FOREWORD

Daniel Kanstroom

[pages 1–14]

Abstract: International criminal tribunals have emerged as the most tangible and well-known mechanism for seeking justice in the wake of atrocious human rights violations. As the enterprise has developed, the need to ask fundamental questions is obvious, compelling, and essential. In March, 2006, the Boston College International and Comparative Law Review, together with The Center for Human Rights and International Justice at Boston College and the Owen M. Kupferschmid Holocaust/Human Rights Project convened a diverse and impressive group of speakers from academia, the judiciary, and legal practice to evaluate: the development of “common law” of the tribunals, the function and limits of tribunals, and the state of legal concepts not clearly governed by international law. Much of the extended conversation of that day is contained in this published version, comprising eight articles. From the participants’ insights one can discern not only important new ideas and syntheses, but an outline for future research that is grounded in a deep respect for the broad human rights enterprise of which the tribunals are the “cutting edge.”

TRIBUNAL DISCOURSE AND INTERCOURSE: HOW THE INTERNATIONAL COURTS SPEAK TO ONE ANOTHER

Patricia M. Wald

[pages 15–28]
Abstract: This Article analyzes the development of a common law for international tribunals through the interpretation of applicable treaties and the interpretation of customary law—a decidedly difficult and amorphous process. The author notes there has been significant development in the common law of the tribunals, but that there is still a long way to go, especially on the issue of when a court should simply interpret or apply existing law and when it should “legislate” or create new law. The Article also examines the less formal rules and practices beyond formal judgments, the “soft” law and practices, which are indispensable to the continued existence of international tribunals. This Article suggests “soft” law and practices may turn out to be more influential in the overall record of these courts than the jurisprudence.


Devin O. Pendas

Abstract: Since the beginning of time, war has been accompanied by atrocity. While there were attempts to regulate such violence, for most of history the penchant toward deliberate atrocity was largely viewed as a political or military problem. During World War II, however, the Allies declared that wartime atrocity was not only morally reprehensible, but also legally actionable and this declaration represented the triumph of a new paradigm for how to think about the conduct of war, the “legalist paradigm.” This Article describes the emergence of the legalist paradigm and argues that the emergence of the legalist paradigm of war was a response to the breakdown of a long-standing civilizational consensus among European Elites.

NUREMBERG’S CONTRIBUTIONS TO INTERNATIONAL LAW

Allan A. Ryan

Abstract: This Article explores the establishment of the International Military Tribunal at Nuremberg beginning with the Moscow Declaration in 1943 and focusing on the Charter of the Tribunal in 1945, which, along with its charges, altered the course of international human rights law. Focusing on the way the Charter and its charges were devised, the author notes that the Tribunal’s existence was not a certainty after World
War II and in fact it almost did not occur due to intense political debate that occurred in both domestic and international arenas. The Article argues that the creation of the Nuremberg Tribunal was the most significant development in human rights law in the twentieth century, as it has been used as the model for the tribunals established to deal with the horrors that occurred in Yugoslavia and Rwanda.

BEYOND TRADITIONAL NOTIONS OF TRANSITIONAL JUSTICE: HOW TRIALS, TRUTH COMMISSIONS, AND OTHER TOOLS FOR ACCOUNTABILITY CAN AND SHOULD WORK TOGETHER

Donald L. Hafner & Elizabeth B. L. King
[pages 91–110]

Abstract: Civil conflicts marked by human rights violations leave devastated communities in their wake. The international community has an interest in assuring that justice is done, an interest which the recent establishment of the International Criminal Court (ICC) confirms. The authors argue the ICC should be augmented by additional mechanisms to bear the burden of doing justice and reconstructing communities after such civil conflicts. This Article explores the potential tensions among such mechanisms, including national human rights trials, truth commissions, and community-based gacaca, and emphasizes the importance of consulting victims in resolving these tensions. The authors conclude that the ICC should take the lead in coordinating the different mechanisms discussed in the Article as part of post-conflict reconstruction.

RIDING THE RHINO: ATTEMPTING TO DEVELOP USABLE LEGAL STANDARDS FOR COMBAT ACTIVITIES

William J. Fenrick
[pages 111–138]

Abstract: The body of law regulating combat activities is, essentially, a body of preventive law which should be applied in military training, planning, and operations to minimize net human suffering and net destruction of civilian objects in armed conflict. Prosecution for violations of such law is uncommon. Such prosecutions have, however, been conducted before the International Criminal Tribunal for the former Yugoslavia (ICTY). This Article reviews the relevant jurisprudence of the ICTY and asserts that effective prosecution for combat offences, such as unlawful attacks, can be conducted before non-specialist tribunals and that these prosecutions can both strengthen the law and elaborate upon its substantive provisions.
CREATING NORMS OF ATTORNEY CONDUCT IN INTERNATIONAL TRIBUNALS: A CASE STUDY OF THE ICTY

Judith A. McMorrow

[pages 139–174]

Abstract: Using the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a case study, this Article explores the merger of legal cultures at the ICTY. The ICTY was crafted in a high-stakes international environment and brings together lawyers and judges who have been trained and inculcated typically in a common law/adversarial system or a civil law/non-adversarial system. Lawyers and judges come to the ICTY not only with a distinct understanding of their roles within their home jurisdictions, but also with different skill sets. Merging the legal cultures has not always been smooth. By comparing how attorney-conduct norms are created in the United States—socialization, malpractice, market controls, regulatory processes, and procedural rules—with the practice at the ICTY, it becomes evident that the judges are the dominant source of norm creation in this international court. These norms are created, however, in an environment in which it appears that most of the substantive interaction between the judges, prosecutors, and defense counsel occurs in formal court settings. Future international courts would benefit from additional discussion among the judicial, prosecutorial, and defense functions as norms are created, including shared discussion about codes of conduct for judges, prosecutors, and defense counsel.

RULE 11 BIS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: REFERRAL OF INDICTMENTS TO NATIONAL COURTS

Susan Somers

[pages 175–184]

Abstract: The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia in an effort to restore peace and security to the region. The Tribunal is an ad hoc institution and has a limited existence. A Completion Strategy was established by the U.N. Security Council to bring the work of the Tribunal to a conclusion. An important aspect of this Completion Strategy is the use of Rule 11 bis to transfer certain cases from the Tribunal to national courts. This article looks at the background, process, and judicial determination of Rule 11 bis requests.
FITNESS HEARINGS IN WAR CRIMES CASES: FROM NUREMBERG TO THE HAGUE

Phillip L. Weiner

[pages 185–198]

Abstract: This Article examines the Strugar decision and its role in establishing the standards for a defendant’s fitness to stand trial before an international tribunal. While fitness to stand trial was an issue in three cases at Nuremberg, those cases failed to establish any standards for the international criminal justice community. In contrast, the Strugar standards have been followed in other Trial Chambers at the International Criminal Tribunal for the Former Yugoslavia, and at The Special Panels for Serious Crimes at the United Nations Tribunal at East Timor. Therefore, the author argues that Strugar may be viewed as the seminal decision on the issue of fitness to stand trial before an international tribunal.

NOTES

ENERGIZING THE INDIAN ECONOMY: OBSTACLES TO GROWTH IN THE INDIAN OIL AND GAS SECTOR AND STRATEGIES FOR REFORM

Krishnan A. Devidoss

[pages 199–210]

Abstract: India is rapidly becoming one of the largest consumers of energy in the world. At the same time, India continues to be hindered by bureaucratic delays, an archaic tax system, security problems and prohibitive investment regulations that have made expansion and consolidation in the petroleum sector difficult. This Note explores underlying structural problems in India’s investment, tax, and regulatory climate that have worked to the detriment of Indian oil and gas companies. This Note argues that corruption, problems associated with contractual stability, a restrictive investment climate, and security concerns have prevented meaningful mergers and acquisitions by Indian companies, prevented them from exploring oil and gas opportunities abroad, and have disadvantaged them with respect to their competitors in other countries. This Note further argues that despite India’s progress in liberalizing its economy, its government must work to address these core underlying problems in order to secure a stable and secure supply of energy to meet its growing demands.
WHEN IS A STATE A STATE? THE CASE FOR RECOGNITION OF SOMALILAND

Alison K. Eggers

Abstract: It has been well over a decade since the world attempted to save Somalia from the dustbin of “failed states.” During that decade, one region of Somalia has pulled away from its post-colonial union with Somalia, established its own government, kept the peace, and managed to flourish in a kind of stability that is only a faint memory to most Somalis outside the region. Somaliland, once a British colony, argues it should be recognized as an independent state. This Note explores the legal conception of statehood, from the Montevideo Convention to the more recent emphasis on self-determination, and then turns to the case of Somaliland, arguing that Somaliland should be recognized as a state by the international community.

A CRITICAL ASSESSMENT OF THE UNITED STATES’ IMPLEMENTATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Christopher N. Franciose

Abstract: As Western corporations continue to expand internationally in search of natural resources and greater economies of scale, they increasingly find themselves operating amidst the political unrest and social conflict that afflicts many developing nations. In such contexts, multinational enterprises often turn a blind eye to human rights abuses, and in the worst cases, become active participants. As a result, many have called for a global system of corporate governance. This Note focuses on the OECD’s framework for influencing corporate behavior internationally: the “OECD Guidelines for Multinational Enterprises.” After explaining the mechanics of the Guidelines, this Note provides a critical analysis of the United States’ implementation by comparing U.S. methods with those of two other adherent states—the Netherlands and France. Ultimately, the Note concludes that U.S. practices leave much room for improvement and offers suggestions for a more robust implementation of the Guidelines.

THE ABORTION CRISIS IN PERU: FINDING A WOMAN’S RIGHT TO OBTAIN SAFE AND LEGAL ABORTIONS IN THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Sarah A. Huff

Abstract: Under Peruvian law, abortion is illegal unless it is necessary to save the life of the mother. At the same time a woman can be imprisoned if she receives an illegal abortion. Yet, despite its illegality and the threat of punishment, there are over 350,000 illegal and clandestine abortions performed each year in Peru and nearly 65,000 of these women are hospitalized due to complications. Peru has the second-highest maternal mortality rate in South American and unsafe abortions account for nearly one quarter of the deaths. The Convention on the Elimination of All Forms of Discrimination Against Women may provide an answer to the problem of unsafe and illegal abortions in Peru. Although it doesn’t explicitly provide that a woman has a right to access safe and legal abortions, it impliedly does so. This Note argues that the actions of the Convention’s Committee reveal that a woman has a right to safe and legal abortions and that Peruvian women should take the next step by asserting their claim to this right through the formal complaint procedure.

THE NATIONAL STOLEN PROPERTY ACT AND THE RETURN OF STOLEN CULTURAL PROPERTY TO ITS RIGHTFUL FOREIGN OWNERS

Jessica Eve Morrow

Abstract: Artifact-rich countries have recently begun to campaign more vigorously for the return of their cultural property that has found its way illegally into the United States. Whether blatantly stolen or taken in violation of a country’s export law, the National Stolen Property Act is the vehicle through which these countries can hope to retrieve their property. Its requirements, however, have often proven too difficult for countries to overcome. The United States, on behalf of the source country, must meet the mens rea requirement of the National Stolen Property Act, an often insurmountable goal because of the confusion surrounding the circumstances under which the property was taken. By relaxing the mens rea requirement, the National Stolen Property Act will become more effective and its goals of punishment and deterrence will be furthered.
Abstract: As global warming continues to warm the Arctic seas, more of the Arctic is free of ice for longer periods. The possibilities for exploitation of natural resources and for control over Northern shipping lanes have prompted countries’ renewed interest in their competing claims to the region. Recently, Denmark and Canada have clashed over their competing claims to a small, uninhabitable rock known as Hans Island. While this island may not seem significant, the eventual resolution of this border dispute may have widespread ramifications for the resolution of international conflicts in other remote, uninhabited areas. This Note examines the International Court of Justice decisions in a number of border dispute cases, applies that jurisprudence to the Hans Island facts, and urges both parties to reach an equitable solution.
SHARPENING THE CUTTING EDGE OF INTERNATIONAL HUMAN RIGHTS LAW: UNRESOLVED ISSUES OF WAR CRIMES TRIBUNALS

Daniel Kanstroom*

Abstract: International criminal tribunals have emerged as the most tangible and well-known mechanism for seeking justice in the wake of atrocious human rights violations. As the enterprise has developed, the need to ask fundamental questions is obvious, compelling, and essential. In March, 2006, the Boston College International and Comparative Law Review, together with The Center for Human Rights and International Justice at Boston College and the Owen M. Kupferschmid Holocaust/Human Rights Project convened a diverse and impressive group of speakers from academia, the judiciary, and legal practice to evaluate: the development of “common law” of the tribunals, the function and limits of tribunals, and the state of legal concepts not clearly governed by international law. Much of the extended conversation of that day is contained in this published version, comprising eight articles. From the participants’ insights one can discern not only important new ideas and syntheses, but an outline for future research that is grounded in a deep respect for the broad human rights enterprise of which the tribunals are the “cutting edge.”

For better or worse, international criminal tribunals have emerged as the most tangible and well-known mechanism for seeking justice in the wake of atrocious human rights violations. If they accomplish their ostensible goals, international tribunals may render justice to the accused, sustain the rule of law, give voice to victims, promote reconciliation, create a record, empower communities, resolve factual disputes, and ensure that grave war crimes do not go unpunished. They offer tantalizing promises of legitimacy, regularity, and predictability as they work to achieve goals common to all systems of criminal law—just pun-

* Clinical Professor of Law and Director, International Human Rights Program, Boston College Law School. This article is an overview of the articles published in this issue that were based on speeches and panel discussions presented at “Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals,” a symposium on war crimes tribunals at the Boston College Law School on March 24, 2006.
ishment, deterrence, incapacitation of the dangerous, and rehabilitation.¹

But criminal law is a blunt instrument at best, even in domestic legal systems. Its purposes are difficult to synthesize and therefore its achievements are elusive to evaluate.² No single normative theory works to justify all criminal doctrines, nor should it.⁵ In operation, criminal law often masks complicated interpretive constructs.⁴ Those who practice criminal law, as I did for many years, repeatedly see the wisdom of the maxim that when one’s only tool is a hammer, all problems tend to look like nails.⁵

Following the death of Slobodan Milosevic in custody and mid-trial at the Hague and the grotesque spectacles of Saddam Hussein first mocking the criminal justice system he faced and then being taunted by his executioners as he faced the gallows, the need to ask hard, fundamental questions about the current state of war crimes tribunals is obvious. Moreover, as the enterprise has developed through the prodigious efforts of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC), and many other tribunals, a welter of more specific legal questions have arisen.

