICC before the court could proceed on a theory of aggression. This is similar to the version proposed in the 1991 Model Code.<sup>351</sup> It is true that, because of the veto power, many cases of aggression may go unpunished. However, this is preferable to politically-motivated prosecutions related to the use of force.

Such a construct would also have the tendency of leaving the primary responsibility of maintaining international peace and security where it belongs, with the Security Council.<sup>352</sup> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."<sup>353</sup> Any other formulation would dimin-

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349. *See supra* notes 271-79 and accompanying text.

350. *Id.*

351. 1991 Draft Code, *supra* note 218.

352. U.N. CHARTER art. 39.

353. *Id.*

ish the power and authority of the Security Council. To give the power to find aggression without the participation of the Security Council is to arguably violate the U.N. Charter's "supremacy clause" in Article 103, wherein it states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."<sup>354</sup>

The second provision that must be renegotiated is Article 8, War Crimes. It is highly unlikely that a member of the U.S. military would ever be tried before the ICC for crimes against humanity or for the crime of genocide based on a political prosecution. For a crime against humanity to exist, it must be committed as part of a "widespread and systematic" attack.<sup>355</sup> Although acts such as murder and rape by American soldiers in operations are certainly foreseeable, it is unlikely that they would be committed in the numbers required to rise to the level of a "widespread and systematic" attack. In all but the very most atrocious scenarios, it is hard to fathom how an American service member would be at risk of prosecution for a crime against humanity.

Genocide is a specific intent crime that requires the accused to purposely intend to destroy in whole or in part a national, ethnical, racial or religious group.<sup>356</sup> The specific intent required is arguably so high, that once again, it is unlikely that an American service member would be forced to answer for the crime of genocide before the court. Although the statute only requires that the intent be to destroy "part" of a protected group, it is reasonable to assume that the "part" would have to be quite substantial. In fact, the first international criminal tribunal prosecutions for genocide were the *Akayesu* and *Kambanda* judgments in the International Criminal Tribunal for Rwanda.<sup>357</sup>

The problem with Article 8, as it is currently drafted, is that there is no minimum baseline, in terms of the numbers or severity, that must be met in order for the court to have jurisdiction. Unlike crimes against humanity, for example, which requires widespread and systematic abuses; there is no minimum threshold requirement.<sup>358</sup> The renegotiation should include the

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354. *Id.* art. 103.

355. Rome Statute, *supra* note 5, art. 7(1).

356. *Id.* art. 6.

357. Prosecutor v. Akayesu, No. ICTR-96-4-T (Sept. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1399 (1998); Prosecutor v. Kambanda, No. ICTR-97-23-S (Sept. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1411 (1998).

establishment of a minimum threshold for war crimes. There are two significant advantages to establishing this minimum criterion. First, the ICC would not be inundated with more cases than it can possibly handle. One need only look at the record at the ICTY and ICTR to understand that the ICC will likely move at an exceptionally slow pace because of its similar limited resources.<sup>359</sup>

Second, looking at the record of the ICTY, the ICC will likely do all that it possibly can to appear entirely evenhanded.<sup>360</sup> This means that it is quite likely that the United States and its service members will be closely scrutinized, perhaps even more so than any other participant in an operation, because of the pressure that non-governmental agencies and countries opposed to United States actions are sure to place on the ICC. If a minimum threshold is established, then in most cases, the entirely frivolous or minor cases will be left domestic courts to resolve. This will serve the court's best interests with its limited resources. It also will be in the United States' best interests because, if a threshold is established, the possibility of a politically based prosecution is far less likely. Only the most egregious of incidents should be brought before the court.

In terms of a proper formulation for Article 8, War Crimes, looking to the language of Article 7, Crimes against Humanity, makes good sense. If charges of crimes against humanity can only be brought where they occur on a systematic and widespread basis, why would it not be reasonable to place the same baseline minimum on war crimes? If the rape and murder of civilians must occur on a widespread and systematic basis in order for the court to have jurisdiction over a crime against humanity, the same requirement should exist for the prosecution of crimes of war. Such a pattern of abuse would suggest a plan or policy to commit war crimes. Where such exists, even a politically-based prosecution would certainly be less objectionable.

Although, at a bare minimum, Article 5 and Article 8 should be renegotiated—other potential amendments should also be considered. Article

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358. Rome Statute, *supra* note 5, art. 8.

359. See *supra* notes 167-176 and accompanying text.

360. See generally Lisa L. Schmandt, *Peace with Justice: Is It Possible for the Former Yugoslavia?*, 30 TEX. INT'L L.J. 335 (1995); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031 (1998); William Walker, *The Yugoslav War Crimes Tribunal: Recent Developments*, 19 WHITTIER L. REV. 303 (1997); Odio & Hoefgen, "There Will Be no Justice Unless Women are Part of that Justice," 14 WIS. WOMEN'S L.J. 155 (1999).

12, Preconditions to Jurisdiction, should be amended to exclude jurisdiction over citizens of non-party states unless the sending state consents. This may mean that some non-party state defendants escape justice, but this is a better alternative than having non-parties liable to a treaty to which they are not a party.

The International Criminal Court is not a court vested with universal jurisdiction.<sup>361</sup>

A *state* has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . .<sup>362</sup>

Universal jurisdiction is based on the notion that some crimes are of such universal concern to the community of states and are of such seriousness that any state should be able to prosecute the perpetrator no matter where he or she may "wander."<sup>363</sup> Universal jurisdiction can be asserted where only certain international law crimes have been violated.<sup>364</sup>

Not only is universal jurisdiction limited to certain crimes, but universal jurisdiction can only be based on the actual presence of an offender within the state territory of the state that intends to assert universal jurisdiction.<sup>365</sup> For example, it would be improper for France to extradite an American to Libya for trial for crimes committed in France.<sup>366</sup>

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361. David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 532-33 (1999).

362. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (emphasis added) [hereinafter RESTATEMENT (THIRD)].

363. Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 60 (1981).

364. RESTATEMENT (THIRD), *supra* note 362, § 404 and commentary; Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction on International Crimes*, 87 COLUM. L. REV. 1515, 1522 (1987).

365. Feller, *Jurisdiction over Offenses with a Foreign Element*, in IIA TREATISE ON INTERNATIONAL CRIMINAL LAW 32-34 (M. Bassiouni & V. Nanda eds., 1973).

366. Ambassador David Scheffer, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (International Criminal Court: The Challenge of Jurisdiction).

The argument is sometimes made that if an accused is present in a state that can assert universal jurisdiction and submit the accused to judgment within its state court system, that state also ought to extradite the individual to the ICC. It does seem to be a fair argument, where a given crime has risen to the level of universal jurisdiction, that a detaining power could transfer the individual to the ICC rather than try them in their own court where a political prosecution is even more likely.<sup>367</sup> However, this argument is inconsistent with the law because the court is treaty-based and therefore should not be capable of exerting personal jurisdiction against citizens of non-party states.<sup>368</sup>

Moreover, the ICC will have the power to punish certain crimes listed in the 1977 Protocols to the 1949 Geneva Convention.<sup>369</sup> Because the United States and certain other nations are not parties to either Protocol, and since the Protocols are relatively new, some violations of these treaties cannot be said to have risen to the level of universal jurisdiction.<sup>370</sup> Therefore, the ICC, as a treaty court, should be amended to prevent jurisdiction over non-party states.

Finally, the prosecutor should not be completely independent<sup>371</sup> and should not be able to rely on non-governmental organizations as a basis for investigation.<sup>372</sup> The prosecutor should only be able to investigate crimes of aggression where the U.N. Security Council gives the prosecutor authority. With regard to other non-aggression crimes, the prosecutor

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367. An additional amendment to protect captured U.S. service members would go a long way if the court had sole jurisdiction to prosecute POWs for war crimes. Currently, detaining powers have the power to prosecute POWs for alleged pre-capture war crimes and post-capture violations of detaining power law. Because of the potential for sham trials alleging pre-capture war crimes, if the ICC had sole jurisdiction over these allegations, it is foreseeable that war's most vulnerable victims, POWs, would be protected from politically motivated prosecutions. See GPW, *supra* note 117, art. 85; COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-26 (Jean S. Pictet et al. eds., 1958).

368. Scheffer, *supra* note 361, at 532-33.

369. Rome Statute, *supra* note 5, art. 8; Protocol I, *supra* note 117; Protocol II, *supra* note 117.

370. Scheffer, *supra* note 361, at 532-33. With regard to universal jurisdiction over war crimes, the four Geneva Conventions have codified the concept of universal jurisdiction over a limited type of war crime referred to as "Grave Breaches." See GWS, *supra* note 117, arts. 49,50; GWSS, *supra* note 117, arts. 50,51; GPW, *supra* note 117, arts. 129,130; GC, *supra* note 117, arts. 146, 147.

371. See *supra* notes 205-09 and accompanying text.

372. See *supra* note 207 and accompanying text.

should not be able to independently investigate crimes unless and until the court seizes on a particular matter for investigation.

In terms of securing a renegotiation, the United States should start with obtaining Russian and Chinese support. If these two members of the Security Council were to agree that a renegotiation was in order, then other members of the Security Council, and eventually the members of the General Assembly, might also be persuaded. Although the treaty does not allow for reservations,<sup>373</sup> it does allow for amendment after seven years.<sup>374</sup> Instead of waiting seven years, perhaps a Protocol could be drafted with the above-listed changes. Another negotiation option might be a General Assembly declaration where all parties might agree to the suggested changes.<sup>375</sup>

Unfortunately, a renegotiation may not be possible and so other strategies should be considered as well. If the United States elects to continue to remain a non-party, it could show a great deal of good faith if it publicly stated in the General Assembly that it would consent to ICC jurisdiction as a non-party state in any case where the United Nations Security Council sent a particular case to the court pursuant to Article 13 of the Statute.<sup>376</sup>

The United States should begin now to enter into bilateral agreements with allies agreeing that they will not extradite each other's citizens to the ICC without the other's consent.<sup>377</sup> If ICC party states are unwilling to go this far in a bilateral agreement, then agreements with some sort of limit on the ally's ability to send Americans to the ICC should be sought. For example, ally states could agree that they would not extradite U.S. citizens for war crimes where the United States is prosecuting the case domestically, or, that they would only extradite U.S. citizens where the war crime involved is quite serious or part of a widespread and systematic pattern.

From a pragmatic military point of view, the ICC should also have an independent Office of the Military Advisor. If the court is to truly understand the impact its decisions may have on military operations in the field, it must have input from the profession of arms. By having standing and

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373. Rome Statute, *supra* note 5, art. 120.

374. *Id.* art. 121.

375. *See supra* note 348 and accompanying text.

376. Rome Statute, *supra* note 5, art. 13(b).

377. Article 98 of the Rome Statute specifically allows for bilateral agreements regarding waivers of immunity and consent between states. *Id.* art. 98.

independent military advisors, it is far more likely that the law will remain relevant on the battlefield.

