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

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I. Introduction

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

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

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

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

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

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

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

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

> But [the usual channels of military justice] remained open and, numerically, the Nuremberg and Tokyo trials were a small part of a very large picture. In Europe, the United States Army judge advocate was made responsible for the prosecution of crimes committed against American troops, or in Nazi concentration camps that had been overrun and "liberated" by American forces. Under this authority, some 1,600 German war crimes defendants (as compared with 200 at Nuremberg) were tried before Army military commissions and military government courts, and over 250 death sentences (as compared with 21 at Nuremberg) were carried out. About an equal number were tried by British, French, and other military courts established by the countries that had been occupied by Germany.
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> Precise figures are lacking, but by the spring of 1948 some 3,500 individuals had been tried on war crimes charges in Europe, and 2,800 in the Far East, taking no account of trials held by the Soviet Union or China. It would be a conservative estimate that some 10,000 persons were tried on such charges from 1945-1950.[5]

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

5. *Id.* at 370.

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

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

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

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

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

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

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

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

lieutenant at a general court-martial for violating the law of war."[8]

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

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

8. Rule for Courts-Martial 201 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. UCMJ art. 18 (2000).

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

II. Overview

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

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

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

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

> Article 3 - Conflicts Not Of An International Character
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> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatmentand torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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

14. Article 4 of Protocol II states:

> Article 4 - Fundamental guarantees
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> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) collective punishments;
> (c) taking of hostages;
> (d) acts of terrorism;
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) slavery and the slave trade in all their forms;
> (g) pillage;
> (h) threats to commit any of the foregoing acts.
> 3. Children shall be provided with the care and aid they require, and in particular:
> (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
> (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
> (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
> (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;
> (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

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

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

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

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15. 18 U.S.C.S § 2441 (LEXIS 2000).

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

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

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

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

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

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

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

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

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

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

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

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

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

> was severely injured, was thrown onto the back of a truck with the dead and driven away.[21]
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> This excerpt from the Tadic indictment is but one example of the many atrocities committed by all sides in the Bosnian civil war, atrocities reminiscent of those committed by the Nazis and Japanese forces during World War II. Unlike the World War II offenses, however, with the Bosnian-like atrocities found in the conflicts in Rwanda[22] and Yugoslavia,[23] there is no treaty-based provision for the prosecution of analogous crimes committed during the course of an internal armed conflict. This limitation

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

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

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

Id. para. 18.

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

Id. paras. 2-3.

also applies to atrocities committed during the ongoing conflict in Chechnya.[24]

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

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

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

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

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

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

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

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

IV. Article 18, Uniform Code of Military Justice

A. Overview

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

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26. Tuzmukhamedov, *supra* note 24.

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

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

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

29. U.S. CONST. art I, § 8, cl. 14.

30. *Id.* art. I, § 8, cl. 10.

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

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

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

B. 1806 Articles of War

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

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

Article 97 stated:

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

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

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

35. *Id.*

36. *Id.*

37. *Id.* art. 97.

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

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

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

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

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39. *Id*. sec. 2.

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

41. 1806 Articles of War, sec. 2.

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

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

C. 1916 Articles of War

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

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

This article specifically grants general courts-martial jurisdiction over "any other person who by the law of war is subject to trial by military tribunals."[48] Significantly, Article 12 of the 1916 statute lacks the limitations

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

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

45. *Id.* art. 97.

46. *Id.* sec. 2.

47. 1916 Articles of War, art.12.

48. *Id.*

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

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

D. 1920 Articles of War

In 1920, the Articles of War were again modified.[54] Article 12 of the 1920 Articles of War (1920 statute) stated:

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

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

50. *Id.* art. 12.

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

52. 1916 Articles of War, art. 12.

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

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

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

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

E. The Uniform Code of Military Justice

In 1950, the Articles of War were codified in the UCMJ.[58] Article 12 of the Articles of War was replaced by Article 18 of the UCMJ, which stated:

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

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

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

57. 1920 Articles of War, art. 12.

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

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

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

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

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

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

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

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59. *Id.* art. 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68. *Ex Parte* Quirin, 317 U.S. 1 (1942).
69. *Id.* at 45-46.
70. *In re* Yamashita, 327 U.S 1 (1946).
71. *Id.* at 12.
72. *Id.*

these treaty provisions would be an offense that satisfies the jurisdictional requirement of Article 18.[73]

V. Customary International Law

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

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

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

75. *See supra* note 11.

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

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

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

duct."[78] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[79]

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

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

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

Id.

78. *Id.*

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

A. Common Article 3

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

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

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

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

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

92. *Id.*

93. *Id.* at 44.

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

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

96. *Id.*

97. *Id.* at 37.

98. *See supra* note 87.

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

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

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

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

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

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

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

B. Protocol II

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

Protocol II expands and further develops the protections found in Common Article 3. Significant to the issue of customary law is Article 4 of Protocol II, entitled "fundamental guarantees"[104] and the protections

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

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

Id.

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

103. *See id.* ¶ 4440.

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

Id.

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

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

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

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

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

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

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

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

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

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107. (continued)

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

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

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

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

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

> Fundamental rules of humanitarian law applicable in armed conflicts[:]
> (1) Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
> (2) It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*
> (3) The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *materiel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.
> (4) Captured combatants and civilians under authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
> (5) Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
> (6) Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
> (7) Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

Id.

109. *Id.*

110. *Id.*

111. *Id.*

humanitarian principles into customary international law. The Chamber stated:

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

B. United Nations Resolutions and Establishment of International Tribunals

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

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

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

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

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

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

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

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

115. *Id*.

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

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

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

119. *Id*.

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

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

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.[124]

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

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

122. *Id.*

123. ICTY Statute, *supra* note 7.

124. *Id.* art. 3.

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

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

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

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

126. Tadic Appeal, *supra* note 11.

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

> sonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.[128]

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

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

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

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

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

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

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

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

132. ICTR Statute, *supra* note 27.

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

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

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

134. *Id.* pmbl.

135. *Id.*

136. *Id.*

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

138. ICTR Statute, *supra* note 27.

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

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

Id.

140. ICTR Statute, *supra* note 27.

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

> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> a) Violence to life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> b) Collective punishments;
> c) Taking of hostages;
> d) Acts of terrorism;
> e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> f) Pillage;
> g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
> h) Threats to commit any of the foregoing acts.[145]

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

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141. ICTY Statute, *supra* note 7.
142. ICTR Statute, *supra* note 27.
143. ICTY Statute, *supra* note 7.
144. ICTR Statute, *supra* note 27, art. 4.
145. *Id.*

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

C. State Legislation

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

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

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

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

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

Id. art. 7.

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

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

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

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147. Article 6 of the ICTR Statute states:

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

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

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

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

150. 18 U.S.C.S. § 2441 (LEXIS 2000).

of whether a violation of the law applicable to an internal armed conflict subjects the violator to punishment under the law of war, the Act includes within it's definition of war crime "violation of common Article 3" and violation of "any protocol to such convention to which the United States is a party and which deals with non-international armed conflict."[152]

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

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

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

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

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152. The Act defines war crimes as any conduct:

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

18 U.S.C.S. § 2441(c) (LEXIS 2000).

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

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

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

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

2. The Practice of Other States

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

humanity (Article 7), war crimes (Article 8), and the crime of aggression.[163]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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173. *Id.*

174. *Id.*

175. *Id.*

176. *See supra* note 161.

