



MILITARY LAW REVIEW

NUREMBERG AND THE RULE OF LAW: A FIFTY-YEAR VERDICT

A COLLECTION OF WORKS ASSESSING
THE LEGACY OF THE WAR CRIMES TRIALS OF WORLD WAR II

*"We must never forget that the record on which we
judge these defendants is the record on which
history will judge us tomorrow."*

Supreme Court Justice Robert H. Jackson

Reprinted Compliments of The Association of Alumni

The Judge Advocate General's School, U.S. Army

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CAPTAIN JOHN B. JONES, JR., *Editor*

MR. CHARLES J. STRONG, *Editorial Assistant*

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SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Authors also should submit a 5 1/4 inch or 3 1/2 inch computer diskette containing their articles in IBM compatible format.

Footnotes should be coded as footnotes, typed double-spaced, and numbered consecutively from the beginning to the end of a writing, not chapter by chapter. Citations should conform to *The Bluebook, A Uniform System of Citation* (15th ed. 1991), copyrighted by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 6th ed. 1992) (available through the Defense Technical Information Center, ordering number AD A254810). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

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INTRODUCTION

This volume of the *Military Law Review* commemorates a monumental event. Fifty years ago, on November 21, 1945, Robert H. Jackson opened the trial of twenty-four alleged major war criminals before the International Military Tribunal in Nuremberg. Jackson, an Associate Justice on leave of absence from the United States Supreme Court to serve as Chief of Counsel for the United States, delivered an opening statement of such gravity, force, and eloquence that discussions of Nuremberg since that day rarely fail to echo one or more of Justice Jackson's captivating phrases.

Justice Jackson reasoned that the Tribunal must seek to punish the horrific wrongs alleged in the indictment even as he insisted that law rather than vengeance must determine the fate of each defendant in the dock:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.¹

In the same opening statement, Justice Jackson reminded the Tribunal that history would deliver its own verdict on whether the proceedings had attained justice: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow."²

Therefore, as it commemorates the beginning of the war crimes trials of World War II, this volume also seeks to record history's fifty-year verdict on Nuremberg. That verdict is rendered and interpreted in the pages that follow by a score of accomplished and insightful scholars, government officials, legal practitioners, and military professionals. As could be expected from any record of thoughtful and intelligent discourse comprising so many separate contributions, this verdict is far from unanimous on many points.

Most of the contributions herein consist of remarks transcribed and papers presented during a conference held November 1995 at

¹2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 98-99 (1947).

²*Id.* at 101.

Decker Auditorium in The Judge Advocate General's School. The Center for Law and Military Operations and The School are proud to have sponsored the conference in conjunction with the University of Virginia's Center for National Security Law and Duke University's Center on Law, Ethics and National Security.

We and the other co-sponsors of the conference challenged the participants not merely to review the past fifty years and render a verdict on Nuremberg, but also to look forward and apply Nuremberg's legacy to the future.

[T]he tribunals prosecuted those deemed responsible for the atrocities of World War II. Can we build on the powerful legacy of these tribunals? . . . Now, fifty years later, can war crimes of a more regional nature, involving ethnic conflict, be successfully dealt with by United Nations chartered tribunals at the Hague and Arusha—international, not military, tribunals seeking to bring to justice those responsible for untold deaths and atrocities in the Former Yugoslavia and Rwanda? Rather than ad hoc tribunals, is there a need for a permanent world court to deal with future violations of international law?³

Even while these and other pressing questions of critical importance to international law remain unresolved, there can be no doubt that the conference participants rose magnificently to our challenge. Merely one illustration of their success in establishing Nuremberg's modern relevance is that the speakers anticipated so many of the tough legal issues that have since arisen during the peace implementation process in Bosnia.⁴

An article by retired Lieutenant Colonel H. Wayne Elliott and Notes by two student contributors complete the volume. Although not presented during the conference, these papers merit inclusion because they assess important parts of the Nuremberg legacy. Their inclusion, however, is apt for other reasons. Lieutenant Colonel Elliott, formerly Waldemar Solf Professor of International Law at The Judge Advocate General's School, first conceived of the idea of holding a fiftieth anniversary conference on Nuremberg in early

³Letter from The Center for National Security Law, the Center on Law, Ethics and National Security, and the Center for Law and Military Operations, to Prospective Individual Participants in Conference, entitled "Nuremberg and the Rule of Law: A Fifty-Year Verdict" (Aug. 9, 1995) (copies on file with the Center for Law and Military Operations).

⁴See General Framework Agreement for Peace in Bosnia and Herzegovina, Nov. 21, 1995, Republic of Bosnian and Herzegovina-Republic of Croatia-Federal Republic of Yugoslavia, *reprinted in* INTERNATIONAL PEACEKEEPING, Oct.-Nov. 1995, at 108-27.

1994. The student contributors are master of laws degree candidates in the 44th Judge Advocate Officer Graduate Course. Many members of the 44th attended the conference and endowed its discussions with the interest of a younger generation that will enable us to host another conference, and render another verdict on Nuremberg and its progeny, in November of the year 2045.

Joseph L. Graves, Jr.
Commandant
The Judge Advocate General's
School

David E. Graham
Director
Center for Law and Military
Operations

17 April 1996
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November 17 and 18, 1995

Decker Auditorium
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Center for Law and Military Operations
The Judge Advocate General's School
United States Army

Center for National Security Law
University of Virginia

Center on Law, Ethics and National Security
Duke University School of Law

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Deputy Prosecutor
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Colonel John T. Burton
Legal Counsel to the Chairman of the Joint Chiefs of Staff

Inis Claude
Professor Emeritus
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The Honorable Hans Corell
Under-Secretary-General for Legal Affairs
The United Nations

Lieutenant Colonel David Crane
Sof Professor of Law
The Judge Advocate General's School

István Deák
Seth Low Professor of History
Columbia University

Robinson O. Everett
Founder, Center on Law, Ethics and National Security
Professor of Law
Duke University School of Law

Colonel David Graham
Chief, International and Operational Law Division
Office of The Judge Advocate General, United States Army
Director, Center for Law and Military Operations

Henry T. King, Jr.

Former Prosecutor at the Nuremberg Trial and Subsequent
Proceedings

Professor of Law

Case Western Reserve University School of Law

Thomas F. Lambert, Jr.

Former Prosecutor at the Trial of Major War Criminals in
Nuremberg

Distinguished Professor of Law

Holder Thomas F. Lambert Endowed Chair Trust

Suffolk University School of Law

Monroe Leigh, Esquire

Steptoe and Johnson

former Legal Advisor, Department of State

Howard S. Levie

Professor Emeritus

St. Louis University School of Law

former Charles H. Stockton Chair of International Law

Naval War College

Jonathan Lurie

Professor of History

Rutgers University

Major Mark S. Martins

Deputy Director and Professor of Law

Center for Law and Military Operations

The Judge Advocate General's School

General Barry R. McCaffrey

Commander-in-Chief

United States Southern Command

Theodor Meron

Professor of Law

New York University School of Law

John Norton Moore

Director, Center for National Security Law and Walter L. Brown

Professor of Law

University of Virginia School of Law

Fred L. Morrison
Oppenheimer, Wolff & Donnelly
Professor of Law
University of Minnesota Law School

W. Hays Parks
Special Assistant for Law of War Matters
Office of The Judge Advocate General, United States Army

Dr. R. John Pritchard
Inter-Faculty Associate Fellow
The Nissan Institute of Japanese Studies
St. Antony's College
Oxford University, England

Michael P. Scharf
Assistant Professor of Law
New England School of Law

Scott L. Silliman
Executive Director
Center on Law, Ethics and National Security
Duke University School of Law

Robert F. Turner
Associate Director
Center for National Security Law
Professor of Law
University of Virginia School of Law

Ruth Wedgwood
Senior Fellow and Director
Project on International Organizations and Law
Council on Foreign Relations
Professor of Law
Yale Law School

OPENING COMMENTS*

JOHN NORTON MOORE**

Good Morning. I would like to welcome you to the Conference on Nuremberg and the Rule of Law: A Fifty-Year Verdict. This conference is co-sponsored by the Center for National Security Law of the University of Virginia that I direct, the Center on Law Ethics and National Security of Duke University School of Law, headed by Judge Robinson Everett, who is going to be addressing you in a moment, and the Center for Law and Military Operations of The Judge Advocate General's School of the Army, which not only is co-sponsoring this conference, but is being gracious enough to let us use their superb facilities.

I would like to specially thank the Center for Law and Military Operations and Colonel David Graham and Lieutenant Colonel David Crane. Colonel David Graham is both the Director of the Center for Law and Military Operations and the Chief of the International and Operational Law Division at the Office of The Judge Advocate General of the Army. Lieutenant Colonel Crane is the Chairman of the International and Operational Law Department of The Judge Advocate General's School.

Let me say a word about both the Duke Center, as our co-sponsor and also our additional co-sponsor, the Center for Law and Military Operations. I believe that these two Centers have done

*Transcribed opening comments presented 17 November 1995 during "Nuremberg and the Rule of Law: A Fifty-Year Verdict," a Conference co-sponsored by The Center for National Security Law, University of Virginia, The Center of Law, Ethics and National Security, Duke University School of Law, and The Center for Law and Military Operations, The Judge Advocate General's School, United States Army. The Conference was held in the Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, November 17-18, 1995.

**Director, Center for National Security Law and Walter L. Brown Professor of Law at the University of Virginia School of Law. Professor Moore also served as the Director of the Graduate Law Program at the University of Virginia for more than twenty years. He is the author or editor of sixteen books and over 140 scholarly articles and served for two decades on the editorial board of the *American Journal of International Law*. Among Professor Moore's numerous accomplishments and six presidential appointments, he has served as the Senate-confirmed Chairman of the Board of Directors of the United States Institute of Peace; Counselor on International Law to the Department of State; a member of the United States legal team before the International Court of Justice in the *Gulf of Main* and *Nicaragua* cases; a member of the National Advisory Committee on Oceans and Atmosphere; and as legal advisor to the Kuwait Representative to the United Nations Iraq-Kuwait Boundary Demarcation Commission.

extraordinarily important work in the last few years. In my judgment, this Center that's been set up here at The Judge Advocate General's School has made some of the most important contributions to the development of humanitarian law made anywhere in the world. They are engaged on a daily basis in an extraordinary effort to train around the world in the rule of law and in human rights. They have developed a whole new field of operational law that has brought law into military operations in one of the most effective ways that law has ever been brought into military operations in any nation in the world. The Center is a special treasure of the United States Armed Forces and something that we should acknowledge and take great pride in as Americans.

I also would like to specially commend the Center at Duke that has done such wonderful work in the short period of time that it has been operating. We were very pleased to have it set up. We have been blessed with being able to work cooperatively with that Center. I have been a great fan of the work that Scott Silliman and Judge Everett have been doing over the last few years. This year, for example, they co-sponsored the American Bar Association Conference and did an absolutely magnificent job on that. It is really Judge Everett and his leadership in that Center, of course, and the leadership of Scott Silliman, that has made this Conference possible along with that of our co-sponsors.

I also would like to thank Donna Ganoë of my staff, who worked very actively on this program. No one was ever blessed with a finer Administrative Director than I have in Donna. She is an absolute genius in putting together conferences. Just to give you an example, yesterday, in addition to trying to put this conference on, we unexpectedly learned that we were going to be hosting six Chief Justices of the former Newly Independent States of the Soviet Union. We hosted them at a separate conference that was put on with about a week and a half of notice while this conference was simultaneously being run, with a Rule of Law Program specially put together for that very distinguished group.

Let me also welcome the members of the 44th Judge Advocate General Officer Graduate Course that are part of the resident Master of Laws program at the JAG School. We are most pleased to have you in attendance and hope that you will take an active part in the conference.

And finally, let me thank the many world-class experts who have given of their time to participate in this program.

Let me shift to a few words of substance—although I am really going to leave this to our panelists at this conference. I would like to

say a few words to perhaps begin to place these events in some context.

World War II and the associated Holocaust of over twenty million dead witnessed new depths of moral suffering, moral degradation, and human miseries. One way to perhaps capture a little of this is perhaps in the statement that President Clinton made in remarks to an American gathering of Holocaust survivors on April 30th of 1995, in which he said:

We think of such things here on the end of this century in the beginning of a new millennium, but in profound ways there can be no such closure for the half century after the Holocaust. For all of those who lived through it and all of us who came after, the Holocaust redefined our understanding of the human capacity for evil. Anyone who has stood in that tower of photographs in the Holocaust Memorial Museum in Washington, who has seen those unforgettable, warm, expressive faces from that small Lithuanian town, anyone who has seen the horror even in pictures knows that we must now and never allow the memory of those events to fade.

The Nuremberg and associated trials at the end of that terrible period were really a cry from the heart of humanity at the unspeakable brutality that had been unleashed by the Nazis. Subsequently, the Nuremberg principles were affirmed by the United Nations General Assembly in 1946, and began to clearly establish the principle that waging a war of aggression or committing war crimes gives rise to personal criminal responsibility. Of equal, or even greater, importance, the Nuremberg principles and subsequently the Genocide Convention also gave rise to a consensus developed in international law that the slaughter of civilians, even if they are the citizens of the state doing the slaughtering, also leads to personal criminal responsibility.

As President Clinton said, we are now a half century after that terrible war. We are a half century after the Holocaust, and we are a half century after these trials. And it is an appropriate occasion for us to take stock and to appraise where we are and where we may be going. Sadly, I am sorry to report, as all of us know altogether too well, that the overriding reality is that genocide and the slaughter of civilians and war crimes has not ended. For all of the talk of "never again," we have seen after the Holocaust one slaughter after another.

er. We saw approximately a quarter to a third of the population slaughtered in Cambodia by the regime of Pol Pot. We are seeing in Yugoslavia the horrible brutality that most seriously comprises the so-called "ethnic cleansing" of the slaughter of the Bosnian population in those areas. We also are witnessing such events as the slaughter in Rwanda, which many have said reached numbers as high as a half million or higher in that period of time. So I think we would have to say that sadly, all of our statements about "never again" have not, in the real world, produced "never again."

I would like simply to make one general observation to this conference as it begins its work and to suggest five very brief corollaries for inquiry about that. The general observation is quite stunning that in terms of overall democide (death by government) in this century from nondemocratic regimes, approximately 170 million people have been killed. This is a rate of two to four times greater than combatant deaths in war for the same period. Quite clearly from those figures and that reality, the problem is one of noncompliance with our human rights norms. The problem is not that we do not have norms. The problem is not that maybe in some ways those norms need to be expanded and massaged and that that is not important. But overwhelmingly the problem—as sadly it is for much of international law—in dealing with use of force law and trying to stamp out aggression as well as grave breaches of the law of war, but particularly on this question of democide and genocide, the problem is a failure, focused on totalitarian entities, to live up to the normative standards and the principles of Nuremberg. *That* is the central issue that the kinds of talent that we have here, and around the world, must focus on, now and in the years to come.

I would suggest five corollaries, at least as issues for inquiry as to how we get better at enforcing the norms. The first corollary is that it seems to me that we must begin to think of collective security, not solely in terms of war avoidance, which remains of central importance, but also in terms of stopping the massive democide that has been an all too frequent feature of our age.

The second corollary is that we should begin to shift our focus from simply ad hoc responses after the fact to a focus on effective deterrence. How do you strengthen our institutions, the United Nations, the whole concept of collective security to be providing effective deterrence ahead of time to prevent these kinds of actions from taking place in the first place?

The third corollary that I would like to suggest, or raise as a question at least, is that it may be more effective in answering that last question by beginning to focus the issue of deterrence on regime

elites in these totalitarian entities, whether they are governments or entities that are below a government level, that are making these decisions to commit the slaughter and are carrying it out. There is an impressive body of evidence, I think, growing about what we know about democide and about war that is suggesting that there is a high correlation with nondemocratic governmental systems—with totalitarian systems particularly—and that the underlying mechanism may be one relating to incentive structures that enables these totalitarian elites to externalize the cost, to impose the cost on their own population, whether in war or whether by slaughtering people that disagree with them. It may be beneficial if we can begin to develop a system of more effective deterrence focused, not just generally on countries, but on the regime elites that are carrying out these kinds of activities. I think that is a subject for important inquiry.

We also must look at the realities of the international community. There are very few cases in which the United Nations is going to be prepared to go in on the ground, in a setting such as Cambodia, for example, to stop the genocide and the slaughter. Most of the cases, sadly, in the real world are going to be cases in which there is no great power to be found that is prepared to take the lead. That means that we really should focus our efforts on two settings. One of those is, "What can we do to encourage, perhaps, a greater sharing, a greater involvement by great powers, in at least a few of the operations, to add deterrence from operations that are fully and effectively carried out with the arrest of those responsible for these activities and their trial?" And, more importantly perhaps, we also should focus our attention on those many situations in which the world simply cannot find the great power who is prepared to proceed in a war fighting mode on the ground. Therefore, we are going to have to find alternate deterrence techniques, again I believe, focused primarily on regime elites. That reality is yet another of the reasons that I think this question of focusing on regime elites is very important.

Finally, let me just add that one of the great enduring principles in all of this struggle is the principle of enhancing understanding, enhancing the flow of information about what is taking place, constantly putting truth before us, and remembering that institutions, such as the Holocaust Museum, for example, are carrying out a terribly important role in having us constantly remember. If we do not call attention to these abuses, if we do not have the kind of visibility, the kind of transparency that we need to have as these take place, as, for example, was sadly lacking with respect to the genocide in Cambodia then we are doomed to relive these horrors. I do not know how many of you have looked at the annex that was done

in the book by Jean-François Revel, *How Democracies Perish*, in which he gives you the juxtaposition of the events taking place in Cambodia with the headlines in the major media around the world that had no relation whatsoever to the slaughter that was taking place at that time. Reports such as the excellent report done by Cherif Bassiouni in the setting of the Former Yugoslavia are, I believe, terribly important, a critically important function of the United Nations and of all governments.

Conferences such as this play an important role in transparency and in truth, and let us all go forward to seek to end these terrible realities.

At this point, I turn the Conference over to the Chairman and Founder of the Center on Law, Ethics and National Security at Duke University School of Law, the Honorable Robinson O. Everett, who will join me in a welcome to all of you and in my hope that this generation will end the democide that has plagued mankind.

OPENING COMMENTS*

ROBINSON O. EVERETT**

Well it is truly a privilege to be here today. It is noteworthy that we are able to continue despite the failures in Washington and the inability to balance the budget or to reach a compromise, and I know that for many people this has created some special problems. I was impressed by the fact that we were able to start with military efficiency on the second that we were supposed to start. I do not want to delay proceedings, but there are a few things I do want to say.

First, I want to pay tribute to John Norton Moore and to his Center. I have known John quite a while, dating back to his days as a student at Duke, and have greatly admired his career. I can say that he has in so many ways been a leader and pathfinder for us. His example has led to the establishment of our Center at Duke. Also I am sure it had a part to play in the establishment of the Center that now exists at the JAG School for Law and Military Operations. His writings have led to the publication of various case books and many other documents in the field of national security.

Moreover I find it interesting that we have here today the editor of a new publication, the *National Security Law Journal*, which is to be published at the University of Mississippi Law School in con-

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**Founder, Center on Law, Ethics and National Security, Duke University of Law; Director, Center on Law, Ethics and National Security, Duke University School of Law. A.B., 1947, *magna cum laude*, Harvard, J.D. *magna cum laude*, 1950, Harvard Law School, L.L.M., 1959, Duke Law School. Among his many accomplishments, Judge Everett has served in the Korean War in the Judge Advocate General's Department; commissioner of the United States Court of Military Appeals; part-time counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary; president of the Durham, North Carolina Bar; member of the Council of the North Carolina State Bar; Chairman of the North Carolina Continuing Legal Education Board and of its Standing Committee on Legal Assistance to Military Personnel; Chairman, American Bar Association's Standing Committee on Military Law; and Chief Judge, United States Court of Military Appeals.

junction with John's Center and our Center. We are proud to play a part in that. I learned yesterday that there is a National Security Law Moot Court Competition, of which I was unaware, but which will be entering its third year. So there is a lot happening in the field, and we are proud to be part of it.

Certainly, nothing could be more significant than looking at the lessons of the past. We are fifty years after Nuremberg. The lessons are just as important now as they were then. Indeed, as we move into the next millennium, perhaps those lessons are more important because we have the example of Rwanda, the former Yugoslavia, and others to look at.

Let me finally express appreciation to the JAG School for its hospitality. We are here in the Decker Auditorium, and I remember Ted Decker, a distinguished former Commandant of the School and a distinguished Judge Advocate General. This auditorium is a wonderful tribute to him.

I would like to do one other thing before closing. A few days ago, one of the great military lawyers, a former Judge Advocate General of the Army, passed away, General Kenneth Hodson. Many of you knew him. I think he was the example for many of us in terms of what a military lawyer should be. I would like to ask just for a moment of silence in his honor.

Thank you.

RECALLING THE WAR CRIMES TRIALS OF WORLD WAR II*

PROFESSOR THOMAS F. LAMBERT, JR.**

Lieutenant Colonel Crane, fellow panelists, my old friend Henry King, who I ran into on the circuits celebrating the Nuremberg verdict over and over again, John Pritchard, who is here today to help redress the international balance of payments that has left us so much in the debt of our friends and companions from overseas, and fellow students of the Nuremberg verdict and judgment.

The invitation from Lieutenant Colonel Crane and his associates of high endeavor to participate in this program came to me as both an honor and a command. He made it very clear to me that we are under time constraints and he knows how to use the hook. He asked me to remember what we learned in basic training. That is a very forgiving way to describe being a ninety-day wonder as we were in those days. That the mind can only absorb what the tail can endure. I recall what Dr. Johnson said, being in the death house powerfully concentrates a man's mind. There is a lot to that. And when I am done, I hope you will deal with me with the measured compassion of Dr. Johnson and his landlady: Remember the time when he saw a poor dog walking by on its hind legs, and his landlady exclaimed, "How grotesque!" Dr. Johnson murmured, "Madam,

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**Former Prosecutor at the Trial of Major War Criminals in Nuremberg, Distinguished Professor of Law, Holder Thomas F. Lambert Endowed Chair Trust, Suffolk University Law School. A.B. with honors in Political Science, University of California at Los Angeles, 1936; Awarded Rhodes Scholarship from Pacific Coast Area to Oxford University, Oxford, England, 1936. B.A., Jurisprudence, Oxford, 1938; B.C.L., Jurisprudence, Oxford, 1939; Awarded Sterling Fellowship in Graduate Law, 1939-40, Yale Law School, 1939-40; LL.D., Southeastern University of Massachusetts, 1965. Among Professor Lambert's numerous accomplishments, he has served as Professor and later Dean, John B. Stetson College of Law, 1940-42; Visiting Professor of Law, New York University Law School (Summer 1946); Professor of Law, Boston University Law School; Trial Counsel, Staff of U.S. Chief of Counsel, Justice Robert H. Jackson, Nuremberg War Crimes Trial, where he wrote U.S. Trial Brief and Trial Address against Nazi Party and presented the Trial Address Against Defendant Martin Bormann, Chief of Nazi Party under Hitler, to the International Military Tribunal.

the notable thing is not that he does it so poorly, but that he can do it at all."

The Nuremberg verdict has its critics. It is time to remind ourselves that a critic has been defined as a man that can find a great deal wrong in the best of things. The distinguished Senator from Ohio, Robert A. Taft, cursed the Nuremberg Trials as being a war crime in itself, which gave one of my colleagues at school the opportunity to observe that Senator Taft had the finest mind in the United States Senate, until he made it up.

The purpose of the trial, of course, was not to get twenty-odd heads on a silver platter. When you looked into the defendant's dock day after day, one thing was crystal clear, the power of these twenty-two to do evil was ended for all time. They were discredited. They were broken. They were more degraded and lower of hope than even a bowery bum. I recall seeing a Fox newsreel not long before the trials. It showed "Champagne Charlie" Ribbentrop striding around with his Nazi cohorts while some retched, middle-European country was losing its independence and going into a thousand years of night, they thought. And then to see him there in the dock, when the interrogator threw him a cigarette and it rolled off the table, and he scrambled for it like a bowery bum, I could not help remember what my mother said, as yours no doubt has said too, "The paths of glory lead but to the grave."

The Nuremberg verdict was handed down by the greatest criminal assize in the history of the planet. It was more, a lot more, than the idle, incoherent chatter of a lot of inconsequential, jurisprudential apparatchiks. The purpose of the Nuremberg Trial, as I see it, looking back on it, was threefold. Number one, to lay down the rule, with all the power of international law behind it, that aggressive war was the greatest of all crimes in that it comprehended all the sins in the Decalogue, all the crimes in the United States Code, all the sins that were conceivable to man. If what those people did in their combinations, and their cabals and couteries was not illegal, how in the world can any society hold a pickpocket, or a kidnapper, or a child molester, or a wife beater in jail overnight?

So, at Nuremberg, you see, we had three great objectives. One was to lay down that proposition that aggressive war is the greatest of all crimes. Number two, to lay down the rule of individual accountability. Henceforth, no matter how exalted your position, whether you were captains, kings, presidents, prime ministers, secretaries of parties, heads of parlor bureaus, military chieftains, bankers, industrialists, no matter how exalted, Justice Jackson said, "We will give you short shrift, a long rope, and into your hands, we will pass the poisoned chalice."

In other words, if war comes, God forbid, not only do the GIs and the corporals die, but the captains and kings, the presidents and prime ministers, the generals, and the admirals, the "caliphs of a continent's capitol," the human beings who in the last analysis, plan, plot, initiate, and carry into execution these wars of aggression. They too will have their lives forfeited. That's number two, individual accountability. No longer does exalted status confer immunity.

Now you can imagine the kind of arrogance that that proposition involves impressing upon the legal community. I think the closest I can think of, comparing it to, was the time when Lord Coke confronted James I, the Tudor and the Stuart despot, he spoke for all people in all times in all crimes. Remember that occasion when James I stared down at him? The king was always on the throne, right? Elevated above, staring down at the wretched, lord chief justice below, and he said to Lord Coke, "Are you suggesting that the King is under any man? And Lord Coke held his ground. He gazed right back at that vast stare, that was staring down at him. I have no doubt that he heard in his ears the rattle of the jailer's keys, felt himself on the way to the tower. He could see the morning sun gleaming on the executioner's ax, but he held his ground and he spoke for all people in all times in all climes. He said, "Sire the king's under no man, but under God and the law. "*Sub deo et lege.*"

When the teacher asked the little five-year-old boy, what was the purpose of cow hide? He answered with simple, accurate honesty. "The purpose of cow hide is to hold the cow together." The purpose of law is to hold society together. And as Justice Jackson said, with words that merit our best efforts to emulate them. He said, "We are here to prove, to convict, and punish crimes that, in their enormity, in their calculation, and in their malignancy, have no opposites on earth." We have never experienced them before, and we must put them down because, as Lieutenant Colonel Crane and others this morning have reminded us, the world cannot survive their repetition. Bad as things were in 1939 to 1945, when you lived in the shadow of the Nazi swastika, imagine how they have worsened since. When E.B. White said in that memorable essay of his, "a small coterie, a cluster of planes flying overhead in Manhattan, no larger than a widget of goose or geese up there can drop bombs that will convert the city into a cemetery and send this old earth spinning like a burned out cinder in the dateless night." That is the power that we have, not to mention the Bubonic plague, Anthrax, and the other chemical agents we can now unleash on the world. The problem for our time is how to beat plutonium into plow shears. We should not have to choose between Munich and Armageddon. This calls on law and its great function of providing third alternatives to dilemmas.

So, the third purpose then at Nuremberg was to make a post-mortem analysis of the nature of the totalitarian state, the first one that I am aware of. I remember one night in the American Embassy, I had the good fortune to encounter John Wyant, who was then the American Ambassador to the Court of St. James. He said it memorably. He said, "What we're learning in this conflict is that the next time we must not wait until the sun is gleaming on their bayonets." We have to take this dragon of totalitarianism, the utmost in evil and stamp it out when it is in its eggshell, and not wait until it is a fullblown dragon devouring democracies à la carte on the menu.

The next point to make is that we (the prosecution's legal staff at Nuremberg) had the good fortune to be in the hands of a great chief. You can always tell something about a law office when you walk into it. The quality of the man or the woman at the head of it diffuses, transmits, is reflected throughout the organization. If it is a place that is ridden with anxiety and fear, you can smell it. The same was true at Nuremberg. We had the good fortune to be in the hands of a man of high vision and low visibility. Not high visibility and low vision. We had those at Nuremberg. How can you ever get an aggregation of that many people together without having gradations of poverty and nobility in their outlook. But the thing about Justice Jackson is that he was a master of both the microscope and the telescope. He had this vision of the trials. He wanted to substitute the force of law for the law of force in interstate relations. He wanted to establish that there were crimes against the peace, as well as others that we had in the books and in our codes and in our covenants. That was a nondelegable responsibility that he shouldered himself. So he had the mastery of the microscope and the telescope. It is like that tenderfoot who was out climbing the mountains in California. He had a problem; when he kept his eye on the Polestar he did not get lost. But he kept stumbling, fumbling, and falling all over the trail. When he kept his eye on the trail, he didn't stumble, fumble, or fall, but he kept getting lost. His Indian guide pointed at him and gently said, "White man needs the near look and the far vision."

That is what we got from Justice Jackson: the total view, the airplane view, the birds-eye view, of the case along with the worms-eye view, on the other. Both were of prime importance; the birds-eye and the worms-eye view. The little worms have a lot more to do with the richness of the acre that we cultivate than have the giant combines lumbering over the landscape of the farm. Here, as well as elsewhere, God dwells in the details. And Justice Jackson well and truly knew this. He said, "Never prepare an opening, closing, or cross-examination, without bearing in mind what we are trying to

do in this trial. Never attempt one of those things, without making it an ice pick to break up the frozen sea within us, the Kafka syndrome as you will recall, because the opposite of love is not hate. The opposite of love is apathy, is indifference. Apathy will smother love faster than outright antagonism. So he wanted all our efforts, our openings, our closings, and our cross-examinations to be that ice pick, to break up the frozen sea within us and the indifference of the world to the third-rail issues that brought us to Nuremberg.

And so, in those terms, I think of maybe three things. I think of the examination of a man named Otto Ohlendorf. When I heard him and saw him for the first time he was indefatigably inconspicuous, easy to overlook. A mild-mannered man, you will not misunderstand me if I say, he reminded me of a vice president of a bank in charge of the loan department. But then when you discover that he was the high-ranking SS General, he was the head of an action group, Einsatzgruppen D, that followed the German armies into the East, after Plan Frederick Barbarossa was unleashed on June 21, June 22, 1941, he was the head of this Action Group D. The examiner said to him, "Well, what was your group responsible for?"

And he answered very coolly, he was a cool character to anticipate that word, he was laid back. He was mild mannered, even had his own inverted charm, come to think of it, and he said, "Well, we were responsible for the liquidation (which he translated as meaning killing) of between 80,000 and 90,000 persons, mostly Jews, Russian commissars, gypsies, and other unworthies."

The examiner said, "Well, could you be more specific?"

Ohlendorf said, "No. It was between 80,000 and 90,000," a small smile playing about his thin lips. "You must allow me a margin of error."

Now, there we said, there was another action group over here, Einstazgruppen A, which seems to be responsible for 125,000. His pride was infringed. He was a craftsman. He snapped out, "My methods were more efficient."

The examiner responded, "What do you mean? Explain to us. Yours were more efficient?"

He said, "They used gas vans for their executions. Toward the end of the war, it became more difficult to get replacement parts for those gas vans. And the wretched inmates of the vans were told that they were just being relocated, but they would know better, and the wailing would begin, they knew they were heading for extinction."

And Ohlendorf said, "It disturbed the morale of the German

civil population to hear all this wailing as the gas vans moved along their highways and other public ways. My methods were more efficient. I used rifle executions. Afterwards, it was so stressful, to the men of my firing squads that I allowed them to shovel dirt on the victims. I found that it relaxed their nerves. You might say that I did it out of," again that small smile, "considerations of humanity."

In my life, I have never heard a man confess to a single murder. Here was a man who confessed to murder at wholesale, to something between 80 or 90,000, adding, "You must give me a margin of error." We had to prove crimes of enormity, malignancy, and calculation that were unbelievable. We had to use credible evidence to prove the unbelievable.

That brings another measured point. Justice Jackson said, "I want to write a record at Nuremberg. There will be an anvil to outlast the hammers of the critics, in all times and all climes." He said, "Let's forge our record in the great bulk out of their own mouths, out of captured German documentation. And then turn this record loose, to seminars and graduate studies in international law at Heidelberg, Berlin, Padua, Vienna, and all around the world. Let them crack or chip this record if they can."

I submit to you with great confidence, that they have not cracked or chipped that record in any substantial measure at all. Hardly in any visible, audible manner, have they done so. And that is because he renounced the use of oral testimony from live captured witnesses, preferring an enduring record to the transitory, more dramatic and sensational testimony from live captured Nazi chieftains. Now waiting out in the wings were the world's media, including radio, press, and tabloid journalism. They were all out there like jackals, domesticated jackals to be sure, waiting for him to call the commander of a concentration camp to the stand and hear him admit that he was responsible for the death of two million people that died of the same ailment, heart attacks, all alphabetically, five minutes apart. The world was yearning to listen to this type of bestial and subhuman, even demonic testimony to cast deep doubt upon the collective humanity of the responsible Nazi lieutenants and the millions of helpful co-conspirators, who participated as helpful executioners in carrying out these crimes against humanity.

Justice Jackson says, "No, primarily you must use captured German documentation." So that ninety percent of all the evidence put in the record at Nuremberg was from captured German documentation. The Nazis were great bookkeepers. You do not have to be reminded of that. For example, in that part of the indictment charging their willful stealing and plundering, they would keep all the

essential facts in their books of accounts, a permanent recording of grand and glorious larceny. When they stole—intellectual, cultural property—they would make entries, its value in local currency. For example, the Bayeaux Tapestry, worth so many hundreds of thousands of French francs, they would make an entry in their account books as to the value of this treasure in the local currency, the site where they stole it, where they carried it to, and its value in Reich Marks. So when we came to that section of the case dealing with the stealing of cultural property, we used wheelbarrows to bring the records in. This was not just looking for a glove that fit. This was looking for many shrouds that fit. All the lights in the courtroom were put out, and numberless wheelbarrows were wheeled in, and we had these tremendous tomes, which practically filled one end of the courtroom. Then the lights of the courtroom were turned on and "voilà!" There was the redhanded evidence. Like I say, they kept books with Teutonic thoroughness, including their own criminality and accountability.

The destruction of the Warsaw Ghetto, will you ever forget it, was all recorded in a book signed by General von Stroop, in a foreword to Hitler. "Mein Fuhrer, I send you this book on the destruction of the Warsaw Ghetto. I killed and liquidated so many millions. You cannot kill them all in one siege, in one season, or in one session. You need more time to kill all of the bacilli and all the lice." When you look at this book, finely tooled, Florentine leather, the kind of care that one might lavish on a book that you would give to a girl that you were in love with, say, "Sonnets from the Portuguese." But here they were, defendants in the dock writing their own accounts of the Ghetto, bragging about their soundtracking of the entire horrifying operation, the destruction of the Warsaw Ghetto. Dynamiting the sewers when the wretched Jews would take refuge in the sewers as their last haven. Stroop's account emphasized that the dynamiting of the sewers forced the wretched Jews to crawl from the sewers on their broken bones trying to escape across the street, only to be liquidated fiercely by the follow up of the killer squads.

And there is the picture of that little boy, will you ever forget it? You all know the one I mean. I do not know how to describe him. He seems to be about, well it is still very difficult to tell, an old man in a young boy's body. He looked about five years old to me, although he might have been eight or nine. Emaciated in the face, a cap that had become way too large for his shrunken body, hollowed cheeks, little trembling hands held up, and terror on his face. No little boy should ever have that satanic and terrifying experience. That kid belonged out in the sunny woods. With a little dog, a dog that will live forever, a summer that will last forever. Instead he was on the

way to being turned into soap. They gave us a new vocabulary, a new grammar of horror. Saponification, turning little children and mothers and grandmothers into soap. This is what Justice Jackson said when he laid down the rule that we would use credible evidence of captured documentation to prove the unbelievable with credible evidence.

Now the trouble is, when you come after the trial and you visit little civic groups—Kiwaniis Clubs, Chambers of Commerce, synagogues, churches, groups of medical legal societies, all the way from Toronto, Canada, down to Key West, when you deal with things like the concentration camp, the terror, and the Nazis crimes against humanity or when you confront Otto Ohlendorf, or the Destruction of the Warsaw Ghetto, when you say six million Jews and you look in their faces, they have "little crosses for eyes." They are dazed by it. It is like saying six million Suzuki Samurai, six million billiard balls. They cannot get a fix on it. They have nothing in the experience that enables them to begin to understand it. So that is why you subordinate the Otto Ohlendorf demons and the Destruction of the Warsaw Ghetto and advance the story of Anne Frank. A little teenage girl-child, hiding in the attic, awaiting the unsleeping terror, of the stormtroopers who will soon be pounding and bounding up that staircase with their iron boots, and the world looks into that little face, trembling, on the threshold of destruction. That is the ice pick that breaks up the frozen sea within us. The worst thing about the Nazi terror was not its horrific nature. It was proving to us that the worst quality of human beings is our adaptability. We can get use to anything, including saponification, boiling little girls and their mothers and grandmothers to make soap. It is part of the demonology of evil; it is the banality of evil. We could just get used to it.

It is true that there is a lot that was not accomplished at Nuremberg. The fires of aggressive war and genocide are still raging around the world. They come to us with our breakfast, lunch, and dinner. We have not prohibited, maybe not inhibited, aggressive war. Does that mean that the whole enterprise of the Nuremberg Trial was an exercise in futility? I do not think so. In the absence of angels, mankind with all its ineptitude must do the best it can, always believing in the efficacy of effort. Even if we cannot rid the world of aggressive war, is it not better that somewhere along the line, in that slow climb upward from savage isolation into cities, sunshine, and or semblance of civilization that we stop to say, "Even though we cannot totally ban and oust aggressive war from our world experience, we still condemn it and with that act of condemnation we take our place with the god-fearing brother-loving people of this

world, including the democracy of the dead, those who have gone before and those who will come after us.

You see, law is not a code, a "crystallized wilderness of single instance." The great provisions of our Constitution—due process, equal protection, First Amendment rights—were not written by an IBM machine. They were deliberately left open-ended by the wisdom of our Constitutional Framers. This has been called the calculated ambiguity of our common law and constitutional law alike. If you want to know what the provisions of the Nuremberg Charter, Nuremberg Judgment, or the United Nations Charter mean, or what any clause or provision of a great charter of liberty mean, you must interpret it, not like a last will and testament. Lest indeed it become one. We do not ask what this provision could have meant in 1789. We do not take our seats in the councils of our Constitutional Framers or our forefathers. We invite them to sit in ours, because law is not a stagnant pool; it is a stream. That goes for international law, too. In moving waters there is life and hope; in stagnant pools decay and death.

I never have understood the notion that international law consists of a group of codes and statutes and contractual assurances. Period, full stop, that's it. When you adopt the United Nations Charter, including its endorsement of the Nuremberg verdict, you adopt their most precious part—their "line of growth." They owe more to Darwin than they do to Newton. They are always in the process of becoming, like lawyers themselves. Justice Jackson said that at Nuremberg, for a second, the light of reason reached out, grabbed, and held to the high ground in laying down those three objectives mentioned at the outset; to lay down with all the force of international law behind it that aggressive war is the greatest of all crimes, to recognize the principal of individual accountability for one's role in participating in the initiating, waging, and carrying out of such wars, and, thirdly, to conduct the world's first postmortem analysis as to the nature of the totalitarian state.

Viewed in this light, in the aspect of eternity, I would only suggest that Nuremberg was much more than an exercise in futility. I command to your careful attention the legend of Sisyphus, which for most of my life I confess that I have misunderstood. I thought it represented the most terrible punishment that had ever been meted out to a man who crossed swords with the gods. He was condemned, as you know, by the King of Corinth to roll that heavy boulder all the way up from the bottom to the crest of that Alpine hill. When he reached the summit, it rolled down again and he began all over again, his endless labors to shoulder the boulder to the top of the high hill. In my original view of that fate, I could not imagine a more

atrocious punishment to be imposed on a human being, until later, with possibly a deeper perspective, on reflection, one comes to see that maybe the struggle to the summit is enough to fill the heart of any man and then to take comfort in the ultimate realization that "it is not necessary to hope in order to persevere." We must keep on trying to ensure a warless world, because even if we are condemned to failure, we would rather fall forward, like a fallen lance, facing the foe, with all our wounds in our front and not at our back.

If we do this, as dedicated lawyers and as men and women of good faith, it may yet be the dawn and not the dusk of our gods.

THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST AND ITS CONTEMPORARY RESONANCES*

DR. R. JOHN PRITCHARD**

In contrast to the Record of the International Military Tribunal at Nuremberg, few law libraries have copies of the Proceedings of the International Military Tribunal from the Far East, although I annotated, indexed, and published them nearly fifteen years ago.¹ The Proceedings themselves are almost never studied. The political context of the Tokyo Trial Proceedings, its Charter and limited jurisdiction, the evidence presented in court, the disequilibrium in the power balance between the two opposing sides, the tables of legal authorities on which the respective sides relied, the one-sided *exclusion* of evidence to the detriment of the defence (on spurious grounds), the forensic skills or inadequacies of Counsel or Members of the Tribunal, the differing structures of the prosecution and

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**Inter-Faculty Associate Fellow, The Nissan Institute of Japanese Studies, St. Antony's College, Oxford (appointment confirmed subject to funding). B.A. in History at the University of California, Riverside 1967, M.A. History 1968, Ph.D., (Econ.) in International History at the London School of Economics 1979. Dr. R. John Pritchard was principally responsible for the success of what became a fourteen-year project carried out at the London School of Economics between 1973 and 1987 which resulted in the publication of the complete proceedings of the International Military Tribunal for the Far East (more than 53,000 pages of transcripts) produced in twenty-two volumes in 1981 and a companion 3500-page, five-volume index and guide series published between 1981 and 1987 and, along with Peter Calvocoressi, completed a 1300-page history entitled *Total War: Causes and Courses of the Second World War*. Dr. Pritchard is currently producing a twenty-one-volume series of *The British War Crimes Trials in the Far East, 1946-1948* and, together with Jane L. Garwood-Cutler, a three-volume series of *The British Trials of Suspected Italian War Criminals, 1945-1949* along with a textbook entitled *The Misconduct of War and the Rule of Law*.

¹See R. JOHN PRITCHARD, *THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES* (R. John Pritchard ed., with the assistance of Sonia Magbanua Zaide, New York & London 1981) (volumes 1-19, *Transcripts of the Proceedings in Open Session*; volume 20, *Judgment and Annexes*; volume 21, *Separate Opinions*; volume 22, *Proceedings in Chambers*). See also R. JOHN PRITCHARD, *THE TOKYO WAR CRIMES TRIALS: INDEX AND GUIDE* (R. John Pritchard ed., with the assistance of Sonia Magbanua Zaide, New York & London 1981-87) (volumes 1-2, *Index to Names and Subjects*; volume 3, *Narrative Summary of the Proceedings*; volumes 4-5, *Miscellaneous Finding Aids*).

defence cases, the soundness or otherwise of rulings made by the Tribunal during the course of the Tokyo Trial, the second-round production of evidence-in-chief by the prosecution in a rebuttal stage, followed eventually by a defence surrebuttal, the ten-thousand pages of closing arguments found in the summations, the curious way in which evidence in mitigation had to be offered by the defence prior to the Court's verdict on the guilt or innocence of the accused, in short what I have called elsewhere the study of the trials *qua* trials: these matters tend to be ignored. And if that is true of this so-called "major" or "Class A" war crimes trial, then it is repeated in spades when it comes to "treating" the so-called "minor" or "Class B/C" war crimes trials.² The judgments of the International Tribunals, arguably the least satisfactory parts of all of the postwar proceedings, are read more frequently but seldom examined within the historical context of their trial processes. That is regrettable. For any lawyer, the issue of due process ought to be the main concern: it defines the strength or weakness of these proceedings. Due process stands apart from the substantive issues of the trial.

The historian, by contrast, must distinguish between two aspects of these proceedings: firstly, the integrity of the trial process; secondly, the substantive issues and the evidence which revolve around that process. The richness and variety of the International Military Tribunal for the Far East in its written and oral evidence has seldom been acknowledged or appreciated. Paradoxically, its complexity and size probably explain why even students of the law of armed conflict rarely take the time necessary to fathom the strengths or weaknesses of the Tokyo Trial. There are innumerable accounts of mind-boggling bestiality, incompetence, and malevolence. There also is abundant evidence of what I have called elsewhere "the majestic sweep of uncomprehending global forces" and of "frail personalities who prayed for vision and sought coherent change."

Compared to the great International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East was far more unwieldy, but dwarfed its German counterpart. It lasted three times longer than Nuremberg, involved at least 280 translators and 232 prosecution and defence lawyers. It absorbed one-quarter of the paper consumed by the Allied Occupation forces in Japan during the Trial: when paper ran out at one stage, B-29 air-

²Nothing better exemplifies the poverty of much of what passes for scholarship in this area than the fact that most students of the subject rely for their authority on the United Nations War Crimes Commission's series of *Law Reports*, a series notable for the suspension of its critical faculties, not least because the United Nations found it politically unacceptable to exercise any critical judgment in comparing the effectiveness or shortcomings or miscarriages of due process that may have been manifest in the differing ways in which individual national war crimes executives carried out their responsibilities.

craft flew from the United States laden with fresh supplies simply to meet the Tribunal's needs. The transcripts of the proceedings in open session and in chambers, taken together, comprise approximately 53,000 pages and, with the even longer full text of the trial exhibits and other documentation assembled for use during the trial, the English-language text represented by far the largest collection of material that exists in any European language on Japan and on Japanese relations with the outside world during the critical period 1927-45. My five-volume set of finding aids to the trial took me fourteen years to produce and fills some 3500 pages.

The Charter of the International Military Tribunal for the Far East was issued as an order by General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, on 19 January 1946. Three months later, it was amended on 26 April at which time India and the Philippines were added to the nine countries which were brought together under the original Charter. The indictment was lodged with the Court during a preliminary hearing on 9 April, two weeks after the indictment had been recast following the arrival of the Soviet prosecution team in Tokyo. These last-minute changes meant that the basic law of the Tribunal and its remit were transformed only days before the accused were arraigned: not an auspicious start to the proceedings.

The Court, then, was composed of eleven members, each representing one of the eleven nations involved in the prosecution.³ Unlike Nuremberg, there were no alternate members, although one American judge resigned and another was appointed to take his place during the course of the trial. The fact that a number of the powers who sat in judgment were minor powers, that some were non-Western, gives the Tokyo Trial a special authority which the Nuremberg Tribunal may be said to have lacked at that time.

In reflecting on Nuremberg, as James Crawford's recent article in *Current Legal Problems* reminds us,⁴ Georg Schwarzenberger suggested that the Nuremberg Tribunal was a *national* tribunal, instituted by the four-power government that was acknowledged as the supreme authority in Germany following extinction of the Third Reich. No such thing can be said about the Tokyo Trial. The legiti-

³The countries taking part in the prosecution and judgment were: Australia, Canada, New Zealand, Great Britain, India, the United States, the Philippines, China, the Soviet Union, France, and the Netherlands. The Tribunal also received evidence relating to Manchuria, the People's Republic of Mongolia, Thailand, Cambodia, Burma, and Portuguese possessions in East Asia, but for various political reasons those countries or territories were not formally associated with the proceedings.

⁴See James Crawford, *Prospects for an International Criminal Court*, in *CURRENT LEGAL PROBLEMS*, PART II, 306 (1995).

macy of the Tokyo Trial, unlike its Nuremberg counterpart, depended not only on the number and variety of the states that took part but more crucially—and sufficiently—on the consent of the Japanese state to submit itself to the jurisdiction of such a court. In Japan, as the two contending sides were well aware, the Japanese civil power was not extinguished with the end of hostilities. Japan, strictly speaking, did not surrender unconditionally, and, therefore, the legitimacy of the Tokyo Trial Charter depended to a large extent on Japanese adherence to a watered-down version of the Potsdam Declaration. The form of words of that Japanese acceptance protected the Japanese Emperor. After Potsdam, there is a real question as to whether any trial of the Emperor would not have been *ultra vires*. I do not mean to suggest, however, that it would have been beyond the capacity of the majority opinion of the Court to have convicted the Emperor had he been put on trial: the majority, in deference to the *spirit* of the law, had an elastic regard for the *rule* of law and so rarely had difficulty in confusing distinctions between black and white.

The Tokyo Trial Indictment to some extent echoed the Nuremberg Indictment on an altogether grander scale. The same ideas of conspiracy, the preparation, initiation and waging of aggressive wars, crimes against peace, responsibility for conventional war crimes, and crimes against humanity which were featured at the Nuremberg Major War Crimes Trial also appeared in the prosecution's case in Tokyo. There were fifty-five counts rather than four, however, and the organization of the case was, therefore, different, although its conceptual framework was similar. The focus on events began in 1927 because the prosecution argued that a forged document known as the "Tanaka Memorial" dating from that year—and taken as credible—was a convenient anchor for the prosecution's basic contention that a "Common Plan or Conspiracy" bound the accused together, right the way through to the end of the Asia and Pacific War in 1945. In any event, the breadth of the supposed conspiracy took in virtually every facet of Japan's domestic and foreign affairs over a period of nearly two decades, half again longer than the period covered by Nuremberg. The defence in Tokyo responded with its interpretation of events, taking in the entire history of Japan's twentieth century constitutional, social, political, and international history up to the end of the Second World War. Thus, as a direct result of the prosecution's emphasis on the doctrine of criminal conspiracy to wage aggressive war, evidence directly linking the individual defendants to what is a broadly historical record of domestic and world history becomes hard to follow. For most of the Trial, there was little attention paid to any indisputably criminal activity on the part of the individual accused.

However, the Tokyo Trial went much further than the Nuremberg Trial by seeking to establish that persons responsible for planning, preparing, initiating, and waging wars of aggression were guilty of murder because their illegal action led directly to the deaths of combatants and noncombatants. The Court judgment ultimately side stepped this interesting issue. It may re-emerge in time, but no concerted international efforts have been made by states to reaffirm this doctrine elsewhere. The Statutes of the International War Crimes Tribunals relating to the Yugoslav secessionist states and Rwanda, for instance, have nothing to say about crimes against peace: instead, both speak in a dialect of international humanitarian law which knows nothing of the concept of aggressive war, and more particularly of conspiracy to wage aggressive war, the singular concept on which the notion of Class A war crimes was distinguished from all of the so-called "minor" Class B/C war crimes trials in the period that followed the Second World War. In this respect, notwithstanding that their statutes refer for authority to the so-called "Nuremberg Principles" which effectively were established by the trial of the major German war criminals, reaffirmed by its counterpart in Tokyo, and endorsed by the well-known UN General Assembly Resolution 95 (I) adopted on 11 December 1946, one must acknowledge that the present-day International War Crimes Tribunals bury the main conventional foundations for the two great postwar International Tribunals, specifically the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes; the 1928 Pact of Paris (the Kellogg-Briand Pact); and the 1945 Potsdam Declaration (which is mainly concerned with rolling back Japanese conquests and only incidentally with the issue of war crimes).

The twenty-eight defendants charged at Tokyo were selected by an Executive Committee of the International Prosecution Section chaired by Sir Arthur Comyns Carr, Q.C.⁵ Far from being thugs, political upstarts, misfits or "hatchet men"—such as those tried at Nuremberg for their crimes in Hitlerite Germany—the defendants at Tokyo were by and large "establishment" figures who had achieved prominence in the leadership of Japan and had won the confidence and approbation of their fellow countrymen through their own administrative competence, intellectual excellence, or distin-

⁵The Court decided that one defendant, Ôkawa Shûmei, a rabble-raising revolutionary intellectual and terrorist, was suffering from tertiary syphilis and thus medically unfit to stand trial: miraculously, he recovered in a remarkably short time after the end of the proceedings. During the trial, two of the other defendants died of natural causes (a heart attack and pneumonia, respectively) brought about by the strain of their circumstances and the appallingly poor conditions in which they were kept by their American guards at Sugamo Prison. This left twenty-five remaining defendants to be tried and convicted.

guished military service. Generally speaking, the contrast with their German opposite numbers is striking. That would have made the task of the prosecutors in Tokyo more difficult except that the Japanese public, Western opinion, and a majority of the Court were happy to make the defendants sacrificial scapegoats for the sins and shortcomings of the Japanese nation. One is obliged yet again to note, however, that the two great International Military Tribunals share with their 1990s' counterparts a theory, that when the pattern of the drift towards war and of subsequent grave breaches of the law of armed conflict is examined, then in Minna Schrag's phrase "it had to be planned and those responsible were culpable."⁶ This, of course, brings us to the slippery slopes of a witch hunt conducted against supposed criminal conspiracies. It also immediately raises questions as to what *ought* to be the right kind of balance between prosecuting "some of the people" who did the actual dirty work and those who may have inspired or directed them. Here the Class B/C trials afford better guidance and a large body of precedent.

President Sir William Webb's opening statement was read on 3 May 1946, and directly after the reading of the indictment which took the remainder of that day and part of the following day, the Court began hearing the prosecution's case on 4 May. The prosecution presented its evidence in fifteen phases. Presentation of its evidence in chief closed on 24 January 1947. The prosecution's conspiracy case superficially has attractions. As an American assistant prosecutor at the trial said much later in summing up, "The Prosecution Case is a sturdy structure built upon a deep and firm and solid foundation of fact. To its destruction the Defence have brought as tools a microscope and a toothpick." What generally was at issue were not the "facts," but the different *constructions* which the two sides placed on those facts.

My view is that the defence interpretation at Tokyo was more trustworthy than that of the prosecution on many of the more hotly contested issues before the Court. One defence counsel rightly said that if the evidence relied on by the prosecution was to be regarded as *proof* of Japan's aggressive intent, then "the Ten Commandments would fit the purposes of the most immoral advocate of sin." Obvious truths took on political overtones which threw the Court into turmoil. Thus, when one defendant, a former Navy minister, pointed out that "In making a decision for war, an opponent is required; only upon the conduct and attitude of the opposite party can a decision for war be made," within the political context of the time his

⁶Minna Schrag, *The War Crimes Tribunal* [on the International Criminal Tribunal for Former Yugoslavia] (Dep't of War Studies, Kings College, London, 18 Oct. 1995) (Security Seminar Series).

remarks were regarded as inflammatory. The Tokyo Trial, like its Nuremberg counterpart, refused to admit evidence favourable to the defence that might appear to bring the wartime conduct of the Allied Powers into disrepute: the Court simply ruled that its jurisdiction was strictly confined to an examination of the conduct of the Japanese side. In terms of the Charter and the rules of procedure of the Tokyo Trial, the Court was *free* to adopt this view, yet, from time to time, the Court proclaimed itself entitled to consider *whatever* it wished and to rule *without* regard to any legal precedents that might or might not exist, subject *only* to its Charter and to confirmation of its proceedings by General Douglas MacArthur following the end of the proceedings. This parallels positions taken by some at the International War Crimes Tribunal at The Hague in our own time. At least one of the prosecutors at the Tribunal for Yugoslavia is adamant that previous war crimes courts, with the exception of Nuremberg, have little if any relevance to what is taking place today. I for one find such an outlook deeply disturbing,⁷ and I find it astonishing that any lawyer, particularly one accustomed to common law traditions, could take such a view which flies in the face of history. On the other hand, defence efforts to put *tu quoque* arguments and similar elements into its case at Tokyo flag relevant issues in the record even when these points or the evidence itself was ruled inadmissible: in these areas the historian reviewing these proceedings—and indeed the proceedings now underway—enjoys a wider latitude than the international lawyer.

Unlike at Nuremberg, where the accused were represented only by German counsel, at Tokyo each defendant had at least one Japanese defence counsel and one American associate defence counsel. At times, the interests of the individual defendants collided. Nevertheless, together they offered a collective defence which, for the most part, failed to convince the majority of the Tribunal but is worthy of close study and, in the main, earns our respect. In any event, following the denial of defence motions to dismiss the charges against the accused, the defence presentation of its case began on 3 February 1947 and continued until 12 January 1948. The defence did not attempt to match the structure imposed by the prosecution's case and instead offered its case in six divisions. Afterwards, the prosecution, and then the defence, presented further evidence in rebuttal until 10 February 1948, a year later, at which time the defence filed further motions to dismiss, which were rejected. The summations, evidence in mitigation, and a last word given to the prosecution, continued from 11 February to 16 April 1948 when the Court retired to consider its findings. By that time, the Court had met in 818 public sessions, had been presented with 416 witnesses

⁷*Id.*

in court, and had read unsubstantiated affidavits and depositions from some 779 others whose evidence the Court accepted for whatever probative value their words might have.

Much to the detriment of the defence, after the close of the prosecution's evidence in chief, the Court "moved the goal posts" in determining the standards by which it tested the admissibility of evidence put before it. The underlying difficulty was, of course, that one cannot directly cross-examine an unsubstantiated affidavit in the absence of its author. On the other hand, the exigencies of time and distance meant that it was quite impracticable to hold up proceedings or to commit the Tribunal or the United Nations to the expense and trouble of compelling witnesses to come to Tokyo from locations scattered around the globe. In any event, the deeds recounted in these papers had weakened many of these potential witnesses that it lay beyond their physical or mental capacity to travel to the Japanese capital in order to submit themselves to cross-examination. In the rebuttal and surrebuttal stages, the goal posts moved back and forth again, always to the disadvantage of the defence.

The 1781-page judgment took months to prepare. The President of the Tribunal, Sir William Webb of Australia, required nine days to read it in Court (from 4 to 12 November 1948). None of the defendants were acquitted of all charges. Seven were condemned to be hanged; sixteen were sentenced to life imprisonment, one to a term of twenty years, and another to seven years of imprisonment. The Tribunal found no "organizations" criminal (it had not been directed to consider the issue under the indictment), but, on the other hand, MacArthur's "occupationaires" were busy carrying out sweeping political purges of individuals and groups within Japan, blacklisting no fewer than 210,288 people, mostly based on their previous memberships in banned organizations.

Three separate concurring opinions were submitted by the President, Sir William Webb; by Delfin Jaranilla representing the Philippines, and by B.V.A. Röling of the Netherlands. Dissenting opinions were filed by Henri Bernard of France and by Radhabinod Pal of India. The five separate opinions were not read in Court but were declared to form part of the official record of the proceedings. As historical curiosities—but nothing more—they are interesting, and several of them are thought provoking.

The judgment and sentences of the Tribunal were confirmed by General MacArthur on 24 November, two days after a perfunctory meeting at his office with members of the Allied Control Commission for Japan, who acted as the local representatives of the nations of

the Far Eastern Commission set up by their governments. Six of those representatives made no recommendations for clemency. Australia, Canada, India, and the Netherlands were willing to see General MacArthur to make some reductions in sentences. However, he chose not to do so (the Far Eastern Commission's recommendations were advisory, not binding). The issue of clemency was thereafter to disturb Japanese relations with the Allied Powers until the late 1950s when a majority of the Allied Powers agreed to release the last of the convicted major war criminals from captivity.

There remains too little time for me to do more than mention a few legal principles that were reaffirmed at Tokyo. In neither the Tokyo nor the Nuremberg Trials was it sufficient for the defence to show that the acts of responsible officers or of government ministers and officials were protected as "acts of state." The twin principles of individual criminal responsibility and of universal jurisdiction in the prosecution and punishment of war criminals were firmly established. If Tokyo and Nuremberg are followed, then, within the sphere of international law, those two principles override any supposed protection—constitutional or otherwise—which national governments or courts may, from time to time, seek to give to individuals who are suspected or proved to be war criminals. Both Courts ruled decisively that international law is superior to national law; nothing that national courts or administrations might say could overturn that basic principle.

Nevertheless, the constitutional authorities in many states are remarkably reluctant to acknowledge, much less incorporate, the existence of laws or international precedents which transcend the sovereign law or rights of states, and most nations, while perversely claiming to act with due regard for international law, also tend to ignore transgressions committed by their own forces which are found unacceptable when committed by foreign belligerents. It is here that those who condemn "victor's justice" have facts, if not merit, on their side.

The questions of "superior orders" and "command responsibility" were addressed and, to a degree, refined both at Nuremberg and at Tokyo. In the Class B/C trials, however, these issues arose more frequently and attempts were made to deal with them on a more rational basis: it is there that one's attention ought to focus if one wishes to consider the matter at greater length.

One of the chief criticisms leveled against these Trials is that they represent "victor's justice." The complaint, so far as it goes, is justifiable: the real crime, the critics would say, is the "crime of defeat." As McCoubrey pointed out in a paper published several

years ago, the great risk of injustice that may flow from a war crimes suspect's trial and severe punishment at the hand of an enemy is not altogether different from the great exposure in a courts-martial, or worse, which may afflict a losing general tried for incompetence or malfeasance *by his own side*. Likewise, in most jurisdictions, the policeman's word outweighs that of the accused.

My feeling, as I already have indicated, is that we must distinguish between the Tribunal's findings of *fact* and the judgment's importance as a step forward in the evolution of a customary international law that holds individuals personally responsible for their offences against the law of armed conflict and gross abuses of international human rights. Scapegoatism is a common enough occurrence. One can recall the fate of the innocent American military and naval commanders at Pearl Harbor who were not merely victimized and disgraced once but in thrice-repeated military and congressional inquiries. Or more recently, one may recall the fate of leading members of Galtieri's regime in Argentina who would have been most unlikely to have been court-martialed for their sins if Britain had not won the Falklands Campaign in 1982. The "Lord Haigs" and "Air Marshal Harris" of this world escape justice only because their defeats were not acknowledged. At Tokyo, however, the International Military Tribunal for the Far East exercised a cathartic function of surpassing importance for the people of Japan and for their former enemies but also relegitimized the Allied occupation of Japan itself. In words by W.H. Auden, quoted approvingly by an American prosecutor attached to the International War Crimes Tribunal at The Hague, in an address which she recently gave and I attended at Kings College, London, she said "to those to whom evil is done, do evil in return."⁸ I am not certain that the phrase is altogether felicitous, nor the sentiments entirely blameless: it betrays a retributive spirit which may be singularly unfortunate in a part of the world where the perpetration of appalling crimes by all sides has been justified by historical antecedents, but I admit that Auden's words express an impulse which is understandable enough.

The initial intention of the Allied Powers was to hold further international military tribunals in both Germany and Japan once the first major war crimes trials concluded. The defendants selected for the first trials were not regarded as Germany's or Japan's only major war criminals, but as representative members of groups held responsible for the outbreak of the two great conflicts which we bundle together as the Second World War. A large number of persons were held in custody with the intention of bringing them to justice as Class A war criminals. The British and the Americans, however,

⁸*Id.*

soon lost their appetite for such proceedings (and their expense), and by December 1946, it was clear that no further major international war crimes trials would take place. Twelve Japanese Class A war crimes suspects remained in custody until 1949, however. One of them, Kishi, subsequently became Prime Minister of Japan. Two other war criminals convicted at the original International Military Tribunal for the Far East also returned to high office: Shigemitsu, a Foreign Minister in Tojo's so-called "Pearl Harbor Cabinet," returned to the same portfolio in the mid-1950s following his release from Sugamo Prison, and Tojo's Minister for Finance, Kaya, an economist by profession (and a very good one) was reinstated to such a degree after serving his sentence as a major war criminal that he became the Japanese Minister for Justice. Of these three men, I have no doubt that Kishi alone was truly an unpleasant character.

To a large extent, of course, the principles of Nuremberg and Tokyo have been codified in the laws of a significant number of nations (with notable omissions including the United States) although only fitfully observed. If the so-called "Nuremberg Principles" are to endure, they need to be reaffirmed by all states in the indoctrination of their forces and from time to time in proceedings brought before their military and domestic criminal courts.

THE NUREMBERG CONTEXT FROM THE EYES OF A PARTICIPANT*

PROFESSOR HENRY T. KING, JR.**

How did I get there?

It is indeed a pleasure to be here. There is a certain joy in reliving this experience which was very important to me personally as well as to mankind as a whole. You can rest assured that everything that is said here is an eyewitness account based on my experience as a prosecutor—first, in the trial of the major Nazi war criminals where I worked on the case against the German General Staff and High Command, and then in the subsequent proceedings. This account also is based on my interviews with Herman Goering, Albert Speer, Fritz Sauckel, Wilhelm Keitel, and others in the Nazi hierarchy. In the past few years I have spoken at length with Speer's daughter, Hilde Schramm, and Hitler's secretary, Frau Traudl Junge.

To give you some background in this exercise, let me take you back to my young manhood days when my father was a public official and ran for elective office. In the community where we lived, Meriden, Connecticut, father ran for almost every office there was. Mostly he was elected, but not always. Each Sunday my family discussed the issues of the day around the dinner table. One Sunday night in 1935 my father asked the question: "How do you stop wars?" Neither I nor my sister nor my mother had the answer. My father, having raised the question, proceeded to give us the answer: "The people don't want wars. It's their leaders. To prevent wars you have to punish their leaders." That summer I had an appendectomy

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**Case Western Reserve University School of Law, Graduate of Yale College and Yale Law School. Among his many accomplishments, Mr. King has served as United States Prosecutor at the Nuremberg Trials; General Counsel of the United States Foreign Economic Aid Program; Chairman of the Section on International Law and Practice of the American Bar Association; United States Director of the Canada-United States Law Institute; and member of the American Bar Association Task Force on War Crimes in Former Yugoslavia. Mr. King has published over fifty articles on international legal subjects, including international business transactions, international arbitration, and Nuremberg-related topics. He is currently writing a book on Albert Speer, one of the Nuremberg defendants.

and returned late to school, and, therefore, I still was at our summer home in Branford, Connecticut, about noon one September Saturday when a news report came over the air from Nuremberg, Germany, transmitting Adolf Hitler's speech at the Nazi Party rally at Nuremberg. The speech totally commanded my attention. I didn't understand the German, but as Hitler began to raise his voice, it was apparent that the audience and Hitler became one. I've never heard anything like that before or since.

I went through Yale Law School in two years instead of three. After graduation I began my career with the major New York law firm of Milbank, Tweed & Hope. It was a good experience and excellent training, but there seemed to be something lacking. My wife encouraged me to seek out a human experience that we could share together. I was not able to understand at just that moment what she meant, but I was soon to find out. Meanwhile, after two years at the large firm I decided to go with a smaller firm in an important capacity. From small fish, big puddle I was going to be a big, big fish in a small puddle and I wanted to share this victory with a very competitive classmate of mine from Yale Law School. So I invited him over to the house for dinner. My wife, Betty, cooked a delicious roast pork dinner, and I announced my surprise and waited for the applause. "Henry," my classmate said, "I hate to upstage you, but I'm joining the United States Prosecution staff at Nuremberg." I didn't go to bed that night; my wife wouldn't let me. I hit the trail for Washington, D.C., very early the following morning, and that afternoon I landed on the steps of the Pentagon and was interviewed for a position at Nuremberg.

Emphatically supported by my wife, I left no stone unturned until I was en route to Nuremberg. But Nuremberg involved considerable risk taking. There were those who told me not to go because I would lose my place in line for success in the traditional practice of law. I disregarded these naysayers and stuck with my decision. This proved to be the best decision I made in my whole life, because I became an individual at Nuremberg, and it gave my life a sense of meaning and purpose.

What it was like when I got there?

On my arrival at Bremerhaven in March 1946, I saw a Germany which had been devastated by modern weaponry. The effects of warfare were so destructive that I resolved to do my part to never let it happen again. Civilization as I had known it had disappeared. People lived in cellars and in the ruins of bombed-out buildings. Food was in short supply.

Many of the people were in rags. We took a train on a bitterly cold rainy March night from Bremerhaven to Nuremberg. We

arrived at the Nuremberg Bahnhof (railroad station) at 4:30 a.m. in a blinding rainstorm. We were billeted at the Grand Hotel right across from the bahnhof. This was where Adolf Hitler and his top subordinates had stayed and played a few years before. We arrived on a Friday and started work in the courthouse the following day, walking to the courthouse through the devastation wrought by the Allied bombing. As we did, we were faced with a continual reminder of the meaning of our mission.

At Nuremberg, I worked on the closing phase of the General Staff and High Command case. We sought to convict them as a group, but the court found that they were not a cohesive group, although what they did had the ring of criminality. As a result, we took steps to try them individually.

I was given three cases: (1) against Walter von Brauchitsch, Commander in Chief of the German Army; (2) against Heinz Guderian, the father of modern tank warfare and Chief of Staff of the German Army; and (3) against former Field Marshall Erhard Milch, who actually led the German air armada in the Battle of Britain.

I prepared the cases against all three, but von Brauchitsch was handed over to the British for trial and sentenced to a long prison term. Guderian was to be transferred to the Polish for trial. But after we were committed to the transfer, we got into a fight with the Poles; Guderian got as far as Berlin, and was stopped there and never turned over to the Poles—and he was subsequently released. He later participated in a Neo-Nazi movement in north central Germany.

The Milch case which I prepared started in December 1946 and was decided in April 1947. Milch was tried for his participation in the Nazi slave labor program and for his role in the human experiments program. He was found guilty on the slave labor counts and sentenced on April 16, 1947, to life imprisonment in Rebdorf Prison outside Munich, but in early 1951 his life sentence was reduced by John McCloy, High Commissioner for Germany, to fifteen years and he was released on parole after serving two-thirds of this sentence in mid-1955. As a matter of interest, Milch had appealed his sentence to the United States Supreme Court, but the Supreme Court refused in October 1947 to take jurisdiction, so his sentence remained intact until it was reduced.

I also worked on the Ministries case and the Justice case.

One of the unique features of the Nuremberg proceedings was that much of the proof of guilt came from the Nazis' own files. The

Germans were the greatest record keepers in history. For example, in preparing the slave labor phase of the case against Milch, we used the minutes of the Central Planning Board, of which he was a member. The board governed Germany's war economy and was to up its eyeballs in the exploitation of slave labor. Documentation for the human experiments case was amply provided by the Luftwaffe files—because the experiments were conducted for Luftwaffe use at Dachau concentration camp. The problem in preparing these cases was proving the "chain of knowledge." It was very hard to establish that, for example, Milch, as de facto head of the Luftwaffe, knew what was going on in the way of human experiments at Dachau. As regards slave labor, we did have some very incriminating documents, because the slave labor problem was frequently discussed at meetings of the Central Planning Board of which Milch was an important member. We convicted Milch to a considerable extent with the voluminous minutes from the Nazis' own files.

What was the law which governed in the handling of these cases? In the first case before the International Military Tribunal, it was the London Charter of August 8, 1945. In the subsequent proceedings, it was the *Control Council Law Number 10*. These two documents were basically similar with two exceptions which I shall mention.

Both defined crimes against peace as planning or waging of aggressive war. But *Control Council Law Number 10* defined "crimes against peace" to include invasions as well as wars—thus, providing a basis for charging the Austrian and Czechoslovak conquests as crimes against peace.

The second category of crimes was war crimes—violations of the laws and customs of war.

The third category of crimes was crimes against humanity—atrocities committed against civilian populations on racial, political, or religious grounds. The London Charter added the provision that "such crimes must be in execution of or in connection of any crime within the jurisdiction of the tribunal." Thus, these crimes under the London Charter could not stand on their own bottom. *Control Council Law Number 10* removed this provision; therefore, we could take cognizance of atrocities perpetrated prior to the outbreak of the war.

Back up for the changes in the case of war crimes and crimes against humanity came from The Hague and Geneva Conventions of 1907 and 1928, respectively, and in the case of crimes against peace, from the Kellogg-Briand Peace Pact of 1928 which outlawed war as an instrument of national policy and various treaties that Germany had signed covering the peaceful resolution of disputes (i.e., the Locarno Treaties).

Under the London Charter and *Control Council Law Number 10*, superior orders was not a defense, although it could be considered in mitigation if the moral choice was not possible. The head of state of a country was not exempted from trial by virtue of his position. The court dismissed the *ex post facto* defense, which was directed at the novelty of the Nuremberg trial, on the ground that *ex post facto* is a principle of justice and not a limitation on sovereignty, and Albert Speer told me after he was released from prison that he felt that the Nuremberg trial was just, and that to allow the *ex post facto* defense with these defendants would create an injustice. The fact of the matter was in several cases they had legal opinions telling them that what they were doing was wrong.

Witnesses—who were they? Some examples.

Rudolph Hoess, Commandant of Auschwitz, testified that he was responsible for the killing of 2,500,000 persons at Auschwitz and that an additional 500,000 people died from disease at Auschwitz.

Otto Ohlendorff, head of Einsatz Gruppe D, admitted directing the killing of 90,000 men, women, and children in Southern Russia. Ohlendorff was a lawyer.

Friedrich von Paulus, who surrendered German armies at Stalingrad in February, 1943, testified against his former military colleagues saying that they planned and initiated the aggressive war against the Soviet Union.

In the Milch case, Roland Ferrier and Paul le Fricc, who were French slave laborers, described the horrendous conditions under which slave laborers lived and worked. They were unbelievable, and their testimony could have been multiplied by others by the thousands.

The foregoing were just a few—plus the defendants themselves.

Who were the defendants—and what were they like?

I talked with several of the defendants in the first case—Speer-Goering-Sauckel-Keitel. Speer impressed me deeply because he said "I did it and I bear my share of responsibility." Milch refused to accept any responsibility. Goering still revered Hitler when I talked to him on September 28, 1946. Hess appeared to be "out of it," but in his closing statement said that he would support Hitler and Nazism again if the opportunity ever arose. Sauckel and Keitel were weak sisters—Sauckel was a whiner and Keitel an old toady to Hitler.

It may be of interest that four of the defendants were lawyers:

Kaltenbrunner, the head of the Gestapo; Frank, a former head of the Bavarian Bar Association and Governor General of Poland; Frick, the Minister of Interior; and Seyss Inquart, the Governor General of the Netherlands and former Nazi Chief in Austria. All four were found guilty and executed.

Who were the major defendants at Nuremberg? Well, it soon became apparent that there were two who were very, very important—super important. One was Herman Goering—because of his standing. He was the Reichs Marshall. A World War I hero, the successor to Baron von Richtoven, the Red Baron who had been head of the Richtoven squadron in World War I. Goering was a national hero, charismatic and sharp, razor sharp. Once he got off the dope and got rid of the painted toe nails and toga that he wore at times during the war, he was extremely acute, and the exchanges between Justice Robert Jackson, the Chief Prosecutor of Nuremberg, and Goering were intense and fascinating. Jackson had been a good appeals lawyer. His experience was not as a trial lawyer, and some felt that he had met his match in Goering. But these sharp exchanges should in no way diminish Jackson's greatness. I last interviewed Goering on September 28, 1946. I had a detailed affidavit that I wanted him to sign, implicating his Deputy, Erhard Milch, in certain war crimes. I tried to play him off against his deputy by suggesting that Goering say some incriminating things about Milch. But he went through the affidavit like greased lightning, crossed out the punch lines and then said, "Here's your affidavit. I give it back to you now and also the paper clip—they think I might do something to myself with this paper clip." Well, he didn't need the paper clip because he killed himself just before his anticipated execution with a cyanide capsule which some think an American soldier named Tex Wheelus helped him to obtain.

The other super important defendant was Albert Speer who was closer to Adolf Hitler than anyone else. Hitler had everybody figured out in terms of their weaknesses and instinctively played one person against another. Hitler encouraged the rivalries: between Speer and Goering; between Bormann and Speer; Goebbels against Himmler; and Goebbels against Ribbentrop. Nobody ever felt secure. It became clear to me very soon after my arrival in Nuremberg that the window into Hitler's soul was Albert Speer, Hitler's closest personal associate. Together they devised architectural dreams to create a new and greater Berlin as a world capital. Hitler was a frustrated architect himself whose grandiose plans could now be realized through Speer's expertise. Speer was responsible for choreographing some of Hitler's charismatic performances at party rallies. Speer conceived of the cathedral of ice which involved searchlights

playing against the dark sky. During these rallies, the legions of Nazism paraded for three or four hours to Nazi marching songs, then the solitary figure of Adolf Hitler appeared at the outer end of the vast Nuremberg stadium and the spotlights tracked him as he walked up to the platform to begin his mesmerizing speeches to the Nazi audience. This panoply was Speer's creation.

The only person that I could see who really understood and influenced Hitler was Albert Speer, so I spent a lot of time with him, during which Speer told me that Hitler was a mesmerizer, depriving people of their will. I didn't need to be told that. Remember, I had heard Hitler on the radio back in 1935. Speer said Hitler took people's wills away from them and twisted them to his own purposes.

Speer also told me that he frequently took the 7 p.m. Wednesday night flight from Tempelhoff to Hitler's retreat in the Obersalzberg. During the flight, Speer would rehearse his exchanges with Hitler. One example from the late stages of the war involved Bormann's plan to destroy all industrial installations in the occupied countries of western Europe, including the Philipsglowlampwerks at Einhoven in the Netherlands and the Renault works in Paris. Speer appealed to Hitler's ego by saying, "We're coming back, mein Fuhrer. You told us we would be. We're going to need those installations. You don't want to destroy them." So Hitler reversed his decision. Thus, Speer was a point of influence without parallel in Hitler's circle. Speer told me that Hitler had no friends, yet Hitler's secretary, Frau Traudl Junge, told me in December 1992 and November 1994 that Hitler regarded Speer as his friend. This was a special relationship unlike any other within Hitler's entourage.

What was the court like?

Chief Justice Geoffrey Lawrence, who also was Chief Justice of the United Kingdom, had a sense of fairness in running the proceedings. He was even handed. He kept the Russian prosecutors under control. Albert Speer expressed to me tremendous respect for Lawrence as a judge.