Finally, if all else fails, the United States may want to consider not providing any military aid, in the form of weapons sales, training, and support to any country that refuses to sign a bilateral agreement prohibiting the extradition of Americans to the court.<sup>378</sup>

### VIII. Conclusion

Within the last fifteen years, the United States has participated in peacekeeping missions in Iraq (1990), Somalia (1992) and Haiti (1992); in joint-security operations in Grenada (1983), the Persian Gulf (1987-88) and the Balkans (1996-present); and has acted unilaterally to protect national security interests with air-strikes targeting Libya (1986), invading Panama to secure the custody of General Manuel Noriega (1989), and, most recently, through air-strikes targeting Sudan and Afghanistan, in self-defense for terrorist attacks of U.S. embassies located in Kenya and Tanzania (1998).<sup>379</sup>

Of course, the most recent NATO operation in Kosovo also must be added to this list.

In all of these cases, it is clear that the United States elected to use military force to defend a nation or a group of people at risk of significant abuse by an aggressive power. Unless the proposed International Criminal Court is abandoned or unless its provisions are changed, many of these types of missions may be deemed overly risky by the U.S. military and civilian leadership. The use of military force and, therefore, its credibility as a deterrent to aggression may be significantly weakened. The world is far too dangerous a place to allow that to happen.

While the International Criminal Court has real promise as a force for good in the deterring of regime elites, it cannot be established in such a

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378. Domestic legislation proposing this approach has been put forward in the U.S. Senate as the American Servicemembers' Protection Act. S. 2726; 106th Congress (1990). However, portions of this proposed statute may be unconstitutional to the extent the legislation seeks to limit a President's prerogative to send troops to states that are parties and refuse to enter into bilateral agreements pursuant to Article 98 of the Rome Statute.

379. David, *supra* note 201, at 372.

manner as to strip the world of its best tool in the fight against tyranny, the armies of the democratic nations of the world. With relatively minor yet extremely significant amendments to the Rome Statute; the world can have its court and its military too. Some have suggested: "It can of course be argued that the Court will be of no use in deterring international crime, although I do not think many would agree that it would make matters worse."<sup>380</sup> The truth is however, the court will likely make the world a much more dangerous place because it will likely deter the forces of good, which will allow the forces of evil to act with impunity.

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380. Wexler, *supra* note 123, at 714.



**DESCENT INTO DARKNESS****PEARL HARBOR, 1941  
A NAVY DIVER'S MEMOIR<sup>1</sup>**REVIEWED BY MAJOR JANE-ELLEN BAGWELL<sup>2</sup>

Viewing the *USS Arizona* Memorial for the first time, visitors see the rusting wreckage of a once great battleship lying under water only a few feet beneath their feet. In stark contrast to the raging fires, explosions, and panic in Pearl Harbor after the attack on 7 December 1941, the *USS Arizona* today is somber and peaceful. Visitors are often surprised to notice a coral reef growing on the deck of the ship and many colorful reef fish swimming near the surface. One of the most surprising, yet touching, scenes is that of Japanese tourists throwing flower leis into the water, in memory of the men who died. During the tour, the guide will invariably remind visitors that the *USS Arizona* is the watery grave for more than eleven hundred sailors and marines who gave up their lives in the service of their country. On the west end of the Memorial a huge wall, listing the name of each man who died aboard the *USS Arizona*, dwarfs the visitor. While bells ring out *Amazing Grace*, tears come to the eyes of young and old, men and women, as they are overcome by the magnitude of the profound loss the United States suffered in a few short hours on 7 December 1941. Trying to hide their tears, visitors often stare quietly out to sea, probably trying to imagine the horrific attack that sank the massive battleship so quickly that over one thousand men died while moored in shallow water, just a few feet from shore.<sup>3</sup>

To most visitors, the water is forbidding and uninviting. Unlike the beautiful blue Hawaiian ocean surrounding Oahu, the water entombing the *Arizona* is murky and brown. It is coated with the rainbow colors from oil still leaking from the battleship almost sixty years later. Divers, however, are typically fascinated with the thought of diving the *USS Arizona* and often ask about diving the wreckage. According to Luke Spence, a member of the *USS Arizona* Memorial Association, because the *Arizona* is a gravesite, it is off-limits to recreational divers. Dives, however, are made

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1. EDWARD C. RAYMER, *PEARL HARBOR, 1941, A NAVY DIVER'S MEMOIR* (1996).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. RAYMER, *supra* note 1, at 92.

aboard the *Arizona* on two occasions. When survivors of the *Arizona* pass away, they may be interred with their shipmates. Carefully selected divers enter the remains within the ship. Dives are also permitted as a part of an ongoing study to determine how best to preserve the remains of the *Arizona* against her rapid deterioration in the salt water.

The *USS Arizona* Memorial contains numerous historical references and a film recounting the tragedy of the Pearl Harbor attack and extolling the miraculous recovery of the Pacific Fleet after the attack. The visitor is merely told the Fleet was resurrected and many ships, bombed in the attack, significantly contributed to the Navy's battles in the Pacific. Unfortunately, the visitor is never told how this miraculous feat was accomplished. *Descent Into Darkness* tells that story.

*Descent Into Darkness* is an account of the Navy salvage dive team's efforts to raise the crippled Pacific Fleet following the attack on Pearl Harbor. It relates the spellbinding story of the unimaginable difficulties and horrors encountered by the salvage divers as they made life-threatening dives on the stricken battleships. *Descent Into Darkness* is the first book to tell this story, filling a critical gap in the history of World War II.

*Descent Into Darkness* is a compelling book that explores the resurrection of the Pacific Fleet and recounts a personal story of courage and camaraderie. Despite raging fires, explosions, and other life-threatening dangers, the Navy salvage divers had to enter the murky black water thickened by oil, debris from the attack, and corpses of the victims. Despite the divers' overwhelming fears, dives had to be made immediately following the attack. Divers not only assessed the damage of sinking ships and kept many of them afloat, they worked desperately against the clock to free trapped survivors from their underwater tombs. Early in the book, the reader is taken by the heart wrenching vision of Navy divers anxiously tapping on the underwater wreckage, hoping to locate and rescue survivors trapped inside before they suffocated or drowned.

Retired United States Navy Commander Edward C. Raymer wrote *Descent Into Darkness*. He was the senior petty officer and chief diver of the Pearl Harbor salvage operations team from 8 December 1941 until his transfer to Guadalcanal in August 1942. *Descent Into Darkness* is his personal account of the salvage divers' important contributions in resurrecting the Navy's Pacific Fleet. In addition to educating the reader about the professional lives of the salvage divers, Raymer provides much needed levity by entertaining the reader with tales of the off-duty lives of enlisted sailors

in wartime Honolulu. *Descent Into Darkness* will entertain a wide range of audiences. Military history enthusiasts will be interested in the little-known details of the recovery of the Pacific Fleet. Divers, particularly technical divers, will be fascinated by the accounts of the ingenuity of the Navy divers in overcoming underwater obstacles and developing diving techniques, many of which are still in use today. This book will also appeal to a wider audience with a general interest in human adventure stories.

*Descent Into Darkness* will captivate all audiences with Raymer's riveting personal stories. The book gets off to a strong start with Raymer's startling account of his first dive and subsequent near death experience aboard the *Arizona* in January 1942. The prologue is a gripping story of his experiences when he entered the black, oil-covered water, into the twisted wreckage of the battleship. The *Arizona* was severely damaged by massive explosions that ripped through her hull and intense fires burned atop the water around her for days following the attack. Divers entered the damaged ships through pitch-black water, without a light to guide them through some of the most dangerous diving conditions imaginable. Visibility underwater was barely two inches as the divers entered these sunken ships and wound their way hundreds of feet inside the ship's wreckage. Underwater, divers placed their lives in the hands of their teammates who tended lifelines, air hoses, and telephone lines from above. The dive team members, topside, used the ship's plans as a map to guide the underwater diver to his worksite and finally though his assigned task. Divers picked their way through dangerous wreckage that held unstable heavy machinery, sharp jagged metal, pockets of toxic and explosive gases, unexploded bombs, and countless other deadly hazards.

Dives aboard the *Arizona* were particularly frightening and gruesome, because the one thousand bodies of the men who died during the attack were still inside the *Arizona*. Raymer succeeds in making the reader feel as though he were experiencing the actual dive when he tells of his first encounter with a floating corpse.

Suddenly, I felt that something was wrong. I tried to suppress the strange feeling that I was not alone. I reached out to feel my way and touched what seemed to be a large inflated bag floating overhead. As I pushed it away, my bare hand plunged through what felt like a mass of rotted sponge. I realized with horror that the "bag" was a body without a head.<sup>4</sup>

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4. *Id.* at 4.

Unfortunately, after capturing the reader's attention with such suspense-filled drama, what follows in the subsequent chapters will leave readers feeling disappointed. Throughout the remainder of the book, Raymer distances himself from the majority of his audience when he begins to use unfamiliar technical terms. When Raymer explains aspects of technical diving, his writing style reads like that of a military training manual. Contrast the above quote with the following quote describing the review of a method used in the salvage operations aboard the *USS California*.

The driver unit weighed ten pounds and had a firing barrel twelve inches long. The projectile was a half-inch in diameter; the pointed end was hardened, while the other end was threaded. The shell casing contained the powder charge of a .45-caliber shell. The projectile was fired by placing its point against the surface to be joined and pressing the driver sharply forward. It could penetrate half-inch thick steel plate.<sup>5</sup>

These mundane excursions into the not-so-fascinating world of technical diving and construction will lead many readers to skim over Raymer's overly technical accounts of salvaging each ship.

The chapters in *Descent Into Darkness* are divided according to the ships on which Raymer's dive team worked. The salvage team played a vital role in returning the *USS Nevada*, *West Virginia*, and *California* into the service of the United States Navy. They also salvaged valuable materials and equipment from the *USS Arizona*, *Utah*, and *Oklahoma*. Each chapter contains information about the salvage dives performed aboard each ship, including numerous stories about the ingenuity of the dive team as they devised innovative ways to combat many of the problems encountered. Technical divers will find that many of these techniques are still used today and many more laid the groundwork for modern dive operations. The majority of the audience, however, will dread the upcoming technical aspects of each chapter and will fail to fully appreciate the importance of the team's work.

Raymer should have followed examples from authors of popular books in the adventure genre. These books frequently take their audiences on an adventure based on a topic unknown to the reader. Many authors of these books adopt a style that both educates and entertains readers. This

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5. *Id.* at 95.

combination of entertainment and education is necessary. The reader generally must understand some of the technical aspects behind the events in the book to understand and remain interested in the story. Recent examples that successfully employed this style include Jon Krakauer's *Into Thin Air*<sup>6</sup> and Sebastian Junger's *The Perfect Storm*.<sup>7</sup> In *The Perfect Storm*, Junger managed to make commercial fishing, a subject of little interest to the general audience, fascinating to millions of readers. Junger was successful because he took time to educate his readers on the technical aspects and the importance of his subject before launching into lengthy dissertations on the matter.