In March 2006, the Boston College International and Comparative Law Review, together with The Center for Human Rights and International Justice at Boston College and the Owen M. Kupferschmid Holocaust/Human Rights Project, convened a diverse and impressive group of speakers from academia, the judiciary, and legal practice to evaluate the following related issues:

1. The development of “common law” of the tribunals: How might various legal standards at different tribunals be reconciled and evaluated? How much uniformity should be sought? What are

² See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 401 (1958) (“Examination of the purposes commonly suggested for the criminal law will show that each of them is complex and that none may be thought of as wholly excluding the others . . . . The problem, accordingly, is one of the priority and relationship of purposes as well as of their legitimacy . . . .”).
⁵ So far as I am aware, the exact origins of this formulation are unclear. It is frequently attributed—without precise citation—to Mark Twain and, more recently, to Abraham Maslow.
the implications of such “common law” development for international human rights law more generally?

2. The function and limits of the tribunals: What are the optimal purposes of trials when massive human rights abuses have destroyed a community or indeed an entire country? How have the tribunals measured up in that regard? How does one reconcile forensic legal practice with the needs of victims? What multi-disciplinary models can be developed to move international criminal practice towards a more holistic approach?

3. The state of legal concepts not clearly governed by international law: What are the professional ethical standards that govern the tribunals? What is the law of competency, the scope of attorney-client privilege, self-representation, the breadth of the protection against self-incrimination, et cetera?

The results of this Symposium were a series of well-reasoned, deeply-engaged, and lively discussions. Fortunately, much of the extended conversation of that day is contained in this published version. From the participants’ insights one can discern not only important new ideas and syntheses, but an outline for future research that is grounded in a deep respect for the broad human rights enterprise of which the tribunals are the “cutting edge” (an intentional double entendre implying both a surgical and a destructive capacity).

Justice Robert Jackson’s opening statement to the Nuremberg Tribunal offers a good starting point for consideration of these topics. Jackson said, “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.” He then focused attention on the fact that, “four great nations, flushed with victory and stung with injury stay[ed] the hand of vengeance and voluntarily submit[ted] their captive enemies to the judgment of the law.” This triumph of law over cruder mechanisms was, he said, “one of the most significant tributes that Power has ever paid to Reason.”

These are surely among the most famous, aspirational, and ringing words ever spoken in a courtroom or indeed anywhere. They retain the

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6 Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945, 2 Trial of the Major War Criminals Before the International Military Tribunal 98–99 (1947) [hereinafter Jackson, Prosecutor’s Address].
7 Id.
8 Id.
power to move and inspire me every time I read them. But one might also note an odd similarity between Jackson’s phrasing of “Power” paying tribute to “Reason” and that of La Rochefoucauld,9 who wrote, four centuries earlier, words with which Robert Jackson was surely familiar: “hypocrisy is a tribute that vice pays to virtue.”10

Jackson was in fact called a hypocrite in his day—not only by Nazis but by believers in the rule of law such as Chief Justice Harlan Fiske Stone, who called Nuremberg “a high-grade lynching party” and, more to our point, said, “I don’t mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law . . . .”11 Many others also opposed the Nuremberg idea—Churchill, as is well-known, suggested shooting the captured Nazi leaders. A memo written in support of this proposition was entitled—with classic British understatement—“The Argument for Summary Process Against Hitler & Co.”12

Is this debate now definitively over? War was famously called the extension of politics by other means by Carl von Clausewitz.13 War crimes are the illegal extension of war by illegitimate means or to legally-protected people. How do—and how should—international tribunals draw such lines? To what extent do the tribunals embody, reflect, and recreate legitimate law and to what extent do they create new law? Are they a tribute paid by power to reason or a hypocritical homage paid by vice to virtue?

The first panel of the Symposium addressed the question of “The Development of the Common Law of the Tribunals.” This undoubtedly seemed an odd title to some. After all, the common law is fundamentally an Anglo-American idea, and even there it is largely anachronistic in the era of the administrative state. Anyone with even a passing knowledge of tribunals as varied as those for the Former Yugoslavia, Sierra Leone, and the ICC would certainly wonder about how much

9 François VI, duc de La Rochefoucauld, le Prince de Marcillac (1613–80).
13 Carl von Clausewitz, On War 605 (Michael Howard & Peter Paret trans., 1976) (“We maintain . . . that war is simply a continuation of political intercourse, with the addition of other means.”).
common law there is. Indeed, the most famous explication of the common law highlighted the importance of a common history, perhaps even a common sense of nationhood:

The life of the law has not been logic; it has been experience . . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.\textsuperscript{14}

What has the law of the tribunals been? What does it tend to become? Which nation’s or nations’ story does it embody? It was in this broad, legal realist sense that we asked our panelists to explore the “cutting edge” of international human rights law. The hope was that we might be at a point where one could improve upon the candid assessment of one panelist, Pierre Prosper, who had served with great distinction as a prosecutor at the United Nations International Criminal Tribunal for Rwanda. Describing his experiences in Rwanda, Prosper conceded: “We made it up as we went along. We really did.”

In her article for this Symposium, Judge Patricia M. Wald,\textsuperscript{15} who served for two decades on the United States Court of Appeals for the District of Columbia and then as a judge at the ICTY, notes that the legitimacy of international courts depends in large measure upon their adherence to a complex body of international law. For criminal tribunals, this means an array of treaties, such as the Hague and Geneva Conventions and Protocols, but it also means “customary law.” Thus, the development of a common law for the tribunals is both a matter of textual interpretation and a still more amorphous process. Major differences among the tribunals themselves render the process of developing a consistent common law particularly complicated. The Rwanda Tribunal, for example, deals with terrible crimes committed during and after a civil war. The ICC has a much broader mandate and a comprehensive treaty.\textsuperscript{16} Judge Wald notes with approval recent

\begin{footnotesize}
\footnote{14}Oliver Wendell Holmes, Jr., \textit{The Common Law} 1 (1881).  
\footnote{16}Indeed, as Judge Wald notes, Article 21 of the Rome Statute mandates a hierarchy of interpretive sources: the Statute, Elements, and Rules come first; followed by treaties and principles or rules of international law; general principles of law derived from national systems, if not inconsistent with the statute or international principles; and, finally, its own prior decisions. \textit{Id.} at 17.
\end{footnotesize}
attempts to better understand and to systematize customary humanitarian law. At the ICTY, the identification of customary law (or its absence) was significant in matters ranging from the nexus between crimes against humanity and armed conflict to the need for discriminatory intent as an element of all crimes against humanity (not only persecution); and whether duress is a defense to killing innocent civilians or limited to a mitigating factor in punishment. But she also notes that the enterprise has a long way to go. The crux of the dispute involves an issue about which American legal scholars and politicians continually argue: when does a court simply interpret or apply existing law and when does it “legislate” or create new law?

In the second section of her article, Judge Wald analyzes a more subtle, but equally important question: the myriad of less formal rules and practices, beyond formal judgments. Here, the legal realism at the heart of her approach clearly emerges. She notes how sources of “soft” law and practice “have been indispensable to the survival of the ICTY and ICTR, and have been intensively mined by more recently established courts for ‘best practices’ replication.” Indeed, she suggests that prosecutorial norms and guidelines may turn out to be even more influential in the overall record of these courts than the jurisprudence. In the end, the problem of how all of this common law may be understood and controlled is a vexing one. As Judge Wald highlights, there can be no doubt that “tribunal law has exploded quantitatively and qualitatively.” But, unlike national courts, international courts are not embedded within a hierarchical judicial system.

At present, for the most part, though one sees many informal routes of convergence, “one court’s jurisprudence must rely on the persuasiveness of its reasoning, supplemented by the critiques of academics and international law scholars, if it is to be picked up by other courts.” As she observes, this pathway is analogous to the transformation of common law into statutory law in the United States. But, as the tribunal enterprise devolves in favor of the ICC, one wonders “where the grist for its mill will come from—the percolation process may have

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18 Wald, supra note 15, at 20.
19 Id.
20 Id. at 23.
21 Judge Wald also notes how the ICC drafters “have cherry-picked what seemed to them the best rulings and practices from the earlier courts and discarded those that did not meet their standard.” See id. at 25.
largely dried up.” Judge Wald offers what I believe is a prescient and important cautionary note about the dangers of a “monopoly jurisprudence.” As she concludes, “academics and court watchers will have to be especially vigilant and productive” to help the ICC fulfill its mission.

As Holmes noted, in order to know what the common law is, we must know what it has been. To this end, the articles by Devin O. Pendas, a historian, and Allan A. Ryan, a lawyer, are especially instructive. Pendas highlights the modern development of the “legalist paradigm,” a term he borrows from Michael Walzer and upon which he elaborates in subtle and important ways. Pendas argues that the emergence of a “full legalist paradigm” following World War II fundamentally transformed the relationship between law and war. But why, he asks, did it suddenly make sense to think about the conduct of war as a potentially criminal enterprise that could actually be prosecuted? His answer is that the development was not, as some have assumed, an apotheosis of human rights reasoning in the wake of the Holocaust, but was also largely a response to the “breakdown of a long-standing civilizational consensus among European Elites.”

As Pendas writes, this civilizational consensus, “rested on the assumption that there was an intrinsic connection between the nation-state form—defined legally by the doctrine of sovereignty . . . and the practice and protection of ‘civilized’ norms of both internal and international conduct.” Outside of this consensus was “barbarism,” a frequently racialized concept, seen to be an attribute primarily of pre-state peoples. International law primarily governed the relationships between, but not within, “civilized” nation-states. This ideal of civilization “delimited what it was that the international law of war needed to regulate. . . . Far from there being any provision for dealing with the reciprocal entanglement of state and individual criminality, there was a radical disjuncture between the two.”

The post-World War II “legalist paradigm” was clearly different. Pendas is skeptical that it was solely the revelation of the Holocaust that

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22 Id. at 26.
24 Pendas, supra note 23, at 38.
25 Id.
28 Id. at 39.
led to Nuremberg. For one thing, “while the Holocaust was hardly ignored completely at Nuremberg or in the successor trials, it was hardly central either.” Second, the new legalist paradigm also supported a series of trials conducted in East Asia. Thus, he concludes, the 1945 legalist paradigm was not a uniquely European phenomenon, and did not originate solely in the experience of Nazi genocide.

Nor can it simply be described as a product of the rise of a Universalist human rights culture in opposition to strong notions of state sovereignty. As Pendas notes, “a doctrine as venerable and self-interested as state sovereignty does not succumb easily.” The Holocaust, he argues, culminated thirty years of European crisis. German “barbarism” seemed to vindicate the worst assessments of pessimists ranging from Conrad to Spengler. Civilization seemed to provide an inadequate moral check on sovereign states, even “civilized” ones. This insight provides a unique gloss on Jackson’s invocation of “wrongs which we seek to condemn” because “civilization cannot tolerate their being ignored, because it cannot survive their being repeated.” Thus, Pendas, notes, “Even when the Holocaust was used to justify the emerging legalist paradigm after World War II, what was relevant was not the killing but the ‘civilized’ status of the killers.”

The horrors experienced from 1914 to 1945 taught Europeans “lessons they had hitherto been unwilling to learn from their own conduct of colonial wars around the world” about the brutal capacity of the modern nation-state to violate human rights on a massive scale. As Pendas (rather challengingly) concludes, “the legalist paradigm of war . . . emerged as a mode of redemption . . . little less than [a] last-chance gamble on the durability of civilization in the face of its own undeniable barbaric tendencies.”

29 He notes that “the unprecedented character of Nazi atrocities made anything less than an unprecedented response seem trivial and inadequate.” Id.
30 Id. (citing Michael R. Marrus, The Holocaust at Nuremberg, in 26 Yad Vashem Studies 4–45 (David Silberklang ed., 1998)).
32 Pendas, supra note 23, at 43.
33 Jackson, Prosecutor’s Address, supra note 6, at 98–99.
34 Pendas, supra note 23, at 44.
36 Pendas, supra note 23, at 53.
Allan Ryan highlights the legal importance of the Nuremberg precedent that under-girds the current tribunals. The importance of Nuremberg, he writes, “lies chiefly in what the process ordained.” As “the first true trial for violations of human rights,” Nuremberg served “as the bridge from the traditional law of war to the law of human rights that marked the latter half of the twentieth century.” Thus, suggests Ryan, Nuremberg “changed forever the presumptions of national sovereignty, individual responsibility, and personal accountability that had underlain international law since the rise of nation-states three centuries before.”

Ryan highlights the major features of the Nuremberg model: the Charter of the Tribunal explicitly held individuals, including the leaders of an enemy nation, accountable under international law for their actions; it defined a new category of crime—“crimes against humanity”—to overcome traditional limitations of international law; and it governed crimes that Germany had taken against its own citizens—an arena that hitherto was widely considered beyond the reach of international law. It took half a century for the Nuremberg precedent to be much more than an isolated episode. With the end of the Cold War, however, the United Nations focused on the horrors of Yugoslavia and Rwanda, and attention turned to Nuremberg for its model. Ryan’s article highlights the fact that Nuremberg was far from inevitable. Indeed, it arose from an intensely political domestic and international process. As Ryan writes, “There was no precedent, no list of crimes to be charged, no guide as to how four different nations should proceed, and often no consensus on the purpose of the trial or what was to be achieved.” His article thus offers Nuremberg as an evolutionary precedent, an exemplar of how tribunal law may develop. Consider the controversy over the proposal to base the trials on conspiracy charges—a uniquely Anglo-American approach that had previously not been thought of as an international crime. Questions about the propriety of conspiracy charges at the tribunals remain quite vital to this day. Similarly, debates over legitimacy and the common law from that period retain relevance. As Ryan notes, many in the U.S. legal community, troubled by the scope and nature of the crimes addressed by Nurem-

37 Ryan, supra note 23, at 55.
38 Id.
39 Id.
40 Id. at 55–56.
41 Id. at 56.
42 Ryan, supra note 23, at 61.
berg, struggled to adapt existing law to the task of redressing them. As Assistant Secretary of War John J. McCloy, a “driving force for war crimes policy in Stimson’s War Department” put it:

In texture and application, this law will be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel . . . . International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones . . . .

But the rub, of course, is the question of where adaptation ends and innovation begins. When Robert Jackson pushed for novel charges of aggressive war, he recognized this clearly. As Ryan notes, Jackson did not and could not pretend that the trial would be applying well-settled principles. Jackson’s view was much more fluid:

International [l]aw is . . . an outgrowth of treaties or agreements between nations and of accepted customs . . . we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law.

Of course, as Telford Taylor recognized, when it came to prosecuting aggressive launching of a war, the more realistic conclusion was that, “the thing we want to accomplish is not a legal thing but a political thing.” Nevertheless, Ryan concludes that the intensely political Nuremberg process, which was “juridical in its execution,” renovated international law, and may even be said to have, in large measure, created human rights law.