177. *See supra* note 160.

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

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

Id.

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

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

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

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179. *Id.*

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

181. *See supra* note 86.

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

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

184. Tadic Appeal, *supra* note 11.

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

In the *Nicaragua* case, Nicaragua sued the United States in the ICJ for numerous alleged violations of customary international law. The claims initiated by Nicaragua stemmed from United States support to the "contras" against the government of Nicaragua.[186]

In order to adjudicate the allegations made by Nicaragua, the ICJ had to determine: whether the conflict was internal or international; the law applicable to such conflicts; and the extent to which activities of the Contras could be attributed to the U.S. government.[187] The ICJ relied on customary international law to adjudicate the dispute.[188] It determined that the conflict between the Contras and Nicaragua was internal, and therefore governed by Common Article 3, and that the conflict between the United States and Nicaragua was international.[189] The court noted, however, that Common Article 3 applied to both conflicts, commenting that Common Article 3 established "a minimum yardstick" of treatment for both types of armed conflict:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949, define certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which also apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p.22; paragraph 215 above). The Court may find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.[190]

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186. *Nicaragua*, 1986 I.C.J. at 19. For example, one allegation made by the Nicaraguan Government claimed "the United States . . . has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua." *Id.*, *reprinted in* 15 I.L.M. at 1026.

187. *Id.* at 114, *reprinted in* 15 I.L.M. at 1073.

188. "The effect of the majority view [reference interpretation of the multilateral treaty reservation by the United States regarding the ICJ's compulsory jurisdiction] is to regard the reservation as precluding direct application of the United Nations and Organization of American States Charters. As a result, the content of international law in this dispute before the Court must be derived exclusively from customary international law." *Appraisal of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 A.J.I.L. 106 (1987).

189. *Nicaragua*, 1986 I.C.J. at 114, *reprinted in* 15 I.L.M. at 1073.

190. *Id.*

The *Nicaragua* court determined that under customary international law, Common Article 3 established the minimum treatment afforded non-combatants regardless of whether the conflict was characterized as an international or internal armed conflict.[191] The court noted that Common Article 3 evinces "general principles of humanitarian law . . . accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not."[192] Because Common Article 3, as a matter of treaty law, is applicable only during "conflicts not of an international nature,"[193] the only possible basis for this holding was that the mandate of this article has attained the status of customary international law. Thus, by the court's rationale, Common Article 3(1) is binding on all states regardless of whether they are signatories to the Geneva Conventions of 1949.

Nine years later, the United States Court of Appeals for the Second Circuit also had the opportunity to comment on the customary nature of Common Article 3 in *Kadic v. Karadzic*, *Doe I and Doe II v. Karadzic*.[194] The case arose in the context of a civil suit brought under the Alien Tort Act,[195] a law which allows for "any civil action by an alien for a tort . . . committed in violation of the law of nations or treaty of the United States."[196] The plaintiffs, "two groups of victims from Bosnia-Herzegovina,"[197] sued Radovan Karadzic, president of the self-proclaimed Republic of Srpska, for alleged war crimes and atrocities committed during the Bosnian civil war.[198] The plaintiffs' claims were based on violations of the "law of nations" and not on any treaty of the United States.[199] As such, the

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191. *Id.*

192. *Id.* at 129, *reprinted in* 15 I.L.M. at 1081.

193. *See* Geneva Convention I-IV, *supra* note 13, art. 3.

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

195. 28 U.S.C.S § 1350 (LEXIS 2000).

196. Under the Alien Tort Act "district courts shall have original jurisdicition of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id*.

197. *Karadzic*, 70 F.3d at 232.

198. *Id.* at 237 (plaintiffs sought compensatory damages, punitive damages, attorneys fees, and injunctive relief under the Alien Tort Act).

199. *See id*. at 238-40. The Court noted: "As in Filarataga, plaintiffs in the instant case 'primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law.'" *Id*. at 238 n.1 (quoting Filartaga v. Pena-Irala, 630 F.2d 876, 880 n.7 (2d Cir. 1980)).

Second Circuit interpreted the claims under customary international law and not treaty law.[200]

The allegations made by the plaintiffs included "genocide, rape, forced prostitution and impregnation, torture and other cruel treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death."[201] The district court, pursuant to a defense motion, dismissed the case for lack of subject matter jurisdiction under the Alien Tort Act stating that "acts committed by non-state actors do not violate the laws of nations,"[202] an essential element of the plaintiffs' claim under the Act.[203] The plaintiffs appealed, again citing the Alien Tort Act as the basis for subject matter jurisdiction.[204]

In analyzing the jurisdictional issue under the Alien Tort Act, the Court of Appeals for the Second Circuit applied the three-part test used by the Supreme Court in *Filartaga v. Pena-Irala*.[205] Subject matter jurisdiction exists under the three-part test if: "(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)."[206] The Second Circuit noted: "The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law."[207] Thus, the critical issue was whether the plaintiffs alleged a violation of customary international law.[208] In evaluating the customary nature of Common Article 3, the court noted the observation made in *Filartaga* that international law evolves over time, and therefore, "courts ascertaining the content of the law of nations 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.'"[209] The court then focused on

200. *Id.*

201. *Id.* at 237.

202. *Id.* (citing Doe I v. Karadzic, 866 F. Supp. 734, 738-39 (S.D.N.Y. 1994)).

203. *Id.*

204. *Id.* at 238.

205. 630 F.2d at 887; *see also Karadzic*, 70 F.3d at 238.

206. *Karadzic*, 70 F.3d at 238 (citing Filartaga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980)).

207. *Id.*

208. *Id.* at 238-40.

209. *Id.* at 238 (noting some of the sources of customary international law cited in Filartaga). "We find the norms of contemporary international law by 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law.'" *Id.* (quoting *Filartaga*, 630 F. 2d at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820))).

whether violations of Common Article 3 are violations of the "law of nations" such that subject matter jurisdiction exists under the Alien Tort Act and whether such violations require "state actor" status. The court concluded that violations of the law of nations are not limited to state actors.[210] Instead, atrocities such as those alleged by the appellants "have been long recognized in international law as violations of the law of war,"[211] and Common Article 3 establishes the "most fundamental requirements of the law of war."[212] The court found:

> The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which bind parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law. . . . The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and violations of international humanitarian law.[213]

As a result of this finding, the court held that "subject matter jurisdiction exists[;] Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor."[214] Thus, this case illustrates that U.S. federal courts consider Common Article 3 to be customary international law, the violation of which subjects the violator to individual criminal responsibility.

Although afforded an opportunity to address Protocol II and its protections, the *Kadic* court declined in light of its findings with respect to Common Article 3.[215] However, the analysis and rationale for the Common Article 3 holding is equally applicable to Protocol II, Articles 4(1) and

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210. *Id.* at 239.

211. *Id*. at 242 (citing *In re* Yamashita, 327 U.S. 1 (1946)).

212. *Id.* at 243.

213. *Id.*

214. *Id.* at 236.

215. *Id.* at 243 n.8. "At this stage in the proceedings [case remanded for action consistent with the court's holding reversing the district court's dismissal], however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law . . . ." *Id*.