The proceedings were simultaneously translated into French, English, German, and Russian. Wolfe Frank was the chief translator from German to English. His translations were delicious—he had a great command of the English language. I used to go to the courtroom sometimes in the afternoon just to listen to him.

Where was the press?

The press were everywhere. They lived at Faber Schloss (castle). Every great newspaper person of the day was there. Radio coverage was very complete.

Who were the defense counsel?

German lawyers were defense counsel. They were the leaders of the German Bar. Some, such as Friedrich Bergold, who represented Erhard Milch, were very good. He also defended Martin Bormann in absentia in the first case. In Hitler's Germany, Bergold had defended Jehovah's Witnesses who had been persecuted. He was smart, hard working—very able—as was Hans Flachsner, Speer's counsel. The star defense counsel was Otto Kranzbuhler who represented Grand Admiral Karl Donitz, the head of the German Navy. He procured an affidavit from United States Admiral Nimitz which said that the United States had undertaken actions paralleling some of the allegedly criminal activities with which we were charging Donitz.

Overshadowing all of these individuals was Robert Jackson, who had the vision to create Nuremberg—he was the greatest appeals lawyer that the United States has ever produced. There would have been no Nuremberg without Robert Jackson. We on the staff worked on his closing statement and submitted drafts, but I later found that Jackson re-did it all himself. It was a masterpiece.

What was the social context?

Tension was high at the courthouse all day. At night we danced and relaxed at the Grand Hotel to Koenig and his great orchestra—"Violetta from la Traviata" and "Wien Wien nur du Alai" are pieces that I shall never forget because of their effect on me and the atmosphere which they recreate in my memory.

What did it all mean to me?

I came home with a sense of mission to never let war on that scale happen again. I became an individual at Nuremberg. I knew who I was and what I stood for. I developed for myself a blueprint of the world as it should be, and putting this into effect has been my goal for the rest of my life.

It has always been my sincere conviction that lawyers because of their training can, and must, play a critical role in establishing a rule of law in the world. I believe that we lawyers have to do what we can to create a better world for future generations; we have been given a privilege by society to practice law, and in return we need to tithe a bit for society.

What we need to focus on is institution building. We need to develop new institutions to fill conspicuous gaps in our international context. For example, an international criminal court is long overdue, and we need to see that it becomes a fixture on the world scene.

It is vital to put in place an international criminal court after which we can make improvements in it based on actual experience. As an alternative to endless debate over a totally comprehensive set of crimes, an international criminal court could be limited at the time of its establishment to jurisdiction over a restricted number of crimes on which there was general agreement. Then, as experience dictates, the court's jurisdiction could be expanded to other crimes. Or we could transform the current ad hoc war crimes Tribunal sitting at The Hague into a permanent Tribunal which would not be limited to jurisdiction over crimes in the former Yugoslavia and Rwanda.

We also must continue to wrestle with the problem of sovereignty. We need to face up to the fact that some limitations on sovereignty are necessary if we are to achieve a better and more secure world. Pristine sovereignty is indeed an illusion in our current world, bound together as it is so tightly today by trade and communication. There is no talk of international wars today in western Europe, the site of most of the wars in the nineteenth and twentieth centuries. This is because the European nations have under the European Community relinquished some sovereignty in order to maintain economic equilibrium and peace in their homelands.

And so we should learn from the lesson of today's Europe—that the price of peace is the transfer of some elements of national sovereignty to international institutions. These prerogatives can in turn provide the basis for international institutions to function. We cannot have it both ways. To achieve an enduring peace, we must give up sufficient sovereignty to enable international institutions to function and work on our behalf. As the largest and most important nation in the world, the United States must be willing to give international institutions sufficient power to work for us. Today, in the absence of a structure for an assured peace, we face—in a nutshell—international anarchy and endless future surprises such as the attack on Kuwait, the death and destruction which is now a fact in the former Yugoslavia, and a replay in other countries of the atrocities in Rwanda.

So we are at the point of decision and the answer seems self-evident. Relinquish some national sovereignty for international goals.

Nuremberg was the start of an odyssey for me, and I am still seeking the golden fleece. Perhaps my life and experience are analogous to the world at large as we all seek to apply the lessons of Nuremberg. We are all still seeking to respond to, and we have not yet answered, my father's challenge that hot May summer night in 1935 when he asked the question: "*How do we stop wars?*"

We aren't there yet, but fifty years after Nuremberg, trials have started at The Hague to investigate war crimes in the former Yugoslavia. The Nuremberg principles are the basis for these trials. Let us work to assure that an international criminal court will become a fixture on the international landscape, in its present form or in a changed form as future experience dictates.

Nuremberg was a historical landmark in other respects as well. It marked the start of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt throughout the world in the United Nations Genocide Convention, the United Nations Universal Bill of Rights, American Convention on Human Rights, and above all, the European Convention on Human Rights and Fundamental Freedoms.

Nuremberg principles governing the conduct of war are incorporated into all the field manuals of the major powers, and the Nuremberg principles have been supplemented as needed by the 1949 Geneva Conventions Governing the Treatment of Prisoners of War and the Protection of Civilians in Wartime.

Nuremberg was the first postmortem analysis of a dictatorship. Through Nuremberg we learned the intimate details of the levers of power in a functioning dictatorship, and how to avoid a recurrence in the future.

Nuremberg held individuals responsible for violations of international law and, correspondingly, that individuals had international human rights not dependent on nation state recognition. This was a giant leap forward in the evolution of a civilized world.

I am an idealist—I make no bones about it. I believe we can have a better world where men and women of all nations and races can live in peace and security and with dignity. I believe that we have to fight for this new world, and I am willing to do my part. In truth, I have devoted my life to it.

As Edwin Dickinson, that great internationalist, said some year ago: "History teaches that without ideals there can be no progress, only change; you may never touch with your own hands the stars that guide you, but by following them, you will reach your destiny."

We have to keep our eyes on the stars. Let us all tithe a bit for future humanity in an endeavor to create a more secure world in which the rule of law prevails. This has been my life-long dream, and I have devoted most of my waking hours to it.

There is an old Andalusian song which is sung in flamenco taverns which runs as follows:

“They say that a day
Has twenty-four hours.
If it had twenty-seven,
I would love you three hours more.”

On a personal level, I would phrase it this way:

“They say that a day
Has twenty-four hours.
If it had twenty-seven,
I would work for a more secure world
three hours more.”

ESTABLISHING AN INTERNATIONAL CRIMINAL COURT: HISTORICAL SURVEY*

M. CHERIF BASSIOUNI**

Since the end of World War I (1919), the world community has sought to establish a permanent international criminal court,¹ but

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**Professor of Law, President, International Human Rights Law Institute, DePaul University; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Former Chairman and Rapporteur on the Gathering and Analysis of the Facts, Commission of Experts Established pursuant to Security Council Resolution 780 (1992); Former Vice-Chairman of the United Nations Ad Hoc Committee for the Establishment of an International Criminal Court.

¹See generally M. CHERIF BASSIOUNI, AN INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 1-21 (1987); BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT (2 vols. 1980); M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 NOUVELLES ETUDES PENALES 1 (1993); M. Cherif Bassiouni, *Draft Statute International Tribunal*, 10 NOUVELLES ETUDES PENALES 1 (1993) (containing French and Spanish translations of the statute); M. Cherif Bassiouni & Christopher Blakesley, *The Need for an International Criminal Court in the New International World Order* 25 VAND. J. TRANSNAT'L 151 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); Michael Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135 (1991). See also PIERRE CARJEU, PROJET D'UNE JURIDICTION PENALES INTERNATIONALE (1953); BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT (2 vols. 1980); THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 34TH CONFERENCE, VIENNA, AUGUST 5-11, 1926 (1927) (adopting the *Projet d'une Cour Criminelle Internationales*); JULIUS STONE & ROBERT WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970); A. SOTTILE, THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT (1951); L'UNION INTERPARLEMENTAIRE, COMPTE RENDU DE LA XXVII CONFERENCE TENUE A ROME EN 1948 (1949); UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 443-50 (1949) [hereinafter HISTORY OF THE UNWCC] (discussing a project for the establishment of a convention for the creation of a United Nations Tribunal for War Crimes); *Constitution et Procedure d'un Tribunal Appropriate pour Juger de la Responsabilite des Auteurs des Crimes de Guerre, Presente a la Conference Preliminare de Paix par la Commission de Responsabilites des Auteurs de la Guerre et Sanctions*, III, LA PAIX DE VERSAILLES (1930); Fannie Klein & Daniel Wilkes, *United Nations Draft Statute for an International Criminal Court: An American Evaluation*, in INTERNATIONAL CRIMINAL LAW 526 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965); Louis Kos-Rabcewicz-Zubrowski, *The Creation of an International Criminal Court*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 519 (M. Cherif Bassiouni ed., 1975); Vespasian V. Pella, *The International Parliamentary Union, XXII Conference, held in Berne and Geneva, 1924*, in L'UNION INTERPARLEMENTAIRE COMPTE RENDU DE LA XXII CONFERENCE TENUE A BERNE ET A GENEVE EN 1924, PUBLIE PAR LE BUREAU INTERPARLIA-

MENTAIRE; COMPTE RENDU DE LA XXIII CONFERENCE TENUE A WASHINGTON ET A OTTAWA EN 1925 (1926); *Project of the International Association of Penal Law*, in ACTES DU PREMIER CONGRES INTERNATIONAL DE DROIT PENAL, BRUXELLES, 26-29 JUNE 1926 (1927); *Projet de Statut pour la Creation d'une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationales*, 5 REVUE INTERNATIONALE DE DROIT PENAL (1928) (presented by the International Association of Penal Law to the League of Nations in 1927); *La Creation d'une Jurisdiction Penale Internationale et la Cooperation Internationale en Matiere Penale*, 45 REVUE INTERNATIONALES DE DROIT PENALE 435 (1974); M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments*, 7 HOFSTRA L. REV. 523 (1961); Bienvenido C. Ambion, *Organization of a Court of International Criminal Jurisdiction*, 29 PHILIPPINE L.J. 345 (1954); American Bar Association Task Force on an International Criminal Court, New York State Bar Association Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court, 27 INT'L LAW. 270 (American Bar Association, 1993); M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court*, 15 NOVA L. REV. 353 (1991); Henri D. Bosly, *Actualite du Tribunal International Penal*, 1-2 ANNALES DE DROIT DE LOUVAIN 3 (1995); Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, 5 CRIM. L. FOR. 341 (1994); Joel Cavigchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. OF INT'L L. 223 (1992); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 86 AM. J. INT'L L. 140 (1994); James Crawford, *Prospects for an International Criminal Court*, 43 CURRENT LEGAL PROBLEMS 303 (1995); Jean Dautricourt, *The Concept of International Criminal Court Jurisdiction—Definition and Limitations of the Subject*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL COURT 636 (M.C. Bassiouni & V.P. Nanda eds., 1973); *Draft Statute for an International Commission of Criminal Inquiry and a Draft Statute for an International Criminal Court*, International Law Association, 60th Conference, Montreal, Aug. 29-Sept. 4, 1982, in REPORT OF THE 60TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (1983); *Draft Statute for an International Criminal Court*, Work Paper, Abidjan World Conference on World Peace Through Law, Aug. 26-31 (1973); *Draft Statute for an International Criminal Court*, Foundation for the Establishment of an International Criminal Court (Wingspread Conference, Sept. 1971); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PAGE INT'L L. REV. 121 (1994); Benjamin Ferencz, *An International Criminal Code and Court: Why They Stand and Where They're Going*, 30 COLUMBIA J. TRANSNAT'L L. 375 (1992); George Finch, *Draft Statute for an International Criminal Court*, 46 AM. J. INT'L L. 67 (1990); INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY (Mark W. Janis ed., 1992); Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POLY 419 (1995); L. Kos-Rabcewicz-Zubkowski, *La Creation d'une Cour Penal Internationale et L'Administration Internationale de la Justice*, CANADA Y.B. INTERNATIONAL LAW 253 (1977); *La Creation d'une Jurisdiction Penale Internationale et la Cooperation Internationale en Matiere Penale*, 45 REVUE INTERNATIONALE DE DROIT PENALE 435 (1974); James A. Leach, *The Case for Establishing an International Criminal Court*, Occasional Paper No. 1, Parliamentarians for Global Action (1992); Bryan F. MacPherson, *An International Criminal Court: Applying World Law to Individuals*, The Center for U.N. Reform Education (1992); Farhad Malekian, *International Criminal Law: The Legal and Critical Analyses of International Crimes* (1991); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L.; Timothy L.H. McCormack & Gerry J. Serifen, *A New International Criminal Law Program*, 62 NETHERLANDS INT'L L. REV. 177 (1995); Richard I. Miller, *Far beyond Nuremberg: Steps Towards an International Criminal Jurisdiction*, 61 KY. L.J. 925 (1973); Vespesian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Vespesian V. Pella, *Plan d'un Code Repressif Mondial*, 6 REVUE INTERNATIONALE DE DROIT PENAL 1948 (1935); Anual Rama-Montaldo, *Acerca de Algunos Conceptos Basicos Relativos al Derecho*

that goal is yet to be realized, although progress toward it is evident.²

In the course of the last fifty years, as the world's major political powers saw fit, four ad hoc tribunals and five investigatory commissions have been established. The four tribunals are as follows: The International Military Tribunal sitting at Nuremberg,³ the International Military Tribunal for the Far East sitting in Tokyo,⁴ the International Criminal Tribunal for the Former Yugoslavia at

Penal International y a una Jurisdiccion Penal Internacional, FUNDACION DE CULTURA UNIVERSITARIA 865; Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994); Brigitte Stern, *La Cour Criminelle Internationale dans le Projet de la Commission du Droit International*, in INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADRE OF INTERNATIONAL LAW 789-60 (1995); Giuliano Vassalli, LA GIUSTIZIA INTERNAZIONALE (Penale, Guiffre ed., 1995); Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); Yeun-Li Liang, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT'L L. 73 (1952); *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR 50TH Sess. Supp. No. 22 U.N. Doc. A/50/22.

²For the ILC's most recent draft of the statute for a permanent international criminal court, see *Report of the International Law Commission*, 46th Sess., 2 May-22 July 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994). The General Assembly decided to consider the draft statute and the establishment of a permanent international criminal court at its 50th session; see U.N. GAOR 6th Comm., 49th Sess., U.N. Doc. A/C.6/49/L.24 (23 Nov. 1994). On the basis of General Assembly Resolution 49/63 (1994), the General Assembly established an Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice during the 49th and 50th sessions in April through August 1995. At the 50th session, the General Assembly reviewed the report of the Ad Hoc Committee and in resolution 50 to 46 established a preparatory committee to meet twice in 1996 (March and August) to draft a statute for an International Criminal Court. The statute is to be present to the 51st General Assembly in 1996, and thereafter, in 1997, a plenipotentiary conference is to be called; Italy already has offered to host the conference.

³See ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 22 (1984); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 16 (1992); John F. Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 61 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 18-32 (1992); Roger Clark, *Crimes against Humanity at Nuremberg*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990); JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* (1994); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977); M. Cherif Bassiouni, *Das Vermächtnis von Nürnberg: Eine historische Bewertung fünfzig Jahre danach in STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN* (Gerd Hankel & Gerhard Stuby eds., 1995) [hereinafter *Nuremberg Fifty Years Later*].

⁴See *Activities of the Far Eastern Commission, Report by the Secretary General, February 26-July 10, 1947* 18 DEPT. ST. BULL. 804-06 (1947) [hereinafter *Far Eastern Commission Report*]; HOWARD S. LEVIE, *TERRORISM—THE LAW OF WAR CRIMES RESPONSIBILITY* (1982); RICHARD LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949); R. John Pritchard, *The British War Crimes Trial in the Far East 1946-1948*, at 1-2 (manuscript on file with the author).

The Hague,⁵ and the International Tribunal for Rwanda at Arusha.⁶ In addition to the tribunals, there have been five investigatory commissions: (1) the 1919 Commission of the Responsibilities of the Authors of War and on Enforcement of Penalties investigating crimes occurring during World War I,⁷ (2) the 1943 United Nations War Crime Commission, which investigated German war crimes during World War II,⁸ (3) the 1946 Far Eastern Commission,⁹ which investigated Japanese war crimes during World War II, (4) the Commission of Experts established pursuant to Security Council Resolution 780 to investigate violations of international humanitarian law in the former Yugoslavia,¹⁰ and (5) the Independent Commission of Experts Established in accordance with Security Council Resolution 935, the Rwandan Commission, to investigate violations committed during the Rwandan civil war.¹¹ It is relevant

⁵See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, Annex U.N. Doc. S/1994/6745 (1994); Annexes to the Final Report, U.N. Doc. S/1994/674/Add.2 (1994); S.C. Res. 608, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/608 (1993); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (3 May 1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

⁶See S.C. Res. 608, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/608 (1993); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (3 May 1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

⁷CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR 1 (1919), reprinted in 14 AM. J. INT'L L. 95 (1920); Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 AM. J. INT'L L. 127 (1989); *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II (4 Apr. 1919), reprinted in 14 AM. J. INT'L L. 127 (1920); *Reservations by the Japanese Delegation*, Annex III (4 Apr. 1919), reprinted in 14 AM. J. INT'L L. 151 (1920); Treaty of Peace with Turkey, signed at Lausanne, July 24, 1923 (Treaty of Lausanne), reprinted in 18 AM. J. INT'L L. 1 (Supp. 1924); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 200 (1992).

⁸The Inter-Allied Declaration, signed at St. James Palace on 13 January 1942, reprinted in PUNISHMENT FOR WAR CRIMES: INTER-ALLIED DECLARATION SIGNED AT ST. JAMES PALACE, LONDON, ON 13 JANUARY 1942, AND RELATIVE DOCUMENTS (United Nations Office, New York, undated); UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAW OF WAR 443-450 (1948); ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 22 (1984).

⁹*Far Eastern Commission Report*, supra note 4, at 804-06.

¹⁰See *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, U.N. Doc. S/1994/674 (27 May 1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784 (1994).

¹¹S.C. Res. 935 U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/RES/935 (1994); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994). See *Preliminary Report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1125 (1994); *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994).

to point out that there has been one nongovernmental investigatory commission: The Carnegie Endowment for International Peace established a commission to investigate alleged atrocities committed against civilians and prisoners of war during the First Balkan War of 1912 and the Second Balkan War of 1913.¹²

After World War I, the Treaty of Versailles had provided for ad hoc tribunals,¹³ but none were established. Article 227 of that treaty provided for the prosecution of Kaiser Wilhelm II for "a supreme offense against international morality and the sanctity of treaties."¹⁴ Additionally, Articles 228 and 229 provided for tribunals to prosecute "persons accused of having committed acts in violation of the laws and customs of war."¹⁵ However, none of these international tribunals came into existence. Instead, with the consent of the Allies, who had included these provisions in the Treaty of Versailles, token national prosecutions took place in Germany.¹⁶ This compromise demonstrates that the political will of the world's major powers is paramount over all else.

Throughout the seventy-five years discussed in this article, the world's major powers, selective as they have been in establishing ad hoc bodies to investigate certain international crimes, nevertheless progressively have recognized the aspirations of world public opinion for the establishment of an impartial and fair system of international criminal justice. But in the course of the historical evolution that took place, only the concept of individual criminal responsibility was recognized,¹⁷ while that of state criminal responsibility has been rejected.¹⁸

In the aftermath of World War II, the International Military Tribunal sitting at Nuremberg (IMT) (1945),¹⁹ and the International

¹²See *Report of the International Commission on the Causes and Conduct of the Balkan Wars*, reprinted in *THE OTHER BALKAN WARS* (Carnegie Endowment for International Peace, 1993).

¹³Treaty of Versailles, 28 June 1919, art. 227, 2 Bevens 43, 136 [hereinafter Treaty of Versailles].

¹⁴*Id.*

¹⁵*Id.* arts. 228, 229, at 137.

¹⁶CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* 98-112 (1921).

¹⁷S. Prakash Sinha, *The Position of the Individual in an International Criminal Law in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW* 122-34 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

¹⁸Fritz Munch, *Criminal Responsibility of States*, in *INTERNATIONAL CRIMINAL LAW* 123-29 (M. Cherif Bassiouni ed., 1986); FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* (1985).

¹⁹Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 Aug. 1945, 82 U.N.T.S. 279, 59 Stat. 1544, 3 Bevens 1238 [hereinafter London Agreement]; Annex to Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), London, 8 Aug. 1945, 82 U.N.T.S. 279, 59

Military Tribunal for the Far East sitting in Tokyo (IMTFE) (1946),²⁰ were established to prosecute individuals for "crimes against peace," "war crimes," and "crimes against humanity." In occupied Germany, the four major Allies, pursuant to *Control Council Law Number 10*,²¹ prosecuted, in their respective zones of occupation, the same crimes as did the IMT,²² while some of the Allies in the Pacific Theater prosecuted Japanese for "war crimes" under their respective military laws.²³ The two postwar experiences with international prosecutions started with the establishment of international commissions, though, as described below, in neither case was their work particularly relevant to the subsequent prosecutions.

Stat. 1544, 3 Bevans 1289 [hereinafter London Charter]. For the Proceedings Before the IMT, see International Military Tribunal sitting at Nuremberg, reported in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949) (commonly known as the "Blue Series"). For the Subsequent Proceedings of the IMT see TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) (commonly known as the "Green Series").

²⁰International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 Jan. 1946; Charter dated 19 January 1946, T.I.A.S. 1589, 4 Bevans 20 [hereinafter IMTFE Proclamation]; Amended Charter dated 26 April 1946, 4 Bevans 27 [hereinafter IMTFE Amended Charter]. For an analysis of the Tokyo proceedings, see PHILIP R. PICCIGALLOS, THE JAPANESE ON TRIAL (1979); ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987); RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIALS (1971); BERNARD V.A. RÖLING, THE TOKYO TRIALS AND BEYOND: REFLECTIONS OF A PEACEMONGER (Antonio Cassese ed., 1993); THE TOKYO JUDGMENT (Bernard V.A. Röling & Fritz Reüter eds., 1977); THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (22 vols., R. John Pritchard & Sonia M. Zaide eds., 1981); THE TOKYO WAR CRIMES TRIALS: THE COMPREHENSIVE INDEX & GUIDE TO THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard ed., 1981-87); THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM (C. Hosoya et al. eds., 1986). See generally N.E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 259-82 (1986) (providing a comprehensive bibliographic listing of works on the IMT and IMTFE). The constitutionality of the Tribunal was challenged before the United States Supreme Court and upheld in *Hirota v. MacArthur*, 388 U.S. 197 (1948).

²¹Allied Control Council Law Number 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945. Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946, reprinted in BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE 488 (1960) [hereinafter CCL 10]. For the United States prosecution, see FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955 (1989).

²²See generally JEAN PIERRE MAUNOIR, LA REPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANÇAIS ET ALLIÉS (1956); HENRI MEYROWITZ, LA REPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L'HUMANITÉ ET DE L'APPARTENANCE A UNE ORGANISATION CRIMINELLE (1960); Remigijusz Bierzanek, *War Crimes: History and Definition*, in 3 INTERNATIONAL CRIMINAL LAW 29 (M. Cherif Bassiouni, ed., 3 vols., 1987) [hereinafter ICL]; *Post-Charter Legal Developments in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 470-527 (1992) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY].*

²³See R. John Pritchard, *War Crimes Trials in the Far East* in CAMBRIDGE ENCYCLOPEDIA OF JAPAN 107 (Richard Bowring & Peter Kornick eds., 1993).

The post-World War I experience showed the extent to which international justice can be compromised for the sake of political expedience. Conversely, the post-World War II experience revealed how effective international justice could be when there is political will to support it and the necessary resources to render it effective. Whether fully realized or not, these sets of experiences were one sided, as they imposed "victors" justice over the defeated;²⁴ however, they were not unjust only because they were one sided. Among all historic precedents, the IMT, whatever its shortcomings may have been, stands as the epitome of international justice and fairness.²⁵

Subsequent to World War II, national prosecutions occurred in the Federal Republic of Germany²⁶ and in other Allied countries, such as Canada,²⁷ France,²⁸ and Israel.²⁹ Australia³⁰ and the United Kingdom³¹ passed national legislation enabling prosecution, similar to the corresponding Canadian law,³² but so far have not brought anyone to trial.

²⁴During World War II, the German *Wehrmacht* had organized a special office to record violations of international law committed against the German peoples. But, the Allies disregarded these claims. See ALFRED M. DE ZAYAS, *THE WEHRMACHT BUREAU* (1989). The IMTPE prosecutions and some of the Far East Allies prosecutions—like the Yamashita trial in the Philippines—revealed procedural infirmities and a substantive lack of fairness. See *In re Yamashita* 327 U.S. 1, 67-125 (Rutledge & Murphy J.J., dissenting); see also REEL, *supra* note 4.

²⁵See Murphy, *supra* note 3.

²⁶Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 *COLO. L. REV.* 449 (1989).

²⁷See *Regina v. Finta*, 112 D.L.R. 4th 13 (1994); *Regina v. Finta*, 61 D.L.R. 4th 85 (1989); *Regina v. Finta*, 50 C.C.C. 3d. 236. See generally Leslie C. Green, *Canadian Law and the Punishment of War Crimes*, 28 *CHITTY'S LAW J.* 249 (1980); Leslie C. Green, *Canadian Law, War Crimes and Crimes against Humanity*, 59 *BRIT. Y.B. INT'L L.* 217 (1988); Michele Jacquart, *La Notion de Crime Contre l'Humanite en Droit International Contemporain et en Droit Canadien*, 21 *REVUE GENERALE DE DROIT* 607 (1990).

²⁸See *Matter of Barbie*, *Gaz. Pal. Jur.* 710 (Cass. Crim. Oct. 6, 1983) (Fr.). See generally Angevin, *Enseignements de l'Affaire Barbie en Matiere de Crimes Contre l'Humanite*, *LA SEMAIRE JURIDIQUE*, 62e annee, No. 5, 14 Dec. 1988, 2149; Doman, *supra* note 17; Le Guehec, *Affaire Barbie*, *GAZETTE DU PALAIS*, No. 127-28, 106e annee, Mercredi 7-Jeudi 8 Mai, 1985; Poncelier, *L'Humanite, une Victime Peu Presentable*, 1991, No. 34, 1987 *REVUE DES SCIENCES CRIMINELLES* 275; Leila Sadat Waxler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 *COLUM. J. TRANSNAT'L L.* 289 (1994).

²⁹See *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Dist Ct. 1962) (Isr.); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277 (Sup. Ct. 1962) (Isr.) (dismissing appeal). See generally GIDEON HAUSNER, *JUSTICE IN JERUSALEM* (1966); PETER PAPADATOS, *LE PROCES D'EICHMANN* (1964); Leslie C. Green, *Legal Issues of the Eichmann Trial*, 37 *TUL. L. REV.* 641 (1962).

³⁰War Crimes Amendment Act 1988, No. 3 (1989) (Austl.).

³¹War Crimes Act 1991, ch. 13 (U.K.); see War Crimes: Report of the War Crimes Inquiry (Sir Thomas Hetherington & William Chalmers, members 1988).

³²Criminal Code, R.S.C. 1927, ch. c 36, s. 7 3.71-3.77 (Can.); see *supra* note 24.

The International Military Tribunal at Nuremberg, the International Military Tribunal in the Far East, and subsequent prosecutions by the Allies were significant precedents in the efforts to establish an effective system of international criminal justice.³³ These historical precedents have developed new legal norms and standards of responsibility which have advanced the international rule of law, for example the elimination of the defense of obedience to superior orders and the accountability of heads of state.³⁴ With the passage of time, these precedents, notwithstanding their shortcomings, acquired more legitimacy and precedential value. Time and the unfulfilled quest for international criminal justice have put a favorable gloss over infirmities and flaws of these proceedings. The symbolic significance which emerged from these experiences is their moral legacy, now heralded by those who seek a permanent, effective, and politically uncompromised system of international criminal justice.³⁵

The conflict in the former Yugoslavia provided another opportunity for advancing international criminal justice. The United Nations Security Council saw fit to establish an ad hoc international criminal tribunal to prosecute those responsible for violations of international humanitarian law and the laws and customs of war.³⁶

³³See generally M. Cherif Bassiouni, *Individual Criminal Responsibility and International Prosecutions in Crimes Against Humanity in INTERNATIONAL CRIMINAL LAW* 192-234 (1992).

³⁴M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 368-96 (1992); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, (1973); LESLIE GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 15-242 (1978); E. MULLER-RAPPARD, *L'ORDRE SUPERIEUR MILITAIRE ET LA RESPONSABILITE DU SUBORDONNE* 185-251 (1965); YORAM DINSTEIN, *THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS,"* in *INTERNATIONAL LAW* 5-20 (1965); N. KEIZLER, *MILITARY OBEDIENCE* (1978).

³⁵Matthew Lippman, *Nuremberg: Forty-Five Years Later*, 7 CONN. J. INT'L L. 1 (1991); M. Cherif Bassiouni, *Nuremberg Forty Years After: An Introduction*, 15 CASE W. RES. J. INT'L L. 261 (1986); *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, in *PROCEEDINGS OF THE EIGHTIETH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* (Apr. 1986) (containing comments by Telford Taylor, Jordan Paust, Richard Falk, and M. Cherif Bassiouni); Hans Kelsen, *Will the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153 (1947); *Nuremberg Fifty Years Later*, *supra* note 3.

³⁶The Security Council decided to establish an international criminal tribunal to prosecute those responsible for violations of international humanitarian law in the former Yugoslavia in Resolution 808, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (22 Feb. 1993) (hereinafter Resolution 808). Pursuant to Security Council Resolution 808, the Secretary-General prepared a report containing comments on the articles of the statute of the tribunal. The tribunal's statute appears in an annex to the Secretary-General's report, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (3 May 1993) (hereinafter Report of the Secretary-General). The Security Council adopted the Secretary-General's draft of the statute without change in resolution 827. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (25 May 1993).

In so doing, the Security Council added another important precedent to the history of international criminal law. Like prior experiences, it started with the establishment of an investigatory commission followed by the establishment of a tribunal. Unlike prior experiences, however, it sought to create a continuum between the investigatory and prosecutorial aspects of the pursuit of justice.³⁷ Then, on the strength of this experience, the Security Council repeated the process in connection with the civil war in Rwanda.³⁸

After the decision to create the Rwanda Tribunal, which took much effort to establish, the Security Council reached a point of "tribunal fatigue."³⁹ Indeed, the logistics of setting up the ad hoc tribunals for the former Yugoslavia and for Rwanda have strained the capabilities and resources of the United Nations and consumed the Security Council's time. This stage of weariness with ad hoc tribunals coincided with renewed efforts for establishing a permanent international criminal court, thus enhancing its prospects.

The efforts to establish such a body started with the League of Nations and was continued by the United Nations.⁴⁰ The League of Nations efforts were linked to a permanent international criminal

³⁷S.C. Res. 827, U.N. SCOR, 48th Sess, 3217th mtg., U.N. Doc. S/RES/827 para. 10 (25 May 1993); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 1 (1994); M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 25 SECURITY DIALOGUE 411 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 68 AM. J. INT'L L. 784 (1994).

³⁸In July 1994, the Security Council passed Resolution 935, using the precedent of the former Yugoslavia as a model, to establish a commission of experts to investigate violations committed during the Rwandan civil war. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/RES/935 (1994). The Rwandan commission lasted only four months which was not long enough for it to effectively perform its task. On 1 October 1994, the Rwandan commission submitted its preliminary report to the Secretary-General, and submitted a final report on 9 December 1994. See *Preliminary Report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1125 (1994); *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994). The statute and judicial mechanism for the Rwandan Tribunal were adopted in Security Council resolution 955. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994). Even though the statutes for the Rwandan Tribunal and the Tribunal for the former Yugoslavia differ, the tribunals share a common Prosecutor and a common Appellate chamber. This is a curious formula for separate ad hoc tribunals, but perhaps demonstrating the need for a permanent body to administer international criminal justice. The seat of the Rwandan tribunal is to be in Arusha, Tanzania. A building to house the tribunal is currently under construction.

³⁹A term aptly coined by David Scheffer, Senior Counsel and Advisor to the United States Permanent Representative to the United Nations, in a speech at the 1994 International Law Weekend at the New York City Association of the Bar.

⁴⁰For the history of this endeavor see *supra* note 1.

court whose jurisdiction was limited only to enforcement of the 1937 Terrorism Convention.⁴¹ The United Nations efforts were more encompassing. These efforts can be traced along two separate tracks: codification of international crimes⁴² and the elaboration of a draft statute for the establishment of an international court.⁴³ Curiously, the two tracks have evolved separately, though logic would have required that they be integrated. But the history of these two tracks reveals the lack of political will by the world's major powers to join them. This is evidenced in the separate courses that the various United Nations institutions have taken.

In 1947, the General Assembly mandated the International Law Commission (ILC) to codify "Offenses Against the Peace and Security of Mankind" and to draft a statute for an international criminal court.⁴⁴ In response to that mandate, the ILC completed in 1954 a "Draft Code of Offenses Against the Peace and Security of

⁴¹Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 Nov. 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547(I).M.364(I).1937.v (1938) (never entered into force).

⁴²G.A. Res. 174(II), U.N. Doc. A/519, at 105-10 (1946). For a history of these efforts, see M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 IS. L. REV. 1-21 (1993), reprinted in COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, 11 NOUVELLES ETUDES PENALES 1 (1993); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980); FARHAD MALEKIAN, INTERNATIONAL CRIMINAL LAW: THE LEGAL AND CRITICAL ANALYSIS OF INTERNATIONAL CRIMES (2 vols. 1991); Daniel Derby, *A Framework for International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW 33 (M. Cherif Bassiouni ed., 1986); Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. INT'L L. 9 (1981); Robert Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983); Robert Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction*, 17 CASE W. RES. J. INT'L L. 79 (1985); Leslie C. Green, *An International Criminal Code—Now?*, 3 DALHOUSIE L.J. 560 (1976); Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983); Leslie C. Green, *New Trends in International Criminal Law*, 11 ISR. Y.B. INT'L L. 9 (1981); Gerhard O.W. Mueller & Douglas J. Besharov, *Evolution and Enforcement of International Criminal Law*, in ICL, *supra* note 13, at 59; Georg Schwarzenberger, *The Problem of International Criminal Law*, 3 CURRENT LEG. PROBS. 263 (1950), reprinted in INTERNATIONAL CRIMINAL LAW 3-36 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965); Quincy Wright, *The Scope of International Criminal Law*, 15 VA. J. INT'L L. 562 (1975). See also 52 REVUE INTERNATIONALE DE DROIT PENAL (1984), symposium issue on Draft International Criminal Court: Pierre Bouzat, *Introduction*, 331; Hans-Heinrich Jescheck, *Development, Present State and Future Prospects of International Law*, 377; John Decker, *A Critique of the Draft International Criminal Code*, 365; Valeri Shupilov, *General Comments on the Draft International Criminal Code*, 373; Reynald Ottenhof, *Considerations sur la Forme le Style, et la Methode d'Elaboration du Projet de Code Penal International*, 385; Robert Friedlander, *Some Observations Relating to the Draft International Criminal Code Project*, 393; Dietrich Oehler, *Perspectives on the Contents of the Special Part of the Draft International Criminal Code*, 407.

⁴³See *supra* note 1.

⁴⁴U.N.G.A. Res. 177(II), U.N. Doc. A/CN.4/4, at 9 (1947).

Mankind."⁴⁵ But, the 1954 Draft Code was tabled until such a time when "aggression" could be defined.⁴⁶ The reason for this incongruent situation was that the General Assembly in 1950 had removed "aggression" from the ILC's mandate to elaborate a draft code of offenses, and gave that task to a special committee of the General Assembly. That committee was remanded in 1952, and then again in 1954. It took twenty years for that committee to define "aggression."⁴⁷ Between 1970 and 1978, the General Assembly did not take up the subject of the draft code of offenses, which it had twice tabled in 1954 and 1957. But in 1978, new efforts forced the issue and the General Assembly placed the matter in its agenda. However, it was only two years later that it mandated the ILC to work on the subject again. The ILC started *ab initio*, and it took until 1991 to produce a final new text,⁴⁸ which was, however, amended in 1995.⁴⁹

The 1991 Draft Code redefined aggression, but also included many new crimes whose definitions were tenuous and vague. Consequently, the member-states' comments on the text revealed little support for it and the General Assembly has taken no action to date.⁵⁰ As a result, in 1995 the ILC revised the 1991 Draft Code and produced a new text with fewer crimes,⁵¹ though still unsatisfactory from the perspective of the required principles of legality. During the

⁴⁵*Draft Code of Offenses Against the Peace and Security of Mankind*, 9 U.N. GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), reprinted in 45 AM. J. INT'L L. 123 (1954) (Supp.) [hereinafter 1954 Draft Code].

⁴⁶See U.N.G.A. Res. 898 (IX) (14 Dec. 1954) (tabling the Draft Code of Offenses until aggression was defined); U.N.G.A. Res. 1187 (XII) (11 Dec. 1957) (tabling the Draft Code of Offenses for a second time).

⁴⁷There were four committees on the Question of Defining Aggression. The last committee finished its work in 1974, finally defining aggression after twenty years of debating the issue. The General Assembly adopted the definition by a consensus resolution. U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (1974). For a history of the committee on aggression's work, see BENJAMIN FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (1975).

⁴⁸*Draft Code of Crime Against the Peace and Security of Mankind*, Report of the International Law Commission, 43d Sess., 29 April-19 July 1991, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991) [hereinafter 1991 Draft Code]. For annual reports between 1950-54 and 1978-91 on the question of a Draft Code of Offenses Against the Peace and Security of Mankind, see the *Yearbook of the ILC*.

⁴⁹*Report of the International Law Commission on the Work of its Forty-Seventh Session 2 May-21 July 1995*, 10 U.N. GAOR Supp., U.N. Doc. A/50/10 (1995).

⁵⁰International Law Commission, *Report to the General Assembly*, 45th Sess., 3 May-23 July 1993, U.N. Doc. A/CN.4/448 (1993); M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 ISR. L. REV. 247 (1993); *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against Peace and Security of Mankind*, 11 NOUVELLES ETUDES PENALES 1 (M. Cherif Bassiouni ed., 1993); Leo Gross, *Some Observations on the Draft Code of Offenses Against the Peace and Security of Mankind*, 13 ISR. Y.B. HUM. RTS. 9 (1983); Sharon Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind*, in 1 ICL, *supra* note 13, at 109.

⁵¹*Report of the International Law Commission on the Work of its Forty-Seventh Session 2 May-21 July 1995*, 10 U.N. GAOR Supp., U.N. Doc. A/50/10 27-143 (1995).

period in which the General Assembly had mandated the ILC to prepare the draft code of offenses, later renamed the Draft Code of Crimes, it also gave a mandate to another special committee to prepare a draft statute for an international criminal court. That committee produced a text in 1951⁵² which was revised in 1953.⁵³ The text, however, was tabled because the draft code of offenses was not completed. As stated previously, it was completed in 1954, but had been tabled because the definition of aggression, which had been entrusted to another body, had not been completed. Thus, these different bodies worked independently at different venues (Geneva and New York), producing different texts at different times. It was therefore easy for the General Assembly to table each text successively because the others were not then ready. That lack of synchronization was not entirely fortuitous: it was the result of a lack of a political will to delay the establishment of an international criminal court. That was a time when the world was sharply divided and frequently at risk of war. Due to the radical political changes since 1989, these political impediments have disappeared. However, as discussed below, other impediments surely exist.

Since World War II, only two international conventions refer to an international criminal jurisdiction: Article 6 of the 1948 Genocide Convention⁵⁴ and Article 5 of the 1972 Apartheid Convention.⁵⁵ The former, however, refers to jurisdiction only over genocide by an eventual international criminal court, leaving primary jurisdiction to the state having territorial jurisdiction.⁵⁶ The latter required the estab-

⁵²*Draft Statute for an International Criminal Court* (Annex to the Report of the Committee on International Criminal Court Jurisdiction, 31 Aug. 1951), 7 U.N. GAOR Supp. No. 11, at 23, U.N. Doc. A/2136 (1952) [hereinafter 1951 Draft Statute].

⁵³*Revised Draft Statute for an International Criminal Court* (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 Aug. 1953), 9 GAOR Supp. 12, at 21, U.N. Doc. A/2645 (1954); see also *Report of the Sixth Committee to the U.N. General Assembly Considering the (Final) Report of the 1953 Committee on International Criminal Jurisdiction*, 9 U.N. GAOR Supp., U.N. Doc. A/2627-Corr.1 (1954); *Report of the 1953 Committee on International Criminal Jurisdiction to the Sixth Committee*, 9 U.N. GAOR Supp. No. 12, at 23, U.N. Doc. A/2645 (1953).

⁵⁴Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III) 9 Dec. 1948, entered into force 12 Jan. 1951, 78 U.N.T.S. 277, 250.

⁵⁵Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (30 Nov. 1973), entered into force 18 July 1976, 13 I.L.M. 50.

⁵⁶See Louis René Beres, *Genocide and Genocide-Like Crimes*, in 1 INTERNATIONAL CRIMINAL LAW 271 (M. Cherif Bassiouni ed., 1986); M. Cherif Bassiouni, Introduction to the Genocide Convention, in *id.* at 281; Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1984); *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994); PIETER N. DROST, THE CRIME OF STATE: BOOK II, GENOCIDE (1959); LEO KUPER, GENOCIDE (1981). See also generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1992).

lishment of an international criminal jurisdiction to prosecute apartheid, but it was never implemented. In 1980, at the request of the United Nations ad hoc committee for South Africa, this author prepared a draft statute for the establishment of an international criminal jurisdiction to prosecute violators of the Apartheid Convention,⁵⁷ but, to date, the draft has not been acted upon, nor is it likely to be in view of the recent changes in South Africa.⁵⁸

The question of an international criminal court came back to the ILC by an unexpected route. In 1989, the General Assembly requested that the ILC prepare a report on the establishment of an international criminal court for the prosecution of persons engaged in drug trafficking.⁵⁹ Contemporaneously, an NGO committee of experts,⁶⁰ chaired by this author, prepared a draft statute in June 1990⁶¹ and submitted it to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders.⁶² The Congress

⁵⁷*Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, U.N. Doc. E/CN.4/1426 (19 Jan. 1980) [hereinafter *Study on the Suppression and Punishment of the Crime of Apartheid*]. See generally M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and other Relevant Instruments*, 9 HOFSTRA L. REV. 523 (1981).

⁵⁸Internal Memorandum, Ministry of Justice of South Africa, *Promotion of National Unity and Reconciliation Bill 011094JE*, Act Number 30 of 1995; Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, The Constitution and International Law* (draft article in print; manuscript on file with the author).

⁵⁹G.A. Res. 43/164 (1988) and 44/39 (1989). In particular, see Agenda item 152, *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking of Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities Establishment of an International Criminal Court with Jurisdiction Over Such Crimes*, Report of the Sixth Committee to the General Assembly, U.N. Doc. A/44/770 (1989).

⁶⁰The committee of experts was assembled by the International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy), in cooperation with the United Nations Crime Prevention Branch and the Italian Ministry of Justice. See M. Cherif Bassiouni, *Draft Statute International Tribunal*, 9 NOUVELLES ETUDES PENALES 1 (1993); M. Cherif Bassiouni, *Draft Statute International Tribunal*, 10 NOUVELLES ETUDES PENALES (1993) (containing French and Spanish translations of the statute).

⁶¹This draft statute was based on this author's proposal to the United Nations to prosecute apartheid violators. See *Study on the Suppression and Punishment of the Crime of Apartheid*, supra note 57. Subsequently, the draft statute was amended and published in M. Cherif Bassiouni, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL* (1987).

⁶²U.N. Doc. A/Conf. 144/NGO.7, *DRAFT STATUTE: INTERNATIONAL CRIMINAL TRIBUNAL* (1990). Item 5, reprinted in 15 NOVA L. REV. 375 (1991). See also M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court*, 15 NOVA L. REV. 353 (1991).

recognized the need for an international criminal court and resolved that the ILC take up the matter.⁶³

In response to the General Assembly's mandate, the ILC in 1990 completed a report which was submitted to the 45th session of the General Assembly. But that report was not limited to the drug trafficking question and was favorably received by the General Assembly. The General Assembly encouraged the ILC to continue its work. Thus, without a clear and specific mandate, the ILC went from a mandate limited to drug trafficking to an all-encompassing project. Wisely, the ILC started with a preliminary report in 1992,⁶⁴ and when that report was favorably received by the General Assembly, the ILC produced a comprehensive text in 1993,⁶⁵ which it modified in 1994.⁶⁶ The changes made in 1994 were intended to answer the political concerns of some of the world's major powers, and as a result it was less satisfactory than its earlier 1993 text.

The 1994 text was submitted to the 49th Session of the General Assembly, which resolved to consider it at its 50th session after discussions at intersessional meetings took place from April through August 1995.⁶⁷ Delegates raised many questions about the 1994 text, but as a result of these productive intersessional meetings by the ad hoc Committee for an International Criminal Court,⁶⁸ the Sixth Committee, on 28 November 1995,⁶⁹ adopted a resolution calling for a preparatory committee meeting to be held in 1996 to prepare a draft statute. This draft will be submitted to the General Assembly's 51st session and then considered at a plenipotentiary conference, which may take place in 1997, thus bringing the world a step closer to the establishment of a system of international criminal

⁶³Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/Conf. 144/28, at 277 (1990).

⁶⁴Report of the International Law Commission on the work of its 44th Session, 4 May-24 July 1992, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

⁶⁵See Revised Report of the Working Group on the Draft Statute for an International Criminal Court, International Law Commission, 45th Sess., 3 May-23 July 1993, A/CN.4/L.490 (19 July 1993); Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum, International Law Commission, 45th Sess., 3 May-23 July 1993, A/CN.4/L.490/Add.1 (19 July 1993); Report of the International Law Commission, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992); Report of the International Law Commission, U.N. GAOR, 44th Sess., Supp. No. 10, at 255, U.N. Doc. A/46/10 (1991).

⁶⁶Report of the International Law Commission, 46th Sess., 2 May-22 July 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121 (1994); Michael P. Scharf, *Getting Serious about an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994).

⁶⁷U.N. GAOR 6th Comm., 49th Sess., U.N. Doc. A/C.6/49/L.24 (23 Nov. 1994).

⁶⁸Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR 50th Sess. Supp. No. 22, U.N. Doc. A/50/22 (1995).

⁶⁹Report of the Sixth Committee A.50-639 and Corr.1 (28 Nov. 1995).

justice.⁷⁰

In summary, the significance of the historical precedents is that the lessons of the past should instruct us about how to avoid the same mistakes in the future.

⁷⁰G.A. Res. 50/46, U.N. Doc. A/RES/50/46 (18 Dec. 1995).

HAVE WE REALLY LEARNED THE LESSONS OF NUREMBERG?*

MICHAEL P. SCHARF**

I. Introduction

The Nuremberg Tribunal was the first international criminal tribunal in modern times. Its Charter and Judgment are among the most significant developments in international law in this century. But, like any novel endeavor, the Nuremberg Tribunal has engendered its share of criticism.¹

Yet, Nuremberg must be judged, not by contemporary standards, but through the prism of history. Viewed within the historic context, it was extraordinary that the major German war criminals were even given a trial, rather than summarily executed as had been proposed by Churchill and Stalin at the Yalta Conference in 1945.² With this in mind, Justice Robert Jackson, the Chief Prosecutor of Nuremberg, began his opening speech for the prosecution by stating: "That four great nations, flushed with victory and

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**A graduate of Duke University School of Law, Professor Scharf now teaches international law, human rights law, international criminal law, and criminal law at the New England School of Law in Boston. From 1989-93, Professor Scharf was an Attorney-Advisor in the Office of the Legal Adviser of the United States Department of State, where he served initially as Counsel to the Counter-Terrorism Bureau and later served as Attorney-Advisor for United Nations Affairs, United States Representative to the Sixth (Legal) Committee during the 1991 and 1992 sessions of the United Nations General Assembly, and as a member of the United States Delegation to the United Nations Human Rights Commission in 1993. Professor Scharf has written several articles on the establishment of an international criminal court and is the author of a recently published two-volume book entitled *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, which contains a chapter comparing and contrasting the Yugoslavia and Nuremberg Tribunals.

¹See generally A. BRACKMAN, *THE OTHER NUREMBERG* (1967); R. CONOT, *JUSTICE AT NUREMBERG* (1983); A. TUSA & J. TUSA, *THE NUREMBERG TRIAL* (1983).

²TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 29-32 (1992). Stalin had proposed that 50,000 German General Staff Officers should be executed, while Churchill had favored executions for a short list of only the most prominent German war criminals. Roosevelt was noncommittal. It was not until President Harry Truman took office two months later, that the United States made it clear that it opposed summary execution and supported instead the establishment of a tribunal to try the German leaders.

stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason."³

This is not meant to exonerate Nuremberg or excuse its shortcomings. Even Robert Jackson acknowledged at the conclusion of the Nuremberg Trials that "many mistakes have been made and many inadequacies must be confessed."⁴ But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."⁵ The question, then, is have we learned from the mistakes of Nuremberg? As the first international tribunal since Nuremberg, we must examine the Yugoslavia Tribunal for the answer to this question.

II. Has the Yugoslavia Tribunal Avoided the Shortcomings of Nuremberg?

There were four main criticisms levied on Nuremberg. First, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. And finally, that it was a tribunal of first and last resort, because it had no appellate chamber. On paper, the Yugoslavia Tribunal appears to have avoided a repeat of these inadequacies, but the practice of the Yugoslavia Tribunal to date may suggest a different story.

A. *Victor's Justice*

Elsewhere, I have written that in contrast to Nuremberg, the Yugoslavia Tribunal was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of states.⁶ Yet, this is somewhat of an oversimplification. The decision to establish the Yugoslavia Tribunal was made by the United Nations Security Council, which has not remained merely a neutral third party; rather, it has become deeply involved in the conflict.

³Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg (21 Nov. 1945) [hereinafter Opening Speech].

⁴Robert Jackson, Report to the President (Oct. 7, 1946).

⁵*Id.*

⁶1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 332 (1995).

The Security Council has imposed sanctions on the side perceived to be responsible for the conflict,⁷ authorized the use of force,⁸ and sent in tens of thousands of peacekeeping personnel.⁹ Its numerous resolutions have been ignored and many of its peacekeeping troops have been injured or killed; some have even been held hostage. Moreover, a compelling argument can be made that the Security Council has (justifiably) favored the Bosnian-Muslims over the Serbs throughout the conflict. Although it imposed sweeping economic sanctions on Serbia; such action was never even considered when Croatian forces committed similar acts of ethnic cleansing. During the conflict, the Council has been quite vocal in its condemnation of Serb atrocities, but its criticisms of those committed by Muslims and Croats has been muted.

Although the Yugoslavia Tribunal is supposed to be independent from the Security Council, one cannot ignore that the Tribunal's prosecutor was selected by the Security Council and its judges were selected by the General Assembly from a short list proposed by the Security Council. While the Tribunal has jurisdiction to prosecute any one responsible for violations of international humanitarian law in the former Yugoslavia, it is perhaps no surprise that the indictments so far have been overwhelmingly against Serbs. As long as the jurisdiction of ad hoc tribunals is triggered by a decision of the Security Council, and the prosecutors and judges are selected by the Council, such tribunals will be susceptible to the criticism that they are not completely neutral.

B. Application of Ex Post Facto Laws

Perhaps the greatest criticism of Nuremberg was its perceived application of *ex post facto* laws, by holding individuals responsible for the first time in history for waging a war of aggression. The first to voice this criticism was Senator Robert Taft of Ohio in 1946, but it was not until John F. Kennedy reproduced Taft's speech in his Pulitzer Prize winning 1956 book, *Profiles of Courage*, that this criticism became part of the public legacy of Nuremberg.¹⁰

⁷S.C. Res. 757 (30 May 1992).

⁸S.C. Res. 770 (13 Aug. 1992) (authorizing force to facilitate the delivery of humanitarian assistance in Bosnia); S.C. Res. 816 (31 Mar. 1993) (authorizing force to enforce the "no fly zone" over Bosnia); S.C. Res. 820 (17 Apr. 1993) (authorizing forceful measures to prevent violations of economic sanctions imposed on Serbia).

⁹See e.g., S.C. Res. 761 (29 June 1992) (dispatching peacekeepers to ensure the security of Sarajevo airport); S.C. Res. 762 (30 June 1992) (dispatching peacekeepers to "pink zones" in Croatia); S.C. Res. 776 (14 Sept. 1992) (dispatching peacekeepers to other parts of Bosnia to facilitate delivery of aid); S.C. Res. 819 (16 Apr. 1993) (dispatching peacekeepers to "safe areas" in Bosnia).

¹⁰JOHN F. KENNEDY, *PROFILES IN COURAGE* 228-30 (commemorative ed. 1964).

The creators of the Yugoslavia Tribunal went to great lengths to ensure that the Tribunal would not be subject to a similar criticism. Thus, in drafting the Tribunal's Statute, the Secretary-General required that the Tribunal's jurisdiction be defined on the basis of "rules of law which are beyond any doubt part of customary international law."¹¹ In its proposal for the Tribunal's Statute, the International Committee of the Red Cross, the world's leading authority on international humanitarian law, "underlined the fact that according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict."¹²

In the first case to be heard before the Yugoslavia Tribunal, the defendant, Dusko Tadic, challenged the lawfulness of his indictment under Article 2 (grave breaches of the Geneva Conventions) and Article 3 (violations of the customs of war) of the Tribunal's Statute on the ground that there was no international armed conflict in the region of Prijedor, where the crimes he was charged with are said to have been committed. In a novel interpretation, the Yugoslavia Tribunal's Appeals Chamber decided by a four-to-one vote that, although Article 2 of the Tribunal's Statute applied only to acts occurring in international armed conflicts, Article 3 applied to war crimes "regardless of whether they are committed in internal or international armed conflicts."¹³

The Tribunal based its decision on its perception of the trend in international law in which "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."¹⁴ While Professor Meron has argued convincingly for acceptance of individual responsibility for violations of the Geneva Conventions and the Protocols additional thereto in the context of internal armed conflict,¹⁵ such recognition would constitute progressive development of international law, rather than acknowledgment of a rule that is beyond doubt entrenched in existing law. In addition to avoiding the *ex post facto* criticism, there is a second important reason why the Tribunal should have exercised greater caution in construing its jurisdiction: states will not have faith in the integrity of the Tribunal as a precedent for other *ad hoc* tribunals and for a

¹¹Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (3 May 1993), reproduced in 2 MORRIS & SCHARF, *supra* note 6, at 3.

¹²Preliminary Remarks of the International Committee of the Red Cross (22 Feb. 1993) reproduced in 2 MORRIS & SCHARF, *supra* note 6, at 391.

¹³Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at 66, IT Doc. IT-94-1-AR72 (2 Oct. 1995). Judge Li dissented from this conclusion.

¹⁴*Id.* at 54.

¹⁵See Theodor Meron, *International Criminalization of Internal Atrocities*, 69 AM. J. INT'L L. 554 (1995).

permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of international law.

C. Violations of Defendant's Due Process

The Nuremberg Tribunal has been severely criticized for allowing the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys.¹⁶ Such affidavits, it has been argued, seriously undermined the defendant's right to confront witnesses against him. The United States Supreme Court has expressed the importance of this right as follows: "Face-to-face confrontation generally serves to enhance the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person."¹⁷

On August 10, 1995, the Trial Chamber of the Yugoslavia Tribunal issued a two-to-one decision, holding that the identity of several witnesses could be withheld indefinitely from the defendant, Dusko Tadic, and his counsel, even throughout the trial, to protect the witnesses and their families from retribution.¹⁸ This decision is troubling in two respects. First, like Nuremberg, the Yugoslavia Tribunal decided to elevate the protection of victims above the accused's right of confrontation, notwithstanding that Article 20 of the Tribunal's Statute requires that proceedings be conducted "*with full respect for the rights of the accused,*" and with merely "*due regard for the protection of victims and witnesses.*" Second, and most worrisome of all, the Yugoslavia Tribunal rationalized its decision on the ground that the Tribunal is "comparable to a military Tribunal" which has more "limited rights of due process and more lenient rules of evidence."¹⁹ It then cited favorably the (the oft-criticized) practice of the Nuremberg Tribunal of admitting hearsay evidence and *ex parte* affidavits with greater frequency than would be appropriate in domestic trials.²⁰ Unfortunately, the Tribunal's rules do not permit an interlocutory appeal from this decision of the Trial Chamber, which will thus not be reviewed until after the completion of the trial.

¹⁶See TELFORD TAYLOR, *supra* note 2, at 174, 241; AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 27 (1993).

¹⁷Maryland v. Craig, 497 U.S. 836, 846 (1990).

¹⁸Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, IT Doc. IT-94-I-T (10 Aug. 1995) [hereinafter Protective Measures for Victims and Witnesses].

¹⁹Protective Measures for Victims and Witnesses, *supra* note 18, at 15.

²⁰*Id.*

D. Right of Appeal

A final criticism of Nuremberg was that it did not provide for the right of appeal. The Statute of the Yugoslavia Tribunal has been recognized as constituting a major advancement over Nuremberg by guaranteeing the right of appeal and providing for a separate court of appeal. However, the procedure for the selection of judges did not differentiate between trial and appellate judges, leaving the decision to be worked out by the judges themselves. When they arrived at The Hague, this became the subject of an acrimonious debate, because nearly all the judges wished to be appointed to the appeals chamber, which was viewed to be the more prestigious assignment. As a compromise, the judges agreed that assignments would be for an initial period of one year and subject to "rotat[ion] on a regular basis" thereafter.²¹

The rotation principle adopted by the judges is at odds with the provisions of the Tribunal's Statute that were intended to maintain a clear distinction between the two levels of jurisdiction. Article 12 provides that there shall be three judges in each Trial Chamber and five judges in the Appeals Chamber, and Article 14(3) expressly states that a judge shall serve only in the chamber to which he or she is assigned. These provisions were meant to ensure the right of an accused to have an adverse judgment and sentence in a criminal case reviewed by "a higher tribunal according to law," as required by Article 14 of the International Covenant on Civil and Political Rights. As recognized by the International Law Commission, the purpose of the principle of the double degree of jurisdiction under which judges of the same rank do not review each other's decision is to avoid undermining the integrity of the appeals process as a result of the judges' hesitancy to reverse decisions to avoid the future reversal of their own decisions.²² The rotation principle, therefore, undermines the integrity of Yugoslavia Tribunal's appellate process.

III. Conclusion

I have previously written that "[t]he Statute represents a marked improvement over the scant set of rules that were fashioned for the Nuremberg Tribunal. The Statute and the Rules provide the necessary framework for ensuring that the [Yugoslavia] Tribunal will comply with international standards of fair trial and due

²¹Rule 27 of the Rules of Procedure and Evidence (adopted on 11 Feb. 1994, amended on 5 May 1994, 4 Oct. 1993, further revised on 30 Jan. 1995), U.N. Doc. IT/32/Rev.3 (30 Jan. 1995), reprinted in MORRIS & SCHARF, *supra* note 6, at 41.

²²Report of the International Law Commission on the Work of Its Forty-Fifth Session, at 323, U.N. Doc. A/48/10 (1993).

process and avoid the criticisms of its predecessor."²³ In light of the subsequent developments described above, I may have been too optimistic in my assessment. The Yugoslavia Tribunal's record so far can only be described as a mixed one. It can, and must, do better. With a half century of development of standards of international due process since Nuremberg to draw from, the Yugoslavia Tribunal's shortcomings cannot be excused as a product of the times.

To paraphrase Robert Jackson again, if we pass the defendants in an international trial a poisoned chalice, it is we, the international community, who ultimately are injured. The record on which we judge Mr. Tadic today, will be the record on which history judges the entire effort to prosecute crimes before an international tribunal.²⁴ If the Yugoslavia Tribunal can demonstrate that such an institution can function effectively *and fairly*, then the case for establishing future ad hoc tribunals or a permanent international criminal court will be strengthened beyond measure.

²³MORRIS & SCHARF, *supra* note 6, at 333-34.

²⁴Opening Speech, *supra* note 3.

A FEW TOOLS IN THE PROSECUTION OF WAR CRIMES*

W. HAYS PARKS**

I. Introduction

The prosecution of war crimes may be novel, but it is not new; we have been down this road before. Within the United States experience, it is not a single road. In addition to the post-World War II process, the United States military has prosecuted any number of United States military personnel for violations of the Uniform Code of Military Justice that might otherwise have been characterized as violations of the law of war.¹

Fortunately, violations of the law within the United States military occur so infrequently that the prosecutorial path is not well traveled. As a result, those charged with the responsibility to proceed with the investigation and possible prosecution of violations of the law of war find it necessary to address issues somewhat unique to such cases. In an October meeting in The Hague with prosecutors and investigators for 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),² a number of issues unique to war crimes prosecutions were raised—or perhaps revisited.³ The orga-

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**Special Assistant for Law of War Matters, Office of The Judge Advocate General of the Army. The opinions expressed herein are those of the author in his personal capacity, and may not necessarily reflect the policy of the Department of the Army, Department of Defense, or any other agency of the United States Government.

¹For example, see GARY D. SOLIS, *MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE* (1989); *United States v. First Lieutenant William L. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), 48 C.M.R. 19 (C.M.A. 1973); GUENTER LEWY, *AMERICA IN VIETNAM* 343-73 (Oxford University Press, 1978).

²This author regards the traditional term *law of war* to be more accurate for this body of law than *international humanitarian law*. As the law of war makes it legally permissible to take the life of an enemy combatant, often in the most violent ways, this author (as one with combat experience) finds it inconsistent to refer to this body of law as *humanitarian*. The United States Department of Defense also refers to this body of law by its more traditional name.

³The author served as the senior prosecuting attorney for the First Marine Division in the Republic of Vietnam in 1968-69, where some of these issues were con-

nizers of this symposium asked me to offer a brief survey of three of these—command responsibility, obedience to superior orders, and reprisals.

II. Command Responsibility

The concept of command responsibility has existed for a very long time; traditionally, a commander has been regarded as responsible for all that his unit does or fails to do. From the standpoint of criminal liability, however, this very historic and general leadership principle left much unsaid. The post-World War II war crimes trials focused on the concept in a way that had not occurred previously, clarifying and defining it.

In determining what constitutes command responsibility from the standpoint of a commander's liability for illegal acts committed by his or her subordinates, it is important—indeed, essential—to state what the post-World War II tribunals did *not* say or, more precisely, rejected. Despite posttrial assertions by at least one defense counsel,⁴ and the very best arguments of some war crimes prosecutors,⁵ *no* post-World War II case stands for the proposition of *strict liability* on the part of a military commander.

The post-World War II case law established individual criminal responsibility and, for a commander, a duty to control his or her troops and ensure that those troops carry out their assigned duties in a manner consistent with the law of war.⁶ A military commander

sidered. Some also were considered by United States Army prosecutors in the course of the investigation and prosecution of individuals accused of acts related to the massacre at My Lai on 16 March 1968, and by United States Army war crimes teams investigating Iraqi war crimes during the 1990-91 effort to liberate Kuwait. The former is discussed *infra* while the latter is reported in DEPT OF ARMY, REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) (Jan. 8, 1992); DEPT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, 621-24 (Apr. 1992).

⁴A. Frank Reel, a defense counsel for General Tomoyuki Yamashita, Japanese military commander in the Philippines in 1944-45, asserted that Yamashita's conviction was based on strict liability rather than any evidence of his guilt of the offenses with which he was charged; see A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (reprint ed. New York: Octagon Books, 1971). Reel was repeating the argument unsuccessfully made by the defense in its appeal to General Douglas MacArthur, the Confirming Authority, who rejected it; see 4 LAW REPORTS OF TRIAL OF WAR CRIMINALS 37. This author's review of the Yamashita record of trial found the evidence against General Yamashita not only overwhelming but inconsistent with the factual representations of Mr. Reel; see W. HAYS PARKS, COMMAND RESPONSIBILITY FOR WAR CRIMES, 62 MIL. L. REV. 1, 26-31 (1973).

⁵For example, Brigadier General Telford Taylor argued in *United States v. von Leeb (The High Command Case)* that Yamashita was based on a strict liability standard; the court rejected this argument. 11 TRIALS OF WAR CRIMINALS 510-11, 544 (1948).

⁶See Parks, *supra* note 4, at 37-38 n.117 (section of the Confirming Authority (General of the Army Douglas MacArthur) in the Yamashita case).

or civilian in the command and control structure may be criminally responsible for the illegal acts of his or her subordinates if the following occurs:

- a. He or she orders offenses to be committed, or
- b. He or she knows (that is, has actual knowledge) or should have known (i.e., was culpably negligent) of the offenses, has the means to prevent or halt them, and fails to do all which he or she is capable of doing to prevent the offenses or their recurrence.⁷

The criminal liability of a subordinate commander in the chain of command who passes on an illegal order from a senior is determined by the military principal of presumption of legality of orders, that is, only if the passed order is patently illegal does the intermediate military commander assume the criminal liability of his or her superiors.⁸ Of course, a subordinate commander may be responsible under the principle of command responsibility for violations of the law of war he or she permits to occur.

The *knew or should have known* standard is, in my opinion, a good one. It rejects strict liability—commanders in combat are, after all, busy persons, seldom possessed of knowledge of all that may be going on about them, working under considerable stress⁹—while denying the commander or commanders the ability to take a Nelsonian attitude and turn a blind eye towards violations of the law of war that any reasonable person could see.¹⁰ The *should have*

⁷See, e.g., *Trial of Erich Heyer and Six Others (The Essen Lynching Case)*, in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 88-92.

⁸See *United States v. von Leeb*, in 11 TRIALS OF WAR CRIMINALS 510-12 (1948).

⁹For example, see *id.* at 543, which states:

A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command...

¹⁰Of course, Nelson's action was one of courage in action against the Danish fleet off Copenhagen on April 2, 1801, rather than criminal negligence. In Nelson's case the blind eye was real rather than contrived. For example, see DAVID HOWARTH, LORD NELSON 122-23, 253-54 (New York: Viking, 1989). The Commission made the connection between these two points in its judgment against General Tomoyuki Yamashita when it stated:

It is absurd to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even crimi-

known portion of the standard is subjective, but may be established through evidence of factors I have identified previously.¹¹ At the same time, several tribunals concluded that a commander may be presumed to have knowledge of offenses occurring within his area of responsibility while he is present therein.¹²

Article 86 of the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949, codified command responsibility, though perhaps not as well as it could have. Paragraph 1 imposes a duty on High Contracting Parties as well as parties to a conflict to repress grave breaches, and to take necessary measures to suppress other violations of the law of war, making it clear that not only the commission of an act but also the failure to act may be a Grave Breach.¹³ Paragraph 2, an effort at codification of the legal standard set forth in the *Yamashita* and *High Command* cases, states:

The fact that a breach of the [1949 Geneva] Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

nally liable, for the lawless acts of his troops, depending upon the nature and circumstances surrounding them....

See *Trial of General Tomoyuki Yamashita*, in 4 LAW REPORTS OF TRIAL OF WAR CRIMINALS 35.

¹¹See Parks, *supra* note 4, at 90-95; the court's opinion in *United States v. List (The Hostage Case)*, in 11 TRIALS OF WAR CRIMINALS 1259-60 (1948).

¹²See *United States v. List (The Hostage Case)*, in 11 TRIALS OF WAR CRIMINALS 1271-72 (1948); *United States v. von Leeb (The High Command Case)*, in *id.* at 567. see also *International Japanese War Crimes Trials in the International Military Tribunal for the Far East*, 200 OFFICIAL TRANSCRIPT, 48,442 to 48,447 (case of General Akira Muto). Rule 10(4) for post-World War II Canadian war crimes trials provided:

Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

See *Canadian Law Concerning Trials of War Criminals by Military Courts*, in 4 LAW REPORTS OF TRIAL OF WAR CRIMINALS 128. This rule established a rebuttable presumption rather than strict liability.

¹³For further discussion, see MICHAEL BOTHE, ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 523-24 (The Hague: Martinus Nijhoff, 1982).

Paragraph 2 is not an entirely accurate codification of the *Yamashita* and *High Command* cases, and has been subject to some criticism, not the least of which is that the English and French texts are not consistent—intentionally.¹⁴

Article 87 of Protocol I is entitled *Duty of Commanders* while actually setting forth the responsibilities of High Contracting Parties and Parties to a conflict to ensure that their respective military commanders comply with the law of war in their conduct of military operations. Although the title may appear misleading, it is not; a civilian in the command and control chain, such as the President of the United States, is a *commander* for these purposes, as previously acknowledged in the *High Command Case*.¹⁵ Applying the term *commander* or *command* responsibility to civilians apparently has caused some problems for the ICTY, which has coined the term *superior authority* to cover all cases.

The differences between the traditional command responsibility standard established in the post-World War II cases and paragraph 2 of Article 86 of Additional Protocol I (in its differing French and English texts) may be substantial or insignificant, depending on its treatment by international tribunals for the former Yugoslavia and Rwanda—or others that may occur in future years. But the first tool for prosecution of war crimes is the principal of command responsibility.

III. Superior Orders

At first blush, superior orders hardly seems a tool, as it often (and incorrectly) is viewed as a defense to prosecution for violations

¹⁴While the English language text states "information which should have enabled them to conclude," the French text is "information enabling them to conclude." See *id.* at 525-26. That the difference was intentional is confirmed in YVES SANDOZ, ET AL., EDS., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1013-14 (Geneva: International Committee of the Red Cross, 1987).

¹⁵See *supra* note 9. Article 7 of the Charter of the International Military Tribunal made no distinction between military and civilian suspects, declaring:

The official position of defendants, whether a Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Charter of the International Military Tribunal (8 August 1945), in 1 TRIALS OF WAR CRIMINALS xiii.

of the law of war.¹⁶ Much has been written about it,¹⁷ and not all nations are in agreement as to its standards, but its general principles can be summarized briefly.

First, obedience to superior orders is essential to discipline and order in any military organization—particularly on the battlefield.¹⁸ The individual soldier is not, and cannot be, an expert in the law of war, nor does the soldier have access to such an expert, as the judge advocate in *The "Peleus" Trial* stated quite eloquently.¹⁹ At the same time, the court in the *Einsatzgruppen* case made a declaration that has been repeated often:

¹⁸Defense counsel Colonel H. Smith correctly summarized the point in *The Belsen Trial* when he stated the following:

What is called the defence of 'superior orders' is rather a misleading phrase, because the real nature of the defence is that of freedom of the realm. coercion.

See *Trial of Josef Kramer and Forty-four Others (The Belsen Trial)*, in 2 WAR CRIMES TRIALS 508 (London: William Hodge and Co. 1949).

¹⁷For example, see YORAM DINSTEIN, *THE DEFENSE OF SUPERIOR ORDERS IN INTERNATIONAL LAW* (Leiden: Sijthoff, 1965); Leslie C. Green, *Superior Orders in National and International Law* (Leiden: Sijthoff 1976); Brigadier Sir David Hughes-Morgan, *Disobedience to a Lawful Military Command*, J. OF THE ROYAL UNITED SERVICES INST., Mar. 1977, at 9-16; Nico Keijer, *Military Obedience* (Leiden: Sijthoff, 1978). A more recent—if briefer—commentary is contained in HOWARD S. LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 512-21 (New York: Oceana Pubs. 1993).

¹⁸For example, the prosecution in its closing argument in *Flick* stated that "The military profession puts a high premium on discipline and obedience and usually does not permit subordinates to question the orders of their superiors. . . ." 4 TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS 1038.

¹⁹In his summary, Major A. Melford Stevenson, K.C., declared:

Undoubtedly a Court confronted with a plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience of military orders not obviously unlawful is a duty of every member of the Armed Forces, and that the latter cannot in conditions of war discipline be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major consideration that members of the Armed Forces are bound to obey lawful orders only, and that they cannot therefore escape liability if in obedience to a command they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.

It is quite obvious that no sailor and no soldier can carry with him a library of International Law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of International Law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful com-

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery.²⁰

Balancing these ideas is not easy. In the aftermath of the 16 March 1968 massacre at My Lai, the United States Army produced a training film entitled *The Geneva Conventions and the Soldier*.²¹ It was a well-produced movie, with professional actors, but it was a bureaucratic overreaction to the My Lai massacre that had every soldier questioning every order issued by his superior—in addition to portraying superiors in a less-than-flattering light. Needless to say, the movie enjoyed a very short run as one commander after another ordered it removed from his base—justifiably, in my opinion.

Beginning with instruction at The Judge Advocate General's School, United States Army, we reversed the negative approach of that movie in Army and Marine Corps law of war training to emphasize that good leadership includes a duty to issue clear, concise, and lawful orders.²²

This lays out some of the predicament of command and obedience in battle. The so-called "defense" of superior orders was articulated in Article 8 of the Charter of the International Military Tribunal as follows:

mand, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did the shooting are not to be excused for doing it upon the ground of superior orders?

Trial of Kapitänleutnant Heinz Eck and Four Others (The "Peléus" Trial), in 1 WAR CRIMES TRIALS 129 (London: William Hodge and Co. 1948).

²⁰See *United States v. Otto Ohlendorf et al.*, in 4 TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS 470. The *Einsatzgruppen* case was quoted with approval in *Kinder*; see *United States v. Thomas L. Kinder*, 14 C.M.R. 742, 776 (A.C.M.R. 1953).

²¹DEPT OF ARMY, TRAINING FILM 21-4228 (1972). The My Lai massacre occurred on 16 March 1968 when United States Army units entered the Vietnamese hamlet of My Lai(4) in Son My Village, Quang Ngai Province, Republic of Vietnam, and proceeded to engage in day-long acts of rape and murder of unarmed, unresisting South Vietnamese civilians. The events and their investigation are summarized in LT GEN. W. R. PEERS, USA (RET.), *THE MY LAI INQUIRY* (New York: W. W. Norton 1979), and more recently, in MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (New York: Viking 1992). Because the Army as yet has no comparable volume to that produced by the Marine Corps (see SOLIS, *supra* note 1), a complete reporting and analysis of the investigation and efforts at prosecution of the My Lai participants regrettably remains unavailable.

²²The need for clarity can be illustrated by the following incident in Vietnam. A Marine lieutenant experienced his first taste of combat. Rushing through a hedgerow following the fight, he looked to the left to see his Navy Corpsman (enlisted medic) standing over a Viet Cong who appeared dead, then to his right, where a Marine was

The fact that the Defendant acted pursuant to [an] order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.²³

A similar rule was promulgated for the International Military Tribunal for the Far East²⁴ and in *Control Council Law Number 10* for the "Subsequent Proceedings" at Nuremberg.²⁵

That three extensive and very good books have been written on this issue²⁶ should make it obvious that I cannot do justice to the principle in a few brief paragraphs. It may be noted that it was a frequent but unsuccessful argument in the International Military Tribunal at Nuremberg, and in each of the so-called "subsequent proceedings." The response of the courts to the plea is best stated by the International Military Tribunal in its review of the cases of defendants Keitel and Jodl, where the court declared:

The provisions of the Article [Article 8, quoted above] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether a moral choice was in fact possible.²⁷

searching the pockets of an obviously dead Viet Cong for military documents. Deciding he would proceed to his right, he turned to his Corpsman and ordered him to "make sure . . . [the Viet Cong over whom the Corpsman stood] is dead." The lieutenant had taken only one step when there was the discharge of a .45 pistol behind him. Turning, he saw the Corpsman standing over the Viet Cong with his .45 pistol, still smoking, in hand. As it turned out, the Viet Cong was already dead—and the Corpsman had missed from a range of three feet. If the story had had a different ending, however, the lieutenant might have been under investigation for his order which, while intended to be lawful, was misconstrued by his subordinate. (Personal knowledge of author.)

²³DEPT. OF STATE, TRIAL OF WAR CRIMINALS 17 (1945). The Charter of the International Military Tribunal also is published in *1 Trials of War Criminals* (at xi-xiv), and at the front of most of the other volumes in that series.

²⁴15 TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS 1215.

²⁵DEPT. OF ARMY, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 251 (15 Aug. 1949).

²⁶See *supra* note 17.

²⁷Nuremberg Trial, Judgment, *Cmd. No. 6964*, at 42.

The work product of the post-World War II tribunals was incorporated into paragraph 509 of the *United States Army Field Manual 27-10. The Law of Land Warfare (FM 27-10)*,²⁸ other law of war materials,²⁹ and the United States military's Rules for Courts-Martial.³⁰

As with command responsibility, far more could be said of obedience to superior orders. As is true of command responsibility, the issue was heavily litigated in the post-World War II trials. Those tri-

²⁸See also the United Kingdom's *THE LAW OF WAR ON LAND, MANUAL OF MILITARY LAW*, pt. III, 176 (London: Her Majesty's Stationery Office 1958). Due to negotiation of the 1977 Additional Protocols I and II, the 1980 United Nations Conventional Weapons Convention, and other law of war or related arms control treaties, *FM 27-10* is scheduled to be replaced by a joint law of war manual currently in preparation; a British replacement for its 1958 publication also is in preparation.

²⁹See, e.g., DEP'T OF ARMY, PAM. 27-161-2, 2 *INTERNATIONAL LAW*, 250-51 (Oct. 1962) [hereinafter DA Pam. 27-162-2].

³⁰See *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1984, R.C.M. 916(d) (1994 ed.), which states:

Obedience to orders. It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

The United States standard preceded the post-World War II trials; see WINTEROP'S *MILITARY LAW AND PRECEDENTS* 296-97 (reprint 2d ed. 1920). At the insistence of British international lawyer L. Oppenheim (and agreement by American J. W. Garner) the British and United States military law of war manuals were amended prior to World War II to reflect (it was incorrectly asserted by Oppenheim and Garner) a "customary international law" standard of immunity from prosecution for illegal acts committed pursuant to the order of a superior. Each manual reverted to the traditional (and current) standard in 1944. A brief history of this episode is contained in L. C. Green, *Superior Orders and Command Responsibility*, XXVII *THE CANADIAN YEARBOOK OF INTERNATIONAL LAW* 167-202 (1989).