Jon Krakauer's *Into Thin Air* provides another successful example of the adventure genre. This book chronicled a deadly attempt to climb Mount Everest. Before using technical terms to describe mountain climbing equipment, Krakauer fully educated his reader on what each piece of equipment was, how it was used, and why it was important to a mountain climber. He also enlightened his reader about the deadly medical conditions that threatened climbers, such as high altitude pulmonary edema (HAPE), which killed one of the character in *Into Thin Air*. Instead of simply telling the readers about the effects of this dangerous condition, Krakauer explained HAPE's causes and cures in two fluid sentences. For those desiring a more scientific explanation, Krakauer included the suspected medical causes of the condition in a footnote.<sup>8</sup> From that point forward, whenever Krakauer discussed the threat of HAPE to the climbers, readers fully understood the seriousness of the condition and were not distracted by wondering why it was so important. Had Raymer used similar methods, he would have been more successful in entertaining his readers while helping them fully appreciate how and why the dive team's contributions were important in the Pearl Harbor salvage operations.

Although *Descent into Darkness* offers a very readable story, as it progresses it loses its humanity in a way that will once again disappoint many readers. A cornerstone of most personal historical accounts is the way in which characters' lives are intertwined with the events in the book. One of the most intriguing aspects of any good book is how the circumstances affect the lives of the characters. In many historical accounts, it is the human drama found in the lives of the characters that keep the reader interested in the story. While the historical events play an important part

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6. JON KRAKAUER, *INTO THIN AIR* (1997).

7. SEBASTIAN JUNGER, *THE PERFECT STORM* (1997).

8. KRAKAUER, *supra* note 6, at 109.

in Raymer's story, he neglects to fully develop his life and the lives of his teammates.

The reader is introduced to the author's eight-member dive team early in the book. They are the heroes of this story. Raymer placed his life in the hands of these men daily and they developed enduring friendships of which Raymer said: "Friendships, such as I have described, are a phenomenon that civilians rarely experience."<sup>9</sup> Although the author knew these great men well, the reader will feel cheated out of the same opportunity because character development is lacking from the beginning. In describing one of his teammates, Raymer says sparingly: "Martin Palmer sat next to him, quiet, bookish, squinting over a copy of *Time* magazine."<sup>10</sup> The first chapter of *Descent Into Darkness* contains similar perfunctory descriptions of the other team members. The reader will not encounter several of these men until later in the story at which point readers will invariably forget who they are. This lack of character development separates the reader further from the all-important humanity of the story. In fact, many readers will feel the frustration of confusing the characters later in the book, being forced to return to the first chapter to figure out who the author is referring to.

Raymer could also use the examples of many great military history books such as *We Were Soldiers Once...And Young*<sup>11</sup> for character development. These books typically do an outstanding job of introducing characters by providing background information about their personal lives, their character traits, and often including their pictures. All of these books manage to create a bond between the reader and the characters; most develop the characters well enough to allow the reader to develop either an affection or a dislike. One way or the other, the reader should feel some type of emotion towards the characters instead of the apathy that comes from not knowing them.

Raymer attempts to humanize his story by providing details of the dive team's off-duty escapades. He also gives the reader a glimpse at the often-dismal life of a sailor in Honolulu in 1942. Each chapter contains many stories of the dive teams' preoccupation with meeting women, their attempts to build and operate a still, and other ways of coping with the

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9. RAYMER, *supra* note 1, at 214.

10. *Id.* at 13.

11. HAROLD G. MOORE & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* (1992).

many restrictions placed on their lives. Despite this attempt to add human drama to the story, the reader will still feel the frustration of viewing history and experiencing life and death situations with characters they never really know.

In the end, the reader will feel a lack of closure with the story and its characters. This problem is exacerbated by the lack of character information in the epilogue. Raymer devotes a minimum of one paragraph to each of the battleships in his book's epilogue, but sums up the lives of all the divers in one combined paragraph, discussing only the medals they received.<sup>12</sup> The reader never finds out what happened to any of the characters after the war. The reader is not even told if all the men survived or what effect their experiences at Pearl Harbor had on their later lives. By contrast, *We Were Soldiers Once . . . And Young* devotes eighteen pages in the epilogue to giving the reader closure, and it tells the reader how the experiences of the Vietnam War later affected the lives of over one hundred characters.<sup>13</sup> Finding out what happened to each of the characters inevitably leaves the reader feeling more satisfied.

*Descent Into Darkness* prevents any bonding between readers and the book's characters. Because of the distance between the two, readers may be acquainted with the events, but are never able to fully honor and appreciate the bravery and sacrifices of the Navy's salvage dive team at Pearl Harbor. Since the one theme that resonated throughout the book was Raymer's intent to pay tribute to his teammates, it was unfortunate that he failed to develop them as endearing characters that readers could come to know and understand.

While *Descent Into Darkness* is not a great book, it is a good book and well worth reading. Because it sets out to tell the great and untold tale of the resurrection of the Pacific Fleet after the attack on Pearl Harbor, it has all of the ingredients of a remarkable story. In spite of its shortcomings and the lack of bonding between the reader and its characters, the reader will still manage to understand the ingenuity, bravery, camaraderie, patriotism, and other admirable attributes of the men who contributed to the resurrection of the Pacific Fleet. Although most readers will enjoy *Descent Into Darkness*, many will also feel there is a greater story yet to be told.

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12. RAYMER, *supra* note 1, at 211.

13. MOORE & GALLOWAY, *supra* note 11, at 348-65.

**THE GREATEST THREAT: IRAQ, WEAPONS OF MASS  
DESTRUCTION, AND THE CRISIS OF GLOBAL  
SECURITY<sup>1</sup>**

REVIEWED BY MAJOR J.R. PERLAK<sup>2</sup>

*The greatest threat to life on earth is weapons of mass destruction—nuclear, chemical, biological.*<sup>3</sup>

The warning quoted above best summarizes the thought process that has driven Richard Butler, author of *The Greatest Threat*, throughout much of his adult life. His book emphasizes that weapons of mass destruction are too deadly to be dealt with based on political expediency, and he reminds us that there is plenty of work yet to be done in Iraq. With his exacting standards and uncompromising adherence to this perspective, Butler was thrust onto the world stage in the late 1990s when he insisted on Iraq's compliance with the stated will of the international community, thereby forcing a confrontation with the Iraqi government of Saddam Hussein.

In July 1997, the career Australian diplomat and arms control advocate was handed the wheel of a ship known as the United Nations Special Commission on Iraq, or UNSCOM.<sup>4</sup> Although it was not widely known or acknowledged in the world community at that time, that ship was perhaps "under way," but it was not "making way." A year into its new captain's cruise, most would agree the ship was foundering. With the launch of Desert Fox air strikes by the United States and the United Kingdom at the end of 1998, the ship had unquestionably sunk.

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1. RICHARD BUTLER, *THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION, AND THE CRISIS OF GLOBAL SECURITY* (2000).

2. United States Marine Corps. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Major Perlak spent part of 1999 deployed as a United Nations Military Observer in the United Nations Iraq-Kuwait Observation Mission (UNIKOM), Headquartered in Umm Qasr, Iraq.

3. Butler, *supra* note 1, at xv.

4. S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/687 (1991) (creating UNSCOM).



In a loosely chronological account, Richard Butler tells his side of the story regarding the final months of UNSCOM. Per the mandate of the United Nations Security Council in 1991, UNSCOM was created by Security Council Resolution 687 for the express purpose of disposing of Iraq's weapons of mass destruction capability.<sup>5</sup> Six years into this process, when Ambassador Richard Butler took over as the Executive Director of UNSCOM in 1997, the world had every reason to expect that the process of disarming Iraq had made significant progress. What Butler discovered and brought to the world's attention was another matter entirely.

The media covered the international spectacle that was UNSCOM's demise with sufficient sensation. Suffice it to say that the mission turned confrontational and ultimately failed, with its inspectors forcibly denied access to the very sites they sought to inspect. These inspectors were accused of espionage and expelled from Iraq, a status that endures to this day.<sup>6</sup>

Butler's book is essentially an autobiographical after-action report on his tenure as the Executive Director of UNSCOM. As such, it is impossible to separate the author from the book. Filled with his often unvarnished personal impressions, it is obvious that Butler's career as a diplomat is over and his career as an arms control advocate by other means, including authorship and public commentary, has begun. He takes no prisoners.

Butler makes it clear that he inherited an already stagnant and untenable situation from his predecessor at UNSCOM, Rolf Ekeus. The Iraqis had frustrated Ekeus for years in his attempts to inspect, verify, and destroy weapons of mass destruction. In a seemingly desperate effort to carry out his mandate, Ekeus made a practice of requesting and accepting intelligence and surveillance information about Iraq from various countries, including the United States.<sup>7</sup> This included the use of U.S. Air Force U-2 aircraft, emblazoned with the "UN" logo and under United Nations orders. Butler continued this practice. The use of this asset would later contribute to the unraveling of political support for UNSCOM on Butler's watch, with the accompanying Iraqi allegations of spying.

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5. *Id.*

6. See, e.g., Barton Gellman, *U.S. Spied on Iraq Via U.N.*, WASH. POST, Mar. 2, 1999, at A1.

7. Butler, *supra* note 1, at 66.

Butler's impressions of Iraqi Deputy Prime Minister Tariq Aziz, both as a negotiator and human being, are often brutally unfavorable.<sup>8</sup> Although a professional diplomat, Butler claims he was deliberately pushed to the limits of civility in his encounters with Aziz. The overall role of these interpersonal dynamics in the demise of UNSCOM cannot be divined from Butler's account, although the reader is left to contemplate how much Butler's uncompromising style may have hastened that demise.

Perhaps the most interesting relationship to discover in this book is between Butler and United Nations Secretary General, Kofi Annan. Beginning with Annan recruiting Butler to replace Ekeus as Executive Director in the spring of 1997, Butler describes a relationship based on a trust and personal loyalty he feels was ultimately betrayed. Butler recounts what he regards as Annan's duplicity in dealing with Iraq and other countries, frequently compromising on fundamental matters that would undermine the very legitimacy and essence of UNSCOM's work. Butler relates the extreme pressure he was under from several sides, and the utter lack of support he had from the Secretary General. The lifting of the increasingly unpopular scheme of international sanctions on Iraq was premised on Iraq's compliance with the mandate of UNSCOM. With pressure from China, France, and especially Russia, new and inaccurate definitions of what constituted "compliance" were forced on Butler. When he refused to accept these politically motivated efforts to lift the sanctions, and insisted on Iraq's basic compliance with inspections and monitoring, Butler contends that the Secretary General basically sold him out and refused to support him further.

Not surprisingly, Butler's description of his dealings with Aziz, Annan, and others spreads the blame for the demise of UNSCOM and can be criticized as self-serving. After all, Butler is in a position where, absent some favorable external frame of reference, he has to explain why his efforts at the head of a mature and visible arms control agency quickly resulted in an international crisis. However, Butler's account gains credibility from the context of the years of stonewalling that his predecessor Ekeus had experienced, and from the physical evidence and data gathered by UNSCOM inspectors, often gained only after significant cost of time and effort in overcoming Iraqi intransigence. The relentless pressure he claims to have been under from Aziz does not strain credibility. Lastly, the methodology in this book is much more than just Butler's personal impres-

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8. *Id.* at 67.

sions. The book's sources, primarily consisting of United Nations Resolutions and other official correspondence, are readily retrieved and verified.