4(2). That is, under the law of nations, individuals can be held individually responsible for violations of customary international law designed to provide the most fundamental guarantees in conflict, such as the protections found in Articles 4(1) and 4(2) of Protocol II, even if the acts occurred during internal armed conflict.

The next and perhaps most significant case in the evolution of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), was also the first major law of war decision by an international criminal tribunal since the World War II trials: *Prosecutor v. Dusko Tadic a/k/a "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*.[216] This case, decided 2 October 1995, involved the criminal prosecution of a member of the Bosnian Serb militia for the brutal treatment he inflicted on Bosnian Muslim detainees while he was serving as a guard at a makeshift detainment facility.[217]

During his trial, the defendant Tadic brought a motion challenging the jurisdiction of the ICTY to hear his case for alleged war crimes or atrocities committed during the civil war in Bosnia-Herzegovina.[218] Specifically, he challenged jurisdiction on three grounds: the ICTY was improperly established;[219] the ICTY had wrongfully assumed "primacy" over the national court system;[220] and the ICTY lacked subject matter jurisdiction over the alleged offenses.[221] The ICTY Trial Chamber denied Tadic's motion resulting in his appeal to the Appellate Chamber.[222] On appeal, Tadic

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216. Tadic Appeal, *supra* note 11 (decided eleven days prior to the 2d Circuit *Karadzic* decision). Dusko Tadic was indicted in the ICTY on thirty-four counts for violating: Article 2 (grave breaches of the Geneva Conventions of 1949); Article 3 (violations of the laws or customs of war); and Article 5 (crimes against humanity) of the ICTY Statute. His indictment and ultimate conviction on some, but not all, of the charges in the indictment stemmed from his role in the war crimes committed during the armed conflict in Bosnia-Herzegovina. Of the thirty-four count indictment, ten alleged murder or cruel treatment in violation of Common Article 3. Of those ten, Tadic was found guilty of five counts of cruel treatment in violation of Common Article 3. In total, Tadic was convicted on eleven of the thirty-four counts with sentences ranging from as little as six years to as high as twenty years per count, with the sentences to run concurrently. *See* Prosecutor v. Tadic, No. IT-94-1-AR72 (May 7, 1997) (Opinion and Judgment), *reprinted in part in* 36 I.L.M. 908 (1997).

217. *Id.*

218. Tadic Appeal, *supra* note 11, para. 2.

219. *Id.* Tadic alleged that the Security Council lacked authority to convene the tribunal and as such, the tribunal lacked authority to hear his case.

raised the same issues,[223] but the Appellate Chamber dismissed all three jurisdictional challenges.[224]

Contrary to Tadic's assertions, the Appellate Chamber found that the ICTY was lawfully established,[225] and that "Appellant's second grounds of appeal, contesting the primacy of the International Tribunal, [was] ill founded." [226] In addressing Tadic's third basis for appeal, subject matter jurisdiction, the court focused on Articles 2, 3 and 5 of the ICTY statue.[227] The court's conclusion regarding Article 3 of the ICTY Statute[228] is most relevant to the analysis of UCMJ jurisdiction over violators of the law of war. In upholding the jurisdiction of the tribunal to hear the case, the Appellate Chamber first noted that Article 3 of the ICTY Statute dealing with violations of the laws or customs of war refers in modern terms to violations of international humanitarian law.[229] Accordingly, it noted that Article 3 covers all "serious violations of international humanitarian law" not covered by other provisions of the ICTY Statute.[230] In determining Article 3's relationship to Common Article 3 violations, the Appellate

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220. *Id.* Article 9(1) of the ICTY Statute gives the ICTY concurrent jurisdiction with domestic courts for "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, *supra* note 7, art. 9(1). Article 9(2) of the Statute gives the tribunal "primacy" over national courts, stating: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." *Id*. art. 9(2).

221. Tadic Appeal, *supra* note 11, para. 2.

222. *Id.* paras. 2-3.

223. *Id.* para. 8.

224. *Id.* para. 146.

225. *Id.* paras. 47-48.

226. *Id.* para. 64. The court also found that it had subject matter jurisdiction over the offenses in the indictment. *Id*. para. 145.

227. *See* ICTY Statute, *supra* note 7, arts. 2, 3, 5.

228. *Id.* art. 3.

229. Tadic Appeal, *supra* note 11, para. 87.

230. *Id.* para. 91.

> Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4, or 5. Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the international tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

Id.

Chamber found that Article 3 of the ICTY Statute specifically covers "violations of Common Article 3 and other customary rules on internal conflicts."[231]

Regarding the customary nature of Common Article 3, the Appellate Chamber resolved any doubt regarding this issue when it stated:

> The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and as that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice [in the *Nicaragua* case], but also applies to Article 19 of the Hague Convention . . . , and, as we shall show below, to the core of Additional Protocol II of 1977.[232]

In arriving at its conclusion that Common Article 3 reflects customary international law, the Appellate Chamber considered statements by government officials,[233] military manuals,[234] the role of international organs in furthering principles of international humanitarian law,[235] United Nations resolutions regarding international humanitarian law,[236] and governmental action.[237] As noted by the *Nicaragua*[238] and *Karadzic*[239] decisions, and affirmed by the decision of the Appellate Chamber, Common Article 3

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231. *Id.* para. 89.

232. *Id.* para. 98 (citations omitted).

233. *Id.* para. 105 (citing a statement made by the Prime Minister of the Democratic Republic of Congo regarding his government's adherence to the laws of war, expecting the same from the rebel forces).

234. *Id.* para. 106 (citing the Operational Code of Conduct for Nigerian Armed Forces and its mandate that Nigerian troops were bound to respect the rules of the Geneva Conventions and were to abide by a set of rules protecting civilians and civilian objects in the theater of military operations).

235. *Id.* para. 109.

236. *Id.* para. 110.

237. *Id.* para. 107.

238. Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 129 (June 27) (Merits), *reprinted in* 15 I.L.M. 1023, 1081 (1986).

239. Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995).

establishes "minimum mandatory rules applicable to internal armed conflicts."[240]

After determining the customary international law status of Common Article 3, the Appellate Chamber addressed Protocol II and its status as customary international law.[241] The Appellate Chamber found: "Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles."[242] In arriving at its conclusion that Protocol II, or at least the core thereof, is customary in nature, the Appellate Chamber noted the position taken by the government of El Salvador during its civil war.[243] El Salvador, after concluding that Protocol II did not technically apply to its internal conflict,[244] chose to apply the provisions of the Protocol out of the belief that they reflected customary international law. The Salvadorian government, the Appellate Chamber noted, "considered that such provisions [of Protocol II] developed and supplemented" Common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place."[245]

More significant to the issue of the customary status of Protocol II, the Appellate Chamber also examined the U.S. position articulated in 1986 by Mr. M.J. Matheson, Deputy Legal Adviser of the State Department. While

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240. Tadic Appeal, *supra* note 11, para. 102.

241. *Id.* para. 117.

242. *Id.*

243. *Id.*

244. *Id.* The conflict in El Salvador did not meet the Protocol II, Article 1, criteria for application of the protocol; nevertheless, the Salvadoran government chose to apply the Provisions of Protocol II as reflective of customary international law. For a conflict to meet the application criteria of Protocol II, Article 1, there must be:

> conflict in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which [are], [1] under responsible command, [2] exercise such control over a part of its territory as to enable them to carry out [3] sustained and concerted military operations and [4] to implement [the] Protocol.