The post-World War II war crimes tribunal standard was the German standard during World War II; for example, see Reich Minister Joseph Goebbels, *A Word on the Enemy Air Terror*, in *VOELKISCHER BEOBSACHTER*, 28-29 May 1944; see also 11 *TRIALS OF WAR CRIMINALS* 168 (1948) (republishing this work), where it is stated that:

It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he blames his superior, especially if the orders of the latter are in contradiction to all human morality and every international usage of warfare.

The United States standard has not been without challenge. In *United States v. Calley*, 48 C.M.R. 19 (C.M.A. 1973), the defense argued (unsuccessfully) that the standard of "a person of ordinary sense and understanding" was too high and should be replaced by a standard of "the commonest understanding" given Lieutenant Calley's lower intelligence. In rejecting this argument, the United States Court of Military Appeals concluded that had Lieutenant Calley been given an order to murder infants and unarmed civilians, as he claimed, such an order would have been "so palpably illegal that whatever conceptual difference there may be between a person 'of commonest understanding' and a person of common understanding" would be irrelevant.

als established a considerable body of law for consideration by future tribunals and litigants.

IV. Reprisals

The third concept that I have been asked to address is that of "reprisal." Of the three, it is the one most frequently cited—or, more accurately, *miscited*—by politicians, the media, and persons or organizations looking for an excuse for "getting even," and one generally misunderstood by the general public.

While there has been considerable writing on obedience to superior orders, there has been less on reprisals. The one published work, although somewhat dated by the codifications of the 1974-77 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, is very good.³¹

Before entering into a discussion of reprisals, it would be prudent to note the items or individuals that nations have agreed are protected from reprisal:

<i>Person or Object</i>	<i>Protected by</i>
Combatant personnel who are wounded, sick, or shipwrecked	GWS, art. 46 ³² GWS (Sea), art. 47; API, art. 20
Civilian wounded and sick	API, art. 20
Medical personnel and chaplains;	GWS, arts. 24, 46
Medical units and installations (<i>military or civilian</i>)	GWS (Sea), arts. 36, 47; API, art. 20

³¹FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (Leiden: Sijthoff 1971).

³²The following abbreviations are used:

GWS: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of August 12, 1949

GWS (Sea): Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949

GPW: Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949

GC: Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949

Hague 1954: Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954

API: 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949

Prisoners of war	GPW, art. 13
Enemy civilians	GC, arts. 4, 33; API, art. 51(6)
Enemy civilian objects	GC, arts. 4, 33; API, art. 52
Property of inhabitants of occupied territory	GC, art. 33
Cultural property	1954 Hague, art. 4(4); API, art. 53
Objects "indispensable to the survival of the civilian population"	API, art. 54
The natural environment	API, art. 55
Works and installations containing dangerous forces	API, art. 56(4)
Military objectives in proximity to works and installations containing dangerous forces	API, art. 56(4)

If a nation is a party to all of these treaties, obviously little is left against which a reprisal may be directed short of using a prohibited weapon against combatants. Until negotiation in October of 1995 of Protocol IV (Blinding Lasers) at the First Review Conference for the 1980 United Nations Convention on Certain Conventional Weapons, however, this option seemed less than viable; nations do not make it a practice to spend defense budgets developing and stockpiling weapons that are illegal per se.³³

One of the problems in practice is that the term *reprisal* has been used when the action is something other than a reprisal, such as a legitimate act of self-defense, retaliation, retorsion, or a lawful attack.³⁴ As is true of command responsibility and superior orders, post-World War II trials focused on the issue.³⁵ From these and the

³³Article 1 of Protocol IV prohibits the employment of a laser weapon "specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is the naked eye or to the eye with corrective eyesight devices." The protocol was intended to address the concerns of some nations that nations might develop and employ a laser weapon for the purpose of mass blinding; Protocol IV was intended to prevent that. Conceivably, a nation could develop and employ such a weapon for reprisal purposes, although the cost of such a system makes this unlikely.

³⁴A classic example of use of the term "reprisal" to describe what was retaliation or escalation is Hitler's 4 September 1940 speech justifying recent Luftwaffe raids on the city of London; see FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 165, 169 (Leiden: Sijthoff 1971); see also W. Hays Parks, *AIR WAR AND THE LAW OF WAR*, 32 A.F.L. Rev. 1, 44-47 (summarizing the events leading up to the September 1940 change in Luftwaffe targeting).

³⁵See *United States v. List*, 11 4 TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS 1248; *Trial of General von Mackensen and General Maelger*, 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1-8 (1949); *Trial of Franz Holstein and Twenty-Three Others*, in 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 22-33 (1947).

limited practice of nations, a definition and specific criteria for a reprisal can be discerned:

- A reprisal is an act which would be unlawful if not committed for the purpose of reprisal;³⁶
- It must be done for the purpose of compelling the other belligerent to observe the law of war;
- It must not be done before other means have been reasonably exhausted;
- It may be executed only on the express order of higher authority;³⁷
- It must be committed against enemy personnel or property whose attack as a reprisal is not otherwise prohibited; and
- It must be proportional to the original wrong.³⁸

Certain conclusions can be drawn from the state of the law today. Although some may assert or claim that the act that was carried out was a reprisal, very few acts will meet the definition of, and criteria for, a reprisal. Further, the target of an alleged reprisal in most cases will be an object or subject expressly protected from reprisal, such as prisoners of war, civilians in enemy hands, medical facilities or cultural property. The list of persons and properties protected from acts of reprisal closes many doors on this claim; these historical criteria limit the few doors, if any, that may remain.

The attraction to reprisals illustrates the very sad state of affairs with regard to respect for the rule of law by some nations; and the perceived need by some (particularly the political leadership whose citizens have been the victim of war crimes) to *do something* when another state or its forces violates the law. If the crimes have ceased, there is no basis for a reprisal, but prosecution for those offenses remains possible. If violations continue, the political leadership of the aggrieved state must shape its response according to the criteria set forth above if the action to be taken is to be a legitimate reprisal. In truth, few acts that have been called "reprisals" really are; and, historically, few reprisals have had their intended effect, that is, to induce a malefactor from his errant ways. Reprisals have

³⁶By way of example of the misunderstanding of the basic definition of "reprisal," the author saw a White House proposal during the Carter Administration that stated that if Warsaw Pact forces attacked NATO forces, the United States would execute a "reprisal" by attacking the invading forces, that is, carrying out a lawful act of self-defense.

³⁷In the United States, for example, the authority to order a reprisal is retained by the National Command Authorities.

³⁸For example, see FRITS KALSHOVEN, BELLIGERENT REPRISALS 33 (Leiden: Sijthoff 1971); DA PAM. 27-161-2, *supra* note 29, at 65-67.

a role in enforcement of the law of war, but it is far more limited than generally perceived.

The other tool in law of war enforcement is that established at Nuremberg, that is, prosecution of those responsible for wrongdoing. Some accused may claim that their acts were reprisals. But just as the reprisal option is quite limited for national leaders, so, too, is the claim of reprisal limited for those who assert it as a defense. They must show that they met the criteria identified above—particularly those of authorization and that the objects or subjects were not expressly protected from reprisal. The defense is likely to be one offered with little, if any, success.

V. Conclusion

One precedent of Nuremberg and other post-World War Two proceedings was the development of a substantial body of law for the prosecution of war crimes. To use today's vernacular, future prosecutors should be aware that others³⁹ have "been there, seen it, done it," and perhaps even bought the t-shirt. I have summarized three examples of issue unique to war crimes cases. It behooves future prosecutors to study this history as they pursue their cases.

³⁹As illustrated by the presentations by former Nuremberg prosecutors Thomas F. Lambert, Jr. and Henry T. King, Jr. in this volume. See also LtCOL. B.J.S. MACDONALD, *THE TRIAL OF KURT MEYER* (Toronto: Clarke, Irwin & Co. 1954); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (New York: Alfred A. Knopf 1992); SOLIS, *supra* note 1.

NUREMBERG AND THE DEVELOPMENT OF AN INTERNATIONAL CRIMINAL COURT*

HANS CORELL**

I. Introduction

The purpose of this seminar is to revisit the war crimes trials that followed World War II and to examine the situation as we see it today, with the ad hoc Tribunals for the former Yugoslavia and Rwanda in operation and the question of the establishment of an international criminal court high on the agenda of the General Assembly of the United Nations.

This morning we had a most interesting recollection of the war crimes trials of World War II and reflections on Nuremberg and the development of international criminal law. The present and the future will be discussed later during the seminar.

Allow me, as the keynote speaker at this luncheon, to make a few reflections of a personal nature. The views I express are my own, and they do not necessarily reflect any position of the United Nations. My reflections are based, in part on my work during the last three years in connection with the present situation in the Former Yugoslavia and Rwanda, and in part on a very down to earth experience as a judge in the criminal justice system of my country.

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**Under-Secretary-General for Legal Affairs, The Legal Counsel, United Nations. Law degree, University of Uppsala, Sweden, 1962. Among his numerous accomplishments, the Honorable Hans Corell served as Under-Secretary for Legal Affairs, Ministry of Justice 1961-64; Ambassador and Under-Secretary for Legal and Consular Affairs, Ministry for Foreign Affairs 1964-94; Agent of the Government of Sweden before the European Commission of Human Rights and the European Court of Human Rights 1983-94; Delegate at the United Nations General Assembly 1985-93; member of the Permanent Court of Arbitration, The Hague, since 1990; Chairman of the Council of Europe Committee of Legal Advisers on Public International Law 1992-94; member of the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, 1992-93; Chairman of the Working Group at the 1992 CSCE Expert Meeting on Peaceful Settlement of Disputes in Geneva; and Chairman of the CSCE Group of Legal and Other Experts. The Honorable Hans Corell has authored a number of books and articles in English, Swedish, and French.

A few years ago, I was traveling through Nuremberg and decided to visit the courtroom where the trials after World War II were held. Except for a sign outside the entrance door, there was nothing to remind of the trials that had taken place there after the war. I am too young to have any memories of the Tribunal, but I recalled the photographs and what little I had then read about the proceedings. In the stillness of the room, it struck me that the question of an international criminal court was not really on the agenda—at least not on any agenda visible to the general public. Certainly, the item was on the agenda of the International Law Commission, coupled with the international code of crimes. But this discussion attracted very limited attention outside a relatively small circle of specialists. And yet, did we not, almost daily read in the newspapers about violations of humanitarian law and human rights, while at the same time very little was done to remedy this at the national level. Was not the impression rather that—whatever the crimes and the atrocities committed—at the end of the day there was impunity.

Little did I know that some years later I would be deeply involved in the creation of an international jurisdiction over violations of international humanitarian law.

I should like to address three different aspects relating to the establishment of an international criminal jurisdiction: the political, the legal and the practical aspects.

In so doing, I should like to state clearly from the outset that long before I took up my position as Legal Counsel of the United Nations, I had made clear that, in my view, the absence of an international criminal court could be described as a missing link in the international legal system.

II. Political Aspects

My first point concerns the political aspects. In following the debate and reading the letters that come to the Secretary-General or to the Legal Office of the United Nations, it strikes me that some enthusiasts seem to be unaware of the highly political environment in which the question of the establishment of an international criminal court is discussed. An international criminal jurisdiction by definition means that states would have to give up an essential element of their sovereignty, namely jurisdiction over their nationals or over individuals who have committed crimes on their territory or against their interests. Whether the international jurisdiction contemplated is exclusive or complementary, is, in this respect, irrelevant. The fact

remains: an entity established under international law and operating at the international level would be authorized to exercise the kind of power which is one of the most typical features of national sovereignty.

It is therefore reassuring that in the debate of the United Nations, many states now speak in favour of the establishment of an international criminal court. However, I think that it is fair to say that there is great hesitation on the part of some member states. I refrain from elaborating on why this is so, but in part, I think that this hesitation stems from the fact that there is still considerable uncertainty with respect to the scope of the jurisdiction of the international court, and in particular, jurisdiction *ratione materiae*.

For nearly fifty years, the international community has been struggling with what is commonly known as an international code of crimes. The matter has been on the agenda of the International Law Commission since its establishment. The Commission formulated the Nuremberg principles in 1950, and in 1954 the International Law Commission submitted the first draft code to the General Assembly.

Since then, the code has been discussed intermittently by the General Assembly and the International Law Commission. The latest development—I refer to the discussion in the Sixth Committee a couple of weeks ago—is that the code will probably be limited to a few crimes and the ones that are most closely related to the enforcement of international humanitarian law.

However, greater certainty with respect to jurisdiction *ratione materiae* of an international criminal court might not per se produce general acceptance of its statute.

Another aspect which is of great importance from the political point of view is the form in which the international court is established. Presently, I think there is general support for the idea that an international criminal court should be established by a treaty. While this method would seem the most natural from both legal and political points of departure, it also has its weaknesses. First of all, one must expect that it will take some time before a treaty acquires enough ratifications for it to come into force. The next question which arises is whether, once it is in force, the parties to the treaty are those which would be most likely to generate acts that would come under the jurisdiction of the court.

This problem brings to the forefront the question what significance an international criminal court would have in a situation where crimes are committed on the territory of states which are not

party to the convention. The question also could be asked, how the international court could be activated with respect to states that might be parties to the treaty but which may not be interested in following its provisions once an armed conflict visits that territory, particularly if the conflict is of a national character.

Against this background, one important issue is whether there should be a link between the United Nations and the treaty establishing an international criminal court. As you are aware, Security Council involvement is being discussed. The International Law Commission has proposed that the international criminal court could be activated by the Security Council with respect to a particular "matter," that is to say a situation to which Chapter VII of the Charter applies. While some participants favour this element in the draft statute, others take a different view and question whether the international criminal court would be seen as truly independent, if it could be activated by the Security Council.

To me this is one of the most crucial elements in the current debate. If the question of the activation of the international criminal court will rest with states solely, I doubt a significant development with respect to international criminal justice will be achieved.

Many of the crimes that we are discussing today are such that member states have universal jurisdiction over them. This means that any state that could secure the person of a perpetrator also would be in a position to bring the perpetrator to justice and deal with him or her in accordance with the national criminal justice system.

The problem is that the state which is most close to the crimes committed may not be in a position to take such action; the state in question may not even wish to investigate the crimes committed.

In other cases, a state may not wish to take action because of the political price that it would have to pay. Unfortunately, international solidarity is not always at hand and were one state to take action, it would risk being "punished"; it might be excluded from the benefits of bilateral exchange—commercial and other—with the state in which the crimes are committed, while other states would quickly reap the benefits in the form of enhanced bilateral exchange. Therefore, in my view, a concerted international effort is a prerequisite, if we are to achieve any more significant reaction against violations of international humanitarian law.

Let me illustrate the problem from another angle. Reading a discussion of the Conference on Security and Cooperation in Europe (CSCE) proposal for an International War Crimes Tribunal for the Former Yugoslavia, an author had discovered that the coming into

force of the contemplated CSCE Treaty was not made subject to the ratification by the states on the territory of the former Yugoslavia. The scholar failed to understand why the authors of the draft Treaty had not made such ratification a prerequisite for the coming into force of the Treaty.

Since I am one of the authors of this draft, let me explain the reason why. And perhaps, this demonstrates a difference in the approach taken by a practitioner as opposed to the scholar.

The CSCE draft was based on the assumption that a concerted international action was necessary. However, because the terms of reference of the rapporteurs was limited to the CSCE—which is not an international organization vested with power, but a political process—we were confined to treaty making. Our ambition was to produce a draft treaty which could form the basis for a diplomatic conference among the CSCE participating states, leading to a convention to be adopted by as many of these states as possible.

To the authors of the draft, the most important thing was that a tribunal could be established and that the treaty could come into force, thus making the tribunal a subject under international law. The goal, was, therefore, a common international effort channeled through the tribunal.

To make acceptance among all states on the territory of the former Yugoslavia a condition for the coming into force of the treaty, probably would have made the CSCE effort wholly impractical. I refer in this context to the failure today of some entities in the territory of the former Yugoslavia to cooperate fully with the Tribunal established in The Hague.

The authors of the draft CSCE statute had to be careful. We knew that the matter was discussed in the United Nations, and in particular in the Security Council, but we were far from certain that any action would be taken. We were not certain that such action was possible, legally and politically. It may well have been that the development had been quite different from what finally emerged through Resolutions 808 and 827.

To us, the CSCE rapporteurs, there also was another possible development involving both CSCE and the United Nations. Would there be a CSCE treaty, and would this treaty come into force without even a single ratification by the states in the territory of the former Yugoslavia? If so, the tribunal could still have been considered as a regional arrangement under Chapter VIII of the Charter of the United Nations. The Security Council would then have had the option of entrusting to this tribunal the adjudication of cases ema-

nating from the armed conflict in the former Yugoslavia. The Council may not even have had to go further than to ordering all member states to cooperate with the tribunal in much the same way as it has ordered member states to cooperate with the tribunal which the Security Council decided to establish itself.

This is in part the explanation of why the draft CSCE treaty did not require ratification by any of the states in the territory of the former Yugoslavia for it to come into force. The rapporteurs had been assured that there would be cooperation on the part of certain states, while they suspected that others would not render their support to the tribunal.

However, in view of the events that followed, this matter is now hypothetical. But it brings to the forefront a question of principle. If an international criminal court would be established, attracting ratification from a number of states from all around the world, could such a court be considered as a regional arrangement? Probably not!

It is therefore necessary to revisit again the question of the nature of the link between an international criminal court, established by a treaty, and the Security Council of the United Nations. The argument has been made that a court which would be dependent on a Security Council decision to take action would not be impartial. However, I fail to see the problem. The moment the Security Council would ask the court to address a "matter," the court would have to act impartially and independently the way foreseen in the statute. In this context, I refer to the Tribunals for the Former Yugoslavia and Rwanda, which are established by the Security Council.

The problem is rather at a different level. Because any decision of the Security Council to activate the court would depend on approval by each of the five Permanent Members of the Council, it could be said that the court might not address any "matter" involving the interests of one or more of these members. However, in this respect the situation is not different from today. The Yugoslav and the Rwanda Tribunals were established by the Security Council with the acceptance of its member states, including the Permanent Members (not by Rwanda in the second case).

Naturally, the ultimate goal should be a generally accepted treaty establishing an international criminal court, a court with which all members states would cooperate. The auspices seem good at the moment, but whether this will come true remains uncertain.

In the meantime, we have to observe the development in the Yugoslav and the Rwanda Tribunals. Depending on the outcome of

the efforts of these Tribunals and the assessment of the effects of their adjudication, other options might be discussed while we are waiting for a treaty to come into force. One such option could be—at least in the intermediate perspective—that the Security Council establishes an international criminal tribunal of a more permanent nature, but which could be triggered into action as the need arises and in conformity with Chapter VII of the Charter. From a legal point of view, that would give raise to a number of additional questions, but basically, the difference from the establishment of the two ad hoc Tribunals is not all that great. Politically, there would be the question whether the General Assembly would accept allocating the necessary funds for such an organ.

III. Legal Aspects

Let me now turn to my second main point, namely the legal aspects. I already have mentioned the form contemplated for establishing the international criminal court: the treaty. By definition, such a treaty would have to address questions of jurisdiction, applicable law, sanctions, enforcement of judgements, and supervision thereof.

The most important question is which law should apply to the tribunal. I mentioned the work on the International Code of Crimes. In parallel, the International Law Commission proposed, and the Sixth Committee of the United Nations now contemplates, provisions on applicable law which appear in the draft statute of the court. In my opinion, these latter provisions also could be seen as a code of crimes, although not a separate one, but included in the statute of the court.

When I follow the debate on this issue, it strikes me that it very much reflects the view of lawyers who are engaged in, and familiar with, public international law, rather than lawyers with experience in criminal law. One of the most important matters in this context is to achieve provisions that fulfil the standards of criminal law provisions that is generally accepted at the national level. Some statements in this debate reveal that the matter may not have been under appropriate scrutiny among criminal law experts at the national level.

It is important to ascertain that the effort to establish an international criminal court is supported at the national level, and in particular, by those who are in charge of criminal law matters: both the legislative branch and the practitioners. In particular, one should be careful to avoid vague and general references to custom-

ary international law and practices, because these are criteria that would cause difficulties in the criminal justice branch at the national level. Furthermore, it is important to understand that a full-fledged criminal law provision would contain not only a description of the act which is being criminalized, but also a clear indication as to the consequences which this act would entail—the penal clause.

Furthermore, criminal law is not confined solely to provisions criminalizing certain acts. There also are a number of general provisions which belong to the field of substantive law—such as rules on attempt, preparation, conspiracy and complicity, or rules pertaining to superior orders.

Against this background, I stress the importance of the collaboration at the national level between experts on public international law and experts on penal law to achieve the necessary understanding among the two categories of the specific features of the respective disciplines. Ultimately, the legislator, i.e., the parliament, must decide whether it can approve that their country participates in an international effort to punish violations of international humanitarian law. The common support of experts in the two fields of law which I just mentioned certainly would carry great weight in the legislative process.

Another element in this context is the judicial guarantees. Here we have to carefully observe that the guarantees that are laid down in various international instruments for the protection of those who are subject to criminal justice—and for that matter all those who participate in the process—are strictly observed at the international level.

I note, in particular, that when the Security Council established the Tribunals for the Former Yugoslavia and for Rwanda, they deemed it necessary to introduce the possibility of appeal. This feature also appears in the draft statute of an international criminal court. The basis for this feature in the criminal justice process is obviously that there is a requirement of appeal laid down in the Covenant on Civil and Political Rights (Article 14.2). I will revert to this matter when I address the practical aspects.

Without going into detail, I must highlight another element, namely, "Who should be allowed to appear as legislator?" If we study the ad hoc Tribunals, a significant feature is that the judges have adopted the rules of evidence and procedure. No doubt, this is a substance which at the national level would be addressed by the legislator—not by the judiciary. The question is, whether in the international effort, more attention should be paid to these aspects and whether there should be included in any future statute more precise rules in this field.

In this context, the judges of the Yugoslav Tribunal—as well as the Rwanda Tribunal—have elaborated on these rules. They have received numerous communications discussing various features of the version first issued. Based on these observations and their further thinking, they have adopted amendments to the rules.

Therefore, it may be that there is underway an international standard which is sufficiently scrutinized and tested for it to form a future common standard with respect to rules of procedure. This might substitute for more detailed deliberations by member states on rules in this area.

IV. Practical Aspects

Let me now touch on some practical aspects of the establishment of an international criminal court.

One has to be realistic. Irrespective of how an international jurisdiction is established, it is obvious that only a limited number of suspects can be brought to trial before an international court. An international trial is a major effort and also relatively costly in comparison with trials at the national level. Sometimes when I follow the debate on the code of crimes, it strikes me that it is rather unrealistic to think that an international court should be able to deal with a great variety of crimes, including crimes that could perfectly well be prosecuted at the national level. What calls for an international criminal court are the crimes that otherwise would not be prosecuted for political or related reasons.

But even a rather limited list of crimes could lead to numerous indictments. As a practitioner, I question how an international court of a relatively limited size will be able to deal with all these indictments.

During this seminar, the development in the International Tribunal for the Former Yugoslavia will be discussed. No doubt, the experiences of the trials before this court will be of tremendous importance when member states continue the discussion on the establishment of an international criminal court.

The question is, how relatively few judges—only two trial chambers with three judges in each of them and one appeals chamber of five—will be able to deal with the cases that are already before the Tribunal. In this context, I stress that I foresee that most of the judgements, if not all, will be appealed. It is only natural that many procedural decisions will be appealed as well, because in the initial phase, they will be first-time experiences. With respect to

appeals, I draw the attention to the fact that the appeals chamber also serves the International Tribunal for Rwanda.

I fear that the trial chambers can only deal with relatively few cases at the same time. Because the proceedings in each case can be expected to be lengthy, the need for courtroom facilities also becomes a problem.

The CSCE rapporteurs in their proposal attempted to deal with this problem in a pragmatic manner. The structure of the court was trial chambers composed of three judges and an appeals court composed of five judges. However, the judges were to be drawn from a roster established beforehand. This meant that judges could be called to serve as and when the need arose.

Close attention should be paid to creating flexibility to assure that the accused under detention would not have to wait to be tried for an unreasonable time.

In my experience, appeals proceedings are often more limited and focused on a few questions as compared to the trial in the first instance. Whether this will be the same in an international criminal court remains to be seen. Under all circumstances, I fear that an appeals chamber will have a considerable case load to deal with, even if the Appeals Chamber of the Tribunal for the Former Yugoslavia may, at present, not be overburdened. However, delays in the appeals chamber may be less serious, because one has to assume that in most cases, the defendant has been found guilty by the first instance and already is serving his or her sentence. Nevertheless, uncertainty for a longer period of time would not be consonant with the requirements of due process as laid down in the International Covenant on Civil and Political Rights and other international instruments.

Another aspect which comes to the forefront is where the trials are to be held. Naturally, the court has to have a seat somewhere in the world. I very much doubt that the contemplated international court will be engaged in trying persons from disparate parts of the world, following action by individual contracting states. The practical situation which I foresee is that the court is triggered into action by a decision in a multilateral context, e.g., by the Security Council. If the present provision on a right for the Council to request the court to address a particular "matter" is retained, this "matter" might very well be far from the seat of the court.

Even if there would only be a few trials, it still would be cumbersome to have the defendants move from across the world together with all the evidence—including all the witnesses which would be

found in the region where the crimes have been committed.

The CSCE rapporteurs proposed that the site of the Yugoslav Tribunal which they foresaw would not be in the territory of the former Yugoslavia, but that the court would be free to meet on that territory.

I think that the effectiveness of an international criminal court would be in direct proportion to the flexibility with which this court can meet in different regions of the world. Many aspects come to the forefront in this context, including the security aspects. But if the ambition is creating an immobile institution housed in the most modern premises and with all the latest technical equipment installed this might not serve the best purpose in all situations. The court might be too remote from the scene where it should be in action.

The question is whether an appeals court could meet elsewhere as compared to the trial chambers. The practitioner in me tells me that the demand for an easily available appeals court will be great and that the arguments that speak in favour of the appeals court meeting also at the scene of the crime, as it were, will be the same as for the trial chambers.

Another matter on the practical side is where the sentence is to be served. The sentences emanating from the International Tribunal for the Former Yugoslavia, are to be served in states that offer prison facilities to the Tribunal. So far, the response to the call from the Secretary-General and from the President of the Tribunal to offer prison space has generated a very meager response. This question needs careful consideration.

The CSCE rapporteurs proposed that the sentences should be served in the former Yugoslavia, but under international supervision. I still ask myself whether this is not the most appropriate solution. There are many aspects that present themselves in this context, including the internationally accepted norms on how prisoners should be treated. To remove a prisoner entirely from his national setting—and, in particular, to make it impracticable for members of his family to see the prisoner—might not meet the standards that the states are obliged to apply at the national level, standards that consequently also should apply in an international context.

The question of establishing an international prison could of course be contemplated. However, I am doubtful, and even more so when I now look back at almost two years experience of serving an international organization. I am afraid that an international prison would be a very costly enterprise and very inflexible, because it

would be difficult to assess to what extent prison space would be needed.

In this context, producing an international criminal court and a statute, coupled with rules of procedure, is not enough. If you are to establish a criminal justice system, you must have rules that govern the system from the very instance that the investigators start prodding into a particular case and to the moment when, maybe many years later, a person leaves the prison having served his or her sentence. This means, in particular, that you must have quite detailed rules governing the servicing of sentences. This is one reason why I think that it is preferable that a prisoner is subject to a set of national rules which would govern the servicing of the sentences and the treatment of the prisoners.

However, international control is necessary to avoid prisoners from being treated too differently. In particular, the international court must have full control over the exercise of the institute of pardon. Unless the court has full control over this institute, it could be misused. An early pardon could be like pulling the plug out of the barrel.

In my view, the practical problems in establishing an international criminal court should not be overlooked. It is my hope that those who engage in the further discussions will avail themselves of the expertise in this field which is to be found at the national level and increasingly among those engaged in the Yugoslav and Rwanda Tribunals.

V. Applicability to the United Nations

Let me now turn to another aspect of this topic, namely to what extent an international criminal tribunal should be competent with respect to the United Nations. The development in recent years in United Nations operations, has been a shift from traditional peace-keeping operations to peace enforcement. This means that operations by the United Nations has led to the use of force. The question of the applicability of international humanitarian law to such United Nations actions then arises. The question also arises in the context of use of self-defense.

Force regulations enacted by the Secretary-General for various United Nations operations in early days provided that the force should observe and subsequently respect the principles and spirit of the general international conventions governing the conduct of military personnel. Later development, in particular the events in the Gulf War, in the former Yugoslavia, and in Somalia, made it obvious

that there was no clear distinction between peacekeeping and peace enforcement operations.

This has led to a practice whereby in status of forces agreements a provision is inserted to the effect that the United Nations shall ensure that the operation is conducted with full respect for the principles and spirit of the general conventions applicable to military personnel. Reference is then made to the 1949 Geneva Conventions.

The Geneva Conventions are drafted for the purpose of regulating obligations between states. The United Nations cannot be considered a "party" to a conflict or a "power" within the meaning of the Geneva Conventions. Furthermore, the United Nations today has no possibility, either juridical or administrative, to effectively undertake the obligations provided for under the Conventions and their additional Protocols. Today, the matter is solved by clauses in status of forces agreements, which means that compliance with international humanitarian law has to be enforced, when and if necessary, by the states who contribute forces to the United Nations operation.

However, with the emerging of an international criminal court, the question could be asked whether the United Nations should not itself enforce compliance. The idea that United Nations should be directly bound by the rules of international humanitarian law is certainly not new, and I am convinced that this matter will be discussed with renewed intensity in the context of the establishment of an international criminal court.

VI. Conclusion

The time that I have at my disposal as a keynote speaker at this luncheon is running short. Allow me a few concluding reflections.

The establishment of an international criminal court is a tremendous undertaking, both from a legal and political view point. Even assuming that all the political reservations that still can be sensed would be cleared, there remains all the legal and practical aspects to be considered and solved.

There is, however, one critical argument that I should like to highlight. It is often supported by a reference to "political realism." The argument is that the initiation of trials against certain actors would hamper an ongoing peace process. Except for the Nuremberg and Tokyo trials, which are sometimes referred to as "victors justice," the international community has so far not succeeded to bring to justice those who bore the ultimate responsibility for atrocities

committed in connection with armed conflict. It also is fair to say that the standards according to which actions have been assessed have been different depending on whether the acts were committed by the victorious or the defeated.

The argument that the Tribunal for the Former Yugoslavia is a complicating factor in the peace negotiations has been made. This argument opens frightening perspectives. The very reason that certain armed conflicts occur, entailing crimes against international humanitarian law, is in my view, that the international community has so far been unable to demonstrate that those responsible would be brought to justice—sooner or later. Until the day when the international community can demonstrate that those who ultimately bear the responsibility for violations of the most fundamental rules for the protection of the human being are brought to justice, history will repeat itself.

In participating in discussions on the Yugoslav tragedy, I have never mentioned names; it is for the prosecutor to do so. All I can say is that, if persons indicted by the prosecutor of the Yugoslav Tribunal are not brought to justice, this may cause irreparable harm to the credibility of international criminal justice for the future.

It is my hope that leading political actors in the peace process, as well as the general public, have now come to realize that it is too late to retreat from the position already taken.

My hope is that a common sense of decency and international solidarity will change the course of history and demonstrate that amnesty cannot be treated as a bargaining chip in peace negotiations.

There are those who would argue that to request amnesty comes very near to a guilty plea. But this is not good enough. If justice is not done, the impunity will sooner or later cause a new outburst of violence. Some of the acts committed in the former Yugoslavia, when you hear them described, are almost beyond comprehension. The same goes for Rwanda. Justice simply must be done!

These events clearly demonstrate the need for an international criminal court. To paraphrase our conclusion in the CSCE report: the establishment of such court is primarily a question of political will.

AD HOC TRIBUNALS HALF A CENTURY AFTER NUREMBERG*

GRAHAM T. BLEWITT**

I would be very surprised if any civilised human would not agree that one major factor which holds any society together is the rule of law. The absence of justice or the rule of law causes any community to descend into lawless anarchy, where there is no respect for the rights of others, where there is no real freedom, nor a safe existence for the members of that community.

Speaking very generally, when considering basic human behaviour, the choice between good and evil should be relatively clear. If people do not understand the difference between right and wrong, there is a real problem and it becomes necessary to educate and teach the difference between the two. In most civilised societies this is not generally regarded as a common problem. However, even when people understand the difference between good and evil, different forces and temptations apply, and if strong enough, cause, to a greater or lesser extent, people to choose the path of evil or wrongdoing.

When this occurs at the communal level, the rule of law becomes more important, where either the threat of sanctions or penalties, or their actual imposition, operates to control or modify human behaviour. In other words, the mere existence of certain laws operates to act as a deterrent against wrongdoing.

Unfortunately, human nature being what it is, the mere existence of various laws is not sufficient to deter criminal behaviour, particularly planned and organised criminal behaviour. Accordingly,

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**Deputy Prosecutor International Criminal Tribunal for War Crimes in the Former Yugoslavia. New South Wales Leaving Certificate, 1964, De La Salle College, Kingsgrove. Admitted as Barrister of the Supreme Court of New South Wales, 1974; admitted as Solicitor of the Supreme Court of New South Wales, 1980. Professor Blewitt's many accomplishments include serving in the Public Prosecutions Office, Sydney 1965-85; National Crime Authority, Sydney 1985-88; serving as Deputy Director, then as Director, of Special Investigations Unit (Nazi War Crimes), Sydney 1988-94; and Deputy Prosecutor, United Nations International Criminal Tribunal for the Former Yugoslavia.

the enforcement of those laws becomes an essential part of the rule of law. The proper administration of justice, including the enforcement of the rule of law in a fair and rightful manner, become the cornerstone of any free and democratic society.

The same considerations apply equally to the international community. Without the rule of law and appropriate measures to enforce the rule of law, there is nothing to stop criminal behaviour at any level, including states committing crimes against their own citizens or against their neighbour's citizens. When the crimes being committed by a state constitute genocide, crimes against humanity, or other serious violations of international humanitarian law, the international community cannot stand idly by to allow such crimes and atrocities to continue or to go unpunished.

The sad fact is, however, that the international community often has stood by, being either unwilling or unable to establish the rule of law at the international level. The international community has developed an impressive array of modern international humanitarian laws aimed at protecting both those involved in the conduct of wars and also nonbelligerents. This has not been enough and, with a few isolated exceptions, the international community has not taken adequate steps to establish an effective enforcement mechanism to complement the existing set of international humanitarian laws.

This is perhaps why during this century alone, with all its wonderful technological developments, which has included new and frightening weapons, that over 160 million people have been killed in wars. There must be some mechanism to enforce the rule of law if the next century is not to see a repeat of the human suffering and tragedy that we have all witnessed.

There are a few bright rays of hope that the international community is moving in the right direction. Nuremberg was the first. The criminal trials held at both Nuremberg and Tokyo constituted the only examples in history where leaders of criminal regimes were apprehended as war criminals and were held to account for their criminal acts. They were not just ordinary criminals, they were the leaders of empires, which sought to dominate the world by terror, using genocide and crimes against humanity as major tools to achieve their goals. The trials achieved another important result, they assigned guilt to the individual perpetrators and alleviated to a large extent, although not fully, guilt being ascribed to the whole German and Japanese peoples.

Nuremberg was a success, but the Cold War left it sitting on the shelf for almost fifty years. During that time, the world has been dripping with blood. The hope that the world would never again see

the suffering inflicted during World War II has not been realised and the suffering and death have been repeated again and again.

Following the Nuremberg example, one clear option for the international community would have been to set up a permanent international criminal court which would have the ability to enforce its decisions, judgements, and orders, or to have them enforced. The jurisdiction of such a court could have been concurrent with that of national courts, but it also should have had the ability to take over any national proceedings in appropriate circumstances. In that way, pressure could have been applied to national courts to act in the first place and to do so in a fair and just way.

If this could have been achieved, victims of crimes undoubtedly would have accepted more readily that the rule of law was applied effectively and that justice was being achieved. In many societies and situations this could have brought about an end to the cycles of violence, which have been erupting as new generations seek to obtain justice or revenge for past crimes that have gone unpunished.

It is essential to build on the legacy of Nuremberg. It is worth repeating that, notwithstanding the horrors of World War II and the enlightened actions that followed at Nuremberg, until now there has not been any action by the international community to establish and enforce the rule of law throughout the world. That horrendous atrocities have occurred in almost every corner of the world, including the Former Yugoslavia and Rwanda, is due to the lack of an effective deterrent for gross criminal behaviour at the state level. This pattern of violence and criminal behaviour will continue until a strong deterrent is in place to prevent or limit the commission of such crimes.

The second ray of hope that points towards a brighter future is that the international community has taken positive steps towards the internationalisation of criminal law by setting up the ad hoc International Tribunals for the Former Yugoslavia and Rwanda. In many ways, the international media should accept a great deal of the credit for this, by being present during the conflicts and bringing into the living rooms of homes all over the world, the frightful images of genocide being committed and thus stirring our political leaders into action.

Thus, the legacy of Nuremberg is taking shape in the form of these ad hoc Tribunals. This development took most of the world by surprise, particularly in light of the painfully slow progress being made to set up a permanent international criminal court. Not many anticipated that the Security Council would create a judicial sub-organ under Chapter VII of the United Nations Charter. This remark-

able and perhaps drastic step was taken only after it was realised that another Holocaust, with widespread ethnic cleansing in the form of genocide and crimes against humanity, was actually occurring in Europe.

Once the Security Council had taken the first step in creating the Tribunal for the Former Yugoslavia it became easier to take similar action in respect of Rwanda. Perhaps, with the success of the Tribunals, which I am confident will be realised, the international community will be able to take the next step, the creation of a permanent international criminal court.

Turning to the ad hoc Tribunals, it is fair to ask whether they will be a success. If they are able to demonstrate that they are capable of operating independently and professionally and giving all accused a fair and just trial, it is my opinion that they will be successful.

The war in the Former Yugoslavia is still being waged and another question is often posed as to whether the Tribunal in The Hague will be able to secure the presence of the major criminals and subject them to the trial process. While the Tribunal is not able to conduct trials in absentia, it nevertheless has an alternative procedure which is likely to bring about the eventual trials of the accused.

Briefly, the Tribunal's procedure is as follows: when the Prosecutor is satisfied that there is sufficient evidence against an accused for an offence over which the Tribunal has jurisdiction, the Prosecutor presents an indictment together with the supporting material to a trial judge of the Tribunal, who—if satisfied that there is a prima facie case—confirms the indictment and issues an arrest warrant. This warrant, together with a surrender order, is then forwarded to the state where the accused is believed to be residing.

All member states of the United Nations have an obligation to comply with such surrender orders. In the event that a state fails to surrender an accused to the Tribunal for trial, the Prosecutor can present the indictment again and call the evidence in public on which the indictment has been based. The Trial Chamber (composed of three judges of the Tribunal) can then reconfirm the indictment and issue an international arrest warrant. This procedure has become known in some circles as the "super indictment."

Additionally, the procedure also enables the Tribunal to refer a state's refusal to cooperate with the Tribunal to the Security Council for action. The Security Council may decide to impose sanctions against that state or ensure that existing sanctions are being applied. Given time, sanctions against a state—especially any state trying to rebuild its economy—are likely to "bite hard" and should not be dismissed lightly.

Some say that such procedures are unlikely to secure many accused persons before the Tribunal, particularly if they are holding positions of power and authority. However, the procedures of the two ad hoc Tribunals could become very effective.

In the case of a political leader, the "super indictment" procedure of either Tribunal will result in the publication of the evidence on which the indictment is based. The world can then judge whether the accused should stand trial to answer the charges. If the accused does not stand trial, he will be branded an international fugitive for crimes that are serious violations of international humanitarian law. The people of the accused's own country also will be able to consider the available evidence against their political leader. Because of the international arrest warrant, the accused will become a prisoner within his own borders. He will not be able to deal with his international colleagues and will become an ineffective political leader—one who should be rejected by his people. Additionally, political opponents may be willing to surrender such a fugitive to the Tribunal.

It is not too bold to observe that in the case of both Dr. Karadzic and General Mladic that they are already becoming isolated fugitives in the Serb-controlled areas of Bosnia, and international leaders are refusing to deal with them, even when it comes to the peace negotiations. The Tribunal is indeed having an impact and there is still a long way to go.

For the ad hoc Tribunals to achieve that part of their mandate relating to the prosecution of persons responsible for serious violations of international humanitarian law, they must be allowed to remain in existence long enough so that the process can be completed, meaning that the international community must insist on the surrender of all accused persons so that trials can take place—this may take several years after the indictment is first issued.

There is one obvious alternative to allowing the ad hoc Tribunals to continue ad infinitum, namely, their jurisdiction could be transferred to a permanent international criminal court, which could put the accused on trial. In this way, the internationalisation of criminal law will be well on the way to being established permanently.

This would then set in place a major deterrent to gross criminal behaviour at the international or state level and at least there may be a way to prevent or limit future acts of genocide and crimes against humanity.

FROM NUREMBERG TO THE HAGUE*

THEODOR MERON**

I am grateful to John Norton Moore and Robinson O. Everett for inviting me to this important conference on Nuremberg and the Rule of Law: A Fifty-Year Verdict. Both the establishment of the Nuremberg Tribunals and of the ad hoc Tribunals for the Former Yugoslavia and Rwanda were of major, perhaps even monumental importance for the establishment of the rule of law in the international community. My task as a commentator has been made easy by the comprehensive and thoughtful paper of my friend Graham Blewitt.

The time could not be more suitable for such a conference, and especially for some reflections on ad hoc Tribunals half a century after Nuremberg. The subject is vast and I have selected a few themes as a focus for my remarks comparing the two ad hoc Tribunals established by the Security Council to Nuremberg.

We often describe the ad hoc Tribunals as the first international criminal tribunals since Nuremberg. The institutional settings are quite different, however. Nuremberg was the first multinational

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**Professor of Law, New York University School of Law. Professor Theodor Meron received his legal education in the Universities of Jerusalem, Harvard (where he received his doctorate), and Cambridge. Since 1978 he has been Professor of International Law at New York University School of Law, specializing in human rights and in humanitarian law, and, since 1991, also at the Graduate Institute of International Studies in Geneva. Among Professor Meron's many accomplishments, he has served as Editor-in-Chief of the *American Journal of International Law*; member of the Council on Foreign Relations; member of the American and French Societies of International Law; member of the Council of the International Institute of Humanitarian Law (San Remo); board member of Helsinki Watch, Americas Watch, and the International League for Human Rights; and Carnegie Lecturer at the Hague Academy of International Law. His publications are: *INVESTMENT INSURANCE IN INTERNATIONAL LAW* (Oceana-Sijthoff 1976); *THE UNITED NATIONS SECRETARIAT* (Lexington Books 1977); *HUMAN RIGHTS IN INTERNATIONAL LAW* (Oxford University Press 1984); *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* (Oxford University Press 1986) (which was awarded the certificate of merit of the American Society of International Law); *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* (Sir Hersch Lauterpacht Memorial Lectures, Grotius Publications 1987); *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (Oxford University Press 1989). He is a frequent contributor to the *American Journal of International Law* and other legal journals. His latest book is *HENRY'S WARS AND SHAKESPEARE'S LAWS* (Oxford University Press 1993).

criminal tribunal. I hesitate to repeat the commonly used term "victors' court" because this would imply an arbitrary, perhaps unjust tribunal. Yet, despite certain shortcomings of due process rules of Nuremberg, which I shall mention, Nuremberg was neither arbitrary nor unjust. It tempered the Charter's harsh rules to protect the accused, it assessed evidence according to accepted and fair legal standards, and was even ready to acquit outright some defendants. Although *tu quoque* arguments were not addressed directly, they were important as the underpinnings of the proceedings. Because of them, some offences were not prosecuted (e.g., the bombing of Coventry) and some charges were rejected on the ground that similar practices of the Allies demonstrated that certain norms did not harden into clear prohibitory rules (Doenitz, von Raeder, and unrestricted submarine warfare).

That victors sat in judgment did not corrupt the essential fairness of the proceedings. Some German critics of Nuremberg acknowledged that defendants before that Tribunal enjoyed more due process protections than they would have before occupation courts and other courts of the Allies. While rejecting the *ex post facto* arguments advanced by the defence against charges of aggressive war; conspiracy to wage it; crimes against humanity; and organized criminality, the Tribunal mitigated the severity of the controversial provisions on criminality belonging to certain organizations, so as to criminalize only the voluntary joining of such organizations with knowledge. The Tribunal mitigated the Charter's arguably novel provisions on conspiracy to wage aggressive war by limiting liability to those directly involved in the formulation or implementation of a plan to wage the war of aggression. It liberally allowed the defendants to raise a superior orders defence in mitigation of punishment.

This is not to excuse due process defects, including a certain lack of equality under the Nuremberg procedures between prosecution and defence. For American lawyers it is particularly difficult to comprehend that witnesses and defendants could and sometimes were questioned by the judges; that there was no specific recognition in the Charter of the presumption of innocence and no discussion of burden of proof; that defendants were not allowed an opening statement; that trials *in absentia* were permitted; that the judgments could not be appealed to higher judicial instances; and that defendants could not challenge the Tribunal. We should, however, remember that the Charter and the procedure of the Tribunal reflected a compromise which reflected civil law traditions that recognize, for example, *in absentia* judgments.

The two ad hoc Tribunals are the first truly international criminal courts, having been established by the United Nations Security Council, and also through the approval of the budget and the election of the judges by the most representative organ of the United Nations, the General Assembly.

The statutes of the ad hoc Tribunals are an epitome of the most advanced United Nations human rights standards. The statutes, the judges, and the prosecution are extremely sensitive to due process rights of the accused.

There are obvious differences between Nuremberg and the new Tribunals. In Germany, the Allies had full police powers, almost sovereign authority, and most defendants were to be found within the territories controlled by the Allies. The ad hoc Tribunals only have the still largely untested powers delegated from Chapter VII of the United Nations Charter. Despite the potential penalties for states and authorities for refusing to cooperate with the Tribunals, that cooperation has not been forthcoming in important cases. Persuading states and authorities to carry out arrest warrants has proved extremely difficult, just as the readiness of the international community to compel compliance has been disappointing.

In Nuremberg, the Allies had the practically unlimited resources of the victorious states. The Hague tries to make ends meet with ridiculously limited means.

In Nuremberg, we had the luxury of a paper trail clearly linking the perpetrators to the crimes. At The Hague, there is no paper link and often no access to the scene of crimes.

Both Nuremberg and The Hague are largely the result of United States initiative and support. This is well known as regards The Hague, but the discussions leading to Nuremberg may require special mention. The British initially were hostile to trials, favoring, as the oral history of Herbert Wechsler suggests, an execution list to be carried out on identification. In Yalta, in February 1945, Stalin is supposed to have mentioned the need to kill some 50,000 Nazis. The Morgenthau Plan proposed a sort of "scorched earth" policy for post-war Germany which would have been accompanied by the identification and shooting of major war criminals. It was not until Potsdam and Truman in July and August 1945, that the agreement in London on the Nuremberg Charter was essentially reached and the United States historical respect for due process reasserted itself.

The alternative to Nuremberg could well have been a blood bath, in which populations long victim to Nazi atrocities would have resorted to lynching, summary executions, and massacres of

Germans. The Allies' intentions to render justice through courts and the Tribunals prevented such acts.

I mention this aspect of Nuremberg to address the continuing debate about the tension between the achievement of peace and the rendering of justice in the Yugoslav context. Were it not for the existence of the two Tribunals, not only would the inclination to individual and collective vengeance, private or unofficial violence, be even stronger, but future reconciliation would be impeded because blame would rest on entire peoples instead of being assigned to individual perpetrators of crimes and responsible leaders.

Tension between justice and peace will become more apparent as the negotiations advance. Short-sighted diplomatic goals should not obscure what closing of the Tribunals would mean to prospects of reconciliation and stability of international law.

The scale of atrocities, unthinkable in Nuremberg, terrible in Yugoslavia and Rwanda, make the very idea of immunity or pardon difficult to contemplate.

The Hague was established to put an end to the crimes which were being committed, presumably through deterrence, to vindicate justice, and to contribute to the restoration and maintenance of peace. Nuremberg was established to bring Nazi war criminals to justice. Both The Hague and Nuremberg had additional normative goals, but I would like to focus for a moment on the problem of deterrence.

During the Second World War, especially through the highly publicized and broadcast Moscow Declaration of 1943, severe warnings of punishment of those committing atrocities were issued and widely publicized. Like the warnings issued by the Security Council with regard to crimes committed in the former Yugoslavia, there is no empirical evidence of effective deterrence in either case. Why have we failed?

Deterrence is often ineffective to prevent crimes, even in nation states with their law enforcement apparatus. The effect of deterrence on the international plane is further reduced by such factors as religious hatred, xenophobia, fanatic patriotism, discipline, superior orders, expectations of victory, and, if need be, of martyrdom.

But I do not believe that the failure of deterrence is inevitable. It is because prosecutions for war crimes on both national and international planes are so exceptional that criminals do not believe that they are likely to be prosecuted and punished. Were war crime trials made a consistent reality, deterrence would be taken more seriously. Instead of despairing over the prospects of deterrence, the interna-

tional community should enhance the probability of punishment by encouraging prosecutions before the national courts, especially of third states, by making ad hoc Tribunals effective, and by establishing a vigorous, standing international criminal court.

Although punishment was the primary articulated justification for Nuremberg, a less obvious, but nonetheless important, goal was to attain respect for international law, to give a new vitality to that law, and to signal to the German people that the rule of law had returned. For the very first time, international law was applied to war criminals in actual cases leading to punishment, even capital. The principle of individual criminal responsibility was vindicated. For the first time the diffuse body of customary law coalesced in a multinational context into criminal law applied in a real Tribunal to defendants in the dock.

It is in the context of the significance of Nuremberg and The Hague for the development of international law that I turn to for a brief discussion of their subject matter jurisdictions. It is here, in the confirmation and the development of international humanitarian law and its essentially customary character through the Charter, statutes, and the case law, that these Tribunals made a historic contribution to the rule of law. In addition to restating war crimes, the Nuremberg Charter defined, for the first time, crimes against humanity and crimes against peace. The former were unfortunately limited by the linkage with other crimes within the jurisdiction of the Tribunal, thus effectively reducing them to wartime atrocities.

The statutes of the ad hoc Tribunals represent a tremendous advance over the Charter of Nuremberg. First, grave breaches of the Geneva Conventions and the crime of genocide have been given the central place. Crimes against humanity have been recognized for noninternational armed conflicts (not only for international wars) in the Yugoslavia Statute and arguably even for peacetime in the Rwanda Statute. Thus, the trend suggested by *Control Council Law Number 10* is being followed. Rape has been criminalized as a crime against humanity. Most importantly, by recognizing the criminality of violations of common Article 3 and of Additional Protocol II to the Geneva Conventions, the Statute for Rwanda constitutes an extremely positive statement of international humanitarian law with regard to internal atrocities.

In Nuremberg and, despite progress since then, also at The Hague, the defence unsuccessfully raised *ex post facto* challenges with respect to subject-matter jurisdiction. At The Hague these challenges have now been resolved by the Appeals Chamber in the Tadic case. But they are likely to reappear in subsequent proceedings and

other cases. Both the prosecution and the Tribunal should approach this matter with prudence. Whether justice has been rendered will, in the long run, be decided in the courts of public opinion and in the halls of academia.

On the other hand, are we not witnessing a certain erosion of Nuremberg's concept of crimes against peace? These crimes had a considerable foundation in normative statements prohibiting aggressive war as national policy and defining aggressive war as a crime. After World War I, serious consideration was given to prosecuting Kaiser Wilhelm.

In a recent statement on the proposed international criminal court, the United States expressed many caveats about the crime of aggression as a crime for which responsibility attaches to individuals. It described aggression as essentially a crime of states, which is ill-defined, and liable to be politicized. The crime of aggression, despite its recognition in ILC draft codes, was not invoked by the Security Council even in such an obvious case as Iraq's invasion of Kuwait and it is seldom invoked in international practice. Yet, it was the United States, and especially Justice Jackson, who insisted on criminalizing war of aggression in the Nuremberg Charter and subsequent proceedings, clearly viewing this crime as one for which responsibility attaches to individuals.

Let me conclude. Under the pressure of atrocities in the Former Yugoslavia and Rwanda we have seen a rapid adjustment of law, process, and institutions. The moral importance of attaching guilt to individuals has been reaffirmed. The establishment of a permanent criminal court has been given a tremendous impetus. Is the cycle of impunity slowly closing?

The possible fear by states that international Tribunals might preempt national prosecutions also may have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law. No matter how many cases the ad hoc Tribunals try, their very existence sends a powerful message supporting the paramountcy of human rights even for the most egregious violators of international humanitarian law and reaffirming the rule of law.

EVALUATING PRESENT OPTIONS FOR AN INTERNATIONAL CRIMINAL COURT*

MONROE LEIGH**

I. Introduction

Fifty years after the commencement of the Nuremberg trials, the international community appears to be moving toward a consensus in favor of establishing a permanent international criminal court. A number of important events in the 1990s have propelled the world toward such a consensus. First, the end of the Cold War tensions created a new political climate that favored international cooperation. Second, the advent of multilateral action in Somalia, Iraq, and elsewhere furthered the notion that such cooperation might be extended to the judicial arena. Finally, the recrudescence of the hoary demons of tribal, ethnic, and religious strife, most recently apparent in "ethnic cleansing" in Rwanda and in the Former Yugoslavia, led the United Nations Security Council to the establish temporary or, ad hoc, Tribunals to try persons for atrocities committed in those nations. All of these factors helped convince a number of nations that international cooperation in the prosecution and suppression of crimes of international concern can be most effectively promoted by the creation of a permanent international criminal court.

In 1992, at its forty-fourth session, the International Law Commission established a Working Group on a Draft Statute for an

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**Member of the Washington, D.C., law firm of Steptoe & Johnson, with a practice primarily in the area of international law and international trade. B.A., *magna cum laude*, 1940, Hampden-Sydney College Hampden-Sydney, Virginia; LL.B., 1947, University of Virginia Law School. Among his many accomplishments, Mr. Leigh has served as Deputy Assistant General Counsel for International Affairs, Office of Secretary of Defense; Assistant General Counsel for International Affairs, Office of Secretary of Defense; Presidential appointment as Legal Adviser Department of State; member Permanent Court of Arbitration, The Hague; member Public Advisory Committee on Law of the Sea, United States Department of State; and member Legal Adviser's Public Advisory Committee on International Law, United States Department of State. Mr. Leigh has written numerous articles, to include: *The Supreme Court and the Sabbatino Watchers*, 13 Va. J. OF INT'L L. 33 (1972); *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. OF INT'L L. 250 (1974); *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 INT'L L. 1 (Spring 1990).

International Criminal Court. In 1993, this Working Group submitted to the International Law Commission a Draft Statute on the International Criminal Court and the Commission referred it to the General Assembly for comment. In 1994, (at its forty-sixth session, after having received written comments by numerous states and nongovernmental organizations), the International Law Commission adopted a Revised Draft Statute for a proposed permanent International Criminal Court. The Commission has recommended that the General Assembly convene a diplomatic conference to adopt a treaty and open it for signature by states.

While the United States government supports the effort to establish an international criminal court, it has emerged as the chief critic of the 1994 Draft Statute and advocates further revisions to it. Most significantly, the United States wishes to limit the role of the Court by denying it jurisdiction over broad categories of cases.

I would like to break up my review of the Draft Statute into three parts. First, I will briefly outline the modern history of the notion of an international criminal tribunal. In this context, I will devote particular attention to the role of the Nuremberg Trials as the precursor of the current efforts to establish such a court. Second, I will discuss the structure of the Draft Statute and highlight provisions relating to jurisdictional issues. Finally, I would like to conclude by discussing various criticisms of the Draft Statute that the United States Department of State has raised.

II. The Movement Towards an International Criminal Tribunal

The idea of establishing an international criminal tribunal did not originate with the Nuremberg Trials. The first modern attempt to establish an International Criminal Court was the Allies' effort at the end of World War I to prosecute Kaiser Wilhelm II and key German military officials for crimes against peace and war crimes pursuant to the Treaty of Versailles of 1919. However, the Dutch government refused to extradite and the Leipzig trials failed because the court either refused to convict or awarded derisory penalties. In 1937, two decades later, the League of Nations adopted a Convention for the Creation of an International Criminal Court but it never entered into force. The Nuremberg Trials were the first successful international criminal prosecutions and deserve recognition as such.

As the world learned of the staggering extent of the atrocities committed by the Third Reich and its allies, a consensus emerged that the persons responsible for such evil must be held individually

accountable for their actions. Accordingly, on January 13, 1942, the Inter-Allied Commission on the Punishment of War Crimes issued the Declaration of St. James. This early expression of the principle of personal accountability for war crimes called on the signatory powers to "place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them or participated in them."

During the following years, the Allies debated the appropriate mechanism for punishing such criminals. In the 1943 Moscow Declaration, the Allies stated that they would try the most prominent Nazi war criminals before an international court.

The Nuremberg Trials have been widely criticized. Some commentators have argued that the Tribunal was a mere ad hoc dispensation of "victors justice" whose judgments were more political than judicial. Others have criticized the Nuremberg Trials for violating due process principles by prejudgment of guilt, application of ex post facto law, procedural irregularities, and judicial bias. Chief Justice Stone has been quoted as saying that the trials were nothing but a "high level lynching" party. Many other colleagues of Justice Jackson held similar views. However, the Nuremberg Trials must be judged within the context of their epoch.

By 1945, the Axis had been defeated and the its cities lay in ruins. Meanwhile, Allied soldiers had liberated the Nazi death camps, and the world learned the extent of the horrors committed by Germany. Yet the victors avoided the temptation to administer "instant justice." Stalin's 1943 remark that 50,000 German General Staff officers should be liquidated at the conclusion of the war was not accepted by the western allies when World War II ended. Instead, the Allies, including the USSR, established the Nuremberg and Tokyo Tribunals to administer justice under the rule of law.

Despite their shortcomings, the Nuremberg Trials constitute the first modern example of the successful prosecution of war criminals by an international tribunal. During the five decades that followed these trials, no similar tribunals were created and no international trials took place. Nevertheless, the Nuremberg principles inspired the advocates of a permanent international criminal court to persevere. It is a precious legacy to our generation and to future generations.

III. Structure of the Draft Statute

The effort to create an international criminal court is both an

evolutionary and a revolutionary process. Many scholars, statesmen, and lawyers, some of whom are present here today, have advocated the idea of such a forum for many years. On the other hand, when established, the international criminal court will be the first permanent international body entrusted with administering criminal justice in history. The framers of its draft statute, not unnaturally, have attempted to balance different conceptions of criminal justice to draft a statute that could win the support of the international community.

Thus, the Draft Statute does not correspond to any particular criminal justice system. Instead, it incorporates principles from various legal regimes. For example, it envisions a largely prosecutorial system, with an independent prosecutor whose role resembles that of its counterpart in common law countries. The Court's decisions, however, will be rendered by a panel of judges without a jury as is the practice in most civil law jurisdictions.

The Draft Statute does not purport to resolve all of the issues relating to the International Criminal Court. For example, for the most part it does not address the issue of what substantive law the Court should apply or what the essential elements of each particular crime are. Instead, the Draft Statute is designed primarily to set forth the basic procedural and evidentiary framework.

The preamble to the Draft Statute states that its main purposes are to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons convicted of crimes of significant international concern. In the commentary to the preamble, the Commission has noted that it intended the Draft Statute to operate in cases where there is little or no prospect of offenders being duly tried in national courts. Additionally, the Court will only exercise jurisdiction over the most serious crimes—that is, crimes of concern to the international community as a whole.

Under the Draft Statute, the Court will be established by the conclusion of a multilateral convention among the party states rather than by an amendment to the United Nations Charter or the adoption of a resolution by the General Assembly and/or the Security Council as was done for the Yugoslav and Rwanda Tribunals. With the approval of the party states, however, the President of the Court will have the authority to enter into an agreement establishing an "appropriate relationship" between the Court and the United Nations. The Commission decided against the establishment of a permanent judicial body by the General Assembly or Security Council resolution because of doubts as to the competence of those organs under the United Nations Charter to create such a

permanent institution. The Commission was convinced that the establishment of the Court by treaty or convention would provide a stronger legal foundation for its judgments than resolutions of the United Nations.

The Draft Statute envisions the Court as a permanent institution that only will convene when required to consider a case submitted to it. The Commission believed that this arrangement would provide the Court with sufficient flexibility if circumstances require it to develop into a full-time judicial body. The International Law Commission rejected the idea that the Court should remain in session permanently. The Court will consist of four organs: (1) the Presidency; (2) the Chambers, both trial and appellate; (3) a Registry, responsible for the administrative functions of the Court, and; (4) a Procuracy which is envisioned as an independent organ of the Court responsible for the investigation of complaints and for the conduct of prosecutions.

The Draft Statute envisions the judges of the Court as persons of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial office. Additionally, they must have criminal trial experience or recognized competence in international law. The Court will consist of eighteen judges—ten with criminal trial experience and eight with competence in international law. No two judges of the Court will be nationals of the same state. They will be elected to serve on the Court by an absolute majority of the party states. The initial group will be elected for staggered terms determined by lot. Thereafter, all judges will hold office for a term of nine years.

The Presidency of the Court will include a president, two vice presidents and two alternate vice presidents chosen from the eighteen judges. The Presidency of the Court will be responsible for the due administration of the Court and other functions conferred on it by the Draft Statute. The president and the vice presidents will be elected by an absolute majority of the judges and will serve for three years or until the end of their term of office as judges, whichever is earlier.

The Court will consist of a Trial Chamber and an Appeals Chamber. As soon as possible after each election of judges, the Presidency will constitute an Appeals Chamber consisting of the president and six other judges. At least three of the six must have "criminal trial experience." The Appeals Chamber will be constituted for a term of three years and its members may serve for subsequent terms. All other judges will be available to serve in Trial Chambers of five judges each. No judge who is a national of a complainant

state or a state of which the accused is a national, may serve on such a case.

The Draft Statute contains an exhaustive list of crimes over which the Court has subject matter jurisdiction. Under Article 20 of the Draft Statute, the Court has jurisdiction over four types of crimes: genocide; aggression; serious violations of the laws and customs applicable in armed conflict; and crimes against humanity. The commentary groups these together as crimes under general international law. Additionally, the Court has jurisdiction over a fifth type of crime—what the Commission has characterized as "treaty crimes," that is, crimes of international concern defined by treaties which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern. A list of such crimes is contained in an annex to the Draft Statute.

The inclusion in Article 20(a) through (d) of crimes under "general international law" has caused significant debate among the members of the Commission for three principal reasons. First, any listing of crimes under general international law raises questions as to why other international crimes, such as apartheid or terrorism, are not included. Second, the primary purpose of the Draft Statute is, arguably, the establishment of a court to try such crimes as the party states can agree are international crimes triable by such a court. However, two of the four types of crime now listed in Article 20(a) through (d)—genocide and serious violations of the laws and customs applicable in armed conflict—already are defined in multi-lateral treaties and proscribing them again as crimes under international law was technically unnecessary. Finally, the other two types of crime listed—aggression and crimes against humanity—are less clearly defined under international law. The Statute, as a procedural and adjectival instrument does not resolve these uncertainties.

The Commission has responded to these concerns by stressing that the four types of crime enumerated in Article 20(a) through (d) are not intended as an exhaustive list of crimes under general international law. Rather, the jurisdiction of the Court is limited to those crimes under general international law which should be within the jurisdiction of the Court at this stage because of their magnitude, the continuing reality of their occurrence, or their predictable international consequences.

In the Commission's view, the prohibition of genocide contained in the Genocide Convention of 1948 is of fundamental significance and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are extremely limited. Therefore, the Court should, exceptionally, have inherent jurisdic-

tion (*competence propre*) over genocide by virtue solely of a state's participation in the Draft Statute, without any further requirement of consent or acceptance by any particular state. The commentary to the Statute states that the case for considering such "inherent jurisdiction" is bolstered by the Genocide Convention itself, which does not confer jurisdiction over genocide on other states on an extradite or prosecute basis, but expressly contemplates its conferral on an international criminal court to be created in the future (which, unfortunately, has yet to be created).

Granting the Court jurisdiction over the crime of aggression was more controversial because the crime of aggression by an individual person has no universally accepted definition under international law. Therefore, the Draft Statute provides for a special mechanism governing complaints brought in connection with such a cause of action. Under Article 23 of the Draft Statute, complaints of, or directly related to, an act of aggression by an individual *may only be brought after the Security Council determines* that a state has committed the act of aggression which is the subject of the complaint.

The inclusion of serious violations of the laws and customs applicable in armed conflict in the list of crimes over which the Court has subject matter jurisdiction reflects the Commission's view that such crimes are recognized under customary international law. In its commentary to Article 20, the Commission emphasized, however, that not all breaches of the laws of war are sufficiently grave to justify their falling within the jurisdiction of the proposed permanent international criminal court. Therefore, the Court is given jurisdiction only over "serious violations" of the laws and customs applicable in armed conflict. The definition of the final category of enumerated crimes, crimes against humanity, is not set forth in any particular treaty regime. Therefore, there is some doubt as to when such crimes are triable as international crimes. The Commission has stated that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. Such crimes are characterized by their large-scale and systematic nature. The Commission noted that the particular forms of unlawful act, such as murder, torture, or rape are less crucial to the definition than the factors of scale and deliberate policy, as well as their being targeted against the civilian population in whole or in part.

Article 21 of the Draft Statute sets forth the conditions under which the Court may exercise in personam jurisdiction. In effect, it distinguishes between the exercise of in personam jurisdiction for genocide cases and its exercise in all other cases.

In all cases other than genocide, the Court may exercise in personam jurisdiction if it receives the consent of both the "custodial state," that is, the state which has custody of the suspect in respect of the crime, and the state on the territory of which the act or omission in question occurred. Because the Commission has determined that the Court should possess "inherent" subject matter jurisdiction over the crime of genocide, however, consent to the Court's jurisdiction is considered to have been given in such cases when a state becomes party to the Statute.

Article 21 differs from the equivalent provision of the 1993 Draft Statute in several material respects. First, it treats genocide separately. Second, it focuses on the custodial state in respect of the accused rather than on any state having jurisdiction under the relevant treaty. Third, it requires acceptance of the court's jurisdiction by the state on whose territory the crime was committed, thus applying to all crimes, with the exception of genocide, the acceptance requirement in the 1993 Draft Statute for crimes under general international law. Finally, the 1994 Draft Statute also requires in these cases the acceptance of a state which already has established, or eventually establishes, its right to the extradition of the accused pursuant to the extradition request.

The Commission has explained that the term "custodial state" covers a broad range of situations. For example, a state is a custodial state with respect to members of its armed forces who are detained under its system of military law while stationed in another country. Moreover, if the crime in question was committed on the territory of the host state, the acceptance of that state also would be required for the Court to have jurisdiction.

The Commission has characterized the system adopted by the Draft Statute for a state's acceptance of the Court's jurisdiction as an "opting-in" system whereby jurisdiction is not conferred automatically on the Court solely by the state becoming a party to the Statute. Under Article 22, a state must accept the jurisdiction of the Court either at the time it becomes a party or at a later time by lodging a declaration of consent to the Court's jurisdiction. Such declarations may be of general application or may be limited to particular conduct or to conduct committed during a particular time. Additionally, states that are not parties to the Draft Statute may consent to the exercise of the Court's jurisdiction. The requirement that in all cases other than genocide, the Court receive the consent of both the custodial state and the state on the territory of which the act or omission in question occurred will result in the exclusion of potential defendants from the Court's jurisdiction. For example, it is unlikely that a custodial state will consent to the exercise of the

Court's jurisdiction over suspects who are high military or government officials of that state. In this case, the Court will only be able to exercise jurisdiction over these suspects if the custodial state has been utterly defeated in war and the victorious nations assume the role of a custodial state and consent to the Court's jurisdiction over such persons. Therefore, it is likely that some high officials with "unclean hands" will escape prosecution in the Court unless events unfold as they did just prior to the Nuremberg Trials.

Under Article 35, the Court has discretion to decide that a particular complaint over which it has jurisdiction is inadmissible. This provision was not included in the 1993 version of the Draft Statute and was added to the current Statute to ensure that the Court only considers cases under circumstances in which it is truly appropriate to do so. In general, a case may be inadmissible if the crime in question has been or is being duly investigated by an appropriate national authority or is not of sufficient gravity to merit further action by the Court.

Article 25 sets forth the investigatory and prosecutorial framework for the Court. It envisages the Court as a facility available to party states, and, in certain cases, to the Security Council. Under Article 25, party states that have accepted the jurisdiction of the Court with respect to the crime complained of may lodge complaints with the Court. In the case of genocide, where the Court has jurisdiction without any additional requirement of acceptance, the complainant must be a contracting party to the Genocide Convention.

In its commentary to Article 25, the Commission noted that it had limited resort to the Court by way of complaint to party states to encourage states to accept the rights and obligations provided for in the Statute and to share the costs associated with the operation of the Court. Moreover, this restriction ensures that complainants are required to comply in advance with the procedural provisions contained in the Draft Statute, such as those concerning evidence and witnesses.

Article 23 of the Draft Statute allows the Security Council to initiate recourse to the Court by dispensing with the requirement of the acceptance by a state of the Court's jurisdiction under Article 22, and the lodging of a complaint under article 25. In its commentary to Article 23, the commission noted that the Security Council will not normally refer to the Court a "case" concerning an allegation against named individuals. In this respect, the International Criminal Court will differ from the Yugoslav War Crimes Tribunal. Rather, Article 23 envisages that the Security Council will refer to the Court a "matter," concerning a situation to which Chapter VII of

the United Nations Charter applies. The Prosecutor will then determine the identity of the individual defendants in connection with such a matter.

The Draft Statute contains numerous safeguards designed to protect the accused. Under Article 40, an accused is presumed innocent until proved guilty beyond reasonable doubt. Article 41 states that the accused is entitled to a fair and public hearing and provides minimum guarantees to the accused. For example, the accused must be informed promptly and in detail of the nature and cause of the charge, tried without undue delay, be allowed to examine the prosecution witnesses, and not be compelled to testify or to confess guilt. Additionally, the accused must have adequate time and facilities to prepare his or her defense and must be present at the trial. Under Article 48, a convicted defendant may appeal a decision on the grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence. The Statute (Article 48) also gives the prosecutor a right of appeal.

In some important ways, the Draft Statute limits the privileges of the accused. Under Article 43, the rights of the accused that are articulated in Article 41 are subject to the Court's discretion to take "necessary measures" to protect the accused, victims, and witnesses. Additionally, under Article 37, the Court may try the accused *in absentia* under certain circumstances. In my view, the possible use of anonymous witnesses and *in absentia* trials are serious defects inconsistent with due process.

IV. Criticism of the Draft Statute

After the adoption of the Draft Statute by the Commission, and its referral to the United Nations, the United Nations established an ad hoc committee to further consider the issues raised. During this period, the United States has emerged—I think its fair to say—as the foremost critic of the Draft Statute. In essence, the United States government strongly believes in national prosecution whenever this is adequate and available, and it seeks to limit the jurisdiction of the Court to situations in which international involvement is truly indispensable. I will now attempt to summarize—without adopting as my own—some of the most significant revisions advocated by the United States to the Draft Statute.

A. Complementary Nature of the Jurisdiction of the Court

The preamble to the Draft Statute states that the international criminal court is intended to complement national criminal justice

systems in those cases where such national trial procedures may not be available or may not be effective. The United States strongly supports this guiding principle and believes that in national prosecutions, all parties involved will be working within the context of established legal and cultural norms. The State Department considers it essential to the legitimacy and authority of states that they remain primarily responsible and accountable for prosecuting violations of their laws.

The United States maintains that various provisions of the Draft Statute fail to uphold the necessary preference for national prosecutions. For example, the United States argues that under Article 21, the custodial state may be able to deny a request for extradition from another state, bound to it by international treaty, and be relieved of all responsibility to prosecute the suspect in question by delivering him to the Court or exercising its right to deny the Court any jurisdiction. The United States maintains that this article, as well as other provisions in the Draft Statute are at odds with the principle of complementarity.

B. Focus of the Court on the More Serious, Well-Established International Crimes

The United States asserts that the Court's jurisdiction should be limited to "clear, well-defined and well-established crimes." The imposition of new norms that are not generally accepted, thus, is not only undesirable in a criminal context, but also may undermine the entire structure and authority of international criminal law. Additionally, the United States is concerned that the Draft Statute lacks the specificity required to avoid burdening the Court with individual crimes that do not satisfy the requirement for seriousness or concern to the international community expressed in the preamble. Therefore, the United States opposes the broad jurisdiction of the Court over the crime of aggression. In addition, the State Department maintains that the Draft Statute should articulate a definition of "crimes against humanity" and should incorporate the definition of genocide found in the Genocide Convention.

The United States believes that aggression is not yet sufficiently well defined as a matter of international criminal law to form the basis of the Court's jurisdiction. It is concerned that individuals will be prosecuted for actions that the United States views as being the responsibility of states. Furthermore, it views the risks of politicized complaints as being high. Therefore, the United States maintains that with respect to individual culpability, the crime of aggression should be excluded from the Draft Statute. At a minimum, the United States demands that the elements of aggression be redrafted

and reviewed before it supports its inclusion in the jurisdiction of the Court.

The United States supports the inclusion of the crime of genocide in the jurisdiction of the Court. However, the United States government believes that the reference to the "crime of genocide" in Article 20 is inadequate. It argues that the definition of the crime of genocide found in the Genocide Convention should be incorporated in the text of Article 20.

The United States agrees that crimes against humanity should be included in the jurisdiction of the Court. It maintains, however, that the definition of these types of crime should be revised to incorporate two factors. First, the crime should only include types of atrocities which may not otherwise be covered by genocide or war crimes. Second, the Draft Statute should set a threshold standard so that a single alleged or isolated instance would be insufficient to require investigation or prosecution unless it affects a substantial number of people. The United States government considers a standard of "serious violations of human rights" to be inadequate for purposes of the jurisdiction of the Court.

C. Need to Further Consider Issues in Connection with the Investigative Phase

The United States is concerned that the Draft Statute could undermine extensive investigative work undertaken in national prosecutions of international terrorists, narcotics traffickers, and war criminals. It questions whether the Prosecutor should initiate such investigations in the manner set forth in the Draft Statute, because the office of the Prosecutor is not designed to perform limited investigative functions for purposes of development of a particular case in response to a particular complaint. The broad authority to investigate that is granted to the Prosecutor under Article 26, thus, is unacceptable to the extent that it could undermine ongoing national investigations. Therefore, the United States government believes that the precise role of the Prosecutor in different types of cases, and particularly at the investigative stage, must be considered further.

D. Inclusion of Narcotics and Terrorism Crimes in the Court's Investigative and Prosecutorial Jurisdiction

The United States believes that narcotics-related crimes which give effect to the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 should be excluded from the jurisdiction of the Court for four

reasons. First, the Convention does not provide the level of specificity needed to form the basis of criminal charges. Second, it is impossible to ensure that the Court would only hear the most significant drug-related charges. Third, including narcotics crimes in the jurisdiction of the Court would intolerably increase the costs and burdens of the Court. Finally, the United States government believes that individual states are best positioned to effectively investigate and prosecute such crimes.

The United States also continues to reserve its position on whether the *treaty crimes of international terrorism* listed in the annex to the Draft Statute are appropriate for the jurisdiction of the Court for substantially the same reasons for which it opposes the granting the Court jurisdiction over narcotics-related crimes. It also maintains that in cases involving terrorism, it is important that, in appropriate circumstances, a state be permitted in its discretion to decline to produce information related to its security despite a request from the Court. Moreover, the United States believes that states should be allowed to ensure that when such information is disclosed to the Prosecutor it not be disclosed to defendants and defense counsel absent a state's consent.

E. Mechanisms for Initiating Jurisdiction

The United States objects to the mechanism for state consent set forth in Article 21 on three grounds. First, the United States insists that it is essential to take account of the views of interested states at the very earliest stage of investigation, rather than when there is a prosecution before the court. The current regime, however, does not sufficiently respect the ongoing national jurisdiction, and may initiate a long and costly investigation in situations where there ultimately will be no jurisdiction over the case. Second, Article 21 fails to properly identify and address the concerns of the "interested states" in any particular case. As you recall, under Article 21 in all cases other than genocide, the Court may exercise in personam jurisdiction only if it receives the consent of both the custodial state and the state on whose territory the act or omission in question occurred. The United States believes that this rule may be inappropriate in certain situations. For example, in the case of a terrorist act, the state with the greatest interest may be the state against which the terrorist act is directed. Finally, the requesting or sending state under extradition treaties and status-of-forces agreements should retain the power to deny the Court jurisdiction even if the custodial state denies a request to surrender a suspect for purposes of prosecution.

F. Crimes Against Humanity and International Humanitarian Law

The United States strongly supports the prosecution of war crimes and other violations of international humanitarian law. Such matters concern grave crimes, which the international community has a deep interest in prosecuting, and national mechanisms have generally failed to redress. Therefore, they should be brought before the Court through referrals by the Security Council. The individual complaint mechanism, however, is ill-suited for these situations and is more appropriate in discrete cases that can be isolated from overall emergency situations. Moreover, the proposed regime may allow a state to abuse the system established by the Draft Statute by initiating massive investigations for political reasons.