But how well does the criminal model embody the essence of human rights law? What are the functions and limits of tribunals? Donald L. Hafner, a political scientist, and Elizabeth B. L. King, a lawyer, grap-
They note that “international criminal tribunals alone cannot bear the full burden of doing justice and stitching polities back together. They must be augmented by other mechanisms.” The problem is how to do this without undercutting the efficacy of the tribunals qua criminal tribunals. Hafner and King survey potential conflicts that arise from the “complementary roles” of international tribunals and national human rights trials, truth and reconciliation commissions (TRCs), and community-based gacaca systems. They do this within the context of a broad vision of the responsibility of tribunals: tasks such as individual or political “healing” are judicial responsibilities and are appropriate for judicial institutions. Therefore, they argue, a proper international tribunal system requires well-planned, carefully calibrated mechanisms able to achieve them. Their article offers valuable insights based on the complicated experience to date of attempts to interweave the international system with various national models.

More specifically, William J. Fenrick, in his well-focused contribution, considers the law that regulates combat activities. He notes that the basic purpose of such international humanitarian law is preventive (i.e., it is designed to be applied in military training, planning, and operations to minimize human suffering and the destruction of civilian targets.) Although prosecution for violations of such law is uncommon, a rather substantial body of law has developed at the ICTY. Fenrick carefully reviews this jurisprudence and argues that it proves that effective prosecution for combat offences can legitimately and productively be conducted before “non-specialist” tribunals.

Finally, participants grappled with the problems of legal concepts that are not clearly governed by international law. Judith McMorrow, a leading scholar of U.S. legal ethics, considered the complex problem of how systems of legal ethics develop at international tribunals. McMorrow provocatively views the international system as an “extraordinary laboratory” in which we can examine how legal cultures interact in the international arena. She carefully examines the ethical dilemmas that

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48 Id.
51 Id.
arise as tribunals bring together lawyers and judges who have been trained in a variety of legal settings. Offering significant comparative insights, McMorrow examines how attorney-conduct norms are created in the United States through such disparate mechanisms as “socialization,” malpractice law, market controls, regulatory processes, and procedural rules. She then compares this fertile (some might say messy) melange to the nascent legal practice community emerging at the ICTY. At present, she concludes, judges are the dominant source of “norm creation.”  

This, she suggests, is because socialization is a weak harmonizing force, malpractice is a non-existent factor, and market controls have little effect. Thus, much norm setting at the ICTY occurs through regulatory processes (e.g., Rules of Conduct) and procedural rules. But, in a conclusion that ought to have important ramifications, McMorrow suggests that the development of coherent, meaningful ethical norms at international courts would benefit from more interaction among the judicial, prosecutorial, and defense functions.

Phillip L. Weiner and Susan Somers added important voices of prosecutorial experience to the Symposium. Somers focuses on Rule 11 bis at the ICTY, which governs the increasingly important system of referral of cases from the ICTY to national legal systems. This article forms an interesting companion to that of Hafner and King in that it explores exactly how such transfers take place. As Somers notes, referral helps to ensure that “lower and intermediate level” persons indicted by the ICTY for serious violations of international humanitarian law will be brought to justice before the appropriate national court, notwithstanding the time constraints of the ICTY “Completion Strategy.” As her article indicates, many questions remain to be pondered in that realm, including matters of legitimacy, timing, harmonization, and questions of which law should be applied.

Weiner grapples with a rich and complex subject that exemplifies the importance of this Symposium: the question of a defendant’s competency to stand trial. His article recounts the first “competency” hearing that had taken place in an international war crimes tribunal since Nuremberg, that of Major-General Pavle Strugar. Weiner carefully analyzes how the trial court’s decision will provide important precedent for

52 Id. at 171.
54 Somers, supra note 53, at 176.
all future war crimes cases and tribunals. He notes how the Strugar decision, unlike prior competency decisions at Nuremberg and Tokyo, sets workable standards for determining the fitness of an accused person to stand trial.\textsuperscript{55} These standards, he concludes, adequately protect both the rights of the accused and the interests of the prosecution.\textsuperscript{56} Thus, Weiner’s work exemplifies how complex problems that were not clearly governed by international law evolve and become refined through the jurisprudence of tribunals.

Taken together, the articles in this Symposium exemplify how the developing law of the tribunals may support Robert Jackson’s aspiration that power ought to pay tribute to reason. The power is more diffuse now, the reason more nuanced, and the challenges of understanding the relationship between the two are more complicated. Therefore the work published here ranges from the most abstract considerations of legitimacy and the deepest reviews of history to highly detailed, technical analyses from which real law develops. As such, it constitutes a major contribution to the scholarly literature of modern human rights law and, one hopes, will help to enhance that law’s quality and to sharpen its cutting edge.

\textsuperscript{55} Weiner, \textit{supra} note 53, at 198.

\textsuperscript{56} \textit{Id.}
TRIBUNAL DISCOURSE AND INTERCOURSE: HOW THE INTERNATIONAL COURTS SPEAK TO ONE ANOTHER

Patricia M. Wald*

Abstract: This Article analyzes the development of a common law for international tribunals through the interpretation of applicable treaties and the interpretation of customary law—a decidedly difficult and amorphous process. The author notes there has been significant development in the common law of the tribunals, but that there is still a long way to go, especially on the issue of when a court should simply interpret or apply existing law and when it should “legislate” or create new law. The Article also examines the less formal rules and practices beyond formal judgments, the “soft” law and practices, which are indispensable to the continued existence of international tribunals. This Article suggests “soft” law and practices may turn out to be more influential in the overall record of these courts than the jurisprudence.

I. Thoughts on the Relationship Between Common Law and Customary Law

First, I want to clarify the relationship between what we think of as common law and the customary law norms that restrain international criminal courts in varying degrees. In our Anglo-Saxon legal tradition, common law develops from the accretion of court decisions dealing with similar problems, and through a process of refining, expanding, and distinguishing among those situations, principles of law emerge. Sometimes these principles are codified into statutory law, but often they are not. In the criminal law area, common law has

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mostly given way to statutory law, in great part because of the notion that a person has a right to know what is legal and what is not when she commits an act, and this is best done by writing it down specifically in the statute books. This transition also grew from the notion that the legislative branch ought to be involved in defining what constitutes a crime.

The concept of binding precedent, or *stare decisis*, plays an important role in common law regimes. Successive courts look to their own prior decisions and the decisions of courts higher in the judicial hierarchy and, unless distinguishable, follow them. Higher courts overturn their own prior rulings only after extra careful deliberation, usually on the ground that intervening events or unintended consequences have shown the earlier decisions to be misbegotten.

On the other hand, international courts and “hybrid” courts—defined here as courts combining national and international judges, prosecutors, and law—gain their legitimacy by proclaiming that they are bound in their rulings by international law. For the criminal courts established thus far that means international humanitarian law (the law of war) that is found mainly in treaties, such as the Hague and Geneva Conventions and Protocols, but even more critically for the tribunals, in “customary law,” those practices that states accept as obligatory in their relationships with other states and, in some cases, with their own citizens.

All international courts explicitly endorse the principle of *nullum crimen sine lege* (no crime unless the law says so). In some instances that means finding the source of the prohibition in customary law when the parties are not citizens of states which have ratified the relevant treaties, or when the tribunal charters themselves were enacted after the allegedly criminal acts took place. Thus, Kofi Annan announced, at the time of the adoption of the International Criminal Tribunal for the former Yugoslavia (ICTY), that “the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”¹

The constraints of customary law are less rigid on some of the other tribunals. The International Criminal Tribunal for Rwanda (ICTR) deals with crimes emanating from a civil war and the applica-

tion of the entire body of international humanitarian law to internal conflicts is less comprehensive, and, in some cases, still uncertain. Hybrid courts are allowed, in many instances by their charters, to resort to national as well as international law, which provides potential elbow room in close cases. The embryonic International Criminal Court (ICC) is the offspring of the Rome Treaty, and its judges will place the greatest emphasis on interpreting their own statute and its elaborate allied document that lists the Elements of the Crimes within its jurisdiction. Additionally, the ICC only has jurisdiction over crimes committed after it came into being in July 2002, so few questions are likely to arise as to whether the statutory provisions can be applied retroactively. Article 21 of the Rome Statute sets up its own hierarchy of interpretive sources: its Statute, Elements, and Rules lead the list; followed by treaties and principles or rules of international law; general principles of law derived from national systems, if not inconsistent with the statute or international principles; and finally its own prior decisions.

The hunt for customary law is not always easy for international courts: it is uncodified, though a recent exercise by the International Committee of the Red Cross (ICRC) has made a valiant effort to compile state practices on major issues of international humanitarian law and even to derive black letter guiding principles. But judges may and do differ on when the behavior of a majority of “civilized” states demonstrates that a particular norm qualifies as customary law. As Theodor Meron, the former President of the ICTY, points out in a recent article, international courts have not had the time or resources to conduct searching inquiries into state practices, and have mostly accepted the “distillation” of those practices contained in other courts’ decisions or in conventions—secondary sources—as their basis. Critics of international law as a controlling factor in U.S. policies—and there are many—scoff that customary law—amorphous and inaccessible as it is—is no “law” at all.

Yet the requirement that a dispositive principle or interpretation underlying a ruling of the court must be based on customary law has permeated the jurisprudence of the ICTY and certainly imposed genuine restraints on how its law has developed. Time permits only mention of a few examples, but Theodor Meron’s insightful article

provides many others. Among the crucial issues in which the identification of customary law, or its absence, has been controlling or important are: the nexus between crimes against humanity and armed conflict (the ICTY’s charter requires the nexus; no other tribunal does); the need for discriminatory intent as an element of all crimes against humanity, not just persecution; the requirement that crimes against humanity be committed pursuant to a specific plan or policy; the requirement that torture be committed by a state-affiliated perpetrator; the requirement that genocide involve the intent to physically or biologically destroy the protected group, not just eradicate its culture; and that duress is a defense to killing innocent civilians, not just a mitigating factor in punishment.

There have, however, been times when the judges did not agree on whether the lack of customary law on a specific point should ban a ruling they believed was justified by the “objective and purpose” of agreed-upon principles of customary law. Judge Shahabudeen explained his view that if the “very essence” of an offense had been condemned in customary law, that was enough to permit the court to expand its application to situations not covered in prior customary law, if the current applications were reasonably foreseeable and furthered the basic principles of the customary law provision.4 Otherwise, the tribunals would be prevented from contributing to the progressive development of the law, even if that development results in criminalizing new conduct. Other judges, including Theodor Meron, worry that such an “approach . . . would affirmatively engage the criminal tribunal in the development of customary law, rather than simply in its application” and so violate the legality principle of nullum crimen.5

The crux of the dispute—when in the process of deciding if an accused has committed a violation of international humanitarian law and when customary law validation is required—basically involves the same issue American legal scholars and politicians are continually fighting about: when does a court simply interpret or apply existing law and when does it “legislate” or create new law? The ICTY has not developed, anymore than we have at home, a clear formula for drawing that line. Meron, for example, admits that established norms of customary law must often be applied to situations which the original consensus principles may not have contemplated, but cautions that the court, in making such applications, must be “very certain” of what

4 Id. at 826.
5 Id. at 825–27.
the basic principles require.\textsuperscript{6} On the other hand, these tribunals are now the chief interpreters of customary law and customary law itself grows and evolves through its capacity to embrace new dilemmas and situations. Too static a judicial mode of interpretation can positively contribute to the stratification of the customary law as well. It is fair to say that the international tribunals have not satisfactorily resolved this tension.

Two examples illustrate this tension. In one case, the court agreed that command responsibility—the concept that a superior officer is responsible for the crimes of his subordinates if he knew or should have known of their commission or if he did not seek their punishment afterward—was an accepted principle in customary law. But the ICTY judges split as to whether command responsibility covered a situation where the officer had not yet taken command but was about to do so within hours.\textsuperscript{7}

The second example involves deportation, which all tribunal charters since Nuremberg have listed as a crime against humanity if part of a systematic, widespread campaign against civilians. Deportation has historically been defined to mean expelling persons from a state. In many current internal conflicts, however, one side may forcibly transfer civilians from one part of a country to another, not across national boundaries. The harm and disruption to the victim obviously is similar, if not identical, to inter-state transfers. The issue of whether forcible transfers inside a country could be covered in a prosecution for deportation under a more liberal interpretation of that term arose in several ICTY proceedings. The court’s answer was no: forcible transfer might itself be a customary law violation (it is specifically banned in the Rome Statute), but there was no basis in customary law for reading it into the ban against deportation.\textsuperscript{8} One judge has opined that the objective and purpose of the two are the same and inclusion of forcible transfer into the crime of deportation was a logical extension mandated by the new forms of old violations the perpetrators had committed.\textsuperscript{9} His remains a solitary voice.

\textsuperscript{6} Id. at 825.

\textsuperscript{7} See Prosecutor v. Hadzijasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 51–56 (July 16, 2003).


The U.N.-affiliated international courts, especially the ICTY, have felt constrained from developing the law of war in what we know as a typically common law fashion. Ephemeral as the concept of customary law seems to many, it has acted as a brake—some think too much so—to these courts. This may not prove equally true for the ICC, which will be working with a far more detailed statute.

II. The Soft Law of the Tribunal

Since I am at heart a legal realist, I was interested during my tenure at the ICTY not just to learn about the law ensconced in the formal judgments of the court, but about the myriad of less formal rules and practices which frequently have just as much or more impact on the final outcomes of cases. Some of this “below the radar” law is formalized in the Tribunal’s Rules of Procedure and Evidence, which at the ICTY is determined by the judges in plenary session. By contrast, at the ICC the Assembly of State Parties (the Rome Statute ratifiers) must approve the Rules. Vital parts of the court’s operational practice are also developed in its non-judicial units, such as the Victim and Witness’ Unit, which safeguards crucial witnesses whose safety is at risk. Both sources of “soft” law and practice have been indispensable to the survival of the ICTY and ICTR, and have been intensively mined by more recently established courts for “best practices” replication. Prosecutorial norms and guidelines may turn out to be even more influential in the overall record of these courts than the jurisprudence. The prosecutors in these courts have enormous discretion on whom to charge, with what, and when; in recent years, it was the Office of the Prosecutor, for instance, that introduced a negotiated guilty plea regime into the ICTY. As far as transfer of these Rules and practices from one court to another, the criteria is fundamentally pragmatic—a question of whether the criteria has worked, rather than whether its roots can be found in customary law. This less visible facet of court operations is entirely familiar to students of our national courts and is, in my view, embedded in all courts’ DNA.

A. The Tribunal’s Rules

First, let’s talk about the preeminent role of the Tribunal’s Rules; their content, candidly, often cannot be easily distinguished from the substantive law found in judicial opinions, especially when, as with the ICTY, the judges are the authors of both. The U.N.-affiliated courts are required by charter to conform to basic principles of the International Compact on Civil and Political Rights (ICCPR), itself accepted
as customary law, including: notice to the accused of the charges; defense counsel, appointed if necessary (well over ninety percent of ICTY defendants get appointed counsel); access by the accused to the evidence against them; public trial; the right to mount a defense; and protection from self-incrimination. Of course, no Compact or Charter can cover all the issues that arise in year-long trials, and the Rules at the ICTY have served as a vehicle for filling the gaps. The Rules have been amended dozens of times in their fifteen-year history. The recent rules on guilty pleas and prosecutors’ recommendations for reduced sentences are an example. Virtually all of the extensive practices of pretrial discovery and pretrial status conferences, as well as the treatment of detainees and convicted prisoners, were brought into being through Rule additions.