There is the inescapable impression from this book that Richard Butler's personality played a large part in the events that ultimately led to the dissolution of UNSCOM. For a career diplomat, he comes across as surprisingly uncompromising. On matters where he believes he is right, he becomes almost sanctimonious. Taken together, it is possible to conclude that he was simply the wrong person to be selected Executive Director of UNSCOM in 1997, and his personality doomed the mission.

This conclusion would be supportable if the subject at hand were the ordinary matters of diplomacy, but in the case of weapons of mass destruction we must look past Butler's seeming stubbornness and see his strength. Anyone familiar with the types and quantities of these weapons in the Iraqi arsenal will appreciate Butler's insistence that we give no quarter in seeing to their eradication. Iraq, known not only to have developed but also fielded these weapons in the Iran-Iraq war and against Kurdish nationals in northern Iraq in the late 1990s, went to great pains (as it still does) to conceal the actual extent of its manufacturing and stockpiling of weapons of mass destruction. Butler recounts in detail UNSCOM's discovery that Iraq, after years of denials, not only had developed but had "weaponized" VX, the most toxic of nerve agents.<sup>9</sup> When confronted with conclusive evidence they had done so, Iraq only admitted to producing some 200 liters, which it then claimed to have destroyed. UNSCOM's evidence showed that Iraq had nearly twenty times that amount.<sup>10</sup>

To get an appreciation of the lethality of VX and U.S. vulnerability to it, realize that the dispersal of roughly two pounds of VX in a large auditorium one hundred meters square and ten meters high would kill everyone inside within three minutes.<sup>11</sup> The results would be equally devastating in a high school gymnasium or a subway station at their busiest time of day. With this enormous destructive potential at stake, and only an incomplete accounting available, Butler's insistence on compliance and his refusal to compromise should be seen in a different light. Indeed, it is more accurate to conclude that he was the right person in the right job. The likely alternative would have resulted in the international community receiving an

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9. RICHARD A. FALKENRATH, ROBERT D. NEWMAN & BRADLEY A. THAYER, *AMERICA'S ACHILLES' HEEL, NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK* 148 (1998).

10. Butler, *supra* note 1, at 159-62.

11. FALKENRATH ET AL., *supra* note 9, at 148.

utterly false sense of security about the state of Iraq's weapons of mass destruction.

This book will prove useful to several disciplines. For those interested in the functioning of the United Nations, particularly the Security Council and its interplay with the Secretary General, Butler provides a unique insight. He relates his role as a high-visibility functionary, who nominally had the mandate of the international community and backing of numerous Security Council resolutions to assist him in his mission. Yet well before UNSCOM was expelled from Iraq, Butler could not garner the political backing of the Secretary General to thoroughly execute any of his essential tasks. Instead, he was asked simply to fold his tent and give Iraq a clean bill of health.

For Butler, anything short of thoroughness in the area of accounting for and destroying weapons of mass destruction was irresponsible and counterproductive; likewise, giving in to political pressures was out of the question for him. Students of political science will benefit from Butler's observations and experiences in dealing with the Iraqis, particularly his one-on-one dealings with Tariq Aziz, where diplomacy, gamesmanship, intimidation, and strength of personal character influenced the outcome of events of international significance. The historian will also appreciate these firsthand recollections from the last leader of UNSCOM, including the details of how and why the mission ultimately failed.

For the soldier, Butler's book offers numerous lessons. Nearly two years since the last efforts were made by UNSCOM inspectors to get an accounting of Iraqi weapons of mass destruction, Butler reminds the reader that no true accounting, much less a verifiable destruction of these weapons, was ever achieved. As such, UNSCOM's incomplete records of their partial destruction should provide little comfort. With this two-year hiatus and the recent history of Iraq as guidance, there is every reason to suspect that Iraq has maintained or rebuilt its stockpiles and has retooled its manufacturing capabilities for these weapons. Lacking the essential support of China, France, and Russia in the Security Council, the successor agency to UNSCOM, the United Nations Monitoring, Verification and Inspection Commission, has been slow to get started and was probably doomed from its inception.<sup>12</sup>

For the sake of world security and the singular goal of eradicating weapons of mass destruction, Richard Butler captained his ship on the

proper course and unfortunately went down with her. *The Greatest Threat* effectively explains how and why this tragedy occurred.

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12. Since the political demise of UNSCOM in December 1998, the United Nations has wrestled with the unfinished business of weapons of mass destruction in Iraq. Fully a year later, in December 1999, the Security Council voted to create a successor agency, the United Nations Monitoring, Verification, and Inspection Commission, or UNMOVIC. Three critical abstentions characterized the Security Council's creation of UNMOVIC—China, France, and the Russian Federation. S.C. Res. 1284, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1284 (1999). The abstention by three of the five Permanent Members of the Security Council has denied UNMOVIC political credibility. As of this writing, UNMOVIC is still recruiting and training personnel and has yet to inspect anything in Iraq. Daily Press Briefing, Office of the Spokesman for the Secretary General (Aug. 31, 2000).

**BREAKING OUT: VMI AND THE COMING OF WOMEN<sup>1</sup>**REVIEWED BY MAJOR IMOGENE M. JAMISON<sup>2</sup>

On 26 July 1996, the United States Supreme Court rejected the single-sex admissions policy of Virginia Military Institute (VMI) and ordered the admission of women into the institution.<sup>3</sup> Laura Fairchild Brodie's *Breaking Out* chronicles the behind-the-scene events that occurred following the Court's ruling as VMI sought to quickly comply with the Court's directive to "assimilate"<sup>4</sup> the last all male academy in the country.

In *Breaking Out*, Brodie skillfully highlights the gender-related issues that VMI faced. Many of these issues have also challenged the Army's senior leadership as they struggle to create a "gender-neutral" Army. Judge advocates who desire to enhance their understanding of gender-related issues in the Army will benefit from reading *Breaking Out*. A useful parallel exists between the lessons learned during VMI's assimilation process and how the U.S. Army has dealt with issues regarding the integration of women into its force. As more and more women join the Army's ranks, commanders will inevitably seek out the advice of judge advocates as they balance the need to stay combat ready, ensuring mission success, with the integration process.

*Breaking Out* is well organized and easy to follow as Brodie skillfully arranges the book's chapters to tell VMI's story. She chronologically

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1. LAURA FAIRCHILD BRODIE, *BREAKING OUT: VMI AND THE COMING OF WOMEN* (2000).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BRODIE, *supra* note 1, at 21. See *United States v. Virginia*, 518 U.S. 515 (1996). The Court held that the state of Virginia violated equal protection with respect to its male-only admission policy at VMI. The state offered a proposed remedy of a separate women's institute at a private women's college. The Court held that this was not a cure for the constitutional violation.

4. *Id.* at 74. Virginia Military Institute considered other terms such as "co-education" and "integration" before settling for this word choice. The VMI decided that the word "co-education" implied more change than the school desired to undertake. The Court's decision did not require VMI to implement a new system of education jointly designed for men and women. Instead, the Supreme Court charged VMI with integrating women into its existing male-oriented program. The word "integration," however, carried its own political baggage. *Id.*

addresses each obstacle faced by VMI through creatively titled chapters, such as: “What is/was VMI;” “Co-education: the Initial Blueprints;” “The Language of Assimilation;” “Memories from Hell;”<sup>5</sup> and “Break Out.”<sup>6</sup> As the author proposes to provide the reader with a first-hand account of VMI’s transition to co-education, this format is quite appropriate. Brodie’s extensive use of interviews and her personal involvement with the assimilation process further enhances the book’s narrative.<sup>7</sup>

One of the greatest strengths of Brodie’s book is her detailed description of VMI as a distinctly Southern institution that resembles the U.S. military. She describes the school as a male-dominated institution priding itself on its methods of discipline, exemplified by its cultural homogeneity, resistance to change, uniforms, haircuts, and even its architecture. Throughout VMI’s assimilation process, school administrators and faculty members had to delicately balance the objective of “co-education” with the institution’s goal of maintaining its educational traditions and missions. Although Brodie does not provide a direct comparison, she commendably sets the stage to bring into analogy VMI and the U.S. military.

Today’s Army leaders often walk a tightrope to effectively identify and resolve gender-related issues without compromising the Army’s mission. Lee Bockhorn,<sup>8</sup> a critic of Brodie’s work who argues that the U.S. military has “feminized” its institution by lowering its standards, implies that the military’s mission has been clearly compromised by this process. Conversely, Bockhorn does not view VMI as being “feminized.” The

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5. *Id.* at 74, 211. The name of this chapter refers to the initial training that VMI students undergo. VMI has a cadet system that consists of arduous training. Prior to becoming full-fledged cadets during their first year, VMI’s freshmen students (called “rats”) undergo six or seven rigorous months where they are constantly yelled at or “flamed.” They also walk around in an awkward pose known as “straining.” Most VMI administrators believe that the “ratline’s adversative training” leaves its survivors with a sense of accomplishment and confidence. It also encourages habits of time management under stress and promotes lifelong friendships. *Id.*

6. *Id.* at 307. The name of this chapter refers to the night when the “rats” claw their way up the muddy VMI Breakout Hill to join the ranks of full-fledged cadets. *Id.*

7. *Id.* at ix (referring to the acknowledgments section of the book). Brodie served on VMI’s Executive Assimilation Committee. Members of this group oversaw VMI’s transition to co-education. She attended weekly meetings from August 1996 through May 1997. She continued her participation on a biweekly basis throughout the 1997-1998 school year, and she also attended various subcommittee meetings and studied specific aspects of the assimilation process. *Id.*

8. Lee Bockhorn, *Women at Arms*, in THE HERITAGE FOUNDATION POLICY REVIEW (2000) (book review).

institution has, instead, made its women more like men. According to Bockhorn, neither of these approaches is palatable.

Despite Brockhorn's criticism, Brodie superbly details how VMI's "assimilation" plan addressed the issue of inclusiveness. Virginia Military Institute's school administrators, faced with the challenge of how to "include" women, revised school publications to reflect inclusive language, using "he or she," or "they," as opposed to only "he." Administrators pondered what to call their female cadets, considering such words as "girls," "gals," "women," "females," "ladies," and "cadets," finally settling on the word "cadet." Virginia Military Institute's superintendent also reviewed words that he thought might be offensive to women such as "dyke," "boned," or "run a period," deciding to keep these traditional terms because they had a legitimate origin.<sup>9</sup> Brodie should be applauded on her very candid and honest discussion of these issues. Again, the gender issues that she addresses also hold true for Army commanders who must create a working environment where female soldiers feel as if they are a part of the team without detracting from the Army's war-fighting mission.

Another strength of Brodie's book is her willingness to tackle VMI administrators' attempts to ward off allegations of sexual harassment. She states that school officials sought to reshape the attitude of the cadet corps<sup>10</sup> regarding its view of women and how to interact with them. Brodie shows how many people held certain pervasive attitudes about women in the military. Even VMI's cooks and members of the cleaning team opposed the admittance of women, on the basis that it would be difficult to cook or clean for them, effectively demonstrating that the administrators would need to reshape attitudes at all levels.