The United States believes that greater weight should be given to national prosecution. In cases involving the military, the Court should complement, but not replace or undermine, the national military command responsibility to prosecute personnel for committing serious war crimes. The state of an offender's nationality or any other state which is actively exercising jurisdiction should, therefore, have preemptive rights of jurisdiction with respect to war crimes. In sum, the United States maintains that the Prosecutor should be required to decline a war crimes case that is being adequately investigated by another country, or where that country has given bona fide consideration to the prosecution.

G. Court Rules and Administrative Matters

Under Article 19 of the Draft Statute, the initial rules of the Court will be drafted by the judges within six months of the first elections for the Court and submitted to a conference of party states for approval. Thereafter, to preserve flexibility, the judges may initiate changes in the Court rules but these will only have definitive effect if not disapproved by majority vote of party states within six months. The United States government maintains that the conduct of pretrial investigations, procedure and evidence rules and other Court rules have a fundamental impact on the ability of the Court to conduct fair and effective proceedings. Therefore, the Court's rules must be formulated in conjunction with the Draft Statute of the Court and agreed to by party states prior to the establishment of the Court.

Finally, the United States believes that the Draft Statute should be revised to address financial and oversight matters relating to the Court. Because the costs involved in criminal investigations and prosecutions are often substantial, these matters should not be left exclusively to the desires of prosecutors and judges. The

Court should establish an annual budget which will be forwarded to the party states for approval. Moreover, the United States argues that the party states should also have a residual power, in exceptional circumstances, to make or overturn management decisions.

V. Conclusion

The State Department once noted that the Nuremberg and Tokyo Tribunals "provide little guidance for the creation of an International Criminal Court with jurisdiction to *hear a broader class of claims* against a much broader number of individuals." While this may be true, I think that the Nuremberg Trials, which represent the first time in history that an international tribunal held persons individually responsible for war crimes, established the foundation for today's efforts to establish an international criminal court.

The Nuremberg Trials differ from the current effort to establish an international criminal court in many respects. Most obviously, the Draft Statute envisions a permanent court established by a treaty signed by many nations, while the Nuremberg Trial was an ad hoc forum, organized by the four victorious Allies. There are, however, striking similarities between the Nuremberg Trials and the proposed international criminal court.

At Nuremberg, the victors demonstrated that certain war crimes and crimes against humanity merit international prosecution. The Nuremberg Trials applied the maxim *nullum crimen sine lege, nulla poena sine lege*, that is, no crime and no punishment without law. They established the principle of individual accountability for war crimes and demonstrated that an individual may be held responsible for actions committed while obeying orders. Indeed, many of the thirty-four principles crystallized by the Tribunal in Nuremberg were later incorporated into the Geneva Conventions of 1949 and the military law of many nations. They became embodied in the fabric of customary international law and should be applied by any court established pursuant to the proposed Draft Statute.

Additionally, the climate that led to the formation of the Nuremberg Tribunal and the current effort to establish the international criminal court is remarkably similar. In 1945, the Cold War was not yet born, while in 1995, it is dead. World War II was won by an international coalition. Likewise, the 1990s have witnessed the emergence of international alliances determined to halt aggression in Iraq and elsewhere. Finally, at the conclusion of World War II, the world was shocked by the infamies committed by the Nazis and

their allies. Today, the global community is outraged by monstrosities staged in the Former Yugoslavia and in Rwanda.

No institution is designed to last in perpetuity, and no tribunal is unassailable. Each generation must strive to create judicial structures that will respond to its needs and concerns. The victors in World War II are sometimes criticized for failing to establish a permanent international tribunal. Future generations may judge us by our attempt to create an international criminal court. And yet, I am one of those who doubts that the present International Law Commission Draft is sufficiently matured for adoption. The concepts could be simplified; the drafting could be improved—it suffers by comparison with the Yugoslav Statute; its sanctioning of *in absentia* trials and the possible use of anonymous witnesses will undermine the Court's credibility in many parts of the world. Nor am I fully satisfied about the protections in the statute against double jeopardy. Finally, the scope of the Court's potential jurisdiction, seems to me seriously disproportionate to the financial resources that the parties or the United Nations are likely to appropriate for its support. Much legal work remains to be done.

Nevertheless, I am hopeful that these obstacles can be overcome and that our generation may yet see the establishment of a permanent International Criminal Court.

EVALUATING PRESENT OPTIONS FOR AN INTERNATIONAL CRIMINAL COURT*

HOWARD S. LEVIE**

I am supposed to comment on Monroe Leigh's presentation. When he gave me a copy of his thirty-six-page paper last night after dinner, he told me that he was giving me some "midnight reading." He sure was right! However, as I had previously lacked an ability to draft comments on an unseen paper, I had drafted a paper of my own and I propose to give you both my comments on Monroe's paper (written after midnight) and a few ideas of my own.

Monroe's paper gives us a clear picture of what the International Law Commission's Draft Statute does and what it does not do; and another clear picture of the United States objections to that Draft Statute—which, to me, appear to indicate a total lack of commitment to the establishment of an International Criminal Court.

I agree with Monroe that an International Criminal Court should not be authorized to conduct trials *in absentia*. I do not agree with him that anonymous witnesses should not be allowed. With no witness protection plan, it is inevitable that witnesses who could be identified and located would be in grave danger from the individuals charged and from their associates.

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**Professor Emeritus, St. Louis University School of Law, A.B., 1928, J.D., 1930, Cornell University; LL.M., 1957, George Washington University. Studied at the University of Nancy, the University of Paris, and the Ecole Libre des Sciences Politiques (Paris). Entered the United States Army as a private in 1942, retiring as a Colonel, Judge Advocate General's Corps, United States Army, in 1963; draftsman of the Korean Armistice Agreement; Chief, International Affairs Division, Office of The Judge Advocate General; Legal Adviser, United States European Command, Paris; Charles H. Stockton Professor of International Law, Naval War College, 1971-72; Lowry Professor, Naval War College, 1982-83; Lecturer, Salve Regina College, 1984-88; Adjunct Professor of International Law, Naval War College, 1991 to present. Professor Levie also has written numerous books, articles, and book reviews, to include: PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (Naval War College Press 1979) (winner of the 1982 Ciardi Prize of the International Society for Military Law and the Law of War); THE STATUS OF GIBRALTAR (Westview Press 1983); THE CODE OF INTERNATIONAL ARMED CONFLICT (Oceana Publications 1986); MINE WARFARE AT SEA (Martinus Nijhoff 1992); TERRORISM IN WAR: THE LAW OF WAR CRIMES (Oceana Publications 1993).

While I agree with many of the objections made by the United States, in view of our experience in the case of the Libyan terrorists who are alleged to have been responsible for the destruction of Pan Am Flight 103 over Lockerbie, Scotland, on 21 December 1988, it appears strange to me that this country should take the position that "states remain primarily responsible and accountable for prosecuting violations of their laws." That is the Libyan position which both the United Kingdom and the United States are challenging in the International Court of Justice. Moreover, the United States is said to be "concerned that individuals will be prosecuted for actions that the United States views as being the responsibility of the state." Apparently the people at the Department of State have never read the statement made at Nuremberg that "crimes against international law are committed by men, not by abstract entities."

The United States also questions the granting to the International Criminal Court of jurisdiction over *treaty crimes of international terrorism*. Once again, I call attention to the case of the Libyan terrorists alleged to have been responsible for the destruction of Pan Am Flight 103 in 1988. They still are in Libya and a decision of the International Court of Justice will not come down before 1996—and that decision may well grant Libya's claim to jurisdiction. An operational International Criminal Court with "primacy" of jurisdiction would have long since tried the case.

Now let me revert to a small part of the paper which I had prepared prior to receiving a copy of Monroe Leigh's presentation.

Up to the present time, proposals for the establishment of an International Criminal Court have not met with much success.¹ The provision for an international criminal court to try the Kaiser contained in the Treaty of Versailles² which ended World War I never materialized because, as so often will happen, custody of the accused could not be obtained.³ The League of Nations proposal for an inter-

¹In a recently published article concerning the proposals for the establishment of an International Criminal Court the present author said:

These proposals have met with decided apathy on the part of governments—perhaps because of a feeling on the part of the government policy-makers of many nations that they might be establishing an international criminal jurisdiction which would thereafter be exercised with respect to their own actions.

Howard Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COMMERCE 1 (1995).

²See TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA: 1776-1949, at 43 (C. Bevans ed.).

³He had obtained asylum in the Netherlands and its government refused to extradite him.

national criminal court met with a dismal response.⁴ The Allied, or United, Nations were more fortunate after World War II with the result that international criminals courts were established—but they were established by the victors with the result that they bore the pejorative title of “victors’ courts.” The United Nations Security Council, acting pursuant to Chapter VII of the Charter of the United Nations, has established an ad hoc International Tribunal for the trial of international criminal offenses committed in Bosnia-Herzegovina⁵ and another one for the trial of such offenses committed in Rwanda, or in neighboring states by Rwandans.⁶ The International Law Commission has dealt with the subject off and on for many years and has finally come up with a Draft Statute.⁷ A summary of the discussion of that Draft Statute in the Sixth Committee of the General Assembly at its forty-ninth session states:

The committee's consideration of the [International Law Commission] report was largely devoted to the Draft Statute. The debate indicated broad agreement on the desirability and feasibility of establishing a permanent international criminal court, a question that has been under consideration within the United Nations for nearly half a century.

...

Most speakers favored convening an international conference of plenipotentiaries to finalize the Draft Statute and establish the court, as recommended by the [International Law Commission], while recognizing the need for some preparatory work in the framework of the Sixth Committee or an ad hoc committee to ensure the success

⁴The Statute of an International Criminal Court, drafted by a Committee of Experts and approved on 16 November 1937 by a Conference called by the Council of the League of Nations, can be found at 1 BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* 369 (1980). That Court's jurisdiction was limited to violations of a Convention for the Prevention and Punishment of Terrorism, adopted at the same time.

⁵*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*, U.N. Security Council Res. 827 (1993), reprinted in 32 I.L.M. 1203 (1993).

⁶*Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations in the Territory of Neighboring States*, U.N. Security Council Res. 955 (1994), reprinted in 33 I.L.M. 1600 (1994).

⁷*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. 49/10, paras. 40-61 (1994) [hereinafter *Report of the International Law Commission*]. For a criticism of the method of granting jurisdiction to its proposed Court, see Levie, *supra* note 1, at 8-9.

of such a conference. The United States, which advocated a somewhat more cautious approach, proposed that an ad hoc intersessional committee should consider whether the necessary consensus could be achieved on fundamental issues relating to the establishment of a court before the convening of a diplomatic conference.⁵

The eventual decision reached by the Sixth Committee, and approved by the General Assembly, called once more for government comments—but also for an ad hoc committee to consider arrangements for a diplomatic conference to draft a convention on the subject.

It appears to me that there are two viable options available as methods for the drafting of a document providing for the establishment of an International Criminal Court: first, a Resolution of the United Nations General Assembly approving an international convention to which is attached an annex containing a statute establishing such a court, drafted either by the International Law Commission or by some other group of experts specially created for that purpose, and submitted to the members of the United Nations, with a recommendation that all such members become parties thereto;⁹ and second, a Diplomatic Conference convened for that specific purpose by the General Assembly or by an interested state. While the United Nations Security Council has established the two International Tribunals with criminal jurisdiction already referred to,¹⁰ action by the Security Council is not considered to be a viable option. In both cases it acted pursuant to Chapter VII of the Charter of the United Nations, the provisions of which would not apply to a permanent Court of general criminal jurisdiction, one not necessarily or directly related to the maintenance of international peace. Moreover, while all states had an opportunity to submit their ideas concerning these Tribunals to the Secretary-General prior to his drafting and submitting the Draft Statutes to the Security Council, and to the International Law Commission during its process of

⁵Virginia Morris & M.-Christiane Bourloyannis-Vraïlas, *The Work of the Sixth Committee at the Forty-Ninth Session of the General Assembly*, 89 A.J.I.L. 607, 614 (1995). The actual discussion can be found in the U.N. Docs. A/C.6/49/SR.16-28, 41 (1994).

⁹This is a procedure which the General Assembly has followed on innumerable occasions. For example, see *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, (XXIII) U.N. GAOR, 23d Sess., Supp. No. 18 (A/7218) (1968), 754 U.N.T.S. 73, 8 I.L.M. 68 (1969); *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques*, G.A. Res. 31/72, U.N. GAOR, 31st Sess., Supp. No. 39 (A/31/39), at 36 (1976), 31 U.S.T. 333, 16 I.L.M. 68 (1977). I do not know why the International Law Commission questioned the competence of the General Assembly to act, unless it was questioning the General Assembly's competence to pass a resolution establishing an International Criminal Court.

¹⁰See *supra* notes 5 and 6.

preparing the Draft Statute, the ultimate decisions as to their content were made by the Secretary-General and the staff of the United Nations or by the members of the International Law Commission, not by the states. There is no question but that under the proposed Diplomatic Conference option, states will have the final say as to the contents of the Statute creating the International Criminal Court, a procedure that makes ratification more likely.

Despite my rejection of the Security Council as the source of an instrument establishing a permanent International Criminal Court, the importance of its actions with respect to the former Yugoslavia and to Rwanda must not be overlooked or understated. The Resolutions it adopted have contributed affirmatively to the precedent that international courts with criminal jurisdiction for violations of international law can, and may, be established by action of the international community.¹¹ This will make future action in this respect much easier. Thus, when the Secretary-General was receiving comments from members of the United Nations before drafting the Statute for the International Tribunal for the Former Yugoslavia, a commission of jurists, formed by the French Ministry of Foreign Affairs to advise it on the matter, noted that the establishment of an International Tribunal for the trial of individuals who had violated the law of war in Bosnia-Herzegovina might be "the prelude" for a permanent International Criminal Court.¹²

One of the major advantages of an International Criminal Court would be the establishment of the primacy of its jurisdiction and the elimination of the need for an *aut dedere aut punire* provision in many treaties. For example, traditional law of war treaties invariably include provisions allowing the asylum state—whether or not the accused is a national of that state—to elect to try the accused rather than complying with a request for extradition made by the state actually concerned.¹³ If the conflict has ended in an

¹¹The Resolution establishing the International Tribunal for the Former Yugoslavia was adopted unanimously; the Resolution establishing the International Tribunal for Rwanda was adopted by a vote of thirteen for, one against (Rwanda); and one abstention (China). One of Rwanda's objections to the Statute was that Rwandan courts would be trying individuals for lesser crimes and giving them the death sentence while the International Tribunal would be trying the individuals responsible for major offenses, such as genocide, and could only adjudge life imprisonment.

¹²Letter from the Representative of France to the Secretary-General, 10 February 1993, U.N. Doc. S/25266, para. 25.

¹³For example, see 1949 Geneva Conventions for the Protection of War Victims, Aug. 12, 1949, arts. 49, 50, 129, 146, 6 U.S.T. 3114-3695, 75 U.N.T.S. 31-417; *Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of the Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, art. 88; Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, reprinted in 72 A.J.I.L. 457 (1978), 16 I.L.M. 1391

armistice or cease-fire, the possibility of an accused being turned over to the former enemy is so remote that it has not even been attempted by a former belligerent.¹⁴ Even in the one instance where there were victor nations and a vanquished nation after World War I, the latter was successful in refusing to extradite to the requesting victors its nationals who were charged with violations of the law of war.¹⁵ The Statute of the International Tribunal for the Former Yugoslavia provides, in its Articles 9 and 10, that the International Tribunal and national courts have concurrent jurisdiction, but that the International Tribunal has primacy and may request a national court to defer exercising its jurisdiction; and that "sham trials" by national courts will not preclude subsequent trials by the International Tribunal.¹⁶ Unfortunately, for obvious political reasons, the Draft Statute for an International Criminal Court prepared by the International Law Commission does not follow this precedent, providing solely for concurrent jurisdiction.¹⁷ This difference was undoubtedly based on the belief that states would be reluctant to become parties to a convention which superimposed an international criminal jurisdiction over their national criminal jurisdictions, even though that international jurisdiction would be limited

(1977). A similar type of provision will be found in some non law of war treaties. For example, see *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, arts. 7, 8, 24 U.S.T. 564. (The application of that provision in this latter Convention is now before the International Court of Justice in the companion cases of *Libya v. United Kingdom* and *Libya v. United States*, involving the requested extradition of the two Libyans alleged to have been responsible for the destruction of Pan Am Flight 103 in 1988.)

¹⁴After the Korean Armistice, the United Nations Command had no alternative but to repatriate to North Korea and Communist China some 200 prisoners of war who had been identified as violators of the law of war. Any attempt to request their extradition for trial would have been useless. After the 1991 Gulf War, in which innumerable violations of the law of war occurred, see Report on Iraq: War Crimes (Desert Shield/Desert Storm) (unclassified version on file with the author); William Arkin et al., ON IMPACT, Modern Warfare and the Environment: A Case Study of the Gulf War (Greenpeace study prepared for a "Fifth" Geneva Convention on the Protection of the Environment in Time of Armed Conflict (3 June 1991, London UK)), no attempt to obtain custody of the culprits was attempted as such an attempt would have again been useless.

¹⁵HOWARD LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 28 (1993). This problem did not arise after World War II only because the victors occupied all of Germany and thus had custody of all alleged war criminals. However, a favored few did succeed in escaping to countries which arbitrarily refused to extradite them, or allowed them to completely disappear. (Just recently, the Argentine Supreme Court allowed the extradition of one of these individuals, now in his late eighties.)

¹⁶See *supra* note 5.

¹⁷The Commentary with respect to its Article 53 contained in the *Report of the International Law Commission*, *supra* note 7, at 132, on the work of its forty-sixth session states:

Moreover, the Statute differs from the Statute of the International Tribunal for the former Yugoslavia, article 9) (2) of which proclaims the Tribunal's "primacy over national courts." By contrast, the present Statute operates in principle on the basis of concurrent jurisdiction.

to specific crimes, all of which would have an international aspect. However, an international criminal court which does not have the right to demand and receive the custody of any person against whom a valid indictment has been filed with it would be nothing but a nonentity, a sham, and a fraud.

Appendix III of the Report of the International Law Commission discusses the possible relationships between the proposed International Criminal Court and the United Nations, the stated alternatives being that the Court either would, or would not, be a part of the organic structure of the United Nations.¹⁸ For a number of reasons, not the least of which are the availability of an existing staff for setting up a new International Criminal Court and the use of the United Nations budgeting process for its financing, it would seem that it would be best if any International Criminal Court is established as a part of the organic structure of the United Nations. Of course, just as no state which has not given its consent is within the jurisdiction of the International Court of Justice, so no state would be bound by the provisions of a convention establishing such an international criminal court, unless it had ratified that convention.

¹⁸See *supra* note 7, at 157.

POSTWORLD WAR II POLITICAL JUSTICE IN A HISTORICAL PERSPECTIVE*

ISTVÁN DEÁK**

In the wake of the Second World War, political trials and administrative purges swept through those parts of Europe that had been under German occupation. These trials and purges formed a crucial stage in European political developments and served as a prelude to the Cold War. To underline the above statement, let me propose a number of theses. They are as follows:

1. The Nuremberg trials of the major German war criminals were but a part, albeit a spectacular and—from a historical perspective—perhaps the most significant part of the political purges then sweeping Europe.
2. All trials and purges formed a component of the progressive, leftward political shift then taking place in Europe. In turn, this leftward shift was only one episode in a series of pendulum-like political swings from left to right throughout the twentieth century. Only recently have we begun to experience what appears to be the demise of radical left-wing politics in Europe.
3. Besides being guided and controlled by the victorious left-wing parties, the political purges of the postwar era

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**Seth Low Professor of History at Columbia University, New York City. Ph.D., 1964, Columbia University. Professor Deák's teaching and research interests are mainly in the history of Central and East Central Europe. His publications include: *WEIMAR GERMANY'S LEFT-WING INTELLECTUALS: A POLITICAL HISTORY OF THE "WELTBURNE" AND ITS CIRCLE* (University of California Press 1968); *THE LAWFUL REVOLUTION: LOUIS KOSSUTH AND THE HUNGARIANS, 1848-1849* (Columbia University Press 1979) (for which he received the Lionel Trilling Book Award of Columbia College, and which also appeared in German and Hungarian); *BEYOND NATIONALISM: A SOCIAL AND POLITICAL HISTORY OF THE HABSBURG OFFICER CORPS, 1848-1918* (Oxford University Press 1990) (which received, among other things, the Wayne S. Vuchinich Book Prize of the American Association for the Advancement of Slavic Studies, and which also appeared in German, Hungarian, and Italian). Istvan Deák is a regular contributor to *The New York Review of Books* and *The New Republic*, for which he writes mainly on World War II, fascism, the Holocaust, and contemporary East European affairs. His current research project is on collaboration, resistance, and retribution in World War II Europe.

were greatly influenced by two cataclysmic developments. The first comprised the civil wars that raged in nearly every European country during the Nazi occupation and in many places even for a few years afterward. The second crucial development was the large-scale ethnic cleansing that took place in Central and Eastern Europe both during and after World War II, a process that puts to shame the ethnic cleansing in present day Bosnia and Rwanda.

In brief, I believe that the nature and character of the postwar political trials were closely tied, not only to the demise of Nazism, but also to the temporary triumph of left-wing political parties emerging from the years of foreign occupation and civil war. Moreover, the trials were closely tied to the great upheavals resulting from a historically unique ethnic cleansing process in Central and Eastern Europe.

Regarding the rise of the political left towards the end and after the end of World War II, consider how many dramatic shifts from left to right and again from right to left took place in twentieth century European politics.

First of all, there was the seeming triumph of Wilsonian democratic ideals after World War I. Germany itself chose the road to democracy in the Weimar Republic and the Paris peace treaties purported to reflect the right of peoples to national self-determination.

In the early 1920s, every European country had a parliament, yet, within the next few years, dictatorial or semidictatorial, so-called strong man regimes arose in Italy, Spain, Portugal, Greece, Austria, Romania, Poland, Yugoslavia, Bulgaria, and the three Baltic states. These regimes were nationalistic, antiliberal, antiparlamentarian, and occasionally somewhat anti-Semitic. The rise and triumph of Hitler in Germany marked one of the last steps in this series of right-wing victories with the difference that unlike most of the strong-man regimes, Hitlerite Germany was radical and not conservative, and that the alpha and omega of its creed was racist anti-Semitism.

Meanwhile, Soviet Russia remained tyrannical, isolationist, and wildly suspicious of the West; it was, in turn, generally suspected and despised in the West. In the late 1920s, Stalin considered the democratic Western powers as its major enemies, calling even the German and other European Social Democrats, "Social Fascists." In Germany, the Communist Party contributed significantly to the triumph of Hitler by violently opposing the pro-Western Weimar Republic and by invariably voting with the Nazis in the German Parliament.

Around 1935, however, Stalin and the Communist International finally realized that Nazism, not the Western democracies,

represented the greater threat to the Soviet Union. There followed one of the characteristic, drastic reversals in Stalinist foreign policy. The new policy line of a Popular Front involved an alliance with all antifascist forces, including the hated Social Democrats and other anti-Nazis, whatever their political creed. This led, among other things, to a Popular Front government in France, yet the great test of new left-wing policies came in Spain, during the Civil War.

Spain turned out to be a failure for the left, however, and consequently, by 1939 Stalin had abandoned the policy of Popular Front. Fearful and disappointed in the West, he revived his earlier pro-German and anti-Western stance and, on August 23, 1939, concluded an alliance with Hitler. The consequence of this treaty was war, the defeat of Poland and France. In June 1940, it looked to many as if the war were over, only that Churchill would not listen to reason. So the war continued, yet the fight against Nazi Germany did not become a popular cause until after Hitler had attacked the Soviet Union in June 1941. Now all hesitant and bewildered leftist, progressive forces had a clear cause: the fight against the Nazis and against all right-wing radical as well as conservative forces in Europe.

From the outset, the resistance movements opposed not only the foreign occupiers, but also those who were cooperating with the occupation forces as well as those in the resistance who were of a different opinion. Soon a bitter struggle developed in the underground over who would control the future state.

German and Italian occupation brought civil war nearly everywhere in Europe, a phenomenon that the French historians describe as *la guerre franco-francaise*. In some countries—such as the Netherlands—the fight was mainly between collaborationists and resisters; in other countries—such as Yugoslavia, Greece, Poland—the fight was between collaborationists, Communist resisters, anti-Communist resisters, and no less importantly, between the ethnic majority and the ethnic minorities.

In World War II Yugoslavia, a bitter civil war raged between Tito's Partisans and Mihailovic's Royalists, between Communists and anti-Communists as well as among Slovenes, Croats, Bosnian Muslims, and Serbs. German and Italian occupation in Yugoslavia led to wholesale ethnic cleansing practiced less by the occupation forces than by the Yugoslavs themselves: hundreds of thousands of Serbian Orthodox peasants were killed, forcibly baptized, or deported in the fascist state of Croatia; hundreds of thousands of other Yugoslavs were killed by the Serbian Chetniks and the Communist partisans during and after the end of the war.

Similarly, in eastern Poland hundreds of thousands of Poles

were deported or killed first by the Soviet NKDV, then by the Nazis, then by Ukrainians and Belorussians allied to the Nazis, then again by the Soviet NKDV. Meanwhile, Poles also were fighting each other in the underground and, at the end of the war, Poles were massacring and deporting Ukrainians as well as Germans civilians.

Not even the Holocaust of the Jewish people should be separated from the civil wars and ethnic cleansing raging in central and eastern Europe at that time. True, the Germans did the killing mainly for ideological reasons, yet for their East European allies the ideological side of the Holocaust was less important than the opportunity it presented to rid their countries of the Jews and to steal or redistribute their jobs and property.

What the Germans did not count on was that, at the end of the war, the same East Europeans would use the opportunity to rid themselves also of the Germans. Thus, the killing of nearly five million East European Jews by the Germans and their East European allies was followed by the expulsion of some thirteen million German civilians, at least two million of whom perished in the process. As the East European leaders, whether fascists or Communists, liked to say at that time: now at last the People were taking possession of their state.

At the end of the war, antifascist political parties came to power everywhere in Hitler's Europe. These parties were determined to punish the traitors and other collaborators and to create a better, more progressive society in which the state would be largely responsible for the welfare of the citizens. All the parties of the resistance believed in both increased state power and in democracy but for most of them the latter concept meant less political than economic and social equality. Because they had only a limited belief in parliamentary procedure, they did not hesitate to deprive their opponents of political rights and to whip up class antagonisms in pursuance of their political goals.

One of the most important moves in the direction of creating a brave new world was to purge those found responsible for the miseries, not only of wartime but also of the preceding decades. This purge took many forms, such as lynchings and other varieties of summary justice as practiced in the initial period; political justice exercised by newly created people's tribunals, which generally operated on the basis of retroactive laws, and administrative purges that led to the dismissal of millions of civil servants and other members of the intelligentsia. In short, the new governments attempted to eliminate much of the old social and political elite to create a new, more trustworthy elite.

Amazingly, these practices were characteristic not only of countries occupied by the Soviet Red Army, where the Communists were more or less in power from the very beginning, but also of western Europe, which was occupied by the Western Allies. During the war, the Communists and other left-wing forces, including progressive Catholics, had been in the forefront of the anti-Nazi struggle and now, quite naturally, claimed the spoils of victory for themselves. The result was a great purge which was as thoroughgoing in such Western democracies as Norway, Denmark, and the Netherlands as in less than democratic Hungary and Romania or Czechoslovakia. Here are some examples:

- In France, there were approximately 10,000 extralegal executions of alleged collaborationists; there were also some 300,000 judicial procedures involving 7037 death sentences and nearly 50,000 cases of *degradation nationale*.
- In Norway, some five percent of the total population, 92,805 persons, were tried in court for treason of whom about thirty were executed.¹
- In Austria, between 1945 and 1955, the people's courts initiated judicial proceedings against 136,829 individuals, of whom 13,607 were actually sentenced. Thirty Austrians were executed by the orders of the Austrian people's courts. More importantly, hundreds of thousands of civil servants, including teachers, clerks, postal workers were fired or suspended from their positions in the wave of anti-Nazi purges that swept Austria in 1945. However, almost all the Nazis were quickly rehabilitated and, after Austria regained its independence in 1955, it became virtually impossible in that country to secure a conviction, even for a Nazi mass murderer.²
- Finally let me mention Hungary, where five former prime ministers and dozens of wartime cabinet members

¹For statistical data on the French purges, see Henry Rousso, *L'Épuration. Die politische Säuberung in Frankreich*, in KLAUS-DIETMAR HENKE & HANS WOLLER, *POLITISCHE SAUBERUNG IN EUROPE. DIE ABRECHNUNG MIT FASCHISMUS UND KOLLABORATION NACH DEM ZWEITEN WELTKRIEG 192-240* (Munich 1991). Statistical data on the purges in Norway are contained in Stein U. Larsen, *Die Ausschaltung der Quislinge in Norwegen*, in *supra* HENKE & WOLLER, at 241-70.

²On the purges in Austria, some of the best sources are DIETER STIEFEL, *ENTNAZIFIZIERUNG IN ÖSTERREICH* (Vienna 1981); Winfried R. Garscha & Claudia Kuretsidis-Haider, *Justice and Nazi Crimes in Austria 1945-1955: Between Self-Purge and Allied Control*, in No. 27/28, *BULLETIN DU COMITÉ INTERNATIONAL D'HISTOIRE DE LA DEUXIÈME GUERRE MONDIALE* (PARIS), 245-55 (1995).

and generals were executed after the war, and where the subsequent purges, increasingly directed by the Communists, amounted to a social revolution. In the course of this revolution, almost the entire former ruling elite was expropriated and degraded, whether fascist, nonfascist, or antifascist.³

Only a few countries did not share in this leftist triumph, such as Italy and Greece as well as occupied Western Germany.

In Italy, following a wave of extralegal killings, practiced mainly by the Partisans in the north, the antifascist parties realized that they could not govern without the former fascists. Because in Italy almost everybody who was anybody had been a fascist and because the fascists themselves had overthrown Mussolini and had surrendered to the Allies, the new governing parties became keen on recruiting ex-fascists into their ranks. Palmiro Togliatti's Communist Party was especially anxious to swell the ranks of the party with former "Little Fascists"—which resulted in the purges stopping and ex-fascists and ex-antifascists allying themselves in governing new Italy.

In Greece, Royalist and Communist resisters had fought each other violently throughout the whole period of German and Italian occupation. When the enemy was gone, towards the end of 1944, civil war began in earnest with the ex-Nazi collaborationists and the British army rallying behind the Royalist anti-Nazis in combatting the Communist anti-Nazis. After many years of extremely brutal war, the Communists were routed but as a consequence, the political purges were directed much more against the Communists than against those who had worked with the German and Italian occupiers.⁴

In Germany, the anti-Nazi resisters were largely eliminated after the failure of the July 20, 1944, conspiracy against Hitler. Moreover, based on a number of factors—the unconditional surrender imposed on Germany, the occupation of Germany by the four major victorious powers, and that the Germans were judged incapable to govern themselves—the punishment of war criminals and the "denazification" of the German people became a matter for the Allies. The Nuremberg Trials were an outcome of this policy, which stood in direct contradiction to Allied policy in the other countries of Europe, including formerly Nazi Austria.

³On the purges in Hungary, see István Deák, *A Fatal Compromise: The Debate over Collaboration and Resistance Hungary in 1944*, in 9 EAST EUROPEAN POLITICS AND SOCIETIES, at 209-33 (1995).

⁴Concerning the purges in Greece, see Mark Mazower, *The Cold War and the Appropriation of Memory: Greece After Liberation*, in *id.*, at 272-94.

Whether or not this was a wise policy has been the subject of a never ending debate. Many, including myself, often have speculated as to what would have happened if the Germans had been allowed to take matters in their hands in 1945, even though under Allied supervision, and in the presence of Allied occupation forces.

What would have happened if the punishment of Nazis had been entrusted to People Courts set up in Germany? It is possible that even fewer Germans would have been punished after the war than actually were. The opposite, however, also is possible. One thing is certain—because the punishment of the main culprits became the business of the Allies, there never was in Germany anything resembling the purges and catharsis that took place in the rest of Europe at that time. Ex-Nazis were punished not at all or only reluctantly in the Western occupied part of Germany, and society in the Federal Republic underwent, at best, a very gradual change. In East Germany, Moscow-trained Communists directed the process of purges much more against innocents and democrats than against the rank and file of the former NSDAP.

Was a great opportunity lost? Perhaps. In any case, millions of ex-Nazis proved themselves to be superb chameleons. To please their new masters they began to practice democracy until they ended up believing in democracy themselves.

In 1946, the pendulum began to swing again, and in 1947 it definitely swung in a more moderate direction. The Cold War was about to begin; the follow-up Nuremberg trials were disliked more and more by United States politicians. In 1947, Communists were removed from the French and Italian governments, while non-Communists were losing their positions in the Hungarian government. Soon the non-Communists would also be kicked out of the Czechoslovak government as they had already been, a year or two earlier, in Poland, Romania, and Bulgaria. Paradoxically, not only the West, but the East as well, was becoming more conservative. Fearful that Tito and Dimitrov, the two leading Communists in the Balkans, would make themselves much too independent, in 1948 Stalin cracked down on all Communist parties and reverted to the pre-1935 policy of Soviet pseudo radicalism. This meant domestic tyranny, a conservative foreign policy, a supremely reactionary cultural and artistic policy called "social realism," and extreme isolationism.

The dream of the resisters to create a rejuvenated, progressive, and fraternal Europe was over. They had hoped for a Europe in which battle-hardened resistance veterans would benevolently guide the peoples towards a just society. Not much came out of all that, if

for no other reason than because Germany had known no spontaneous political purges, and because the Americans as well as the Soviets had decided to mold the two Germanies into their own image.

It is another question, however, whether a left-wing dominated "Resistance Europe" would have brought more happiness and a longer lasting peace to the Europeans than did the United States. In all likelihood, the resisters' socialist, somewhat authoritarian, and, in many ways, amateurish program would have created a host of problems. It also would have alienated the United States without whose help, guidance, and domination the rapid reconstruction of Europe and the creation of democratic practices would have been unlikely if not impossible. Thus, despite the somewhat unfair treatment of those who had risked their lives to oppose Nazi totalitarianism, one must judge the "Americanization" of Europe as the only viable solution.

Paradoxically, the postwar purges introduced by the resistance movements must have been one reason why the western Europeans welcomed United States domination. These purges were frightening enough for most people to be willing to turn their attention to economy instead of politics.

"WAR CRIMES" DURING OPERATIONS OTHER THAN WAR: MILITARY DOCTRINE AND LAW FIFTY YEARS AFTER NUREMBERG—AND BEYOND*

MARK S. MARTINS**

I. Introduction

German soldiers committed war crimes¹ during World War II, and some of them faced prosecution at Nuremberg and elsewhere following the war.² Strong evidence indicates Serb soldiers have

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**Major, United States Army; Deputy Director, Center for Law and Military Operations and Professor of Law, The Judge Advocate General's School; B.S., United States Military Academy, 1983; B.A. Honours, Politics, Philosophy, and Economics, 1st class, Oxford University, 1985; J.D., *magna cum laude*, Harvard Law School, 1990; LL.M., The Judge Advocate General's School, 1994. Major Martins, a former Infantry officer, teaches classes on the law of war, war crimes, and other topics. The opinions and conclusions reflected in this essay are my own and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. I thank Lieutenant Colonel H. Wayne Elliott, Major Bill Barto, Major Dave Diner, Major Randy Keys, Major Marsha Mills, Lieutenant Commander Jim Winthrop, Major Rich Whitaker, Captain David Bolgiano, and Captain John Jones for their valuable comments and guidance.

¹Throughout this essay, unless otherwise specified or indicated by context, the term "war crimes" will denote not only violations of the laws or customs of war, see, e.g., 2 L. OPPENHEIM, INTERNATIONAL LAW §§ 252-52 (7th ed., H. Lauterpacht, 1955); but also "Crimes Against Peace" and "Crimes Against Humanity," as those terms have been defined since 1945. See Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (hereinafter London Charter).

²In addition to the trial of senior European Axis defendants before the International Military Tribunal, the Nuremberg Palace of Justice was the scene of 12 additional trials of significant but lesser known alleged war criminals before the Nuremberg Military Tribunals convened by the United States pursuant to Allied Control Council Law Number 10. See, e.g., NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 4-5, 11-13 (1986). These 12 trials involved 162 defendants, 26 of whom were German Army generals. See DEPT OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOL. II, 226-33 (1962) [hereinafter DA PAM. 27-161-2]. German regular army soldiers were also defendants in many of the thousands of military courts and commissions convened by the Allies after the war in the different zones of occupation. See TUTOROW, *supra* at 5.

committed atrocities that should subject them to prosecution now, fifty years after the Nuremberg trial of major war criminals.³ A comparison of particular crimes against defenseless persons at the hands of German and Serb military regulars—half a century apart—emphasizes Nuremberg's legacy for United States men and women in uniform, some 20,000 of whom may soon deploy as peacekeepers to the region where these crimes occurred.

Yet Nuremberg's legacy for soldiers today consists of far more than a rule against killing defenseless captives. To keep the entire legacy potent and relevant, we must study it in light of modern characteristics of United States forces. These characteristics include greater involvement in "operations other than war," a category of operations that recently assumed an important position in United States military doctrine. These characteristics also include a growing base of experience in applying peacetime humanitarian rules, a body of law that along with the law of armed conflict contributes to a still-emerging discipline of "operational law."

Interpretation of Nuremberg's legacy in light of these modern characteristics commends three courses of action for the future, none of which is completely novel and all of which require steady commitment.

- First, interested scholars, governmental and nongovernmental officials, judge advocates, and military commanders should pursue strategies for enforcing human rights that reinforce both humanitarian norms and military discipline.
- Second, these same parties should analyze events and form new practices and institutions according to discrete, recurring issues and not principally according to traditional legal categories.
- Third, these parties should cultivate a partnership to promote wide understanding of and compliance with the Nuremberg principles and respect for the rule of law.

I will present these matters in turn. In part II, I will state the facts of a German military atrocity called to account at Nuremberg and a Serb military atrocity alleged in a recent indictment at The Hague. In part III, I will compare the former and the latter in light of United States military doctrine and operational law. In part IV, I will sketch broad guidelines for preserving or building a sense of urgency about Nuremberg's lessons within military ranks of all countries.

³See *infra* notes 22-27, 58-77 and accompanying text.

II. Atrocities Then and Now

A. German Soldiers Under Field Marshals Keitel and List

Fifty years ago, Field Marshal Wilhelm Keitel was the highest ranking career soldier sitting among German defendants in the dock at Nuremberg.⁴ The Allies had defeated and occupied Germany. Prosecutors accused Keitel of horrific war crimes⁵ and supported the charges with massive documentary and other evidence. Keitel's principle defense was that Hitler had ordered him to issue the instructions that he gave to the German armed forces.⁶ The International Military Tribunal convicted him and sentenced him to death.⁷ Keitel died in a hangman's noose on October 16, 1946.⁸

1. *The 100 to 1 Order*—Keitel's many heinous acts included the issuance of a directive to Field Marshal Wilhelm List, the commander of German forces occupying the Balkans early in World War II.⁹ In the directive, Keitel ordered that 50 to 100 hostages were to be killed for every German soldier killed during attacks by guerrillas.¹⁰

⁴See 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 68-79 (1947) (consisting of Appendix A to the Indictment, which alleged the individual responsibility of the 24 defendants) [hereinafter T.M.W.C.]. Between 1938 and 1945, Keitel held the titles of Chief of the High Command of the German Armed Forces, member of the Secret Cabinet Council, member of the Council of Ministers for the Defense of the Reich, and Field Marshal. The other career military men were Alfred Jodl, Karl Doenitz, and Erich Raeder. Although Herman Goering, Rudolf Hess, Joachim Von Ribbentrop, Alfred Rosenberg, Hans Frank, Martin Bormann, Wilhelm Frick, Fritz Sauckel, Constantin Von Neurath, Arthur Seyss-Inquart, and Ernst Kaltenbrunner each held the title of General in the SS, and although one of the many structures subordinate to the SS was an army of half a million regular soldiers known as the Waffen-SS, the roles of these men in the Nazi Party and their lack of connection to the Waffen-SS identify them as political rather than military figures. See *id.*

⁵See *id.* at 27-67. Keitel was indicted on all four counts of the indictment of the major war criminals: Common Plan or Conspiracy to Wage Aggressive War (Count One), Crimes Against Peace (Count Two), War Crimes (Count Three), and Crimes Against Humanity (Count Four).

⁶See 18 T.M.W.C., *supra* note 4, at 4 (containing treatment of superior orders in summation by Dr. Otto Nelte, counsel for Keitel).

⁷See 1 T.M.W.C., *supra* note 4, at 291, 365.

⁸See WHITNEY HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG 485-88 (1954).

⁹See Document NOKW-258, Directive from the Chief of the OKW to 40 Addressees, subject: Communist Insurgent Movement in the Occupied Territories (16 Sept. 1941), reprinted in United States v. List (Hostages Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 at 757, 971-72 (1948) [hereinafter TRIALS OF WAR CRIMINALS] (English translation).

¹⁰The relevant portion of the directive read as follows:

In order to stop these intrigues at their inception, severest measures are to be applied *immediately at the first appearance*, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty

List received Keitel's directive and distributed it to his subordinate units.¹¹ During List's own subsequent war crimes trial, prosecutors proved the link between his distribution of this "100 to 1 order" and several notorious massacres.¹²

2. *The Execution of Captives at Sabac*—In one of these, German soldiers rounded up and shot some 2200 Jews and other concentration camp prisoners labeled as communists.¹³ List's subordinate commanders excused the executions—which in this case involved prisoners from concentration camps in Sabac¹⁴ and Belgrade—as reprisals for an attack by unknown partisan fighters on a German signal unit.¹⁵ Available records contain more information about the Sabac killings than the Belgrade killings.¹⁶ About twenty-two German soldiers had died in the earlier attack.¹⁷

3. *The Trial of List*—List employed three arguments in his defense at trial. First, he stated that German troops killed the captives as a matter of military necessity. The killings were the only way to deter the guerrilla attacks.¹⁸ Second, List contended that Keitel, not he, had issued the original "100 to 1" order. List had merely distributed the order to subordinate headquarters.¹⁹ Third, List claimed that he had not known German soldiers were killing defenseless prisoners. He had been absent from his headquarters when it received reports of the executions.²⁰ The court rejected each of these defenses, convicted List of complicity in the murders of thousands of Greeks, Albanians, and Yugoslavs, and sentenced him

for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect.

Id.

¹¹*Id.* at 1269.

¹²*See id.* at 1264-74.

¹³The exact number will never be known. The documents and other evidence at trial reflected several numbers between 449 and 2200. Responding to the defendants' argument that only 449 were killed, the court opined that "[t]he evidence does not conclusively establish the shooting of more than 449 persons, although it indicates the killing of a much greater number." *Id.* at 1270.

¹⁴Pronounced roughly "Sah-bah-tch."

¹⁵On 2 October 1941, near the village of Topola in what is today the Yugoslav province of Vojvodina, a troop unit of the 521st Army Signal Regiment was ambushed from the cornfields along the unit's route of march. See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1267.

¹⁶*See id.* at 767, 775, 1268; CHRISTOPHER R. BROWNING, FATEFUL MONTHS: ESSAYS ON THE EMERGENCE OF THE FINAL SOLUTION 44-51 (1995) (citing primary sources).

¹⁷Total German casualties from the ambush near Topola were 22 dead, 3 wounded, and 15 or 16 missing. See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1267.

¹⁸*See id.* at 1255-56.

¹⁹*See id.* at 1269.

²⁰*See id.* at 1271.

to life imprisonment.²¹

B. Serb Soldiers Under General Mladic

General Ratko Mladic is a career military officer who began his service with the Yugoslav Peoples' Army and since 1992 has commanded the Bosnian Serb Army.²² In April of that year, armed conflict broke out between forces loyal to the Muslim-led government and forces—comprising former Yugoslav military regulars as well as numerous militias, paramilitary groups, and special forces—loyal to the concept of a Bosnian Serb republic.²³ At the start of the conflict, forty-four percent of the population in Bosnia-Herzegovina was ethnic Bosnian (mostly Muslim), thirty-one percent was Serb, and seventeen percent was Croat.²⁴ Prosecutors accuse Mladic of terrible violations of international humanitarian laws and have amassed compelling evidence against him.²⁵

1. *Ethnic Cleansing*—Among the many alleged heinous acts for which Mladic bears responsibility are those he committed in April and May of 1992, in concert with political and paramilitary leaders of the Bosnian Serbs, to further a policy of "ethnic cleansing" among Muslim populations of Bosnia-Herzegovina. This policy allegedly involved the systematic selection and rounding up of Bosnian Muslim civilians. According to official investigative documents and to Mladic's indictment, Bosnian Serb forces detained, sexually assaulted, tortured, beat, robbed, and killed Muslim civilians to create an arc of Serb-populated counties within Bosnia. By removing Bosnian Muslims from these counties—which are geographically contiguous with each other and with Serb enclaves in Croatia—Mladic and other leaders sought to reconnect the Serb populations of the former Yugoslavia. Prosecutors will attempt to establish links between Mladic, the policy of "ethnic cleansing," and several notorious massacres.

²¹See *id.* at 1274, 1318.

²²See International Criminal Tribunal for the Former Yugoslavia, The Prosecutor of the Tribunal Against Radovan Karadzic and Ratko Mladic, Indictment, at 1 (July 1995) [hereinafter Mladic Indictment] (copy on file with author).

²³See UNITED NATIONS, FINAL REPORT OF THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780, annexed to Letter from Boutros Boutros-Ghali, Secretary-General of the United Nations, to the President of the Security Council 29-33, U.N. Doc. S/1994/674 (May 24, 1994) [hereinafter FINAL REPORT OF COMMISSION OF EXPERTS].

²⁴THE DORLING KINDERSLEY WORLD REFERENCE ATLAS 116 (Ian Castello-Cortes ed., 1994) (noting that before the conflict, "[i]ntermarriage was common and ethnic violence was rare. Society was largely secular and materialistic. In the aftermath of secession, cultural differences became a basis for dividing society . . .").

²⁵See Mladic Indictment, *supra* note 22, at 4-23. Unless otherwise indicated, the factual assertions in the next three paragraphs of the text are based on the Mladic Indictment and on FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, at 33-37, Annex III, 23-32, Annex IIIA, 141-44.

2. *The Execution of Captives at Brcko*—One of these massacres took place at Brcko,²⁶ in northeastern Bosnia-Herzegovina, ironically about fifty miles from Sabac, where List's soldiers executed the concentration camp prisoners during World War II. After regular military units overran Brcko in late April and early May of 1992, Serb soldiers and paramilitary men herded about 5000 civilians into Luka Camp, a hastily converted brick factory and pig farm outside the town.

In the space of six weeks, members of a paramilitary group known as "Arkan's Tigers" brutally beat and killed many of the civilians at the camp, often by shooting them. Surviving witnesses state that bodies were taken away at night and then dumped in the nearby Sava River, buried in mass graves, or destroyed at a lard manufacturing plant. One estimate places the death count at the Luka Camp at 3000 during these six weeks, though a precise number cannot be determined given the uneven quality of evidence at this point.

3. *The Trial of Mladic*—Should he be tried, Mladic could be expected to argue that he directly killed no one and that he did not know defenseless captives were being executed.²⁷ He could be

²⁶Pronounced roughly "Birchko."

²⁷The court before which Mladic has been indicted is the first International War Crimes Tribunal to be convened since the post-World War II trials in Nuremberg and Tokyo. Alarmed at allegations of systematic and widespread torture and killing, the United Nations Security Council on October 6, 1992 asked the Secretary General to establish a Commission of Experts to investigate the alleged crimes. S.C. Res. 780, U.N. SCOR, 319th mtg. U.N. Doc. S/RES-780 (1992). The Secretary General did so, and a five-member Commission began investigating the allegations in November of 1992. See FINAL REPORT OF COMMISSION OF EXPERTS, *supra* note 23, at 1. Responding to an interim report of the Commission that concluded willful killing, "ethnic cleansing," mass killings, torture, rape, and other crimes had been committed in the former Yugoslavia, the Security Council on February 22, 1993 decided to establish an international tribunal to prosecute the offenders. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). The Security Council soon thereafter received a proposal from the Secretary-General on how best to implement its February decision. United Nations, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159-1202 (1993) (including a proposed statute for the recommended Tribunal, annexed to the resolution) [hereinafter REPORT OF THE SECRETARY-GENERAL (which will refer to the body of the report)] and STATUTE OF THE INT'L TRIBUNAL (which will refer to the annexed statute)]. Then on May 25, 1993—acting under Chapter VII of the United Nations Charter, see U.N. CHARTER, arts. 39-51—the Security Council established a Tribunal and simultaneously adopted the Tribunal's constitutive statute. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). On February 11, 1994, pursuant to Article 15 of that statute, the eleven judges of the new tribunal adopted rules of procedure and evidence. See 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: RULES OF PROCEDURE AND EVIDENCE, U.N. Doc. IT 32, *adopted* Feb. 11, 1994, *reprinted in* 33 I.L.M. 484-554 (1994) (*entered into force* Mar. 14, 1994) [hereinafter INTERNATIONAL TRIBUNAL RULES OF PROCEDURE]. See generally VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995).

expected to protest that in April and May of 1992, no one could have controlled the dozens of irregular and paramilitary organizations that were fighting in Bosnia-Herzegovina and that he did his best to control the military regulars who at that time were forming the newly designated Bosnian Serb armed force. He could be expected to claim that as soon as he attained some degree of control—and to the extent of that control—he closed detention camps such as the Luka Camp and prevented further atrocities against Muslims. Today, Mladic remains in command of Bosnian Serb forces in Bosnia-Herzegovina.

III. Nuremberg's Legacy for United States Forces

The crimes at Sabac and Brcko, fifty years and only fifty miles apart, offer a helpful context within which to examine Nuremberg's legacy today for United States military forces. Understanding the full impact of that legacy on modern military operations and devising methods for building on it require recognition of the distinctive characteristics of United States forces.

A. Defining the Legacy

What is the Nuremberg legacy? Hundreds of books have attempted to record it, capture it, and interpret it, and no definitive list of "Nuremberg principles" will ever command unanimous academic support.²⁸ Still, diverse authorities isolate several ideas and developments as precedents established at Nuremberg.²⁹

Perhaps the most popularly understood of these is prosecution for "crimes against peace," a novel charge against individuals at the highest levels of government, industry, and the military for starting or conspiring to wage an aggressive war against peaceful nations.³⁰

²⁸One source lists 855 publications addressing the International Military Tribunal and the United States subsequent proceedings at Nuremberg. See TUTOROW, *supra* note 2, at 283-368.

²⁹See, e.g., WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS (1970); HARRIS, *supra* note 8, at 555-60; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 21-42 (1992); Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in JOHN N. MOORE, ET AL., NATIONAL SECURITY LAW 359-402 (1990).

³⁰Actually, crimes against peace figured in two of the counts in the indictment before the International Military Tribunal. The gravamen of Count One was that the defendants had conspired to commit crimes against peace, war crimes, and crimes against humanity. See 1 T.M.W.C. *supra* note 4, at 29 (invoking London Charter, *supra* note 1, art. 6). The gravamen of Count Two was that they had planned, prepared, initiated, waged—or conspired to plan, prepare, initiate or wage—an aggressive war. See *id.* at 42 (invoking London Charter, *supra* note 1, art. 6(a)). Crimes against peace, as defined in the Charter, thus embodied two theories of individual criminal liability that were new to international law. The idea of giving the Tribunal

Another is prosecution for "crimes against humanity," a category of crime defined to include even harms inflicted on civilian populations of the defendant's own country outside a time of war or occupation.³¹ Another is prosecution of individuals on the basis of membership in organizations previously adjudged to have been criminal.³²

Another "Nuremberg principle" is employment of a judicial trial to determine the fate of senior leaders, who in an earlier age may have been executed or left alone on the basis of a political decision.³³ Still another is enforcement of international law against individuals rather than merely against states.³⁴

Although these ideas and developments may form the core of Nuremberg's larger legacy, they are not the only or even the principal legacy inherited by soldiers. For centuries, soldiers had been tried for harming persons or property in violation of the laws and customs of war committed in connection with military operations or occupation.³⁵

Trials of military regulars at Nuremberg, elsewhere in Europe, and in the Far East following World War II generally eschewed

jurisdiction to try the defendants for conspiracy originated with Colonel Murray Bernays, a lawyer and member of the personnel branch of the United States Army General Staff. See TAYLOR, *supra* note 29, at 35. The idea of giving the Tribunal jurisdiction to try the defendants for waging aggressive war originated with Colonel William Chanler, the Chief Legal Officer of the Allied Military Government in Italy. See *id.* at 37.

³¹See London Charter, *supra* note 1, art. 6(c). The view that "'crimes committed against . . . any persons because of their race or religion,' and especially Nazi atrocities against German Jews and Catholics should be punishable as 'war crimes.'" was first espoused by Herbert C. Pell, the United States Commissioner to the United Nations War Crimes Commission. See TAYLOR, *supra* note 29, at 24-26 (quoting Pell). The reluctance of the Tribunal to convict defendants for crimes against humanity that were not also traditional war crimes, see 1 T.M.W.C., *supra* note 4, at 254-55, stimulated the codification of the crime of genocide. See Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, art. II, 75 U.N.T.S. 277, reprinted in 45 AM. J. INT'L L. 7 (Supp. 1951) [hereinafter Genocide Convention] (defining genocide as killing and other acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group"); Solf, *supra* note 29, at 368.

³²See London Charter, *supra* note 1, art. 9.

³³See TAYLOR, *supra* note 29, at 25 (identifying the Declaration of St. James of January 13, 1942 by representatives of the nine governments-in-exile as the first principled utterance on the subject of World War II war crimes and stating that "[t]he leaders of these German-occupied lands, on whose peoples the burden of the atrocities directly fell, did not merely want to see the heads of their oppressors roll; they wanted vindication and retribution by law, applied through judicial process"), 31 (describing British Prime Minister Winston Churchill's unsuccessful proposal at Yalta on February 9, 1945 that "the leading Nazis" should be shot once their identity had been established).

³⁴See 1 T.M.W.C., *supra* note 4, at 222-24; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9-11 (1982).

³⁵See, e.g., HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES 9-38 (1992); DA PAM. 27-161-2, *supra* note 2, at 222-23.

novel criminal theories—such as conspiracy to wage aggressive war or membership in a criminal organization—in favor of prosecuting “war crimes” in this more traditional sense.³⁶ Nuremberg’s chief contributions to this preexisting body of international criminal law were in setting a standard by which commanders could be held responsible for the war crimes of subordinates; rejecting the defenses of military necessity and superior orders; and stating the narrow circumstances justifying reprisals.³⁷

1. *Command Responsibility*—The killings at Sabac—and the subsequent trials of Keitel and List for complicity in that massacre—provide a specific context in which to discuss these contributions to military law. On 4 October 1941, one of List’s subordinate commanders issued an order in response to the guerrilla attack that had left twenty-two German soldiers dead. The order implemented the earlier “100 to 1” order that he had received from List’s headquarters:

As reprisal and retaliation, 100 Serbian prisoners are to be shot at once for each murdered German soldier. The Chief of the Military Administration is requested to pick out 2,100 inmates in the concentration camps Sabac and Belgrade (primarily Jews and Communists) and to fix the place and time as well as burial place. The detachments for the shooting are to be formed from the 342d Division . . . and from the 449th Corps Signal Battalion.³⁸

On 9 October 1941, the same subordinate commander reported that the execution was in progress.³⁹ This report, and List’s subsequent failure to discipline the perpetrators or act to prevent similar later killings, helped convince the court of List’s responsibility for the massacre.⁴⁰ The court found List guilty under a standard for command criminal responsibility still regarded as authoritative today.⁴¹ According to that standard,

[t]he commander [is responsible for the acts of subordinates] if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control

³⁶See DA PAM, 27-161-2, *supra* note 2, at 231, 234-35.

³⁷See *id.* at 240-51.

³⁸See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1267. The subordinate commanding general was Lieutenant General Franz Boehme, one of the 11 other defendants tried by the court that tried List.

³⁹See *id.* at 1268.

⁴⁰See *id.* at 1271-72.

⁴¹See DEPT OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501 (18 July 1956; (C1, 15 July 1976) [hereinafter FM 27-10].

are about to commit or have committed a war crime and he fails to take necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.⁴²

2. *Military Necessity*—The judgment against List also remains one of the most forceful modern precedents rejecting military necessity as a defense to war crimes.⁴³ List maintained that the 100 to 1 order issued by Keitel was lawful under a theory of *kriegsraison*, a rationale based on military necessity and expediency and a close cousin to the German theory of "total war."⁴⁴

According to *kriegsraison*, the so-called reprisal killings at Sabac and elsewhere were necessary to pacify the resistance movement that was spreading throughout the Balkans in the fall of 1941 and that was tying down German units needed at the front lines.⁴⁵ The court rejected the defense, stating that "the rules of international law must be followed even if it results in the loss of a battle or even a war."⁴⁶

⁴²See Major Richard Baxter, Draft Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 8.8A (1 Mar. 1954) [hereinafter Annotated Draft of FM 27-10] (noting that the language of the command responsibility standard proposed and ultimately adopted for the Army's field manual was based on the court's judgment against List as well as on *In Re Yamashita*, 326 U.S. 1, 15, 16 (1946)) (copy on file with the library of The Judge Advocate General's School, United States Army, Charlottesville, Virginia); cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, art. 86 ("[T]hat a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."); art. 87 ("The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.") [hereinafter Protocol I]; STATUTE OF THE INT'L TRIBUNAL, *supra* note 27, art. 7(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 reasonable measures to prevent such acts or to punish the perpetrators thereof").

⁴³See LEVIE, *supra* note 35, at 498. The other seminal military case tried at Nuremberg was *United States v. Von Leeb* (The High Command Case), 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 462, 541 (rejecting the defense of military necessity).

⁴⁴See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1252, 1256, 1272; 1 T.M.W.C., *supra* note 4, at 227.

⁴⁵See 9 T.M.W.C., *supra* note 4, at 543; 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1252, 1256, 1272.

⁴⁶11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1272.

3. *Superior Orders*—The judgment against Keitel was a clear rejection of the defense of superior orders. Keitel had sought to evade responsibility for the massacre of innocent civilians at Sabac and elsewhere with the justification that Hitler himself had demanded orders such as the 100 to 1 order be issued, and that Keitel "had only the choice between military disobedience by refusing to transmit the orders, or complying with the instructions to forward them."⁴⁷

This was by no means the first war crimes case in which the defense of superior orders failed,⁴⁸ but in rejecting the defense, the International Military Tribunal helped establish the standard to which soldiers are trained today:

the fact that the law of war has been violated pursuant to an order of a superior authority . . . does [not] constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.⁴⁹

4. *The Law of Reprisal*—Nor did the law of reprisal excuse the massacre in the Sabac Camp, as List argued. Reprisals are actions that otherwise would be unlawful and taken to enforce future compliance with the law of war.⁵⁰

List maintained that the guerrilla fighters who killed the twenty-two German soldiers were violating the law of war because they were not carrying arms openly, and, as civilian inhabitants of an occupied territory, were not permitted to take up arms against the

⁴⁷See 18 T.M.W.C., *supra* note 4, at 4.

⁴⁸See, e.g., *The Trial of Captain Henry Wirz*, in I THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98, 86 (Leon Friedman ed., 1972) (reprinting key documents from the 1865 military commission that convicted the commandant of the Andersonville prison of murdering and mistreating prisoners of war despite hearing the defendant argue that he was "only the medium, or I may better say, the tool, in the hands of my superiors"). See generally LEVIE, *supra* note 35, at 512-21 (discussing precedents dating from the 15th century).

⁴⁹See FM 27-10, *supra* note 41, para. 509; Annotated Draft of FM 27-10, *supra* note 42, para. 8.15 (reconciling London Charter, *supra* note 1, Article 8, with British and American restatements of the defense); MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 916d (1995) (hereinafter MCM) ("It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the order to be unlawful."). The London Charter precluded consideration of superior orders as to responsibility but permitted consideration as to mitigation. In stating its reasons for adjudging Keitel guilty, the Tribunal ruled, "[s]uperior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification." 1 T.M.W.C., *supra* note 4, at 291. The court in List's case also rejected the defense. See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1236.

⁵⁰See FM 27-10, *supra* note 41, para. 497a.

occupying power.⁵¹ The court conceded this point.⁵² List maintained that some form of reprisal was therefore lawful. The court agreed.⁵³ List argued that because it was impossible to identify the specific individual guerrilla fighters who had killed the German soldiers, measures against the general population could be permissible reprisals.

While deploring the state of customary international law on this point,⁵⁴ the court reluctantly agreed with List, stating that hostages could be taken and executed only "as a last resort."⁵⁵ The court then opined that the slaughter of the Sabac camp prisoners was not lawful under this standard, was unnecessarily severe, and bore no connection to the killing of the German soldiers, which had occurred in a different town.⁵⁶

⁵¹See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1246.

⁵²See *id.* The treatment of the status of the so-called "guerrillas" in the List case inspired Professor Baxter to term them "unprivileged belligerents," in that international law does not deem their conduct criminal, but that it also does not immunize them from prosecution under national law. See Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y. B. INT'L L. 323 (1951), reprinted in MIL. L. REV. BICENTENNIAL ISSUE 487, 501 (1975). Conceiving of spies, guerrillas, and saboteurs as unprivileged belligerents rather than as violators of the law of war seemed to contradict *Ex parte Quirin*, 317 U.S. 1, 31, 34, 36 (1942), which referred to the saboteurs in that case as having committed war crimes. Regardless whether the Yugoslav guerrillas who bedeviled List were war criminals or unprivileged belligerents, it is clear that they were not complying with well-established rules of land warfare. See Regulations Annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 1, 2, 36 Stat. 2277, 205 Consol. T.S. 277, which state:

Article 1.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army or form part of it, they are included under the denomination "army."

Article 2.

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

⁵³See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1253.

⁵⁴See *id.* at 1251-52: "There has been a complete failure on the part of the nations of the world to limit or mitigate the practice [of collective punishment for acts of individuals] by conventional rule. This requires us to apply customary law. That international agreement is badly needed in this field is self-evident." Customary international law results from a general and consistent practice of states that they follow out of a sense of legal obligation. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT].

⁵⁵See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1249.

⁵⁶See *id.* at 1248-50.

The partial success of List's reprisal argument led to the prohibition, in the Geneva Conventions of 1949, against making civilians the objects of reprisals.⁵⁷

B. Operations Other Than War

If he were to follow the lead of a Bosnian Serb who already is standing trial in the Hague, Mladic would raise an argument not used by Keitel and List. According to this argument, the International Tribunal in The Hague should not be permitted to try him for complicity with the butchery at Brcko because the armed conflict that erupted there was internal rather than international in character.⁵⁸

Mladic could be expected to argue that because the law of war did not apply to the conflict, no international court could justly try him or anyone else for "war crimes." The dead at Brcko were casualties of a nasty internal fight between Bosnian Serbs and Bosnian Muslims, not of a battle between soldiers of warring sovereign nations. Because the grave breach provisions of the Geneva Conventions (part of the law of war)⁵⁹ are the firmest available basis for international criminal charges, and because these provisions presume the existence of a state of international armed conflict or occupation,⁶⁰ this argument demands careful consideration.

1. *International v. Internal Armed Conflict*—International armed conflict is any dispute between two sovereign states involving the use of their armed forces.⁶¹ Though a declaration of war is not required to create an international armed conflict, such a declaration by either state creates such a condition, whether or not armed resistance is occurring.⁶² In 1941, the inhabitants of Sabac were pro-

⁵⁷See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 33, 34 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]; JEAN S. PICTET, COMMENTARY ON GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 227-28 (1958).

⁵⁸International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Defense Brief to Support the Motion on the Jurisdiction of the Tribunal, paras. 3.1, 8-12 (23 June 1995) (copy on file with author).

⁵⁹Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-51, 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, arts. 50-52, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 102, 105-08, 129-31, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; GC, *supra* note 57, arts. 146-48.

⁶⁰See, e.g., FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, at 13.

⁶¹INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 40 (Yves Sandoz et al., eds., 1987).

⁶²See *id.*

tected under the law of war because Yugoslavia was occupied territory, having fallen into the hands of an enemy state's forces.⁶³

Mladic could argue that in late April and early May of 1992, by contrast, the Muslim inhabitants of Brcko had not fallen into the hands of enemy forces. Instead, they were rounded up by their own Serb neighbors of Brcko, by Serb soldiers who had received training and arms as members of the Yugoslav People's Army, but who were now part of a nascent Bosnian Serb Army, and by Serb paramilitary groups from elsewhere in the former Yugoslavia.⁶⁴ Mladic could be expected to argue that while the Muslim victims in Brcko were indeed citizens of a recently established independent state of Bosnia-Herzegovina,⁶⁵ the existing state of Yugoslavia was formally disengaging itself from the struggle occurring in the breakaway republic.⁶⁶

Mladic also might insist that he was not the commander of the individuals who terrorized the Muslims of Brcko, and that under the standard enunciated by the court in List, he should not be held responsible for their crimes.⁶⁷ The court deciding List's fate had placed great weight on the fact that List was the commander of an occupying force and that, as such, he had a duty to preserve order, punish crime, and protect lives and property within the occupied territory.⁶⁸ It had based its acquittal of two of List's codefendants pre-

⁶³See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1244.

⁶⁴See FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, annex III, at 9.

⁶⁵European Community Declaration on Recognition of Bosnia and Herzegovina, U.N. Doc. S/23793, Annex (6 Apr. 1992), reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, at No. 173 (Snezana Trifunovska ed., 1994).

⁶⁶On 27 April 1992, Yugoslavia adopted a new constitution that declared it was composed only of the Republics of Serbia and Montenegro. See CONSTITUTION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA, art. 2, reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 65, at No. 184. On 19 May 1992, the Yugoslav People's Army publicly divided itself into the Serbian Army in Bosnia and Herzegovina (later the VRS) and the Army of Yugoslavia (VJ). The latter became the armed force of Serbian and Montenegro. See International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Response to the Motion of the Defense on the Jurisdiction of the Tribunal at 41 (7 July 1995) [hereinafter Prosecution Brief on Jurisdiction of Tribunal] (copy on file with author) (citing evidence provided by Andrew James William Gow, a prosecution witness).

⁶⁷See *infra* note 41 and accompanying text; 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1260 ("An Army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters . . . It would strain credulity of the Tribunal to believe that a high ranking commander would permit himself to get out of touch with current happenings in the area of his command during wartime."). 1261 ("In determining the guilt or innocence of these defendants, we shall require proof of a causative overt act or omission.").

⁶⁸See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1244-45.

cisely on the rationale that they were not in such a position of command.⁶⁹

The fluid and decentralized environment surrounding the Brcko atrocities would be a key factual prong of Mladic's attempt to evade command responsibility. There are as many as eighty-three different paramilitary groups operating in the territories of the former Yugoslavia, and some fifty-six of these have worked in support of Serbs.⁷⁰ Moreover, most of their paramilitary activity has occurred within Bosnia-Herzegovina.⁷¹ Even assuming for the sake of argument that a state of occupation existed, Mladic might well argue that in such an environment any of several prominent paramilitary leaders is a more logical candidate than he for the title of occupying commander.⁷²

Should Mladic ever come before the international criminal tribunal in the Hague, these and many other points of fact and law will surely be raised. The prosecution will have strong, and I think decisive responses in its favor. Although the objectives of this brief essay preclude extensive discussion of these, four of the strongest responses require mention:

1. On 22 May 1992, the political leader of the Bosnian Serbs, and clear partner of Mladic's, signed an agreement in Geneva stating that the grave breach and other listed provisions of the Geneva Conventions would apply to the conflict.⁷³
2. The ostensible break between the Yugoslav state and the Bosnian Serbs in May of 1992 was a deception, and the continued logistical, financial, and even direct military support of the Bosnian Serbs by Yugoslavia assured the international character of the conflict.⁷⁴
3. Mladic has long had requisite command and control, as demonstrated by his negotiation of cease-fire and prison

⁶⁹See *id.* at 1284-87 (judging Hermann Foertsch, Chief of Staff of 12th Army, Army Group E, and Army Group F, and Kurt Von Geitner, Chief of Staff to the Commanding General in Serbia, to the Military Commander of Serbia, and to the Military Commander Southeast).

⁷⁰See FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, annex III.A, at 11.

⁷¹See *id.*

⁷²See *id.* at 31, annex III.A, at 23-33 (describing the control exercised by Vojislav Seselj, leader of the "White Eagles" or "Chetniks," and Zeljko "Arkan" Raznjatovic, leader of "Arkan's Tigers"). With respect to alleged crimes occurring in late April and early May, he will likely note that he did not assume command of the Bosnian Serb Army until 14 May 1992. See Mladic Indictment, *supra* note 22, at 1.

⁷³See Prosecution Brief on Jurisdiction of Tribunal, *supra* note 66, at 44.

⁷⁴See *id.* at 41-42.

exchange agreements, agreements relating to the opening of the Sarajevo airport, agreements related to access for humanitarian aid convoys, and anti-sniping agreements, all of which were implemented.⁷⁵

4. Whether or not the conflict was international for the purposes of applying the law of war, it was clearly a serious threat to international peace and security. As such, it provided the Security Council the basis to create a tribunal and define subject matter jurisdiction consisting of crimes under a body of humanitarian law that applies to internal conflicts.⁷⁶

These arguments, if supported by facts at trial, would justify convicting Mladic for the 1992 crimes committed by armed forces at Brcko.

Still, the absence of a clear state of belligerency or occupation—obvious conditions during the Sabac executions in 1942—complicates the chain of legal arguments required to convict Mladic for the Brcko executions of 1991. More important from the practical standpoint, the absence of a clear victor—no stumbling block at Nuremberg in 1945—presently precludes taking Mladic into custody and trying him at the Hague in 1995.⁷⁷

These modern difficulties are symptoms of an era in which war is officially outlawed and in which the most prevalent and vicious armed threats to human life erupt from within, rather than between, existing states.⁷⁸

2. *War v. Operations Other Than War*—The complexities for prosecutors and judges of bringing a war criminal such as Mladic to justice when there has been no clear war and no clear winner bear a close relationship to the complexities for soldiers and generals of conducting operations other than war. Although in the modern era the United States has faced nothing resembling the organized thugery of Arkan's Tigers on its own soil, its frequent if reluctant involvement in dirty little nonwars and other struggles of low inten-

⁷⁵See Mladic Indictment, *supra* note 22, at 3.; see also 2 MORRIS & SCHARF, *supra* note 27, at 97-101 (describing sources, including the *Ltst* case, on which they "knew or had reason to know" standard of the Hague Tribunal's Statute was based, and attempting to distill the criteria by which a leader's responsibility would be judged under that standard).

⁷⁶See International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Decision on the Defense Motion at 10, 25-26, 29-30 (10 Aug. 1995) (hereinafter Decision on Jurisdiction of Tribunal).

⁷⁷Trial of Mladic *in absentia* is precluded by STATUTE OF THE INT'L TRIBUNAL, *supra* note 27, art. 21(4)(d).

⁷⁸See, e.g., R.J. RUMMEL, POWER KILLS; ABSOLUTE POWER KILLS ABSOLUTELY (1991).

sity around the globe has stimulated a significant development in military doctrine.⁷⁹

This development in military doctrine has accelerated with the end of the Cold War, the disappearance of a large conventional military threat, and the increasing threat to global and national security posed by ethnic conflicts, narcotics trafficking, and nuclear proliferation.⁸⁰ Today, the development is identified in the United States military community with the term "operations other than war," which made its first official appearance in 1993.⁸¹

The United States Army defines operations other than war as "military activities during peacetime and conflict that do not necessarily involve armed clashes between two organized forces."⁸² The keystone doctrinal manual for the Army explains:

Nations use all the resources at their disposal to pursue national objectives. The US promotes the self-development of nations through the measured use of national resources and assistance. The prime focus of the Army is warfighting, yet the Army's frequent role in operations other than war is critical. Use of Army forces in peacetime helps keep the day-to-day tensions between nations below the threshold of conflict. Typical peacetime operations include disaster relief, nation assistance, security and

⁷⁹See, e.g., DANIEL P. BOLGER, *AMERICANS AT WAR 1975-1986: AN ERA OF VIOLENT PEACE* (1988); LAWRENCE A. YATES, *COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NUMBER 15, POWER PACK: U.S. INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966* (1988).

⁸⁰See MICHAEL J. MAZARR, *THE REVOLUTION IN MILITARY AFFAIRS: A FRAMEWORK FOR DEFENSE PLANNING* (1994).

⁸¹See DEPT OF ARMY, *FIELD MANUAL 100-5, OPERATIONS 2-0*, ch. 13 (14 June 1993) [hereinafter *FM 100-5, OPERATIONS*]. The United States joint military community adopted the term soon thereafter. See *JOINT CHIEFS OF STAFF PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS I-3 to I-4* (9 Sept. 1993) [hereinafter *JOINT PUB. 3-0*]. Even as this essay was being drafted, the Army strongly indicated that the term itself will drop out of usage, although the missions described by the term will remain a focus of doctrinal development. See Memorandum, Commander, United States Army Training and Doctrine Command to 35 Senior Addressees within the Command, subject: Commander TRADOC's Philosophy on the Term "Operations Other Than War" (2 Nov. 1992) (copy on file with the author) which states:

As U.S. military forces became increasingly involved in worldwide operations following the breakup of the Soviet Union, the U.S. Army coined the term "OOTW" to provide an overarching concept for our doctrine as we entered a new historical period for the U.S. Army. The term "OOTW" [operations other than war] has served us well to provide increased visibility for new types of operations over the past several years. . . . We have reached a point in our post-cold war doctrinal development so we can now speak with more precision about Army operations in peacekeeping, humanitarian assistance, . . . and other specific missions. Since "OOTW" has served its purpose, we should begin to retire the term, while maintaining and enlarging the vital lessons learned in specific areas.

⁸²See *FM 100-5, OPERATIONS*, *supra* note 81, glossary, at 6.

advisory assistance, counterdrug operations, arms control, treaty verification, support to domestic civil authorities, and peacekeeping.⁸³

Thus, a United States infantry private who soon may find himself on sentry duty in Brcko helping to implement a peace plan for the region would be serving in an operation other than war,⁸⁴ even if he is receiving small arms fire from one of Arkan's Tigers who is not yet tamed, and even if he comes upon fresh evidence of brutal atrocities stemming from continued armed conflict between Serbs and Muslims.

C. Military Doctrine and Field Manuals

For at least four reasons, this new military category known as operations other than war is important to our assessment of Nuremberg's legacy and to our inquiry into how the legacy might be strengthened.

⁸³See *id.* at 2-0, 2-1.

⁸⁴This essay's discussions of United States units and soldiers in Brcko are hypothetical. Although Brcko is strategically important to all parties to the conflict because it lies astride a narrow corridor connecting Serb-controlled land, see, e.g., Michael Dobbs, *Bosnia Talks Open with Warning to Leaders*, WASH. POST, Nov. 2, 1995, at A1, A22, and although units will likely be placed at or near Brcko if and when a multilateral force deploys to Bosnia, it was not clear at the time this essay was written precisely where United States and other nations' forces will operate. Also, despite that this essay refers to the hypothetical United States soldiers in Brcko as "peacekeepers," this should not be construed as an indication of what the precise nature of the mission will be, or to suggest that, a United States force in Bosnia will not have armament, rules of engagement, international justification more consistent with the term "peace enforcers." See, e.g., Salley Morphet, *UN Peacekeeping and Election Monitoring*, in UNITED NATIONS, DIVIDED WORLD 163, 201 (1994), stating that the guiding principles of peacekeeping to be

the important role of the UN Secretary-General and of UN command—albeit one that the Permanent Members (of the Security Council) had to keep an eye on; the necessity for agreement, both at the UN and on the ground, of the political parameters of the operation, including the need for consent of the host states, and also, in some cases, of the other main parties involved; the fact that those engaged in peacekeeping had to maintain neutrality and impartiality (as peacekeepers *not* peace enforcers) so that they could contribute to the management of the problem rather than risk becoming part of it; the fact that the military should not use force except in self-defence or to defend their positions; and the importance of creative flexibility (e.g. through use of police and administrators) in response to the varying situations that faced them on the ground.

See also *An Agenda For Peace—Preventive Diplomacy, Peacemaking, and Peacekeeping*, Report of the Secretary-General, para. 44, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277 (1992): "[Peace enforcement units] would have to be more heavily armed than peace-keeping forces and would have to undergo extensive preparatory training within their national forces. . . . I consider such peace-enforcement units to be warranted as a provisional measure under Article 40 of the Charter. Such peace-enforcement units should not be confused with the forces that may eventually be constituted under Article 43 to deal with acts of aggression"

1. *A Medium of Dissemination*—First, the category is part of United States military doctrine and as such provides a medium through which to communicate the legacy to soldiers.

Whereas doctrine to a lawyer means "a rule, principle, theory, or tenet of the law,"⁸⁵ doctrine to the military professional is "the authoritative guide to how [military forces] fight wars and conduct operations other than war."⁸⁶ Doctrine seeks to build on collective knowledge within the military, to reflect wisdom that has been gained in past operations, and to incorporate informed reasoning about how new technologies may best be used and new threats may best be resisted.⁸⁷

Effective military doctrine states basic principles clearly and thereby provides comprehensive, consistent guidance for the training, equipping, and organizing of the force, yet it also provides sufficient flexibility to accommodate demands of local conditions and permit the use of judgment by local commanders.⁸⁸ Doctrine is thus "in a constant state of evolution,"⁸⁹ as changes occur in the nature of threats to national security, in the technologies available to resist those threats, and in the objectives defined by elected and appointed officials.