Perhaps the most prominent area of Tribunal law dominated by Rule changes involves the gradual substitution of written evidence for live testimony, especially as it pertains to witness statements. This is with no doubt a critical issue in many proceedings because witnesses can seldom be forced to come to the Tribunal; it has no police force to enforce its summonses. Many, if not most, witnesses would prefer to stay home and have their out-of-court statements read into the record. In the beginning, the Tribunal Rules expressed an explicit preference for live testimony even though Rule 89 did not bar hearsay, but rather allowed “any relevant evidence [the court] deems to have probative value.” Depositions were also permitted under special circumstances. The Appeals Chamber initially interpreted the Rules to require specific indicia of reliability for admission of written witness statements, which were to be the exception, not the rule. Under the press of backlogs and pressure for more expeditious trials, in 2001 the court amended its Rules to allow written evidence to prove background, historical, or peripheral facts so long as the written statements did not purport to concern the role or conduct of the accused as to the charges being tried. Transcripts of testimony in prior proceedings could also be introduced subject to demands for cross-examination if a new line of questioning was justified. Perhaps most revealing, the original preference for live testimony was

dropped altogether. Still restive, the prosecution and some judges would be hospitable to more inroads through the Rules for written testimony in lieu of live witnesses. If there are future changes, it will as likely be through Rule changes as through judicial opinions.

A special Rule on Gender Crimes, Rule 96 in the ICTY Rules, has been picked up by all the other Tribunals, relatively unchanged, and is another example of Rule-based law which might not meet strict customary law standards. The Rule was pushed strongly by international women’s groups and sets out liberal standards for doing away with the corroboration requirements of gender crimes and tightly cabins any consent defense to such crimes.

A third area in which the Rules have been amended and have substantively affected the law is pretrial release. Nothing is said about pretrial release in the ICTY Statute and the original Rule contained a strong presumption against pretrial release, authorizing it only in “exceptional circumstances.” Only a few defendants were released in the first several years and then only for humanitarian reasons. As the number of detainees grew and the length of their detentions raised concerns about violation of human rights, the Rules were amended to delete the “exceptional” requirement. The granting of pretrial and even pre-appeal release has grown perceptibly, now encompassing dozens of defendants, including those of the highest rank.

Apart from Rules-based tribunal “common law,” there are other areas where judges do not feel bound by customary law and in which they more freely act with discretion. Sentencing comes most quickly to mind. The ICTY and ICTR Statutes and Rules give scant direction to sentencing; the ICTY Charter rules out capital punishment (as do all U.N.-related courts), but authorizes sentences ranging from one day to life. The court, in its Charter, was told to “take account” of sentencing in the former Yugoslavia, but was obviously not bound by that admonition; otherwise, it was told to consider the gravity of the crime and mitigating and aggravating factors, but such factors were not listed anywhere. Early on, the Tribunal rejected the notion of any sentencing tariff based on a hierarchy of the four basic crimes (genocide, aggression, war crimes, and crimes against humanity).


I regret to say that—even with the considerable leeway given—the ICTY has not yet arrived at a discernible common law of sentencing any more than pre-Sentencing Guidelines U.S. courts did. Victim groups generally complain the sentences are too low; they are unhappy, too, with the even lower sentences resulting from guilty pleas when the perpetrator provides information or testimony against other indictees. Only a few life sentences have been given and some surmise that until the two most prominent fugitives, Ratko Mladic and Radovan Karadzic, have been captured, judges fear to dilute the currency of their highest penalty. There has been confusion, too, on the court and off, over the application of cumulative sentencing—how many cumulative sentences can be given when convictions on several different counts arise from the same acts? The Appeals Chamber itself often revises sentences of the trial court up or down, not always on clear-cut criteria. Life sentences are more common in the ICTR, perhaps because the Rwandan courts, where thousands of war crime perpetrators have been, or will be, tried, retain the death penalty, and that gap in punishment potential has provoked local criticism of the international court as too soft on the genocidieres.

In short, no principled common law of sentencing has emerged from the Tribunals, and it is interesting that the ICC has chosen to incorporate in its Charter and Rules greater guidance on sentencing criteria—listing mitigating and aggravating circumstances (drawing on ICTY and ICTR opinions for the list) and setting up a dividing line between sentences of up to thirty years and life sentences. Special procedures are required for the latter, which must be specifically justified by the gravity and circumstances of the crime.

III. The Pathways of Tribunal “Common Law”

There can be little doubt that even within the constraints of customary law adherence, tribunal law has exploded quantitatively and qualitatively. The pathways for its development and refinement across court boundaries are not, however, the same as in national court systems. International courts are not part of a hierarchical judicial system where higher courts can supervise and, if needed, overturn lower courts; neither is there a popularly elected legislature to codify or prospectively change rulings made by the courts. It is true international and hybrid courts have Appeals Chambers which can revise or reverse trial court holdings, but one court has no say over another’s jurisprudence. Recurrent suggestions that the International Court of Justice (ICJ) be given a final say over other U.N.-affiliated courts have been
rejected and the various courts do, on occasion, differ and flatly contradict one another.

Most scholars are sanguine about the “let a thousand flowers bloom” status of international criminal jurisprudence, though some have offered sensible suggestions about voluntary comity guidelines to minimize the contradictions. Hybrid courts, which administer both international and domestic law, may be pulled in the direction of harmonizing the two, though it is interesting that the Iraqi Special Tribunal was specifically instructed in its enabling law to consult international court interpretations of the basic international crimes.  

In sum, one court’s jurisprudence must rely on the persuasiveness of its reasoning, supplemented by the critiques of academics and international law scholars, if it is to be picked up by other courts. As another route to convergence, there are out-of-court exchanges in person and on paper between judges and practitioners in different tribunals, as well as common training for the prosecutors and defense counsel to insure that they know other courts’ jurisprudence and have an opportunity to probe its attractions or deficiencies.

One circumstance militating toward coherence of doctrine is the fact that the authorizing laws of all international and hybrid courts define the same four basic genres of international crimes in basically the same way. There are minor differences, but in general the similar definitions provide an umbrella framework for interpretations that do not allow for radical departures. No new genres of international humanitarian violations have been articulated—war crimes, crimes against humanity, grave breaches of the Geneva Convention, and genocide are “it.” Thus, rulings of one court are bound to be relevant to others. This is not to say that under the genre definitions there have not been new additions of the kind of actions that qualify for inclusion in the master headings: disappearances and apartheid have been added to the list of crimes against humanity; and rape has been explicitly listed as a war crime and crime against humanity. Sexual slavery, forced sterilization, and forced prostitution were first prosecuted under the rubric “other inhumane acts,” but were later added to the formal list of war crimes in the Rome Statute. On the other hand, the definition of genocide, despite its difficulties in application to new forms of mass murders in the Balkans and in Darfur, has remained virtually untouched for fear that the Genocide Convention’s half-century struggle for ratification might

13 Only recently, however, has the process of translating the decisions into Arabic been undertaken.
be undone if the amendment process required it be gone through again.

There is also ample evidence that some of the Tribunal jurisprudence has been rejected by the drafters of the Rome Statute and its Elements and Rules. For example, contrary to ICTY rulings which held that genocide can be committed by a single individual and does not require a state plan or policy, the Rome Element of Crime insists that there must be proof in a prosecution for genocide that the conduct took place in the context of a manifest pattern of similar conduct directed against the protected group, or that the conduct involved could by itself affect the destruction of the group. As aforementioned, the ICC has chosen to spell out in far greater detail criteria and procedures for sentencing rather than depend almost entirely on judges’ discretion.

On the heated issue of duress as a defense to a war crime or crime against humanity, the ICC-written law has chosen to follow the dissent of ICTY President Antonio Cassesse rather than the ICTY majority in supporting such a defense. This example, incidentally, reinforces for me the value of dissent in a rapidly moving international jurisprudence. Originally, some scholars thought dissents should not be allowed in order to preserve the cloak of unity. Time has, I believe, shown that in international courts, as well as national ones, dissent is especially vital and particularly useful when precedent does not rule out choices for later courts, and yet there may be few, if any, rulings in different courts for newly-constituted courts to choose from.

My main point is that so far Tribunal “common law” has developed horizontally across courts by persuasion and vertically by culmination in the ICC’s written law. The ICC drafters have cherry-picked what seemed to them the best rulings and practices from the earlier courts and discarded those that did not meet their standard. It is interesting that this pathway is not dissimilar from the gradual transformative journey of the common law into statutory law in our own country. So far, the ICC law is much more extensively written down (see, for example, the long list of specific rules on admissibility of particular kinds of evidence) and though the judges will certainly add to the body of law once their cases start going, their rulings may be more focused on interpreting the written law than on finding customary law to justify their rulings.

Given the pathway from early courts to later ones, and the numerous examples of how the ICTY and ICTR have provided experience and choices for the ICC, it has to be a cause for concern that all of the earlier international courts, and most of the hybrid courts, are
scheduled to go out of business within a few years. New ones may arise but are apt to be of limited duration. National courts may pick up some of the slack, but can be expected to show sharper variations in jurisprudence reflecting a greater input of local law. Thus, while the ICC will be the flagship of international humanitarian law, it is less clear where the grist for its mill will come from—the percolation process may have largely dried up. In this respect, a monopoly jurisprudence is perhaps more to be feared than the more familiar spectre of too many voices at odds with one another. Some competition may be a good thing for international, as well as national, tribunals.

The demise of the early courts will produce many problems. Logistically there is the problem of what to do with their records so that future courts can access them to evaluate the value of their judgments. There is also a scholarly task of sorting their good work from the less good. These courts have produced remarkable feats of creative and sensitive judging, but in some cases, the jurisprudence has been uneven; not all the judges have had judicial or practitioner backgrounds, and some of the judges have not recognized the legitimate limits of even customary law. Unlike national courts, the early international courts will not be given the time to mature their jurisprudence, to correct midstream mistakes, and to arrive at seasoned rationales. Someone else may have to do that job for them.

The importance of the development of international law by international courts will and should continue. Many national courts increasingly cite to international court law in their own work and as the ICC works into a full schedule of cases, the complimentary doctrine will require that states which want to do their own investigations and prosecutions in order to defeat ICC jurisdiction be able and willing to draft national laws dealing with international crimes. An increase in national prosecutions—universal jurisdiction may also account for additional cases—will likely involve looking at the international court cases for guidance and a safe harbor. The ICC—without U.S. participation, I note—may have to bear this burden of advancing international humanitarian law in the courts alone.

IV. CONCLUDING THOUGHTS

Over the past fifteen years, a group of international and hybrid courts have produced an impressive body of international humanitarian law, as well as the first concerted attempt at applying it to a myriad of fact situations since Nuremberg. Although the ICTY, the ICTR, and the Sierra Leone courts have flown the flag of customary law, many
new doctrines have grown up and many new fact situations have been accommodated under old labels and rubrics. The Tribunals’ Rules and operational practices have supplied additional opportunities to improvise and experiment. The Tribunals have looked to each other’s work and the new ICC has adopted in written form what its drafters considered the best rulings and practices of the earlier courts.

When these courts die, the ICC will lose an important source upon which to draw for substantive and procedural guidance. It is probably not a good thing for international law to have a monopoly court. Academics and court watchers will have to be especially vigilant and productive in their critique of ICC work product to help that court fulfill its paramount function.

Devin O. Pendas*

Abstract: Since the beginning of time, war has been accompanied by atrocity. While there were attempts to regulate such violence, for most of history the penchant toward deliberate atrocity was largely viewed as a political or military problem. During World War II, however, the Allies declared that wartime atrocity was not only morally reprehensible, but also legally actionable and this declaration represented the triumph of a new paradigm for how to think about the conduct of war, the “legalist paradigm.” This Article describes the emergence of the legalist paradigm and argues that the emergence of the legalist paradigm of war was a response to the breakdown of a long-standing civilizational consensus among European Elites.

Introduction

Since time immemorial, war has been accompanied by atrocity, that is, mass violence directed at non-combatants or at prisoners of war. One need only recall Tacitus’s description of the Roman way of war in Britain—“[t]o robbery, slaughter, plunder, they give the lying name of empire; they make a solitude and call it peace”—or the Roman treatment of the Carthaginians in the wake of the Third Punic War (literally salting the earth) to recognize this.1 While there were attempts, through customary law or, later, through formal law, to regulate this violence, this inclination towards deliberate atrocity was largely viewed

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for most of history as primarily a political or military problem, one firmly under the jurisdiction of politicians, diplomats, or generals.\textsuperscript{2} Yet this is precisely what changed beginning in the second half of World War II. Starting in the fall of 1943, with the founding of the United Nations War Crimes Commission (UNWCC) and with the Moscow Declaration, condemning Axis atrocities and promising legal retribution, the Allies declared their intention to pursue a legal as well as a political and military strategy for managing the end of the war.\textsuperscript{3} Henceforth, wartime atrocity was, in principle at least, legally actionable, not merely morally reprehensible. This declaration that justice, as much as peace or renewed international stability, would be an essential goal of postwar policy represents something new in the history of the world. Indeed, it represented the triumph of a new paradigm for how to think about the conduct of war, one that could be termed, to borrow a phrase from Michael Walzer, the “legalist paradigm.”\textsuperscript{4}

\section{I. Background}

The legalist paradigm of war, as I am using the term, has two central aspects: first, it asserts the possibility of state criminality, that state actions can, regardless of the doctrine of state sovereignty, be criminal actions; second, it asserts individual culpability, that state criminality does not excuse individual actors for their culpable actions in state sponsored crimes. This definition expands on Walzer’s, which refers exclusively to state criminality and is limited to the question of aggression.\textsuperscript{5} By its very nature, Walzer’s definition thus tends to exclude individual criminality. (No individual ever invaded a neighboring country on his or her own.) This seems to me to be too narrow a reading of the paradigm that emerged from World War II. While it is true that crimes against peace, i.e., aggression, were the centerpiece of the prosecution’s case at Nuremberg, it is this area of the international criminal law of armed conflict that has been least developed subsequently. Rather, it is the notion that individuals, acting as state agents,

\textsuperscript{2} See generally, e.g., Theodore Meron, War Crimes Law Comes of Age: Essays (1998).
\textsuperscript{4} See generally Arieh J. Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (1998) (discussing the diplomatic and policy debates surrounding these matters).
\textsuperscript{5} Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 61–63 (1977).
\textsuperscript{6} See id. at 61–63, 85, 90.
can and should be held criminally liable for specific atrocities, that has come to dominate the legalist paradigm. In this respect, there is a mutual entanglement of individual and state criminality. The systematic character of these crimes in general requires state—or quasi-state (e.g., separatist guerillas)—sponsorship, but it is individuals, not collectivities, who are held culpable and punished.