Over the last decade, Army commanders have also struggled with issues stemming from sexual harassment.<sup>11</sup> Although Army officials have drafted regulations that govern this specific conduct, sexual harassment

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9. BRODIE, *supra* note 1, at 77-78. The word "dyke" refers to any uniform that is worn by a cadet or, more specifically, to various straps and sashes on cadet uniforms that hold up items such as the saber. It is also the relationship that exists between a "rat" and an "upperclassman." The word "boned" refers to a cadet who is reported for misconduct. The phrase "run a period" refers to each grading period. *Id.*

10. *Id.* at 20, 26. The VMI has an organized cadet corps where students live in barracks and wear their uniforms around-the-clock. The cadet corps has leadership positions that are held by student company officers, battalion commanders, and others. The Cadet Regimental Commander commands the entire cadet corps. *Id.*



remains one of the biggest challenges for Army leaders. VMI officials, adopting the military's approach, responded by drafting school regulations and providing sensitivity training to everyone at the institution from school professors to the buildings and grounds crews. Even though many cadets dismissed the training as unnecessary or a waste of time, according to Brodie, the training encouraged the cadets to "start talking." This leaves readers with the promise of awareness if not change.

Brodie next explains VMI's dating policy, an issue that the Army's senior leadership also faced regarding fraternization in the military. Brodie reveals how VMI administrators addressed concerns that arose from the placement of male and female cadets together in a "close and intense" academic environment. Virginia Military Institute implemented a policy that forbade senior cadets from dating new cadets, commonly referred to as "rats," throughout the senior cadets' entire fourth-class year. Company officers could not date within their companies, battalion commanders could not date within their battalions, and the Cadet Regimental Commander could not date anyone in the entire cadet corps. The administrators, echoing the concerns of the Army leadership, recognized that the authority upperclassmen exerted over the new cadets made dating "dangerous." As with the Army, it is unclear what issues will arise under this policy.

Brodie points out that prior to 1975, the U.S. armed forces maintained a policy of involuntary discharge for pregnant soldiers. Just as the military reversed its position regarding the involuntary release of female soldiers and addressed accommodation issues for them, VMI also had to scrap its parenthood plan. The plan stated procedures for dismissal of any pregnant cadet or cadet who caused the pregnancy of a fellow cadet or a civilian woman. Administrators were certain that pregnancy was clearly incompatible with a cadet's first year activities at VMI. Administrators, instead of creating a "one-size-fits-all" policy, decided to address the parenthood issue on a case-by-case basis, allowing for a generous leave of absence for the pregnant female cadets. Again, it remains to be seen how successful

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11. *Id.* at 173. Brodie points out that even as VMI planned its orientation sessions, a scandal at the Aberdeen Proving Ground was "ballooning into a public outcry" against sexual harassment in the U.S. Army. *Id.*

the VMI policy will prove in practice. In the meantime, VMI appears to have set the groundwork to effectively resolve this issue.

*Breaking Out* highlights misconceptions that many VMI school officials and others held about women. The author writes about conversations that the assimilation committee members had regarding the proposal to require females to take group showers. The administrators rejected this proposal, concluding that women faced with the requirement to take communal showers were often too embarrassed to properly wash themselves. The administrators feared that this environment would diminish the female cadets' ability to properly clean themselves, thereby increasing the number of female urinary tract infections. Some school officials also believed that menstrual cramps would debilitate women and limit their school participation. Although these types of discussions add a comical flavor to the author's book, they also enhance the realism of her work. These misconceptions not only hold true for many members of the VMI administration, but also for many of the male soldiers serving in the military.

Brodie next uses the VMI example to explore the subject of how a military woman should look and act. Initially, the female cadets' appearance would not be a concern because they would have a "unisex" look with buzz cuts and uniforms that flattened the curves of their bodies, but the issue would arise after their first year. On the one hand, administrators planned for women being "too feminine," regulating what kind of underwear women could wear under their uniforms and creating a pantyhose policy. On the other hand, administrators feared that women would look "too masculine." They feared that these cadets would attract the wrong type of women to VMI. The administrators also worried that the school would receive complaints about the cadets' appearance when the female cadets traveled home during breaks wearing extremely short haircuts. Brodie provides no definitive answers in this section of the book. Regarding how a VMI woman should act, she concludes that the expectations have yet to be fully defined. Many questions remain. For instance, how will a VMI woman act in a leadership position? Will she command respect? Will she serve as an effective role model for all cadets?

While the reader may applaud Brodie for taking us behind the scenes to obtain a view of the steps that VMI administrators took to assimilate women, the reader is left wondering about the author's objectivity and openness. Brodie states in her introductory remarks that no one can talk about VMI without getting "personal," and she acknowledges that she brings "personal baggage" to the table. She is a member of the VMI

Assimilation Committee and teaches English literature at VMI on a part-time basis. Her husband is VMI's band director. In one breath, she states that she has loathed VMI at times. In another, she views herself as a self-proclaimed feminist who is a member of the VMI family.<sup>12</sup>

Despite Brodie's potential bias, she presents a fair and balanced account of VMI's transition. Philip Gold<sup>13</sup> agrees, stating that Brodie's "evenhandedness is magnificent." A Brodie critic, Elizabeth Bobrick,<sup>14</sup> comments that it is "usually difficult to tell where Brodie stands on any given issue. This makes her a trustworthy reporter, although the end result is a tad bland." Bobrick further comments that Brodie's status as an insider was both a "help and a hindrance." She applauds the author for not showing sympathy for the alumni or for those who attacked the Supreme's Court's decision. Bobrick additionally observes, however, that Brodie always made VMI's superintendent, Major General Josiah Bunting III,<sup>15</sup> come out "smelling like a rose," showing that she revered him.<sup>16</sup> While the reader may dispute Bobrick's finding that *Breaking Out* is a "tad bland," the reader will most likely agree with her ultimate conclusion that Brodie presents an objective account of what happened at VMI.

One potential criticism of *Breaking Out* is that it is not a serious work. Brodie informs the reader up front that her book is not a scholarly work based on exhaustive research. She also states that she relied heavily on nonconfidential information and documents that school officials distributed at meetings. Brodie based her book on a total of sixty-six interviews that she conducted with cadets, administrators, faculty, and staff at VMI. However, approximately 430 new male cadets and thirty new female cadets matriculated to VMI in the fall 1997 class alone. This number does

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12. *Id.* at xiii. The VMI administrators would not have allowed Brodie to conduct her research if she had not been considered an "insider." She states that one other female before her had attempted to chronicle VMI changes. According to Brodie, "this short-term visitor to the Post was touted in the papers as an expert on VMI, espousing a viewpoint so full of doubts that the Commandant who had befriended her thought 'Never again.'" *Id.*

13. Philip Gold, *VMI and Women Cadets: Planning, Implementing and Living with It*, WASH. TIMES, MAY 21, 2000, at B-7 (book review).

14. Elizabeth Bobrick, *Arms and the Woman*, in WOMEN'S REVIEW OF BOOKS, June 2000, at 8 (book review).

15. BRODIE, *supra* note 1, at xiii. General Bunting gave Brodie permission to undertake an oral history of VMI's transition process. He also invited Brodie to join the VMI Assimilation Committee. In the acknowledgments section of her book, Brodie thanks General Bunting for his generosity and open-mindedness for allowing her to conduct her research.

16. Bobrick, *supra* note 14, at 9.

not include the more senior cadets, leading the reader to question why Brodie did not include interviews from a larger pool of cadets to support her theories, thereby reflecting her desire to present an objective view and the majority view of the cadets. Despite these shortcomings, Brodie does an excellent job of putting forth the issues. The reader is left with hope that VMI will become a much stronger and more diverse institution as a result of the “breaking in” of women.

The theme that runs throughout VMI’s attempts to address gender-related issues is the clear need for VMI administrators to have a thorough understanding of the law and the legal implications of their actions. Brodie makes it clear that the school administrators relied heavily on their legal team. Similarly, the Army’s senior leadership will look to judge advocates to review and interpret Army rules and regulations concerning gender issues. Judge advocates will greatly benefit from reading *Breaking Out*, and they will gain a better understanding of their role in advising commanders on these gender-related issues. Also, if judge advocates understand what is often misunderstood about the integration process, they will be able to conduct more meaningful legal training.

**VIRTUAL WAR: KOSOVO AND BEYOND<sup>1</sup>**REVIEWED BY MAJOR GEORGE R. SMAWLEY<sup>2</sup>

What happens when war is fought with impunity: a “spectator sport”<sup>3</sup> without sacrifice, with unequal teams, vague rules, and few if any penalties? Technology and the relaxed political accountability afforded by the demise of the Warsaw Pact have given the West the ability to play a game that is faster and neater than at anytime in our history. In the modern era of sports, home teams are exposed to few if any injuries, minimal cost, and a free-agency previously unheard of. War, like sports, has always had a moral paradigm that implicitly attributes at least the possibility of loss to either side. Recent events suggest that paradigm is shifting.

*Virtual War* describes three key aspects of the Kosovo conflict: the history of the Balkans leading to the 1998 NATO air war, Operation Allied Force; Western intervention in a civil war without United Nations (U.N.) sanction; and the means of war which distinguish this conflict from others. The book provides more than merely a review of the methods used by NATO during the Kosovo air campaign. It effectively describes the conflict in general terms that benefit readers without extensive background in the war itself, international law, or military history. Author Michael Ignatieff also goes one step further and explores the conflict from the perspective of a journalist experienced in Kosovo, asking whether war can be justified on moral grounds despite the absence of firm legal authority.<sup>4</sup> Ignatieff concludes that the NATO air campaign echoed in a new age of modern warfare, remote politically and militarily for all except the civilian Kosovar and Serb populations, who suffered dearly.

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1. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* (2000). Ignatieff also authored *The Warrior's Honor: Ethnic War and the Modern Conscience* (1998) and *Blood and Belonging: Journeys into the New Nationalism* (1993).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. IGNATIEFF, *supra* note 1, at 191.

4. *Id.* at 163. The author argues that humanitarian justice demanded the unilateral NATO action, ignoring Yugoslav sovereignty otherwise guaranteed by the U.N. Charter. *Id.*

## I. Historical Perspective

*Virtual War* begins with a historical account of the war and its aftermath. The journalist author adds insight to this historical narrative, owing to his coverage of the Kosovo conflict and his long-standing ties to the region. It includes a perceptive look at “Balkan physics,” introducing the Milosevic regime, its tortured political and military miscalculations, and the resistance to international involvement in what many consider a sovereign matter. Included are sympathetic vignettes of the daily struggles encountered by the civilian populations before, during, and after Operation Allied Force, and the Western response to their suffering.