Protocol II, *supra* note 14, art. 1.

245. Tadic Appeal, *supra* note 11, para. 102.

discussing the view of the United States on Common Article 3, Mr. Matheson also stated:

> [T]he basic core of Protocol II is, of course, reflected in Common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process.[246]

Therefore, the Appellate Chamber, the government of El Salvador, and the United States all arrived at the same conclusion when evaluating the customary nature of Common Article 3 and Protocol II. It was agreed that Common Article 3 provides minimum protection for civilians and noncombatants in internal armed conflicts. Additionally, the provisions of Common Article 3 have achieved customary international law status. Finally, all three found that those protections in Protocol II that mirror the Common Article 3 protections—that is, Articles 4(1) and 4(2) of Protocol II—are likewise customary in nature.[247]

After finding that Common Article 3 and the core of Protocol II were customary international law, the Appellate Chamber in *Tadic* inquired whether violation of these customary provisions triggered individual criminal responsibility. [248] The Appellate Chamber observed that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[249] Therefore, it held:

> Applying the foregoing criteria [the Nuremberg factors][250] to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether committed

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246. *Id.* (quoting M.J. Matheson, Deputy Legal Advisor, U.S. State Department, speaking before the Humanitarian Law Conference in 1987).

247. For example, the provision prohibiting murder of innocent civilians during an internal armed conflict in Common Article 3 is customary international law. *See supra* notes 99, 107. The same provision found in Article 4 of Protocol II is likewise prohibited. Protocol II, *supra* note 14, art. 4(2)(a). To hold otherwise would be analogous to saying that the fundamental rights protected by Common Article 3 and viewed as fundamental under customary international law are no longer fundamental under Protocol II, a conclusion which defies logic.

248. Tadic Appeal, *supra* note 11, para. 128.

249. *Id.*

> in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[251]

These profound excerpts from the *Tadic* opinion serve as perhaps the most powerful evidence to date that the provisions of Common Article 3, as well as the core provisions of Protocol II, are customary international law,[252] and that serious violations of these customary provisions entail individual criminal responsibility.[253] Finally, the Appellate Chamber provided a useful definition of serious violations: "a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[254]

F. Military Manuals

Military manuals may also indicate that a principle has evolved into customary international law. As demonstrated by the *Tadic* appellate decision, military manuals and operational guidelines can be a critical source

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250. *Id*. In addressing the Nuremberg factors, the court stated:

> [T]he International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibitions, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible, because as the Nuremberg Tribunal concluded: "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Id (citing THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY pt. 22, at 445-47, 467 (1950)).

251. *Id.* para. 129.

252. The core provisions of Protocol II are those provisions whose purpose is identical to that of Common Article 3, protection of fundamental rights for non-combatants during armed conflict. Protocol II, *supra* note 14.

in determining whether a law of war provision has reached customary status, and whether a violation of the provision entails individual criminal responsibility.[255] While not dispositive on the issue, the fact that a military conforms its conduct to the provisions of Common Article 3(1) of the Geneva Conventions of 1949 and Articles 4(1) and 4 (2) of Protocol II, to include punishing those who violate these provisions, illustrates the customary nature of the provisions and the acceptance of individual criminal responsibility for violations.

In *Tadic*,[256] the Appellate Chamber looked at several military examples, including the Operational Code of Conduct for Nigerian Forces and

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253. *See* Prosecutor v. Jelisic, No. IT-95-10 (Dec. 14, 1999) (Judgment), *available at* http://www.un.org/icty/ brcko/trialc1/judgement/jel-tj991214e.htm. Commenting on the customary nature of Common Article 3, the Jelisic court stated:

> Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary. The charges for murder and cruel treatment are based on Article 3 common to the Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda. As a rule of customary international law, Article 3 common to the Geneva Conventions is covered by Article 3 of the Statute as indicated in the *Tadic Appeal Decision*. Common Article 3 protects "[p]ersons taking no active part in the hostilities" including persons "placed *hors de combat* by sickness, wounds, detention, or any other cause. "Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.

Id. paras. 33-34. *See also* Prosecutor v. Akayesu, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1399 (1998); Prosecutor v. Kambanda, No. ICTR-97-23-S (Sep. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1411 (1998); Prosecutor v. Furundzija, No. IT-95-17/1-T 10 (Dec. 10, 1998) (Judgment), *reprinted in* 38 I.L.M. 317 (1999).

254. As noted by the Appellate Chamber, technical violations of Common Article 3 or Protocol II that are not serious, although violations of international humanitarian law, are not offenses subjecting the individual to criminal prosecution under Article 3 of the statute for violating the laws or customs of war. Tadic Appeal, *supra* note 11, para. 94. A review of the indictments from both courts, the International Criminal Tribunals for Yugoslavia and Rwanda, fails to reveal any charged offense such as the technical violation addressed above. The charged offenses all involve "felony" type offenses, such as rape, murder, torture, forced prostitution, and assault.

255. *See id*. paras. 106, 118 (discussing the Operational Code of Conduct for Nigerian Forces and the German Military Manual of 1992, respectively).

256. *Id.*

the conduct of rebel forces in El Salvador as evidence of the customary nature of Common Article 3 and Protocol II.[257] Nigeria required that federal troops comply with the Geneva Conventions and, in addition, "abide by a set of rules protecting civilians and civilian objects in the theater of military operations."[258] In El Salvador in 1988, the Secretary for the Promotion and Protection of Human Rights, a member of the rebel Farabundo Marti para la Liberación Nacionale (FMLN), stated: "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II."[259] Similarly, the German Military Manual mandated compliance with "the rules of international humanitarian law in the conduct of military operations in all armed conflicts."[260] On the issue of individual criminal responsibility, the Appellate Chamber considered the military manuals of Germany, New Zealand, Great Britain, and the United States as evidence that violations of Common Article 3 and Protocol II result in individual criminal responsibility.[261]

G. Government Statements

Statements by government officials are yet another source in determining whether a rule or provision has reached customary status and if so, whether violations thereof entail individual criminal responsibility. The United States, since the mid 1980s, has referred to Common Article 3 and the fundamental protections of Protocol II as customary international law. As previously discussed, Mr. M.J. Matheson, Deputy Legal Adviser of the State Department, commented that: "The basic core of Protocol II is, of course, reflected in Common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law."[262] This U.S. position was further defined in a 1998 statement, sub-

257. *Id.* paras. 106-107.

258. *Id.* para. 106.

259. *Id.* para. 107.

260. *Id.* para. 118. Although not considered by the Tadic Appellate Chamber, the United States Law of War program, Department of Defense (DOD) Directive 5100.77, is additional evidence regarding the customary nature of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2). DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998). The directive states, in part: "The heads of DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." *Id*. paras. 5.1, 5.3.

261. Tadic Appeal, *supra* note 11, para. 131; *see also*, Graditzky, *supra* note 129, at 29.

mitted to the Preparatory Committee on the Establishment of an International Criminal Court, wherein the United States representative stated:

> The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section . . . covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.[263]

H. The Restatement (Third) of the Foreign Relations Law of the United States (1986)

The Restatement (Third) of the Foreign Relations Law of the United States,[264] another source in evaluating the customary international law status of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), recognizes the concept of individual responsibility for offenses against international law as well as universal jurisdiction. Under Section 404 of the Restatement, universal jurisdiction exists for war crimes such as serious violations of Common Article 3 and Protocol II.[265] Section 404 of the Restatement provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402[266] is present.[267]

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262. Tadic Appeal, *supra* note 11, para. 117 (quoting M.J. Matheson, Deputy Legal Advisor, U.S. State Department, speaking before the Humanitarian Law Conference in 1987).