A. The Beginnings of the Law of War

It would overstate the case to say that it had never occurred to anyone that wartime atrocities might be legally actionable prior to 1943. There were precedents. The Romans considered the declaration of war, though not its conduct, to be a matter for the *jus gentium*, the law of nations. Formal laws of war, in the form of Royal ordinances, date back to the Middle Ages, and oral customary law concerning proper conduct in wartime dates back even further.\(^6\) Thus, in the first known war crimes trial in 1305, the English executed Sir William Wallace (of *Braveheart* fame) “for waging a war of extermination against the English population, ‘sparing neither age nor sex, monk nor nun.’”\(^7\) Nevertheless, as this case itself illustrates, enforcement in this period was sporadic, highly politicized—it was more a trial for treason than it was for war crimes—and liable to qualify by today’s standards as criminal itself (in this case torture without any protection of due process).

Above all, regulating military conduct was either ad hoc, through Royal ordinances issued for specific campaigns, or customary and largely unenforceable, as in the heraldic *jus armorum*, the law of warriors. In either case, its promulgation and enforcement was national (or occasionally bilateral), rather than international in scope.\(^8\) Most importantly, the legal regulation of military violence was in this period seen as at best a secondary issue, an option that could be pursued according to the moral or religious predilections of various actors, but which was not established as a general principle that pertained in all conflicts.

In the early modern period, several authors, Hugo Grotius first and foremost, began to articulate a doctrine of natural rights that was not restricted by considerations of sovereignty or domestic jurisdiction,

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\(^6\) Meron, *supra* note 2, at 1–10.


\(^8\) Meron, *supra* note 2, at 1–2.
thus justifying what amounted to armed humanitarian intervention.\textsuperscript{9} Grotius, for instance, wrote:

It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nation and of nations, done to other states and subjects.\textsuperscript{10}

Some crimes, he argued, are crimes regardless of the sovereignty of those committing them, on the basis of a natural, and hence international, sense of law. Grotius also argued that it was possible to conduct war in a moderate and humane manner and therefore, since such conduct was in principle possible, it could be legally required.\textsuperscript{11} This meant that the specific conduct of war could, in principle, be legislated. This was an important theoretical advance over the ad hoc domestic jurisdiction of earlier royal ordinances.

Yet, as Richard Tuck has argued, Grotius’ thought concerning rights was “Janus-faced . . . its two mouths speak the languages of both absolutism and liberty.”\textsuperscript{12} For instance, like most early modern theorists, Grotius defended slavery based on a doctrine of sovereignty. Under the proper circumstances, a person could cede rights to a sovereign, including the right to one’s own liberty and that of one’s progeny. Consequently, while sovereignty did not constitute the absolute boundary of legality, neither could its requirements be entirely subsumed under general legal principles. Indeed, in his defense of humanitarian intervention, Grotius continues:

\begin{quote}
[F]or the liberty of inflicting punishment for the peace and welfare of society, which belonged to individuals in the early ages of the world, was converted into the judicial authority of sovereign states and princes; a right devolving upon them not only as rulers of others, but as subject to the controul
\end{quote}

\textsuperscript{9} Id. at 122–30.

\textsuperscript{10} HUGO GROTIIUS, 2 THE RIGHTS OF WAR AND PEACE 334 (A.C. Campbell trans., B. Boothroyd, 1814) (1625) [hereinafter GROTIIUS, RIGHTS OF WAR AND PEACE]; MERON, supra note 2, at 124 (citing Grotius as well).


\textsuperscript{12} See RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 79 (1979).
[sic] of no earthly power. For that is a right which can belong to no subject.  

Sovereignty thus both enabled and limited the demands that justice could impose upon monarchs and their soldiers.

The very nature of war itself imposed further restrictions upon humanitarian principles in this context. “In war things which are necessary to attain the end in view are permissible.” The most obvious necessary thing in war is of course killing, which ought to be limited but cannot be avoided. “Though there may be circumstances, in which absolute justice will not condemn the sacrifice of lives in war, yet humanity will require that the greatest precaution should be used against involving the innocent in danger, except in case of extreme urgency and utility.” Note that here as elsewhere, Grotius’ humanitarianism is bounded strictly by principles of utility. Innocents ought not be harmed unless it is urgent and useful to do so. As Peter Haggenmacher pointed out, for Grotius, a belligerent in a “just war” is permitted everything that is necessary to achieve the ends of that war, namely, the restitution of his violated rights, though no more.

In the end, even Grotius acceded to some degree to a European military realpolitik, one in which the logic of violence trumped the logic of law, and which governed the conduct and practice of war to a far greater extent than did any legal considerations. This position culminated in Carl von Clausewitz’s coldly logical conclusion that:

Kind-hearted people might of course think that there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, this is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. . . . War is an act of force, and there is no logical limit to the application of that force. Each side, therefore, compels its op-

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13 Grotius, Rights of War and Peace, supra note 10, at 334–35. Significantly, Meron omits this portion of the quote. Meron, supra note 2, at 124.
14 Grotius, De jure belli ac pacis libri tres, in Best, supra note 11, at 30 (1994) [hereinafter Grotius, De jure belli].
15 Grotius, Rights of War and Peace, supra note 10, at 286.
16 Peter Haggenmacher, Grotius et le Droit International—le Texte et la Légende, in Grotius et L’Ordre Juridique International, supra note 11, at 129; see also Grotius, De jure beli, supra note 14, at 31.
ponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes.\(^{17}\)

For Clausewitz, as for most military practitioners, the logic of military violence of necessity exceeded the capacity of law to regulate it. To think otherwise, he asserted, was both hopeless and dangerously naïve.\(^{18}\) Any observable moderation of military violence between “civilized” peoples was simply the result of the “social conditions of the states themselves and in their relationships to one another.”\(^{19}\)

In other words, if civilized nations refrained from inflicting upon one another the worst that war had to offer, this reflected the nature of civilization, not of war; nor could it be dictated as a matter of deliberate policy but was only a spontaneous result of the social condition of civilization:

Savage peoples are ruled by passion, civilized peoples by the mind. The difference, however, lies not in the respective natures of savagery and civilization, but in their attendant circumstances, institutions, and so forth. The difference, therefore, does not operate in every case, but it does in most of them. Even the most civilized of peoples, in short, can be fired with passionate hatred for each other.\(^{20}\)

Clausewitz’s prescient implication, then, was that a change in these social circumstances could well lead to a barbarization of warfare, even among civilized peoples.

B. Toward Formal Codification

Beginning in the mid-nineteenth century, there was a movement towards the formal codification of what had been a largely informal, ad hoc customary law of war, beginning with Francis Lieber’s *Instructions for the Government Armies of the United States in the Field*, the famous General Orders No. 100 of 1863.\(^{21}\) Lieber’s code added little that was new to the customary laws of war, and indeed, perhaps because of

\(^{17}\) **Carl von Clausewitz**, *On War* 75, 77 (Michael Howard & Peter Paret eds. & trans., 1976).

\(^{18}\) Clausewitz wrote that “[t]o introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.” *Id.* at 76.

\(^{19}\) *Id.*

\(^{20}\) *Id.*

\(^{21}\) See Meron, *supra* note 2, at 131–41; see also Telford Taylor, *The Development of the Laws of War, in War Crimes*, *supra* note 7, at 49–50.
Lieber’s own background as a soldier in Blucher’s army fighting against Napoleon, even evinces some of Clausewitz’s cold logic of military extremism, justifying both the granting of no quarter when militarily necessary and military reprisals under certain circumstances. Still, the recognition that customary law alone was insufficient protection against military atrocity, and that some form of codified law was necessary, marks a decisive precedent for the emergence of the legalist paradigm of war.

This development toward formal codification continued with the Hague Conventions on the Laws and Customs of War of 1899 and 1907. These were important developments, to be sure, beginning a process of bringing the laws of war into line with the increasingly formal, stipulative character of domestic law in this same period. Although they relied heavily on Lieber’s code, the Hague Conventions were more stringent in their prohibition against giving no quarter, and prohibited, among other things, the bombardment of towns or other civilian habitations, the pillage of occupied territories, and the maltreatment of prisoners. In a real sense, the history of the modern laws of war begins with these Conventions, and they continue to supply much of the vocabulary of the international laws of war. As Telford Taylor has noted, “in all of these treaties, the laws of war are stated as general principles of conduct, and neither the means of enforcement nor the penalties for violation are specified.”

Taylor slightly overstates the case, as Article 3 of the 1907 Hague Convention does stipulate that “a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part

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22 Lieber wrote:

It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.

Meron, supra note 2, at 134. Similarly, “Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.” Id. at 135.


24 Taylor, supra note 21, at 50.
of its armed forces.” Nonetheless, the fact that the stipulated penalties are restricted to reparations indicates the extent to which the Hague Conventions were still working within an essentially political understanding of military atrocity. Indeed, one might go further and argue that the Hague Conventions conceptualized military atrocity as essentially a civil law violation of the implicit contract of civilization itself and thus subject to compensatory, but not penal, sanctions. This would make their use of reparations as a sanction symptomatic of a civilizational model of international law itself, one based on a largely tacit, but nonetheless powerful, sense of shared normative consensus.

Furthermore, the assertion that states are responsible for the actions of their military personnel in the Hague Conventions stops well short of a doctrine of state criminality, as there is no indication that the state itself could be a criminal actor. There remains a substantial gap between individual atrocity and state liability in the Hague Conventions. A fully legalist paradigm of mass atrocity and war crimes, one that stipulates the criminal, as opposed to political, liability for war crimes of both individuals and states is at most still inchoate.

The primacy of sovereignty can again be seen in the first rudimentary efforts at a systematic prosecution of military atrocity in the wake of World War I. Under pressure from British Prime Minister David Lloyd George, who had pledged in the elections of 1918 to “hang the Kaiser,” Article 28 of the Versailles Treaty declared that Allies had the right to try Germans for violations of the laws and customs of war. In fact, however, no such tribunals were ever convened. Indeed, there was a fundamental conflict between the British, who favored the creation of an international tribunal after the war, and the Americans, who did not. In 1919, American representatives to the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties argued that they were unaware of any “international statute or convention making the a violation of the laws

28 Willis, supra note 27, at 49, 177.
29 Kochavi, supra note 3, at 2.
and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offense.” 30 Thus, although the Allies delivered a list of 845 suspects to the Germans in February 1920 whom they wanted turned over for trial, the conditions were already in place for Allied capitulation to German pressure to abandon international trials. Instead, they allowed the Germans to stage their own trials of a mere forty-five suspects. 31

The principle of sovereignty won out even in the case of a defeated and, at the time, widely detested power, one against whom allegations of war crimes, although treated skeptically for much of the past eighty years, have turned out to be more true than many have assumed. 32 With great reluctance and typical respect for matters of military policy, the Germans opened their trials under the jurisdiction of the German Supreme Court in Leipzig in the spring of 1921. The trials proved to be a fiasco. Only a handful of the accused were convicted and those that were received very mild sentences (ranging from two to four years). 33 Two of the worst offenders soon escaped prison, probably with police assistance, and disappeared.

Despite their limitations, however, the Leipzig trials, together with their equally problematic counterparts in Constantinople, marked an important step in the development of the legalist paradigm of war, in that they represented the first serious effort to use international pressure to enforce the laws of war. 34 Nonetheless, the central significance of the Leipzig trials was essentially as a negative precedent. They fully, if temporarily as it turned out, discredited the Hague notion that states could and should be allowed to prosecute their own war criminals.

II. EMERGENCE OF THE LEGALIST PARADIGM

These rather unsatisfactory precedents make the emergence in the wake of World War II of the legalist paradigm of war even more striking. This time around, it was the Americans in particular who, in contrast to their position after World War I, strongly favored the application of legal prosecutions to Nazi atrocities. Secretary of War Henry J.  

31 Kochavi, supra note 3, at 2–3.
33 Willis, supra note 27, at 126.
Stimson, one of the leading American advocates of trials, wrote in his journal that “it is preferable to organize a major trial during which we can prove, in its entirety, the Nazi plot to wage a war of aggression that once set in motion violates all the normal rules which limit cruelty and unnecessary destruction.”\(^{35}\) The drafting of the London Charter for the International Military Tribunal in June 1945 thus marked a major turning point, one that had to overcome considerable opposition, not only from those, like Churchill and Stalin, who initially favored summary executions, but also from lawyers working for both the U.S. State Department and the British Foreign Office.\(^{36}\) The three crimes outlined in the London Charter, crimes against peace, war crimes, and crimes against humanity, mark the first full articulation of the legalist paradigm of war by connecting both state and individual criminality.

If the emergence of a full legalist paradigm in the aftermath of World War II thus marks a fundamental transformation of the relationship between law and war, then the question obviously arises as to why this shift occurred. Why did it make sense after World War II, in a way that it never had before, to think about the conduct of war as a potentially \textit{criminal} enterprise, one that ought to be legally actionable in some manner? Why did justice, understood in legal (rather than, say, political or moral) terms, come to join peace or victory as an increasingly common war aim? I would argue that the emergence of the legalist paradigm of war after 1945 was a response to the breakdown of a long-standing civilizational consensus among European Elites.

\textbf{A. The Civilizational Consensus}

This civilizational consensus rested on the assumption that there was an intrinsic connection between the nation-state form—defined legally by the doctrine of sovereignty as it emerged from 1648 on—and the practice and protection of “civilized” norms of both internal and international conduct. “Barbarism,” generally seen in at least implicitly racialist terms, was held to be an attribute primarily of pre-state peoples, and international law was seen as pertaining to the relationships


between, but not within, civilized, and hence sovereign, nation-states.\textsuperscript{37} Henry Bonfils and Paul Fauchille argued in 1898 that international law “applies to relations between states which have attained this level of civilization.”\textsuperscript{38} International law, including the law of war (as in the Hague Conventions), was not just, as the Romans had held, a \textit{jus gentium}, a law of nations, but a law of civilized nations. This in turn delimited what it was that the international law of war needed to regulate: individual excesses against enemy civilians or prisoners of war, the victims presumed to be citizens of sovereign nation-states; and who was in charge of enforcement, each sovereign state being responsible for its own personnel. Far from there being any provision for dealing with the reciprocal entanglement of state and individual criminality, there was a radical disjuncture between the two.

The legalist paradigm as it emerged after World War II marks a clear departure from this model. In particular, in the categories of “crimes against peace” and “crimes against humanity,” as they emerged in the London Charter, the mutual implication of individual and state criminality is largely codified. But why? Why did a legalist paradigm emerge for responding to mass atrocity in wartime in the mid-twentieth century? The most obvious and common answer is that the unprecedented character of Nazi atrocities made anything less than an unprecedented response seem trivial and inadequate. Geoffrey Robertson, for instance, has asserted that “the Holocaust was a revelation that . . . crystallized the Allied war aims and called forth an international tribunal—the court at Nuremberg—to punish individual Nazis for the barbarities they had authorized against German citizens.”\textsuperscript{39} This answer is inadequate for two reasons.