Although judge advocates who deploy to Bosnia might be able to translate Nuremberg's imperatives from German wartime occupation in Sabac to United States peacekeeping in Brcko, there is little hope of the infantry private and his commanding officers doing so unless those imperatives are conveyed in new military doctrinal terms.

2. *Export Potential*—Second, operations other than war are part of *United States* military doctrine and as such promise to have an impact on the conduct of soldiers in many nations.

While several other nations' armed forces have long oriented

⁸⁵See BLACK'S LAW DICTIONARY 432 (5th ed. 1979); see also MARY A. GLENDON, MICHAEL W. GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS & CASES* 162, 209 (2d ed. 1994) (discussing the role of *la doctrine* within the civil law tradition).

⁸⁶See FM 100-5, OPERATIONS, *supra* note 81, at v; JOINT CHIEFS OF STAFF, PUBLICATION 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 118 (1 Dec. 1989) (hereinafter JOINT PUB. 1-02).

⁸⁷See generally MAJOR PAUL H. HERBERT, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NO. 16, *DECIDING WHAT HAS TO BE DONE: GENERAL WILLIAM E. DEPUY AND THE 1976 EDITION OF FM 100-5, OPERATIONS 3-9* (1988) (describing the function of doctrine in an army and charting the modern practice of publishing doctrine in manuals).

⁸⁸See TIMOTHY T. LUPFER, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NO. 4, *THE DYNAMICS OF DOCTRINE: THE CHANGES IN GERMAN TACTICAL DOCTRINE DURING THE FIRST WORLD WAR 55* (1981).

⁸⁹See DEP'T OF ARMY, FIELD MANUAL 100-11, FORCE INTEGRATION 11 (1988).

their training and force structure around conflicts of low intensity,⁹⁰ the United States Army has traditionally emphasized principles of "massive firepower" and "the offensive" within a singular focus on large-scale conflict against a conventional force.⁹¹ For the first time, the keystone doctrinal field manual of the Army also includes exegesis on the virtues of "restraint" and "legitimacy," fundamental principles of operations other than war.⁹²

Because the United States conducts military education and training programs with a great number of countries,⁹³ and because the United States military goes to great lengths to publish and distribute its doctrine in field manuals,⁹⁴ the new emphasis on operations other than war cannot fail to influence military forces around the globe.⁹⁵ United States military units operating in Brcko and elsewhere to implement a peace plan will—largely by force of example—be exporting the new doctrine, along with a United States view on the proper role of the military in a democracy, on civilian control of the military, and on human rights.

⁹⁰See, e.g., AUSTRALIAN DEFENCE FORCE, PUBLICATION ADFP 1, OPERATIONS (1994).

⁹¹See, e.g., ANDREW F. KREPINEVICH, JR., THE ARMY AND VIETNAM 199 (1986); Daniel P. Bolger, *The Ghosts of Omdurman*, PARAMETERS, Autumn 1991, at 33.

⁹²See FM 100-5, OPERATIONS, *supra* note 81, at 13-4 ("Restraints on weaponry, tactics, and levels of violence characterize the environment. The use of excessive force could adversely affect efforts to gain legitimacy and impede the attainment of both short and long-term goals.") ("Committed forces must sustain the legitimacy of the operation and of the host government. Legitimacy derives from the perception that constituted authority is both genuine and effective and employs appropriate means for reasonable purposes.") This is not to say that 1993 marked the first treatment of these principles by United States land forces. see DEP'T OF ARMY, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT (5 Dec. 1990); UNITED STATES MARINE CORPS, SMALL WARS MANUAL (1940), but only to emphasize that they had never before found a place in keystone doctrine.

⁹³See 22 U.S.C. §§ 2347-47d (authorizing the Expanded International Military Education and Training Program (EIMET)); 10 U.S.C. § 168 (authorizing military-to-military contacts); *id.* § 166a (authorizing CINC Initiative Funds); 22 U.S.C. § 5901 (authorizing expanded military-to-military contacts between the United States and the independent states of the former Soviet Union); 10 U.S.C. § 1050 (authorizing the Secretary of the Army Latin American Cooperation Fund); *id.* § 1051 (authorizing payment of travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences). Funds are made available to these programs in appropriations acts. See, e.g., Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-306, 108 Stat. 1608 (1994); Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 108 Stat. 2599 (1994).

⁹⁴See, e.g., HERBERT, *supra* note 87, at 3-9.

⁹⁵The influence that FM 27-10, *The Law of Land Warfare* has had on many armies since 1956 provides an excellent illustration. See, e.g., Yoram Dinstein, Military Rule-Making: Military Manuals and Other Administrative Rules Relating to Armed Conflict, Remarks During International Colloquium at Bad Homburg, Germany (June 17-19, 1988), in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 214, 215 (Michael Bothe ed., 1990) [hereinafter NATIONAL IMPLEMENTATION]; (describing the impact upon Israel). See also *infra* note 179.

3. *Translation to Modern Circumstances*—Third, operations other than war are a new part of United States military doctrine and, as such, must be integrated into systems and forms of conduct that already incorporate Nuremberg's lessons in a particular way. The category remains at this point a general doctrinal concept that has not yet been fully written into the many subordinate manuals that flesh out military doctrine or into actual thinking and behaviors of soldiers and commanders. Although much work has already been done in this area,⁹⁶ there is more to be done.

The training of the United States ground component still emphasizes wartime tasks and relies for the most part on a bright line distinction between war and peace. The manual expounding Army doctrine for training relies on a central concept of "battle focus" and emphasizes the identification of those unit tasks that will receive training priority by analyzing "war plans."⁹⁷ The Department of Defense Law of War Program⁹⁸ and numerous law of war publications issued for consumption by soldiers and judge advocates further illustrate the focus on wartime.⁹⁹

The United States soldiers who deploy to Brcko will have received instruction and undergone evaluation on nine basic rules that refer to "enemy combatants" and "prisoners of war" and "prevent[ing] violations of the law of war."¹⁰⁰ While these rules are indis-

⁹⁶See DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (30 Dec. 1994); Joint Chiefs of Staff, Publication 3-08, Interagency Coordination During Joint Operations at I-10 (31 Jan. 1995) (first draft); JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS 75 (28 Feb. 1995) [hereinafter JTF COMMANDER'S HANDBOOK]. See also *infra* notes 128-40 and accompanying text (discussing development of operational law to deal with difficulties of operations other than war).

⁹⁷See DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE I-7, 2-1 (15 Nov. 1988).

⁹⁸See DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM D.1 (1994) ("As used within this directive, the law of war encompasses all international law with respect to the conduct of hostilities binding on the United States or its individual citizens, as contained in treaties and international agreements to which the United States is a party, or applicable as customary international law").

⁹⁹See, e.g., DEP'T OF ARMY, FIELD MANUAL 27-2, YOUR CONDUCT UNDER THE LAW OF WAR (23 Nov. 1984); FM 27-10, *supra* note 41; DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (7 Dec. 1956); DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW VOLUME II (23 Oct. 1962); DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1 Sept. 1979); DEP'T OF ARMY, TRAINING CIRCULAR 27-10-1, SELECTED PROBLEMS IN THE LAW OF WAR (26 June 1979) [hereinafter TC 27-10-1]; DEP'T OF ARMY, TRAINING CIRCULAR 27-10-2, PRISONERS OF WAR (17 Sept. 1991); DEP'T OF ARMY, TRAINING CIRCULAR 27-10-3, THE LAW OF WAR (12 Apr. 1985).

¹⁰⁰See DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, ch. 14 (19 Mar. 1993) [hereinafter AR 350-41]. In listing the nine "Soldiers' Rules" to be taught to all entering soldiers, the regulation styles the subject matter as "basic law of war rules":

(1) Soldiers fight only enemy combatants.

(2) Soldiers do not harm enemies who surrender. Disarm them and turn

pensible to the training of individuals for war, our Brcko peacekeepers may be forgiven if they are somewhat confused about how these rules pertain to their mission.

4. *National Security Strategy*—Fourth, operations other than war are critical to a national security strategy that implicitly seeks to perpetuate the Nuremberg legacy. The strategy—contained in an annual report submitted by the President to Congress pursuant to the 1986 Goldwater-Nichols Act¹⁰¹—maps out the advancement of national interests through “engagement and enlargement.”¹⁰²

“Engagement” refers to a commitment to “exercise global leadership” and stresses “preventive diplomacy—through such means as support for democracy, economic assistance, overseas military presence, military-to-military contacts . . . in order to help resolve problems, reduce tensions and defuse conflicts before they become crises.”¹⁰³

Successful engagement depends on conventional military forces capable of fighting and winning “two nearly simultaneous major regional conflicts” against foes such as North Korea or Iraq. Yet, it also depends on a credible overseas military presence, on participation in multilateral peacekeeping, peace enforcement, and other peace operations, and on other military missions that include counterterrorism, noncombatant evacuation, counternarcotics, and humanitarian and disaster relief operations.¹⁰⁴ There is no discernable difference between what military doctrine terms “operations other than war” and this diverse set of missions articulated in *national strategy*:

“Enlargement” refers to efforts to increase the number of constitutional, free market, free election democracies.¹⁰⁵ By committing them over to your superior.

(3) Soldiers do not kill or torture enemy prisoners of war.

(4) Soldiers collect and care for the wounded, whether friend or foe.

(5) Soldiers do not attack medical personnel, facilities, or equipment.

(6) Soldiers destroy no more than the mission requires.

(7) Soldiers treat all civilians humanely.

(8) Soldiers do not steal. Soldiers respect private property and possessions.

(9) Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superiors.

Id. para. 14-3b.

¹⁰¹See Dep't of Defense Reorganization (Goldwater-Nichols) Act of 1986, § 603, Pub. L. No. 99-433, 100 Stat. 1012-17 (codified at 10 U.S.C. § 16113(e)(2) (1988)).

¹⁰²THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT (Feb. 1995).

¹⁰³See *id.* at 7.

¹⁰⁴See *id.* at 9.

¹⁰⁵See *id.* at 22-24.

to the objective of enlargement, the strategy relies on the view that such democracies are more likely to respect fundamental human rights and remain peaceful:

[a]ll of America's strategic interests—from promoting prosperity at home to checking global threats abroad before they threaten our territory—are served by enlarging the community of democratic states and free market nations. Thus, working with new democratic states to help preserve them as democracies committed to free markets and respect for human rights, is a key part of our national security strategy.¹⁰⁶

Efforts to promote democracy and human rights abroad may require deployments of troops in operations other than war, such as humanitarian assistance, refugee assistance, and peace enforcement.¹⁰⁷

The links between the United States strategy, the military doctrine implemented by our hypothetical peacekeepers in Brcko, and the Nuremberg legacy are strong as well as obvious.¹⁰⁸ If United States soldiers in Brcko can help reestablish orderly, rule-governed processes in a land ravaged by arbitrary and vengeful uses of brute power, then they will have invigorated the Nuremberg legacy.

D. Peacetime Humanitarian Law

The river Sava runs through the towns of Sabac and Brcko, and during the atrocities of 1941 and 1992, the blood of defenseless

¹⁰⁶See *id.* at 22.

¹⁰⁷See *id.* at 23 ("We must be willing to take immediate public positions to help staunch democratic reversals, as we have in Haiti . . .").

¹⁰⁸See *id.* at 23-24 (stating in connection with the enlargement prong of the strategy "[t]he United States has taken the lead in assisting the UN to set up international tribunals to enforce accountability for the war crimes in the former Yugoslavia and in Rwanda."). The term "human rights"—so prominent in the *National Security Strategy*—embodies a development in contemporary international law that was in many respects triggered by the crimes prosecuted at Nuremberg. See, e.g., EIGHTEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS, AND HUMAN RIGHTS 1 (1988), reprinted in Richard B. Lillich, *Human Rights*, in MOORE ET AL., *supra* note 29, at 675 ("The idea of international protection of human rights on a universal scale owes its origin to the tragic events accompanying the Second World War and the totalitarian excesses preceding it . . ."). Several distinct types of rights are claimed to be human rights. One authority groups them as follows: life (right not to be murdered or physically assaulted); freedom (thought, expression, religion, association, movement); property (limited by public policy); rule of law (right not to be subjected to arbitrary arrest and right to fair trial); social, economic, and cultural goods (education, work, social security, rest, leisure, standard of living adequate for one's health and well being). See THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT 222-24 (David Miller ed., 1987) (describing the evolution of human rights from "natural rights" or "rights of man," and noting that the status of social, economic, and cultural goods as human rights is controversial) (hereinafter BLACKWELL ENCYCLOPAEDIA); see also *infra* note 127.

captives ran thick in the river.¹⁰⁹ Whereas the Nuremberg trials that sought justice against Keitel and List for bloodshed in the Sava relied on the law of war, the indictment of Mladic for bloodshed in the Sava relies on humanitarian law applicable in peace or war. This is a body of law with which judge advocates have become familiar in recent years, not merely to confirm for soldiers that international law clearly proscribes harming innocents during all operations, but also to provide guidance on whether certain provisions grant economic and social "rights" or create remedies consisting of United States judicial or executive action.

1. *Military Criminal Jurisdiction*—A United States infantry division deployed near Brcko could encounter numerous issues pertaining to international humanitarian law. Assume that United States soldiers are told by several Muslim survivors of the 1992 executions that a particular Serb male was an officer in the Bosnian Serb regular forces. The survivors allege that the man directed the rounding up of Muslims and then personally killed five individuals at the Luka Camp on 25 May 1992. The man volunteers himself into the custody of the United States troops to protect himself against vengeful Muslims. Assume that Bosnian courts in the area are not yet established and equipped to conduct a trial, the International Tribunal in The Hague is not seeking to exercise jurisdiction,¹¹⁰ and the United States division commander believes that the man will

¹⁰⁹The victims in the Sabac executions of October 1941—said to be "reprisals" for the Topola ambush described at notes 15 and 17 *supra*—fell into two general categories. The first category comprised survivors among a group of about 1100 Jewish refugees from central Europe, mostly Austrians, that had been interned at the Sabac camp. The second category comprised survivors of a punitive expedition by German forces in the Sava Bend region carried out in September in an attempt to quell insurgent activity. During that expedition, men between fourteen and seventy years of age were rounded up and interned in the Sabac camp. Prior to the Topola ambush, both categories of eventual victims were force-marched to Jarak, twenty-three kilometers away, and then marched back again to Sabac four days later when the site proved unsuitable for a concentration camp. During these forced marches, which crossed the Sava River, stragglers became bleeding corpses in the river. See generally 7 T.M.W.C., *supra* note 4, at 553 (quoting a report prepared by the Yugoslav government—"Those who could not stand the pace and fell by the way were ruthlessly shot on the spot. Because many were old and weak the number of victims was great, especially while crossing the bridge over the Sava."); 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 775; BROWNING, *supra* note 16, at 44-50. As mentioned earlier and reported in FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, annex III A, at 142 ("The bodies were stacked behind the hangar and then taken away at night to be either dumped in the nearby Sava River or buried in a mass grave.") (citing UNITED STATES SUBMISSION TO THE UNITED NATIONS-BRCKO, 26 Sept. 1992, IHRLI Doc. No. 11347-11365, at 11351-53). See also International Criminal Tribunal for the Former Yugoslavia, Prosecutor of the Tribunal Against Goran Jelusic and Ranko Cecic, Case No. IT-95-10-I, para. 3 (30 June 1995) ("Often, the accused and camp guards forced the detainees who were to be shot to put their heads on a metal grate that drained into the Sava River, so that there would be minimal clean-up after the shootings.")

¹¹⁰See STATUTE OF THE INT'L TRIBUNAL, *supra* note 27, art. 9(2): "The International Tribunal shall have primacy over national courts." *Id.*

not receive basic procedural protections if he is given into the custody of local Bosnian officials.

Can the division commander himself convene a tribunal to try the man on charges of violating Common Article 3 of the Geneva Conventions,¹¹¹ genocide, and crimes against humanity¹¹² in connection with the 1992 killings? I think not, but the question is closer than one might believe.

With the exception of the genocide charge,¹¹³ the barriers to such a military trial overseas stem from ancient customary public international law and United States domestic law rather than from international humanitarian law.¹¹⁴ As the Hague Tribunal in the

¹¹¹See *supra* note 59. Article 3 of all four conventions deals with internal armed conflicts, and binds each party to the conflict to apply a minimum set of humanitarian safeguards to "[p]ersons taking no active part in the hostilities." The final paragraph of Common Article 3 states that application of these minimum safeguards "shall not affect the legal status of the Parties to the conflict," a provision included in the article at the insistence of nations concerned that application of the Conventions in cases of civil war would interfere with the *de jure* government's lawful suppression of a revolt, or that it may confer belligerent status, and thus increased authority, upon the adverse party. See JEAN S. PICTET, COMMENTARY ON GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 60 (1952). The Hague Tribunal for the Former Yugoslavia recently ruled that its Statute gives it subject matter jurisdiction to try and punish individual violators of the Common Article 3 safeguards. See Decision on Jurisdiction of Tribunal, *supra* note 76, para. 65.

¹¹²See *supra* note 31 and accompanying text.

¹¹³See Genocide Convention, *supra* note 31, art. VI. "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of 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." *Id.* (emphasis added).

¹¹⁴The closeness of the question stems from the clear grant of subject matter jurisdiction over law of war violations given to military courts-martial and military commissions under international law, see, e.g., L. OPPENHEIM, 2 INTERNATIONAL LAW § 237c (H. Lauterpacht, 7th ed. 1955), and under United States constitutional law, see U.S. CONST. art. I, § 8, cl. 10, and statutory law, see 10 U.S.C. §§ 818, 821 (1988). At least one international authority believes that violations of Common Article 3 and crimes against humanity are prohibited by the law of war. See Decision on Jurisdiction of Tribunal, *supra* note 76, paras. 65, 83. If the mission to Brocko were to develop so as to push United States forces into the role of an occupying power, see *infra* note 125 and accompanying text, then the law, abhorring a vacuum, might require the commander to step in and establish order through use of his traditional power to try and punish brigands. See, e.g., United States v. Rockwood, Record of Trial, 1924-25, 1928-29 (10th Mountain Div., 22 Apr. 8-14 May 1995) (14-volume record of trial on file with author) (testimony of defense expert, Professor Francis Boyle opining that the United States was an occupying power in Haiti in September of 1994 and thus had the obligation under international law to preserve law and order) (hereinafter Rockwood Record of Trial); but see, e.g., Lieutenant General Henry H. Shelton, Commander of Combined Joint Task Force 180, Remarks During Press Conference at the United States Embassy in Port-au-Prince Haiti (Sept. 19, 1994) ("We have stressed from the beginning that this is not an occupation force," quoted in A "Cordial" Reception as Americans Take Control; Peacekeeping Troops Meet No Resistance—and Some Cheers—As They Took Haitian Ports and Airfields. But

case of *Dusan Tadic* has already decided, regardless of whether the conflict was international in May of 1992, defendants can be tried for violating Common Article 3 or for crimes against humanity.¹¹⁵

2. *Refugees*—Whereas the question of whether military criminal tribunals can enforce peacetime humanitarian rules that prohibit murder and other violent acts is an academic one for the moment, questions about peacetime rules concerning treatment of refugees are not. Consider the case of a C-130 transport aircraft crew that discovers three Bosnian Muslims stowed away aboard the aircraft ten minutes after departing an airstrip near Brcko.

Do the stowaways qualify for protection as refugees under international humanitarian law,¹¹⁶ and are they entitled to accompany the aircraft to the United States base in Germany? Or can the pilot return the aircraft to Brcko and thus forcibly repatriate the stowaways? United States policies and immigration laws¹¹⁷ may require that the stowaways be permitted to land with the aircraft in Germany, but recent litigation concerning Haitian migrants interdicted by Coast Guard vessels on the high seas indicates that international humanitarian law does not bar repatriation.¹¹⁸

3. *Detention*—Also realistic are scenarios in which individual inhabitants of Brcko invoke civil and political rights under peace-

Risks Remain High, ORLANDO SENTINEL, Sept. 20, 1994, at A1). Still, the circumstances would have to be quite extreme, and the ability of local government to exercise its authority completely broken, to justify a trial by a United States court, of a foreign national, in the territory of another sovereign state. This is particularly true in light of the modern tradition of using status of forces agreements between states to enable one state to hold criminal trials in another. See generally RESTATEMENT, *supra* note 54, §§ 421-22 & 422, Reporter's Note 4 (treating jurisdiction to conduct United States criminal trials abroad and citing, *inter alia*, *Reid v. Covert*, 354 U.S. 1, 12, 77 (1957), *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin, 1979), North Atlantic Treaty Status of Forces Agreement, 1951, 4 U.S.T. (1792)); Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509-19 (1994) (arguing that national courts, to include military tribunals, could try offenders against international law); Mark S. Martins, *National Forums For Punishing Offense Against International Law: Might Our Own Soldiers Have Their Day in the Same Court?*, Paper presented at the Conference on Deterring Humanitarian Law Violations, Charlottesville, Virginia (Nov. 5, 1994) (analyzing the argument of Everett and Silliman) (on file with author).

¹¹⁵The Tribunal's decision applies to all of the time period within its jurisdiction. See Decision on Jurisdiction of Tribunal, *supra* note 76, paras. 65-83.

¹¹⁶See United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33.1, 19 U.S.T. 6259, 189 U.N.T.S. 137.

¹¹⁷See, e.g., 8 U.S.C. § 1253(h); DEPT. OF DEFENSE, DIRECTIVE 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (Mar. 3, 1972).

¹¹⁸See *Sale v. Haitian Centers Council, Inc.*, 125 L. Ed. 128, 139, 150-53 (1993).

time international law.¹¹⁹ If United States troops—to establish a stable and secure environment pursuant to a Security Council Resolution—detain individuals suspected of violent crimes, are these detained persons entitled to the list of specific procedural measures contained in the International Covenant on Civil and Political Rights?¹²⁰ I think not. The United States experience in Haiti illustrates that some provisions of that Covenant are simply unintelligible in a deployment setting,¹²¹ although the detainees should receive essential due process and be protected from arbitrary treatment.

4. *Medical Care*—United States forces deployed to Brcko and elsewhere can anticipate that questions involving distribution of medical care will arise. At least one commentator advocates that a duty “to search for and collect wounded, sick, and missing persons and . . . to ensure their adequate care . . .” should apply in all situations and at all times.¹²² Does this mean that United States peacekeepers must make expeditions with litters into the mountainous Bosnian countryside to collect and care for inhabitants who have fallen ill?¹²³ While troops undoubtedly will provide medical care as resources permit to those in urgent need, their ability to secure the military objectives set by the Security Council would be frustrated by imposing a strict affirmative duty of care.

Careful analysis reveals that neither conventional nor custom-

¹¹⁹See International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2, 999 U.N.T.S. 171, 6 I.L.M. 368, entered into force for the United States Sept. 8, 1992 [hereinafter Covenant] (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”), art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”), art. 9 (“No one shall be subjected to arbitrary arrest or detention.”); see also LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROTECT OR OBEY: THE UNITED STATES ARMY VERSUS CAPTAIN LAWRENCE ROCKWOOD 5 (1995) [hereinafter LAWYERS’ COMMITTEE] (invoking International Covenant to support argument that international law placed a duty on Captain Rockwood to violate orders in conducting unannounced visit on Haitian penitentiary).

¹²⁰See Covenant, *supra* note 119, art. 14.

¹²¹See Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 80 & nn. 16-17 (1995).

¹²²See Asbjorn Eide et al., *Combatting Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT’L L. 215-17, 222 (1995).

¹²³Even in armed conflict, the obligation of an army to search for and collect the dead, wounded, and sick does not extend to civilian persons, who are the responsibility of civilian authorities. See GC, *supra* note 57, art. 16; PICTET, *supra* note 57, at 135; DEP’T OF ARMY, FIELD MANUAL 8-10, HEALTH SERVICE SUPPORT IN A THEATER OF OPERATIONS 3-10 (1991).

ary international law imposes such an open-ended duty.¹²⁴ Similar analysis is required in all overseas operations other than war when questions arise as to whether the United States is in the nature of an "occupying power," a role that contemplates a range of heavy affirmative obligations.¹²⁵ These analyses support the practice of

¹²⁴See Interview with Theodore Meron, Professor of Law, New York University School of Law, in Charlottesville, Virginia (Nov. 18, 1995). Although it is not uncommon for states and commentators to declare in general fashion that the law of war "will be applied" to a particular conflict and that detainees will be given "prisoner of war treatment," regardless whether a international armed conflict exists, see, e.g., United States Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994), quoted in Meron, *supra* note 121, at 78 ("If it becomes necessary to use force and engage in hostilities, the United States will, upon engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict."), when particular obligations and questions of status are discussed, the "application" of proposed conventional or supposed customary rules proves inapt. For instance, during military operations in Panama, the United States government was careful to maintain that treaty provisions applicable to international armed conflict would not strictly apply. See, e.g., Letter from Abraham D. Sofaer, Legal Adviser to the United States Department of State, to Richard L. Thornburgh, United States Attorney General (Jan. 31, 1990) (explaining that "prisoner of war status is generally sought by captured individuals because persons entitled to such status may not be prosecuted for legitimate acts of war," and reporting that on December 20, 1989 the Departments of State and Defense had elected to extend protected treatment to members of the Panamanian Defense Force "even if they might not be entitled to these protections under the terms of Article 4 of Geneva Convention III"). The distinction between status and treatment is important, because it confirms that the United States is not acting out of a sense of legal obligation. Recall that customary law results from a general and consistent practice followed by states out of a sense of legal obligation. See *supra* note 54. These observations are reconcilable with Eide, et al., *supra* note 122, at 217 (acknowledging that among the significant problems with minimum standards are "where the threshold of applicability of international humanitarian law is not reached," and where "the character of the conflict situations" is not defined), 222 (qualifying the duty to collect the wounded and sick with the phrases "[e]very possible measure" and "to the fullest extent practicable"); see also Meron, *supra* note 121, at 78 (stating that the Geneva Conventions were not "strictly speaking, applicable" to United States operations in Haiti).

¹²⁵See Hague Regulations, *supra* note 52, art. 43 (stating that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country"), reprinted in FM 27-10, *supra* note 41, para. 363; GC, *supra* note 57, art. 55 ("To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate"), reprinted in FM 27-10, *supra* note 41, para. 364. In most instances, the prerequisites are not met for a state of occupation to exist. See *id.* para. 352 ("Occupation . . . is invasion plus taking firm possession of enemy territory for the purpose of holding it."); *id.* para. 355 ("Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."). But see Rockwood Record of Trial, *supra* note 114 (testimony of defense expert Professor Francis Boyle) (opining that the United States was an occupying power in Haiti). Cf. DEPT. OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 610 (1992) ("Coalition forces [in the Persian Gulf conflict] acted briefly as an occupying power").

United States forces in Somalia, Haiti, and elsewhere.¹²⁶ They also illustrate that distinguishing what is binding from what is merely aspirational in peacetime humanitarian law is fully consistent with preserving Nuremberg's legacy.¹²⁷

E. Operational Law

Legal issues associated with the deployment of peacekeepers to Brcko will extend to many areas besides international humanitarian law. Operations other than war implicate an enormous and diverse body of domestic, foreign, and international rules. The United States military is committed to conducting orderly, deliberate, rule-governed operations.¹²⁸ It also is committed by law and by long tradition to comply with policies and instructions issued by duly elected and appointed civilian leaders.¹²⁹ Accordingly, these many other compliance issues will absorb considerable attention from commanders, soldiers, and judge advocates. The connection of these efforts at compliance to the Nuremberg legacy will be that they affirm the rule of law.

Operational law is a unique emerging discipline that addresses the need to support deployed military forces on the entire range of legal fronts. It is defined broadly as "that body of foreign, domestic, and international law that impacts specifically upon the activities of United States forces in war and operations other than war."¹³⁰ While

¹²⁶See Center for Law and Military Operations, *The Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates*, subpts. III.B.3, III.K.2 (draft 3 Oct. 1995) (on file with author) (hereinafter *Law and Military Operations in Haiti*); Interview with Colonel John Smith, Former Staff Judge Advocate for the 10th Mountain Division in Somalia, in Charlottesville, Virginia (Oct. 4, 1995) (describing analogies drawn by judge advocates serving in Somalia to the law of occupation).

¹²⁷Extravagant claims that human rights have become binding obligations that could actually undermine the protection of those rights that are uncontroversial. See BLACKWELL ENCYCLOPAEDIA, *supra* note 108, at 224 ("Declarations of rights have sometimes been presented as statements of self-evident truths which therefore require only to be announced. This approach is, at best, implausible and invites the opponent of human rights to dismiss them as no more than a set of prejudices."); accord Lillich, *supra* note 108, at 697-98 (analyzing with great care which parts of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 7th Sess., 183d mtg., U.N. Doc. A/777 (1948) have become customary international law); RESTATEMENT, *supra* note 54, § 702 (regarding a limited list of human rights as customary international law).

¹²⁸See, e.g., LIEUTENANT COLONEL GEOFFREY B. DEMAREST, *THE STRATEGIC IMPLICATIONS OF OPERATIONAL LAW* (1995) (comprising a "Blue Cover Publication" of the Foreign Military Studies Office at Fort Leavenworth, Kansas).

¹²⁹See, e.g., Colonel Charles J. Duniap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341-92 (1994).

¹³⁰See INTERNATIONAL AND OPERATIONAL L. DEP'T. JA-422, *THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 1-1* (4th ed. 1995) [hereinafter *OP. LAW HANDBOOK*].

present in some form since the Vietnam conflict,¹³¹ the need for the discipline clearly emerged during United States operations in Grenada in 1983.¹³²

Examples of operational legal challenges that may confront commanders and soldiers in Brcko include the following:

- drafting understandable rules of engagement (ROE), which are rules that dictate "who can shoot at what, with which weapons, when, and where,"¹³³ and developing situational training exercises that can assist troops in achieving the proper balance of initiative and restraint under the ROE;¹³⁴
- complying with the manpower limits imposed by the United Nations Participation Act¹³⁵ or with the reporting requirements of the War Powers Resolution;¹³⁶
- ensuring respect for the legal system of Bosnia-Herzegovina and adherence to any bilateral or multilateral status of forces agreements that create criminal jurisdictional arrangements, claims structures, or transportation privileges;¹³⁷

¹³¹See, e.g., MAJOR GENERAL GEORGE S. PRUGH, DEPT OF ARMY, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (1975); George S. Prugh, *United States European Command: A Giant Client*, 44 MIL. L. REV. 97, 111-13 (1969); William H. Parks, *The Law of War Adviser*, 31 JAG. J. 1 (1980); Steven Keeva, *Lawyers in the War Room*, A.B.A. J., Dec. 1991, at 52.

¹³²Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9. At about the same time, legal advisors for British forces were identifying a similar need as a result of operations in the Falkland Islands.

¹³³Colonel Fred Green, *An Address to the American Society of International Law, on the Subject of Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity* (1992) (using this informal definition of ROE), reprinted in 86 AM. SOC'Y INT'L L. PROC. 39, 62-67 (1992); see also DEPT OF ARMY, SUBJECT SCHEDULE 27-1, THE GENEVA CONVENTIONS OF 1949 AND THE HAGUE CONVENTION NO. IV OF 1907, para. 3a (29 Aug. 1975) (using this definition of ROE). Formally, ROE are "directives issued by competent authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, PUBLICATION 1-02, DEPT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 317 (1 Dec. 1989) [hereinafter JOINT PUB. 1-02].

¹³⁴Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1-160 (1994).

¹³⁵United Nations Participation Act of 1945, § 7(a)(1), Pub. L. No. 79-264, 59 Stat. 619 (amended by legislation and codified at 22 U.S.C. § 287d-1(a)(1) (1988 & Supp)) [hereinafter UNPA] (comprising one of the nine sections of the Act that are codified at 22 U.S.C. §§ 287 to 287e-1).

¹³⁶War Powers Resolution of 1973, sec. 4 (2), Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. § 1543(2) (1988 & Supp.)).

¹³⁷See Law and Military Operations in Haiti, *supra* note 126, subpts. III.A., III.B., III.M., III.K.

- interpreting United States executive branch materials relating to intelligence collection;¹³⁸
- construing statutory provisions that would constrain disposition of any weapons obtained in buyback and control programs;¹³⁹
- conducting official investigations pursuant to service regulations;
- disciplining some service members under the Uniform Code of Military Justice; and
- interpreting procurement and fiscal laws to ensure that congressional intent with respect to military and humanitarian assistance appropriations is not frustrated.¹⁴⁰

A military force that adheres scrupulously to these legal constraints is also a force that is capable of living and spreading Nuremberg's lessons.

IV. Preserving the Legacy

Modern United States military doctrine and operational law—as I have presented these notions in part III's comparison between Sabac and Brcko—suggest no easy formulae for perpetuating the legacy of Nuremberg. Nevertheless, three broad imperatives seem as relevant today as they were fifty years ago.

A. Enforce Humanitarian Law While Respecting Military Discipline

Although the objectives of humanitarian law and military discipline are conceptually distinct, the practical measures that serve one frequently serve the other. The objective of humanitarian law is

¹³⁸Intelligence law for the military community largely involves interpretation of regulatory materials subordinate to a 14 year-old executive order. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) ("United States Intelligence Activities"); see also Law and Military Operations in Haiti, *supra* note 126, subpt. III.C.

¹³⁹See, e.g., Foreign Assistance Act of 1961, 75 Stat. 434 (amended by more than 15 subsequent pieces of legislation and codified at 22 U.S.C. §§ 2301 to 2349aa-9 (1988 & Supp.) (comprising chapter 32 ("Foreign Assistance") and subchapter II ("Military Assistance and Sales")); Arms Export Control Act of 1976, 90 Stat. 734, (amended by more than eight subsequent pieces of legislation and codified at 22 U.S.C. §§ 2751-2796c (1988 & Supp.) (comprising chapter 39 ("Arms Export Control")); see also Law and Military Operations in Haiti, *supra* note 126, subpt. III.E.

¹⁴⁰See Law and Military Operations in Haiti, *supra* note 126, subpts. III.K.3, III.I, III.L.3

to eliminate unnecessary suffering.¹⁴¹ The immediate objective of discipline within an armed force is to increase military effectiveness and thus defeat the enemy more quickly.¹⁴² History has recorded that early improvements in the lot of innocent victims of war came about because soldiering evolved into a profession, troops formed into standard units under regular chains of command, and commanders enforced discipline.¹⁴³ Discipline in the ranks forged a distinction between soldier and civilian, combatant and noncombatant, and humane treatment of those not involved in the conflict was a salutary byproduct of these developments.

Today, humane treatment of noncombatants is not merely an incident of sensible internal military regulation. It has independent legal force. When courts and scholars refer to the law of war as being "prohibitive law" they are often making the point that humanitarian practices required by treaty cannot be abandoned in specific cases where there is a military advantage to be gained.¹⁴⁴ Thus today, quarter is given to prisoners because they are protected under international law, not because the capturing force finds it practical to do so, not because the prisoners are thought to have valuable intelligence that good care and feeding might encourage them to divulge, and not because giving quarter demonstrates good order and discipline.

Still, conditions which frustrate military discipline may also frustrate humanitarian goals, and the executions at Brcko seem to provide concrete support for this fact. Although military regulars appear to have participated in rounding up Muslim males of fighting age and in transporting them to Luka Camp, the preponderance of killing, torture, rape, and other crimes occurred at the hands of

¹⁴¹See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble, 36 Stat. 2277, 205 Consol. T.S. 277 (stating that the parties were "[a]nimated by their desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization: Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible.").

¹⁴²See, e.g., FM 100-5, OPERATIONS, *supra* note 81, at 2-3, which states:

War is tough, uncompromising, and unforgiving. For soldiers, the rigors of battle demand mental and physical toughness and close-knit teamwork. Between the anxiety of battle, soldiers spend long hours doing routine but necessary tasks in the cold, wet weather and mud, moving from position to position, often without hot meals, clean clothes, or sleep. In war, the potential for breakdown in discipline is always present. . . . Army forces apply the combat power necessary to ensure victory through appropriate and disciplined use of force.

¹⁴³See, e.g., George L. Coll, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 173-81 (1975); TAYLOR, *supra* note 29, at 6.

¹⁴⁴See 11 TRIALS OF WAR CRIMINALS, *supra* note 9, at 1256; FM 27-10, *supra* note 41, para. 3.

Arkan's Tigers and other indisciplined paramilitary forces.¹⁴⁵ Further, the military regulars were arguably not "regulars" at all, in that they had been cut loose from one chain of command and were casting about for another, circumstances that would tend to foster indiscipline even among trained and experienced soldiers.¹⁴⁶

1. *Incentives to Fight as Soldiers*—A wise strategy for increasing compliance with humanitarian rules—and thus perpetuating the Nuremberg legacy—includes creating incentives for individuals to fight as soldiers in disciplined regular units. Hague Convention IV of 1907¹⁴⁷ reflects this approach as do the Geneva Conventions Relative to the Treatment of Prisoners of War of 1929 and 1949.¹⁴⁸ Although heated disagreement surrounds the issue of whether provisions in Protocol I of 1977¹⁴⁹ create incentives or disincentives for individuals to fight as soldiers and comply with the law of war,¹⁵⁰ both sides of the disagreement concur that humanitarian concerns are advanced when armed conflict is fought by disciplined units that carry their arms openly.¹⁵¹

Because local inhabitants throughout Yugoslavia in 1941 were fighting as guerrillas, soldiers in the German punitive expedition in Sabac had less difficulty rationalizing the round up and execution of male inhabitants of fighting age. Serb attackers of Brcko in 1992 doubtless excused their execution of civilians with the unoriginal claim that their captives were enemy guerrillas. New rules of international law must be formed with careful attention to their effect on this vicious cycle of violation and reprisal.

2. *Obedience to Lawful Orders*—A wise strategy also insists that soldiers obey lawful orders rather than pursue their own

¹⁴⁵See FINAL REPORT OF THE COMMISSION OF EXPERTS, *supra* note 23, annex III.A, at 141-44.

¹⁴⁶See *id.* annex III, at 10-11.

The history of war clearly reveals that professional armies that are under effective command and control commit fewer violations than fighting units that are not properly trained in the law of armed conflict and are not under the effective command and control of superior officers. But when military commanders order violations, permit them to happen, fail to take measures to prevent them, and fail to discipline, prosecute, and punish violators, then the worst can be expected.

Id.

¹⁴⁷See *supra* note 52.

¹⁴⁸See Convention Relating to the Treatment of Prisoners of War, July 27, 1929, art. 1, 47 Stat. 2021, 2 Bevans 932; GPW, *supra* note 59, art. 4A(2).

¹⁴⁹See Protocol 1, *supra* note 42, arts. 43-44.

¹⁵⁰Compare, e.g., Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 127-34 (1985) (arguing that the provisions create disincentives) with George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693, 703-08 (1986) (arguing that the provisions create incentives).

¹⁵¹See *id.*

appetites, desires, or political ends. In the modern era of operations other than war, the achievement of humanitarian aims via peace-keeping will be frustrated if individual soldiers are permitted to pursue personal plans uncoordinated with the unit mission.

United States participation in a mission to Bosnia may well prove to be unpopular. The deployment and lodgment buildup phases must place a premium on force security because early television footage of body bags returning to Dover Air Force Base, Delaware, could cause a rapid loss of political will. Even if violence directed against United States soldiers proves to be rare, forces could very well be involved in preventing Serb on Muslim or Muslim on Serb violence in the streets.¹⁵² Strict command and control of conventional combat units will be essential, as many soldiers are under twenty years old and have not received extensive training for such missions. If in this scenario soldiers were to leave their places of duty within a secure compound and travel to the Luka Camp or elsewhere in search of evidence of atrocities, the entire humanitarian mission would be in jeopardy.¹⁵³ The same would be true if soldiers began to

¹⁵²See, e.g., *Law and Military Operations in Haiti*, *supra* note 126, subpt. III.A.1 (detailing the controversy that erupted on 20 September 1994 over whether United States troops should protect Haitians from violence by other Haitians).

¹⁵³These were the essential facts from the court-martial of Captain Lawrence Rockwood. Rockwood was a counterintelligence officer assigned to the 10th Mountain Division with place of duty in Haiti at the Combined Joint Task Force 190 Headquarters, located in the Light Industrial Complex in Port-au-Prince. On the evening of 30 September 1994, Captain Rockwood was scheduled for duty as the senior officer in charge of the J-2 Counter-Intelligence Human Intelligence Cell in the Headquarters. A perimeter wall surrounded the secure compound that included the Headquarters, and security guards imposed on those seeking to leave the compound a minimum of two vehicles per convoy and two persons per vehicle. Captain Rockwood, armed with a loaded M-16 rifle, avoided the security guards by jumping over the perimeter wall. Then he traveled about six kilometers to the National Penitentiary, where Haitian authorities had remained responsible for the prisoners. *see* Agreement Signed by Jimmy Carter and Emile Jonassaint, the Military-Appointed President of Haiti, in Port-au-Prince, on 18 Sept. 1994, paras. 2, 4, *reprinted in* *Law and Military Operations in Haiti*, *supra* note 126, app. C. After learning that Captain Rockwood was making an unannounced appearance at the prison, Major Lane, the military attaché at the United States embassy, went to the prison to prevent an altercation. While at the prison, Captain Rockwood insulted Major Lane and denounced the chain of command, claiming that President Clinton's televised speech on 15 September gave him authority to prevent human rights abuses. About two hours later, Major Lane succeeded in calming Captain Rockwood down, convinced him to unchamber the round in his rifle, and got him to leave the prison.

Captain Rockwood ultimately was charged with a number of offenses. The charges consisted of failure to go to his place of duty at the Headquarters on the evening of 30 September; violation of an order not to leave the compound without the proper convoy; dereliction in performance of duty to leave only in a proper convoy; going from his place of duty at the hospital ward to which he was taken after leaving the prison; disrespect to Lieutenant Colonel Bragg, whom he confronted and shouted down after leaving the hospital; disobedience to Lieutenant Colonel Bragg, who repeatedly had ordered him to "stop talking," and to "lower his voice" during the posthospital confrontation; and conduct unbecoming an officer and gentleman for the entire course of events leading up to his departure from the prison. *See* 10 U.S.C. §§

888, 889, 890, 892, 933. On 14 May 1995, a general court-martial in Fort Drum, New York, found Captain Rockwood guilty of all but the two charges pertaining to the convoy procedures. It sentenced him to dismissal and total forfeiture of pay and allowances, apparently not having been persuaded by his affirmative defenses of duress and justification. See generally Rockwood Record of Trial, *supra* note 114.

Although the case is only beginning its way through the appeal process, initial review of the 14-volume record of trial indicates that the court-martial was fairly conducted and that the findings and sentence were appropriate in light of Captain Rockwood's conduct. On 29 September, 1994, the day before Captain Rockwood left his post and only ten days after troops began arriving in Haiti, a grenade attack and two shooting incidents had left 16 Haitians killed and 60 wounded. The multinational force correctly placed priority on quelling the violence in the streets and on continuing the secure and orderly build up of its base of operations. A misstep costing American lives at this delicate stage in the operation could have caused a complete collapse of the mission and scuttled the restoration of President Aristide. Discipline and obedience to orders were essential to success in Haiti. Responsiveness to commands, originating with the civilian leadership and relayed through the Department of Defense and a clear chain of command, not only is essential to military success but is also required by our form of government. One commentator has analyzed the legal issues in this manner:

No officer has a right to disregard lawful orders of superiors. (Title 10 U.S.C. sec. 890, Article 90, Uniform Code of Military Justice). An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. (Manual for Courts-Martial, United States 1984 (hereafter MCM), Part IV, para. 14c.(2)(a)(i)). The dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. (MCM Part IV, 14c.(2)(a)(iii)). As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted to the accused. (MCM Part IV, para. 14c.(2)(a)(iv)(c)). CPT Rockwood, however, argues that he acted under various higher authorities, including the Dalai Lama—his "spiritual teacher." He points to a speech in which President Clinton said our national objectives included "stopping brutal atrocities." He believes that the President's general guidance superseded specific orders from his immediate superiors. It is true that an order is not lawfully binding if it is in conflict with the lawful order of a superior authority. (See generally *U.S. v. Green*, 22 M.J. 711 (A.C.M.R. 1986)). An order or regulation is not lawful if it is contrary to the Constitution, the laws of the United States, or lawful superior orders. However, before a President's policy guidance can legally amount to a contrary regulation or order, it must first meet the criteria of enforceability under Article 90 or Article 92, UCMJ. To be considered a conflicting order under Article 90, UCMJ, the President's guidance must have been a specific mandate to do, or not to do, a specific act. (MCM Part IV, para. 14. (c)(2)(iv)(d)). Under MCM Part IV, para. 16c.(1)(e), "Regulations which supply only general guidelines or advice for conducting military functions may not be enforceable under Article 92(1)." The analysis at MCM App. 21, para. 16, pg. A21-92, states: "The general order or regulation violated must, when examined as a whole, demonstrate that it is intended to regulate the conduct of individual service members, and the direct application of sanctions for violations of the regulation must be self-evident." (*United States v. Nardell*, 21 U.S.C.M.A. 327, at 329; 45 CMR 101, at 103 (1972)).

The commanders of the 10th Mountain Division were apparently sensitive to CPT Rockwood's idealism. Although they were not required to do so, they attempted to explain their actions to him. He was allowed to air his concerns within his chain of command, with the legal officials of the Staff Judge Advocate, with a U.N. military observer, and with the Multinational Force Inspector General. CPT Rockwood would have us believe that none of these individuals shared his superior sense of com-

disobey orders on the basis that the oath of allegiance they swore to the United States obliges them to refuse service with a United Nations force.¹⁵⁴

3. *Dissemination of Humanitarian Rules*—A wise strategy also stresses wide dissemination of humanitarian rules. In this way, soldiers and guerrilla fighters alike can become familiar with the basic protections they must afford to noncombatants. Also in this way, soldiers learn that it is neither disciplined conduct nor a defense to war crimes charges to obey superior orders that are clearly illegal or to seek military advantage by violating the rules.¹⁵⁵ Dissemination is an integral goal of modern humanitarian conventions,¹⁵⁶ and it is

passion. When his reckless vendetta eventually forced his command to discipline him, they did so in a measured fashion. They reportedly offered him nonjudicial punishment under Article 15, UCMJ. (Title 10 U.S.C. sect 815). This modest punishment might have kept his military career intact, while reinforcing the principle that officers of the division could not arrogate power unto themselves. CPT Rockwood refused to argue his case at this lower-level forum, instead choosing to demand trial by court-martial. Next, the command offered to allow him to resign from the Army in order to avoid the stigma of a court-martial conviction. He declined the offer. The command appears to have taken carefully measured steps to balance the equities of the case with the need to maintain discipline within the division.

Hearings Before the Subcommittee on the Western Hemisphere of the House Committee on International Relations, 104th Cong., 1st Sess. (May 4, 1995) (Testimony of Colonel Richard H. Black (United States Army, Retired)). See also Edward J. O'Brien, Note, The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood, infra at 275.

¹⁵⁴See *United States v. Specialist Michael New* (3d Infantry Div. 1995; (involving a case, still at the pretrial stage, of an Army medic charged with failure to obey a lawful order to don the United Nations blue beret and patch); *G.I. Is Charged After Refusing U.N. Duty*, N.Y. TIMES, Oct. 19, 1995, at A12. See also *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953) (opining that the military is an organization in which the essence of the service "is the subordination of the desires and interests of the individual.").

¹⁵⁵See 1 T.M.W.C., *supra* note 4, at 325 ("Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for the commission of these crimes.") (judging Alfred Jodl).

¹⁵⁶See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284 (requiring signatory nations to "issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention"); GPW, *supra* note 59, art. 127 ("The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population."); See generally H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, ARMY LAW., July 1963, at 1, 7-9 (discussing the requirements for "dissemination" contained in pertinent treaties). Article 82 of Protocol I, *supra* note 42, which has not yet been ratified by the United States but which is consistent with United States practice, contains a more explicit role for judge advocates:

The High Contracting Parties at all times, and the Parties to the conflict

perennially deserving of additional resources, creative ideas, and realistic training applications.

4. *Prosecution of Leaders*—Finally, a wise strategy for increasing compliance with humanitarian law emphasizes prosecution of those leaders and commanders who use the obedience of soldiers to serve criminal ends. Wehrmacht soldiers who executed captives at Sabac were wrong not to have disobeyed their patently illegal orders. Yet List and Keitel were still more culpable at having directed the machinery and might of trained military forces toward evil purposes.

As with any measure designed to deter, the promptness and frequency with which prosecutions follow from criminal conduct will bear a direct relationship to their effectiveness in improving compliance, a fact that has caused me to write elsewhere that military courts should be taken seriously as war crimes forums.¹⁵⁷ A doctrine of command responsibility is necessary to permit prosecutions to occur, but all theories of prosecution that eliminate the need to prove individual mens rea with respect to a particular alleged harm run the risk that the result will be labeled "victors' justice."¹⁵⁸

in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces in this subject.

See also W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 4-7 (Horace B. Robertson, Jr. ed., 1991) (describing the role of manuals in the transmission of law).

¹⁵⁷See Martins, *supra* note 114.

¹⁵⁸I include in this category not only extreme formulations of command responsibility, see *In re Yamashita*, 327 U.S. 1, 26, 34 (1945) ("Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.") (Murphy, J., dissenting); but see W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22-38 (1973) (asserting that the military commission that convicted Yamashita probably was convinced that the general had actual knowledge of the atrocities, but also the conspiracy and criminal organizations counts at Nuremberg. See *supra* notes 30, 32. Yet, whereas the Supreme Court's opinion in *Yamashita* (as opposed to the military commission's finding of guilty) seems to reflect an unfair strict liability standard of command responsibility, the court-martial of the United States Army company commander of troops who committed atrocities at My Lai seems to reflect too high a standard of mens rea. See *United States v. Medina*, Unnumbered Record of Trial (Headquarters, Fort Benning, Georgia, Sept. 1971) (judge's instructions) (instructing that "a commander is also responsible if he has actual knowledge . . . and he wrongfully fails to take the necessary and reasonable steps to ensure compliance with the law of war"), quoted in William Eckhardt, *Command Criminal Responsibility*, 97 MIL. L. REV. 1, 15 (1983); see also Solf, *supra* note 29, at 387-91; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99, 175-85 (1972).

B. Be Legal Realists

Justice Jackson addressed concerns that the results of Nuremberg would be seen as victors' justice by noting that "the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes"¹⁵⁹ and that "[t]he worldwide scope of the aggressions carried out by these men has left but few real neutrals."¹⁶⁰ To the challenge that the first ever trial for crimes against peace involved *ex post facto* application of law, he replied that "[t]he wrongs which we seem to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."¹⁶¹ Although Jackson rose to eminence without attending college, and his one year at Albany Law School probably did not expose him to the academic legal thinking that flourished at Harvard, Columbia, and Yale in the 1920s and 1930s,¹⁶² these remarks reveal him to have been a legal realist.¹⁶³

1. *Realism*—The methodology known as legal realism resists easy synopsis, but it can be identified with three tenets:

- First, realists view legal doctrines and categories as impermanent and as having developed through history from "ideas of expediency, justice, and supposed logic."¹⁶⁴
- Second, realists cast a questioning eye on inherited legal categories and seek to bring into plain view the policy considerations that lie behind those categories.¹⁶⁵
- Third, realists believe it is possible to identify a coherent public interest and to develop policies and reform the law to further that interest.¹⁶⁶

Justice Jackson's appeal to an urgent public interest and his willing-

¹⁵⁹See 2 T.M.W.C., *supra* note 4, at 98 (opening speech).

¹⁶⁰See *id.*

¹⁶¹See *id.*

¹⁶²See TAYLOR, *supra* note 29, at 43.

¹⁶³Justice Jackson's record of service to New Deal policies before joining the Supreme Court, *see id.*, further establishes his links to legal realism. Legal realist scholars who joined public service in furtherance of these policies included Thurmon Arnold, Charles Clark, Felix Coher, Walton H. Hamilton, Jerome Frank, Rexford G. Tugwell, and William O. Douglas. See Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1675 n.41 (1982).

¹⁶⁴Walter Wheeler Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449, 477 (1917).

¹⁶⁵See *e.g.*, KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 565 (1930).

¹⁶⁶See, *e.g.*, Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943) (forwarding a Realist-inspired, policy oriented, vision for American law in which legal education would marry social science).

ness to challenge existing conceptions of international law placed him firmly within the realist tradition thus defined.

Legal realism has spawned systems of jurisprudence that furnish insights into international law and offer guideposts to military legal advisors and others concerned about perpetuating Nuremberg's lessons. One of these systems proposes that our conceptions about law should emphasize decision processes more than rules.¹⁶⁷ It also requires an analysis of the different functions served by key persons in decision processes.¹⁶⁸ Judge advocates can make practical use of these insights without involving themselves in policy formulation, a role that could undermine civilian control of the military.¹⁶⁹

2. *Emphasis on Process*—What does legal realism commend to our hypothetical operation other than war in Brcko? Should a detention facility prove necessary, an emphasis on process must guide our facility operations. While domestic Bosnian law pertaining to pre-trial arrest and detention, peacetime international humanitarian law, and analogies to the Geneva Conventions will be important references, the foremost demand is that a United States joint detention facility in Brcko or anywhere else in Bosnia must guarantee essential due process for individuals temporarily held as threats to the "secure and stable environment."¹⁷⁰ The process must be humane and fair, and it must ensure that if there is no evidence that a person threatens the force or innocent civilians, he should be set free promptly.¹⁷¹

3. *Distinct Roles*—Judge advocates serving in Bosnia are well advised to consider the separate functions that they are fulfilling as they contribute to command decisions. Judge advocates perform four distinct roles. When representing the government or individual soldiers before courts-martial, administrative hearings, domestic courts, or international tribunals, a military lawyer has an ethical

¹⁶⁷See, e.g., *id.* The "policy-oriented jurisprudence" developed by Professors McDougal and Lasswell includes a theory of how the subject matter of law must be conceived (emphasis on the decision process rather than rules), an exhaustive framework of inquiry (analysis of values, interests, decision functions, and phases), and a catalogue of necessary intellectual tasks (clarification of goals, description of past trends, analysis of conditioning factors, projection of future trends, and invention of policy alternatives). See John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 665-73 (1968); Frederick S. Tipson, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 4 VA. J. INT'L L. 535 (1971).

¹⁶⁸See Captain Matthew E. Winter, "Finding the Law"—*The Values, Identity, and Function of the International Law Adviser*, 128 MIL. L. REV. 1 (1990).

¹⁶⁹See generally Dunlap, *supra* note 129.

¹⁷⁰See, e.g., S.C. Res. 940, U.N. SCOR, 49th Sess., S/RES/940 (1994) (authorizing member states to form a multinational force "to establish and maintain a secure and stable environment that will permit implementation of the Governor's Island agreement . . ." in Haiti).

¹⁷¹See Law and Military Operations in Haiti, *supra* note 126, subpt. III.D.

obligation to perform the role of "advocate," one who zealously guards the client's interests within an adversarial setting.¹⁷² When called on "for an opinion or ruling on the applicability of law or, more precisely, on the existence of a legal obligation or right," a military lawyer must perform the role of "judge," one who decides not on the basis of his own policy preferences, but rather, as far as possible, on "objective" reasons grounded in the "law."¹⁷³

When confronted with the rare commander who refuses or fails to balance military necessity with the prevention of unnecessary suffering, the military lawyer must occasionally perform a role as the "conscience" of the unit, one who purposefully tries to inject humanitarian considerations into military decisions.¹⁷⁴ Finally, when assisting the commander to accomplish unit goals within the law, the military lawyer performs the role of "counselor," one who provides input beforehand so that the unit can find solutions to problems and accomplish its mission within legal constraints.¹⁷⁵

4. *Operational Law and the Counselor Role*—In the context of modern operations other than war, legal realism demands that even while continuing to pursue excellence in the traditional roles of "advocate," "judge," and "conscience," judge advocates must develop new skills and greater enthusiasm for the role of "counselor." They must

- design realistic, performance-oriented training for rules of engagement,
- review operations plans to identify intelligence law concerns,
- caution procurement officers on the legal limits of their authority,
- establish prompt and efficient claims and legal assistance operations,
- inform commanders of fiscal constraints,

and much more. Many of these counselor functions require that judge advocates acquire technical, nonlegal expertise in aspects of the military art. In short, legal realism counsels judge advocates to practice operational law. The policy end at stake is nothing other than the rule of law itself, perhaps Nuremberg's most important legacy.

¹⁷²See Winter, *supra* note 168, at 21-24.

¹⁷³See Oscar Schachter, *The Place of Policy in International Law*, 2 GA. J. INT'L & COMP. L. 5, 6 (Supp. 2, 1972), quoted in Winter, *supra* note 168, at 26.

¹⁷⁴See Winter, *supra* note 168, at 31-32.

¹⁷⁵See *id.* at 29-30.

C. Maintain an Interdisciplinary Partnership

The judgments against Keitel and List for the massacre at Sabac and related crimes provided authoritative and concrete holdings on several old international legal rules,¹⁷⁶ and they persuaded the drafters of the Geneva Conventions of 1949 to adopt new rules proscribing reprisals against civilians and hostage taking.¹⁷⁷ In 1956, the judgments found their way into various parts of the United States Army's *Field Manual 27-10, The Law of Armed Conflict*.¹⁷⁸ That military manual's restatements of the command responsibility standard, the defenses of superior orders and military necessity, and many other customary and treaty-based rules have influenced the development of humanitarian law.¹⁷⁹

Fifty years of treaty drafting and manual writing suggest that attempts to build on the Nuremberg legacy will succeed when they are genuinely collaborative efforts by legal scholars, judge advocates, government attorneys, scientists, diplomats, and policy makers of different nations.¹⁸⁰ The drafting of *Field Manual 27-10* illustrates this point. Commenting on the parallel drafting of *Field Manual 27-10* and its British counterpart in the early fifties, Professor Gerald Draper commented:

¹⁷⁶See *supra* notes 42, 46, 49 and accompanying text.

¹⁷⁷See *supra* notes 37, 50-57 and accompanying text.

¹⁷⁸See *supra* note 41 paras. 3, 497, 501, 509.

¹⁷⁹See, e.g., Christopher Greenwood, *Military Rule-Making: Military Manuals and Other Administrative Rules Relating to Armed Conflict*, Report to International Colloquium at Bad Hamburg, Germany (June 17-19, 1988), in NATIONAL IMPLEMENTATION, *supra* note 95, at 193, 196-97.

A good manual, it is suggested, can have an influence comparable to that which the Restatements published by the American Law Institute exercise in other fields. At the very least it is likely to be regarded as an authoritative text by the courts, military tribunals and other bodies in the country from which it comes. As such, it may have a considerable influence if that State is militarily powerful. Moreover, since many States do not publish military manuals of their own (or, at least, confine their publications to shorter training works), the manual of one State may well end up being used as a kind of Restatement by courts in other countries.

Id.

¹⁸⁰See, e.g., Dieter Fleck, *Military Rule-Making: Military Manuals and Other Administrative Rules Relating to Armed Conflict*, Report to International Colloquium at Bad Hamburg, Germany (June 17-19, 1988), in NATIONAL IMPLEMENTATION, *supra* note 95, at 185-92 (surveying technical questions, applicable to interpreting Protocol 1, ranging from secure voice communication in medical aircraft to siege and blockade operations); see also *id.* at 187 (stating that various types of military manuals are necessary for modern training in armed forces and noting that "soldiers today are facing many different subjects in a world of increasing complexity. They are dealing with fields of study so varied that we have to concentrate very much to sell the idea of humanitarian law effectively."). These collaborative efforts in treaty drafting and manual writing were greatly aided because key individuals such as Richard Baxter, Waldemar Solf, Gerald Draper, and Howard Levie had both military and academic experience.

Departments [of the military and government] write from a different perspective than the academic. They tend to see too many trees, and not enough wood. I admit, the academic may sometimes see too much of the wood, and too little of the trees. But the balance between the two of them is needed.¹⁸¹

The process of combining the best of differing perspectives is frustrating and painstaking. It is not an overnight project. It requires patience, an emphasis on principle rather than personality, and a willingness to concede the legitimacy of opposing views. Yet its value is that the resulting rule or manual stands a far better chance of actually influencing human conduct.

Interdisciplinary efforts also will serve humanitarian aims in many spheres of modern conflict management besides treaty drafting and manual making. Military operations other than war cannot be conducted successfully by military forces alone.¹⁸² The relief provided by hundreds of nongovernmental organizations and the expertise furnished by civilian engineers, judges, physicians, police advisors, and other subject matter experts during operations in Haiti are recent testaments to this fact.¹⁸³ Similarly, scholarship cannot illuminate the causes of conflicts or suggest ways to limit the human suffering they create unless it incorporates a range of theoretical and practical disciplines.¹⁸⁴

¹⁸¹Gerald Draper, Remarks During International Colloquium at Bad Hamburg, Germany (June 17-19, 1968), in NATIONAL IMPLEMENTATION, *supra* note 95, at 202, 207-08.

¹⁸²See, e.g., FM 100-5, OPERATIONS, *supra* note 81, at 13-4 ("In [operations other than war] other government agencies will often have the lead. Commanders may answer to a civilian chief, such as an ambassador, or may themselves employ the resources of a civilian agency. Command arrangements may often be only loosely defined, causing commanders to seek an atmosphere of cooperation rather than command authority to achieve objectives by unity of effort."); JTF COMMANDER'S HANDBOOK, *supra* note 96, at 6-7 ("In peace operations, military action must complement diplomatic, economic, informational, and humanitarian efforts in the pursuit of an overarching political objective."); NATIONAL SECURITY STRATEGY, *supra* note 102, at 12 ("Generally, the military is not the best tool to address humanitarian concerns"); HARRY L. COLES & ALBERT K. WEINBERG, UNITED STATES ARMY IN WORLD WAR II: CIVIL AFFAIRS—SOLDIERS BECOME GOVERNORS 10-29, 721-892 (1964) (cataloguing the diverse political, economic, and administrative challenges faced by military and civilian leaders in reclaimed Allied territory in post conflict Europe).

¹⁸³See Law and Military Operations in Haiti, *supra* note 126.

¹⁸⁴See, e.g., 1 QUINCY WRIGHT, A STUDY OF WAR 15 (1942). This is the conclusion of the Triangle Universities Security Seminar (TUSS)—a consortium of Duke University, The University of North Carolina at Chapel Hill, and North Carolina State University—which has proposed an interdisciplinary study of war similar to the massive project undertaken by Quincy Wright, Charles Merriam, and their colleagues and students between the World Wars. This also is a guiding principle in the efforts of The Center for National Security Law, The Center for Law, Ethics, and National Security, and The Center for Law and Military Operations to conduct seminars and publish materials that integrate the many disciplines of national security and operations law.

V. Conclusion

Modern military operations other than war can be the setting for crimes no less vicious than those prosecuted at Nuremberg. The blood running in the Sava River today is no less red than the blood carried by the same river in 1941. Professor Quincy Wright, who later served as an advisor to the United States judges on the International Military Tribunal at Nuremberg, wrote in his monumental study of war that

[p]roposals frequently made by military men and international lawyers for limiting methods of war or for localizing war seem to have little chance of success. Modern nations at war will use all their resources for victory and will pay little attention to rules of good faith, honor, or humanity A nation in arms, goaded by suffering and propaganda, will tend toward absolute war when it fights. . . . Nations desiring peace must rely on prevention rather than on neutrality.¹⁸⁵

This passage conveys Wright's precise intended meaning only if understood within the context of his argument against appeasing aggressive states.

Yet these words apply to crimes committed today by individuals during all levels of armed conflict as well as they applied then to aggression waged by the Axis powers before and during World War II. The approach of neutral disengagement in either situation is fatal. The verdict we announce at the 100th anniversary of Justice Jackson's opening statement will depend on how well we absorb this last lesson from Nuremberg.

¹⁸⁵See 2 QUINCY WRIGHT, *A STUDY OF WAR* 1322 (1942).

MILITARY JUSTICE 50 YEARS AFTER NUREMBERG: SOME REFLECTIONS ON APPEARANCE V. REALITY*

JONATHAN LURIE**

The words of Justice Robert Jackson, uttered at the opening of the Nuremberg trials, ought to give us pause. As the proceedings started, he noted that for the Allies "flush with victory and stung with injury[.]" to "stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power has ever paid to reason." What "law" did Jackson have in mind? It was some type of international civil law that presumably would cover military "misconduct," perpetrated by the losers. What ever its source, from 1946 to the present, the Nuremberg Trials have cast a long shadow—giving even greater import to Jackson's caveat: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow." For some, it must be noted that this record is of dubious validity.

Thus, almost fifty years after the war crimes trials, the *New York Times* writer Max Frankel, himself a refugee from Hitler's horrors, observed that at Nuremberg "the winners were producing a false image of justice, a theatre of the absurd. . . ." He described the proceedings as "a retroactive jurisprudence that would surely be unconstitutional in an American court."¹ The Nuremberg events—in

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**A.B., *cum laude*, 1961, Harvard College, M.A.T., 1962, Harvard University, Ph.D. 1970, University of Wisconsin. At Rutgers University, Professor Lurie serves as Professor of History and Adjunct Professor of Law. He also has been a panelist for Social Sciences Applications, Rutgers University Research Council; Chair, History Department, Rutgers University-Newark, member, Committee to revise Newark Graduate School by-laws; Historian to the United States Court of Appeals for the Armed Forces and visiting Professor of Law, United States Military Academy at West Point. Publications: *THE CHICAGO BOARD OF TRADE, 1858-1905; THE DYNAMICS OF SELF REGULATION* (Urbana: Univ. of Illinois Press 1979); *LAW AND THE NATION 1865-1912* (New York: A. Knopf Inc. 1983). *ARMING MILITARY JUSTICE, VOLUME 1 OF THE HISTORY OF THE UNITED STATES COURT OF MILITARY APPEALS* (Princeton: Univ. of Princeton Press 1992).

¹See *N.Y. TIMES MAGAZINE*, May 7, 1995, at 45-49. "I could never endorse the pretense that by starting a war, like men in every generation, and murdering civilians, as even the ancient Greeks had done, the Nazis had violated some kind of 'law' and were now subject to trial and sentence by hurriedly conjured 'court.'" *Id.*

other words—gave the appearance of justice, but the reality was otherwise. The gap between the appearance and reality of the Nuremberg Trials troubled Frankel. The Nuremberg Trials claimed, wrongly in his judgment, to be an exercise in justice.

It is not my intent either to support or refute the accuracy of Frankel's view on Nuremberg. It is submitted, however, that his methodological exploration of appearance as opposed to reality is a useful tool in critical evaluation. Just as the lessons and results of Nuremberg are being reexamined, so too can one reconsider certain aspects of military justice. Some of its key premises, particularly the impetus towards effective civilian judicial oversight of the system, may be as fragile as Frankel found the assumptions behind the Nuremberg Trials to be. These comments seek to explore other aspects of this fragility. My concern extends from the United States Supreme Court down to the military command level.²

To judge by appearances, military justice has undergone impressive growth and reform since Nuremberg. The unification of our armed services resulted in a single Uniform Code of Military Justice applicable to all branches, adopted in 1950. The Code mandated two levels of military appellate courts, and since 1951 the United States Court of Appeals for the Armed Forces has been in operation.³ Indeed, Frederick B. Wiener has observed that between 1950 and 1955 every large English speaking country "adopted a scheme providing for appeals of the judgments of courts-martial directly to civilian tribunals. With surprising unanimity," he wrote, "the common law world concluded virtually at the same moment in time that, just as war is too important to be left to the generals, so military justice is too vital to be entrusted only to judge advocates."⁴ Although it is not clear, these changes may have resulted in part

²My concern with military justice in the setting of this important conference on Nuremberg and war crimes trials stems in large part from proposals that military tribunals might serve as forums for war crimes prosecutions. See, e.g., Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509-19 (1994). The dangers threatening justice for service members tried by court-martial are the very dangers that raise problems with military trials. Cf. Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might Our Own Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. (forthcoming 1996) (generally agreeing that the option of military trials should be seriously considered while arguing that the Everett and Silliman proposal to try alleged war criminals in military courts would be sound only if four indicia of fairness are present).

³On October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals as the United States Court of Appeals for the Armed Forces. See Nat'l. Def. Auth. Act for Fiscal year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2631 (to be codified at 10 U.S.C. § 941). I will refer to each court by the name by which it was known at the time.

⁴FREDERICK B. WIENER, CIVILIANS UNDER MILITARY JUSTICE 232 (Univ of Chicago 1967).

from the fallout of the Nuremberg trials.

Consisting now of five civilian judges selected by the President with Senatorial confirmation, the United States Court of Appeals for the Armed Forces has built an impressive body of military common law, extending to more than fifty volumes. Although certain of its decisions may be appealed to the High Court, in reality for most of the court-martial appeals that it hears, the United States Court of Appeals for the Armed Forces is the Supreme Court of the military justice system. Judicial rhetoric concerning both the application of civil rights to the military and the United States Court of Appeals for the armed forces' role in overseeing such application also has been noteworthy. Thus in 1960, the United States Court of Military Appeals⁵ held that "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of the armed forces."⁶ Seven years later, at the height of the Warren Court's so called "revolution" in criminal justice, the United States Court of Military Appeals reiterated the point in even stronger language. "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights."⁷ On numerous occasions since then, these cases have been cited and they remain good law.⁸

For its part, the United States Supreme Court has used impressive language concerning the Bill of Rights and its application to the armed services. But application has not followed articulation. It is one thing to use "civil rights" rhetoric in opinions. It is quite another to employ it even as the Court *rejects* a claimed constitutional right applicable to the military. Here the gap between rhetoric and result, between appearance and reality is striking; and the examples of it are all too numerous. A few can be cited here.

⁵See *supra* note 3.

⁶United States v. Jacoby, 11 C.M.R. 428, 430 (C.M.A. 1960).

⁷United States v. Tempia, 16 C.M.R. 629, 633 (C.M.A. 1967). In this case, the court applied the famous Miranda rules for custodial interrogation to the military. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸On the other hand, as Edward Sherman has noted, "the product of the military courts in the First Amendment area has not been distinguished." Even the Court of Military Appeals "has not exhibited much sensitivity nor expertise in the First Amendment area." Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J., 326-27 (1971). Daniel Benson has observed that "military justice, in general, tends to suffer from its own type of credibility gap when one compares its actual accomplishments with the extravagant assertions of its effectiveness made by its supporters." Daniel Benson, *The United States Court of Military Appeals*, 3 TEXAS TECH L. REV., 12 (1971).

In 1974, in *Parker v. Levy*, the Court opined that "members of the military are not excluded from the protection granted by the First Amendment."⁹ But Justice Rehnquist immediately hedged. "The different character of the military community and of the military mission requires a different application of these protections."¹⁰ In *Parker*, a case based on the application of two vague and general articles in the Uniform Code of Military Justice, the Court found no First Amendment protection for the defendant.¹¹ Justice Stewart pointed to the flaw in the Court's reasoning. "The question . . . is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them."¹² These two "catch-all" articles "are anachronisms, whose legitimate military usefulness, if any, has long since disappeared."¹³

Two years later, the Supreme Court—rejecting a contrary decision by the Court of Military Appeals—held that a service member facing a summary court-martial had no constitutional right to counsel.¹⁴ Again, Rehnquist "recognize[d] that plaintiffs, who have been either convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment." And again, he immediately hedged. "However, whether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject."¹⁵ Justice Marshall observed that "there is no indication that Congress made a judgment that military necessity requires the denial of the constitutional right to counsel."¹⁶ He "could only read the Court's opinion as a grant of almost total deference to any Act of Congress dealing with the military."¹⁷

⁹417 U.S. 733, 758 (1974).

¹⁰*Id.*

¹¹The two articles concerned "conduct unbecoming an officer and a gentleman," and punishment for "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offences not capital." See UCMJ arts. 133, 134 (1988). First enacted as part of the old Articles of War in 1775-76, the military has consistently, and thus far successfully, insisted on their retention.

¹²*Parker*, 417 U.S. at 787.

¹³*Id.* at 789.

¹⁴*Middendorf v. Henry*, 425 U.S. 25 (1976).

¹⁵*Id.* at 43.

¹⁶*Id.* at 68.

¹⁷*Id.* at 69. Justice Marshall could have gone further and noted that there appears to be no specific evidence that Congress has ever intended military justice to be beyond federal and civilian judicial scrutiny.

In 1980, the Court refused to recognize the right of a service member to circulate petitions without prior approval of the base commander. Justice Powell again reiterated Rehnquist's point that members of the military are entitled to First Amendment protection, but added that "the rights of military men must yield somewhat to meet certain overriding demands of discipline and duty."¹⁸ While not commenting on Powell's lack of juridical precision, Justice Brennan aptly described his apologia for military discipline against the defendant as "a series of platitudes about the special nature and overwhelming importance of military necessity."¹⁹ He further emphasized that "this Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity."²⁰

Finally, in 1986 by a five-to-four vote, the Court found that the Air Force could forbid an ordained Rabbi from wearing a yarmulke while on active duty as a clinical psychologist. Following a well-established litany, Rehnquist stated that "aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."²¹ Again, Justice Brennan dissented, claiming that the majority decision "is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity."²² Indeed, "unabashed *ipse dixit* cannot outweigh a constitutional right."²³

In all these decisions, and more recent examples could be offered, one is struck by the consistency with which the Court pays lip service to its position that the Bill of Rights applies to the armed services, even as, with equal consistency, it rejects applicability in each instance. Indeed, diligent research has thus far failed to locate one case in which the Court has squarely held that the First

¹⁸*Brown v. Glines*, 444 U.S. 348, 354 (1980). The petition in this case that apparently caused such concern for the military's ability to carry out its mission, dealt with grooming standards.

¹⁹*Id.* at 368.

²⁰*Id.* at 370. "A properly detached—rather than unduly acquiescent—approach to the military-necessity argument here would doubtless have led the Court to a different result." *Id.*

²¹*Goldman v. Weinberger*, 475 U.S. 503 (1986).

²²*Id.* at 515 (Brennan, J., dissenting). "The Court, however, evades its responsibility by eliminating in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel." *Id.*

²³*Id.* at 516. "If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be." *Id.* at 515. Later, Congress overruled the Court.

Amendment applies to the armed services.²⁴ All that we have is rhetoric that it does apply and, case after case, the reality that it does not. "Too often," as the *New York University Law Review* observed more than fifteen years ago, "courts have responded to announcements of military interests with supine deference rather than with a careful assessment of the legitimacy of these claims."²⁵

This trend, which shows no sign of abatement, should trouble the United States Court of Appeals for the Armed Forces, if only because the High Court has yet to endorse its unequivocal statements concerning Bill of Rights protection for the military. It is true that "the lack of judicial decisions specifically guaranteeing those rights to service members does not mean that their existence is an open question."²⁶ Alternatively, given the direction that the Supreme Court has taken in such cases, it may be just as well that it has yet to speak definitively on this subject. In the meantime, United States Court of Appeals for the Armed Forces decisions serve as controlling precedent. But the continued disinclination of the Supreme Court to provide definitive guidance is "disturbing."²⁷ It may be too much to ask the Rehnquist Court figuratively to place a sign over the gates of the military establishment, "Abandon court protection for Bill of Rights applicability, all ye who enter here." On the other hand, it is not too much to insist that the Court be more honest and candid regarding its current intention that such issues will be left to military discretion.

One possible explanation for the Court's excessive timidity in this area may be a well-established fear of confrontation with the military establishment, of somehow interfering with its "mission"—a concern that was made very clear to the newly appointed judges of the Court of Military Appeals in 1951, even before they were confirmed. At an unusual Saturday hearing, Senator Richard Russell, the Chair of the Senate Armed Services Committee remarked that "this court is something new in anything that I know of in the judicial system. . . . I personally had misgivings about the creation of this court." Conceding that there were cases within the military where individuals had not received even decent treatment, let alone justice, Russell insisted that "any abuse of the powers of this court will be disastrous to this Nation. . . . I am sure that you gentlemen will in your duties temper justice with that knowledge that this will

²⁴In his comprehensive article, "The Bill of Rights and Service Members," Francis Gilligan apparently makes no mention of the First Amendment. See *ARMY LAW*, Dec. 1987, at 3-10.

²⁵53 *N.Y.U. L. REV.* 1123 (1978).

²⁶Fredric Lederer & Frederick Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 *WM. & MARY BILL OF RIGHTS J.* 222-23 (1994).

²⁷*Id.*, at 220 n.7.

indeed be a court of military justice[,] and will not be an agency that will be damaging to the observance of discipline in the armed services."²⁸ Over the years, these sentiments have been reiterated in different forums, probably to the detriment of rigorous judicial scrutiny concerning military justice.

The gap between appearance and reality extends beyond the Supreme Court's lack of interest concerning due protection for the military. It reaches the very heart of military justice: the role of the commander and the role of the military judges. More than forty years ago, Frank Fedele wrote,

[I]t seems too clear for argument that courts-martials are criminal courts, possessing penal jurisdiction exclusively and performing a strictly judicial function in enforcing a penal code and applying highly punitive sanctions. . . . As the civil judiciary is free from the control of the executive, so the military judiciary should be untrammelled and uncontrolled in the exercise of its function by the power of military command. . . . The court-martial can no longer be regarded as a mere instrument for the enforcement of discipline.²⁹

As to improper command control, Fedele warned that "as long as the possibility of such control remains, it will continue to bring suspicion and discredit upon trials by courts-martial and upon the administration of military justice itself."³⁰

Twenty years ago, material prepared by The Judge Advocate General's School, United States Army, for a course in the military/criminal legal system featured a lengthy article reprinted from the *UCLA Law Review* by Luther West—a retired Lieutenant Colonel in the Judge Advocate General's Corps. West observed that the Court of Military Appeals "is a decidedly weak court in eliminating command influence in military trials."³¹ The major threat of

²⁸Unpublished typescript of hearing (82) SArS-T. 34, Senate Armed Services Committee: Nominations to the Court of Military Appeals, 27-28 (June 16, 1951) (on file in the United States Senate Library).