263. Thedor Meron, *War Crime Law Comes of Age*, 92 A.J.I.L. 462, 466-67 (1998) (quoting United States Statement Submitted to the Preparatory Committee on the Establishment of an International Criminal Court (March 23, 1998)).

264. RESTATEMENT (THIRD), *supra* note 79.

265. *Id.* § 404.

266. Restatement § 402, Bases of Jurisdiction to Prescribe, states:

> Subject to § 403, a state has jurisdicition to prescribe laws with respect to
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interest in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. § 402.

Restatement § 403, Limitations on Jurisdiction to Prescribe, states:

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe laws with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including where appropriate:
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international, political, legal, or economic systems;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.
> (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescription by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id. § 403.

I. Conclusion

As evident from the preceding paragraphs, Common Article 3(1) of the Geneva Conventions of 1949 and Articles 4(1) and 4(2) of Protocol II are now considered to be customary international law. As such, their provisions are binding on all nations and parties to a non-international—that is, internal—armed conflict, irrespective of whether the state is a signatory to the Geneva Conventions or Protocol II. Likewise, the provisions are equally binding on non-state belligerents, regardless of whether they have agreed to be bound by the Conventions and Protocols. Furthermore, violations of these customary law provisions trigger individual criminal responsibility subjecting the violator to prosecution for a crime of universal jurisdiction. As noted by the Court of Appeals for the Sixth Circuit in *Demjanuk v. Petrovsky*,[268] "[i]nternational law recognizes a 'universal jurisdiction' over certain offenses . . . [a principle] based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people."[269]

Unfortunately, the courts lack a comprehensive listing of those serious violations of international humanitarian law, applicable to internal armed conflicts, which would authorize criminal prosecution. What the courts should follow, in the absence of such a list, is the test established by the *Tadic* Appellate Chamber: a serious violation occurs when "a breach of a rule protecting important values involve[s] grave consequences for the victim."[270] Obvious examples of serious violations under this standard would be murder, rape, torture, physical abuse, and sexual abuse.[271] What is certain is that the fundamental, minimum protections contained in Common Article 3(1)[272] and Protocol II, Articles 4(1) and 4(2),[273] are customary international law, and violations subject the individual to criminal responsibility.[274] Lastly, violators of these minimum protections are, under the concept of universal jurisdiction, subject to prosecution by any

267. *Id.* § 404.

268. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

269. *Id.* at 582 (citing RESTATEMENT (THIRD), *supra* note 79, § 404).

270. Tadic Appeal, *supra* note 11, para. 94.

271. Failing to collect and care for the wounded or failing to educate children under your control, to include religious and moral education, may rise to the level of a serious violation, but that is a question of fact for resolution by the tribunal or body convened to hear the case. *See supra* note 107.

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

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

state because, in prosecuting crimes of universal jurisdiction, the prosecuting authority is acting on behalf of all states under international law and not pursuant to domestic law.[275]

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274. *See* Prosecutor v. Kambanda, No. ICTR-97-23-S (Sep. 4, 1998) (Judgment and Sentence), *reprinted in* 37 I.L.M. 1411 (1998); Prosecutor v. Akayesu, No. ICTR-96-4-T (Sep. 2, 1998) (Judgment), *reprinted in* 37 I.L.M. 1399 (1998); Prosecutor v. Jelisic, No. IT-95-10 (Dec. 14, 1999) (Judgment), *available at* http://www.un.org/ icty/brcko/trialc1/judgment/jel-tj991214e.htm; Prosecutor v. Furundzija, No. IT-95-17/1-T 10 (Dec.10, 1998) (Judgment), *reprinted in* 38 I.L.M. 317 (1999); Graditzky, *supra* note 129; Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421 (1994); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554 (1995); Meron, *supra* note 263; Kristijan Zic, *The International Criminal Tribunal for the Former Yugoslavia: Applying International Law to War Criminals*, 16 B.U. INT'L L.J. 507 (1998); *see also* Beth Ann Isenberg, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Action*; 60 ALB. L. REV. 1051 (1997); Marie-Claude Roberge, *Jurisdiction of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda Over Crimes Against Humanity and Genocide*, 321 INT'L REV. RED CROSS 651 (1997).

275. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

> This "universality principle" is based on the assumption that some crimes are so universally condemned that the perpetrators are enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses . . . . Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial. Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the laws of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interests of all nations by seeking to punish the perpetrators of such crimes.

Id. at 582-83. *See also* Roberge, *supra* note 274.

VIII. The War Crimes Act of 1996 and its Relationship to Article 18, UCMJ: Preemption or Co-existence?

The War Crimes Act of 1996[276] was passed to implement, at least in part, the obligation of the United States under the Geneva Conventions of 1949[277] to "enact appropriate legislation criminalizing the commission of grave breaches"[278] and to "provide criminal penalties for certain war crimes."[279] However, the Act, as amended,[280] is limited to those circumstances where "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States."[281] Thus, the Act does not fully implement the obligation under the Geneva Conventions to prosecute or extradite[282] persons guilty of grave breaches because, as written, the Act does not extend to foreign nationals committing grave breaches against non-nationals of the United Sates.

Despite recommendations by both the State Department and the Department of Defense, the War Crimes Act of 1996 failed to provide for universal jurisdiction.[283] The House Judiciary Committee, in addressing this concern, stated: "[E]xpansion of H.R. 3680 to include universal jurisdiction would be unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight."[284] A review of the legislative history of the Act, including statements by members of Congress, reveals that it was passed based in part on the belief that current legislation, to include the Uniform Code of Military Justice, created "gaps" in the forums available to prosecute individuals for war crimes.[285] Additionally, the House Judiciary Committee and the sponsor of the bill, Congressman Walter Jones, Jr., of North Carolina, noted that a certain class or group of individuals were beyond the reach of any United

276. 18 U.S.C.S. § 2441 (LEXIS 2000).

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

278. H.R. REP. NO. 104-698, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2168 (referring to Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; and Geneva Convention IV, Article 146).

279. *Id.* at 1.

280. 18 U.S.C.S. § 2441 (LEXIS 2000) (amended in 1997 to replace the term "grave breaches" with "war crimes" and to include violations of Common Article 3 within the definition of war crimes).

281. *Id.*

282. The conventions impose an obligation on the signatories to prosecute or extradite persons guilty of grave breaches regardless of their nationality. *See supra* notes 157-58.

States courts. The Judiciary Committee observed that, although some war crimes recognized as grave breaches were covered by federal statute, such as 18 U.S.C. § 2340a and 18 U.S.C. § 1091 prohibiting torture[286] and genocide,[287] certain gaps in the law existed. The Committee stated:

> The conduct these statutes proscribe would in many instances be considered grave breaches of the conventions if they took place in the context of armed conflict. However, many crimes [that] would be considered grave breaches are not encompassed by these statutes. For instance, the simple killing of a prisoner of war would not be covered by any of the statutes.[288]

Congressman Jones expressed a similar concern on the ability to prosecute war criminals, commenting that "it is difficult to believe, in the absence of a military commission or an international criminal tribunal, the United

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283. H.R. REP. NO. 104-698, at 13.