First, while the Holocaust was hardly ignored completely at Nuremberg or in the successor trials, it was hardly central either.\textsuperscript{40} In particular, the prosecution’s insistence at Nuremberg that crimes against peace, and not crimes against humanity, was the foundational criminal charge, as well as the court’s finding that crimes against humanity had to be linked to crimes against peace (thus making peacetime crimes

\textsuperscript{38} Henry Bonfils & Paul Fauchille, Manuel de droit international public 17–18 (2d ed. 1898) (1894).
\textsuperscript{39} Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice, at xiv (1999).
\textsuperscript{40} See Michael R. Marrus, The Holocaust at Nuremberg, in 26 Yad Vashem Studies 4–45 (David Silberklang ed., 1998).
against humanity non-actionable), marginalized the Holocaust to a significant degree. Second, Nazis were hardly the only ones tried under the new legalist paradigm of war after 1945. There were a series of trials conducted in East Asia as well. It would be a mistake to see the East Asian trials as a purely derivative phenomenon, particularly given the lasting impact of the Yamashita precedent regarding the doctrine of command responsibility. The legalist paradigm in 1945 was not a uniquely European phenomenon, and thus cannot be held to have originated solely in the experience of Nazi genocide.

1. Doctrine of State Sovereignty

If the specifically unprecedented character of Nazi atrocities cannot fully account for the emergence of the legalist paradigm, how then do we account for it? The answer to this question can be discerned by noting a particular feature of the paradigm it replaces—the doctrine of state sovereignty. In July 1998, when Undersecretary of State David Scheffer testified before the Senate Foreign Relations Committee concerning the Statute of the International Criminal Court then being negotiated in Rome, Senator Jesse Helms (R-NC) noted, in defending his opposition to the ICC:

I’ve been accused by advocates of this court of engaging in 18th century thinking. Well, I find that to be a compliment. It was the 18th century that gave us our Constitution and the fundamental protections of our Bill of Rights. I’ll gladly stand with James Madison and the rest of our Founding Fathers over that collection of ne’er-do-wells in Rome any day.

In his inimitable fashion, what Senator Helms was arguing was that rights are inextricably connected with sovereignty and that the state is their only possible guarantor. At its theoretical and jurisprudential core, international law prior to 1945 was, as I have shown, a law of sovereignty. The legalist paradigm of war was a direct challenge to this


vision of the sovereign nation-state—even if much of this challenge was deflected, first by the Nuremberg tribunal and subsequently by the United Nations in the face of the Cold War. In this respect, the legalist paradigm of war has to be understood as a key element in the broader universalizing project of international human rights.

The doctrine of state sovereignty, stated in its most austere form by Thomas Hobbes, holds that “because every subject is by this institution author of all the actions and judgments of the sovereign instituted; it follows that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice.”

Though subsequent authors and legal developments, ranging from John Locke to the U.S. Constitution, were able to more or less successfully challenge the rigidity of Hobbes’s assertion that the sovereign is incapable, by nature, of injustice, they mostly restricted their critiques to domestic politics, defending a legal restriction of unbounded state sovereignty only within the nation. In other words, the sovereignty of the state could, on these accounts be limited by the citizens of that state, but not by outsiders.

The rise of a universalist human rights culture in opposition to strong notions of state sovereignty is in effect an attempt to replace norms guaranteed politically by the state with norms guaranteed legally by international consensus—though still enforced, if at all, by third party states acting in the name of international institutions. As such, it often appears as either a utopian project for world governance in a liberal vein or, more pragmatically, as an attempt to impose legal norms on the state form via an international cultural consensus, i.e. as a form of pressure politics. The question then is not just why the state came to be seen as a threat to certain rights-based norms—the answer to that is all too obvious—but rather why it was ever assumed otherwise. In other words, given the explicitly anomic form of sovereignty, why was it ever assumed that this form would not on occasion acquire an anti-normative or immoral content? If many now recognize that the state form is at best morally neutral, at worst, capable of great evil, why was it ever assumed otherwise?

The explicit answer, formulated in the aftermath of the wars of religion, was that whatever the potential evil of the state form, it was

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preferable to the anarchic violence ensuing from universalizing moral projects. That, in effect, was Hobbes’s answer. Yet this answer only acquired plausibility against a background assumption that the state form itself would not, as a rule, act all that badly. Why not? The answer is that for much of the history of the modern European nation-state, it was taken for granted that the anomic state form was embedded in a larger, transnational normative framework conceptualized loosely as “civilization.”

As defined by J.S. Mill, civilization entailed a “multiplication of physical comforts; the advancement and diffusion of knowledge; the decay of superstition; the facilities of mutual intercourse; the softening of manners; the decline of war and personal conflict; the progressive limitation of the tyranny of the strong over the weak . . . .” European states, along with other honorary Europeans, like the United States and even to a degree Japan, were civilized states and could be expected to behave more or less accordingly, certainly vis-à-vis other civilized states. In the context of European colonialism, this civilizational consensus also had a clear racial dimension to it. Yet if “civilization” was a code word for “white,” it was also viewed as a mode of regulating violence.

The state had no need to subject itself to the explicit norms of formal law because it was always already an institutional embodiment of the prior informal normative consensus of civilization. It was only when this assumption proved itself to be spectacularly untrue—not once but twice in the span of a generation—that the project of exogenously regulating state violence through international law could acquire more than utopian force. Indeed, for a time at least, it came to be widely perceived as a matter of life and death, both for the state and for civilization itself.

48 J.S. Mill, Coleridge, 33 London & Westminster Rev. 257, 261 (1840), quoted in Raymond Williams, Keywords: A Vocabulary of Culture and Society 58 (rev. ed. 1983).
49 This formulation brackets the difficult question of whether “civilization” as such in fact exists, as Norbert Elias has argued, or whether it is simply a cultural fiction, a just-so story that some societies have chosen to tell about themselves. See generally Norbert Elias, The Civilizing Process: The History of Manners (1978).
50 This latter understanding is the sense in which Elias uses the term. See id.
2. The Civilized Versus the Savages

To trace the collapse of what might be termed the “civilizational supposition” to the Holocaust alone would be too narrow. A doctrine as venerable and self-interested as state sovereignty does not succumb easily. What one must keep in mind is that the Holocaust was not an isolated event, however unprecedented it was; rather, it marked the culmination of thirty years’ crisis, involving two world wars, and unparalleled destruction. In particular, what was troubling to a great many European and American elites in the mid-twentieth century is that events seemed to be proving the pessimists right. Such pessimists, whether of the right (Oswald Spengler), the left (H.G. Wells), or the middle (Joseph Conrad), had long argued that European civilization was fragile and that Europeans themselves were paradoxically the main source of the threat. German barbarism in the two world wars was thus a problem both because of its victims and because of its perpetrators. That such things happened was unfortunate, but not actually that surprising. That Europeans did them to other Europeans was truly shocking. Civilization apparently provided an inadequate moral check on sovereign states, even “civilized” ones.

This is one of the key points in Justice Robert H. Jackson’s famous declaration, in his opening statement to the court at Nuremberg, that:

[T]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment

51 One could, of course, argue in terms of hegemonic stability theory that there was a shift in global hegemons in 1945, from Europe (or Britain) to the United States and that this accounts for the emergence of the transnational norms of the legalist paradigm. Yet this would not explain why the new hegemonic regime took the specific form of the legalist paradigm, particularly given that the United States’ hegemonic status has, if anything, increased in recent years, yet its support for the legalist paradigm has changed into explicit opposition. So it seems unlikely that a change in hegemons alone explains more than the conditions of possibility for the emergence of the legalist paradigm. See generally ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987) (describing hegemonic stability theory).
of the law is one of the most significant tributes that Power has ever paid to Reason.\textsuperscript{52}

Two things are worth noting about this statement. First, reason here is synonymous with law, and the argument is clearly that even state power is, or ought to be, subordinate to law. Second, law is placed in the service of civilization; indeed, it serves as both its embodiment and its most powerful shield.

Even when the Holocaust was used to justify the emerging legalist paradigm after World War II, what was relevant was not the killing but the “civilized” status of the killers. Thus, Judge Michael Musmanno, who served at the successor trials at Nuremberg, wrote:

\begin{quote}
How can one write about a planned and calculated killing of a human race? It is a concept so completely fantastic and so devoid of sense that one simply does not want to hear about it and is inclined to turn a deaf ear to such arrant nonsense. Barbarous tribes in the wilds of South Pacific jungles have fallen upon other tribes and destroyed their every member; in America, Indian massacres have wiped out caravans and destroyed whole settlements and communities; but that an enlightened people in the 20th century should set out to exterminate, one by one, another enlightened people, not in battle, not by frenzied mobbing, but by calculated gassing, burning, shooting, poisoning is simply blood-curdling fiction, fit companion for H.G. Wells’ chimera on the invasion from Mars.\textsuperscript{53}
\end{quote}

In his opening statement in the same case (the \textit{Pohl} case), prosecutor James McHaney argued:

\begin{quote}
The systematic and relentless annihilation of the Jewish people by the Nazis constitutes one of the blackest pages in the history of the civilized world. . . . One must search as far back as the massacres by Genghis Kahn and by Tamerlane to
\end{quote}

\textsuperscript{52} Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945, \textit{in} \textsc{2 Trial of the Major War Criminals Before the International Military Tribunal} 98–99 (1947) [hereinafter \textsc{Trial of the Major War Criminals}].

\textsuperscript{53} Michael A. Musmanno, Concurring Opinion, \textit{The Pohl Case, in 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law} No. 10, at 1128–29 (1950) [hereinafter \textsc{Trials Under Control Council Law}].
find anything remotely comparable to the extermination of the Jews by the Nazis.\(^{54}\)

For McHaney, as for Musmanno, it was not genocide as such that was shocking, but rather that it had occurred in the “civilized world.”

There is an explicitly racial dimension to Musmanno’s and McHaney’s shock at European genocide. This is hardly surprising, given that America shared a patriarchal understanding of the civilizing mission of late Imperialism, as one can see in Theodore Roosevelt’s well-known remark that it was the United States’ obligation vis-à-vis the “weak and chaotic people south of us,” to “police these countries in the interest of order and civilization.”\(^{55}\) The leading role played by the United States in formulating the legalist paradigm of war after 1945 was hardly innocent of its own imperialist past.\(^{56}\) Musmanno’s shock is that of a colonizer forced to recognize in a society much like his own the behavior long attributed to the colonized.

As Catherine Hall has recently remarked, “The right to colonial rule was built on the gap between metropole and colony: civilization here, barbarism/savagery there.”\(^{57}\) Often, however, such dialectical encounters are understood in postcolonial studies as cultural encounters in lieu of military ones; as discursive, rather than coercive, engagements.\(^{58}\) In a broad sense, of course, European cultural norms were central to the colonialist project, including its legal dimensions. Yet while colonialism was indeed as much a cultural process as it was anything else, in the context of the emergence of the legalist paradigm of war, it was the dialectics of colonial violence that was key.\(^{59}\)

Walter Bagehot asserted in 1869 that, like “the magical scent of the savage,” which he took to be indicative of their amazing physical prowess, their “persecuting tendency” likewise set them apart from

\(^{54}\) James McHaney, Opening Statement, \textit{The Pohl Case, in 5 Trials Under Control Council Law, supra note 53, at 250–51.}

\(^{55}\) Dana G. Munro, \textit{Intervention and Dollar Diplomacy in the Caribbean 1900–1921}, at 76 (1964).


\(^{58}\) “How, precisely, were structures of inequality fashioned during colonial encounter, often in the absence of more conventional, more coercive tools of domination?” Jean & John L. Comaroff, \textit{Of Revelation and Revolution, in Christianity, Colonialism, and Consciousness in South Africa} 6 (1991).

Colonial subjects were held to be particularly violent, especially prone to atrocities against non-combatants, great rapers of women and murderers of children, and to practice a mode of warfare that systematically refused to recognize the consensual limits of “civilized” fighting.

If Clausewitz had recognized that civilization provided only a limited and extrinsic check on the totalizing logic of violence, others, less intellectually honest than Clausewitz, projected any European excesses onto the colonial situation itself. Perhaps the most famous example of this projection of imperial violence onto the colonial context is Joseph Conrad’s *Heart of Darkness*, where it is Africa itself that strips away the veneer of civilization from Kurtz, such that he reverts to an atavistic savagery. Barbarism is something Kurtz learns in Africa, not something he brings with him from Europe.

This projection of barbarism onto the colonial context can be seen, paradoxically, in much of the anti-imperialist rhetoric of Europe itself. For instance, at a meeting of the Queenstown Town Commissioners in County Cork, Ireland, in 1879, one of the commissioners interrupted the proceedings to condemn the British conduct of the war in Zululand. He requested:

> That this board do express its utter abhorrence of the brutal savagery practiced in the name of war upon the unfortunate native tribes in South Africa by the British army . . . and whilst we look upon this war as altogether an unjustifiable one, we also most emphatically condemn the atrocious means adopted in carrying it on, for which there is scarcely a parallel to be found in the history of the darkest days of feudal barbarism.

Two points must be made with regard to this anti-imperialist condemnation of barbaric colonial war. The first is that it was by no means a universal attitude among Europeans. In the same meeting in Queenstown, another commissioner took the occasion to remark that

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60 Walter Bagehot, *Physics and Politics, or, Thoughts on the Application of the Principles of “Natural Selection” and “Inheritance” to Political Society* 104–05 (1948).

61 Joseph Conrad, *Heart of Darkness and other Tales* (Oxford University Press 1998) (1899); see also Sven Lindqvist, *Exterminate All the Brutes* (Joan Tate trans., 1996) (discussing Conrad’s *Heart of Darkness*).

62 *The Queenstown Town Commissioners and the Zulus, Flag of Ireland*, Aug. 9, 1879. I am indebted to Prof. Paul Townend for pointing me to this source.
“those Zulus deserved what they got.” More generally, there was a refusal even to acknowledge the possibility of European atrocities in the colonies. Sir Constantine Phipps said of King Leopold’s Congo Free State that he could not believe “that Belgians, members of a cultivated people amongst whom I lived could, under even a tropical sky, have perpetrated acts of refined cruelty.”

Second, and more important, was the sense clearly implied in Phipps’s statement that if Europeans practiced barbaric tactics in colonial warfare, they did so only in response to the exigencies imposed upon them by the barbarians they were fighting. Britain’s leading theoretician of colonial war, Colonel C. E. Callwell, remarked that “uncivilized races attribute leniency to timidity. A system adapted to [the suppression of the French rebellion in] La Vendée is out of place among fanatics and savages, who must be thoroughly brought to book and cowed or they will rise again.” To this he added that, in what he termed “small wars,” “operations are sometimes limited to committing havoc which the laws of regular warfare do not sanction.”