Ignatieff comments that Serb bitterness toward NATO tactics ultimately worked in Milosevic’s favor. The author includes, as an example, an icy exchange with a Serb friend critical of NATO governments willing to “kill in name of values, but not to die” for them.<sup>5</sup> Here, Ignatieff begins to lay the loose groundwork for the book’s main premise: technology and the unchallenged political status of the West allowed NATO to ignore Yugoslav sovereignty and prosecute a devastating campaign, without significantly endangering a single NATO soldier. The cloud of questionable legal justification and divided international opinion fueled the perception of victimization by the Serb people, and it helped legitimize Milosevic’s claim of Western imperialism.

The author assumes little of the reader’s understanding of the history of the conflict, and this approach may come as a disappointment to anyone with a dedicated interest in Balkan affairs. Instead, Ignatieff offers compelling human insight and critical historical context complete with detailed military, diplomatic, and political profiles.<sup>6</sup> His freelance approach is sometimes distracting, but the style and subject of the interspersed tails of his Balkan experiences are interesting nonetheless. Ignatieff reminds the reader that the war was about people, and he is unable to resist the human-interest story, which he relates with passion.

The Balkan historical exposé is well done.<sup>7</sup> The book’s occasional treatment of related issues of politics and law, however, can be frustrating,

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5. *Id.* at 151.

6. Including General Wesley Clark, Richard Holbrooke, and prosecutor Louis Arbour.

7. The author includes references to President Wilson’s enunciation of the right of Balkan peoples to national self-determination, and traces the development of Balkan nationalism from that point forward.

as they are often incomplete. Ignatieff relates, for example, that Milosevic abolished the limited autonomy Kosovars previously enjoyed under the Tito constitution,<sup>8</sup> but fails to explain how that autonomy worked. Similarly, he describes “the cross-cultural validity of human rights norms”<sup>9</sup> as a basis for intervention on behalf of Kosovars suffering from years of Serb repression, but avoids any meaningful discussion of human rights as a legal force under international law.<sup>10</sup> The book references these issues, and the idea of humanitarian intervention, because they are undeniably part of the Kosovo story. Anything more is beyond the author’s scope, which is unfortunate given the ambitious promise set in the book’s introduction.

Where the author does succeed, however, is in his superb overview of the International Criminal Tribunal for the former Yugoslavia (ICTY). Ignatieff accurately details the history and practical workings of the court, and the experience of Chief Prosecutor Louise Arbour. In a chapter aptly called “Justice and Revenge,” he describes the nature of the tragedy, and discusses the successes and challenges faced by the international community to bring indicted war criminals to justice. In this the author humanizes the war and illuminates a central crux of the book: that the war was about people—its victims—in whom the justification for intervention is found.

## II. Humanitarian Intervention and State Sovereignty (Virtual Law)

An integral part of “virtual war,” asserts the author, is the ability of the West to disregard certain tenets of international law. Midway through the book begins a discussion of the absence of U.N. sanction for the NATO action in Kosovo. This section centers on the short but fascinating personal correspondence between the author and a member of the British House of Lords, Robert Skidelsky. This spirited exchange between Skidelsky, an unapologetic Westphalian<sup>11</sup> opposed to the NATO intervention,<sup>12</sup> and Ignatieff,<sup>13</sup> an internationalist, mirrors the debate that occurred

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8. IGNATIEFF, *supra* note 1, at 20.

9. *Id.* at 82.

10. See also WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* (1982) (viewing war from the context of social morality, and discussing attempts to justify war where motives are consistent with fundamental human notions of justice).

11. Referring to the Treaty of Westphalia (1649) (emphasizing preservation and rights of national sovereignty), available at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

in Western capitals over the international right of intervention and Prime Minister Tony Blair's new "Doctrine of International Community."<sup>14</sup>

The letters provide the author with a creative forum to argue his case that intervention is warranted where diplomacy fails and where systemic human rights abuses threaten the existence of ethnic populations and regional security.<sup>15</sup> The argument is emotional, and Ignatieff avoids any serious discussion of NATO's violation of international law.<sup>16</sup> Military coercion, however, has an integral legal component that cannot be ignored. The author's failure to address relevant tenets of international law leaves many questions unanswered, thereby compromising his advocacy for humanitarian intervention.

This short exchange over sovereignty and law is nonetheless a highlight of the book. It contributes to the general balance of opinion expressed throughout the work. Unfortunately, it is unaccompanied by a much deserved critical examination of the justifications used by NATO in support of the air war.<sup>17</sup> Instead, Ignatieff advocates generally for intervention where extreme human rights abuses and threats to regional stability justify military action. The author disregards the U.N. Charter regime in such cases. That regime, however, is the cornerstone of international law for conflict management, and the failure to address the war in the context of a discussion of Article 2(4)<sup>18</sup> or Chapter VII of the U.N. Charter is a critical weakness in the discussion.

So, too, is the absence of any meaningful review of Security Council actions. It is important to remember that in early 1998, the Council found

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12. IGNATIEFF, *supra* note 1, at 86. Lord Skidelsky was deeply concerned over the implications of disregarding the international legal regime shielding sovereign states from intervention on matters of internal politics and policy.

13. Ignatieff is a renowned journalist, biographer, and commentator who publishes widely on issues of nationalism and humanitarian intervention. He has published two previous books on ethnic nationalism. *See supra* note 1.

14. *Id.* at 74 (citing Prime Minister Tony Blair, Address at the Economic Club of Chicago (Apr. 22, 1999) (arguing for international cooperation as a means to preserve regional security)).

15. *Id.* at 76 (including a casual discussion of Chapter VII of the UN Charter, mandating intervention where the sovereign's policies threaten to destabilize neighboring states).

16. *See* Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 A.J.I.L. 834, 863 (1999) (editorial comment) ("The doctrine of 'humanitarian intervention' is not well defined and the evidence does not establish a rule of law permitting the use of force against a state in situations like that of Kosovo.").



that the Milosevic regime had committed serious human rights violations. United Nations action included ordering a cessation of hostilities toward the Kosovar Albanian population, and the creation of an observer force.<sup>19</sup> While lacking express legal authority for intervention afforded by Chapter VII, this provided critical political cover that ultimately made the operation palatable to the West. Similarly, Security Council action subsequent to the air campaign suggests international concurrence and a possible ratification of the NATO intervention.<sup>20</sup> The book should note such facts, but does not.

The absence of more than a passing reference to the U.N.'s interventionist approach to conflicts in Somalia, Rwanda, Haiti, and Bosnia is another omission. They would assist the reader's understanding of a new international humanism justifying intervention in the internal affairs of sovereign states, one of the key points the author tries to make. An historical analysis of the political dynamic and legal justifications for an inter-

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17. See, e.g., Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 *MIL. L. REV.* 181 (1999).

In justifying its use of force on its own authority, NATO pointed to various factors. These included the severe humanitarian catastrophe caused by Serb conduct, the threat to stability and security of other states in the region, the actions taken by the Security Council, the special role of NATO as a regional organization in securing peace in Europe, the extensive violations by the FRY of its past commitments, and the extensive violations of international humanitarian law. These factors taken together justified armed intervention in these unique circumstances.

*Id.* at 189.

18. U.N. CHARTER art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.").

19. See S.C. Res. 1160, U.N. SCOR, 53th Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53th Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 53th Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998), available at <http://www.un.org/Docs/scres>.

20. *Id.* S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) (requiring withdrawal of Yugoslav forces from Kosovo, authorizing NATO deployment and peace enforcement under Chapter VII, and establishing U.N. civil administration in Kosovo).

ventionist approach to humanitarian relief is significant as the precursor to what happened in 1998 in Kosovo.<sup>21</sup>

### III. Means and Methods (Virtual War)

Taking a narrative look at the character of the conflict, Ignatieff observes that Western air superiority allowed NATO to wage a devastating campaign with near impunity, and minimal exposure to loss. The basis for using modern means to avert casualties is simple: technology allows it, and the politics of democratic constituencies demand it. The strategy of limited engagement arises where political expediency justifies a war, as well as limits it; that is, the engagement is justified by humanitarian need, but limited by political constituencies with little taste for total war. In this sense, Kosovo was a limited armed conflict in the tradition of Clausewitz's "cabinet war".<sup>22</sup>

The analogy is illustrative. Almost by definition Allied Force was a cabinet war fought with modern means, limited only by public opinion.<sup>23</sup> "Virtual war" simply represents the evolution of limited armed conflict. The nature of the NATO intervention easily fits with the classic notion of "continuation of political intercourse with the addition of other means,"<sup>24</sup> a fact not entirely lost on the author.<sup>25</sup> "Technology that removes death from the experience of war"<sup>26</sup> characterized the conflict, and thereby lim-

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21. From the Israeli treatment of Palestinians to apartheid in South Africa, as well as the evolving conflicts in the Balkans, the growing willingness of the U.N. to act in otherwise sovereign internal matters is unmistakable.

22. IGNATIEFF, *supra* note 1, at 111.

Cabinet wars are fought and won by technicians and [General] Clark's team produced a virtuoso display of technical improvisation. Cabinet wars do not end with parades, garlands, civic receptions or sorrowful ceremonies at graveyards. They do not reach deep into the psyche of a people; they do not demand blood and sacrifice and they do not reward their heroes.

*Id.*

23. *Id.* at 104 ("[General] Clark was never allowed to forget what was at stake for the politicians . . . Tony Blair . . . told him straight out that the political future of every leader in Europe depended on the outcome.").

24. CARL VON CLAUSEWITZ, *ON WAR* 605 (Michael Howard & Peter Part eds., 1984).

25. IGNATIEFF, *supra* note 1, at 110 ("[T]his was not a war at all, but an exercise in coercive diplomacy designed to change one man's mind.").

26. *Id.* at 5.

ited its impact upon allied civilian, military, and government institutions through the distance afforded by modern aerial war.<sup>27</sup>

While limited war is not new, casualty-free war that “transforms the expectations that govern the morality of war” is, and comes after close consideration of the legitimacy of war without risk.<sup>28</sup> Ignatieff provides an important historical context<sup>29</sup> that places NATO at the cutting edge of the armed conflict spectrum where “precision lethality” removes traditional concerns of cost, substituting instead questions of the moral and legal implications of a war free from reprisal.<sup>30</sup> The author’s analysis suggests the West,<sup>31</sup> free from the legal constraints of the U.N. Charter and capable of projecting extraordinary power with minimal risk, may venture into similar wars elsewhere.

In his analysis, Ignatieff underestimates the difficulty with which the military campaign was prosecuted, and ignores the extraordinary reluctance of democratic leaders to engage in armed conflicts. Military capability and political will are two very different things. While Ignatieff includes a passing reference to public support,<sup>32</sup> he otherwise fails to seriously reconcile the two. The West’s political will to engage in future humanitarian intervention is critical, and quite possibly more important than the ability to prosecute war itself. Diplomatic and economic interests will always be involved; values will always be tempered by national interest.<sup>33</sup>

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27. See also ANTHONY H. CORDESMAN, *THE LESSONS AND NON-LESSONS OF THE AIR AND MISSILE WAR IN KOSOVO* (1999) (summarizing the success and failures of the air campaign, and the limits of air power as a unilateral strategy for control of ground forces).

28. IGNATIEFF, *supra* note 1, at 161.

29. *Id.* at 164-176. The author details the history of armament development from the crossbow forward, and notes that the objective has always been one of perfecting accuracy at a distance.