> We believe . . . that the jurisdictional provisions should be broadened from the current focus on the nationality of the victims of war crimes. Specifically, we suggest adding two additional jurisdictional bases: (1) where the perpetrator of a war crimes is a United States national (including a member of the Armed Forces); and (2) where the perpetrator is found in the United States without regard to the nationality of the perpetrator or victim.

Id. (statement by Judith Miller, General Counsel of the U.S. Department Defense, 17 May 1996, concerning House Report 2587, the precursor to House Report 3680 (The War Crimes Act of 1996)). The Department of Defense urged broader jurisdiction than was either proposed in House Report 2587 or passed in House Report 3680. Additionally, the current version of the War Crimes Act of 1996 as amended in 1997, falls short of the expansive jurisdiction recommended by the Department of Defense.

284. *Id.* at 8.

285. *Id.* at 5-7. "Military commissions might be able to fill these gaps, at least when the United States is involved in hostilities. However, the extent to which commissions can be employed is unclear." *Id.* at 7 (discussing the viability of using military commissions to close the perceived gap in authority to prosecute war criminals). "H.R. 3680 would also fill another gap in current law. The ability to court martial members of our armed forces who commit war crimes ends when they leave military service. H.R. 3680 would allow for prosecution even after discharge." *Id.*

286. 18 U.S.C.S. § 2340a (LEXIS 2000).

287. *Id.* § 1091.

States currently has no means, by which we can try and prosecute perpetrators of war crimes in our courts."[289]

Both the House Judiciary Committee and Congressman Jones reached their conclusions after considering application of the Uniform Code of Military Justice and courts-martial as a mechanism to prosecute. Unfortunately, the Committee and all persons dealing with the issue seem to have misread Article 18 of the UCMJ.[290] The Committee first noted: "The Uniform Code of Military Justice grants court-martial jurisdiction [under Article 18] to try individuals for violations of the laws of war."[291] It went on to say: "Since the Geneva Conventions are considered parts of the laws of war, courts-martial would seem to be a powerful mechanism for punishment of war crimes."[292] Had the Committee stopped here in its analysis it would have properly concluded that courts-martial jurisdiction does exist for serious violations of international humanitarian law. Instead, the Committee noted a perceived limitation on courts-martial jurisdiction, one that ignores the plain text of Article 18.[293] The Judiciary Committee continued: "Their limitation [regarding courts-martial jurisdiction], however, is that they apply to very circumscribed groups of people: generally, members of the United States armed forces, persons serving with or accompanying armed forces in the field, and enemy prisoners of war."[294]

The flaw in the Judiciary Committee's analysis is that it ignores the plain meaning of Article 18. It further ignores the Supreme Court's decisions in *Quirin*[295] and *Yamashita*[296] where, in interpreting Article 12 of the

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288. H.R. REP. NO. 104-698, at 5. The official legislative history of the 1996 statute is limited to grave breaches limiting it to those conflicts of an international nature also known as Common Article 2 conflicts. The 1997 amendments extended the statute to violations of Common Article 3. The 1996 legislative comments, however, are still applicable since none of the comments regarding the need for the War Crimes Act of 1996 were limited by or dependent on the nature of the conflict (that is, international versus internal). Rather, the legislative history discusses the need to pass the War Crimes Act to close a perceived gap in criminal jurisdicition that existed at the time, a gap existing irrespective of the conflict classification, and to provide for prosecutorial authority to prosecute war crimes in U.S. domestic courts.

289. 142 CONG. REC. H8620, H8621 (daily ed. July 29, 1996).

290. UCMJ art. 18 (2000).

291. H.R. REP. NO. 104-698, at 5.

292. *Id.*

293. UCMJ art. 18.

294. H. REP. NO. 104-698, at 5 (citing UCMJ art. 2).

295. *Ex Parte* Quirin, 317 U.S. 1 (1942) (holding that a military commission was authorized by the Articles of War to prosecute enemy aliens who were not enemy prisoners of war for violations of the law of war).

1920 Articles of War,[297] the precursor to Article 18, the Court concluded that Article 12 of the Articles of War provided for two separate bases of jurisdiction.[298] The *Yamashita* Court properly noted that Article 12 [now Article 18], clause 1 jurisdiction was connected to then Article 2 of the Articles of War (the precursor to Article 2 of the UCMJ), which listed persons subject to the code.[299] Under clause 1, persons subject to the code were and still are subject to general court-martial jurisdiction.[300] However, clause 2 jurisdiction under Article 12 of the Articles of War (or its successor, Article 18, UCMJ) established jurisdiction based purely on violations of the law of war, regardless of whether the person was or is subject to the code at the time of the act.[301] Interestingly, the Committee later cites *Yamashita* for Congress's authority to enact federal criminal laws relating to war crimes, yet fails to recognize the importance of *Yamashita* in differentiating between jurisdiction under clauses 1 and 2 of Article 18, UCMJ.[302]

Although the House Judiciary Committee properly noted a limitation on the exercise of Article 18, clause 1 jurisdiction, no such limitation is placed on clause 2. Instead of concluding, "courts-martial *would seem* to be a powerful mechanism for punishment of war crimes,"[303] the more

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296. *In re* Yamashita, 327 U.S. 1 (1946) (holding that an enemy prisoner of war may be tried by a military commission pursuant to the Articles of War for violations of the law of war).

297. 1920 Articles of War, 41 Stat. 787 (1920).

298. *See Ex Parte Quirin*, 317 U.S. at 27-28; *see also Yamashita*, 327 U.S at 7.

299. *Yamashita*, 327 U.S at 7.

300. *See* UCMJ art. 18 (2000) (clause 1); *see also Ex Parte Quirin*, 317 U.S. at 27-28; *Yamashita*, 327 U.S at 7.

301. *See Ex Parte Quirin*, 317 U.S. at 27-28; *see also*, Yamashita, 327 U.S at 7.

302. H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

303. *Id.* at 6 (emphasis added). The House Judiciary Committee also considered the use of military commissions but noted:

> Many gaps in federal law relating to the prosecution of grave breaches of the Geneva Conventions could in principle be plugged by the formation of military commissions. However, the Supreme Court condemned their breadth of jurisdicition to uncertainty in *Ex Parte Quirin*, where it stated that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the laws of war."

Id. (citation omitted).

accurate conclusion is that courts-martial *are* a powerful mechanism for punishment of war crimes.

One other possible explanation for the limited scope of the War Crimes Act[304] is that it is an exercise of domestic legislation, creating domestic criminal law. Thus, the offenses it creates are separate and apart from that body of international law, the violations of which are commonly referred to as war crimes and violative of customary international law. For example, the prohibition against genocide has been recognized by all nations since the Nuremberg Trials as customary international law.[305] The crime of genocide is one that is subject to universal jurisdiction,[306] and, if committed during an armed conflict, would be a war crime.[307] Therefore, genocide is an international law offense subjecting the violator to prosecution for violating the laws of war. Genocide is also a crime under U.S. domestic law, 18 U.S.C. § 1091.[308] As a result, a genocide prosecution at a court-martial would be an exercise of international criminal law, whereas a genocide prosecution in federal district court is an exercise of domestic law. This same logic applies to all war crimes cognizable under Article 18, UCMJ.[309] The War Crimes Act is instead an exercise of "nationality jurisdiction"[310] and "passive personality jurisdiction."[311] The former authorizes a state to exercise jurisdiction over its nationals and arguably those persons residing or domiciled in the state.[312] The latter authorizes a state to exercise jurisdiction and apply its domestic law to an act committed out-

304. 18 U.S.C.S. § 2441 (LEXIS 2000).