The French had first perfected the art of barbaric warfare against barbarians in their invasion of Algeria in the 1840s, practicing razzia, or raid, against the indigenous economic infrastructure as a means of literally starving the people into submission. “We must forget those orchestrated and dramatic battles that civilized peoples fight against one another...and realize that unconventional tactics are the soul of this war,” proclaimed General Thomas Bugeaud, the commander of French forces in Algeria. The French general Castellane justified this unconventional economic war by explaining:

In Europe, once [you are] master of two or three large cities the entire country is yours[,]...but in Africa, how do you act against a population whose only link with the land is the pegs of their tents? The only way is to take the grain which feeds them, the flocks which clothe them. For this reason, we make war on silos, war on cattle, the razzia.

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63 Id.
66 Id. at 42.
68 Id. at 39.
This, of course, is a euphemistic way of saying that the French in Algeria made war on civilians and, simultaneously, of justifying it. In effect then, if Europeans behaved like barbarians in the colonies, it was because the barbarian circumstances forced them to do so. In short, the atrocities which ineluctably accompanied such unrestrained violence were projected as fantasies onto their victims; their barbarism caused our barbaric actions. Clearly, Conrad was not alone in seeking to pacify barbarism by situating it elsewhere. Barbarism was a function of location, not of military violence as such, and consequently not something one needed to worry about in intra-European warfare.

The logical conclusion of this, which one can see in the so-called Martens clause to the preamble of the 1907 Hague Convention, was that in legally regulating intra-European war, a certain standard of civilized conduct could be presupposed. The Martens clause states:

[U]ntil 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 law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.69

In effect then, much of the conduct of war within Europe was entrusted to customary international law, conceptualized specifically as the typical practices of “civilized” countries.70 Cultural norms were explicitly considered an adequate substitute for legal ones. Heinrich von Treitschke argued, in 1898, that “all noble nations” had recognized the need to regulate military violence through an international law of war:

There is nothing in international law more beautiful, or showing more unmistakably the continual progress of mankind, than a whole series of principles, grounded only upon univers-salis consensus and yet as firmly established as those of the Common Law of any country . . . . the whole trend of political life has come into the open to such a degree that any gross

69 See Hague Convention, supra note 25, at 70.
70 The high contracting parties did not include formal colonies, nor did they include many of the non-western countries who had signed the 1899 Hague Convention, including e.g. Argentina, Chile, Colombia, Ecuador, Honduras, Korea, Paraguay, Persia, Peru, Turkey, Uruguay, or Venezuela.
breach of international law immediately causes great irritation in every civilized country.\textsuperscript{71}

Yet, Treitschke was careful to add:

It is mere mockery, however, to apply these principles [of international law] to warfare against savages. A Negro tribe must be punished by the burning of their villages, for it is the only kind of example which will avail. If the German Empire has abandoned this principle to-day it has done so out of disgraceful weakness, and for no reasons of humanity or high respect for law.\textsuperscript{72}

The civilization consensus that under-girded the assumption that the laws of war between civilized states need not worry about state criminality and could trust states to police their own soldiers was already felt to be in crisis before World War I. The literature of cultural pessimism in this period is enormous and much of it focuses on the presumed fragility of civilization.\textsuperscript{73} As early as 1892, J.G. Frazer ruminated:

It is not our business here to consider what bearing the permanent existence of such a solid layer of savagery beneath the surface of society, and unaffected by the superficial changes of religion and culture, has upon the future of humanity. The dispassionate observer, whose studies have led him to plumb its depths, can hardly regard it otherwise than as a standing menace to civilisation.\textsuperscript{74}

Such worries were hardly the exclusive provenance of academic mystics like Frazer (or, one might add, Oswald Spengler or Richard Wagner). It was also a common theme in the popular literature of the day. In his 1913 potboiler, \textit{The Power-House}, John Buchan’s arch-villain Andrew Lumley taunts the hero, Sir Edward Leithen, barrister and Tory MP, for defending the principles of civilization:

That is the lawyer’s view, but, believe me, you are wrong. Reflect, and you will find that the foundations are sand. You think that a wall as solid as the earth separates civilization

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\textsuperscript{71} Heineh von Treitschke, \textit{Politics} 300–01 (Hans Kohn ed., 1963) (1898).

\textsuperscript{72} Id. at 306.


\textsuperscript{74} J. James George Frazer, \textit{The Magic Art and the Evolution of Kings} 236 (St. Martin’s Press 1966) (1892).
from barbarism. I tell you the division is a thread, a sheet of glass. A touch here, a push there, and you bring back the reign of Saturn.\textsuperscript{75}

To Buchan’s Andrew Lumly, one could, of course, add Sax Romer’s Fu Manchu, H. Rider Haggard’s She, and a host of other master criminals and exotic savages of the late nineteen and early twentieth centuries, all threatening the complacent civilization of adolescent readers across Europe.

\textbf{B. Europeanization of Colonial Violence}

It was the experience of what Raymond Aron called Europe’s second thirty years’ war, that is, of two total wars within the space of a generation from 1914 to 1945, that brought home to Europeans the lessons they had hitherto been unwilling to learn from their own conduct of colonial wars around the world: that the modern nation-state was capable of brutality and a callus disregard for elementary rights on a previously unimagined scale.\textsuperscript{76} Whether the Herero, the Tasmanians, or the Native Americans were the victims, Europeans and their descendants had been practicing genocide long before there was a word to describe it.\textsuperscript{77} The breakthrough to the legalist paradigm came not, as one might expect, from the experience of genocide but from total war.\textsuperscript{78} Total war, as conceptualized, if not consistently practiced by Napoleon, and perfected in colonial war, became the dominant experience of two generations of Europeans. Total war had two related dimensions: first, the application of gross, asymmetrical violence, and second, the waging of war not only, or even mainly, against a contending military force but against its constituent society.\textsuperscript{79} Total war was

\textsuperscript{75} John Buchan, \textit{The Power-House}, in \textit{The Leithen Stories} 1, 28 (Canongate Books Ltd 2000) (1913).


\textsuperscript{79} There was also the dimension of total mobilization, but that is less relevant in this context.
simply the *razzia* writ large—and as such, was ineluctably linked to atrocity.  

World War I began to Europeanize this form of colonial violence. It was marked, as was colonial war, by asymmetrical violence, only here it was reciprocal asymmetrical violence. This somewhat paradoxical formulation must be understood precisely. From the perspective of the individual combatant, the violence was asymmetrical. As Ernst Jünger remarked of his first experience of combat in World War I, “[i]t was quite unlike what I had expected. I had taken part in a major engagement, without having clapped my eyes on a single living opponent.” Artillery was responsible for roughly seventy percent of the wounds inflicted in World War I. In set piece battles, machine guns inflicted the greatest number of fatal wounds and were highly valued by military planners precisely because of their machine-like character, with fixed firing arcs and fixed rates of fire that deliberately reduced the gunner to an adjunct operator who did little more than feed the automatic beast. Thus, for the average soldier in World War I, dying, rather than killing, became the core experience. Soldiers became objects, not subjects, of violence. If for the individual violence was asymmetrical, for the contending forces as a whole, it was reciprocal, each all too capable of inflicting similar casualties on the other; hence the stalemate of the western front and the shift from a war of maneuver to a war of attrition, or what the Germans tellingly called a *Materielschlacht*, a battle of matériel. The failure of the Leipzig trials for German war crimes in 1923 can thus be interpreted in part as the failure of the legal language of agency to comprehend the transformation of soldiers from agents into victims,

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84 *Id.* at 230.

85 One ought not exaggerate this point, of course, since there was plenty of killing in World War I as well. See, e.g., Stéphanie Audoin-Rouzeau & Annette Becker, 14–18: *Understanding the Great War*, at 15–45 (2000).
quite literally into materiel, and in the process rendering them culturally into martyrs on the altar of civilization.86

The Fascist response to World War I can be interpreted in part as an attempt to restore agency in the wake of its violent destruction in the war, but agency conceptualized for a new era, an anti-liberal, anti-individualist collective agency; agency as historical destiny, agency as the voice of the dead.87 If World War I put Europeans into the military situation of savages, World War II put them into the social situation of savages. World War II was no longer about blurring the distinctions between soldier and civilian, between agent and victim, between subject and object, but about their obliteration. The generality of this situation hid the specificity of the Holocaust from most observers until well after the War; hence Nuremberg’s concentration on military violence as the crux of the crisis of civilization in the face of civilized barbarism. Like fascism, but from the radically distinct framework of liberal legalism, it was an attempt to restore agency to a situation that threatened the very conditions of its possibility, primarily by trying to outlaw total war itself since it was rightly feared that total war could not be waged without barbarism.88

Conclusion

It was less the unprecedented character than the massive scale of Nazi barbarism that was decisive for the emergence of the legalist paradigm, allowing an implementation of ideas and doctrines that had begun to develop as early as Grotius, but had hitherto been unable to overcome the resistance posed by the institution of national sovereignty. The two key pillars of the legalist paradigm—the disconnection of rights from sovereignty and the doctrine of mutual state and individual criminality—emerged as a response to the realization, driven home by the experience of the mass destruction and atrocity perpetrated by nation-states in the course of global war, that sovereign


nation-states alone were not simply insufficient guarantors of the basic rights associated with "civilization," but that they could often be their worst violators.

It was this experience that was foremost in the minds of many at Nuremberg, lead prosecutor Justice Robert H. Jackson first among them. On July 26, 1946, responding to charges by the defense that the trial violated the prohibition against *ex post facto* law through its retroactive authorization under new international statutes (the London Charter), Jackson justified this novelty by noting that far from:

standing at the apex of civilization . . . in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first. . . . If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization.\(^8^9\)

According to Jackson, the London Charter, which he had helped draft, merely recorded the state of international law. Even if it marked a new advance, it was roughly parallel to the "evolution of local law when men ceased to punish crime by 'hue and cry' and began to let reason and inquiry govern punishment."\(^9^0\) Law, as embodied reason, and thus as a marker of civilization and progress, offered the opportunity for the second half of the twentieth century to redeem the first, to use law to bring the principles of international order into line with those of civilization.\(^9^1\) The failure to do so, Jackson noted with an apocalyptic tone entirely in keeping with the times, might well mean the permanent end of civilization itself. The legalist paradigm of war thus emerged as a mode of redemption, a bulwark against apocalypse, as little less than an eschatological last-chance gamble on the durability of civilization in the face of its own undeniable barbaric tendencies.

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89 Robert H. Jackson, Summation, in 19 Trial of the Major War Criminals, supra note 52, at 397–98.
90 Id. at 398.
91 On the "happy ending" of the twentieth century, see Michael Geyer, Germany, or, The Twentieth Century as History, 96 S. Atlantic Q. 663 (1997).
Abstract: This Article explores the establishment of the International Military Tribunal at Nuremberg beginning with the Moscow Declaration in 1943 and focusing on the Charter of the Tribunal in 1945, which, along with its charges, altered the course of international human rights law. Focusing on the way the Charter and its charges were devised, the author notes that the Tribunal’s existence was not a certainty after World War II and in fact it almost did not occur due to intense political debate that occurred in both domestic and international arenas. The Article argues that the creation of the Nuremberg Tribunal was the most significant development in human rights law in the twentieth century, as it has been used as the model for the tribunals established to deal with the horrors that occurred in Yugoslavia and Rwanda.

Introduction

The International Military Tribunal at Nuremberg (IMT) in 1945–46 was the most significant development in human rights law in the twentieth century. Although the trial of twenty-two leaders of Nazi Germany by the United States, France, Great Britain, and the Soviet Union was in itself a considerable accomplishment, the importance of Nuremberg lies chiefly in what the process ordained. Not simply a war crimes trial, it was also the first true trial for violations of human rights, and serves as the bridge from the traditional law of war to the law of human rights that marked the latter half of the twentieth century. In doing so, Nuremberg changed forever the presumptions of national sovereignty, individual responsibility, and personal accountability that had underlain international law since the rise of nation-states three centuries before.

It did so by establishing three principles of utmost importance. First, the Charter of the Tribunal explicitly held individuals accountable under international law for their actions. No longer could men claim that international law applied only to states and that they were

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shielded from personal liability. Second, the Charter defined a new category of crime—“crimes against humanity”—to overcome two traditional limitations of international law. Crimes against humanity defined those actions the defendants had taken prior to World War II, or separate from it, where the traditional law of war could not be applied. In addition, it defined the crimes that Germany had committed against its own citizens, chiefly Jews—an arena that most considered beyond the reach of international law. “Crimes against humanity” had nothing to do with combat, weapons, or armies. Finally, it established that the leaders of an enemy nation could be held accountable in a judicial proceeding: a trial drawn largely from the Anglo-American adversarial tradition, including, remarkably, due process guarantees first laid down in the U.S. Constitution of 1789.

For nearly fifty years after its end, Nuremberg stood as an isolated episode—interesting and historically significant, but unique; a chapter that had marked the end of World War II, but had little application to the hard realities of the Cold War. When the Cold War ended, however, and the United Nations (U.N.) moved to address the horrors of Yugoslavia and Rwanda, it turned to Nuremberg for its model and inalterably changed the course of human rights.

The significance of Nuremberg is that it did not have to happen. It was the result of an intensely political process, both domestically and internationally, that played out before any judge donned a robe to hear the evidence of Nazi horrors. There was no precedent, no list of crimes to be charged, no guide as to how four different nations should proceed, and often no consensus on the purpose of the trial or what was to be achieved. The full story of Nuremberg is far beyond the scope of this work, but this Article focuses on how the charges were finally devised. One cannot understand Nuremberg without understanding that it was first a political process that only later culminated in a trial and judgment.

I. Background

A. The Nature of Hitler’s War

The defining characteristic of the Holocaust—Nazi Germany’s twelve-year campaign to annihilate the Jews of Europe—was the vast,
pervasive, and intricate network of government, party, and “private sector” resources that were deployed to carry it out. It would have been impossible to achieve such a result without concerted effort by virtually every organ of German life and their counterparts in puppet and occupied countries.

Adolf Hitler became Chancellor of Germany in 1933 as head of the National Socialist Workers Party (NSDAP, or Nazi Party), and his government embarked on an insidious and increasingly intrusive program to deprive German Jews of their civil and political rights. In 1939, World War II began when Germany invaded Poland; in 1940, the Nazi war machine rolled westward through Holland and Belgium and into France; and in 1941 it turned eastward, invading the Soviet Union and quickly establishing its rule nearly to Moscow.

In 1941, special killing units traveled with or just behind the German army as it moved eastward. Their task was to find, remove, and kill Jews in those areas, which they did largely through firing squads. This method of killing was inefficient, time-consuming, and expensive, and so in 1941 Germany created the first of four death camps on Polish soil. From that date until the Nazi collapse in 1945, some six million European Jews were dispossessed of their homes and property, separated from their families, transported by trains to the East, and put to death in gas chambers, their possessions confiscated and sent back to Berlin. As late as 1944, when the Allies had already landed in France and were pushing the German forces back to Berlin, Germany was rushing Hungarian Jews to their deaths at Auschwitz. To carry out this enormous campaign, Hitler created a new bureaucracy—the Reich Security Home Administration (RSHA)—which itself required the support and cooperation of a vast network of public bureaucracy and private industry: transportation, labor, military, banking and finance, diplomacy, and communications.