30. Suggesting that Yugoslav forces were unable to impose serious losses on NATO forces.

31. It is important to remember that Security Council members Russia and China, and a significant number of Non-aligned states opposed the intervention.

32. IGNATIEFF, *supra* note 1, at 193 (“By the end of the operation, poll support for further bombing slipped below 50 percent for the first time, and it is doubtful that military action could have been continued much longer than it was.”).

33. Rwanda, Chechnya, and Tibet are proof of the limitations.

## IV. War with Impunity (Virtual Accountability)

Finally, Ignatieff describes a set of conditions that facilitated an armed conflict conducted, he maintains, with near impunity. They include the political, physical, psychological, and economic distance between the theater of operation and the allied nations. Clearly, NATO air superiority and advanced weaponry freed General Wesley Clark from the reliance upon a sizeable expeditionary force that may or may not have been possible. First displayed during the Gulf War, this weaponry provided the West with unparalleled conventional capabilities.<sup>34</sup>

Ignatieff identifies several key characteristics of the modern war that distinguish it from the “total” war of the Cold War era and earlier. Among them is “virtual consent,”<sup>35</sup> where democratic constituencies and legislatures are removed from the decision making process, and “virtual mobilization,” where a number of common factors regarding citizens’ participation in the conflict are identified. The fluid nature of the law of war is also noted.<sup>36</sup> Consent and mobilization enfranchise populations and give them a stake in the outcome through their collective effort and sacrifice. The absence of each, therefore, reinforces the distance civilians feel from the battle.

Allied Force was premised on the notion that there are fundamental principles of humanity worth fighting for. The problem, Ignatieff observes, is that “values are [only] real to the degree that we are prepared to risk something in order to make them prevail.”<sup>37</sup> Therefore, he finds “virtual values” prevail in the West where the willingness to uphold them is tempered by political pragmatism and an unwillingness to take casual-

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34. For a complete history on the application of technology to war craft, see MAURICE PEARTON, *DIPLOMACY, WAR AND TECHNOLOGY SINCE 1830*, at 11 (1984) (“Technology has enlarged the options open to policy-makers in their pursuit of the aims of the state, . . . it has also made the problems and costs of choosing more onerous.”).

35. Ignatieff makes the case that this is most apparent in the United States, where presidents have been circumventing the War Powers Act since Truman’s foray into Korea. It is significant that legislative bodies, excluded from the process, become free to undermine and criticize the executive’s decision and thereby compromise the integrity of the decision itself. The consent of the government as a whole is never obtained.

36. IGNATIEFF, *supra* note 1, at 200. The author faults military lawyers for converting intensely moral issues into legal guarantees used to justify the means to the end: “The real problem with the entry of lawyers into the prosecution of warfare is that it encourages the illusion that war is clean if the lawyers say so.” *Id.*

37. *Id.* at 201.

ties, as in Somalia. The only thing that has changed over time is the expectation that it can be done with *no* casualties.

Unlike real war, “virtual victory” is a self-limiting concept satisfied with an end state short of the removal of the enemy. It may well be the U.N. Charter regime that preserves tyrants in a world where the “continuation of a rogue sovereign is deemed preferable to the costs of reconstituting something in its place.”<sup>38</sup> There is an irony in a military alliance willing to breach international guarantees of sovereignty, but unwilling to “finish the job” through removal of the sovereign himself, one where tyrants are defeated but not vanquished. Given that this new development has resulted in thousands of U.S. and NATO personnel deployed to the Middle East and the Balkans, Ignatieff correctly notes that virtual victory may be a “poor substitute for the real thing.”<sup>39</sup>

#### V. Summary

Ignatieff’s *Virtual War* offers plenty of history with telling observations and anecdotes, but limited hard analysis of what Allied Force meant to the development of international armed conflict. The presentation is akin to the mighty Susquehanna River in Pennsylvania: a mile wide and three feet deep. The author’s discourse on NATO’s departure from international law is accurate but undeveloped. The treatment of precision weaponry is interesting but unremarkable. Since the most striking feature of the Kosovo campaign was the West’s disregard for the rule of law in favor of humanitarian principle, the real revolution was not in war itself but in the vacuum of virtual law that has energized legal scholars everywhere. Unfortunately, the book fails to address this with any real depth.<sup>40</sup>

Still, *Virtual War* is an excellent beginning for the lay reader unfamiliar with the complexities of Balkan history, international law, and NATO’s conduct of the war. It introduces the key players, history, and critical issues for arguably the most complex, on-going international crisis since the Gulf War. Ignatieff is a journalist—a good one—who makes sufficient reference to authorities able to take the reader to the next level, though he endeavors little to appeal to lawyers or military historians with more than

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38. *Id.* at 209.

39. *Id.* at 210.

40. *See generally* EDITORIAL COMMENTS: NATO’S KOSOVO INTERVENTION, 93 A.J.I.L. 824 (1999) (provides a series of seven scholarly commentaries collectively providing a superb overview of the conflict’s legal issues).

a casual interest in his subject. Nevertheless, he excels in the presentation of facts and personalities to humanize the NATO intervention in Kosovo with a journalistic flourish that successfully captures the essence of the conflict.

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*Despite our apparent victory, this theme is also at the center of the Kosovo story: why nations that have never been more immune from the risks of waging war should remain so unwilling to run them. Virtual War attempts to explain this paradox, by exploring the new technology of war and the emerging morality governing its use.<sup>3</sup>*

In his introduction, Michael Ignatieff establishes an ambitious goal of exploring the technology and morality of the emerging twenty-first century conflict. Fortunately for his reader, he fails. Instead, the author provides a portrait of the Kosovo conflict, admirably told through the people who lived it. Michael Ignatieff is neither Tom Clancy nor Norman Polmar taking us through the technological innovations of a modern military. Nor is he St. Augustine or St. Thomas Aquinas exploring the morality of the use of force. Instead, Ignatieff is a storyteller. A journalist by trade, he employs participants of the conflict, both central and peripheral, to guide the reader through the issues he raises.

From General Wesley Clark, Supreme Allied Commander Europe, to Aleksa Djilas, a Serbian writer and historian, Ignatieff frames the conflict in a manner that cannot be captured in gun-sight videos and press briefings. From Louise Arbour, Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, to Blerim Shala, a leader of the Kosovar Albanian delegation at Rambouillet, Ignatieff shows his readers perspectives of the conflict that would otherwise be inaccessible. His method results in a series of stand-alone snapshots, which he uses to outline the elements of the conflict. While these stories are interesting, it is the employment of three common themes that ties these anecdotal chapters into a coherent work. At its core *Virtual War* explores: (1) the relatively new politico-military concept of a "virtual war;" (2) a state's (or group of

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1. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* (2000).

2. United States Navy. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. IGNATIEFF, *supra* note 1, at 7.

states') decision to intervene in a conflict within the territory of a sovereign state; and (3) the nature of such interventions.

### I. "Virtual War"

In order to appreciate the journey, one must first understand the language of the tour guide. In Ignatieff's view, the Kosovo conflict represents a new player on the use of force stage: the virtual war. Ignatieff first observes:

For the citizens of the NATO countries, on the other hand, the war was virtual. They were mobilized, not as combatants but as spectators. The war was a spectacle: it aroused emotions in the intense but shallow way that sports do. The events in question were as remote from their essential concerns as a football game.  
...<sup>4</sup>

Kosovo did not include Sergeant Stryker (John Wayne) leading his men ashore on Iwo Jima. Nor did it include a Desert Shield type build-up of forces overseas in preparation for combat. Instead, Kosovo had an unreal quality about it. "For NATO combatants the experience of war was less visceral than calculative, a set of split-second decisions made through the lens of a gun camera or over a video-conferencing system."<sup>5</sup> Examining the impact of this new-type of limited conflict on the conduct and morality of warfare is a path that Ignatieff follows throughout his book.

Although not a virtual war, Ignatieff believes elements of Desert Storm laid the foundation for the concept we are now struggling to understand.

Ever since the moment during the Gulf War in 1991 when reporters saw cruise missiles 'turning left at the traffic lights to strike the bunkers of the Iraqi regime, the Western public has come to think of war like laser surgery. Displays of this kind of lethal precision at first awakened awe; now they are expected. We routinely demand perfection from the technology that surrounds us—our mobile phones, computers, cars. Why not war?<sup>6</sup>

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4. *Id.* at 3.

5. *Id.* at 4.

6. *Id.* at 92.



The man charged with managing this technological display was General Wesley Clark. In the chapter “The Virtual Commander,” Ignatieff provides a glimpse of the man whose job was to keep together a coalition of nineteen nations while directing a combat campaign using tactics with which he personally disagreed.<sup>7</sup> Ignatieff’s portrayal of Clark can be compared to a composer leading his symphony through a difficult performance. The music, written collaboratively by nineteen different composers, is not finished when it is handed to the conductor. The conductor’s job, in addition to getting the orchestra through a very public performance, is to do so in a manner that keeps all nineteen composers happy. The music is technically challenging, and while everyone listening realizes the complexity, no one is willing to tolerate mistakes. Even if few and far between, sour notes—such as bombing a civilian train, a refugee convoy, or a nursing home—flavor the entire performance. As a result, the conductor is fired; or as Ignatieff stated: “The man who won the first postmodern war in history was now looking for a job.”<sup>8</sup>

An interesting note that carries throughout Ignatieff’s book is whether Clark’s dismissal was pre-ordained by the very nature of a virtual war. Given the technological superiority of NATO, expectations may have been unfairly heightened that a show of force would produce a permanent Balkan solution. Unfortunately, in Ignatieff’s opinion, a virtual war can only lead to a virtual victory.<sup>9</sup> This leaves us with one of the troubling paradoxes uncovered by the author. As this style of warfare becomes a more viable option, western countries (particularly the United States and Great Britain) may turn to it with increasing frequency as an element of their foreign policy. Unfortunately, absent a truly limited set of goals, a virtual war can only result in a hollow victory. A lasting solution to most disputes still requires military presence if not a ground-based use of military force.

## II. The Decision to Intervene

But are Western countries more likely to consider a “virtual” campaign an option in future international hot spots? Ignatieff is unsure. Citing British Prime Minister Tony Blair’s speech to the Economic Club of

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7. *Id.* at 93.

8. *Id.* at 112.

9. “Virtual war proceeds to virtual victory. Since the means employed are limited, the ends achieved are equally constrained: not unconditional surrender, regime change or destruction of war-making capacity of the other side, only ambiguous ‘end state.’” *Id.* at 208.