305. *See supra* note 152; *see also* Isenberg, *supra* note 274; Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425 (1999).

306. RESTATEMENT (THIRD), *supra* note 79, § 404 (Reporter's Note); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

307. Violations of international humanitarian law are by definition war crimes. FM 27-10, *supra* note 7, ¶ 499.

308. H.R. REP. NO. 104-698, at 4.

309. UCMJ art. 18 (2000).

310. RESTATEMENT (THIRD), *supra* note 79, § 402(2), cmt. a ("International law recognizes links of . . . nationality . . . as generally justifying the exercise of jurisdiction to prescribe."); *Id.* cmt. e (discussing nationality, domicile and residence as bases to exercise jurisdiction).

311. RESTATEMENT (THIRD), *supra* note 79, § 402, cmt. g ("The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.").

312. *See supra* note 152.

side its territory by a person not its national where the victim of the act, generally criminal in nature, was its national.[313]

This distinction between international law and domestic law is highlighted by the comment in the section-by-section analysis of the legislative history, where the House Judiciary Committee stated:

> The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations.[314]

Although apparently mistaken in the belief that the Act was closing a "gap" which really did not exist and which ignored the plain meaning of Article 18, UCMJ,[315] Congress correctly concluded that no mechanism existed in which to prosecute war crimes in federal district court.[316] From a federal criminal prosecution standpoint, a gap did exist. However, to say that no criminal forum existed before passage of the War Crimes Act was inaccurate. In any event, since the conclusions about the limits on Article 18, UCMJ, clause 2, jurisdiction were mistaken, this passage confirms that the War Crimes Act of 1996 does not bar prosecution of war criminals pursuant to Article 18, UCMJ.

This forum-enabling conclusion was highlighted by Senator Jesse Helms, who came closest to accurately stating the real need for the War Crimes Act of 1996 when he said:

> Many have not realized that the U.S. cannot prosecute, in federal court, the perpetrators of some war crimes against American servicemen and nationals. Currently, if the United States were to find a war criminal within our borders—for example, one who had murdered an American POW—the only option would be to deport or extradite the criminal or to try him or her before an international war crimes tribunal or military commission. Alone, these options are not enough to ensure that justice is done.[317]

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313. *Id.*.

314. H.R. REP. NO. 104-698, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2176-2177.

315. UCMJ art. 18 (2000).

316. H.R. REP. NO. 104-698, at 12.

317. 142 CONG. REC. S9648 (daily ed. August 2, 1996).

As his statement indicates, the War Crimes Act of 1996 was passed to allow for prosecution under domestic law in federal district courts. Senator Helms recognized the existence of other forums, to include a military commission, but noted that "these options are not enough."[318] What Senator Helms and the House Judiciary Committee overlooked was that a general court-martial has been a viable option for prosecuting serious violations of the laws of war since the 1916 Articles of War, and that since the Bosnia-related prosecutions, this jurisdiction extends to war crimes committed during an internal armed conflict.

The War Crimes Act as written does not reach the conduct of a Tadic, Akayesu, or Milosevic unless the atrocities or war crimes committed by them are directed against United States nationals. However, Article 18, UCMJ, does reach these individuals and, contrary to the legislative history and committee reports, always did.

IX. Policy Considerations Regarding the Exercise of Article 18 Authority

Although Article 18 of the UCMJ establishes court-martial jurisdiction over the Serb lieutenant in the opening hypothetical, no rule requires the exercise of such jurisdiction. As with any authority that exists under law, particularly international law, the decision to exercise that authority is made based on multiple policy considerations. There certainly would be sound policy considerations both for and against the assertion of such jurisdiction over the lieutenant in the hypothetical. Therefore, prior to exercising such jurisdiction, a commander deployed as part of a peacekeeping or peace enforcement force will have to evaluate the pros and cons of court-martialing a local national, non-U.S. service member for war crimes—serious violations of international humanitarian law—committed against a member of the local national's own country. From a legal perspective, however, the first task is to establish that there are no legal impediments to convening a general court-martial and prosecuting a non-U.S. service member for such violations of international humanitarian law committed during an internal armed conflict.[319]

Once it is established that the UCMJ authorizes the exercise of jurisdiction, a multitude of policy considerations would have to be considered. It is easy to identify possible factors that weigh against such an exercise of jurisdiction. Some of these include the possible adverse affect on a coali-

318. *Id.*

tion or joint mission, international policy implications, and U.S. policy. However, there may be strong policy reasons supporting such a course of action. In the hypothetical presented, these reasons might include limited resources at the ICTY and ICTR, lack of an international forum, accountability, deterrence, and the presumption that soldiers are best suited to hear cases involving alleged war crimes.

Despite the existence of the ICTY and ICTR, their resources, specifically financial resources, are limited and preclude prosecution of all persons guilty of war crimes in the tribunals' jurisdiction.[320] As with any prosecutorial function, when given limited resources, the prosecutor must pick and choose which cases to try and which cases to let go. Since war crimes are crimes of universal concern, the United States should, on a case-by-case basis, consider trying war criminals at general courts-martial, especially when the criminal is within the reach of forward-deployed U.S. forces and it appears that the ICTY or ICTR is unable or unwilling to prosecute.

In addition to the limited resources of the two current international tribunals, both have temporal and geographic limitations on jurisdiction. The ICTY's jurisdiction is limited to "the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters. The temporal jurisdiction . . . shall extend to a period beginning on 1 January 1991."[321] The ICTR's jurisdiction is similarly limited:

> The territorial jurisdiction . . . shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighboring states in respect of serious violations of international humanitarian law committed by Rwandan citizens.

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319. A commander can prosecute a U.S. service member under Article 18, clause 2, for violating the law of war. Generally, however, service members are prosecuted for violating the punitive provisions of the UCMJ under Article 18, clause 1, as persons subject to the code. *See supra* note 10; *see e.g.*, United States v. Calley, 46 C.M.R. 1131 (1973) (prosecution under the UCMJ of First Lieutenant William Calley, U.S. Army, for the murder and attempted murder of innocent civilians in My Lai during Vietnam, both offenses under the code and war crimes under the laws of war).

320. *See generally* The International Criminal Tribunal for the Former Yugoslavia, *ICTY Key Figures*, *at* http://www.un.org/icty/glance/keyfig-e.htm (last modified Jan. 23, 2001); The International Criminal Tribunal for Rwanda, *About the Tribunal*, *at* http://www.ictr.org/ (last visited Feb. 14, 2001) (General Information, Budget and Staff).

321. ICTY Statute, *supra* note 7, art. 8.

> The temporal jurisdiction . . . shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.[322]

A general court-martial convened under Article 18, UCMJ, would have authority to prosecute the same offenses covered by the ICTY[323] and ICTR[324] without the temporal or geographic constraints placed on both tribunals.