²⁹See Frank Fedele, *The Evolution of the Court Martial System and the Role of the U.S. Court of Appeals in Military Law 148-50* (1954) (DJS dissertation submitted to the George Washington University School of Law). Fedele added that "good justice never has had a bad effect on discipline. Discipline delivers the accused for trial; justice takes over the trial for possible punishment." *Id.*

³⁰*Id.* at 152.

³¹Luther West, *A History of Command Influence on the Military Justice System*, 18 *UCLA L. Rev.* 153 (1970). Nine years earlier, another law review writer had been much less charitable towards the court, "[T]he main affliction of the Court of Military Appeals . . . is that the court is turning out a second-rate work product substantially below the minimum norm, in both learning and analysis, which should be required of every judicial tribunal, especially the Court of last resort working in a specialized

command influence "at the present time lies in the very fact that military commanders . . . still determine whether to sign charges in the first place, which cases to refer to trial, and what court members shall sit in judgment of the case." More importantly, he concluded, "the military future of every member of the court-martial is still within the absolute discretion of the military commander who convenes the court-martial."³² West believed that "with only minor exceptions, the system of military justice must be completely removed from the operational control of the military departments, and placed in the hands of civilian administrators, preferably under the control of the Attorney General of the United States."³³

In 1991, probably in this auditorium, David Schlueter presented a balanced and insightful lecture on the state of military justice. Concerning the commander's selection of courts-martial members, he said "At a minimum, it looks bad. In legal parlance, the process can present an appearance of evil. The fact that the [courts] have not ruled the process unconstitutional is no reason not to consider a revision seriously."³⁴ Indeed, he added, "whatever system is used, the role of the prosecutor and the commander in the selection process should be reduced if not eliminated."³⁵

Unlike Luther West, Schlueter did not suggest that the commander be totally removed from the military justice system. But he insisted that "the process of scrutinizing the role of the commander must continue. The irony is that within the military, there exist the resources to combat virtually any problem that presents itself. Yet the military cannot rid itself of this one menace. It may be that

field." Alfred Avins, *New Light on the Legislative History of Desertion Through Fraudulent Enlistment: The Decline of the United States Court of Military Appeals*, 46 *MIL. L. REV.* 71 (1961).

³²West, *supra* note 31, at 151.

³³*Id.* at 153-54. As far as this author can tell, as summarized above, West's description of the court-martial remains accurate. The comments made by Eugene Fidell, a distinguished attorney and frequent litigator in military justice cases seem especially apt. "Appearance—symbolism—is critical in any system of justice. It is even more critical when the system is one in which the bulk of criminal defendants—often members of disadvantaged minorities—find themselves toward the bottom of an official totem pole, and typically have little if any say in the selection of their legal representatives, either at trial or on appeal." Eugene Fidell, *The Culture of Change in Military Law*, 126 *MIL. L. REV.* 132 (1989).

³⁴Although the Supreme Court has since sustained the practice, this does not change the validity of Schlueter's comments.

³⁵David Schlueter, *Military Justice for the 1990's*, 133 *MIL. L. REV.* 20 (1991). Schlueter pointed to the ready availability of computerized random selection for jury duty. "I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member's liberty and property interests are at stake." *Id.*

other methods will have to be found to contain it."³⁶

Schlueter subtitled his lecture on military justice as "a legal system looking for respect." These remarks have tried to indicate why his subtitle is so apt. But it is sad to note that for almost half a century the true potential of military justice under the Uniform Code of Military Justice has not been completely fulfilled. As retired Coast Guard Captain Kevin Barry put it—"It is a system which, in critical aspects no longer meets the standards and expectations established by the developing currents of due process."³⁷

Historians are not good at fortune telling. We have enough troubles explaining what has happened without predicting what will transpire. But let me predict that unless our military justice system is reformed, either from within or without—military justice will keep on looking for respect, and will face insuperable difficulty in finding it. Such is the reality, whatever else its appearance may indicate.³⁸

My remarks began with a quotation from Nuremberg Prosecutor Jackson. It seems appropriate that they conclude with another quotation from Justice Jackson, written in 1944. We cannot, he emphasized, "distort the Constitution to approve all that the military may deem expedient."³⁹ This seems to be at least one character-

³⁶*Id.*

³⁷Kevin Barry, *Reinventing Military Justice*, PROCEEDINGS (U.S. Naval Inst.), July 1994, at 57. Barry described military judges as follows:

They serve at the will of the Judge Advocate General, the officer who appoints them. They serve without terms of office, and while serving they receive officer evaluation reports, which are crucial to future promotions and assignments. They are frequently drawn from the ranks of staff judge advocates and often aspire to return to that job—or to positions on the staff of the Judge Advocate General—all of which are seen as career-enhancing assignments. . . . Thus judges sometimes appear to be drawn from the ranks of prosecutors, and aspire to future assignments again as prosecutors. When this unwholesome appearance is coupled with constantly circulating reports of judges who feel that they have been "burned" as a result of their judicial decisions, the result is a military justice system that can be viewed as subject to command control—and thus unjust.

Id. at 58.

³⁸See Fredric Lederer & Barbara Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RIGHTS J. 629-80 (1994). "If the military judiciary, and consequently the results of the military criminal legal system, are to be (or at least ought to be) perceived as impartial and free of command control, either the appearance or actuality of command involvement is sufficiently troubling to justify remedial legislative action."

³⁹*Korematsu v. United States*, 323 U.S. 214, 244 (1944).

istic of the current appearance concerning military justice, and only time will reveal whether it is the reality.⁴⁰

⁴⁰As Blackstone put it, "he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier." Asking why the Supreme Court has been so unwilling to put issues involving the First Amendment and the military to the same type of balancing test that it has done so often in other First Amendment cases, one judge advocate concluded that "there can be no doubt. The freedom of speech clause of the first amendment extends as his birthright to protect him who 'makes himself for a while a soldier.'" Jerome X. Lewis II, *Freedom of Speech—An Examination of the Civilian Test for Constitutionality and Its Application to the Military*, 41 MIL. L. REV. 78, 80 (1968). "Unless we would deny a soldier the liberty that he defends, there materializes a dilemma closely akin to its civilian cousin. I submit that it may be resolved in exactly the same manner."

“WAR CRIMES” DURING OPERATIONS OTHER THAN WAR: MILITARY DOCTRINE AND LAW 50 YEARS AFTER NUREMBERG AND BEYOND*

COLONEL JOHN T. BURTON**

Judge Everett, I want to thank you and Professor Moore for inviting me down. As I was looking over the program—the people who have spoken here, the people who are attending—I am rather awed and humbled by the stature of the people in the audience. I think it is a good mix of military personnel and scholars, and in Major Mark Martins's¹ case, it actually is an overlap of the two. I would like to try to accomplish two things this morning. My primary goal is to try to bring the theoretical discussions, the historical discussions, the analysis of the so-called “Nuremberg legacy,” into focus as we are trying to apply the lessons learned, if you will, to the pending deployment into Bosnia. We have to grapple with these things. If Nuremberg stands for nothing else, we must be able to translate what happened there and what has happened since, into the “right now” practical reality of what we do. If we are unable to do this, then we have failed indeed.

So I want to do two things, I want to give you a “thumbnail sketch” of some of the issues that I have personally grappled with, and that a lot of people are grappling with right now during the

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**Legal Counsel to the Chairman of the Joint Chiefs of Staff. B.A., 1968, Duke University, J.D., 1974, University of North Carolina School of Law. Among his many accomplishments, Colonel Burton has served as Defense Counsel, Fort Leonard Wood, Missouri, 1975; Trial Counsel, Fort Leonard Wood, Missouri, 1976-77; Administrative Law Attorney/Labor Counselor, Fort Leonard Wood, Missouri, 1977-79; Plans Officer, Judge Advocate General's Corps Personnel Office, Office of The Judge Advocate General, 1980-82; Trial Attorney, Litigation Division, Office of The Judge Advocate General, 1982-84; Deputy Staff Judge Advocate, 2d Infantry Division, Camp Casey, Korea, 1984-85; Deputy Legal Adviser & Legislative Assistant to the Chairman, Joint Chiefs of Staff, 1986-87; Chief, Military Personnel Law Branch, Office of The Judge Advocate General, 1987-89; Staff Judge Advocate, 3d Armored Division, Frankfurt, Germany, 1989-91; Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff, 1991-94.

¹See *supra*, Mark S. Martins, “War Crimes” During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg—And Beyond, at 145.

proximity talks in Dayton, Ohio, and in the planning for possible deployment into Bosnia. The second thing that I would like to do is to leave some time for your questions. I see myself as a current events person here. So you may have some questions that have been triggered by press articles and the like, and I will answer them the best that I can as they pertain to the subject we are dealing with here today. The way that the system is working out in Dayton—and one of the reasons I could not get down here for the entire conference—is that my office reviews all this. Everything that is occurring in Dayton gets faxed back to us. We have a twenty-four-hour watch cell; we provide them support around the clock. If they are awake, we are awake. Luckily, contrary to what you may have read, they do go to sleep sometime. So we get a little break. But, for example, we just gave legal review to the latest peace proposal, the annexes, everything that has been put together out there. And that should be being tabled and discussed this morning as we speak. And when I get back tonight, we will probably review what they did today. So that is the way life goes in the Chairman's Legal Office. It is fun. It is exciting. But enough of that.

The force that is going in is going to go into Bosnia under Chapter 7 of the United Nations Charter. And I think most of you know what that means. It also is going to go in under the terms of the peace agreement. And I would like to state my bottom line first. There has been much talk in some of the press articles about well, what is the military going to do in Bosnia? Are they going to arrest so and so? Are they going to bring Mladic to justice? Maybe, maybe not. We will see. To me, that is not what is important. What is important is the legacy of Nuremberg, and to me it is more than a legacy, it is almost a down right miracle.

As you recall, many criticized Nuremberg as being "victor's justice." It could never happen again unless there was a clear victory in war, Nuremberg was just a blip on the screen. It is not reality. As one commentator put it, the hope of "Nuremberg: Never Again," has been shattered by the reality of, "Nuremberg: Again and Again." Well, I submit to you that this is totally untrue. The lessons of Nuremberg have worked. Notice what is about to happen here. A force of about 75,000 extraordinarily, well-trained soldiers—highly disciplined, under very responsible leadership, with robust, but very tightly constructed, rules of engagement—are about to go into a very troubled region in Europe with the consent of the parties, with the authority to engage, if necessary, in armed conflict, to force them to comply with the peace agreement they have signed. Now if that is not extraordinary, I do not know what is. We are not going in as a belligerents, and we are not going in as an occupation force, I use "we" loosely, because this is a NATO operation. But we are going in

with the authority to engage in armed conflict with the consent of the very parties themselves. Once they signed that dotted line, there was no turning back, short of a total breakdown of the agreement. So if a party's armed forces say, renege on a certain portion of the peace agreement, they will be met with extraordinary force to force them to comply. That is a miracle. So, we may not have the so-called "victor's justice" at Nuremberg, but I submit to you that what has happened here is perhaps even more remarkable than Nuremberg, because we did not have to fight a war to get to where we are to be able to enforce peace.

We use that term "peace enforcement," but let me tell you, what we are about to do is incredible. We are about to enforce a peace with armed force. Now have we had so-called peace enforcement action before? Sure we have—Korea, Desert Storm—but those are more classic wars. We were belligerents, in my opinion. The laws of war applied. In this case, we are going in with the consent of the parties. Rather strange I think. In a lot of ways the deployment is going to be a very traditional deployment. We have negotiated status of forces agreements with these countries, including with Serbia. There are five parties to the agreement by the way. Croatia, Bosnia-Herzegovina, and the former Republic of Yugoslavia, which I will refer to as Serbia, plus the Croat-Bosnian Muslim Federation. They just call that the Federation. Plus, the Bosnia-Serb entity called Republic of Serbska. So actually, there are going to be five signatures here. We are engaging in what some may call a fiction of maintaining the territorial integrity of Bosnia-Herzegovina, while at the same time, we are dealing with the two separate entities there in Bosnia, in BH, as I call it, the Federation, and Serbska. Some refer to that as *de facto* partitioning, some refer to it as civilized ethnic cleansing. I can address those later if you want to. I am just telling you it is real, and there is some very fresh, imaginative thinking going on at Dayton, cynicism notwithstanding. And you may be amazed at what happens.

And even if it does not work, I will guarantee you that the lessons of Dayton will pay dividends in future conflicts in other places. Of course, the House of Representatives last night voted that maybe it should not happen. But even if Congress does not approve it, we may already have won. Even if one troop does not even go in, the parties are at peace. If you think we are not monitoring it closely, we figure there are about 800 rounds per day being fired somewhere in Bosnia. The average number of people being killed per day is about three now. All this is not good, but it is pretty good for a cease-fire. And if we do not go in at all, I, the optimist, would say, I think that peace will probably prevail there anyway. Or at least

some version of it. I think that the parties are too weary and they have agreed on too much and put too much of themselves into this peace agreement. We are not banging them on the head in Dayton. They came to the table because they wanted to. So I think we will win anyway. I mean "win" in the big sense of peace in that part of the world.

We are going to be there to force compliance with only the military aspects of the agreement. As I said earlier, we are not going in as an occupation force, but strictly to enforce the compliance of the parties with the military aspects of the treaty. We are not going in to perform law and order or police functions—we are not going to do this. We will be there to force the parties to comply with certain agreed on areas of separation, to force them to comply with certain demilitarized areas, to force them to comply with zones of separations. That is what we are going to do. It might surprise you that part of the military mission also will be to ensure free movement and protection of civilians, to allow them to relocate as they choose. So respect for human rights, as well as the law of war issues, very much underscore the military mission as we go in.

So that brings us to the war crimes issue. That is why we are all here. And I can answer more questions, if you want to know some of the details. Everything I am telling you here is unclassified and believe it or not, it is in the public domain. But although there is so much talk about it, you may not have pieced it all together yet. So what is going to be our role when we go in? We are not an occupation power. You heard Mark talk about some of the responsibilities as you all know, that you have for actually investigating war crimes and bringing people to trial if you are an occupation power. We came very close to that at the end of Iraq. I happened to be part of the 3d Armored Division that had the so-called occupation force task down around Safwan, Iraq, at the end of the Persian Gulf War. As has been pointed out, and Mark has done so very well in his paper,² and I do not know if he touched on it this morning, but whether you are an occupation force or not is not something you just wake up one morning and decide. It is a question of fact. If you are acting as one, you probably are one. We were very close to being an occupation force in southern Iraq. We were not allowed to promulgate the rules and codes of criminal conduct, that sort of thing, which would have helped us maintain law and order. But we were responsible. We were the law and order. We fed them. We took care of them. We looked after them. We detained the trouble makers. And we did much more, which I can go into if you would like.

²Major Mark Martins presented his paper, "War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg—And Beyond," earlier in the day at this conference.

But this is not going to be happening in Bosnia. That is going to be left up to the so-called civil force, whatever it is, of the parties. They are expected to police themselves. In that light, we are not going to search for war criminals. And you may ask, "How can we avoid this?" Well let me give you a couple of ideas here. What would compel us to do this? Well first of all, you have got the general requirement of the Geneva Convention of 1949, where the high contracting parties have agreed to search for people who have committed grave breaches. Now it does not say it in the Conventions, but I, for one, happen to believe in negotiating track record here, that the high contracting of parties there agreed to conduct these searches only on their own territory. I know—if I did not see somebody shake their head "No," I would be very alarmed. Either you are asleep, or this is the wrong lecture. There is a lot of contentious issues on that.

But remember, this is a NATO operation. As it stands right now, there is our view that the 1949 Conventions do not require NATO forces in Bosnia to use these military forces to actively search for people who may have committed grave breaches. As the Secretary of Defense has said, if we encounter them, if they come under our control, then we would detain them and turn them over to appropriate authorities; to include even the Tribunal at The Hague, if need be. Some may observe that the Yugoslav War Crimes Tribunal has issued arrest warrants. So far they have not had much impact on the parties. But they have delivered copies of those arrest warrants to Belgrade, to Pale, to Sarejevo, and to Zagreb. And of course when they were first issued, Mladic and Karadzic were the high visibility people. Right now, there is "some of everybody" indicted. So the Croatians have people that they should be turning over right now. The Serbs just had three of their top military people indicted for crimes that they clearly committed as members of the Serbian Army, not as part of the Bosnian-Serb ragtag group, but clearly as part of a regular force. They have now been indicted. So we will see if Milosevic, who so far avoided turning over Mladic and Karadzic on the theory that he does not have anything to do with these people, turns over these Serbia military members. He has said: "They are not mine. They are Bosnians. They are Bosnian-Serbs." He cannot duck anymore. These three people are clearly his and post-Dayton, I am an optimist. I would expect him to turn them over. I am not reading between the lines here, that is just me the optimist speaking. I do not see how he get out of that box. And they are pretty small fish anyway.

The Yugoslav War Crimes Tribunal has issued these orders. Now, orders can be issued to other people too, such as all the member states who are going to part of this NATO force. And if those

orders say not only in your territory, but in any jurisdiction under your control, would they apply in Bosnia? In other words, if the United States had such an order, that in Bosnia that the United States is charged to arrest and detain these people and turn them over, would we be bound? As far as a state obligation goes, I think that the answer is, "Yes." We view these orders, and literally the Statute of the Tribunal itself, as well as the United Nations Resolution under Chapter VII that set it up, as binding. Article 29 of the Statute of the Tribunal places the obligations on the state. However, it is not an obligation, in our opinion, that flows directly to the soldier, the platoon leader, or the commander in the field. It is a *state* obligation. And in this case, where we have a regional organization commanding and directing, if you will, this operation, our view is, that unless the North Atlantic Council directs that its military commanders, pursuant to an arrest warrant from the Tribunal, search for these people, the soldier on the ground does not have any free flowing obligation to do so.

Now if I were writing this as a law review article, which I am not, I would footnote it right here, because I have a real concern, and I want to use this opportunity to express it. Most of you are familiar with the Captain Rockwood case.³ We have, since Nuremberg, very loosely grouped all of the grounds that we tried people under in Nuremberg under this thing called "international humanitarian law." You generally will not hear me ever use that phrase, even though it is very popular. I do not have a problem with it as a linking phrase, in another words, to link war crimes with crimes against humanity, aggressive war, the things that people were tried for, the major four things they were tried for at Nuremberg. You could give me a lecture on that. But that linked them all together. And that is fine. That is a good shorthand phrase. But what has happened, especially in the last couple of decades, in my opinion, is what that linking implied—and what some wise commentators might have noted—that there is a certain overlap between the law of armed conflict and, for example say crimes against humanity—so-called human rights law. But people have been using this "international humanitarian law" as the "umbrella" law, if you will, which subsumes the law of armed conflict. Now we can go into this in some more detail, but what this results in is, and I disagree with it totally, but it results in "Rockwood cases," where you have got a captain of the United States Armed Forces in Haiti who believes that "international humanitarian law" compels him to prevent any human rights abuses that he perceives in Haiti. Even if

³For details on the Captain Rockwood case, see Edward J. O'Brien, Note, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, *infra* at 275.

it means disobeying orders from his superior. And what is his rationale? That this (international humanitarian law) is a superior law. That is the convoluted mess you get into, in my opinion. That is what happens when you have a framework that says there is a law out there that bypasses the sovereigns, that bypasses the chain of command and goes straight to the soldier on the ground, separate and apart from the law of war or crimes against humanity. This particular argument says that the soldier on the ground has duty to international humanitarian law. And I do not believe that this is the state of customary international law. So, with that in mind, that is the footnote.

Returning to Bosnia. Our view is that even where the Tribunal issues an order, it does not affect the soldier on the ground. We think that the North Atlantic Council has to actually implement, if you will, or the member states, implement any such order from the Tribunal. I am not making this sound like this is all "cut and dried" and decided. This is my view. The North Atlantic Council has a lot of decisions yet to make. Another basis for dealing with suspected war criminals in Bosnia also may flow from the peace agreement itself. Article 29 calls on all member states, including those warring parties in Bosnia, to enforce the orders of the Tribunal. They have these orders. Of course, they have not enforced them yet. I hope that the peace agreement will incorporate in it, as a matter of the parties signing one more time, their obligation to do this. And once they do, it will be part of the peace agreement. And what is the military there for? To enforce the peace agreement. Therefore, it may be that, as a result of the peace agreement itself, you can find military forces in Bosnia actually apprehending war criminals. Why? Because the parties may be violating the terms of the peace agreement. And we are there to enforce compliance. And if they have agreed to turn them over, we may find ourselves in a situation where we need to help them comply with the peace agreement. So I do not want to discount the possibility that we will not be seeking them out under certain circumstances.

The other issue is, what is "under control?" We are not going to control all of Bosnia. We are going to control key towns, key checkpoints, avenues of separations, but by no means the entire state of Bosnia. So there will be a lot of areas that are not under our control. Serbia, the Republic of Serbska, Bosnia-Serbs, will be a large piece of that. Most of our presence is going to be in the Federation area. Not on the other side. So if Mladic wants to hole up in some mountain cabin somewhere, we are probably not going to go get him. That will not be part of the mission—he will not be in that part of the area that we are deployed to. Even a 75,000-member force, deployed

over an area that vast, is extraordinarily, extraordinarily small. Especially when you have other missions that facilitate a secure environment, whereby the humanitarian peace can take place. Free movement on the roads. That sort of thing. That does not leave a lot of people left. And remember, the 75,000-member force includes a lot of support forces. You do not have that many "trigger pullers" on the ground. It would take a lot of trigger pullers to actually go after Mladic. And I think you all are familiar enough with what happened in Somalia when the United Nations wanted us to go after Aideed. Although it is very difficult to do, it can be done. Everyone of these people could be delivered to The Hague within two weeks. But it takes political will to make it happen. We cannot have a situation like we had in Somalia where we lose eighteen people, and then suddenly, turn tail and run. If you do not have the will to do it, then you should not be doing it in the first place. So I think that sort of rationale is prevailing so far.

With that, let me conclude. When we do get our hands on one of the indicted war criminals, a lot of people are concerned about what would their status be under international law. That would be difficult to determine, but I do not worry about it myself. I think that it is a concern only if we intend to do something with them. But right now we have got Articles 9 and 10 of the Tribunal Statute which state that the Tribunal basically has primacy over any sovereign taking action. I think you are all familiar with that. So our obligation is to get them to The Hague as quickly as possible. I can easily see if we got our hands on Mladic, we are talking hours, not days, until he touches down and is taken into custody by the authorities in The Hague. So I do not worry too much about his status. But you hear a lot of debate on that, such as what would we do with him? What would his exact status be? The tougher situation is what about the ones who are suspected war criminals; not indicted by the Tribunal? People come up to us, they report certain things. Our job—and I think this is what the NATO mission is going to be—is to prevent war crimes from happening, and that is a pretty major thing to do. And to report them. If we discover evidence of it, we will try to preserve, protect, and report it. But we are not going to investigate it. The military force in Bosnia is not going to be in the business of routinely investigating war crimes. So if people come up to us and say, "This man right here, not three weeks ago, slaughtered X number of people," and the slaughter is not ongoing, we will report it and, under certain circumstances, even detain him, and would turn him over to civil authorities, if he has not been indicted.

THE SIGNIFICANCE OF NUREMBERG FOR MODERN INTERNATIONAL LAW*

FRED L. MORRISON**

I. Introduction

Nuremberg is the visible symbol of the transition from a Westphalian system of state sovereignty to an international system that took place in the middle of this century. In a sense, it represents the foundation of modern thinking about international law, with an emphasis on the maintenance of peace and the responsibility of the state and its officers to international standards.

Although the city of Nuremberg is only about 300 kilometers from Westphalia, and the actions at Nuremberg occurred 300 years later, a vast difference exists. Just as the Peace of Westphalia was the defining event for international law for three centuries, the judgment at Nuremberg is one of the formative events for the international law of our day. It has transformed the legal and political basis for the exercise of public authority in the modern world. Unabashed claims of national sovereignty, stimulated by the nation-state system recognized at Westphalia, have been modified by universalist claims for peace, human rights, and limitations on the use of force articulated in the Nuremberg principles. Just as Westphalia confirmed and codified changes that already had taken place, and stood as the precursor of others to come, Nuremberg confirmed and pro-

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**Oppenheimer Wolff & Donnelly Professor of Law University of Minnesota Law School. A.B., 1961, University of Kansas, B.A., 1963, Oxford University, M.A., 1968, Oxford University, Ph.D., 1966, Princeton University, M.A., 1965, Princeton University, J.D., 1967, University of Chicago. Among his many accomplishments, Professor Morrison has served as visiting Professor, Institute for International Law, University of Kiel, Federal Republic of Germany, 1966; member, Advisory Committee on International Law, Department of State, 1986-89; Counselor on International Law, Department of State, 1982-83; Counsel for the United States in the International Court of Justice, 1984; and Consultant to Blue Ribbon Committee on the International Court of Justice of the Section of International Law and Practice of the American Bar Association, 1988-89. The author wishes to thank Carol Muffett, a second-year student at the University of Minnesota Law School, for his assistance in the preparation of this piece.

claimed changes that had been occurring during the preceding half century, and stands as the precursor of those of the next period. I will focus on the broad scope of the changes introduced into the modern international community, rather than on the specifics of criminal responsibility.

Nuremberg is, of course, not only a city, it is a concept. It encompasses London (and the Charter of the War Crimes Tribunal drafted there), Tokyo (and the principal Eastern Theater trials), San Francisco (and the drafting of the Charter), Lake Success (and the initial United Nations meetings), as well as the locations of the subsidiary trials of World War II, and a host of other decisions and events that we accept as part of our modern common learning about international law. It was not a sudden and rash event. Other international agreements and understandings led to it—the various Hague Conventions, the Covenant of the League of Nations, the Kellogg-Briand Pact, the various treaties of nonaggression in the interwar period. And others succeeded it—the Genocide Convention, the Universal Declaration of Human Rights, and other instruments of the modern era. But the years 1945-46 were the critical point of change, and the adoption of the Charter and the judgment at Nuremberg were the high points of that change in the international order.

The significance of Nuremberg also can be measured by tons of paper and gallons of ink. A quick count, clearly not exhaustive, identifies more than 1000 books and significant law review articles discussing the Nuremberg and Tokyo Trials, and the establishment of effective legal norms prohibiting war crimes. It can be measured by the changes in international norms and expectations that quickly followed its decisions: most closely the adoption of the Genocide Convention, but also the Universal Declaration of Human Rights, and its related Covenants and Conventions.

As we discuss Nuremberg, we must concentrate on the actual charges in the indictment and judgment.¹ There were three substantive counts, together with the all-encompassing "common plan or conspiracy" charge. These were: (1) crimes against peace (i.e., waging an aggressive war); (2) war crimes; and (3) crimes against humanity. Nuremberg marks a paradigm shift on at least two of these issues—from a Westphalian system of state sovereignty to an increasingly international set of community norms—and a substantial change on the third. In the discussion that follows, each of these counts will be examined separately.

¹The judgment is reported at *The Nurnberg Trial 1946*, 6 F.R.D. 69 (1947); see also 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS (1947).

II. The World Before Nuremberg

To understand the world before Nuremberg, one must first understand the world before Westphalia. Before 1648, the Pope and Emperor had claimed spiritual and temporal authority to control the exercise of political power. Neither of them had been completely successful, especially for the preceding century, but both continued to have some aura of supremacy. After Westphalia, neither the Pope nor the Emperor, nor anybody else, had "jurisdiction" over the local sovereign, however petty and mean that sovereign might be. The world after Westphalia was a world of state sovereignty. International law accepted the permissibility of wars of colonial conquest; indeed, it accepted wars among the self-styled "civilized" states so long as the requisite formalities had been observed. Rules limiting those uses of force were binding only in so far as they had been accepted—and not yet repudiated—by one of the nation states.

I will examine the law before Nuremberg with respect to each of the substantive counts of the indictment, but I will take the counts in a different order. First, I will turn to the charge of crimes against peace.

The customary international law had not prohibited wars, even wars of aggression. As Hyde wrote in 1922:

It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.²

Oppenheim had stated the same proposition two decades earlier:

International law cannot object to States going to war, but does oblige them to follow certain basic rules of conduct.³

As Clausewitz had noted a century earlier, "War is nothing more than a continuation of political relations with the addition of other means."⁴

The Covenant of the League of Nations did not in terms prohibit war—it only provided temporary and procedural relief.⁵ The Kellogg-Briand Pact prohibited war as an instrument of national policy, but it was only a treaty, binding on its signatories, not a prin-

² CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 189 (1st ed. 1922).

³ OPPENHEIM, *INTERNATIONAL LAW*, § 53, at 56 (1st ed. 1905).

⁴ KARL VON CLAUSEWITZ, *VOM KRIEGE*, ch. 6, § B (1833) ("Der Krieg ist nichts als eine Fortsetzung des politischen Verkehrs mit Einmischung anderer Mittel.")

⁵ Article 19 of the Covenant of the League of Nations only required a "cooling off period."

ciple of generally applicable law. Although there was some controversy about whether these rules articulated newly emerging general principles of law and there was a growing sentiment among international lawyers against "unjust wars" or wars of aggression, that sentiment had not yet been fully absorbed into the body of knowledge at the time of the Nuremberg proceedings.

The authors of the Nuremberg Charter—and the judges at Nuremberg itself—had to struggle to transform this system of unlimited state sovereignty into one in which states were fundamentally restrained from using their physical power to assert their political superiority without violating the *nulla poena sine lege* principle.⁶

The second count to be addressed is crimes against humanity. Here the customary international law was even less certain in the years before the war. International law only protected aliens against atrocities at the hands of foreign governments. In 1905, Oppenheim wrote:

Owing to its personal supremacy over them, a state may treat its subjects according to its discretion.⁷

Hyde, who wrote after World War I, concurred:

A state enjoys the right normally to accord such treatment as it may seem for its own nationals within places subject to its control.⁸

Hyde noted that interference with this right of unlimited control would impair the political independence of states, a view that resonates in certain antihuman rights claims today. John Bassett Moore expressed the view of the United States as follows:

There are cruelties and outrages of such a revolting nature that is natural, laudable indeed, that when they occur, they should meet with general condemnation. But this duty to "outraged humanity" should be left to the action of individuals, and to the expression of public opinion, for it is manifest that if one government assumes the power to judge and censure the proceedings of another. . . the intercourse of nations will soon become a system of crimination and recrimination hostile to friendly communication.⁹

⁶The Nurnberg Trial 1946, 6 F.R.D. 69, 107-10 (1947).

⁷OPPENHEIM, *supra* note 3, § 124, at 172.

⁸Hyde, *supra* note 2, § 55, at 87-88.

⁹6 MOORE, DIGEST OF INTERNATIONAL LAW, § 923, at 348.

Indeed, a quick search of library catalogues revealed only four books published in the half century preceding Nuremberg devoted to the issues of international human rights.

International law provided little solace for citizens who were oppressed by their own government, at least if that government was one of the traditional Western powers. Protection depended on the color of your passport. There are some poignant stories about the Swiss government, for example, which intervened actively to protect Swiss Jews who were imprisoned in the concentration camps, but turned its back on German nationals to whom it owed no duty of protection.¹⁰ (The Nazis apparently regularly notified foreign consuls when foreign Jews were placed in concentration camps, because they understood such notification to be required by international law in the case of all aliens!¹¹ They did not think, however, that international law had any relevance to their treatment of domestic Jews.) The Wallenberg story, and others like it, demonstrate the importance of nationality as a prerequisite for international protection in this era—for Wallenberg's effort was to issue Swedish identity papers to Hungarian Jews, a bureaucratic measure that provided immeasurable additional protection to them.

Although there were instances of international protection of human rights, these were only undertaken against the marginal countries of Europe (e.g., in the Balkans) or against African or Asian regimes (e.g., China and parts of India) where they were little more than a pretext for a colonial occupation.¹²

The London Charter reinforces this point. It limited prosecutions of "crimes against humanity" to those "in execution of or in connection with any crime within the jurisdiction of the Tribunal,"¹³ thus cutting off indictment of many of the prewar atrocities.¹⁴ The limitation may very well reflect the contemporary understanding of the limited scope of international law in this field.

The third count involved war crimes *per se*. The law of war crimes was indeed better developed. It was based on the Hague Conventions, a highly detailed and complex set of regulations about the conduct of warfare, and the Geneva Convention. There was a

¹⁰WERNER RINGS, *DIE SCHWEIZ IM KRIEG* 339-40 (1974).

¹¹*Id.*

¹²See, e.g., OPPENHEIM, *supra* note 3, § 137, at 166 (European intervention in the Balkans); HYDE, *supra* note 2, § 55, at 89 (protection of religious freedom in uncivilized (sic) countries such as China).

¹³Charter of the International Military Tribunal, art. 6(c) in 39 AM. J. INT'L L. 257 (Supp. 1945).

¹⁴*Control Council Law Number 10*, which governed the subsequent proceedings, did not contain this limitation.

long catalogue of prohibited acts, but most of these limitations were seen as conventional. They were not binding unless there was general participation in the restrictions.

III. The World of Nuremberg

One must remember the setting of Nuremberg: the collapse of the Third Reich, the utter destruction of the war, the horror of the Holocaust. Nuremberg was selected as the site of the trials for symbolic reasons. The pageantry and chauvinism of the *Parteitag* was to be replaced by the solemnity and internationalism of a trial. Nuremberg thus symbolized the end of a notion of unlimited national sovereignty and the emergence of a new international set of norms binding, despite the command of the national sovereign. It was the clearest symbol of the paradigm shift that was taking place.

The judges at Nuremberg were concerned that the proceedings be seen as the enforcement of legal norms, not simply a process of the victors punishing the vanquished. Thus the Nuremberg decision devotes much attention to the *nullem crimen sine lege* argument.¹⁵ The defendants argued that the old legal system protected them against punishment, an argument that had proven effective in the war crimes trials held at the end of World War I. Although that argument may seem nonsensical to us today, it was not a trivial argument in its time. At the parallel Tokyo Trials, which too often are ignored, the Indian judge, Justice Pal, accepted it and dissented from the convictions there.¹⁶ We need not reexamine that claim today. But we should be cautious against assuming that what is true today has always been true. The decision at Nuremberg built on and confirmed the growing changes in international law, but it represented a turning point for individual responsibility and for international law.

One element of the judgment deserves particular attention. The rejection of the "superior orders" defense is of necessity based on the presumption of an applicable legal order outside of and beyond the nation state.¹⁷ This, in itself is the most important sign of transformation of the paradigm that was being made. It was perhaps made easier by the collapse of the German state; there was no German court to claim an exclusive competence to try accused German war criminals. But the transformation nevertheless took

¹⁵The Nurnberg Trial 1946, 6 F.R.D. 69, 107-10 (1947).

¹⁶R. B. PAL, DISSIDENT JUDGMENT OF JUSTICE R. B. PAL, M.A., LL.D. (Calcutta, 1953).

¹⁷*Nurnberg Trial*, 6 F.R.D. at 110-11.

place. The Nuremberg Tribunal was not simply an occupation court trying violations of local law, it was an international body trying violations of international norms.

IV. The World After Nuremberg

The world after Nuremberg was very different from the world before. The decisions of 1945-46 erased any lingering doubts about the illegality of aggressive war. The decisions of the immediate post-war world created an international law of human rights.

On the question of the use of military forces, the United Nations Charter articulated the principal limitations in Articles 1 and 2, in providing that:

The Purposes of the United Nations are . . . to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.¹⁸

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 Purpose of the United Nations.¹⁹

Chapter VII of the United Nations Charter provided, for the first time, mechanisms to implement that prohibition. The failure of the Charter mechanisms effectively to provide collective security for the first forty-five years did not detract from the development of appropriate international norms. The alternative mechanism of individual and collective self-defense—provided by Article 51—filled the gap. The principle of the illegality of aggression was firmly established. Future military operations had to be justified as “enforcement measures” or as “collective self-defense.” Aggressive crossing of frontiers was seen as a violation of international norms that required an international response—in Korea in 1950 and in Kuwait in 1990.

The notion of a *ius cogens*, a supreme international law from which states cannot deviate, originates with this development.

It was in the sphere of crimes against humanity, or—more positively stated—human rights, that development was most rapid. The protection of human rights against the depredations of national governments—even their own governments—became the focus of much

¹⁸U.N. CHARTER art. 1(1).

¹⁹*Id.* art. 2(4).

of the development of international law for the subsequent half century. From the Genocide Convention,²⁰ through the Universal Declaration of Human Rights,²¹ to the Covenants on Civil and Political Rights²² and on Economic and Social Rights,²³ and the Convention on the Elimination of All Forms of Racial Discrimination,²⁴ and the various other antidiscrimination conventions. This explosion of international legal instruments protecting the rights of individuals without examination of their nationality or their connection to another state formed a sharp break with the past. What would have been *unthinkable* before 1939 became commonplace by 1955.

The consequence of these actions reinforced the judgment of the Nuremberg Tribunal; it made its application continuous, not sporadic, and based on specific texts, not based on implications of customary doctrine.

In the area of war crimes, narrowly defined, there also has been a development of clearer codifications and extension of the protections. The Geneva Conventions of 1949,²⁵ extended by the Protocols of 1977,²⁶ expanded their protection in the light of modern warfare, and also extended it to the modern forms of conflict that do not involve declared war between states.

V. The Modern Significance of Nuremberg

One important contribution of Nuremberg is as a model for the current war crimes tribunals. Nuremberg is the modern font of authority for the imposition of punishments for war crimes. From its decisions flow the notions of state and individual responsibility for international crimes. The two extant war crimes tribunals, as well

²⁰78 U.N.T.S. 277 (1948).

²¹General Assembly Resolution III:217 (1948).

²²999 U.N.T.S. 171, 6 I.L.M. 368 (1966).

²³993 U.N.T.S. 3, 6 I.L.M. 360 (1966).

²⁴993 U.N.T.S. 195, 5 I.L.M. 352 (1965).

²⁵Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁶Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977).

as the proposals for the permanent tribunal are part of its progeny.

But Nuremberg has a far greater significance. Like the foundation stones of a building, much of its significance is concealed by the superstructure that has been built on it. Yet the foundation is essential to the integrity of that superstructure. They are the imposition of a true international responsibility of individuals and states, which provides a change in the whole structure of international law.

PROSECUTING WAR CRIMES*

RUTH WEDGWOOD**

I am very happy to be here as a retired, if perhaps overripe, ex-federal prosecutor. It is an honor to be with people like Under-Secretary-General Hans Corell and Judge Georges Abi-Saab, who wrote a wonderful concurrence in the important October 1995 jurisdictional decision of the United Nations International Criminal Tribunal for the Former Yugoslavia and with Colonel Dave Graham, who used to give wonderful legal advice to the Southern Command in Panama, and with Graham Blewitt, Deputy Prosecutor in The Hague. I visited the Ad Hoc Tribunal last summer and found it striking that the prosecution of war crimes had finally become a symbol of popular culture. The Yugoslav War Crimes Tribunal is situated in an old insurance building next to the North Sea Jazz Festival in Churchillplein, where thousands of young people gather in the summer, a short distance from the Kurhaus and its seaside invitations. This site may symbolize Richard Goldstone and Nino Cassese's challenge of institution building, of making it up as they go along, as any good jazz artist does, and as well their task of creating a structured assurance for post-Maastricht Europe, trying to settle the ethnic enmities of central Europe, a task that requires justice as much as prosperity.

Let me draw on my past as a prosecutor to suggest a few of the problems war crimes courts will need to tackle in the future, whether constructed on an ad hoc or permanent basis. I will then look at the normative changes that may follow from the Yugoslav civil war. Yugoslavia is an intellectual and spiritual watershed for

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**Professor of Law at Yale Law School and Senior Fellow and Director of the Project on International Organizations and Law at the Council on Foreign Relations. Professor Wedgwood is directing a study of the role of regional organizations in peace-keeping and conflict resolution. She has written about the use of force in international politics, the national security decision-making process, the law of war crimes, and the law of the United Nations. Professor Wedgwood is a former law clerk to Justice Harry Blackmun of the United States Supreme Court, a former federal prosecutor specializing in national security cases, and former Chairman of the Council on International Affairs of the Association of the Bar of the City of New York. She serves on the Secretary of State's Advisory Committee on International Law. Professor Wedgwood also writes in constitutional history, including the history of foreign affairs power.

Europe and the world, as was Nuremberg. If only by chance, the fifty-year mark is going to force us to re-examine many of our assumptions about how to regulate peace.

The Tribunal for prosecution of war crimes in the Former Yugoslavia has been in operation for more than two years. Its development has been difficult. We are familiar with the intricate politics of the United Nations Security Council that delayed the selection of a prosecutor. Richard Goldstone was chosen in 1994, and has been a highly visible leader, together with President of the Tribunal Antonio Cassese. But the challenges in creating this institution are manifold.

One of the first problems is the cultural divide on how you conduct criminal cases. Two prosecutorial cultures have grown up quite separately. In Europe, in the post-Hitler trauma, there is a kind of delicacy about criminal cases that does not reside in the United States. For example, proactive investigation, including the use of professional witnesses inserted into the scene where violations are occurring, is less native to European prosecutors; so, too, the use of informants. Europeans hesitate at techniques such as luring a suspect across state boundaries to capture him in a sting operation. Karl Paschke, the new Inspector General at the United Nations, who has been tasked to guarantee the integrity of United Nations programs, is facing the same cultural divide.

On the other hand, the United States is more restrictive than Europe on the types of proof admitted at trial. Our judicial system has less tolerance for hearsay and asks for *utra voce* testimony, supposing that seeing a witness in the act of testimony tells something that a written text does not. The American Bill of Rights confrontation clause guarantees a defendant's right to see and hear the witnesses. The privilege against self-incrimination and the interrogation of defendants is another disputed area. The United States permits a defendant to refuse to testify and forbids drawing an adverse inference from his silence; Continental procedure begins with questions put to the defendant. Even the ethics of witness preparation differ. American prosecutors extensively prepare witnesses for testimony, checking their stories against other available proof, and counseling them what is admissible and inadmissible in front of a jury. Commonwealth and Continental prosecutors prefer spontaneity, questioning the reliability of prepared witnesses. The first task of an international criminal court is to gain consensus on a new cosmopolitan criminal procedure that combines the views of Europe, the United States, and the rest of the world. A process of negotiation among the prosecutorial staff, and with defense lawyers and judges, as to what is acceptable in the courtroom, will take time to work

itself out. In debates on a permanent international criminal court, many countries have been interested to see proposed rules of procedure and evidence, before they will agree to its jurisdiction.

An international criminal court must also develop lawyers familiar with the contrasting cultures of international law and criminal law. Criminal law has a weight of proof, an *avoirdufois*, that civil litigators and law professors are not used to—a specificity of proof, a working assumption that not every case will be proved, that some criminals will and should go free. Criminal proof is not Bayesian logic, it is not probability theory. It demands a quality of evidence that sometimes reminds us of the seventeenth century's idea of the "pointing finger of God"—when an eyewitness actually points out a defendant, it was taken as almost a supernatural act that the person is able to remember and identify. In criminal proof, there is no assumption, at least on the part of working prosecutors, that truth and proof are coincident. Many true claims cannot be proven. International law is quite different in ethos. International lawyers are used to working in an open-jointed system, without a clear hierarchy of authority, filling lacunae with analogy and resemblances, resting on inferences of consent, curing small imperfections of provenance or procedure. It is a cultural challenge for judges, prosecutors, and defense counsel to understand what it means to combine the fluidity and catholicity, the eclecticism of international law, with the weightiness of criminal proof. This constructive work and growth of a new legal culture will take time.

A third leg of the shake-down cruise is defining the sources of law. The October 1995 opinion of the Ad Hoc Tribunal is important, if only as a guide to the Security Council on how to draft the statute for a new tribunal if it should do this again, and to the General Assembly as a guide for a permanent international criminal court. The ravages of civil wars in the last ten years are transforming the law of war. Formerly, we assumed civil wars should be regulated by the nation state. Now most believe that serious violations of decent conduct in either civil or international armed conflict should be actionable by the international community. The Security Council has found that civil wars can threaten international peace and security. Civil wars gravely harm civilians. Civil wars muster combatants who lack a professional military ethos, and their passionate hatreds can yield atrocious war crimes. The structure of the 1949 Geneva Conventions provided universal jurisdiction and common enforcement for grave breaches of the laws of war in international conflicts. But Geneva's humanitarian standard for noninternational conflicts in "common article 3" of the four conventions of 1949 did not provide for universal jurisdiction for serious violations, and the Second Geneva Protocol of 1977 was also limited to national enforce-

ment. The important innovation of the Security Council's creation of the International Criminal Tribunal for the Former Yugoslavia was to demand an international response, even if the conflict is to be considered a civil war. The October 1995 opinion of the Ad Hoc Tribunal takes a relatively conservative view of the Tribunal's jurisdictional scope, concluding that its "grave breaches" jurisdiction is confined to international conflict.¹ This is narrower than necessary, in my view—one can read the Security Council resolution as giving the Tribunal jurisdiction over the *type of criminal act* counted as a grave breach in international war, regardless of the internal or international nature of the Yugoslav war, especially since the later Statute for the Rwanda Tribunal makes plain that international prosecution of serious violations of the law of armed conflict in a civil war is fully consistent with principles of subsidiarity and sovereignty. One should not ask the customary law of armed conflict to undertake all the work where the architecture of treaty-based law is available. Geneva has been central to thought in the postwar development of humanitarian law, and its jurisdictional extension by the Security Council should not deprive it of pride of place. A careful assessment of how to provide a sturdy international architecture for prosecutions of serious violations of the law of armed conflict—both in civil wars and international wars—while respecting the place of national prosecutions must precede the drafting of a statute for a permanent court or any future *ad hoc* court, so that the tribunal can draw on a full complement of norms.

A fourth difficulty in combining disparate cultures is the issue of prosecutorial discretion and targeting. In the United States, we are familiar with the concept that common law prosecutors must choose their cases, make targeting decisions that are strategic to maximize general deterrence, often striking deals, letting some people go free to convict other people. This process depends on the integrity of the prosecutor. In American debate, ever since Kenneth Culp Davis wrote his fine book *Discretionary Justice*, there has been interest in ways of regularizing prosecutorial decisions, guarding integrity and fairness in a deeply discretionary decision-making process, by articulating some of its principles and prescriptions. Continental justice, on the other hand, has maintained a model of full prosecution, the norm that available proof must always be acted on. To Americans, this model may ignore the prosecutor's role in developing proof. It may be better to make instrumental logic open and transparent so it can be critiqued. In any event, international

¹Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 79-84, Case No. IT-94-1-AR-72 (2 Oct. 1995), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991.

war crimes prosecutions will require a careful and justified selection of targets. Full prosecution is constrained by the difficulty of the cases, the limit of resources, and the wide scale of violations, even where the heinousness of the offenses makes it difficult to conceive of curtailing any charges.

Fifth, is the challenge of money and budget, not ordinarily a prosecutor or judge's concern. Richard Goldstone and Nino Cassese made the rounds in the United Nations, learning what it means to live multilaterally. It requires learning the sensitivities of the Security Council and General Assembly, including the important place of the ACABQ, the advisory committee on administrative and budget questions, a low-profile body wielding great power in United Nations budget allocations. It requires learning how to court member countries, and learning the hazards of dependence on private donors, a serious problem for an international court that must maintain the fact and appearance of independence. Getting enough money to put basic facilities up and running has been half the drama and saga of the Ad Hoc Tribunal. At one moment it appeared the Tribunal might lack enough money for field investigations in the Former Yugoslavia. It needs a much more structured allocation of monies to defense counsel and defense investigators, seeing them as fully part of the architecture of the court as is the prosecutor. The court has even lacked a law library and adequate phone system. We should not force prosecutors and judges to divert time and energy to budget politics and passing the hat. Institutionalization of a permanent war crimes court may allow the professional tasks of law enforcement to be better insulated from United Nations budgetary politics.

Two final problems of institutional development are the delicate matters of witness protection and obtaining intelligence information. In its August 1995 procedural decision, the Ad Hoc Tribunal said that it would permit anonymity and confidentiality for some witnesses at trial, shielding their identities even from the defendant, while admitting the evidence, because the court has no witness protection program to guarantee the safety of witnesses involved in its process.² This challenges due process if one pushes it too far; it is not going to be a long-term acceptable argument to limit the confrontation between defendant and witness, or even to lessen the didactic quality of the trials, by allowing anonymous witnesses if one could have accommodated the witnesses' need for safety by having a developed witness relocation program. There is nothing that prevents the United Nations from setting up a witness program. To

²Prosecutor v. Duško Tadić, Decision on the Prosecutor's Motion—Protective Measures for Victims and Witnesses, Case No. IT-94-I-T (10 Aug. 1995).

be sure, witness protection is a new institution in Europe. In the late 1980s we had a distinguished prosecutor from Italy come to Yale to inquire how one would go about setting up a protection program. It is harder in a small country where there is nowhere to hide. Europe lacks the equivalent of Kansas, the anonymity of midcontinent. It is hard to hide in Ljubljana, or Rome, or Florence. But international tribunals must take seriously the idea that if you are going to put lives in jeopardy, there is an institutional obligation to secure witness safety while maintaining due process for the defendant.

Similarly, intelligence requires institutional growth by national and international agencies. Judge Goldstone has learned about the reticence of the American intelligence community and the reluctance to share intelligence intercepts, electronic or human. The United States has learned to handle intelligence information in the trial process with some sensitivity through the Classified Information Procedures Act,³ which we drafted in the late 1970s. Similar procedures can be used internationally—for example, giving advance notice of any intelligence information that might be used at trial, substituting generic descriptions for specific information and setting advance limits to the scope of examination. Institutionally, the lesson of the United Nation's Special Commission on Iraq, run by the talented Swedish diplomat Rolf Ekeus, is that if the players get to know each other over a period of time, and intelligence operatives come to understand the prosecutor's depth of character, there can be effective international sharing of intelligence intercepts. This will be crucial for many cases. The demands of criminal proof are not always satisfied by a seasoned inference. One needs specific proof. And it is there that the intelligence intercepts can be truly crucial, in developing leads and witnesses, and even as direct proof at trial.

I want to talk about a few other things that lie outside the courtroom. The first is how to make war crimes investigations more effective. One of the great heroes of American prosecutors is Henry Stimson. At various stages of his career, Stimson served as United States Attorney for the Southern District of New York, which is the Manhattan District in which the United Nations is situated, and as Secretary of War. He took a battlefield approach to his criminal cases. He is famous among Americans for his "shirt sleeves" ideal. A prosecutor ought not merely to be a barrister, Crown Counsel, silk scarf and best bib and tucker, wig and gown. The prosecutor also belongs in the field, directing investigations, almost a cop, involved both before and after the criminal case is officially put on in the courtroom, with ethical responsibilities that extend before and after. The prosecutor's role in the courtroom is only part of his compass; he

³94 Stat. 2025 (1980) (codified at 18 U.S.C. app. III § 4).

is also obliged to assure that the case is properly developed from the time of the offense onward, and to look carefully at strategies of deterrence.

In addressing war crimes, prosecutors should put themselves to the same field test of efficacy. For example, why are we limited to retrospective historical proof? In the conflict of the Former Yugoslavia, the War Crimes Tribunal was up and running in the middle of the conflict. A core hope is that one can impress the combatants with the teeth in humanitarian law, through courtroom sanctions, and even by multilateral retorsion, multilateral retaliation. One key to effective sanctions is to gather proof on the ground as events unfold.

We could deploy "white hatted" investigative peacekeepers, United Nations officers specially assigned to monitor law of war violations, to gather evidence and report. Humanitarian observers could be deployed with ordinary peacekeeping forces or even in battlefield situations, where there is no ordinary peacekeeping force. Professional witnesses are hard to intimidate. Unlike civilians, they will not have to return to the neighborhood of the violator. Specially designated judge advocate general officers could accompany each peacekeeping expedition, to observe both sides and place first priority on the preservation of evidence. In Bosnia, some of the early UNPROFOR troops tried to gather evidence of war crimes, but ultimately when it came to balancing their several missions, UNPROFOR personnel felt the need to put war crimes reportage aside and place first priority on military tasks. In Srebrenica, some of the United Nations troops disposed of a videotape of the Serb bombardments, for fear of retaliation if they were overrun. It is important to place high priority on the collection and preservation of evidence.

The second question of efficacy concerns arrest policy. A lay observer may ask why one bothers to present evidence in court if no one is in custody. President Cassese devised a procedure for confirming indictments, where a warrant of arrest has not been executed, to allow the world to hear live testimony. But why a forensic setting? Why not just have a truth commission, which is a lot cheaper? Why have an intricate formal procedure in The Hague at considerable expense—\$30 million a year—which cannot be provided for many wars. To justify this cost, the court ultimately has to be effective, and it is going to require live bodies and defendants. I think in this case, Colin Powell's advice in Haiti that we should get the troops on the ground first and discuss the fine points later, may be good advice. We should not try to sketch these things out too carefully in advance. Nonetheless, it is important to execute arrest warrants

where we possibly can. In *Alvarez-Machain*,⁴ the United States extraterritorially arrested or abducted a defendant for a very serious drug and murder offense. In the Lockerbie-Libyan case, the United States and United Kingdom persuaded the Security Council that there was an enforceable duty to extradite on the part of Libya, and the Council employed economic sanctions to force the point.⁵ Ultimately, the Security Council may feel the need to consider direct execution of international arrest warrants, if that is needed to make the tribunal effective. There would be nothing sadder than fifty-one indictments returned and defied. It is facetious to suppose defendants will turn up in Geneva for heart treatment. There should not be pockets of asylum in the Balkans or elsewhere for people under international war crimes indictment.

The question of a duty to rescue is well beyond the Tribunal's immediate competence, but if we are speaking of mechanisms for international humanitarian law, it is essential. The fall of Srebrenica and the Serb execution of Muslim prisoners was a pointed test of the integrity of United Nations assurances that civilians will be protected. The peacekeepers in Srebrenica surrendered to the advancing Bosnian Serbs, and reportedly a high national military official telephoned the United Nations Special Representative to demand that air strikes against the Serbs not be carried out, for fear it might jeopardize the peacekeepers' lives. Perhaps air strikes would have been futile or even counter-productive in protecting civilian lives. But the immediate demand was to hold back air strikes because the strikes would endanger peacekeepers. Here the United Nations faces a hard moral question. Can NATO or the United Nations properly prefer soldiers' lives to many more lives of innocent civilians? The non-Yugoslav protagonists in the Srebrenica debacle each have a reasonable claim that others were at fault. An adequate number of peacekeepers was not provided, and the Security Council ignored the military advice urgently proffered by the Secretary-General—demonstrating the minimum number of troops needed—in voting the original safe areas resolution. NATO did not use force to maintain open access to Srebrenica, and the few unsupplied, unresisted United Nations troops could not have repelled the Serbs. Nonetheless, traditional peacekeeping did not serve well at Srebrenica. Traditional peacekeeping is seen, at its most attractive, as a Nordic minimalism, part of the ethos of nonviolence. At its least attractive, it can be seen as a preference for peacekeepers' lives over civilian lives. United Nations insiders are frank to say that troop-donating countries make clear that they refuse to take casualties, and that operational phone calls are frequently made from foreign

⁴United States v. Alvarez-Machain, 504 U.S. 655 (1992).

⁵U.N.S.C. Res. 748 (1992); U.N.S.C. Res. 883 (1993).

offices declining to allow hazardous use of troops. In a kind of instrumental logic, the United Nations accepts this, arguing that "We need peacekeepers for a rainy day and we must not offend the donating countries today; therefore, we will not do anything that would put their lives directly in hazard." One has not heard the last of Srebrenica. The safe areas were the rainy day for which force was deployed. The failure to defend civilians drained the United Nations and even NATO of credibility.

War crimes cases must also be judged by the Hippocratic dictum of doing no harm. In the course of conducting war crimes prosecutions, we must not tolerate new delictual acts. In the *Demjanjuk* case, the Israeli Supreme Court decided that the defendant must be freed, despite eyewitness testimony; exculpatory evidence had not been disclosed in the extradition, and the Israeli Supreme Court had scruples about the reliability of the proof. In Rwanda, the United Nations Ad Hoc Tribunal has taken jurisdiction over the war crimes trials of the Hutu leadership, but has left thousands of other suspects to the jurisdiction of the Rwanda national government. The Tutsi war crimes program has created a new humanitarian emergency. A recent report of the International Committee of the Red Cross disclosed that Hutu suspects have been subjected to lethal conditions of confinement; 57,000 prisoners are forced into jails designed for 12,000. The mortality rate is five percent every fifteen months, far beyond any ordinary figure.⁶ This is unacceptable for an enterprise whose purpose is the enforcement of humanitarian norms. The United Nations has taken steps to try to ameliorate the conditions, building prison camps and urging the Tutsi government to allow prisoners to be transferred to the new sites. The reluctance of the Tutsi government to allow relief of the conditions is a chastening reminder that war crimes prosecutions can be morally fallible. It would be the highest irony if the quest to punish war crimes becomes the excuse for turning a blind eye to violations of bare minimum conditions of confinement.

The conflicts in Rwanda and Yugoslavia pose long-term challenges to our political theory, as well as challenges in institution building. Once the trials are over and done, we may have to rethink the use of force in civil conflicts. Severe casualties to civilians are the accompaniment to modern war and civil wars are as bloody as international wars. The United Nations recently published statistics that ninety percent of casualties in modern war are civilians, compared to fourteen percent in World War I.⁷ The restrictions currently

⁶See Wedgwood, *Retaliation in Rwanda*, CHRISTIAN SCIENCE MONITOR, Dec. 20, 1995, at 20.

⁷UNICEF Report Calls Children Major Victims of Recent Wars, N.Y. TIMES, Dec. 11, 1995, at A11.

imposed by *jus ad bellum* on parties' resort to force apply only to interstate conflicts. The international community is treating every symptom of civil war, without questioning the legitimacy of civil war itself. To permit a forcible humanitarian response, Chapter VII has been read with new realism, recognizing civil wars as a threat to peace and security. Perhaps Article 2(3) and 2(4) of the United Nations Charter should also be read to restrict civil war and intrastate war in the first instance, as we presently restrict interstate war. It is a problem for a Whig who believes in the right to rebel; it is a problem for a legal positivist who believes the nature of the state is its right to use force in governing. Nonetheless, I think that in time we may recognize at least a duty of resort to international mediatory remedies before using large-scale extended force in the resolution of civil conflicts, or even a duty of binding arbitration. More modestly, the Security Council may want to assert the competence to impose a mandatory cease fire on belligerent parties in a civil war. Does the international community lack all right to call a halt to conflict if other methods of dispute resolution are available? If the parties in Bosnia never came to agreement, would one be obliged to allow the war to continue for another twenty years? Even humanitarian aid is imperilled by extended conflict, because of donor fatigue. If we want to limit the hazards that go with any war, we need to understand that the ordinary fighting of a civil war causes widespread civilian harm. Possible limitation on the use of armed force as a way of resolving civil conflicts is one challenge.

The conflict in Yugoslavia also poses a challenge to European political theory by impeaching the legitimacy of *jus sanguinis*—defining citizenship by blood descent. Ethnically based citizenship lies at the heart of constitutional theory in a good many European states. After the *nettoyage* of the Yugoslav war, *jus sanguinis* is revealed in its least pleasing aspect. There is a deep link between Slobodan Milosevic's ethnic nationalism and the tactics of ethnic cleansing. Serbia's crudities reveal the link between ethnically based territorial claims and the violation of *jus in bello*. Many of Europe's decisions have centered on ethnic citizenship, such as the German constitutional court challenge that guest workers could not be permitted to vote in local elections because German democracy entails a *volk*, the will of the German people.⁸ These seem even more problematic after Yugoslavia's ethnic *auto-da-fé*.

And finally, for Americans, the challenge will be to understand that minority rights and regional autonomy do not answer every desire of nationalities, at least in Europe. The desire to occupy pub-

⁸Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty (Oct. 12, 1993), in 33 INTERNATIONAL LEGAL MATERIALS 388 (1994).

lic space and gain a historical destiny, the deep links between cultural growth and political ambition, make minority status an insufficient anodyne for many peoples who have felt themselves to be denied a part in history. How one addresses this is a much more puzzling question. American assimilationism, the melting pot we have lived with so contentedly here, is not necessarily going to answer European political structure. Even while the war impeaches *jus sanguinis* as a theory of citizenship, pluralism is in for some tough sledding because of the lusts that the Yugoslav conflict has reached and recognized.

The general mood in the United Nations is that peacekeeping is due for retrenchment. The United Nations will turn to coalitions of the willing, to ad hoc multilateralism. This leaves a peculiar American responsibility for doing what we can to enforce humanitarian law within the limits of our other needs and missions. It may be that we cannot act in all cases. But in the final analysis, the only instrument available for effective enforcement of humanitarian law is countries willing to take up the burden.

ROLE OF THE ARMED FORCES IN THE PROTECTION AND PROMOTION OF HUMAN RIGHTS*

GENERAL BARRY R. McCAFFREY**

I. Introduction

It is a pleasure to be with you today. I thank you for the invitation to speak and to those that have been involved with both the University of Virginia Law School and Duke in putting together this conference. I was delighted to be asked to speak and join your efforts and review what has been accomplished. I will address how the United States Armed Forces can be supporters of human rights and how we have integrated human rights in all our programs and exercises. I also will discuss the United States Southern Command's commitment to the preservation of human rights.

II. Modern Sources of Human Rights

You can find in common law, in the United Nations General

*General McCaffrey presented the following on 18 November 1995 during "Nuremberg and the Rule of Law: A Fifty-Year Verdict," a Conference co-sponsored by The Center for National Security Law, University of Virginia, The Center of Law, Ethics and National Security, Duke University School of Law, and The Center for Law and Military Operations, The Judge Advocate General's School, United States Army. The Conference was held in the Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, November 17-18, 1995.

**General, United States Army, Commander-in-Chief, United States Southern Command. Commander-in-Chief, United States Southern Command since February 1994. Director of Strategic Plans and Policy, Joint Staff from May 1993 to February 1994. Assistant to the Chairman of the Joint Chiefs of Staff from June 1992 to May 1993, commanded the 24th Infantry Division (Mechanized) 1990-92. Deployed the Division to Saudi Arabia in August 1990 and led it on combat operations during Desert Storm for which he was awarded the Distinguished Service Medal. Graduated from Phillips Academy, Andover, Massachusetts, and the United States Military Academy at West Point. Master of Arts Degree in Civil Government from American University. Honorary Doctorate in Military Science from Norwich University. Military education includes the Armor Advanced Course (Distinguished Graduate), the Army Command and General Staff College (Honor Graduate), and the Army War College. Professional schooling includes: Harvard University, National Security Program; National Defense University, General Officer Course; Western Behavioral Sciences Institute. Management and Strategic Studies, and Defense Language Institute—Vietnamese (Honor Graduate). Previous assignments include: West Point, teaching American Government, National Security Studies, and Comparative Politics (1972-75); Deputy United States Military Representative to the NATO Military Committee (1968-69); Director for Strategy, Plans, Policy, and Joint Affairs at Headquarters, Department of the Army (1969-90).

Assembly's declaration of 1948, and the Organization of American (OAS) Charter, clear statements of the rights of men and women. The American States have jointly reaffirmed and have subscribed to a set of principles. This is a policy for all Americans—north, central, and south. It forms a spiritual bond, I would suggest, among those of us in this hemisphere.

III. Modern Sources of Human Rights: The OAS Charter and Human Rights

The American States reaffirm the following principles:

Social justice and social security are bases of lasting peace.

The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.

Each State has the right to develop its cultural, political, economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

Our political leadership and our peoples have agreed that social and political justice is essentially the basis for a lasting peace. We also have agreed that our people have certain fundamental rights. We know that these rights do not come from us who have guns and they do not come from the political leadership. They come from the nature of man. And I think that all of us recognize this and that this recognition forms the basis for the declarations of the OAS on fundamental individual rights.

IV. Human Rights and Democracy

President Clinton, one of the most educated and intelligent of our heads of states certainly in this century, is a person whose values are formed by absolute respect for the individual. These are his views on human rights.

Democracy is rooted in compromise, not conquest. It rewards tolerance, not hatred. Democracies rarely wage war on one another. They make reliable partners in trade, in diplomacy, and in the stewardship of our global environment. And democracies, with the rule of law and respect for political, religious, and cultural minorities are

more responsive to their own people and to the protection of human rights.

He expressed these ideas on 27 September 1993 in an address to the United Nations General Assembly. This was a fundamentally important thing for him to do, to express our society's values. His message was "this is our motivation, this is what we stand for." It seems to me that this is a fundamental aspect of any discussion of human rights. Democracies, because of the consensual nature of their political and civil societies, are fundamentally respectful of human rights.

Let me share another very useful quote with you. One made by our Assistant Secretary of State for Human Rights and Humanitarian Affairs, Mr. John Shattuck. It has helped clarify my own thinking and is as follows:

Human rights, democracy and the rule of law are not the same. But they are complementary and mutually reinforcing. Fundamental rights are best guaranteed by basic institutions of democracy: a free press, an independent judiciary, a vibrant civil society, freely contested, transparent and meaningful elections. Democracy—the rule of, by and for the people—is only possible in a political and social order that fully respects the rights of each and every man, woman, and child in society. Governments that do not respect the rule of law are by definition lawless.

The point Mr. Shattuck makes, the one that is probably most useful to all of us here, is that there is a linkage between this subject of human rights, this principle of the rule of law, and the fundamental values of democracy.

And finally, I will offer you Sun Tzu's thoughts on what laws mean to the commander. What would any sort of presentation be like without at least one appeal to a noted military philosopher?

In *The Art of War*, Sun Tzu made the following observations regarding the commander:

Laws are regulations and institutions. Those who excel in war first cultivate their own humanity and justice and maintain their laws and institution.

The commander stands for the virtues of wisdom, sincerity, benevolence, courage, and strictness.

I think that as you go through the writings of each significant military thinker—twentieth century or earlier, expressed in one

form or another—you will find Sun Tzu's thoughts on a commander's responsibilities. You will recognize the idea that a commander's actions are a reflection of his values. This idea may be expressed in different ways. However, there is I think, a universal recognition that armies and their leaders must subscribe to some higher moral code.

V. Facing the Past

One of the problems that we must deal with as commanders is the legacy of our previous actions. There is a history to each of our military forces. Some of it is painful; none of it will go away. A people, a state, an army that cannot face up to its own past, cannot learn from it. Inevitably, the past will block progress to the future until it is dealt with. It seems to me that until each nation's military leadership and the institution itself faces up to that history, they cannot move ahead. That's just what the United States Armed Forces have tried to do.

The most useful insights we in the United States Armed Forces have learned about human rights occurred as a result of studying our past. We have our own history of problems with human rights abuses. Many of them occurred during the small wars we fought on our frontier during the nineteenth century against Indian tribes; the Sand Creek massacre comes to mind. Some of these tragedies are more modern. The truth is, we have had incidents of human rights violations in every war that we have fought. After all, we are dealing with imperfect people and their leaders.

The most notorious incident in recent United States history is the My Lai massacre. We have learned much from studying that incident. Studying it was painful, but the Peers Report and the many other investigative works that analyzed the root causes have helped us to better protect and promote human rights. I will talk more of lessons learned from that incident, and how it has affected generations of officers.

VI. Winning the War and Losing the Peace

A. Establishing a Proper Command Climate—Two Opposites from American Military History

We are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies.

If the . . . (civilians in the South) raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity seeking. If they want peace, they and their relatives must stop the war.

—General William T. Sherman

No greater disgrace can befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenseless. Such proceedings not only disgrace the perpetrators and all connected with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movement.

—General Robert E. Lee

I also would like to briefly discuss what we have learned from the conduct of Generals Robert E. Lee and William T. Sherman during our Civil War. In American military history, there could not be a more clear-cut contrast in the treatment of noncombatants than that posed by the attitudes of these two military commanders. I would suggest that General Sherman undoubtedly waged devastating war on the South, ruthlessly . . . much as the Germans did almost a century later during Russia in World War II. Of course, he also won. But was his approach, making the "old and young, rich and poor, feel the hard hand of war, as well as their organized armies" the most effective course of action? We all need to think about this question.

Today, nearly 130 years later, General Lee is still revered as a man of integrity and principle. But he lost. Why then would we argue that his lessons are the ones that should hold value for us today as we study our own problems? Let me attempt to answer this question. Winning a war is a reasonably easy proposition. It involves energy, courage, violence, and organization. Winning the peace, however, is far more difficult.

General Sherman's actions, his barbarity and cruelty, created a hundred years of bitterness in the American South; some aspects of which endure today. General Lee on the other hand, consistently espoused values that were not and are not a military weakness. Those values are a source of consistent strength because they preclude an army depleting its strength on wanton acts of destruction and do not create a requirement to defend gains because of enduring hostility from the civilian population. Therefore, I would suggest that by examining our own past, these are the types of lessons that

we should learn and the values that we should appreciate.

B. When Is an Operational Commander Liable?

I will not go into this area in too much detail because it really is a legal subject, but there are two basic standards to which every commander needs to adhere. The first is the Medina Standard, the second is the Yamashita Standard.

The Medina Standard—If he or she ordered the crime committed or "*knew that a crime was about to be committed, had power to prevent it, and failed to exercise that power.*"

The Yamashita Standard—If he "*should have known*" of the war crimes and did nothing to stop them. (Applies only when the war crimes are associated with a widespread pattern of abuse over a prolonged period of time. In such a scenario, the commander is presumed to have knowledge of the crime or to have abandoned his or her command).

The former was adopted as a result of My Lai and Captain Medina's failures. He allowed some 300 Vietnamese civilians to be murdered at My Lai. This standard is the one to which we now hold our own military leaders. That is, if, for example, a captain, colonel, or general knows of a human rights violation or war crime, and takes no action, then he or she will be held criminally liable.

The latter, the Yamashita Standard, was named for the Japanese general who was tried after World War II and found responsible for the atrocities committed by the troops serving under him as commander in the Philippines. The court concluded that he failed to control his forces, in Manila in particular, and allowed his forces to ravage the civil population. General Yamashita was executed for his role in these widespread atrocities.

VII. Contributing Causes to Human Rights Abuses

The United States Armed Forces have learned through study of our own history. We have learned that there is an assortment of institutional problems that contribute to human rights abuses. When we see any of these occurring, we ought to recognize that the likelihood of a human rights abuse incident has just increased. Some of the institutional problems encountered are as follows:

- Poor Leadership

- Poorly trained or ill-disciplined troops
- Unclear orders or missions
- Tendency to dehumanize the enemy
- High frustration level among troops
- Poor understanding of the complexities of unconventional war
- High casualties

Perhaps we could discuss some of the key lessons we have learned from our own mistakes. We should begin by emphasizing that the two most common contributors are poor leadership and poorly trained or ill-disciplined troops. Allow me to briefly address some of those contributing institutional problems:

Poor Leadership and Training—Units that have poor military leadership will have problems with human rights. We know that. We know that troops will do in combat exactly what they do in training; that if they are poorly trained and ill disciplined, then they cannot fight effectively. We saw that watching the Iraqi army for eight months before Desert Storm and then watching them under fire. We also know that poorly led and ill-disciplined forces will not respect the rights of noncombatants, prisoners of war, or private property.

Tendency to Dehumanize the Enemy—One of the things that my Division Command Sergeant Major and I absolutely would not tolerate as we prepared to fight the Iraqis in the months leading up to Desert Storm was the use of labels ascribing the Iraqis as less than human. We believed that creating those attitudes, indeed tolerating their use, increased the chances that they would then be treated in a less than humane manner.

High Casualties—We also have learned that high friendly casualties lead to frustration, particularly if you combine them with gruesome injuries. Daily losses resulting from an invisible enemy are especially difficult for an army trained to fight a conventional enemy. In such circumstances, so typical of internal wars, we know the temptation increases for our soldiers to seek retribution on the perceived enemy civil population. Strong military leadership becomes so much more important.

All military commanders always must be on the look out for these indicators. We have to ensure that our leaders at the squad, company, and battalion levels can recognize and deal with these problems before they become incidents. We do this through more effective human rights training to avoid future breakdowns in leadership.

VIII. How to Avoid Human Rights Abuses

How do operational commanders go about avoiding human rights abuses? Let me offer you some obvious and not so obvious thoughts:

Zero Tolerance of Abuse—We had a great debate in my own division, the 24th Infantry Division, prior to the war against Iraq. Our lawyers were trying to persuade me that I could not state in an annex to our division order a directive that if you committed a war crime you would be arrested and sent back out of Iraq to Saudi Arabia. But the concept that the command sergeants major, the colonels, and I had to uphold was that if you mistreated prisoners, civilians, or property, we would not allow you the honor of continuing to fight. We would send you to the rear in disgrace and handcuffed. I was convinced, and am still convinced, that as military professionals we have to state that there is no acceptable level of violence against civilians. There should be zero tolerance when it comes to abusing human rights. That must be the point of departure for all of us.

Human Rights Training—It seems to me that human rights training is one of the greatest challenges for those in uniform. How do you address the issue without suggesting that respect for the enemy, his soldiers, and civilians detracts from the central objective of winning the conflict? How do you explain that the respect for human rights actually contributes to military effectiveness? How do you impart instruction without appearing to paternalistically lecture? Military leaders need to be especially aware of these concerns and be prepared to address these challenges with their junior leaders.

Rules of Engagement—Let me offer some thoughts on this subject from personal experience. The initial rules of engagement for my division in Desert Storm were published as a twelve-page document. It seemed to me that they would be impossible to understand, unless you were a lieutenant colonel with a law degree—who had a desk, a light, and some time to think. They were of little use to the sergeant, to the tank company commander, or to the brigade operations officer. So we said "Look, rules of engagement are not a tool of lawyers, they are a tool of commanders." We must be able to express these instructions in a way that is helpful to a twenty-five-year-old captain or a twenty-year-old private. So we put the rules of engagement on cards, made them simple, and did not state the obvious. Examples of the less obvious rules include: do not tamper with places of worship, do not go in them; and do not fire on built-up areas without permission from your battalion commander.

Rules of engagement, it seems to me, must be written for easy use by soldiers and their combat leaders. However, there is no question in my mind that rules of engagement must not put our own military forces at risk. You cannot place your troops in danger without giving them adequate means of protection.

Treating Soldiers with Respect—Perhaps this too should be obvious. However, it is not always understood that soldiers treat civilians, prisoners, and other people's property as they themselves are treated. If we treat our own soldiers with dignity under the rule of law, with some sense of compassion, then our soldiers are much more likely to act in a similar fashion toward the civil population.

Lead by Example—The opening days of combat in a new conflict are the most difficult. The young men and women of the force do not know exactly what is appropriate conduct. They are waiting for their operational commanders to tell them. They also are watching and waiting for their operational commanders to show this appropriate conduct by their actions. And that is how they in turn will act.

Control Your Troops—Allow me, if I may, another personal observation. I was a company commander in combat in Vietnam. Normally, I would have somewhere between 70 to 130 soldiers in my command. We knew that eventually, without question, everyone of us would be killed or wounded. Sooner or later you would be a casualty. You were highly unlikely to go a month as a lieutenant or six months as a soldier without being killed or wounded.

In this combat environment of enormous violence and danger there was another central concern I had as a combat infantry company commander. I knew that in my company at any given time there were one, two, or three soldiers who were like caged animals awaiting release. However, the *overwhelming* majority of my soldiers, because of the influence of their families, their schools, their churches, and yes, our Constitution—were incapable of carrying out human rights violations. The one, two, or three were criminals waiting for the opportunity to strike. And so the challenge again, I would suggest, is how do you treat a unit honorably while recognizing that you have to guard against the potential criminals who are inside every army in the world? I would also suggest that our most important responsibility is to guard against letting criminals into our officer corps.

IX. Honorable Conduct Pays Off

I also would suggest that all of us who have commanded forces

in combat know that respecting the dignity of the people being protected—as well as the dignity of the enemy forces—pays off in the end. If you act as the German SS units did in the Ukraine during World War II, slaughtering, pillaging, raping, plundering, then you will turn an entire nation and people against you. And the same is true during internal stability operations and during unconventional warfare. Adherence to the Geneva Convention and respect for dignity and human rights pays off for operational commanders.

Whose position would you rather be in? That of a German SS commander facing the enmity of an entire nation? Or that of an allied commander in the Gulf War facing an army that would rather quit than fight and whose soldiers are eagerly seeking the safety that comes with surrender to your forces? I would suggest that operational commanders, can control to a certain extent which position our forces adopt. If we instill a code of conduct and a sense of discipline in our subordinate leaders and in our units, they will treat all with whom they deal in both peace and war respectfully. We will not have abusive forces.

X. Conclusion

Let me end by sharing with you an idea of José San Martín, made in 1816:

The nation does not arm its soldiers for them to commit the indecency of abusing said advantage by offending the citizens who sustain them through their sacrifices.

I think that this is a useful idea to end with. Armed forces spend very little of their time actually fighting. Instead, most of their energy is dedicated to preparing themselves for eventual employment. In these peace-time activities, they interact continuously with their fellow citizens—recruiting new soldiers, living alongside civilian communities, purchasing goods and services, or participating in the national debate about what constitutes proper force structure, roles, and missions.

Our experience has been that our citizens are supportive of the armed forces if they think highly of us. How do they form their impressions of us? They form them when their sons and daughters—our soldiers, sailors, airmen, and Marines—go home and tell their families and friends that they are treated well while they serve. They form them every time that they come in contact with the armed forces: when they see a soldier traveling on leave; when they see a military convoy; and when they live beside a military base.

Finally, they form them when they see us in action in a conflict or in a peaceful mission.

Consequently, our every action in peace or war affects the very prestige of our institution. We must always protect our honor. A single incident, another My Lai, will cause long-term damage to our institution.