Chicago on 22 April 1999, Ignatieff seems to accept Blair's five-part test for when intervention is appropriate:

The presumption enshrined in the U.N. Charter that states should not resort to war except in self-defense and that they should be immune from intervention by other sovereign states had now to be revised. Acts of genocide, [Blair] said, could never remain a purely internal matter. Likewise, oppression which led to massive flows of refugees could not be allowed to stand. If such conditions mandated intervention in principle, [Blair] went on, we also had to ask practical questions before we sent troops in. First, are we sure of our case? Second, have we exhausted all diplomatic options? Third, are there military options "we can sensibly and prudently undertake?" Fourth, are we prepared for the long-term? And finally, do we have national interests involved? If we could answer these questions in the affirmative, we should intervene.<sup>10</sup>

In a "virtual debate" with independent member of the House of Lords, Robert Skidelsky, published in *Prospect* magazine, Ignatieff's position paraphrased most of these conditions for intervention; notably, however, Ignatieff dropped the requirement for a national interest.<sup>11</sup> In this regard, his position appears to have been significantly influenced by his visit to a refugee camp in Macedonia in April 1998. As he looked down on the camp from a Macedonian hillside, Ignatieff contemplated events of the last ten years in the former Yugoslavia. At that moment, national interest seemed irrelevant.<sup>12</sup>

While the intellectual justifications for military intervention were clear when listening to the Prime Minister or visiting a refugee camp, they become far less clear to Ignatieff when walking the streets of Belgrade with an old friend shortly after the bombing campaign stopped. After visiting reminders of NATO's air strike, Ignatieff and Aleksa Djilas agreed to disagree.

The requirement that "he who casts the first stone should be without sin" is a guarantee of inaction. The fact that the West does not live up to its ideals does not invalidate the ideals or

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10. *Id.* at 72-73.

11. *Id.* at 76-77.

12. *Id.* at 45.

invalidate their defense. Ideals are frequently defended by people with dirty hands—a bad conscience. This is what our argument came down to—bad conscience on both sides.

The bad conscience on my side was that we had talked the language of ultimate causes and practiced the art of minimum risk. Aleksa's bad conscience was that he had lived inside a morally squalid state and had done so little to bring it to its senses.<sup>13</sup>

It was not simply the morality of intervention that led to disagreements between the author and his acquaintances; the lack of domestic process and procedural safeguards leading up to NATO's intervention also caused a healthy debate. Personally, Ignatieff seems less troubled by the failure of NATO to get U.N. approval, then by the failure of the United States and United Kingdom to get wide-spread approval within their respective political systems.<sup>14</sup> Citing inaction in Rwanda, the author believes that absent Security Council reform, the current world order guarantees U.N. inaction. As such, he believes a regional organization such as NATO is justified to step in. "When a house is on fire, you do not seek a search warrant before entering to put out the blaze."<sup>15</sup> While legal scholars will be quick to cite the U.N. Charter and enter a debate with Mr. Ignatieff over the legality of NATO's action, it is important to remember that the author is a journalist, not a lawyer. While his letters to Mr. Skidelsky demonstrate a good understanding of international legal philosophy, *Virtual War* is not intended as a legal treatise. The author is the son of a diplomat who spent two years living and studying in Belgrade as a child. This book not only examines the evolving nature of warfare, but also is, in a way, the author's attempt to come to terms with his nation's bombing of his childhood hometown.

### III. The Nature of Intervention

The decision to intervene is only a jumping off point. Once accomplished, the tactics take center stage. This issue, as woven through the book, might be the most contentious. NATO's air campaign was controversial from a number of respects. Under Prime Minister Blair's own cal-

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13. *Id.* at 155.

14. *Id.* at 177. "In place of Congress and Parliament as the effective control on the war-making powers of our executives, we have polls and focus groups." *Id.*

15. *Id.* at 181-82.

culus, intervention is only justified if it has a chance of success. Whether or not an air-only campaign had a “chance of success” is a matter of great disagreement. Underlying this debate is the truly important question of the Kosovo campaign: what was the objective?

The larger question was whether the air campaign—for all its astonishing accuracy—had actually worked. When the Serbian columns withdrew northwards in mid-June, with the men in sunglasses and bandannas standing up in the tanks making obscene gestures at the Western camera crews, it became clear that Clark’s air campaign had not defeated Milosevic’s forces in the field. It seemed strange that such a mighty display of air power—34,000 sorties over seventy-eight days—should have achieved such an ambiguous result.<sup>16</sup>

Ignatieff seems to argue that, by its very nature, a virtual war had no chance of success. In his view, the goal of the campaign needed to be a sustainable peace for the whole region.<sup>17</sup> This goal, however, is beyond the limited objectives of a virtual war.

The nature of NATO’s intervention is not only controversial because of the questionable nature of the results it made possible, but also because the air-only campaign brought into question the moral and legal underpinnings of NATO’s tactical decisions. Aleksa Djilas, the author’s Serb friend, became embittered when he discussed the hypocrisy of NATO’s willingness to kill for ideals, but not die for them.<sup>18</sup> He is not alone. The author himself appears troubled as he realized “the alliance’s moral preferences were clear: preserving the lives of their all-volunteer service professionals was a higher priority than saving innocent foreign civilians.”<sup>19</sup> These common misgivings, however, seem to flow from different streams, one looking backward, and the other looking forward. Djilas represents the Serb resentment that they never got a fair shot at NATO, whereas Ignatieff’s concerns are for the precedent this may set for future conflicts. It’s important to keep in mind that, although the author accepts intervention without U.N. approval, there are rather strict sets of criteria that must be met. This new virtual warfare, he fears, may make Western intervention more common-place: “If war becomes virtual—and without risk—demo-

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16. *Id.* at 94.

17. *Id.* at 65.

18. *Id.* at 151.

19. *Id.* at 62.

cratic electorates may be more willing to fight especially if the cause is justified in the language of human rights and even democracy itself.”<sup>20</sup>

The final impact of a virtual war on the conduct of hostilities is its impact on the target set. The greater accuracy of the weapons contain their own built-in paradox:

While precision guidance weaponry is supposed to reverse the twentieth-century trend towards even greater civilian casualties, warfare directed at a society’s nervous system rather than against its fielded forces, necessarily blurs the distinction between civilian and military objectives. The most important targets have a dual use.<sup>21</sup>

So where does that leave society as we enter the new century? Is virtual war a more or less humane form of warfare?

To the technologically advanced nation capable of waging a virtual war, the risks to their own armed forces are decreased significantly. It would appear to follow from this that such a country would be more willing to use military force. That may not be the case. While virtual war makes casualties less common, they also make them less acceptable to a technological society involved in a conflict. Unfortunately, as Ignatieff points out, a virtual war is limited to achieving very narrowly tailored objectives. The great majority of campaigns where substantial change is going to be effected require troops on the ground. Because virtual war makes casualties less acceptable, does it make it more difficult for a Western nation to amass the political will to intervene in a conflict that may require the deployment of troops?

And what of the targets of a virtual war campaign, how do they respond? This is an open issue. Milosevic chose to attempt to manipulate Western public opinion.<sup>22</sup> A nation that cannot compete on the technological battlefield has a very limited choice of responses, but may not follow the Serb model. “The only viable responses have been asymmetrical, aimed not at military objectives per se, but at American public opinion: terrorism against civilian targets or American installations abroad . . . .”<sup>23</sup> Will Americans believe that precision weapons have made the world a

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20. *Id.* at 180.

21. *Id.* at 170. “The extraordinary fact about the air war was that it was more effective against civilian infrastructure than against forces in the field.” *Id.* at 108.

safer place if, in response to a future intervention, a terrorist attack strikes the American heartland? Ignatieff compares a virtual war to a sporting event on more than one occasion, stating: “These conditions transform war into something like a spectator sport. As with sports, nothing ultimate is at stake: neither national survival, nor the fate of the economy.”<sup>24</sup> Does that analogy stand if the action is no longer on the television screen, but down the street from one’s home?

The author’s sporting event analogy effectively provides a simple and workable framework through which to examine the impact of a virtual war on the home front. Much like a Super Bowl, a significant amount of hype precedes a virtual war campaign. By kick-off, most Americans are tuned-in. As the game progresses, absent truly compelling occurrences, interest begins to fade. If the game is a blowout, only a percentage of those who tuned in will watch the second half. It’s no different with a virtual war. A large number of people follow the conflict at the outset. Once it becomes apparent that U.S. forces are not at great risk, public interest fades.<sup>25</sup> This conclusion leads Ignatieff to his most troubling question: “If violence ceases to be fully real to the citizens in whose name it is exercised will they continue to restrain the executive resort to precision lethality?”<sup>26</sup> Only time will tell.

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22. *Id.* at 52.

Instead of fighting NATO in the air, he fought NATO on the air-waves. By allowing CNN and the BBC to continue broadcasting from inside Serbia, he hoped to destabilize and unsettle Western opinion with nightly stories of civilians carbonized in bombed trains and media workers incinerated by strikes on television stations.

*Id.*

23. *Id.* at 192.

24. *Id.* at 191. In a conflict where thousands were killed, this analogy may appear to trivialize human suffering. Clearly this is not the author’s intent.

25. Southwest Asia is an example of this phenomenon. In December 1998, a large number of people followed Operation Desert Fox in Iraq. As that campaign evolved into enforcement of the northern and southern no-fly zones, public interest waned. Despite the fact that coalition forces continue to drop ordinance on Iraq, it is difficult to find a newspaper story (or television coverage) of the conflict. *See id.* at 191.

26. *Id.* at 163.

## IV. Conclusion

While Michael Ignatieff does an outstanding job of tracing his three major themes through the Kosovo conflict, his work unfortunately suffers from two weaknesses. First, the author's criteria for international intervention within a sovereign state contain a tone reminiscent of colonial-era paternalism. Second, Ignatieff is too quick to brush aside the absence of U.N. Security Council action prior to NATO intervention in Kosovo. While listed as two separate and distinct shortcomings of his book, both are probably more appropriately characterized as symptoms following from one central ailment: the author's distinctively Western-centric view of the world order.

In their debate on NATO intervention in Kosovo, Robert Skidelsky remarked on this tendency.<sup>27</sup> Defenders of Ignatieff may counter by citing the author's criticism of the West for its failures to readily assist the War Crimes Tribunal in The Hague.<sup>28</sup> Even in this criticism, however, the roots of Ignatieff's bias can be seen. His disappointment rests with the West, particularly the United States and United Kingdom, and not the world community at large.<sup>29</sup> Ignatieff's apparent view that the West has an obligation to take the lead in solving the world's problems, leads to an impression that he is also willing to allow the West to define what constitutes those problems. In this regard, the author's overseas childhood as the son of a diplomat may be both a blessing and a curse. While it has provided him a unique perspective on the former Yugoslavia, it may in part be responsible for the obligatory interventionism he seems to view as a Western responsibility. It is important to keep in mind, nevertheless, that while relevant when examining the merits of *Virtual War*, Ignatieff's Western bias does not detract from his vision of twenty-first century warfare or the moral issues it raises.

Anyone reading *Virtual War* looking for definitive answers to the issues presented will be disappointed. Much like the outcome of the bombing campaign itself, Ignatieff's book leaves the reader looking to an uncertain future. As a definitive philosophical work on the application of morality to emerging military technologies, it is a failure; however, as an enjoyable and thought-provoking guided tour through the Balkans in 1998

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27. *Id.* at 80, 86.

28. *Id.* at 125.

29. *Id.* at 126.

which leaves the reader to contemplate the implications of this conflict on the future of the international community, it is a success.



By Order of the Secretary of the Army:

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