A general court-martial convened under Article 18, UCMJ, could further prosecute war crimes committed in areas not covered by an international tribunal. For example, the ongoing conflict in the Russian Republic of Chechnya is not subject to the jurisdiction of either the ICTY or ICTR. As previously noted, a Russian soldier or member of the Chechnyan belligerency is not subject to prosecution under the War Crimes Act for violations of the law of war directed at another Russian or Chechnyan nor is the Chechnyan conflict covered by either the ICTY or ICTR. In these circumstances, Article 18, UCMJ, provides a viable forum beyond the local domestic courts in which to prosecute individuals for war crimes.

Finally, a general court-martial is arguably the forum best suited to prosecute individuals suspected of war crimes. At a general court-martial, either a military judge or panel of officers or officers and enlisted personnel, all of which are senior to the accused, decides guilt.[325] The concept is simple—soldiers should sit in judgment of other soldiers. Indeed, the law of war includes a strong tradition that warriors should decide the fate of

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322. ICTR Statute, *supra* note 27, art. 7.

323. ICTY Statute, *supra* note 7, arts. 2-5 (authorizing the prosecution of grave breaches, violations of laws or customs of war, genocide, and crimes against humanity respectively).

324. ICTR Statute, *supra* note 27, arts. 3-5 (authorizing the prosecution of crimes against humanity, violations of common Article 3 and Protocol II, and genocide respectively).

325. Under the Rules for Courts-Martial, except in a capital case, the accused can request to be tried by a military judge alone or by a panel of officers or officers and enlisted personnel if the soldier is enlisted. No member of the panel can be junior to the accused. Whether judge alone or panel, the person or persons deciding the accused's guilt or innocence would be another soldier or soldiers. Regardless of the accused's status as someone not subject to the code, the Article 18 court-martial would follow court-martial procedures as found in the 2000 Manual for Courts-Martial. *See* MCM, *supra* note 8.

other warriors. Perhaps the Supreme Court in *Yamashita*[326] best summed up this concept of warriors judging warriors when it stated:

> We do not consider what measures, if any, petitioner [Yamashita] took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide.[327]

The Supreme Court, in 1945, noted the special skill and expertise soldiers have and the common sense and simple logic of allowing soldiers to stand in judgment of other soldiers. Under the War Crimes Act, instead of being judged by soldiers, persons with the "peculiar competence of the military officers"[328] necessary to evaluate law of war issues, the persons judging soldiers will be those persons randomly selected according to federal district court procedures.

There are, of course, equally compelling policy considerations against such exercise of jurisdiction. These include: the adverse effect or impact such a decision might have on the mission; the breakdown of coalition cohesion; international criticism; and resource diversion.[329] How-

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

327. *Yamashita*, 327 U.S at 17; *see also* Smith v. Whitney 116 U.S. 167, at 178 (1886) ("Of questions not depending upon the construction of the statutes, but upon unwritten military law or usages, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.").

328. *Yamashita*, 327 U.S at 17.

329. A decision to prosecute might, for political or other considerations, cause coalition forces to withdraw from the operation. For example, in Operation Joint Endeavor, the Implementation Force (IFOR) was comprised of military forces from numerous countries to include the United States, France, Britain, Germany, Russia, Poland, Denmark, and Sweden. What if a soldier from the Russian Brigade, a unit in the American sector of Bosnia-Herzegovina, was accused of war crimes during the pre-1994 Chechnyan conflict? Although the Commander of Task Force Eagle, the American Task Force in sector had authority to convene a general court-martial under Article 18, UCMJ, he might choose not to based on the potential impact the decision to court-martial would have on the mission and IFOR.

ever, by simply acknowledging the legality of Article 18 jurisdiction, policy makers gain a previously unrecognized option.

Finally, as previously discussed, Congress expressed its concern with a "universal jurisdiction" approach to handling war crimes when it evaluated the War Crimes Act of 1996.[330] The Judiciary Committee specifically rejected proposals that would expand jurisdiction "into conflicts in which this country has no place and where our national interests are slight."[331] As evident from this passage, the authority to prosecute is perhaps a simpler question to answer than whether to prosecute. Can the commander do it? Yes. Should he do it? That question needs to be answered on a case-by-case basis taking into account all policy aspects and ramifications associated with deciding for or against prosecution.

X. Conclusion

The prosecution of individuals responsible for committing war crimes is a major component in the machinery of enhancing respect for and compliance with the law of war. Such prosecutions are viewed by the international community as being directly linked to the restoration of peace and security in war torn nations. The importance of providing mechanisms for such prosecutions has led to unprecedented developments in international criminal law, exemplified by the creation of international criminal tribunals devoted exclusively to the adjudication of such crimes, even when committed in a purely internal conflict.

As World War II came to a close, the obvious focus of international lawyers, diplomats, and leaders concerned with dealing with war crimes was on crimes committed during the course of state versus state warfare. Today, however, encouraging respect for the fundamental humanitarian protections established to apply to internal armed conflicts seems more urgent than focusing on major international armed conflicts. As the international community has demonstrated, war crimes prosecutions related to

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330. *See supra* note 283.

331. H.R. REP. NO. 104-698, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

internal conflicts are an integral component for encouraging respect for the law.

As is clear from the plain meaning of Article 18, UCMJ, as traced from its origin in 1806, Article 18 authorizes a general court-martial for violations of the law of war if the violator "by the law of war is subject to trial by a military tribunal." Serious violations of the law of war subject violators to prosecution by U.S. military, international criminal tribunals, and non-U.S. military tribunals,[332] as well as national courts. As discussed in Part IV, the language of Article 18, UCMJ, referring to military tribunals does not mean that a tribunal must be ongoing to vest jurisdiction in a general court-martial; rather, this language qualifies the nature of the offense for which a general court-martial has jurisdiction: the violation must be such that the violator or offender is a person who "by the law of war is subject to trial by a military tribunal."[333]

A review of the varied sources of international law reveals that the provisions of Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), have attained customary international law status, thus binding on all states.[334] Furthermore, violations of the prohibitions contained within these provisions are serious violations of the law of war that entail individual criminal responsibility for the violator.[335] As such, the violator is a person "who by the law of war is subject to trial by military tribunal," thus giving rise to Article 18, clause 2, UCMJ jurisdiction. Prosecution at a general court-martial under Article 18, UCMJ, is an exercise of international law, separate and apart from the War Crimes Act of 1996, and is thus not preempted by this domestic criminal statute. Finally, although policy considerations related to any such exercise of jurisdiction are numerous, these are distinct from the legal issue of whether such prosecution is permitted, and should only be a factor once the legality of such a course of action has been assessed.

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332. Since 1996, Switzerland has held two military tribunals regarding war crimes in Bosnia-Herzegovina and Rwanda, crimes committed by non-nationals. *See* International Committee for the Red Cross, *International Humanitarian Law, National Implementation, at* http://www.icrc. org/ihl-nat.nsf/WebCASE?OpenView (last visited Feb. 21, 2001) (National Case Law, Switzerland) (detailing a 17 April 1997 Swiss Military Tribunal case, as well as two Swiss Military Court of Cassation cases). In the 8 July 1996 Court of Cassation case, Switzerland complied with a request by the ICTR for the transfer of a case of a Rwandan citizen to its jurisdiction. The accused had unsuccessfully appealed his transfer to the ICTR. *Id.*

333. UCMJ art. 18 (2000).

334. *See supra* notes 88, 99.

335. *See supra* note 250.