HOSTAGES OR PRISONERS OF WAR: WAR CRIMES AT DINNER

H. WAYNE ELLIOTT, LIEUTENANT COLONEL,
JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY (RETIRED)*

*The taking of hostages is prohibited.*¹

*Measures of reprisal against prisoners of war are prohibited.*²

I. Introduction

The images filled the world's television screens. Depicted were dejected, scared soldiers chained to obvious military targets. The nightly newscasts revealed new levels of depravity, and contempt for law, in the war in Bosnia. It was war crimes at dinner. In response to NATO air attacks, the Bosnian Serb leadership directed the seizure of hundreds of United Nations "peacekeepers" as hostages. The Serbian leadership made it plain that these United Nations peacekeepers would be held until the United Nations agreed to stop any future NATO air strikes. To protect military targets from future attacks some of the captives were chained to likely targets. When criticism of the chaining began to mount, the Serbs declared that the captives were prisoners of war. (As if that change in designation made a difference!) The United Nations responded that they could not be prisoners of war because no war existed.³ Therefore, they

*B.A. 1968, The Citadel; J.D. 1971, University of South Carolina; LL.M. 1982, University of Virginia. Currently an S.J.D. Candidate at the University of Virginia School of Law. Member of the Bars of South Carolina, United States Court of Military Criminal Appeals, and the United States Supreme Court. The author's last assignment with the Army was as the Chief, International Law Division, The Judge Advocate General's School, Charlottesville, Virginia.

¹Article 34, Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

²Article 13, Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

³*Red Cross Says UN Peacekeepers Are Not Hostages*, REUTERS, June 2, 1995, available in LEXIS, News Library, Current News File. See also JEAN S. PICTET, COMMENTARY IV 51 (1958) (Pictet wrote a commentary on each of the four Conventions) [hereinafter Pictet IV], which states the following:

Every person in enemy hands must have some status under international law: he is either a prisoner of war, and as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

were hostages. However, the International Committee of the Red Cross denied that they were hostages and claimed that they were prisoners of war because they were taken in response to an attack on Serbian forces by NATO acting for the United Nations.⁴ In a television news interview after the prisoner of war declaration, Radovan Karadzic, the apparent leader of the Bosnian Serbs, initially characterized the captives as "hostages," then corrected himself and called them "war prisoners." Does their status, whether prisoners of war or hostages, really affect their right to be treated in accordance with the requirements of international law? No. The law quoted above is clear. If civilians (as the United Nations seems to believe), the war crime was complete when they were taken. If prisoners of war (as the ICRC and, at the time, the Serbian captors seemed to believe), war crimes were committed while they were held.

While the conflicts in the Former Yugoslavia could be used as a comprehensive training package in how to commit war crimes,⁵ the action of the Serbs in seizing and deliberately endangering the detained United Nations personnel may be the most visible example of an ongoing war crime in history. What sets this particular war crime apart is its blatant criminality. Usually a belligerent accused of committing a war crime will either deny that a crime has occurred or raise an arguable defense (e.g., combat conditions justified the act under the theory of military necessity). The hostage takers here have not even bothered to make a claim that taking the hostages was lawful. And, if the captives are considered to be prisoners of war, there are a myriad of requirements for their treatment. The Serbs have complied with none of them.

Today, unlike a soldier, the kidnaper or terrorist will more likely prefer the hostage-taking tactic.⁶ The taking of hostages is an illegal act. In one of the most damning photographs to come out of the United Nations hostage-taking incident, a menacing Serb soldier is shown "guarding" a captive who is handcuffed to a building. The guard wears a ski mask to hide his identity. That is strong evidence that even the Serbs recognize that they have crossed the line from a

⁴*Id.*

⁵War crimes have occurred on all sides of the conflict. "All sides in the Bosnian war hold civilians for subsequent exchanges for combatants captured by an opposing party." HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 12 (1992). "Prisoners are routinely beaten and otherwise tortured. Serbian forces also have used prisoners as human shields to ward off attack by Muslim and Croatian forces." *Id.*

⁶Interestingly, in press reports of kidnappings for money, the captive is usually referred to as a "victim." When the captive is illegally taken for political reasons or during a war he is usually referred to as a "hostage." The word "victim" originally denoted a person or an animal killed as a sacrifice. "Hostage" originally denoted someone held as a pledge or security for a promise. The word hostage is etymologically unrelated to the English word "host." JOHN AYTO, DICTIONARY OF WORD ORIGINS (1990).

lawful act of war to a war crime. Lawful soldiers in lawful combat rarely have reason to hide their identity from the world.

It makes no difference that the Bosnian Serb leadership has since released all the captives unharmed. War crimes have occurred. The shorter the time hostages are held, or prisoners of war are mistreated, the better, however, quick release is only a factor to be considered in mitigation—it is not a defense. The world cannot simply sit idly by and permit such craven lawlessness. There must be some consequence. Accepting that the conflict in the Former Yugoslavia is now fully covered by the law of war,⁷ this article will review the historical practice relating to wartime hostages and their treatment, examine the modern law regarding hostages, and explore the criminal liability of those responsible for committing this war crime.

II. Definitions

A. True Hostages

In the past, the giving and receiving of hostages was an accepted part of warfare. Hostages often were held as surety that the other side in a conflict would comply with its obligations, either as set out in a particular ad hoc agreement or as part of a larger rule of the law of war. One party might demand that hostages be produced as evidence of the other party's good faith. The hostages provided were living proof of one party's bona fides. They were often of high social status, usually well treated, and, on fulfillment of the agreed conditions, released. While held, they often were given free run of the community. However, if the terms of the agreement were violated, or if war broke out, the hostages were to be treated as prisoners of war. That a hostage escaped with the connivance of his government was

⁷Early in the fighting the status of the conflict was debated. Was it a civil (internal) war? If so, it would be governed by common Article 3 of the Geneva Conventions which applies to internal conflicts. If it were an internal conflict, the right of the United Nations to get involved would be suspect. *But see* Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 A.J.I.L. 1, 7-11 (1995). The escalation of the fighting and the involvement of Croatia and Serbia clearly support the position that the full law of war now applies. *See generally* Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POLY 499 (1994). The United Nations War Crimes Commission also has determined that "the conflicts (sic) in Yugoslavia are international and thus that all the laws of war, including, of course, the rules governing war crimes, are applicable." Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 A.J.I.L. 78 (1994). However, common Article 3 prohibits the taking of hostages even in noninternational or internal conflict. The prohibitions listed in common Article 3 are the most basic of humanitarian safeguards. Thus, even if the war is considered to be an internal conflict, the taking of hostages is prohibited by the law of war.

just cause for war. If the hostage acted alone or without the authority of his government in escaping, then he was subject to punishment if captured.⁸

In addition to surety hostages, the Romans sometimes took hostages to ensure that the inhabitants of occupied territory refrained from attacks on the occupation troops. The Romans recognized that for the hostage taking to have the desired preventive effect, the persons held must have had some personal relationship to the inhabitants responsible for the attacks. For this reason, hostages usually would be taken only from the immediate vicinity of the area in which the attacks occurred.

By the Middle Ages, captives had a monetary value and the practice of holding prisoners for ransom became firmly established. While the ransom system usually applied to prisoners of war captured in combat, hostages continued to be held as living performance bonds for promises made. In France in 1360, the Treaty of Brétigny addressed the ransom of the French King and the settlement of English claims to French lands. To ensure compliance with the treaty's terms, forty French hostages were furnished to the English.⁹

This practice continued for several centuries. In 1764, the treaty between the British and the Seneca Indians provided that three Indian Chiefs were to be held by the British and released "on due performance of these articles."¹⁰ Hostages held pursuant to such formal agreements were entitled to be well treated and often were involved in the activities of the high society of the captor. Little was to be gained by the deliberate mistreatment of hostages because they were held only as surety for a promise. Mistreatment simply might lead the other side to void the agreement. However, the practice of providing for the delivery, custody, and release of hostages in a formal agreement has been abandoned. The modern practice is to provide for the temporary transfer of control of territory as a guarantee of compliance with the terms of a treaty.¹¹

Sometimes hostages were held as security for requisition demands and the payment of contributions. The hostages would be

⁸For the treatment of hostages by the Greeks and Romans, see I COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 398-406 (1911).

⁹The hostages were released as the ransom amount was paid. Some stayed in England for ten years. The incident is discussed in BARBARA W. TUCHMAN, *A DISTANT MIRROR* 189-203 (1978). The Treaty also is discussed in Meron, *supra* note 7, at 7-11.

¹⁰Ellen Hammer & Marina Salvin, *The Taking of Hostages in Theory and Practice*, 8 A.J.I.L. 20, 21 (1944).

¹¹In the Franco-Prussian Treaty of 1870, the Germans continued to hold parts of France that Germany had occupied during the war. Germany released portions as France made the treaty-imposed indemnity payments. *Id.* at 21-22 & n. 11.

held until the governing body of an area was able to raise enough funds to pay the demand.¹²

During the Civil War, in General Order 100, the Union forces attempted to set out the prevailing rules of the law of war. Articles 54 and 55 concerned hostages:

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.¹³

The wording of the two articles reflects the prior practice. The hostage was "accepted," not taken. The rationale for holding the hostage was the "pledge" made by one belligerent to the other in "fulfillment of an agreement." In short, where hostages were held it was because both sides consented. Under these circumstances it is not surprising that the hostage was to be treated as a prisoner of war.

B. Indirect Hostages

Although the practice of "accepting" hostages had become rare even by the midnineteenth century, the practice of "taking" hostages to ensure the peaceableness of the population of an occupied territory continued through World War II. Napoleon took hostages during his Italian campaign to ensure the cooperation of the inhabitants. However, the penalty to be exacted should the inhabitants continue to threaten the French forces was deportation of the hostages to France.¹⁴

Despite the language of General Order 100, both Union and Confederate forces seized innocent civilian inhabitants of occupied territory in attempts to force the other side, or those loyal to it, to perform, or refrain from, particular acts. Hostages often were taken into custody and held until a person responsible for attacks on the occupying force was surrendered. For example, in November 1863, General Grant decreed that "[f]or every act of violence to the person of an unarmed Union citizen a secessionist will be arrested and held

¹²GERHARD VON GLANN, *THE OCCUPATION OF ENEMY TERRITORY* 237 (1957).

¹³Series III, 3 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 154 (1899).

¹⁴Editorial Comment, *The Execution of Hostages*, 36 A.J.I.L. 271-72 (1942).

as a *hostage* for the delivery of the offender."¹⁵ These captives were not held because they provided some security for the performance of an agreement. They were held because having them in custody might have an indirect effect on the conduct of third parties, i.e., the members of the general population. The practice of holding such indirect or third party-hostages bears a strong resemblance to the Roman procedure. However, the requirement that the person held have some personal relation to those actually responsible for attacks on the military forces of the captor became less important. The advent of mass media meant that everyone in a particular area could be expected to know that when an allegedly illegal act threatened the security of the occupant innocent people might pay a price for it. In short, the relationship between the hostage and the alleged miscreant became increasingly indirect.

C. Prophylactic Hostages

During the nineteenth century, another practice involving the seizure of innocent individuals developed. During the Civil War, trains often were the target of unauthorized combatants (most often called *guerillas* or *partisans*). To deter attacks on military trains, some commanders placed prominent local civilians on the locomotives as shields against such attacks. For example, in Alabama in 1862 the Union commander, General Rosseau, ordered that "preachers and leading men of the churches . . . be arrested and kept in custody, and that one of them be detailed each day and placed on board the train. . . ."¹⁶ However, by the end of the nineteenth century, the practice of shielding military targets with innocent captives was roundly condemned. Lord Roberts, the British commander in the South African Boer War, had directed that innocent civilians be placed on trains to safeguard the trains against attacks.¹⁷ Although this order was withdrawn after only eight days,¹⁸ Roberts was

¹⁵Quoted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 797 (G.P.O. ed. 1920).

¹⁶*Id.* at 797 n.61.

¹⁷The order not only provided for prophylactic hostages, it delineated the consequences of attacks on the trains. In pertinent part it read:

3. As a further precautionary measure, the Director of Military Railways has been authorized to order that one or more of the residents, who will be selected by him from each district, shall from time to time personally accompany the trains while travelling (sic) through their district.

4. The houses and farms in the vicinity of the place where the damage is done will be destroyed, and the residents of the neighbourhood dealt with under martial law.

92 BRITISH AND FOREIGN STATE PAPERS 1899-1900, 1089 (1903).

¹⁸Only the portion permitting the Director of Railways to require local residents to ride the trains was withdrawn. The provision authorizing the destruction of houses and farms remained. *Id.* at 1091.

severely criticized in the House of Commons for the order. In language that the modern day military lawyer would surely appreciate, James Bryce deplored that Roberts "had no competent legal advisor with him who would have prevented him from issuing a proclamation so entirely at variance with the recognized authorities on war."¹⁹ Despite these concerns, this practice persisted into the twentieth century as the Germans continued to shield military targets during the Franco-Prussian War and in both World Wars.

Furthermore, despite Bryce's condemnation of shielding and his call for competent legal advisors for commanders, it remained unclear whether the practice of taking and deploying hostages as human shields (to prevent unlawful attacks conducted by illegal combatants against legitimate targets) constituted a violation of the law. Essentially, where attacks against military objectives were conducted by illegal combatants, shielding was considered to reflect prior military practice; a legally permissible act. This view apparently was based on the idea that placing a hostage on a target that was subject only to attack by people acting unlawfully did not make the hostage taker directly responsible for the fate of the hostage. In other words, it was the illegal act of associates of the hostage which led to his precarious predicament, not the act of the occupant in placing him on the target. However, it generally was viewed as improper to shield a legitimate military objective from lawful attack by lawful combatants by placing noncombatants on or near it and, in effect, daring the other side to attack. The 1914 *British Manual on Military Law* demonstrates that this practice soon fell into a gray area of the law. In typical British understatement, the manual opined that the placing of civilians on legitimate military objectives (such as trains) would necessarily expose the hostages to both lawful and unlawful attacks and "cannot be considered a commendable practice."²⁰

Nonetheless, the practice of shielding military targets with hostages continued. Saddam Hussein held many Americans as "human shields" in 1990 prior to the start of the Gulf War. (Even Saddam Hussein did not refer to them as hostages but as "guests."²¹) Those held in occupied Kuwait were "protected persons" under the Civilians Convention. Those held in Iraq were not protected by the Civilians Convention so long as the United States main-

¹⁹Hammer & Salvin, *supra* note 10, at 23.

²⁰BRITISH WAR OFFICE, *MANUAL OF MILITARY LAW* ¶ 463 (1914) [hereinafter *BRITISH MANUAL ON MILITARY LAW*].

²¹Adam Fresco, "Guests" Go Before the Camera with Messages, *THE TIMES*, Aug. 28, 1990, available in LEXIS, News Library, Archive News File.

tained diplomatic relations with Iraq.²² Had Saddam Hussein continued to hold his Iraqi "guests" after the start of hostilities, whether as hostages or as human shields, this action would have violated the law of war.

D. Reprisal Prisoners

Placing hostages on military targets was intended to protect the target from attack, whether by lawful or unlawful combatants. But, suppose the attacks occurred anyway. Could the hostages be taken and shot by the captors as a reprisal? There is a recognized right to take action as a reprisal for a prior illegal act of the opposing belligerent.²³ Even if the acceptance of hostages as such was falling into disfavor in the nineteenth century, taking innocent persons hostage pursuant to the law of reprisal still flourished and these persons often were referred to as "reprisal prisoners."²⁴ The usual explanation for the difference in terminology between "reprisal prisoners" and indirect hostages is that reprisal prisoners are taken after, and in response to, an allegedly illegal act of the other side.

An example is again found in the Civil War. In May 1861, the Confederate government commissioned the ship *Savannah* as a privateer. The *Savannah* was empowered by the Confederacy to prey on northern merchant shipping. In June 1861, the ship was captured and its crew brought to New York. After an indictment, the crew was charged with piracy—a crime for which the sentence might be death—and tried in federal court in New York City. Confederate President Jefferson Davis responded to the threat of trial with a directive that a like number of Union prisoners of war, recently captured at the Battle of First Manassas, be selected by lot for treatment similar to that meted out to the *Savannah's* crew. In a personal communication to the Union government, specifically President Lincoln, Davis set out his intentions:

²²The Civilians Convention applies in all "cases of partial or complete occupation." See GC, *supra* note 1, art. 2. However, the Convention excludes from its coverage "nationals of a neutral State who find themselves in the territory of a belligerent State . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." *Id.* art. 4. At the time that the Americans were being held in Iraq, the United States was a "neutral" State. See generally Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 A.J.I.L. 104 (1991).

²³Reprisals remain an accepted part of the law of war. However, there are limits on those against whom a reprisal action might be taken. See DEPT OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 497 (July 1956; [hereinafter FM 27-10]).

²⁴In World War II, German general orders concerning such prisoners sometimes referred to these individuals as "expiatory prisoners." See *United States v. List*, 11 TWC 759, 873 (1950; [hereinafter *Hostages Case*]). This series, entitled, "Trials of War Criminals," includes the official reports of the criminal trials of the second tier of the Nazi leadership conducted by the United States.

[I]f driven to the terrible necessity of retaliation, by your execution of any of the officers and crew of the *Savannah*, that retaliation will be extended so far as shall be requisite to secure the abandonment of a practice unknown in the warfare of civilized man, and so barbarous as to disgrace the nation which shall be guilty of inaugurating it.²⁵

In short, privateering was a lawful means of warfare and to treat the crew as pirates rather than as prisoners of war violated international law. To stop the violation the South would respond in kind. "Self-protection and the enforcement of the laws of nations and of humanity alike required, in this instance at least, full and ample retaliation."²⁶ The status of those Union soldiers selected for execution would change from prisoner of war to "reprisal prisoner." Interestingly, the taking of reprisal prisoners in response to an illegal act by the enemy was one of the accepted means of enforcing compliance with the law. The jury acquitted the crewmembers and the incident was defused. Today, the law of war prohibits making prisoners of war the object of reprisals.

President Davis was responding to a specific act which was undertaken by the enemy state, not by unauthorized individuals loyal to that state. An example of a belligerent state reacting to attacks by members of the enemy population is found in German actions in World War I Belgium. After nighttime destruction of the railroad tracks (not the trains themselves) and telegraph lines by unknown persons (presumed to be members of the local civilian population) the German commander ordered that local civilians be seized and held as hostages. He then published a notice to the population:

In future, the localities nearest the place where similar acts take place will be punished without pity; *it matters little if they are accomplices or not*. For this purpose hostages have been taken from all localities near the railway line, thus menaced, and at the first attempt to destroy the railway line, or the telephone or telegraph line, they will be shot.²⁷

While it might be possible to protect a train by placing innocent members of the local population on the train, this tactic does not work when the target of the damage is the tracks. Accordingly, the German commander threatened to execute innocent persons already in custody if further attacks occurred.

²⁵J. THOMAS SHARP, HISTORY OF THE CONFEDERATE STATES NAVY 76 (1977 ed.).

²⁶*Id.* at 75

²⁷ELLERY C. STOWALL & HENRY F. MUNRO, II INTERNATIONAL CASES, WAR AND NEUTRALITY 164 (1916).

The two types of hostages were beginning to meld. There always had been some prophylactic effect intended in publicly seizing, holding, and threatening hostages. There might be an even greater prophylactic effect when the innocent hostage was put in the position of being the first victim of his fellow countryman's actions. Real harm to the hostages (at least the ultimate harm, execution) at the hands of the captor would come only in response (reprisal) to the commission of a prohibited act by others who might logically be considered to be associates of the hostage.

By the turn of the century, there was established precedent for taking hostages as a reprisal for the illegal acts of other members of the population. Precedent also existed for taking hostages to ensure the general peaceable conduct of citizens in occupied territory. Furthermore, there was even some precedent for executing hostages as a reprisal for the illegal acts of others. Whether or not the opposing belligerent state had authorized, condoned, or encouraged the prerequisite illegal act did not seem to matter.

III. Modern Hostages Law

A. Hostages in Occupied Territory

At the turn of the last century, there was a movement to codify the law of war. The effort culminated in two Hague Treaties, one in 1899²⁸ and one in 1907.²⁹ Both treaties established rules for the proper administration of occupied territory. Neither treaty specifically mentioned hostages. However, Article 50 of the 1907 Hague Regulations prohibited the imposition of collective punishment on the population of an occupied area. It could be argued that taking hostages in response to the illegal acts of a segment of the population was the "imposition of a collective punishment." During this time, the practice of taking and holding hostages became legally intertwined with the law of occupation. Yet, hostage taking also continued to be an important part of the general law of reprisals.

Where the taking, holding, and even the endangering, of hostages was predicated on prior illegal acts of partisans in an area governed by the law of occupation, it still was not clear that the hostage taker had violated the law. The civilian population of an area under occupation had no legal right to attack the occupying

²⁸Hague Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247

²⁹Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention No. IV]

forces. The law of occupation presumes that the civilian population will refrain from harming the occupant. When an inhabitant of occupied territory commits an act harmful to the occupant or which interferes with the conduct of the occupation, the offense generally is known as "war treason."³⁰ The phrase is a recognition that there is a duty owed by the inhabitants of occupied territory to the occupant and a breach of that duty constitutes a special kind of crime, somewhat akin to the duty a citizen usually owes his own government, i.e., the displaced sovereign of the occupied territory. If members of the population desire to frustrate the occupant, they are obligated to organize themselves into military style commands. As a result, the application of the rules during an occupation can be quite situational. What was the legal status of the territory? What actions did the partisans or those responsible for the harm take to comply with the law? What was the relationship of the hostages seized to the attackers? The answers to these questions are key to establishing criminal liability.

B. The Hostages Case

By World War II, the practice of providing and accepting hostages as surety for an agreement had left the battlefields. The German occupation of Europe was often resisted by a sizable percentage of the local population. Those responsible for much of the resistance generally were referred to as partisans. In response, the Germans sometimes took hostages. These hostages were held to put pressure on other inhabitants to comply with the security requirements of the occupation (indirect or third-party hostages); in short, to secure public order (at least the German concept of order). The Germans also used hostages to shield lawful military objectives,

³⁰*The British Manual* provides an extensive list of examples of war treason:

Many other acts, however, which may be attempted or accomplished in occupied territory, or within the enemy's lines by private individuals or by soldiers in disguise, are also classed as war treason, although perfectly legitimate if done by members of the armed forces. For instance, damage to railways, war material, telegraphs, or other means of communication, in the interests of the enemy; aid to enemy prisoners of war to escape; conspiracy against the armed forces or against members of them; intentionally misleading troops in the interest of the enemy, when acting as guide; voluntary assistance to the enemy to facilitate his operations, (for instance, by giving supplies and money and acting as guides); inducing soldiers to serve as spies, to desert, or to surrender; bribing soldiers in the interests of the enemy; damage or alteration to military notices and signposts in the interests of the enemy; fouling water supply and concealing animals, vehicles, supplies, and fuel in the interests of the enemy; knowingly aiding the advance or retirement of the enemy, circulating proclamations in the interests of the enemy.

BRITISH MANUAL ON MILITARY LAW, *supra* note 20, ¶ 445.

including trains, from partisan attacks (prophylactic hostages).³¹ If attacks on German forces and equipment continued, then a specified number of those held might be executed in response (reprisal hostages).³²

The legal questions concerning the ultimate fate of hostages were at the core of *United States v. Wilhelm List*,³³ one of the "subsequent proceedings" cases tried before a United States Military Commission. The issue was how far could the occupant go in its treatment of hostages. If taking and holding hostages as part of a reprisal was legal, was it also legal to kill the hostages as part of an escalated reprisal? List's actions were the subject of what became known as the "*Hostages Case*." The opinion in the case has been criticized. Nonetheless, it stands as the best explanation of the problems with the law as it existed before and during World War II.

List had been the German commander in Yugoslavia where partisan activity against the German forces was especially heavy. To rein in the partisans, hostages were taken. Tried along with List were other high-ranking German commanders who also were charged with responsibility for the killing of hostages in their areas of operations. Often a significant number of those taken hostage were executed in retaliation for German soldiers killed by partisans.

³¹The use of hostages to immunize a military objective from attack has been called a "prophylactic reprisal." MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 417 (1959). The International Military Tribunal at Nuremberg was presented evidence on the German shielding practice in Belgium. A witness, Van der Essen, described the usual procedure:

When hostages were taken it was nearly always university professors, doctors, lawyers, men of letters, who were taken hostage and sent to escort military trains. At the time when the resistance was carrying out acts of sabotage to railways and blowing up trains, university professors . . . were taken and put in the first coach after the locomotive so that, if an explosion took place, they could not miss being killed. I know of a typical case which will show you it was not exactly a pleasure trip. Two professors of Liege, who were in a train of this kind, witnessed the following scene: The locomotive passed over the explosive. The coach in which they were, by an extraordinary chance, also went over it, and it was the second coach containing the German guards which blew up, so that all the German guards were killed.

Trial Transcript, International Military Tribunal, VI I.M.T. 540 (1947).

³²The most notorious incident of killing innocent people for the death of a German occurred in the Czech village of Lidice. In retaliation for the assassination of Reinhard Heydrich, the Acting Protector of Bohemia and Moravia, in May 1942, every inhabitant of the village was either summarily shot or sent to concentration camps. In a farmer's field, 172 men and boys were machine gunned. The village was completely razed. WILLIAM L. SHRER, *THE RISE AND FALL OF THE THIRD REICH* 992 (1960). In another incident, after explosives were discovered in the French village of Oradour-sur-Glane, the German commander ordered the village burned and its inhabitants shot. A postwar French court found that 642 people had perished in the carnage. *Id.* at 993.

³³See *Hostages Case*, *supra* note 24, at 759, 873.

Thus, there were two hostage-related issues in the case. First, under what circumstances can hostages be taken and held? Second, when is it appropriate to kill hostages in retaliation for the acts of members of the civilian population?

The occupation of Yugoslavia presented special problems for the German forces. The terrain and institutionalized infighting among the various ethnic groups in Yugoslavia made finding and capturing the partisans difficult. The Germans resorted to taking hostages to pressure the locals into either ceasing the partisan activity or revealing information about the partisans. When attacks continued, the Germans began executing hostages in retaliation. A ratio of 100-1 was established, although whether such a high number were actually executed is uncertain. In response to a partisan attack at Topola, in which twenty-two German soldiers were killed, 449 persons were executed.³⁴

The *List* court attempted to set out the law regarding hostages. The court acknowledged that many of the partisan attacks against the German forces were unlawful and, therefore, would justify a German measure in reprisal. The court's opinion drifted from the law regarding hostages to the law regarding reprisals. The court recognized that hostages were no longer "accepted" and that innocent persons held in modern war were more likely to be persons taken in reprisal for a previous unlawful act attributed to the other belligerent and directed against the occupying forces. The court established a working definition of the two classes of persons who might be held:

For the purposes of this opinion the term hostages will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term "reprisal prisoners" will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offenses committed by unknown persons within the occupied area.³⁵

The court recognized that the inhabitants of occupied territory owe a duty to the occupant and must not harm the occupation forces. To help maintain the peace, the occupant must take certain precau-

³⁴*Id.* at 1287-88.

³⁵*Id.* at 1249. Unfortunately, a personality conflict existed between the presiding judge, Charles F. Wennerstrum of Iowa, and the prosecution team. The judge attacked the prosecution and the overall fairness of the trials after he had concluded the case. In response, the Chief Prosecutor, Brigadier General Telford Taylor, described the judge's criticism as "wanton, reckless nonsense." JOHN ALAN APPLEMAN, *MILITARY TRIALS AND INTERNATIONAL CRIMES* 190-91 (1954). The feud is also discussed at 43 *A.B.A.J.* 310 (Apr. 1948).

tionary measures, such as posting regulations for the information of the population. Obviously, these regulations would forbid attacks directed against the occupying forces and provide for the punishment of those who commit such acts. The occupant also might require that the local inhabitants register with the authorities, avoid particular places, and comply with any established curfew. Only if these preliminary measures fail to curb the acts of violence can the occupant take and hold hostages. If hostages are taken, those selected should have some connection to the likely culprits responsible for the attacks. The names of those taken hostage should be published and a clear statement included that these persons will be punished if acts of war treason continue to occur. In short, the court recognized that there was a legal right to take hostages and that, if all the requirements were met, those people taken as hostages might be made to pay the ultimate price.³⁶

The court then discussed "reprisal prisoners." These persons are taken hostage not only to deter future violent and illegal conduct, but, if necessary, to be available for punishment in response to any act of war treason committed by other members of the population. If the taking of hostages was lawful, then the legal question became one of their treatment and fate. The court found a right to execute hostages and unfortunately held, or seemed to hold, that "[h]ostages may be taken in order to guarantee the peaceful conduct of the population of occupied territories and when certain conditions exist and the necessary prerequisites have been taken, *they may, as a last resort, be shot.*"³⁷ The harshness of this statement simply invited criticism of the opinion.³⁸

However, the court set out some procedural requirements that must be satisfied before taking the last resort. The court said that while it is permissible to execute persons as a reprisal for the acts of others, such an execution can only be carried out after a judicial inquiry into the facts and circumstances of the precedent illegal conduct or attack. The inquiry must confirm that all preliminary steps had been taken and that there has been "meticulous compliance with the foregoing safeguards against vindictive and whimsical orders of military commanders."³⁹ If the requisite meticulous compliance is established, then the judicial inquiry must consider the need for the execution. In other words, how successful would the execution of a particular hostage, or group of hostages, be in deterring future illegal activity? The inquiry also must examine the

³⁶*Id.* at 1249-50.

³⁷*Id.* at 1249 (emphasis added).

³⁸See Lord Wright, *The Killing of Hostages as War Crime*, 25 B.Y.I.L. 296 (1948).

³⁹*Hostages Case*, *supra* note 24, at 1251.

extent to which the occupant had complied with its obligations regarding the civilian population, particularly the extent to which the civilian population had been warned of the consequences of continued illegal attacks on the occupation forces.⁴⁰ Again, the execution of hostages was always the last resort, permissible only when every other attempt to quell the disturbances had failed.

Perhaps it was the court's enunciation of procedural niceties, the completion of which would permit the execution of innocent persons for the offenses of others, that led to the condemnation of the court's opinion and reasoning. Yet, the court was correct in some respects. The taking of hostages, while increasingly rare, had not been outlawed by any treaty. And, throughout much of history, hostages had been taken in reprisal for illegal acts committed against occupation forces by people with no demonstrable connection to the hostages. But actually killing the hostages "seems to have been originated by Germany in modern times. . . . No other nation has resorted to the killing of members of the civilian population to secure peace and order so far as our investigation has revealed. . . ." ⁴¹ In spite of the uniqueness of the German practice, the court saw this history as strong, if not compelling, evidence that customary international law did not prohibit reprisal executions.⁴²

Confusion was exacerbated by the court's attempt to differentiate between hostages and reprisal prisoners. As one official commentator noted:

It may be thought that, according to the stress placed by the Tribunal, such prisoners [reprisal prisoners] differ from hostages in that they are killed after, and not in anticipation of, offences on the part of the civilian population; but, in practice, the difference is not likely to be great, since reprisals are essentially steps taken to prevent future illegal acts, just as are the taking and killing of hostages according to the Tribunal's definition. . . . In fact, the only practical difference between "hostages" and "reprisal prisoners" seems to be that the former are taken into custody before, and the latter only after, the offenses as a result of which they are executed.⁴³

⁴⁰As an example of such a warning, see *supra* text at note 27.

⁴¹*Hostages Case*, *supra* note 24, at 1251.

⁴²The Charter of the Nuremberg Tribunal listed the killing of hostages as a war crime. The Hostages Tribunal apparently viewed this crime as not including a killing done as part of a reprisal.

⁴³*United States v. List*, 8 L.R.T.W.C. 61, 79 (1949). The quote is from the compiler of this series, entitled, "Law Reports of the Trials of War Criminals," which contains summarized reports of many of the war crimes cases.

In other words, it is not when the prohibited acts of the partisans occur, but when an innocent person is made captive that determines his or her status as either a "hostage" or a "reprisal prisoner." In sum, the court found that the law of war permitted the taking of hostages and sanctioned their execution so long as certain conditions were met. Although the court was not pleased with the result, apparently it felt that it had to take the law as it was, and not as it would like it to be. Several of the defendants, including List, were convicted. None were sentenced to death. The court concluded, "That international agreement is badly needed in this field is self-evident."⁴⁴ The international community would soon demonstrate its concurrence with the court's sentiments.

In *United States v. Von Leeb*, also known as the *High Command Case*, a different tribunal commented on the Hostages Tribunal's reasoning:

It was held [by the Hostages Tribunal] further that similar drastic safeguards, restrictions, and judicial preconditions apply to so-called "reprisal prisoners." If so inhumane a measure as the killing of innocent persons for the offenses of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all mentioned prerequisites still would be murder.⁴⁵

The *High Command* court's subtle criticism of the reasoning in *Hostages* reveals the unsettled nature of the law when hostages actually are killed. If the killing is done as part of a lawful reprisal, there was some support for its legality. However, despite its legality, it was not a desirable practice.

C. *The Rauter Case*

In *List*, the defendants were tried before a United States Military Commission for crimes committed in Yugoslavia. Postwar courts in the Netherlands tried many Germans for crimes committed in the Netherlands, among them was General Hans Rauter, former German SS and Gestapo chief in occupied Holland. The facts of his case provided the perfect opportunity to further articulate the law related to killing hostages.

Along with other crimes, he was accused of having illegally ordered the execution of innocent civilians and, in doing so, "inten-

⁴⁴*Id.* at 63.

⁴⁵11 T.W.C. 528 (1950).

tionally committed systematic terrorism against the Netherlands people."⁴⁶ His defense was that the executions were part of a lawful reprisal for the criminal acts of local partisans against German forces.

In response to acts of violence directed against the German forces, innocent Dutch citizens were taken hostage. In January 1944, Rauter informed the Dutch people that he had "arrested" fifty inhabitants of Leiden in response to an attack on a Reich official. Three of the fifty were killed while "trying to escape."⁴⁷ On several occasions he directed that ten Dutch civilians be shot for every German killed by partisans. In April 1944, after an attack against two Dutch Nazi sympathizers in the towns of Beverijk and Velsen, Rauter directed that 480 men be arrested. In publicly announcing the arrests, Rauter proclaimed:

The arrest of 480 young men . . . is a reprisal action with regard to Beverijk municipality, the intention being to prevent further attempts from being started. . . . For that reason it had to reach as wide a circle as possible, a great number of whom I am quite convinced are innocent. I have to stick to these measures because it must be made quite clear to all Dutch municipalities that in similar cases I shall answer in the same way, and it is only in this fashion that I can frighten the circle of those who act thus and who, at least outwardly, assert they are acting in the national interests.⁴⁸

When this action failed to "frighten the circle" he began to publicly execute some persons previously seized and held as "*todeskandidaten*" (death candidates).⁴⁹ The Dutch trial court convicted him and sentenced him to death.⁵⁰ The case was reviewed on appeal.

Both courts recognized that the law on hostages and reprisals was unsettled. However, the Dutch courts' opinions contributed "to the gradual elimination of the existing uncertainty and difficulties."⁵¹

An initial question concerned the right of the Dutch people to resist the German occupation under the terms of the surrender of the Dutch military command to the Germans. The trial court found that the terms of the surrender did not preclude partisan activity.

⁴⁶*Trial of Hans Albin Rauter*, 14 L.R.T.W.C. 89 (1949) [hereinafter *Rauter*].

⁴⁷*Id.* at 102.

⁴⁸*Id.* at 103.

⁴⁹*Id.* at 105.

⁵⁰*Id.* at 107.

⁵¹*Id.* at 124.

Nor did the surrender automatically make all partisan activity illegal under either Dutch or international law. That the Dutch people could engage in partisan activity without violating the terms of the Dutch surrender did not mean, however, that the Germans could not punish those individuals who did so and were caught. The trial court distinguished between legitimate reprisal measures and actions that merely were retaliatory.

As the official reporter described the trial court's reasoning:

[T]he alleged reprisals were all unlawful and for this reason criminal [T]he accused never made attempts to apprehend the actual perpetrators of the offenses concerned, and killed hostages as a measure of revenge or intimidation [B]y killing several hostages at a time for the death of one member of the German authorities, he [Rauter] had committed excessive reprisals in violation of the rule requiring due proportion.⁵²

The appellate court took a slightly different approach to the case. It likewise focused on the warlike acts of the partisans and the requirement that they be unlawful before the defense of reprisal could be successfully raised. The appellate court held that for an act to be a lawful reprisal it must be taken in response to an unlawful act of the opposing belligerent (i.e., the Dutch government), not in response to unlawful acts of individuals.⁵³ The acts charged against Rauter were taken "as retaliation not against unlawful acts of the state with which he is at war, but against hostile acts of the population of the [occupied] territory in question or of individual members thereof, which in accordance with the rights of occupation, he is not bound to tolerate."⁵⁴ Relying on Article 50 of the 1907 Hague Convention, the court held that taking action against members of the population in retaliation for the acts of other members of that population amounted to a collective penalty and was prohibited. Essentially, the court held that true reprisals could be taken only when the opposing state had committed a prior illegal act. Where the inhabitants of occupied territory commit illegal acts against the occupant, the occupant is entitled to punish those actually responsible, but not their innocent fellow countrymen. Rauter's death sentence was confirmed.⁵⁵

Both cases illustrate the basic problem. How far may the occupant go in maintaining law and order in the area under his control?

⁵²*Id.* at 130.

⁵³*Id.* at 132.

⁵⁴DEPT OF STATE, 10 WHITEMAN DIG., § 10 *Conduct of Hostilities*, at 10.

⁵⁵*Rauter*, *supra* note 46, at 89.

The *Hostages* court found no specific rule prohibiting, and some prior practice supporting, the execution of hostages as acts of reprisal. It then established procedural safeguards intended to place the population on notice that illegal activity would be punished, if necessary, by the execution of innocent inhabitants. The Dutch appellate court held that the prerequisite for a reprisal was illegal *state* action, or at least state-sanctioned action, by the opposing belligerent. Where no connection between the inhabitants of the occupied territory and an illegal act of the displaced sovereign could be shown, reprisals against innocent inhabitants were always illegal. It would take a specific provision of an international agreement to clarify the law.

IV. The 1949 Geneva Conventions

A. *The Civilians Convention*

The law of war paid little attention to civilians before the adoption of the 1949 Geneva Conventions. There were established rules which applied in periods of occupation, but very little protection existed for civilians outside of occupied territory. When the drafters met to revise the law of war after World War II it was clear that civilians needed greater protection. The result was a fourth Geneva Convention specifically concerning civilians.⁵⁶

Article 34 of the Civilians Convention is categorical: "The taking of hostages is prohibited." The prohibition applies in both occupied territory and the territory of a belligerent. The official commentary to the Convention explains that the article concerns "the taking of hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage in order to ensure the security of the Detaining Power."⁵⁷ The commentary also states that the word "hostage must be understood in its widest possible sense."⁵⁸ The prohibition on the taking of hostages was phrased in the most absolute terms. The intent of the original Red Cross drafters was to enshrine in the Convention the principle of law that no one should pay with his or her freedom for the acts of another.

In case any doubt existed as to the impact of Article 34 on the law of reprisals, Article 33 prohibits the imposition of collective penalties and also specifically forbids taking reprisals against pro-

⁵⁶See GC, *supra* note 1.

⁵⁷PICET IV, *supra* note 3, at 230.

⁵⁸*Id.*

tected persons. Thus, if the United Nations captives in Bosnia are considered to be civilians, to hold them hostage is a clear breach of the Geneva Civilians Convention. To hold them as some sort of reprisal prisoner is likewise a clear breach.⁵⁹

Two other provisions of the Civilians Convention clearly address the treatment of the United Nations hostages (presuming, of course, that they are civilians and not prisoners of war). Article 28 provides that the "presence of a protected person may not be used to render certain points or areas immune from military operations." Note that this article is actually addressed to the captor, not the attacker. In essence, the article states that no military advantage will be gained by placing "protected" persons near military objectives. Therefore, it is assumed that because the target will not gain any immunity by the presence of protected persons, no reason exists to place a protected person near it.

Article 83 of the Civilians Convention provides that the "Detaining Power shall not set up places of internment in an area particularly exposed to the dangers of war." The Commentary to the provision states that the intent was to have "internees . . . treated . . . by analogy with the prisoners of war."⁶⁰ Wartime internment (the process of holding civilians in camps) of enemy civilians is a severe measure regulated by extensive provisions of the Civilians Convention.⁶¹ When addressing the war in Bosnia, the legal relationship of the hostages to the Serb captors is crucial in determining whether this provision applies. For it to apply, the hostages must be considered to be both civilians *and* enemies of the Serbs. Regardless of how one characterizes the hostages, the prohibition on exposing them to the "dangers of war" is certainly broad enough to prohibit their being chained to likely targets. There is no evidence that the Serbs made the slightest attempt to comply with the safeguards established in the Convention for the treatment of internees.

B. The Prisoner of War Convention

The Prisoner of War Convention also is relevant. The Serbs are in no better position if the captives are considered to be prisoners of war. But are they prisoners of war? Generally, prisoners are war are

⁵⁹The United States Army manual on the law of war sets out the current rules for American soldiers in a paragraph dealing with reprisals: "The taking of hostages is forbidden (GC, art. 34). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden." FM 27-10, *supra* note 23, para. 497g.

⁶⁰PICTET, *supra* note 3, at 382.

⁶¹Articles 79-135 of the Civilians Convention, or about one-third of the Convention, covers internment of civilians. The "regulations applicable to civilians reproduce almost word for word the regulations relating to prisoners of war." *Id.* at 370.

persons belonging to the armed forces "who have fallen into the power of the enemy."⁶² If the capturing power decrees that persons held by it are prisoners of war, there is no logical reason for the state of which those persons are nationals to reject the characterization. Nor should the United Nations question the designation. The Prisoner of War Convention provides much more extensive protections to captives than does the Civilians Convention.

If they are considered prisoners of war, then they obviously can be held. But their captivity must meet all the requirements of the Prisoner of War Convention. Article 23 of the Convention prohibits detaining a prisoner of war in an area where he might be exposed to the "fire of the combat zone." Like the Civilians Convention, Article 23 also provides that the presence of a prisoner of war may not be used to "render certain points or areas immune from military operations." The prohibition on exposing the prisoner of war to fire in the combat zone is intended to ensure that prisoners of war are evacuated from the front as soon as possible and that they are not then held near military objectives.⁶³ Again, the place to which they are evacuated, if it is an otherwise valid military objective, can not be rendered immune from attack by their presence. Accordingly, there is no reason to place prisoners of war near military objectives. Although the United Nations forces understandably may be reluctant to attack a target where their compatriots are being held, the advantage gained by the Serbs is at best merely tactical and most assuredly remains illegal and impolitic.

The expected response of a war criminal charged with using prisoners of war to shield a target is that the act was required by "military necessity." That a tactical advantage might have been gained by the prohibited act is no defense to a charge of violating unambiguous and nondebatable rules of the law of war. The United States Army manual on the law of war explains, "Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity."⁶⁴ The Bosnian Serbs have made no effort to meet

⁶²GPW, *supra* note 2, art. 4.

⁶³JEAN S. PICTET, COMMENTARY III 171 (1960).

⁶⁴FM 27-10, *supra* note 23, para. 3. See also *In re Burghoff* in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW YEAR 1949, Case 195 (H. Lauterpacht, ed., London 1955). Burghoff was convicted of shooting a number of Dutch citizens without trial as part of an illegal reprisal. He raised the defense of military necessity. The Dutch appellate court addressed the defense of military necessity as follows:

This vain effort to defend crimes stems from the proposition only too often put forward by belligerents, particularly Germany, that military necessity is sufficient justification for offenses against the laws of war. This proposition is directly contrary to the principles of the laws of war.

their obligations under the Prisoner of War Convention and could not successfully plead military necessity as a defense to a charge of endangering the captives.

C. The 1977 Protocols

The 1977 Protocols to the Geneva Conventions,⁶⁵ while perhaps not directly binding on the parties to the conflict, nevertheless provide useful background information on the subject.⁶⁶ Article 44 of Protocol I provides that any "combatant . . . who falls into the power of an adverse Party shall be a prisoner of war." Because combatants generally include all members of the armed forces of a party to the conflict, the members of the national armed forces made available to the United Nations, if not considered to be civilians *vis-a-vis* the Serbs, would be considered combatants. The Protocol provision does not refer to an "enemy," but simply an "adverse Party." Even if the Serbs, through some distortion of a common sense definition, are not characterized as the "enemy" of the United Nations peacekeepers, they most assuredly have made themselves an adverse party (especially by their actions in taking and endangering the lives of the captives). Article 45 of the Protocol provides that should there be any doubt as to the status of a person who "falls into the power of an adverse Party he shall be presumed to be a prisoner of war." The Protocols would, therefore, clearly tip the scale in favor of prisoner of war status for the hostages held by the Serbs.

However, Protocol I also provides some guidance should the captives be considered civilians. The 1949 Conventions did not squarely address the problem. Article 51 of the Protocol addresses the protection of the civilian population and their use as prophylactic prisoners:

The presence or movements of the civilian population shall not be used to render certain points or areas

which are expressly directed to keeping military action within the bounds prescribed by those laws and to delimit the spheres in which an appeal to military necessity may be allowed.

Id. at 551-52.

⁶⁵1977 Protocols to the 1949 Geneva Conventions, reprinted in DEPT OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (SEPT. 1979) [hereinafter PROTOCOL I]. The United States is not a Party to the Protocols. Nonetheless, many of the provisions reflect customary international law.

⁶⁶For purposes of the International Tribunal's jurisdiction, but not for the purpose of setting out principles of customary international law, Protocol I is relevant, at least according to the United States Ambassador to the United Nations. Ambassador Albright said, "it is understood that the laws and customs of war referred to [in the Statute for the Tribunal] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including . . . the 1977 Protocols Additional to these Conventions." Quoted in Meron, *supra* note 7, at 80.

immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.⁶⁷

In sum, it really does not matter how the United Nations personnel are characterized.⁶⁸ Whether they are considered to be civilian noncombatants or prisoners of war, there have been violations of the law.

V. Criminal Liability

The Geneva Conventions make distinctions between "grave" breaches of the Conventions and lesser violations. Where a grave breach of the Conventions has occurred, every party is obligated to "search for persons alleged to have committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."⁶⁹ A party also may choose to hand the suspect over to another party for trial. The sum of these obligations is usually referred to as a duty to "prosecute or extradite."⁷⁰ Grave breaches are universal jurisdiction crimes and, therefore, are subject to prosecution in every state. Where a lesser or simple breach is alleged, the primary duty is on the state of the offender to take such action as is necessary to suppress future violations.

The Civilians Convention lists the "taking of hostages" as one of its grave breaches.⁷¹ Most, if not all, domestic penal codes prohibit the taking of hostages for any reason. The hostage taking that is prohibited—and made a grave breach of the Civilians Convention—includes the added element of a threat to either prolong the detention or put the hostage to death. In effect then, the taking, to be a

⁶⁷PROTOCOL I, *supra* note 65, art. 51, ¶ 7.

⁶⁸There also is a draft treaty concerning United Nations personnel. See Convention on the Safety of United Nations and Associated Personnel *reprinted in* 34 I.L.M. 484 (Mar. 1995). This treaty prohibits the "intentional commission of . . . kidnaping or other such attack upon the person or liberty of any United Nations or associated personnel." *Id.* art. 9(1)(a). Each state party is obligated to make the commission of any of the prohibited acts a crime under its national law "punishable by appropriate penalties which shall take into account their grave nature." *Id.* art. 9(2). Article 14 creates a prosecute or extradite obligation. However, the treaty is not yet in force.

⁶⁹See *e.g.*, GC, *supra* note 1, art. 129.

⁷⁰See generally A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. I L. 402 (1963).

⁷¹GC, *supra* note 1, art. 147.

grave breach, must be more than the domestic law tort of wrongful imprisonment. The commentary explains why: "[T]he fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify."⁷² Conceiving of a hostage situation which does not include the threat to either hold the hostage for a prolonged period of time or to kill that hostage is difficult. In any event, if the Serb hostage takers did not intend to prolong detention or put the hostages to death, they can try to raise their lack of intent to threaten or harm the hostages as a defense in court.

The Prisoner of War Convention also includes a list of grave breaches.⁷³ Although the taking of hostages is not a grave breach of the Prisoner of War Convention (because captives covered by this Convention are properly held), this Convention declares "inhuman treatment" and "willfully causing great suffering" to prisoners of war to be grave breaches. Chaining a person to a likely target is surely "inhuman treatment." The woeful countenance on each prisoner's face demonstrates that they were caused "great suffering."

Article 13 of the Convention requires that "Prisoners of War must at all times be humanely treated." Article 13 adds definition to the concept of inhuman treatment and prohibits "any act or omission causing death or seriously endangering the health of a prisoner of war"⁷⁴ Undoubtedly, chaining a prisoner of war to a valid military objective, which might at any time be attacked, clearly endangers the health of the prisoner. Article 13 also provides that endangering the health of a prisoner of war "will be regarded as a serious breach of the present Convention."⁷⁵

What does all this mean? The Serbs have committed grave breaches of the Geneva Conventions by taking and endangering the United Nations personnel and every state party to the Conventions is obligated to take action to "prosecute or extradite" those responsible for the breaches. In language common to each of the Conventions a "High Contracting Party" is required to "search for persons alleged to have committed . . . grave breaches . . . and . . . bring such persons, regardless of their nationality before its own courts."⁷⁶ The broad language of the obligation ("search for," "alleged," "bring")

⁷²PICTET IV, *supra* note 3, at 600-01.

⁷³GPW, *supra* note 2, art. 130.

⁷⁴*Id.* art. 13.

⁷⁵In Article 13, the word "serious" is used rather than "grave." The equally authentic French text uses the word "grave" in both articles. No distinction is intended. HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 352 (1979).

⁷⁶See GC, *supra* note 1, art. 146.

refutes any suggestion that the "prosecute or extradite" obligation is limited to the trial of a defendant actually in custody. Preparing appropriate indictments is clearly part of prosecution action and is a precursor to bringing the defendant before the courts. States which do not take steps to prosecute or extradite are themselves violating the Geneva Conventions. There is no room in the law related to grave breaches for political considerations.

VI. Enforcing the Law

The conflict in the Former Yugoslavia is a military, legal, and political quagmire. Yet, in that quagmire we can find at least one point of firm terrain—the law of war. Violations of the law of war have occurred on all sides of the conflict. But, regarding the hostage-taking incident, only the Serbs are responsible. There is no doubt as to the law or as to its violation by the Serbs. To simply take a "let bygones be bygones" approach to law enforcement in the hope of reaching some sort of peace settlement would be a tragic mistake. Yet, unfortunately, this is all too often suggested as part of, if not key to, any proposed "diplomatic solution." If the Serbs will negotiate only after an assurance of immunity from prosecution, why not give them the immunity? The answer is that any agreement containing such a provision is unlikely to stand for long. Further, there would be no way to immunize the Serbs from enforcement action taken by countries which had no part in the agreement, but which take their obligations under the Geneva Conventions seriously and are prepared to enforce them. If Serbian war criminals cannot be given total, universal, and absolute immunity—an apparent impossibility—then why make immunity a key to "peace?" But, there is a larger issue. If recognized war criminals are able to negotiate away their crimes, then much of the *raison d'être* for the law of war is negated. Such blatant contempt for the law must have a consequence.

Of course, the initial goal when a belligerent commits a war crime is to force that belligerent to stop. As this is written, the Serbs apparently have released the hostages, so one might be tempted to accept the argument that because the war crime has ceased, there is nothing left to be done. Unfortunately, this is absolutely wrong. When a kidnaper releases his victim, society does not simply walk away and take no action against the kidnaper. Although the release of the victim always remains the primary goal, accomplishing that goal does not wipe the slate clean. The kidnaper must pay a price for his actions. Why should any less be demanded, or expected, of the

wartime hostage-taker?

One clearly permissible consequence is simply to conduct a reprisal operation. The action of the Serbs is clearly illegal. A follow up, and strengthened, air raid to punish them, and, thereby, prevent such crimes in the future, would be a most appropriate reprisal action. In this author's opinion, the reprisal action should be accompanied by a clear and unequivocal statement that the reprisal attack is occasioned solely by the prior illegal act of the Serbs in taking the hostages and, if further violations of the law occur, so too will further reprisal actions. While such action might again endanger the peacekeepers or simply invite counter-reprisals by the Serbs, these possibilities should not automatically be a bar to military action. The Serbs must be made to believe, or at least worry, that there might be a heavy price to pay for their continued violations of the law of war. Sometimes, we need to quit speaking softly, or even loudly, and use the "big stick."⁷⁷

It might also help to constantly remind the Bosnian Serbs that the protection of human rights is a fundamental aim of the international community. If the Serbs intend to fight a war, they must do so in compliance with the law that regulates war. Nothing prohibits the international community from getting more involved in the conflict to protect the human rights of noncombatants. The world is appalled at the actions of the Bosnian Serbs. They have chosen to conduct the Bosnian war using methods not seen since those same methods were condemned during and after World War II. If the prosecution of war criminals was an Allied war aim in World War II,⁷⁸ how can the world sit by and allow a reversion to pre-World War II atrocities to go unpunished today?

Every press release or news conference concerning the war in Bosnia should include a statement that the world expects some action on the part of the Serbs directed at punishing those who have publicly exhibited such contempt for law. Further, every diplomatic utterance should include a demand for trial and a reminder that the nations of the world intend to take whatever action is required to

⁷⁷The "big stick" quotation is attributed to President Theodore Roosevelt. There was a somewhat analogous event to the hostage taking in Bosnia during his presidency. In 1904, an American, Ion Perdicaris, was taken hostage by a Moroccan bandit named Raisuli. Raisuli intended to hold Perdicaris until the Moroccan government agreed to his demands. Roosevelt sent a message to the Moroccan government outlining two options: "Perdicaris alive or Raisuli dead." Perdicaris was released, but only after the Moroccan government paid a ransom to Raisuli. But, suppose a message were sent to the Bosnian Serbs along the lines of "The peacekeepers free or Karadzic dead." Such a message certainly would serve as an "attention getter" and would be so out of character with the normal diplomatic language that one might reasonably expect results, and quickly.

⁷⁸See *The Moscow Declaration*, reprinted in 38 A.J.I.L. 7 (Supp. 1944).

place those responsible for this outrage in the defendant's dock.

Karadzic's public approval of the taking of the hostages and his approval of their mistreatment is a prosecutor's dream. It is now impossible for him to claim a lack of knowledge or disapproval of the hostage taking. If there was ever any doubt as to the propriety of making him an international bandit, that doubt has been removed by his actions. But, in addition to providing the fact finder with videotaped evidence of his individual criminal responsibility, he also has made any criminal defense by his subordinates very difficult. His characterization of the captives as "war prisoners" clearly placed all Serbian military subordinates on notice as to their officially recognized status. When the captives were declared to be prisoners of war, any question as to the standard for their treatment and their coverage by the Prisoner of War Convention was removed. From that moment on, his subordinates were on actual notice that the captives were considered by their leadership to be prisoners of war and their treatment governed by the Prisoner of War Convention. And, as is the case with all criminal law, even Bosnian Serb "soldiers" are presumed to have knowledge of the law.

War crimes have occurred on all sides of the war in Bosnia. The usual explanation/defense/excuse for one side's violations of the law of war is that the other side has done exactly the same thing. This is the equitable doctrine of *tu quoque* or "thou also."⁷⁹ The essence of this doctrine is "If I did it, you did it too! And, therefore, who are you to pass judgment on me?" Even though it is not a legal defense to a war crimes charge, it is the type of argument that can make war crimes trials appear to be driven more by politics than law. But, in seizing United Nations personnel and holding them as hostages, this plea simply is not available. United Nations forces never held Bosnian Serbs hostage.

What should be done? First, every former hostage should be interviewed regarding the circumstances of his capture and the conditions of his imprisonment. Statements should be taken for use in any criminal trial. The identity of the commanders who carried out the seizure as well as the identity of those who served as guards should be established. The evidence needs to be collected quickly and preserved.

As soon as possible, those states whose nationals have been held and abused should prepare indictments against the Serbian captors, identified by the foreign equivalents of "Jane Does" and "Richard Roes" if necessary. But, most importantly, all those identified members of the Serbian leadership who have publicly embraced

⁷⁹See HOWARD S. LEVIE, *TERRORISM AT WAR* 521-25 (1993).

the hostage taking should be named in the indictments. All those who actually participated in the taking, mistreating, and endangering of the captives also should be promptly indicted.

Obviously, an indictment based on the hostage taking should also be prepared by the Prosecutor's office at the Special Tribunal established by the United Nations to hear war crimes cases arising in the conflict.⁸⁰ Furthermore, other countries throughout the world—and especially the United States—should make clear that they also are prepared and willing to aid in the capture and prosecution of war criminals. As the world's only superpower, the United States has the ability to truly be a "bully pulpit" from which to make, and enforce, a demand for justice. As a practical matter, the United States is now in a position to condition foreign aid, governmental recognition, and a host of other favorable actions on virtually any lawful goal it wants to establish. One of those goals should be the termination of all support for countries that engage in war crimes or which take no action to punish war criminals.⁸¹ If necessary, the United States should stand ready to prosecute war criminals in its courts, basing its jurisdiction on the universality principle. The United States should review the available forums in which such a trial might take place, including the possibility of bringing war criminals to trial before general courts-martial and military commissions.⁸² Both military forums have statutory jurisdiction to try "any person" for a violation of the law of war.⁸³

⁸⁰The Tribunal was established on May 25, 1993 by the United Nations Security Council pursuant to its Chapter VII authority as outlined in the United Nations Charter. See generally James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 A.J.I.L. 639 (1993).

⁸¹The debate over the establishment of diplomatic relations with Vietnam has focused on the prisoner of war/missing in action issue. Apparently, there has been no demand by the United States that Vietnam demonstrate its compliance with its obligations under the Geneva Conventions to punish Vietnamese soldiers who tortured American prisoners of war held in North Vietnam. In this author's opinion this is a grievous mistake. Compliance with the fundamental precepts of international law should be a prerequisite to membership in the community of nations. The same mistake should not be made if and when the issue of establishing formal diplomatic relations arises regarding the Bosnian Serbs.

⁸²Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV., 509, 519 (1994). "Very little attention has been paid in recent years to the possibility of using American military tribunals to enforce the law of war. Such a use, however, appears to be a permissible option supported by precedent."

⁸³General 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." 10 U.S.C. § 818. "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." *Id.* § 821.

The chain of command of the Serbian military forces is known. The Hague Prosecutor's Office already has indicted the Bosnian Serb Army commander, General Ratko Mladic,⁶⁴ as a war criminal for previously committed crimes. But a commander also can be held criminally responsible for the actions of his subordinates. The commander's criminal liability extends at least to those cases where he knew, or should have known, of the offense and took no action to either prevent it or to stop it.⁶⁵ Given the publicity that the taking and holding of the hostages generated, it would be most unlikely for a Serbian commander to successfully plead a lack of knowledge. If any Serb commander made an effort to stop the offense and to punish those responsible, it has yet to be reported. Therefore, Serbian commanders, with either chain of command responsibility for the hostage takers or territorial responsibility for the areas in which they were held, should be indicted and given an opportunity to make their case in a judicial forum.

Once indictments are prepared, a complete international police effort should be mounted. No effort should be spared in bringing the suspects into a judicial forum. Arrest warrants should be prepared and distributed around the world. The list of the indicted should be forwarded to INTERPOL for inclusion in its computer data base. Having one's name listed as a wanted criminal in INTERPOL's computer network sends a global message that those who violate the law of war are no different than any other transnational criminal. Once indicted, the "mugshots" of every known suspect, including Karadzic, should be on the first page of every bulletin issued by INTERPOL. INTERPOL serves chiefly as an information exchange mechanism rather than as an action agency. But, with such obvious war crimes, it becomes important to focus attention on the crime and the criminal. With attention comes pressure and when the pressure is great enough, action might be taken to bring the criminals to justice.

However, suppose that the effort to bring the suspects into court fails. Even though the International Tribunal for Yugoslavia is prohibited from trying a person *in absentia*, some consideration should be given to doing so in the domestic criminal courts of those states in which the war criminals are indicted. Trials *in absentia* are an accepted part of many domestic legal systems and Martin

⁶⁴In early August 1995, Karadzic formally removed Mladic from command. The removal apparently had nothing to do with Mladic's indictment by the Hague Tribunal as a war criminal, a distinction shared by Karadzic. Rather, the removal appears to be related to battlefield losses to the Croats. His removal has been challenged by other Bosnian Serb generals. *Bosnian Serb Generals Reject Demotion*, WASH. POST, Aug. 7, 1995, at A14.

⁶⁵See generally William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1993).

Bormann was tried *in absentia* by the Nuremberg Tribunal.⁸⁶ Those responsible for the daily atrocities in the Former Yugoslavia should be made to worry about the possibility of such a trial. The benefit of considering trials *in absentia* is clear:

If there is enough evidence collected, the mere fact that the accused is not accessible to the tribunal cannot impede his prosecution. If there is a possibility of trying individuals *in absentia* . . . main war criminals will not escape international condemnation and punishment. If there is such a possibility, it will provide the way to isolate perpetrators as well as the governments giving shelter and refusing to extradite war criminals.⁸⁷

An *in absentia* trial does not mean that the defendant cannot make an appearance, it means only that the trial will not be delayed while the court awaits an appearance. Additionally, any indictments for war crimes would be made globally public and the world's media certainly would cover the trial. The defendant would be on notice as to all the proceedings and the prosecution's case against him. The trial would not take place in some sort of "Star Chamber" in which the defendant is given no opportunity to present a defense. What could be wrong with offering war criminals the opportunity to publicly appear in a properly established court and explain and defend their actions?

The country with the greatest influence on the Bosnian Serbs is Serbia proper. Serbia should be especially reminded that the lifting of the international embargo against it is absolutely dependant on its cooperation in bringing war criminals to justice. The Bosnian Serb people also should be made to understand that they might avoid some of the world's approbation, and take a giant step toward international legitimacy, by trying the war criminals themselves. Of course, the trials would have to be legitimate and something more than mere show. In short, treat war criminals like war *criminals*, not as respected national leaders.

Incredibly, a Serbian leader has been quoted as saying "I expect we have gained a lot of respect from this. The international community has started to respect us as much as all the others in

⁸⁶German General Heinz Lammerding, who ordered the destruction of Oradour-sur-Glane, was tried by the French *in absentia* after the war. Shirer, writing in the late 1950s, reported that Lammerding never had been found. SHIRER, *supra* note 32, at 993.

⁸⁷Symposium, *Should There Be an International Tribunal for Crimes Against Humanity*, VI PACE INT'L L. REV. 69 (1994) (remarks of Kresimir Persl, Counselor, Embassy of Croatia, Washington) [hereinafter Symposium].

this conflict."⁸⁸ Where such contempt for the law and human decency are publicly displayed, respect never should be the result. The taking of these hostages should lead to the international community "respecting" these war criminals to the same extent as the Bosnian Moslems and the other Serb victims "respect" them. If so, indictments and preparations for trials should not be long delayed.

These war criminals should be forced to live as international outcasts, unable to leave their enclaves without fear of being arrested. At the same time, international recognition of the legitimacy of their cause should be absolutely intertwined with the willingness of the Serbian forces to comply with the minimum standards of the law of war, including the public prosecution of those who fail to do so. When the commission of war crimes is seen as a tactic in which any short-term tactical advantage is far outweighed by the long-term adverse consequences to the cause as a whole, war crimes will diminish considerably. It is an elementary principle of physics: for every action there is a reaction. When war crimes are committed, the individual and the cause should expect to pay a price.⁸⁹ Putting war criminals, regardless of political station, in the defendant's dock is certainly an appropriate reaction to the crimes committed. This is not a quixotic quest. There is no doubt as to the law; no doubt as to its violation; no doubt as to the identity of some of those responsible; and no doubt as to the duty imposed on the rest of the world. What is missing is a demonstrated determination to enforce the law.

As this article is being written (Summer 1995), the tide of war is running strongly in the Bosnian Serbs' favor. It is quite probable that the string of Serb military successes will continue and that the Bosnian government may be forced to submit to the Serbs. Should

⁸⁸Christine Spolar, *Bosnian Serbs Say World 'Has Started to Respect Us'*, WASH. POST, June 9, 1995, at A21.

⁸⁹The price to be paid could include monetary damages. Article 3 of the Fourth Hague Convention of 1907 provides:

A belligerent which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Hague Convention No. IV, *supra* note 29. The 1949 Conventions reflect the same sentiment in a provision common to all four Conventions:

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

GC, *supra* note 1, art. 148; GPW, *supra* note 2, art. 131. Regarding this provision, Pictet has stated that "The State remains responsible for breaches of the Convention and will not be allowed to absolve itself from responsibility on the grounds that those who committed the breach have been punished. For example, it remains liable to pay compensation." PICTET IV, *supra* note 3, at 602-03. Each of the hostages, their state of nationality, and the United Nations might demand monetary compensation based on these provisions.

this happen, the effort to punish those responsible for egregious violations of the law of war should be redoubled, not reduced or eliminated. Victory on the battlefield can not be seen as leading to immunity in the courts. Entry into the family of civilized nations must be predicated on a demonstrated ability to live by and enforce those basic rules of law recognized as binding on every member of the family. Again, if the Serbs cannot, or will not, produce the defendants for trial in the Hague Tribunal or in the courts of another state, they have the right to meet their law of war obligations by trying the defendants themselves.

In the wake of the Serbian seizure, in a conflict a thousand miles away and on the edge of another continent, the world witnessed yet another hostage taking.⁹⁰ Chechnyan rebels seized hundreds of hostages, executed some, and announced that more would be killed unless the Russian government gave in to their demands. Not unexpectedly, the few Chechnyan guards photographed also wore masks to hide their identity. It is not too much to suggest that the Chechnyan hostage taking was based on the apparent success of the Serbs in extracting some sort of promise from the United Nations that there would be no more attacks on Serb positions. Whether or not such a promise was actually made is irrelevant. Others react to what they see as a positive outcome for obvious violations of the law by committing the same violations. Conceivably, the Chechnyan rebel leadership might have been less willing to take and then execute hostages if the Serbs had been treated as international outlaws rather than as successful military commanders and lawful players on the world scene. Just as in Bosnia, this crime must be punished.

The prosecution of war criminals can be a major weapon in the arsenal of law available in the much-touted New World Order. The weapon may be a little rusty from lack of use, but it can be cleaned and polished and once again made to do its duty in enforcing the law. The prosecution of a war criminal forces the individual criminal to explain his actions and endure the consequences. But additionally, the public trial of war criminals ensures that the criminal personalities of those responsible for committing atrocities become known to their countrymen. At the conclusion of the Nuremberg trials, Herman Göring discussed the significance of the trials with the prison psychologist. Göring, Hitler's onetime trusted lieutenant, said of his Fuhrer's legacy: "You don't have to worry about the Hitler legend any more. When the German people learn all that has been revealed at this trial, it won't be necessary to condemn him; he has

⁹⁰Lee Hockstader, *Gunmen Hold 500 Hundred Hostages in Russian Town*, WASH. POST June 16, 1995, at A1.

condemned himself."⁹¹ If we substitute the Serbian leadership for Hitler, and the Serbian people for the Germans, the same analysis might again be made for the importance of war crimes trials in this case.

Some argue that the prosecution of war criminals might hinder a return to peace. However, this is not true. A viable rule of law is crucial to establishing lasting stability and peace. The people of Bosnia, on all sides, are not likely to forget the crimes that have been committed against them. Not every member of the Bosnian Serb forces is a war criminal. Very likely, many of them are as appalled by these crimes as is the rest of civilization. When war criminals are brought into court and their misdeeds recounted for the world, the result is to focus attention, and condemnation, on those actually responsible for the atrocities. In the words of the Bosnian Ambassador to the United Nations, "[W]hen we identify and prosecute the guilty, we exonerate the innocent."⁹²

In 1941, the world watched in horror as the Nazis systematically conquered Europe and imposed a brutal regime on the peoples of Europe. In October 1941, two months before the United States entered the war, President Roosevelt discussed the Nazi practice regarding hostages:

The practice of executing scores of innocent hostages in a reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples learned long ago the basic principle that no man should be punished for the deed of another. . . . These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution.⁹³

President Roosevelt's words were prophetic. They are as relevant for the war in Bosnia today as they were for the war in Europe over fifty years ago. While it may be difficult for the world to understand what this war in Bosnia is all about,⁹⁴ a failure to punish

⁹¹G. M. GILBERT, NUREMBERG DIARY 392 (1947).

⁹²See Symposium, *supra* note 87, at 63 (remarks of Ambassador Muhamed Sacirbey).

⁹³*Hostages Case*, *supra* note 21, at 798-99.

⁹⁴One author has described the cause of the war as follows:

Bosnia's war is cruelly simple. It is the result of the resurrection in our time of the aggrieved and historical quests of two great Balkan powers of medieval origin, Serbia and Croatia, and the attempt to re-establish their ancient frontiers with modern weaponry in the chaos of post-communist eastern Europe.

those responsible for the atrocities which have occurred certainly will make it easier to understand at least part of what the next war in the Former Yugoslavia will be about—unrequited revenge.

ED VULLAMY, *SEASONS IN HELL 5* (1994). While this might offer an explanation of the cause, it does not quite answer the question, "Why?" In answer to this question another author writes:

But finally there must and does come the question why, which is the hardest to answer because there are hundreds of answers to it, none of them good enough. No graphics, drawings or maps can be of any genuine help, because the burden of the past—symbols, fears, national heroes, mythologies, folksongs, gestures and looks, everything that makes up the irrational and, buried deep in our subconscious, threatens to erupt any day now—simply cannot be explained.

SLAVENKA DRAKULIĆ, *BALKAN EXPRESS* 7 (1993).

THE NUREMBERG PRINCIPLES, COMMAND RESPONSIBILITY, AND THE DEFENSE OF CAPTAIN ROCKWOOD

MAJOR EDWARD J. O'BRIEN*

I. Introduction

On the evening of 30 September 1994, Captain (CPT) Lawrence P. Rockwood, a counterintelligence officer for Joint Task Force (JTF) 190, left his place of duty at the Light Industrial Complex in Port-au-Prince, Haiti, and went to the National Penitentiary to conduct an inspection.¹ Captain Rockwood feared that prisoners in the National Penitentiary were being abused, tortured, and killed.² Although Captain Rockwood had brought his concerns to other members of the JTF staff, they did not share his concern.³ The testimony of several witnesses at his trial indicate that CPT Rockwood's fears were based on speculation and not on any evidence of abuse at the National Penitentiary.⁴ By going to the National Penitentiary,

*Judge Advocate General's Corps, United States Army. Written while assigned as a student in the 44th Judge Advocate Officer Graduate Course. B.S., *magna cum laude*, 1984, Washington and Lee University; J.D., *magna cum laude*, 1992, University of Notre Dame Law School; LL.M. candidate, 1986, The Judge Advocate General's School, United States Army. Formerly assigned as Trial Counsel and Chief, International and Operations Law, 10th Mountain Division, Fort Drum, New York, 1992-95; Assistant S-3, 307th Engineer Battalion (Airborne), Fort Bragg, North Carolina, 1988-89; Company Commander, Executive Officer, and Platoon Leader, 130th Engineer Brigade, Hanau, Germany, 1984-87. This note is based on a paper the author submitted to satisfy, in part, the Master of Laws degree requirement. The author deployed to Haiti as the legal advisor to Brigade Combat Team 2-10 (10th Mountain Division), and later served as a prosecutor in *United States v. Rockwood*.

¹Francis X. Clines, *American Officer's Mission for Haitian Rights Backfires*, N.Y. TIMES, May 12, 1995, at A1.

²Charley Reese, *Americans, Don't Tolerate Injustice Done to Fine U.S. Serviceman*, ORLANDO SENTINEL, Jan. 5, 1995, at 12.

³*Id.*

⁴*United States v. Rockwood*, No. 9500872 (10th Mountain Div. 22 Apr. & 8-14 May 1995) [hereinafter *Rockwood Record of Trial (ROT)*]. Three witnesses, Chief Warrant Officer (CW2) Francis R. O'Connell, Sergeant First Class (SFC) David L. Hooper, and Sergeant (SGT) Philip E. Quinn, each testified that they saw all of the intelligence reports submitted to the JTF Headquarters but none of them saw any reports of violence at the National Penitentiary. *Id.* at 982, 1151, 1213. Captain Rockwood based his conduct on two reports. First, CPT Rockwood relied on a report of the horrible conditions United States soldiers discovered in the prison at Les Cayes. Second, CPT Rockwood relied on a State Department report which characterized the conditions in the Haitian prisons, including the National Penitentiary, as poor. *Id.* at 1823 (testimony of CPT Rockwood). These reports established that prisoners received inadequate amounts of food, water, and medicine, and that the prisons were crowded

CPT Rockwood left his place of duty and disobeyed orders.⁵

At his court-martial, CPT Rockwood tried to justify his conduct based on international law.⁶ One of CPT Rockwood's defense theories was that his command was criminally negligent by not protecting Haitian prisoners from alleged human rights abuses, and that

and very unsanitary. *Id.* Prosecution Exhibit 9 (State Department Report). We need not resolve the question of whether institutional neglect is a human rights violation. Even if it is, human rights treaties do not impose an obligation on a third-party nation to rectify the violations. Human rights treaties establish rights and duties between citizens and their government. See Richard B. Lillich, *Human Rights*, in JOHN N. MOORE, ET AL., NATIONAL SECURITY LAW 671, 720 (1990). Institutional neglect, in this case, is not a war crime, since the law of war did not apply. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the law of war applies during international armed conflict); *infra* note 12 (the United States was not an occupying power); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995) (stating that the Geneva Conventions were not "strictly speaking, applicable" to United States operations in Haiti). Captain Rockwood's concern about physical abuses at the National Penitentiary was baseless speculation. While the JTF Commander focused on mission accomplishment (creating a safe and secure environment) and force protection, CPT Rockwood set his own agenda. To fully appreciate the wrongfulness of CPT Rockwood's conduct, one must consider the context in which it occurred. Colonel (COL) Richard H. Black described the situation in Haiti to a House Subcommittee as follows:

Troops landed in Haiti to begin Operation Uphold Democracy on September 19, 1994. [Captain] Rockwood's actions took place during the dangerous period just eleven days after Multinational forces arrived in Haiti. Domestic support for the intervention was fragile. It was evident that Americans felt the operation did not warrant U.S. casualties, so security concerns were paramount. Our "permissive entry" was made with the agreement of both the *de facto* and the *de jure* governments of Haiti. We were not in a state of belligerency, and the extent of our influence over the affairs and personnel of the Haitian government was in a state of transition. Port-au-Prince was in a state of civil unrest. On September 29, the day before CPT Rockwood's surreptitious nighttime departure, the multinational force responded to a grenade attack and two shooting incidents in that city which left 16 Haitians killed and 60 wounded. The potential for a widespread outbreak of violence was substantial. A misstep at that moment might have set in motion a chain of events leading to loss of American lives and collapse of the entire mission.

Human Rights Violations at the Port-au-Prince Penitentiary: Hearing Before the Subcomm. on the Western Hemisphere of the House of Representatives Comm. on International Relations, 104th Cong., 1st Sess. 27 (1995) (written statement of COL Black) [hereinafter *Congressional Hearing*].

⁵Clines, *supra* note 1, at A1. Charges included two specifications of absence without leave (AWOL), disrespect to a superior commissioned officer, willful disobedience of a superior commissioned officer, failure to obey a lawful order, and conduct unbecoming an officer and a gentleman. The disrespect and disobedience charges and one specification of AWOL arose from CPT Rockwood's conduct on 1 October 1994. See Rockwood ROT, *supra* note 4, Appellate Exhibit I (Charge Sheet). The court-martial convicted CPT Rockwood of all charges except the charge for failing to obey a lawful order. The court-martial sentenced CPT Rockwood to dismissal and forfeiture of two-thirds of his pay and allowances.

⁶Clines, *supra* note 1, at A1. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(c) (1984) [hereinafter MCM] ("A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.").

CPT Rockwood could be held criminally responsible if he failed to act.⁷

Asserting that his command was criminally negligent presupposes that the command had a duty to act. Captain Rockwood's defense raised two legal concepts to impose a duty on the JTF 190 Commander. Neither theory withstands scrutiny.

First, CPT Rockwood invoked the doctrine of command responsibility for war crimes committed by subordinate soldiers.

I reached the conclusion that the U.S. would bear responsibility because the human rights violations would be committed with the knowledge of the command, in the direct proximity of its forces, and by Haitian forces with whom the U.S. had a signed agreement of cooperation. I based my concern over the command's possible criminal negligence on the historical principles recognized in the Charter of the Nuremberg Tribunal which held commanders to be liable for failing to take action to "prevent" war crimes. More particularly, I was aware of the case of the *United States v. Yamashita*. General Tomoyuki Yamashita, former commander of Japanese Forces in the Philippines, was sentenced to death in 1945 by an international war crimes tribunal [sic] for his failure to protect American prisoners, even though he neither ordered nor knew of their execution by his soldiers.⁸

⁷Clines, *supra* note 1, at A1. Captain Rockwood also raised the defense of duress. See Rockwood ROT, *supra* note 4, Appellate Exhibit XVI. See also MCM, *supra* note 6, R.C.M. 916(h).

It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

Id. This defense has several weaknesses. First, CPT Rockwood's apprehension was not reasonable; he had no information which indicated innocent persons would be immediately killed or suffer serious bodily injury if he did not act. Rockwood ROT, *supra* note 4, at 982, 1151, 1213. Second, CPT Rockwood had other opportunities through the chain of command to eliminate the harm he perceived. *Id.* at 2087-88, 2101-03 (testimony of the JTF Inspector General, Lieutenant Colonel (LTC) Robert L. Harrison). The remainder of this note will focus on the justification defense.

⁸*Congressional Hearing*, *supra* note 4, at 24 (written statement of CPT Rockwood). Captain Rockwood implies that the agreement between President Carter and President Emile Jonassaint made the United States responsible for the actions of Haitian soldiers. However, a review of this agreement leads to the opposite conclusion; this agreement recognizes the sovereignty of Haiti. See Agreement Signed by Jimmy Carter and Emile Jonassaint, the Military-Appointed President of Haiti, in

However, the abuses, if any occurred, were the abuses of *Haitian* soldiers guarding the National Penitentiary, not American soldiers under the command of the JTF 190 Commander. Moreover, nothing indicates that the JTF 190 Commander had knowledge of the alleged abuses. Captain Rockwood did not claim that the JTF 190 Commander ordered the alleged abuses or even knew of them. Captain Rockwood tried to impute knowledge of the abuses he suspected were occurring in the National Penitentiary relying on *United States v. Yamashita*.⁹ However, the facts of *Yamashita* are much different from the facts of CPT Rockwood's case.¹⁰

Port-au-Prince, on 18 September 1994, paras. 2, 4, reprinted in Center for Law and Military Operations, *The Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates*, app. C (draft of 3 Oct. 1995) (on file with author) (hereinafter *Carter Agreement*).

⁹327 U.S. 1 (1946).

¹⁰The cases are not even remotely similar. The crimes committed by General Yamashita's soldiers were widespread and heinous.

[T]he additional specific charges involved the murder and mistreatment of over thirty-two thousand Filipino civilians and captured Americans, the rape of hundreds of Filipino women, and the arbitrary destruction of private property. . . . For nineteen days, . . . the court listened to prosecution evidence that sought to demonstrate the bestiality, enormity, and widespread nature of Japanese war crimes in the Philippines. . . . In whispers and in screams, it heard how over thirty-two thousand Filipino civilians had died. It learned how Japanese soldiers executed priests in their churches, slaughtered patients in their hospitals, machine-gunned residents in their neighborhoods, and beheaded or burned alive American prisoners of war. It learned of Japanese torture, including the water cure, the burning of feet, and the removal of fingers. It learned how one Japanese soldier tossed a baby in the air and impaled it on the ceiling with his bayonet, and how others bayoneted an eleven-year-old girl thirty-eight times. It learned of rape and necrophilia; of how 476 women in Manila were imprisoned in two hotels and repeatedly raped over an eight-day period by officers and enlisted men alike; of how twenty Japanese soldiers raped one girl and then . . . cut off her breasts; and of how drunken soldiers, after killing women civilians, then raped the corpses.

RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 80-84 (1982). The abuses alleged by CPT Rockwood were speculative at best. CW2 O'Connell, SFC Hooper, and SGT Quinn all testified that the headquarters received no reports of abuses at the National Penitentiary. Colonel Michael L. Sullivan testified that he saw no signs of torture or abuse on 1 October 1994 when he walked through the National Penitentiary. Rockwood ROT, *supra* note 4, at 982, 1151, 1213, 1515-16. Mr. Paul J. Browne, Deputy Director of the International Police Monitors, walked through the National Penitentiary on 13 October 1994. Before Congress he said:

no one was found dead inside, and none of the prisoners we talked to reported any killings or proactive physical abuse, but conditions inside the prison were medieval, nonetheless. . . . [after the visit] we worked with the Red Cross to provide inspection of the prisons . . . We had a discussion about providing two meals a day . . . in some areas, but decided that that might cause prison break-ins, people hungry, Haitians, in neighboring communities, trying to get into the prison to be fed. So we limited it to one MRE a day. . . . by American standards of course. I was shocked. But for the poorest country in the hemisphere, whose ordinary

Second, CPT Rockwood claimed that the United States was an occupying power in Haiti, and, therefore, had a duty to go to the National Penitentiary and protect the human rights of the Haitian prisoners.¹¹ However, this argument failed because the United States was not an occupying power in Haiti.¹²

This is only the first component of CPT Rockwood's defense. Merely showing that his command was criminally negligent was not enough; CPT Rockwood also had to show that he had an affirmative duty to act. Captain Rockwood claimed the War Crimes Tribunal at Nuremberg established such a duty. *The New York Times* quoted CPT Rockwood as saying, "I am personally responsible for carrying out international law . . . [t]hat is the Nuremberg (P)inciple."¹³

This note evaluates several components of CPT Rockwood's justification defense to determine whether international law did indeed

citizens lived without potable water, with open sewers like you saw in the prison also coursing their way through the cities . . . and without electricity most of the time, I have to be honest with you that I wasn't surprised that Haiti's prisons were just as bad as some of the conditions the regular citizenry had to put up with.

Id. at 5-6.

¹¹The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Regulations Annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277, 205 Consol. T. S. 277.

¹²Compare Rockwood ROT, *supra* note 4, at 2133-34 (testimony of William H. Parks, Special Assistant to The Judge Advocate General for Law of War Matters, that the United States, the International Committee of the Red Cross, the Aristide government and the Cedras government all understood that the United States was not an occupying power before United States troops deployed); Meron, *supra* note 4, at 78 (that the Geneva Conventions were not "strictly speaking, applicable" to United States operations in Haiti) with Rockwood ROT, *supra* note 4, at 1924 (testimony of Professor Francis Boyle that, in his opinion, "given the circumstances here where the United States had surrounded Haiti, there was massive overwhelming force there ready to be used, an ultimatum had been given and indeed General Cedras, according to President Carter, capitulated only when he was told that U.S. paratroopers had already been sent on their way and were into their mission, and at that point he capitulated to the ultimatum, . . . and went along with the occupation, and I think that if you read [FM 27-10] it's clear that under those circumstances the laws of war and the other treaties applicable would apply."). See also DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 365 (1956) [hereinafter FM 27-10] ("Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.").

¹³Clines, *supra* note 1, at A1. Captain Rockwood never articulated his defense with precision. This quote could signify CPT Rockwood's belief in an international law duty independent of the command responsibility theory. Regardless of whether this represents a separate theory or a component of the command responsibility theory, we ultimately reach the same conclusion.

justify his conduct. Section II reviews the legal innovations of the International Military Tribunal at Nuremberg while Section III examines the doctrine of command responsibility and the criminal liability of staff officers for the unlawful acts of soldiers within the command.

II. What are the Nuremberg Principles?

In 1946, the United Nations General Assembly began the process of capturing the principles of the Charter and judgments of the Nuremberg International Military Tribunal.¹⁴ Under the direction of the United Nations General Assembly, the International Law Commission formulated "Principles of the Nuremberg Charter and Judgment."¹⁵ The Nuremberg trials are a source and a test of the international law of war.¹⁶ However, the meaning of the Nuremberg trials are often misunderstood.¹⁷

One author has reduced the contribution of the Nuremberg Tribunal to two principles.¹⁸ "The Tribunal's most significant innovation was its legal definition of aggression as the 'supreme crime.' . . . A second principle enunciated was that government leaders were personally responsible for their policies. . . . Most of the other Nuremberg principles were corollaries of these two major innovations."¹⁹ Another author has identified seven principles which we will briefly consider.²⁰

A. *The Initiating and Waging of Aggressive War Is a Crime*

Before 1945, war was ethically, morally, and legally neutral.²¹ International law considered a war politically justifiable if a state's

¹⁴Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in JOHN N. MOORE ET AL., *supra* note 4, at 359, 367.

¹⁵*Id.* at 367-68. These principles are reprinted as Appendix L to DEPT OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOL. II (1962) [hereinafter DA PAM. 27-161-2].

¹⁶Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS* 4 (1992).

¹⁷"Some twenty-five years ago, widespread controversy arose over the meaning of Nuremberg vis-a-vis the Vietnam War. . . . Ask the passerby what the words "war crimes" brings to his mind, and the chances are that the reply will be 'Nuremberg.'" *Id.* at 4-5.

¹⁸WILLIAM J. BOSCH, *JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS* 14-15 (1970).

¹⁹*Id.*

²⁰WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* 555-60 (1954).

²¹BOSCH, *supra* note 18, at 14. "International law did not prohibit war; rather it viewed the institution as a normal function of sovereign states. The rights claimed did not have to have legal or moral merits: it was regarded as sufficient that a sovereign state asserted its rights." GERHARD VON GLAHN, *LAW AMONG NATIONS* 670 (6th ed. 1992).

aggressive conduct was essential to its national interests.²² For hundreds of years, the international community regarded the right to go to war as not only a lawful course of action for a sovereign state, but as one of the very characteristics of sovereignty.²³ War served two purposes in international society. First, it provided a method of self-help to enforce rights; second, war provided a method to change the rules of international law when fundamental conditions changed in the relations between states.²⁴

The Nuremberg Tribunal changed this outlook and declared that acts of aggression violated both moral norms and international law. Moreover, the judges asserted that aggression was the greatest legal crime, and that death was the only fit penalty for someone guilty of this crime.²⁵ Beginning with Nuremberg, those who initiated and waged aggressive war could be held responsible for the killings and property damage resulting from the war that they perpetrated or in which they participated.

B. Conspiracy to Wage Aggressive War Is a Crime

The Nuremberg Charter enumerated three international crimes: crimes against peace, war crimes, and crimes against humanity.²⁶ The Nuremberg Charter also defined conspiracy to commit crimes against peace as a separate and discrete crime.²⁷ However, the Tribunal did not interpret its Charter as establishing conspiracy to commit war crimes or crimes against humanity as separate crimes.²⁸ Even though the Charter provided that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law,²⁹ the Tribunal considered this provision to be a theory of individual liability and

²²BOSCH, *supra* note 18, at 14.

²³VON GLAHN, *supra* note 21, at 669.

²⁴*Id.*

²⁵BORSCH, *supra* note 18, at 14.

²⁶See *infra* notes 27, 31, 36 and accompanying text.

²⁷The Principles of the Nuremberg Charter and Judgment include:

VI. The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

DA PAM. 27-161-2, *supra* note 15, at 303.

²⁸HARRIS, *supra* note 20, at 555.

²⁹See DA PAM. 27-161-2, *supra* note 15, at 303-04 "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law." *Id.*

not separate crimes.⁵⁰

C. *The Violation of the Laws or Customs of War Is a Crime*

The Nuremberg Tribunal clearly established violations of the laws or customs of war as international crimes.⁵¹ Before the Nuremberg Charter, international law was unclear whether breaches of the laws of war were criminal acts.

The Hague Convention of 1907 covers land warfare and is illustrative of the conventional law existing before 1945. Article III of the Hague Convention states:

a belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁵²

A fair interpretation of this language is that the payment of compensation by the belligerent state is the only remedy available for a violation of the law of war. Nothing in the Convention covers the trial and punishment of individuals who are guilty of violating the laws of war.⁵³

D. *Inhumane Acts upon Civilians in Execution Of, or in Connection with, Aggressive War, Constitute a Crime*

Traditional international law had not recognized this offense or anything similar before 1945.⁵⁴ The trials of offenders charged with crimes against humanity were widely criticized as *ex post facto* punishment.⁵⁵ Notice the limitation inherent in this principle; to be an international crime the inhumane act or acts must be connected

⁵⁰HARRIS, *supra* note 20, at 555.

⁵¹The Principles of the Nuremberg Charter and Judgment include VI. The crimes hereinafter set out are punishable as crimes under international law:

b. War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment of prisoners of war or of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

DA PAM. 27-161-2, *supra* note 15, at 363.

⁵²VON GLAUB, *supra* note 21, at 877.

⁵³*Id.*

⁵⁴*Id.* at 885.

⁵⁵*Id.* Crimes against peace was criticized as an *ex post facto* law also, but the prohibition of aggressive war was the next step in the evolution of the just war doctrine gaining popularity in international law. See BOSCH, *supra* note 18, at 14. But see TAYLOR, *supra* note 16, at 51 ("The *ex post facto* problem, I wrote was not a bothersome question, if we keep in mind that this is a political decision to declare and apply a principle of international law.")

with an aggressive war.³⁶

The punishment of crimes against humanity beyond traditional war crimes expanded the scope of international law. One of the more controversial aspects of this new international offense was that the acts of Germans against their fellow Germans fell within the definition of the crime. Positive German law, however, would have allowed many of those acts made criminal by the Nuremberg Charter. This expansive criminal definition violated the basic principle of international law that no state shall intervene in the territorial and personal sphere of another national legal order.³⁷

E. Individuals May Be Held Accountable for Crimes Committed by Them as Heads of State

At Nuremberg, for the first time, the international community held individuals, who committed acts of military aggression and related crimes, criminally responsible according to a judicial process.³⁸ "Every international agreement concluded since 1856 [until 1943] on the conduct of hostilities contains a provision to the effect that nations only are the bearers of the rights and obligations arising under the laws and customs of war."³⁹

The Nuremberg Charter changed another legal norm as well.⁴⁰ The principle that individuals are not personally subject to penal

³⁶HARRIS, *supra* note 20, at 556. See also DA PAM. 27-161-2, *supra* note 15, at 303-04. The Principles of the Nuremberg Charter and Judgment include:

VI. The crimes hereinafter set out are punishable as crimes under international law:

...
c. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Id. (emphasis added).

³⁷VON GLAHN, *supra* note 21, at 885-86.

³⁸HARRIS, *supra* note 20, at 537.

³⁹George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407, 416 (1943).

⁴⁰The Principles of the Nuremberg Charter and Judgment include:

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

DA PAM. 27-161-2, *supra* note 15, at 303.

punishments for acts done by them on behalf of the state was a customary rule of warfare before 1945.⁴¹ The Charter eliminated immunity for heads of state acting in their official capacity. The Charter held the individuals who formulated state policies and directed the implementation of those policies responsible where the state policies were criminal under international law.⁴² Not only were heads of state liable; military commanders who acted in a political capacity also were criminally liable. The Tribunal said,

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.⁴³

Liability did not extend to military leaders who participated in an aggressive war but had no responsibility for the political policies or decisions which led to the aggressive war.⁴⁴

F. Individuals May Be Held Accountable for Crimes Committed by Them Pursuant to Superior Orders

The maxim that members of the armed forces of a country are not personally responsible for acts that they commit in contravention of the rules of warfare under the orders of a military superior was a recognized principle of the law of war before 1945.⁴⁵ Under the Nuremberg Charter, not only were individuals subject to international law, but the defense of superior orders did not constitute a valid defense for an individual accused of committing a war crime.⁴⁶

G. An Individual Charged with a Crime Under International Law Is Entitled to a Fair Trial

The Nuremberg Tribunal did not endorse summary justice for the leaders of Germany. The Nuremberg judgment stands for the proposition that war criminals are entitled to a fair trial where their rights are respected, where they can present and fully develop their defense, and where convictions are based on evidence and not expediency.⁴⁷

⁴¹Manner, *supra* note 39, at 416.

⁴²HARRIS, *supra* note 20, at 556-57.

⁴³*Id.* at 557.

⁴⁴*Id.* at 555.

⁴⁵Manner, *supra* note 39, at 417.

⁴⁶The Principles of the Nuremberg Charter and Judgment include:

V. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

DA PAM. 27-161-2, *supra* note 15, at 303.

⁴⁷HARRIS, *supra* note 20, at 560. See also DA PAM. 27-161-2, *supra* note 15, at 303 "Any person charged with a crime under international law has the right to a fair trial on the facts and law."

The elements of a fair trial included the presumption of innocence, the "beyond a reasonable doubt" standard of proof for conviction, and the inadmissibility of confessions taken under duress.⁴⁸

The International Military Tribunal at Nuremberg had a substantial impact on international law. This section illustrates the first error in CPT Rockwood's statement of international law. Among the legal innovations of the International Military Tribunal at Nuremberg was the rule which made individuals criminally liable for their acts which violated international law. However, the Tribunal did not impose a positive duty on individuals to enforce international law.

III. Individual Responsibility for the Acts of Others

This section will examine *United States v. Yamashita* and later proceedings to determine the standard of criminal responsibility for commanders for the acts of their subordinates and also will examine staff officer responsibility for the conduct of subordinates within the command.

A. Command Responsibility

The post-World War II Tribunals consummated the doctrine of command responsibility and the duty to control one's soldiers.⁴⁹ The seminal case in the area of command responsibility is *United States v. Yamashita*.⁵⁰ General Yamashita was the commander of Japanese forces occupying the Philippines during World War II. He was convicted for "permitting" troops under his command to commit extensive atrocities against the civilian population and prisoners of war.⁵¹ This precedent is controversial in that some commentators claim the prosecution did not prove that General Yamashita knew about the atrocities⁵² while others claim that such knowledge was irrelevant.⁵³ "This so-called popular view [of *Yamashita*] . . . is that a commander may be convicted for the war crimes of a subordinate on the basis of *respondeat superior*, without any showing of knowledge."⁵⁴

⁴⁸HARRIS, *supra* note 20, at 558-59.

⁴⁹William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 76-77 (1973). This article traces the evolution of general command responsibility and the specific criminal responsibility of commanders from the time of Sun Tzu through the 1970s. *Id.* at 2.

⁵⁰327 U.S. 1 (1946).

⁵¹See *supra* note 10.

⁵²But see Parks, *supra* note 49, at 22-30 (detailing the evidence that General Yamashita had actual knowledge of the atrocities).

⁵³*Id.* at 87. See, e.g., TELFORD TAYLOR, NUREMBERG AND VIET NAM: AN AMERICAN TRAGEDY (1970).

⁵⁴Parks, *supra* note 49, at 87. *Respondeat superior* means "that a master is liable in certain cases for the unlawful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

Command responsibility is a legal doctrine whereby commanders, in some situations, may be held responsible for the unlawful conduct of their subordinates. The Supreme Court's decision in *Yamashita* considered whether international law imposed a duty on commanders to control their troops.⁵⁵ After considering the relevant international law, the Court found:

these provisions [of international law] plainly impose on [the] petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.⁵⁶

General Yamashita was convicted of a breach of this duty by "permitting" his soldiers to commit brutal atrocities. "Permitting" implies knowledge of the acts permitted.⁵⁷ Knowledge is not only relevant, but necessary, to invoke command responsibility. Of course, a commander could have actual knowledge of unlawful conduct by his subordinates. *Yamashita* stands for the proposition that, in certain circumstances, knowledge can be imputed to the commander.⁵⁸

The Subsequent Proceedings at Nuremberg,⁵⁹ particularly the *Hostage Case* and the *High Command Case*, refined the precedent

⁵⁵[T]he gist of the charge is an unlawful breach of duty by [General Yamashita] as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command and for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.

United States v. Yamashita, 327 U.S. 1, 14-15 (1946).

⁵⁶*Id.* at 16.

⁵⁷Parks, *supra* note 49, at 87.

⁵⁸*Cf. id.* at 90.

⁵⁹The Subsequent Proceedings refer to twelve cases tried in Nuremberg after the International Military Tribunal concluded its proceedings. These proceedings were set up by the United States. The Subsequent Proceedings include: *United States v. Karl Brandt et al.*, (*The Medical Case*); *United States v. Joseph Altstoetter et al.*, (*The Justice Case*); *United States v. Milch*; *United States v. Ernst Weissaecker et al.*, (*The Ministries Case*); *United States v. Flick*; *United States v. Krauch* (*The I. G. Farben Case*); *United States v. Krupp*; *United States v. Von Leeb* (*The High Command Case*); *United States v. List* (*The Hostage Case*); *United States v. Ohlendorf* (*Einsatzgruppen Case*); *United States v. Pohl* (*Concentration Camps*); and *United States v. Greifelt* (*The RuSHA Case*). See DA PAM. 27-161-2, *supra* note 15, at 226-32.

established in *Yamashita*.⁶⁰ The *Hostage Case* was the trial of Field Marshal Wilhelm List, and others, for complicity in the murder of thousands of civilian hostages during the German occupation of Yugoslavia, Albania, and Greece during World War II.⁶¹ One of List's defenses was that he did not know what his soldiers were doing. List argued that he was not at his headquarters when it received reports of the atrocities.⁶² The Tribunal was willing to impute knowledge of atrocities to List because reports of the atrocities had reached his headquarters.⁶³

The *High Command Case* was the trial of Field Marshal Wilhelm Von Leeb, and others, for complicity in the murder of thousands of civilians during the German invasion of Russia.⁶⁴ The judges in the *High Command Case* distinguished *Yamashita*⁶⁵ but reaffirmed its standard of command responsibility. Addressing command responsibility, the Tribunal found the following:

There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. . . . We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and

⁶⁰ *Yamashita* had confirmed the existence of a duty and responsibility [of a commander]; the *High Command* and *Hostage* Tribunals sought to achieve some definitional value for each. *Yamashita* addressed the duty and responsibility of the commander with a broad brush; the *High Command* and *Hostage* cases provide much of the detail necessary to complete the picture.

Parks, *supra* note 49, at 63.

⁶¹ *Id.* at 58.

⁶² 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1271 (1948) [hereinafter TWC].

⁶³ An Army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters. . . . It would strain the credulity of the Tribunal to believe that a high ranking commander would permit himself to get out of touch with current happenings in the area of his command during wartime.

Id. at 1260.

⁶⁴ *Id.* at 462.

⁶⁵ While [*Yamashita is*] not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however entirely applicable to the facts in this case for the reason that the authority of *Yamashita* in the field of his operations did not appear to have been restricted by either his military superiors or the state, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities.

Id. at 544.

that the offenses committed must be patently criminal.⁶⁶

The current Army policy relies on the *Yamashita* standard as clarified by the *High Command Case* and the *Hostage Case*. The current Army standard is as follows:

The commander is . . . responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.⁶⁷

Captain Rockwood claimed that his commander had a duty to prevent Haitian soldiers from committing war crimes. This is an unwarranted expansion of the doctrine of command responsibility. The JTF Commander had a duty to control his troops;⁶⁸ he had no duty with respect to the Haitian soldiers guarding the National Penitentiary.⁶⁹ Even if the prison guards were doing what CPT Rockwood suspected, and even if the JTF Commander had knowledge of what they were doing and did nothing about it, the JTF Commander was not derelict in his duties because he had no duty to control Haitian soldiers. Holding the JTF Commander responsible for the conduct of Haitian soldiers would create a new duty to regulate the conduct of foreign soldiers.

Holding the JTF Commander responsible for the misconduct of Haitian soldiers, assuming there was misconduct, would require one to impute to the JTF Commander knowledge of what the Haitian

⁶⁶*Id.* at 542-45. The court clearly stated that the commander must have knowledge of the offenses to be held responsible on a command responsibility theory. To those who claim that knowledge is irrelevant based on *Yamashita*, this case is a step away from the standard in *Yamashita*.

⁶⁷FM 27-10, *supra* note 12, para. 501.

⁶⁸See 22 U.S.C. § 3927(a) (1985). The Chief of a United States Diplomatic Mission to a foreign country is responsible for "the direction, coordination and supervision of all Government executive branch employees in that country (except for employees under the command of a United States area military commander)." *Id.* While the JTF Commander had a duty to control his soldiers, he did not have a duty to collect information about Haitian human rights practices. Compare *id.* § 2384 placing responsibility with the Assistant Secretary of State for Human Rights and Humanitarian Affairs to observe, review, and gather information pertaining to human rights and humanitarian affairs in foreign countries with *id.* § 2383 committing similar responsibilities pertaining to human rights from the responsibilities of the Secretary of Defense.

⁶⁹See Carter Agreement, *supra* note 8, para. 4 (this agreement recognizes the sovereignty of Haiti); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987) (a state has sovereignty over its territory and general authority over its nationals. Sovereignty means "a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." *Id.* § 206 cmt. 2).

soldiers were doing. Captain Rockwood made a poor case for imputing knowledge of mistreatment at the National Penitentiary to the JTF Commander. Captain Rockwood failed to present the court-martial with any evidence that any abuses occurred at the National Penitentiary during the relevant period. Moreover, Colonel Sullivan and Mr. Browne discovered no evidence of physical abuses in the National Penitentiary during visits immediately after CPT Rockwood's inspection.⁷⁰ Clearly, the abuses were not as widespread as the atrocities in the Philippines during the Japanese occupation. The evidence at trial was clear; the JTF 190 headquarters received no reports of abuses at the National Penitentiary.⁷¹ The only report

⁷⁰See *supra* note 10.

⁷¹See *supra* note 4 and accompanying text. See also Bob Gorman, *The Media and Capt. Rockwood*, WATERTOWN DAILY TIMES, Dec. 3, 1995, at F6-F7.

Rockwood's story was further expanded by Anna Husarska, a staff writer for the New Yorker, who provided articles about Rockwood for the *Washington Post*, "Duty to Disobey," and *The Village Voice*, "Conduct Unbecoming." Husarska gave exacting detail to the events leading up to Rockwood's actions. The most important concerned the "information" the counterintelligence officer was receiving about human rights abuses. "From the beginning, I was receiving many hair-raising reports on prisons, dungeons and other body dumps," [CPT Rockwood] told Husarska. . . . Rockwood then upped the ante. In Husarska's early stories, he said classified intelligence reports prevented him from disclosing to the media all he knew about the National Penitentiary. But a week before his trial, he told Rita Beamish of The Associated Press that he had received intelligence reports indicating that Haitian prisoners were in danger. "We knew there were [between] 400 and 500 people there. I had information that people were being tortured and executed and bodies were being taken to the dump." . . . During his court-martial, Rockwood never produced any witnesses to support his contentions about the Port-au-Prince prison. Under cross-examination, he admitted that he had no information about human-rights violations at the prison before he arrived. In fact, despite his comments to reporters about intelligence information concerning torture and body dumps, Rockwood testified that all he had access to during the week he was in country were State Department reports about prison conditions in general. On the day before Rockwood went AWOL, a hand grenade was thrown into a crowd of Haitians in Port-au-Prince, killing 16 and wounding scores. Rockwood and his intelligence colleagues were ordered to determine where the grenade came from and whether Haitian civilians and U.S. soldiers were in danger of further attacks. . . . For months, the media printed his pious talk about the Dalai Lama, concentration camps, acting on one's conscience and stopping Haitian-on-Haitian violence in the prisons. Reporters took Rockwood's word that he had classified information showing that prisoners were being tortured and killed in Haiti's national prison. But when it was shown that Rockwood's actions were based on his speculation and not intelligence information, much of the media simply ignored the testimony and held tight to Rockwood's pretrial comments. In the end, much of the media missed the central point of this strange case of a man obsessed with ending human rights abuses in Haiti: When he was given a direct order to investigate an actual event in which Haitians were killed by fellow Haitians, Capt. Lawrence Rockwood [investigated the National Penitentiary] instead [.]

that the JTF 190 headquarters received about the National Penitentiary before CPT Rockwood went there to inspect was a State Department report on the conditions of Haitian prisons generally.⁷² Ironically, CPT Rockwood personally prevented the processing of this report through normal intelligence channels by taking it for his own purposes and not logging it in.⁷³ Without widespread abuses or reports of unlawful conduct, knowledge cannot be imputed to the JTF Commander based on *Yamashita* or the Nuremberg cases.

B. Staff Officer Responsibility

International law imposes a duty on commanders to control their subordinates. Staff officers are inherently different from commanders. In the *High Command Case*, the court distinguished between commanders and staff officers:

In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. . . . Command authority and responsibility for its exercise rest definitely upon his commander.⁷⁴

In the *Hostage Case*, two defendants were acquitted because they did not participate in the crimes and, as staff officers, they lacked command authority over those who perpetrated the offenses. Lieutenant General Hermann Foertsch was the Chief of Staff for Field Marshal List. Lieutenant General Foertsch was not responsible for the conduct of the soldiers under List's command. The Tribunal said:

The nature of the position of the defendant Foertsch as chief of staff, his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of any direct evidence placing responsibility on him, leads us to conclude that the prosecution has failed to make a case against the defendant. No overt act from

⁷²See *supra* note 4 for a description of this report.

⁷³Rockwood ROT, *supra* note 4, at 1152-53 (testimony of CW2 O'Connell that he controlled all incoming reports in Haiti, that the State Department report, if received by the JTF headquarters, was not logged in, that the first time he saw the State Department report was at Fort Drum, New York, on 9 February 1995 in CPT Rockwood's possession while CPT Rockwood was preparing for the Article 32 Investigation, and that he asked CPT Rockwood "if he picked it up in Haiti" and CPT Rockwood did not answer.); *Id.* at 1619 (Captain Rockwood testified "I reported to work on the 29th [of September 1994], early that evening I finally received a response to my high priority request of 10 August for the conditions in Haitian penitentiaries. . . it was a general report").

⁷⁴1WC, *supra* note 62, at 514.

which a criminal intent could be inferred, has been established. . . . He must be one who orders, abets, or takes a consenting part in the crime.⁷⁵

Similarly, Brigadier General Kurt Von Geitner, who also was a chief of staff, was acquitted of charges. Interestingly, Von Geitner was acquitted even though he had signed and initialed orders issued by his Commanding General for unlawful acts.⁷⁶

These cases clearly stand for the proposition that a staff officer, like CPT Rockwood, is not responsible for the acts of subordinates.

IV. Conclusion

When we apply the law cited by CPT Rockwood, it does not excuse his criminal conduct. Even if knowledge of the alleged abuses were imputed to the JTF 190 Commander, he was under no duty to act; therefore, he was not criminally negligent under a command responsibility theory. If one assumes the JTF Commander had a duty to control Haitian forces, there were no compelling circumstances or reports to support imputing knowledge of the abuses to him. To find the JTF Commander criminally negligent on a command responsibility theory, one would have to impute to him knowledge of the acts and assume that a duty to control foreign soldiers existed.

Assuming that the JTF Commander was criminally negligent, CPT Rockwood, a staff officer, could not be held criminally responsible for his commander's dereliction. The Nuremberg Principles did not impose a duty on CPT Rockwood to enforce international law. The Nuremberg Principles only required CPT Rockwood to comply with international law to avoid criminal sanctions. Without the threat of criminal prosecution, CPT Rockwood cannot maintain that he was under an international duty to act when he violated the Uniform Code of Military Justice. Therefore, without an affirmative duty to act, CPT Rockwood's conduct cannot be legally justified.

⁷⁵*Id.* at 1286.

⁷⁶*Id.* at 1287. See also DA PAM. 27-161-2, *supra* note 15, at 244 (staff officers are not responsible for the conduct of soldiers of subordinate units within the command pursuant to a criminal order unless they personally had something to do with initiating, drafting, or implementing the criminal order).

THE YAMASHITA WAR CRIMES TRIAL: COMMAND RESPONSIBILITY THEN AND NOW

MAJOR BRUCE D. LANDRUM*

I. Introduction

General Tomoyuki Yamashita was a man at the wrong place at the wrong time. Toward the end of World War II, as United States forces were slicing through the Pacific, the Japanese high command knew that an attack on the Philippines was likely.¹ But Field Marshal Terauchi, the Japanese Southern Army Commander, had lost confidence in his man on the scene in the Philippines, Lieutenant General Kuroda.² On 26 September 1944, Kuroda was relieved as 14th Area Army Commander and General Yamashita was appointed to replace him.³ Arriving from his prior command in Manchuria and assuming command of the 14th Area Army on 9 October 1944, Yamashita had a mere eleven days before the American invasion of Leyte began on 20 October.⁴ He received little or no turnover from Kuroda or his staff, inherited an army with a number of new and untrained soldiers, and was immediately tasked with supporting the defense of Leyte.⁵ General Yamashita barely had time to put together a staff,⁶ learn the situation, and make basic defensive plans. He undoubtedly was not thinking about "law of war" training.

*Major, United States Marine Corps. Written while assigned as a student in the 44th Judge Advocate Officer Graduate Course. B.S., 1982, University of Florida; J.D., 1989, University of Florida. LL. M. candidate, 1996, The Judge Advocate General's School, United States Army. Formerly assigned as Instructor, Division Director, Evidence Division, Naval Justice School, Newport, Rhode Island 1992-95; Trial Counsel, Camp Pendleton, California, 1991-92; Defense Counsel, Camp Pendleton, California, 1989-91; Marine Corps Funded Legal Education Program, 1986-89; Series Commander, Marine Corps Recruit Depot, Parris Island, South Carolina, 1985-86; Platoon Commander/Battalion Staff/Company Executive Officer, 2d Battalion, 8th Marines, Camp Lejeune, North Carolina, 1983-85.

¹RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 3 (1982).

²*Id.* at 5.

³*Id.* at 6.

⁴*Id.* at 8.

⁵*Id.* at 3, 8-10.

⁶Yamashita's chosen chief of staff did not even arrive on the scene from his prior command until 20 October, the day of the American invasion of Leyte. *Id.* at 8.

General Yamashita had no way of knowing that he would be judged against the strictest standard ever devised to hold a commander responsible for the actions of his subordinates. Not only was he at the wrong place and time when he took command of the 14th Area Army, he also was at the wrong place and time when he was captured and tried as a war criminal the following year.

II. The War Crimes

By December of 1944, General Yamashita had given up on trying to support the defense of Leyte and decided to concentrate on defending Luzon.⁷ To do this, he divided his army into three groups, each of which would be responsible for a different sector of the island. Yamashita's "Shobu" Group would occupy the northern sector, while Lieutenant General Yokoyama's "Shimbu" Group would have the sector that included Manila.⁸ As it turned out, the vast majority of Japanese atrocities were committed in Yokoyama's sector, during the time after Yamashita had departed Manila to go north.

The greatest numbers of civilians were killed in the Batangas Province, an area under the control of Colonel Fujishige, a Yokoyama subordinate. The total was estimated at 25,000 killed.⁹ Because Fujishige's forces (known as the Fuji Force) were far removed from Yokoyama's main force, the general gave mission-oriented guidance to his colonel, but left the details of execution to his discretion. Filipino guerrilla resistance was the main problem for the Fuji Force, so Colonel Fujishige decided, on his own authority, to declare war on the civilian population.¹⁰ Fujishige reportedly told his subordinates that "all the civilians have now turned into guerrillas; therefore, kill all of them."¹¹ With orders like this, it is easy to see why such astounding numbers of civilians were murdered in Batangas.

The next highest number of atrocities occurred in Manila, during the defense of that city by the remaining Japanese naval forces, technically attached to Yamashita's army but acting contrary to his orders. General Yamashita had no intention of defending Manila,

⁷*Id.* at 12.

⁸*Id.* at 13. The third group was the "Kembu" group commanded by Major General Tsukada in the Bataan Peninsula. Few, if any, war crimes were alleged to have occurred in this sector. *Id.* at 13, 140.

⁹*In re Yamashita*, 327 U.S. 1, 14 (1946); LAEL, *supra* note 1, at 34-35.

¹⁰LAEL, *supra* note 1, at 34-35.

¹¹*Id.*

but wanted to keep it as long as possible to remove as many of his supplies as he could from the city.¹² Apparently, Rear Admiral Iwabuchi, Commander of the Manila Naval Defense Force was either unable to withdraw in time, or had decided to defend the city with his 20,000 men.¹³ By the time that General Yamashita found out that the naval forces were still in Manila and issued a specific order to Yokoyama to evacuate them, it was too late. Iwabuchi's forces were trapped in the city by MacArthur's encircling divisions.¹⁴ The Japanese defenders killed over 8000 civilians in Manila during a two-week period.¹⁵ Almost 500 civilians were raped¹⁶ and thousands of others were mistreated or wounded.¹⁷

Aside from the Japanese atrocities in Batangas Province and Manila, the Japanese forces committed similar crimes in smaller numbers elsewhere on Luzon, all within the area of General Yamashita's command. Almost 8000 civilians were murdered in Laguna Province, and several hundred in other provinces.¹⁸ But virtually all of these war crimes occurred in Southern Luzon, outside of General Yamashita's "Shobu" sector.¹⁹

III. General Yamashita's Responsibility

General Yamashita surrendered his remaining forces in the Philippines on 3 September 1945.²⁰ Within a month, he was served with a generic charge alleging that he had "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes . . ." ²¹ Two bills of particulars later supplemented this charge with 123 specifications, all

¹²*Id.* at 23.

¹³*Id.* at 26-31. See also Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 169 n.66 (1993); Robert H. Reid, *Manila to Mark Anniversary of Its Wartime Destruction*, AP, Feb. 2, 1995, available in LEXIS, World Library, AP File.

¹⁴LAEL, *supra* note 1, at 31-32.

¹⁵William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 25 (1973); Lieutenant Commander Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 88 (1985).

¹⁶LAEL, *supra* note 1, at 140.

¹⁷Parks, *supra* note 15, at 25; Burnett, *supra* note 15, at 88.

¹⁸LAEL, *supra* note 1, at 140.

¹⁹*Id.* at 139.

²⁰Parks, *supra* note 15, at 22; Burnett, *supra* note 15, at 88.

²¹*Id.*; See also *In re Yamashita*, 327 U.S. 1, 13-14 (1946); DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II 241 (23 Oct. 1962) [hereinafter DA PAM. 27-161-2].

alleging specific war crimes committed by members of Yamashita's command. Combined, the specifications alleged the murder and mistreatment of over 36,500 Filipino civilians and captured Americans, hundred of rapes, and the arbitrary destruction of private property. They did not allege, however, that the accused ordered, or even knew about, any of these crimes.²²

At trial, the defense strategy was to deny any knowledge of the crimes and to discredit any evidence directly linking Yamashita with any of them. The defense argued that the general should not be punished for his "status" as the commander of the perpetrators without any showing of "fault" on his part.²³ The prosecution argued that the atrocities were so widespread and numerous that Yamashita must have known of them, unless he was affirmatively avoiding knowledge. Either way, the prosecution argued, the commander had failed in his duty to control his troops.²⁴

On 7 December 1945, after hearing all the evidence, the military commission, composed of five general officers, convicted General Yamashita and sentenced him to hang.²⁵ According to the commission's written findings, Yamashita's guilt was indicated by the widespread nature of the offenses. Although isolated acts of subordinates would not bring criminal liability to their commander, "the crimes were so extensive and widespread . . . they must either have been wilfully permitted by the accused, or secretly ordered by the accused."²⁶ In other words, the commission did not accept Yamashita's claim of ignorance.

Before the commission had even announced this verdict, the defense team already had sought habeas corpus relief from the United States Supreme Court.²⁷ The Court ultimately denied any relief, upholding the authority and procedures of the military commission, and specifically holding that military commanders have an affirmative duty to control their subordinates.²⁸ The Court held that breaching that duty was a punishable violation of the law of war. The Court did not evaluate the factual guilt or innocence of the accused, but merely held that the military commission that tried him had the authority to do so.²⁹ General Yamashita was executed

²²LAEL, *supra* note 1, at 80-82; Parks, *supra* note 15, at 23-24; Burnett, *supra* note 15, at 88.

²³LAEL, *supra* note 1, at 82-83.

²⁴*Id.* at 83.

²⁵*Id.* at 95; Burnett, *supra* note 15, at 91.

²⁶Burnett, *supra* note 15, at 92 (quoting the military commission findings).

²⁷LAEL, *supra* note 1, at 94; *In re Yamashita*, 327 U.S. 1 (1946).

²⁸*Yamashita*, 327 U.S. at 15-17, 25-26.

²⁹*Id.* at 17.

on 23 February 1946, nineteen days after the Supreme Court issued its decision.³⁰

Opinions vary widely on General Yamashita's personal responsibility for the war crimes on Luzon. Some writers have called him a victim, an "honourable Japanese general" tried and executed on "trumped-up charges,"³¹ the subject of a "legalized lynching."³² Perhaps Supreme Court Justice Murphy's dissenting opinion in the case best summarizes the argument that Yamashita was a scapegoat. In Justice Murphy's view, the victors in the battle had done everything possible to disrupt Yamashita's command, control, and communications, and now they were charging him with having committed a war crime for not having effectively controlled his troops.³³

On the other hand, in a well-researched and persuasively written article, William H. Parks points out evidence in the record that General Yamashita personally ordered or authorized at least 2000 summary executions.³⁴ Other evidence, although perhaps more questionable in reliability, indicated that Yamashita had ordered an extermination campaign against all Filipinos.³⁵ This seems unlikely considering that most of the atrocities occurred in sectors physically distant from Yamashita. As Richard Lael observes in his book, *The Yamashita Precedent: War Crimes and Command Responsibility*, if Yamashita had ordered the atrocities, there probably would have been more offenses in his sector.³⁶ Of course, the Manila sector was the most densely populated area, so inevitably more atrocities occurred there.

In any case, Parks takes the view that Yamashita was not held to a standard of commander's strict liability, as many have claimed, but had participated personally in the war crimes.³⁷ Lael, on the other hand, believes that Yamashita was held to "strict accountabili-

³⁰LAEL, *supra* note 1, at 119; Parks, *supra* note 15, at 37.

³¹Geoffrey Wheatcroft, *Face the Truth About War Crimes*, SUNDAY TELEGRAPH, Feb. 12, 1989, at 24.

³²Jim McInerney, *Fil-Am Defenders Were Hoodwinked By Roosevelt*, ETHNIC NEWSWATCH FILIPINO REP., Dec. 5, 1991, available in, LEXIS, World Library, ALLWLD File (attributing this description of Yamashita's execution to Justices Rutledge and Murphy); see also *Memories of a Painful Journey to Fulfillment*, HERALD (Glasgow), Aug. 12, 1995, available in LEXIS, World Library, ALLWLD File (alleging that Yamashita was really executed because his army beat the British "fairly and squarely in battle in Malaya").

³³*Yamashita*, 327 U.S. at 34-35.

³⁴Parks, *supra* note 15, at 27 n.92.

³⁵*Id.* at 29-30.

³⁶LAEL, *supra* note 1, at 139-40.

³⁷Parks, *supra* note 15, at 37; see also Burnett, *supra* note 15, at 92-93. Parks suggests that much of the misinterpretation of *Yamashita* has been caused by the unartfully drafted commission decision and the biased history of the case written by one of the defense counsel. See Parks, *supra* note 15, at 22, 27 n.92.

ty." but agrees that the case has been misinterpreted.³⁸ That the Supreme Court upheld the verdict of the military commission has been misinterpreted by many to mean that the Court approved the strict standard that the commission applied to Yamashita.³⁹ To the contrary, the Supreme Court merely held that a commander has a duty to protect prisoners and civilians, but did not hold that Yamashita had violated the duty under the facts of that case.⁴⁰

The actual impact of *Yamashita* seems to be somewhere in the middle. Because the military commission made no specific finding that Yamashita actually knew of any of the atrocities, the case is cited for the proposition that a commander is responsible for doing everything possible to prevent war crimes. In a case like this, where the atrocities were so widespread, the commission was willing to find that the commander "must have known" what was going on, and to hold him criminally responsible for failing to act to prevent further violations and to punish violators.

IV. Command Responsibility Refined

Yamashita marked the high point for a commander's criminal responsibility for subordinates' actions. In 1948, two cases tried before the Nuremberg Military Tribunals adopted more limited liability standards for commanders.⁴¹ In *The Hostage Case*,⁴² the command responsibility concept was primarily refined from a "must have known" standard to more of a "should have known" standard. In other words, a commander's knowledge of widespread atrocities within the command area was rebuttably presumed rather than irrebuttably presumed.⁴³

³⁸LAEL, *supra* note 1, at 123, 127.

³⁹*Id.* at 123.

⁴⁰*In re Yamashita*, 327 U.S. 1, 15-17 (1946).

⁴¹LAEL, *supra* note 1, at 123-27; see also Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994) (stating that *Yamashita* was punished for nonfeasance while the Nuremberg tribunals apparently imposed a more lenient malfeasance standard; but see Parks, *supra* note 15, at 63-64 (stating that *Yamashita* took a "broad brush" approach and the Nuremberg cases merely filled in the details). Other trials in the Far East also limited the commander's liability, for example, the trial of Admiral Toyoda in 1949. See *id.* at 72-73.

⁴²Also known as *United States v. Wilhelm List*. Parks, *supra* note 15, at 58; DA Pam. 27-161-2, *supra* note 21, at 232.

⁴³LAEL, *supra* note 1, at 124. In this case, absent exceptional circumstances, commanders were presumed to know the contents of reports that reached their headquarters. *Id.* For example, defendant Wilhelm List's headquarters received reports of thousands of unlawful killings, but List did nothing to stop or condemn the killings and, therefore, was held criminally responsible. Parks, *supra* note 15, at 61 (quoting the decision of the tribunal).

In *The High Command Case*,⁴⁴ another Nuremberg tribunal espoused a standard apparently giving commanders the benefit of the doubt on the knowledge issue. Noting that modern warfare is highly decentralized, this court held that a commander *cannot know* everything that happens within the command, so the prosecution must prove knowledge. Beyond that, this court held that the prosecution must prove wanton criminal neglect (amounting to acquiescence) in supervising subordinates to hold the commander criminally responsible for the subordinates' actions.⁴⁵

With these refinements and limitations of the command responsibility standard, the stage was set, twenty years later, for the trial of Captain Ernest Medina, the immediate superior commander of Lieutenant William Calley and the troops responsible for the My Lai, Vietnam, massacre in 1969. In formulating instructions for the court-martial members to apply to the facts of the case, the military judge closely followed the *High Command* rationale.⁴⁶ He instructed that, to find Medina guilty, the members had to find actual knowledge plus a wrongful failure to act. Furthermore, the wrongful failure to act had to amount to culpable (gross) negligence.⁴⁷ While this formulation may have little precedential value, it clearly rejected any supposed *Yamashita*-type strict liability standard in favor of a standard based on personal culpability.⁴⁸

In 1977, international delegates agreed on Protocol I to the 1949 Geneva conventions. In Article 86, this protocol also adopted a standard of liability resembling the *High Command* formulation.⁴⁹ Although the United States has not ratified Protocol I, the delegates' rejection of the "should have known" standard proposed by the United States signals that the *Yamashita* precedent may not carry any weight in the international community.⁵⁰

V. Command Responsibility in the Former Yugoslavia

The debate over the appropriate standard of command responsibility has taken on a fresh significance in light of the recent indict-

⁴⁴Also known as *United States v. Wilhelm von Leeb*. Parks, *supra* note 15, at 38; DA PAM. 27-161-2, *supra* note 21, at 231.

⁴⁵LAEL, *supra* note 1, at 125-26 (including quotations from the tribunal's decision); see also Parks, *supra* note 15, at 42-43; DA PAM. 27-161-2, *supra* note 21, at 242 (both quoting some of the same language).

⁴⁶LAEL, *supra* note 1, at 130-32.

⁴⁷*Id.* at 130-31.

⁴⁸*Id.* at 132.

⁴⁹*Id.* at 133-34.

⁵⁰*Id.* at 134-35.

ment of Radovan Karadzic and Ratko Mladic, the political and military leaders of the Bosnian Serbs.⁵¹ Whether these cases ever will be tried is unknown and may ultimately be a political, rather than a legal, question.⁵² However, if these cases are tried, the prosecutors must be wary of relying on *Yamashita's* supposed strict liability standard.

Even in United States courts, *Yamashita* has lost favor. If it ever stood for a strict liability standard, that strict standard never has been enforced again.⁵³ The Protocol I standard is probably the best indication of what the international community would find acceptable, and that standard rejects any strict liability.⁵⁴ Comparing the Protocol I standard with that established by the United Nations Security Council in creating the International Criminal Tribunal for the Former Yugoslavia, the two appear to be quite similar.⁵⁵

The recent indictment alternatively alleges both direct participation and command responsibility theories of liability. The language alleging command responsibility follows verbatim the wording of the Security Council's standard.⁵⁶ If direct participation in the crimes is proven, the command responsibility allegation will be unnecessary. But if prosecutors must prove command responsibility,

⁵¹See Indictment (Prosecutor v. Karadzic & Mladic), 1995 International Criminal Tribunal (Former Yugoslavia) Pleadings (July 1995).

⁵²In a footnote, Parks relates that 34 alleged war criminals had to be released at the end of the Korean conflict due to the terms of the armistice. He says that "Only where there is a clear 'winner' and 'loser' is there likelihood of international war crimes trials." Parks, *supra* note 15, at 3 n.5. The question of amnesty for war criminals already has arisen in the current peace talks among the Balkan factions, but the chief prosecutor of the International Criminal Tribunal and the United States State Department have said that there will be none. David Wood, *U.N. War Crimes Charges Complicate Peace Talks Among Balkan Factions*, SACRAMENTO BEE, Sept. 29, 1995, at B9. Only time will tell which view will prevail.

⁵³See *supra* section IV. The case of General Masaharu Homma applied essentially the same standard as *Yamashita*, but this trial ran virtually simultaneously with that of General Yamashita. Parks, *supra* note 15, at 75. See also *In re Homma*, 327 U.S. 759 (1946).

⁵⁴See *supra* text accompanying notes 49-50.

⁵⁵The Protocol I standard imposes liability if commanders "knew, or had information which should have enabled them to conclude in the circumstances at the time" that subordinates were committing war crimes and "they did not take all feasible measures within their power to prevent or repress" the crimes. LAEL, *supra* note 1, at 134 (quoting Article 86 of Protocol I); see also DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 65 (1 Sept. 1979).

The United Nations statute standard imposes liability if commanders "knew or had reason to know" that subordinates were committing war crimes and "failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 508, U.N. Doc. S/25704 (1993) (proposing Article 7 of the statute that ultimately was adopted).

⁵⁶See, e.g., paragraph 33 of the indictment.

they will be *unable* to use a "must have known" or "should have known" standard. Instead they will have to prove that the accused "knew or had reason to know" of the violations and then wrongfully failed to act. In this context, "had reason to know" appears to mean "had the information from which to conclude" much like the more stringent standard of proof embodied in Protocol I.⁵⁷

Holding the prosecution to this higher standard of proof is appropriate. The evidence required to prove actual knowledge in this conflict probably will be abundant because most reports have indicated that atrocities and other war crimes have been a deliberate tool of war, either by the order of the leaders or at least with their knowing approval.⁵⁸ Given the number of times that these accused have been confronted with these allegations by reporters, their claims of ignorance certainly will be less credible than General Yamashita's was.⁵⁹ If the prosecution fails to prove the required knowledge, any conviction obtained without such proof would only martyr the accused and likely would not "meet the judgment of history."⁶⁰ Such are the lessons of *Yamashita*.

⁵⁷See *supra* note 55.

⁵⁸See, e.g., United States Dep't of State, *Bosnia in Light of the Holocaust: War Crimes Tribunals*, 5 DISPATCH 209, 210 (Apr. 18, 1994) (stating that "Bosnian Serb leaders have sought a 'final solution' of extermination or expulsion to the problem of non-Serb populations under their control"); Warren Zimmerman, *The Last Ambassador: A Memoir of the Collapse of Yugoslavia*, FOREIGN AFF., Mar.-Apr. 1995, at 1; Charles G. Boyd, *Making Peace with the Guilty: The Truth About Bosnia*, FOREIGN AFF., Sept.-Oct. 1995, at 22; David M. Kresock, Note, "Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention, 27 CORNELL INT'L L.J. 203 (1994).

⁵⁹See Kresock, *supra* note 58, at 221-25.

⁶⁰This was the rationale proposed by Secretary of War Stimson for having war crimes trials at the conclusion of World War II, instead of summary executions as advocated by Winston Churchill and others. "Punishment is essential, not as retribution, but as an expression of civilization's condemnation of the Nazi philosophy and aggression. . . . That condemnation must be achieved in a fair manner which will meet the judgment of history." LAEL, *supra* note 1, at 47 (quoting a letter from Stimson to Secretary of State Hull, dated 27 October 1944).

GLOBAL SURVIVAL*

REVIEWED BY H. WAYNE ELLIOTT**

The United Nations has declared the 1990s as the "Decade of International Law." In June 1995, the United Nations commemorated the fiftieth anniversary of its Charter. As we look back on the last fifty years, we see a landscape littered with many failures on the part of the United Nations, most the direct result of the overall contentiousness between East and West during the Cold War. But some successes have emerged from the debris. The collective response of the world community, acting largely under the auspices of the United Nations, to the unambiguous and clearly illegal aggression of Iraq against Kuwait stands as the preeminent success. The less successful, but nonetheless significant, attempts by the United Nations to resolve the conflicts in the Former Yugoslavia and Rwanda, to feed the people of Somalia, and to restore some form of democracy in Haiti, also indicate that the United Nations of the future may yet prove to be a useful institution for global stability and peace.

The United Nations is in a period of flux. It has demonstrated that when conditions are right (as with Iraq) it can act, and act decisively. At the same time, it has not yet demonstrated an ability to do much more than talk when conditions are not ideal (such as with Bosnia). What can be done to make the United Nations more effective? If something can be done, should it? In his latest book, *Global Survival*, Benjamin Ferencz provides some answers.

Ferencz is no stranger to the international law community. He has written several books outlining problems that the international community faces in attempting to diminish threats to peace and security. He is an articulate defender of international law, whose experience as one of the prosecutors at the Nuremberg trials lends credence to his ideas. He firmly believes that the United Nations can, and indeed must, be made a more effective player on the world stage. In this book he provides a script for how that might be accomplished. As the book's introduction, written by Professor Louis Sohn, says, "This book is arriving at the right moment when mankind is starting to develop a new 'Agenda for Peace,' and may soon be ready

*BENJAMIN B. FERENCZ, *GLOBAL SURVIVAL* (Oceana Pubs. 1994); 469 pages; \$45.00.

**Lieutenant Colonel, United States Army (Retired). Former Chief, International Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Currently, an S.J.D. candidate at the University of Virginia School of Law.

for dynamic change." Ferencz sets forth concrete proposals for just such a dynamic change.

The book is divided into three substantive parts, followed by an extensive bibliography of relevant texts. Part I is entitled, "The World Legal Order—What's Right and What's Wrong." Here the author traces the development of the current legal order. Earlier attempts at mandating adherence to the rule of law failed because states which were involved in writing the rules were actually more interested in the formal protection of their own parochial interests. As a result, many treaties were so filled with escape clauses and consensus language that their failure to accomplish the lofty goals they set should come as no surprise. In short, there was a weakness in the language of the law itself, and this weakness was compounded by the complete absence of an enforcement system to deal with breaches of the law. Further, the absence of an enforcer was compounded by the lack of an international court to interpret the law and direct that compliance with the law be enforced. There simply could be no forward movement in the law without enforcement and interpretation. *Global Survival* proposes solutions for these problems.

In June 1945, there were great expectations for the newly formed United Nations. The defects which had plagued the old League of Nations had, the Charter's drafters hoped, been either remedied or, at least, diminished. The wartime cooperation of the East and West created an environment of optimism for the embryonic organization. Yet, the United Nations almost immediately became nothing more than a forum for endless debate, staffed by a bloated and moribund bureaucracy. It soon became an organization with little more than moral suasion as its primary weapon. Soon even that largely dissipated. Even as the defects in the Charter became increasingly clear, there was nothing that could be done to change it. Amendment of the Charter was, and is, simply too difficult and too time consuming.¹ Ferencz recognizes the limitations of the amendment process and looks to the United States constitutional practice for an answer. Essentially, he argues that many of the shortcomings in the Charter can be overcome by simply interpreting its provisions differently. Thus, if there needs to be an international criminal court

¹Article 108 of the United States Charter provides the following:

Amendments of the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

to punish individuals who violate international law, he suggests that the Security Council simply direct its creation as part of the authority granted to the Council in Part VII of the Charter to deal with threats to international peace and security. This is exactly what has happened with regard to the establishment of an international tribunal to hear war crimes cases from the conflict in the Former Yugoslavia.

Ferencz argues that some problems are global in nature and, therefore, must be resolved globally. The greatest of these is war. He proposes to minimize the likelihood of war, or at least its destructiveness, by limiting arms. The existing restrictions on nuclear weapons are a solid foundation upon which to build. Thus, he would expand the international inspection system for verifying that states are in compliance with internationally mandated restrictions on the development and employment of nuclear weapons to include conventional arms. Slowing the arms race would speed international security. Those states that fail to comply with mandated standards would be internationally ostracized through economic sanctions. If these sanctions fail, the Security Council must be prepared to act, including using military force.

Part II is entitled "Global Management Reconsidered." Here Ferencz focuses on the applicable international laws for peace, the need to create an international judicial system, and the need for an effective enforcement system. If a system of international courts, with mandated, compulsory, and universal jurisdiction, could be created to render opinions on questions of international law, how could the courts' decisions be enforced against a state? The basic problem confronting global decision makers is the concept of sovereignty. Sovereignty serves as a brake on the development of global solutions to problems. Ferencz argues that there must be "new thinking" about sovereignty, including a recognition that sovereignty actually exists in the peoples of the world and not in the entities through which they are governed.² State boundaries should not be permitted to stand in the way of protecting fundamental human rights. In egregious cases of human rights violations, there is already a growing recognition that the old prohibitions against interfering in the internal affairs of a state should not bar other states from acting to remedy the situation, including holding those responsible criminally liable for "crimes against humanity."³ Again, what is required are innovative interpretations of the Charter. Issues of a people's self-determination and a state's right of self-defense must be viewed in light of the larger good of the world as a whole. Charter prohibitions

²FERENCZ, *supra* note *, at 199.

³*Id.* at 172.

restricting United Nations involvement in matters once considered to be internal to a member state should give way to new interpretations recognizing the relationships of one state, or one people, to others. Ferencz places little faith in the ability of regional organizations to meet the challenges of the future and too much reliance on regional alliances might simply lead to even larger conflicts. Global problems call for global solutions. The Security Council, which serves as the designated guardian of the peace of the world community, must respond to threats to the peace. Where there is a threat to world peace, the Security Council should obtain an advisory opinion from the International Court of Justice (ICJ) and, if force is an appropriate remedy, be prepared to act on the opinion. Having an approving opinion from the ICJ as to which party is at fault and what action is appropriate would dramatically increase the authority of the United Nations. It would automatically give the imprimatur of the law to any enforcement action taken by the Security Council.⁴ Ideally, the military forces employed would come from formally established United Nations troops, a truly international police force.

Part III is entitled "Making the System Work." Obviously, the defects in the United Nations are not new to either lawyers or diplomats. Ferencz makes his contribution to correcting these defects by proposing that the Security Council make greater use of its delegated authority to act in cases of threats to world peace. This broad grant of power would include the development and clarification of existing norms of international conduct and the creation of new organs to help ensure compliance with those norms. Twelve proposed Security Council resolutions are set out which would establish the norms of international behavior, create judicial organs to consider disputes and punish violators, and set up international bodies to enforce the norms and the judicial decisions. Five of the resolutions are intended to strengthen the laws of peace and are derived from prior law-making treaties and practices. These resolutions would: mandate the peaceful settlement of disputes; clearly define aggression; prohibit crimes against humanity; end the arms race; and "enhance social justice" by establishing minimal standards of human welfare, including the protection of the environment. Three resolutions which deal with the creation of an expanded and improved international court system are more radical. One would require that international disputes which are determined by the Council to constitute a threat to peace be submitted to the ICJ and that the Security Council act to enforce the Court's decision. Another would establish an International Criminal Court to deal with individuals who violate certain Security Council resolutions related to interna-

⁴See generally Roberto Ago, "Binding" *Advisory Opinions of the International Court of Justice*, 85 A.J.I.L. 439 (1991).

tional peace. A third resolution would establish a "World Tribunal for Social Justice" as an organ of the Security Council. This tribunal would consider issues related to violations of the social justice resolution discussed above. Finally, Ferencz sets out four resolutions intended to create monitoring and enforcement agencies. These would create a "Disarmament Enforcement Agency" to implement the resolution mandating arms reductions, a "Sanctions Agency" to oversee the implementation of sanctions against states which do not comply with the disarmament resolution, a "Police Agency" to oversee peacekeeping activities, and a "Social Justice Agency" to monitor the progress of human rights. All the proposed resolutions are legally based on the Security Council's mandated responsibility to determine the existence of any "threat to the peace, breach of the peace, or act of aggression."⁵

"New thinking" is required when reading this book. For lawyers, a natural tendency exists to focus on the *status quo* and to view such dynamic proposals for international authority as simply too "Pollyannish" for serious consideration. But Ferencz makes a convincing case. He presents concrete suggestions for solving many of the problems inherent in the existing world order. His principle solution, which relies on innovative interpretations of the Charter, is not far removed from the approach used in resolving constitutional questions in the United States. But could such an interpretive approach work in the Security Council? For the Security Council to take on an expanded role by new interpretations of its existing Charter-based authority might not meet with universal approval, especially from those states that are not permanent members of the Council.⁶ Additionally, where would the Security Council look to find a basis on which to rest its new found interpretations of its authority? Ferencz would look to the overall aims and goals of the institution for guidance, a revolutionary approach which would probably support expanded, and expedited, United Nations activity. Others might prefer to simply look to prior practice and precedent—of which there is precious little on which to build—a somewhat more evolutionary approach which would move the process at a much slower pace.⁷ Certainly, a major hurdle to overcome before effective action by the Security Council can be expected is the possible veto of

⁵U.N. CHARTER art. 39.

⁶[T]he end of the Cold War and changes in political alignments have given rise to new concerns over "political" interpretation of the Charter, particularly by a more active Security Council dominated by the permanent members. Since the Security Council has exercised its mandatory powers and has imposed sanctions, its conformity to Charter provisions has been questioned more sharply in debates and scholarly commentary.

Oscar Schachter, *United Nations Law*, 88 A.J.I.L. 1, 7-8 (1994).

⁷*Id.* at 9.

any proposal by any one of the permanent members. Ferencz addresses this very real problem and suggests five possible, and alternate, solutions. He proposes that the veto power be permitted only if: a permanent member is asked to commit its military forces into battle; the impact of a veto might be modified so that two members must agree to it before it is counted; its use could be limited to procedural issues; it might be forbidden if its use would negate a decision by the ICJ; or the permanent members agree in writing not to exercise the veto.⁸ In his view, none of these solutions would necessarily require amendment of the Charter. Yet, to this reviewer, it seems that if the Charter is not formally amended, the veto always will be a consideration in devising appropriate responses to threats to the peace.⁹ Its mere presence, no matter how restricted, will undermine the organizational stability which is a key component in the process of ensuring "global survival."¹⁰

Another problem might be the limits of the Security Council's interpretations of its own authority. In practice, each organ of the United Nations has determined the limits the Charter places on its power to accomplish its particular functions. The ICJ does not have a clearly accepted judicial review role such as is found in United States practice.¹¹ Without such oversight, the many states that are not members of the Security Council might be quite reluctant to yield such immense power to the few who are.

Ferencz's literary technique is to outline the problem and its background, propose solutions, and then, in an even-handed way, evaluate the solutions. He invites the reader to challenge his approach and to devise other suggested solutions. Ferencz refers to the need for "creative lawyering" when confronting these issues. His goal is to focus attention on the problems and suggest that they are not insolvable. Once that is accepted, answers might be found.

As this review is written it appears that the United Nations

⁸FERENCZ, *supra* note *, at 230-31.

⁹See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 A.J.I.L. 552 (1993) ("Practically speaking, it is quite unlikely that the veto can be eliminated or even significantly limited.") *Id.* at 567.

¹⁰But see FERENCZ, *supra* note *, at 245, "Stability of the international order is important but stability does not mean rigidity—stability requires flexibility."

¹¹In its past jurisprudence, the Court has asserted its competence both to interpret United Nations resolutions and to make judicial pronouncements on the legality and validity of United Nations resolutions with respect to their conformity with the constituent instrument. Both these processes are meaningful in the context of Security Council enforcement action.

Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 A.J.I.L. 643, 664-65 (1994).

will be forced to admit its failure to even slow, much less stop, the fighting in Bosnia. Pundits, scholars, politicians, and diplomats will surely dissect the United Nations role there and find much to criticize. The import of this book is that it forces the reader to at least consider the possibility that the United Nations can, nonetheless, play an effective role in the search for world peace. Make no mistake. There is much of Utopia here, yet there is enough realism and substantive legal thought to give the reader pause. The reader is put on a scholarly roller coaster, alternately optimistic and pessimistic. Maybe something can be done. And, if so, then why not try it? If it is possible to reinvent the United Nations by reinterpreting its Charter, this is surely the time to do so.¹² This book might be the blueprint that makes it happen. All that is needed is "new thinking" about the institution.

¹²See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 A.J.I.L. 83 (1993). "[W]ith the end of the Cold War, the Council not only has revived atrophied functions, but also has undertaken activities that, arguably, may not have been contemplated at its inception." *Id.*

NUREMBERG: INFAMY ON TRIAL*

REVIEWED BY LIEUTENANT COLONEL LAWRENCE J. MORRIS**

Joseph Persico has accomplished a difficult task: he has written yet another book on the Nuremberg Trials and managed to make it illuminating without being sensational, and understandable to the general reader while satisfying to the lawyer or one who has read one or more of the previous books about the International Military Tribunals.

Persico does much to humanize many of the defendants, especially Hermann Goering, and others, like Hans Frank, who have received less attention from historians. He portrays Frank's struggle with a conscience formed by three major influences: his training as a lawyer; his embrace of Nazism; and his revived Catholicism. The struggle appears to have been genuine and, by most any measure, is affecting and provocative. However, it also is an unsympathetic portrayal of a man who, notwithstanding his evident "reconversion" in confinement, had the intellectual and formative tools to have resisted enthusiastic capitulation to the Nazi regime. In that sense, it is an enduring lesson for tribunals of any type, but also a challenge to those who would evaluate policy makers or convicts for their motives or rehabilitative sincerity.

Goering, inevitably, stands alone as a major character and a leader—arrogant, boastful, and profane. Persico suggests at least an element of reflectiveness in Goering, and provides some new evidence and perspective regarding Goering's celebrated suicide.

To lawyers and advocates, Persico's treatment of the trial preparation strategy is instructive. He plows little new ground, and does not treat the legal issues in the depth of Telford Taylor's *Anatomy of the Nuremberg Trials*, but his work is aimed at the general reader. Still, the tension between United States Supreme Court Justice Robert H. Jackson's documents-only strategy, and the forces that sought to humanize and dramatize the war through witnesses, not only highlights Nuremberg's dual purpose—that is, trials for the individuals, coupled with a message of deterrence and justice to the world—but speaks to any trial lawyer trying to plot a strategy that

*JOSEPH PERSICO, *NUREMBERG: INFAMY ON TRIAL* (New York: Viking 1994): 520 pages.

**Judge Advocate General's Corps, United States Army. Currently assigned as Professor and Chairman, Criminal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

is both tidy and dramatic, organized and compelling. Persico gives Justice Jackson high marks for overall strategy and his masterly opening statement and closing argument, but abysmal ratings for his meandering, nonconfrontational cross-examinations.

Persico tells much of the story through the repeated visits to the defendants by two Army psychiatrists, both of whose work is somewhat tainted by plans for books (which each later published). This approach provides a thread that keeps the story moving, but Persico draws no conclusions—and the psychiatrists provide little penetrating insight—regarding the mental composition of the defendants, leaving this story-telling vehicle incomplete. His sketches of many of the defendants—clever Speer, manipulative Hess, vacuous Keitel, the coarse but well-read Streicher, and many others—are dispassionate and pointed, and provide the best windows onto the kind of compromises that people from diverse backgrounds made with their consciences to work in the Hitler regime.

While not sympathetic to the Nazis as a group or individually, Persico raises some of the enduring questions about the Nuremberg legacy, including the much-discussed concerns about focusing on a conspiracy theory (a convenient web, but legally and morally problematic as the lone basis for a potential death sentence), unease about victors' justice (tainted most notably by the inclusion of the Russians on the Tribunal), and the attempt to indict Alfred Krupp for the sins of his infirm father, Gustav. Persico also celebrates the liberal due process accorded the defendants and the statements that Nuremberg was *intended* to make to the world. "Intended," in that Persico's epilogue treats the Tribunals as having bequeathed neither civility in war, nor certain justice after such wars, and certainly not deterrence of future war crimes. He bemoans Bosnia, certainly Pol Pot, and others. He does not imply that Nuremberg should not have happened, in light of another half-century of butchery. He suggests, however, that its legacy may be slim and not especially durable.

THE NUREMBERG WAR CRIMES TRIALS CD-ROM*

REVIEWED BY H. WAYNE ELLIOTT**

Two confessions are in order. First, up until a few years ago I was a confirmed technophobe. I saw a need for some sort of word processor (though even the name seemed nonsensical—how can words be processed?) and accepted the fact that some people would, of necessity, have to become proficient at using it. But as the old manual typewriter always struck me as a marvelous piece of office machinery, especially when in the hands of a skilled operator, I just did not see how the emerging technology could be all that much better. And, if it really did get better, then it would not be too long before I would be expected to use it. At the time, it seemed best simply to put it aside. I am certain that others agreed with me.

Secondly, I have not completely read the material under review. Although I doubt anyone has ever read all of it, and if someone did, then he or she probably is no longer in a position to read this review.

Well, times change and so has my attitude toward technology. Several years ago, when I first saw the online computer services in use, even I had to admit that there might be a future for something like that. I still preferred the old hard copy, but it seemed that whatever I needed was the one publication to which the office did not subscribe or which, either because of its importance or its antiquity, was always missing from the library. Obviously, that would be much less of a problem if the publication were nothing more than a series of mysterious digital commands stored in some giant computer miles away. Then, if you could get into that computer, research should be much easier. For me WESTLAW and NEXIS were the onramps to the information highway. Now I could get into my computer and the appropriate database, and, by typing a few search terms, access could be gained to an enormous amount of material. Refining the terms further reduced the number of sources and eventually the exact document needed would appear on the monitor. Research proficiency was well underway. All that remained was to figure out how

*THE NUREMBERG WAR CRIMES TRIALS CD-ROM (Aristarchus Knowledge Industries, Seattle, WA.); \$995.

**Lieutenant Colonel, U.S. Army (Retired). Former Chief, International Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Currently an S.J.D. Candidate at the University of Virginia School of Law focusing on the law related to war crimes.

to use the results to my advantage. That, unfortunately, the computer simply could not do.

Yet, I always felt that something was missing. WESTLAW and LEXIS were designed for the average practicing civilian attorney. For the military attorney, and particularly for the international/operational attorney, large gaps in the database existed. Treaties often were not included, even fewer executive agreements existed. Additionally, most Army regulations and other Army publications did not make it into these commercial databases. Thus, even though this technology worked well in a peacetime "garrison environment," hard copy still was required in the field. Several years ago, the Army leadership decided to solve the problem by transferring many of the regularly used publications in the field onto CD-ROMs—those small shiny disks that can hold thousands of pages of textual material. This allowed an incredible amount of useful information to be taken to the field with little effort. To function effectively, all that was needed was a CD-ROM drive and an up-to-date disk. However, if the information changed faster than the disk could be updated and distributed, the risk always existed that any answer found might be incorrect because of obsolescence. Accordingly, to avoid being caught with stale information, the safest practice was to maintain access to a current hard copy. So despite the technological advances, drawbacks still existed.

It seemed that the perfect subject for the emerging CD-ROM technology was something that: (1) would not dramatically change; (2) was crucial to the military lawyer's duty performance; and (3) directly impacted the unit's mission. From an international/operational law perspective, an ideal subject which met these criteria was law related to war and war crimes. The law of war is fairly fixed and the law relating to war crimes trials is almost entirely based on the Allied experience after World War II. *Army Field Manual, 27-10, Law of Land Warfare (FM 27-10)*, is an excellent one-volume source of the law. Furthermore, in a previous edition of the *Military Law Review*, I have reviewed an excellent one-volume source of information on the general subject of war crimes trials, *Terrorism in War—The Law of War Crimes*.¹ The CD under review has the potential to fill in the remaining gap. The problem has been that even though *FM 27-10* set out most of the law in this area, and *Terrorism in War—The Law of War Crimes* provided fine examples of its application, there was virtually no way for judge advocates in the field to have access to the original trial documents. The only original

¹See H. WAYNE ELLIOTT, *TERRORISM IN WAR—THE LAW OF WAR CRIMES*, reviewed in 144 MIL. L. REV. 184 (1994) ("Every judge advocate should be familiar with this book. It belongs in the office library as well as in the deployment package."). *Id.* at 186.

sources remotely available were the transcripts of the International Military Tribunal's proceedings at Nuremberg and, then, there were few complete sets. Furthermore, the existing sets are nearly fifty years old and are beginning to deteriorate. The developers (publishers does not seem to be the correct word) of this CD-ROM have taken action which will help solve the problem.

This CD-ROM contains the complete transcripts of the International Military Tribunal which met at Nuremberg and sat in judgment of the major Nazi leadership. In the hard-copy version, this trial transcript consists of forty-two volumes. As a result of this trial, the depravity of the Nazi regime was publicly displayed for Germany and all the world to see. In many respects this trial marked the beginning of a new era for the rule of law. Yet, while many judge advocates might have a general understanding of what occurred, few have had the opportunity to actually read the testimony of Goring, Ribbentrop, et. al. Few have read their explanations, excuses, and sometimes braggadocio for the acts charged. Psychopaths make especially interesting witnesses when the noose stands nearby and empty. Civilian international lawyers and diplomats have tended to focus on the prosecution's case concerning crimes against peace and crimes against humanity to the exclusion of the conventional war crimes with which several of the defendants also were charged. One possible explanation is that the charge alleging conspiracy to commit a crime against peace was legally the most problematic, and it fell to the American prosecutors to handle that portion of the trial. However, for the judge advocate the real gems of law come from the more mundane allegations of violations of the conventional and customary law of war.

The actual transcripts are of limited utility. They are not well indexed and include quite a few documents in German or French. To make the transcript more useful, the United States government published an eleven-volume supplement called *Nazi Conspiracy and Aggression*. The supplement contains English translations of many of the original documents. These eleven volumes are also included on the CD-ROM.

When the International Tribunal concluded its work many more German war criminals still needed to be tried, however, the planned second international trial was never held. The prosecution of these somewhat lower-echelon war criminals occurred in the courts of the four individual Allies. The United States conducted twelve major trials involving high-ranking Nazi officials before what were actually military commissions staffed with civilian judges. Collectively these trials are known as the "Subsequent Proceedings." These cases contain much of the current law on military necessity,

superior orders, and command responsibility. The United States government published the abridged record of these trials in fifteen volumes and it also is located on the disk. Finally, the after action report to the Secretary of the Army by the chief prosecutor at the subsequent trials, Brigadier General Telford Taylor, as well as General Taylor's 1949 monograph on the trials, are included. All together, there are seventy volumes comprising 126,897 computer pages of information on this one disk.

I now venture from the law to technology, with not a little trepidation. The disk works in either DOS or Macintosh systems. It is quite likely that most law offices already have the necessary CD-ROM player and, if not, the price is not prohibitive. The disk package comes with easily understood instructions on how to load the disk and begin the research. The disk includes the basics of how to use it in a "Getting Started Guide" and help is always available by pressing the "F1" key. The developers divided the material into 18,928 "bibliographic units." This appears to be simply an arbitrary division of the volumes into something other than pages as part of the process of digitizing the information and has no effect on conducting a search.

The disk permits a keyword search. Text can be highlighted and then saved to a notepad, another disk, or printed on paper. It is possible to download whole volumes, although the user is cautioned that to do so would take a substantial number of floppy disks.

In experimenting with the disk (adults do not "play" with such technology) I searched for all instances in which the word "forfeiture" appeared. (It is not generally known, but the Tribunals were authorized to impose civil fines and to order the forfeiture of illegally obtained goods.) Within seconds it indicated that the word "forfeiture" appeared thirty-seven times on the disk. With a few keystrokes I was able to move to each of those instances, finally revealing that the sentence which had been imposed by one of the Subsequent Proceedings courts on the German industrialist Alfred Krupp directing the forfeiture of his assets had been set aside by the United States High Commissioner for Germany, John J. McCloy. To trace that information through the volumes would have taken days and, even then, there would have been no guarantee that the end result would not have been missed. I also searched for all references to "Leipzig." I was interested in seeing how the German defendants viewed the failed efforts to prosecute German war criminals after World War I in trials which had taken place in Leipzig. The disk fairly quickly told me that the word "Leipzig" appeared more than one thousand times and asked if I wanted to continue the search. While the best thing to do was probably to refine the search string

by adding a modifier, I instead typed the name of one of the World War I defendants, Ludwig Dithmar. The disk quickly found the one instance in which that name appeared. His case had been cited in one of the Subsequent Proceedings. In the discussion of his case, was a description of the German rule on the defense of superior orders—a rule not appreciably different from that of the United States military today. Through trial and error, one can narrow or expand the search terms to find a particular item.

The disk's developers are considering putting the Tokyo war crimes trials on a CD-ROM. Finding the Tokyo trial record is even more difficult than finding that of the European trials. Perhaps for that reason, much of the attention of the legal community has focused on the Nuremberg trials. However, for a catalog of depravity and wholesale violations of the law of war, one really should examine the Tokyo trials. Legal scholarship would be well served with easy access to that record.

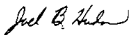
The only drawback to the disk is its suggested price. Nonetheless, the cost is understandable, given the limited market for such a specialized area of the law. In any event, it appears that because the disk replaces seventy volumes of difficult-to-find material, paying the price asked is reasonable. Additionally, this type of material will not be updated. Unlike other areas of the law which are constantly changing, the law of war is evolutionary in its development. The legal principles affirmed and established by these Tribunals will not change. Consequently, this would appear to be a one-time purchase.

The United Nations has established a war crimes tribunal for crimes that have occurred, or will occur, in the conflicts in the Former Yugoslavia and Rwanda. The judges, who will meet at The Hague, sit as the juridical descendants of the judges at Nuremberg fifty years ago. The prosecutors at The Hague stand as the jurisprudential and intellectual descendants of the prosecutors at Nuremberg. In many respects, the problem then was establishing the law. The problem today is largely one of finding it. Technology and the disk's developers have combined to make the quest much easier. Let us hope that the Hague Tribunal has the disk. It should be included as part of the international/operational law materials in every office concerned with training in the law of war or with applying that law to real-world missions.

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:



JOEL B. HUDSON
Acting Administrative Assistant to the
Secretary of the Army
00818