Relatively little of this had to do with war itself. Many elements of the German Army were implicated in war crimes and in the persecution of Jews, but the Holocaust was not a military offensive. It was a so-

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2 Jews were first meticulously defined—a Jew was anyone with one Jewish grandparent—and then denied places in national universities and the civil service, deprived of their right to vote, interred along with political prisoners in concentration camps, made to wear yellow stars, deprived of property if they emigrated, and then restricted in their emigration. In 1938, on the night known as Kristallnacht, synagogues, homes, and businesses owned by Jews were ransacked and burned by Nazi partisans supported by the government.

3 Germany ruled Poland directly from Berlin through a German governor-general; it established a puppet regime in occupied areas of France; and it set up collaborationist governments in Latvia, Lithuania, Estonia, and the occupied areas of the Soviet Union.
cial offensive, initiated in 1933 long before the war began. The death camps were behind the front lines, staffed and administered by the Nazi Party’s security organization, not the military. Jews interred or killed in concentration camps were not prisoners of war; they were kidnapped civilians.

B. The Beginnings of Nuremberg

The world had never seen anything like it: an entire government of a major world power, aided by a massive party organization and a sophisticated infrastructure of private industry, mobilized to eliminate the Jews of Europe. These developments were no secret to the Allies and on November 1, 1943, with the Allied invasion of Europe in advanced planning, President Roosevelt, Prime Minister Churchill, and Marshal Stalin issued the “Moscow Declaration,” promising that when the war was done:

[T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in [Nazi] atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. . . . The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical localisation and who will be punished by a joint decision of the Governments of the Allies.4

It was by no means clear, however, that the fate in store for the “major criminals whose offenses have no particular geographical localisation” would be a trial.5 It was one thing to say that a German officer who had oversen the roundup of Jews in a French village should be made to stand trial in France after the war; it was quite another to conclude that the major Nazi leadership should have their fate decided by judges acting under rules of trial procedure and according to evidence presented by lawyers.

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5 See id. at 14.
Only in the aftermath of the Allied invasion of Europe on June 6, 1944 did attention turn to the question of how the Allies should deal with the vanquished Germany. On this question, there were two broad and competing schools of thought in Washington. One, led by Secretary of the Treasury Henry Morgenthau, Jr., advocated that Germany and the Germans be harshly punished through a program of “pasturalization” that would effectively demolish German industry and render the nation a vassal state, powerless to consider aggression and war for generations to come. The other school of thought, led by Secretary of War Henry Stimson, would set Germany on its feet as soon as possible, restoring at least some degree of autonomy under occupation, and encouraging the Germans to understand that their salvation lay in peaceful and responsible partnership with the West.

1. Stimson’s Proposal

The question of dealing with Nazi leaders was only one part of this broader debate, but it was an important part. Much of the wrangling over how to deal with the Gestapo (the state secret police), the Schutzstaffel (SS) (the elite military unit that served as Hitler’s bodyguards and as a special police force), the leadership of the Nazi party, and those who had joined the party and its various tentacles of terror was driven by a fear that if Nazism itself was not thoroughly obliterated it would rise again. In September 1944, when German defeat seemed inevitable, Morgenthau presented to President Roosevelt a plan that called for “the arch-criminals of this war whose obvious guilt has generally been recognized by the UN” to be “apprehended as soon as possible” and “be put to death forthwith by firing squads” of U.N. soldiers. Secretary of War Stimson answered with a novel proposition:

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6 In this context, the Allies were the United States, Great Britain, and the Soviet Union (and Roosevelt, Churchill, and Stalin were known as the “Big Three”). Although the French were eventually to join as one of the four powers signing the Charter of the IMT, it was occupied by the Germans until the liberation of Paris in August, 1944; General de-Gaulle, leader of the Free French in exile, was not included in summit meetings with Roosevelt, Churchill, and Stalin.

7 See, e.g., The Road to Nuremberg 28–29, 36–37 (Bradley F. Smith ed., 1981) [hereinafter Smith, Road to Nuremberg].

8 See id. at 37, 38.

9 See generally id. at 48–74. Nobody in Washington or London assumed that defeat of Nazi Germany would bring with it a quick and total repudiation of fascism, though that is exactly what happened.

10 Henry Morgenthau Jr., Appendix B: Punishment of Certain War Crimes and Treatment of Special Groups (Sept. 5, 1944), in American Road: The Documentary Record, supra note 4, at 28.
The method of dealing with these [“arch-criminals”] and other criminals requires careful thought and a well-defined procedure. Such procedure must embody, in my judgment, at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense. . . . [T]he very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. . . . I am disposed to believe that at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them.\textsuperscript{11}

Roosevelt was initially sympathetic to Morgenthau’s approach. In London, too, the Lord Chancellor reported to the War Cabinet:

I am strongly of the opinion that the method by trial, conviction and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the court, formulating the charge, and assembling the evidence, the question of their fate is a political, not a judicial, question. It could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy.\textsuperscript{12}

The Lord Chancellor recommended that his government take the position that when “major criminals [fall] into Allied hands, the Allies will decide how they are to be disposed of, and the execution of this decision will be carried out immediately.”\textsuperscript{13}

Roosevelt and Churchill met in Quebec in mid-September 1944 and reportedly saw eye-to-eye both on Morgenthau’s policy of crippling the German economy, and on the advantages of summary execution. When word of this impending policy leaked to the press, however, there was widespread criticism of such a harsh and vindictive plan, and, always sensitive to the political winds, Roosevelt retreated, leaving the matter an open question. Stimson, joined by Secretary of State Cordell

\textsuperscript{11} Communication from Secretary of War (Stimson) to the President (Sept. 9, 1944), in \textit{American Road: The Documentary Record}, \textit{supra} note 4, at 30–31.

\textsuperscript{12} Lord Chancellor Sir John Simon, Major War Criminals, memorandum (Sept. 4, 1944), in \textit{American Road: The Documentary Record}, \textit{supra} note 4, at 32.

\textsuperscript{13} Colonel Murray C. Bernays, G-1, Subject: Trial of European War Criminals (Sept. 15, 1944) [hereinafter Bernays], in \textit{American Road: The Documentary Record}, \textit{supra} note 4, at 33.
Hull and Secretary of the Navy James V. Forrestal, took the opportunity to press the case for a trial, drafting for the President (though it was never sent to him) a plan that answered several troublesome issues: how to deal with a huge number of possible defendants whose individual trials would far exceed the Allies’ capacity; and how to reach atrocities that had taken place before the war or apart from military action and thus were not war crimes, and were, in addition, directed by a government against its own citizens and thus arguably beyond the scope of traditionally understood international law.\footnote{Draft Memorandum for the President from the Secretaries of State, War and Navy, Subject: Trial and Punishment of European War Criminals (Nov. 11, 1944), in \textit{American Road: The Documentary Record}, supra note 4, at 41–44.} Stimson urged that the objective of prosecution should be “not only to punish the individual criminals, but also to expose and condemn the criminal purpose behind each individual outrage,” expanding the world’s focus from individual crimes to “the results of a purposeful and systematic pattern created by [Nazi leaders] to the end of achieving world domination.”\footnote{\textit{Id.} at 44.} This emphasis on the concerted effort of the Nazis—the forest rather than the trees—was to dominate U.S. thinking in both the planning and the eventual conduct of the trial at Nuremberg.

The proposal developed in the War Department was to conduct an initial trial on a charge of conspiracy, a uniquely Anglo-American legal concept that defines the plotting of a crime by two or more people as a crime separate from the one they intend to commit.\footnote{\textit{Id.} at 42–43.} A person is guilty of conspiracy if he does even a single overt act in furtherance of it, and evidence of one conspirator’s evil acts can be used against all the other defendants, including those who did not participate in those acts or even know of them, so long as each defendant played some overt role toward the accomplishment of the conspiracy’s overall objective.\footnote{For example, if several people conspire to rob a bank, the murder of the bank guard in the course of the holdup incriminates, in a conspiracy to murder, those persons whose only role was to procure the weapons, regardless of whether they anticipated the murder or even opposed it.} No one had ever before suggested that conspiracy was a crime under international law.

As Colonel Bernays, of the War Department’s Special Project Branch, envisioned it, the Nazi party, the government and its state agencies, such as the SS, and their various leading officials would be charged with “conspiracy to commit murder, terrorism, and the de-
struction of peaceful populations in violation of the laws of war.” This would provide a platform on which the entire Nazi program could be laid bare through documents and testimony. Following the certain conviction of these defendants in the main trial, there could be a series of subsequent trials in which any member of the government, the party, or its kindred agencies could be convicted of conspiracy merely upon proof of membership in the organization. The understanding was that these subsequent trials would be both sweeping and quick.

The proposal encountered opposition from the Army’s Judge Advocate General, and from the Justice Department, but through negotiation and subtle redrafting of contentious points, Stimson, Secretary of State Hull, and Attorney General Francis Biddle were able to present a memorandum to President Roosevelt on January 22, 1945 that contained the essence of the conspiracy/criminal organization theory, as well as the two-stage system of trials. The memo barely mentioned the word “conspiracy,” but spoke of a “premeditated criminal plan or enterprise, which either contemplated or necessarily involved” the commission of “mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of ‘total’ war, its prosecution with utter ruthless disregard for the laws and customs of war.”

The very scope of the crimes—extending over twelve years and all of Europe—presented logistical problems of “appalling dimensions” in finding and organizing the evidence, in connecting specific crimes to specific individuals, and in staging the trials themselves. As the Secretaries stated, the prewar atrocities:

[A]re neither “war crimes” in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished;

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18 See Bernays, supra note 13, at 36.
19 Though the draft proposal did not say so, the idea posed serious questions of fairness: what an individual actually did—if indeed he had done anything at all—would be irrelevant, as would even his purpose or intent in joining the organization.
20 See Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminal (Jan. 22, 1945) [hereinafter Jan. 22 Memorandum], in American Road: The Documentary Record, supra note 4, at 117–22.
21 Id. at 118.
22 Id. at 119.
and the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.\textsuperscript{23}

Rejecting the idea of summary execution as “violative of the most fundamental principles of justice” (and likely to produce martyrs as well), the Secretaries further stated:

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.\textsuperscript{24}

The Secretaries stuck to the idea of two-stage process. First, an initial trial of the major German leaders and the organizations they led, charging defendants “both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about.”\textsuperscript{25} The criminal enterprise would be defined:

\[T\]o permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war.\textsuperscript{26}

The second stage would be individual trials of members who were members of the groups convicted at the first trial in which membership would be sufficient evidence of guilt. In a concession to those who had criticized the fairness of this idea, however, the Secretaries noted that, in addition to proof of membership, “[p]roof would also be taken of the nature and extent of the individual’s participation” so that punishment “would be made appropriate to the facts of his particular case.”\textsuperscript{27}

\textsuperscript{23} Id.
\textsuperscript{24} Id. at 120.
\textsuperscript{25} Jan. 22 Memorandum, \textit{supra} note 20, at 120.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 121.
Several aspects of this proposal are noteworthy. The Secretaries were acutely aware that a conventional charge of war crimes would be inadequate to reach prewar crimes and the massive persecution of “civilians,” and could not illuminate the broad scope of the Third Reich’s terrors. The answer to that was the charge of conspiracy; the idea of new class of crimes, “crimes against humanity,” had not yet crystallized. For the first time, the idea of “waging an illegal war of aggression” was proposed—though as an object of the conspiracy, not a crime in and of itself. Overall, the proposal was innovative, but not radical—“triumphs of caution and moderation.”28

2. International Stalemate

The impending meeting of the Big Three—the U.S., U.K., and Soviet Union—in Yalta in early February, 1945 hastened the creation of the memo, but much to the Secretaries’ disappointment, the President remained noncommittal and, worse, did not broach the subject at Yalta.29 The British, in the dark on these political maneuverings in Washington, were proceeding on the assumption that Hitler and the other top leaders would be summarily executed, and that lower-ranking Nazis would be sent back for trial to the countries in which their crimes had taken place. The British invited a U.S. delegation to London in early April 1945 to work out a plan for dealing with war criminals, but the conference produced only ambiguity and stalemate. Lord Simon, the Lord Chancellor, proclaimed that he was “very worried by the prospect of a trial which might be drawn out almost indefinitely, in which all sorts of things might be raised and discussed—whether legal or historical—leading to controversy and debate in the world at large, with a reaction which we can hardly calculate.”30 That same day he also asked:

[W]hat is the real charge which Allied people and the world as a whole make against Hitler? It is the totality of his offences against the international standard which civilized countries try to observe which make him the guilty man that he is. . . . If the method of public trial were adopted, the comment must be expected from the very start to be that the whole thing is a “put-up job” designed by the Allies to justify

28 American Road: The Documentary Record, supra note 4, at 56.
29 Id. at 135.
30 Memorandum to Judge Rosenman From Lord Simon (Lord Chancellor) (April 6, 1945), in American Road The Documentary Record, supra note 4, at 151–52.
a punishment they have already resolved on. . . . [I]t is by no means unlikely that a long trial will result in a change of public feeling as to the justification of trying Hitler at all. Will not some people begin to say “The man should be shot out of hand”? . . . . [I]s there not a danger of the trial being denounced as a farce?  

Washington was unmoved. Responding to Simon, Assistant Secretary of War John J. McCloy, who had become the driving force for war crimes policy in Stimson’s War Department, answered forcefully the contention that a trial would be unable to deal with the entire scope of Nazi depredations before the war and apart from it:

It is true that all the Axis has done should be brought into the grounds of punishment. The offenses charged should include the preparation for war, the prewar atrocities and the launching of aggressive war in violation of Germany’s treaty obligations as well as the ruthless conduct of war in violation of international law and custom. The very breadth of the offense, however, is not in itself argument against judicial action. It is a most important reason for a trial, for it is highly desirable that there be established and declared by actual decision, after adequate hearing and determination of the facts, the principles of international law applicable to the broad, vicious Nazi enterprise. In texture and application, this law will be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of those principles on a sufficiently comprehensive scale to meet the situation. International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones . . . .

Britain and the United States were talking past each other, and each was hardening its position. There was no word from the President, no guidance, no letter to Churchill urging quick resolution along U.S. lines. The U.S. delegation sat glumly in London, watching the entire enterprise unravel.

31 Id. at 156–57.
32 Id. at 161.
C. Creation of the International Military Tribunal Charter

Then, on April 12, President Roosevelt died. Harry Truman, “a man of quick and firm decision, little inclined to the artful, evasive tactics of his predecessor,” was quickly briefed on the Stimson-Hull-Biddle memorandum and of the stalemate with the British over execution versus trial. He decided “that there must be a trial and that the basic American policy position was sound. Emboldened by the strong presidential mandate that had so long eluded them, the American planners raced forward on a number of fronts.”

1. Jackson’s Plan

Truman appointed U.S. Supreme Court Justice Robert H. Jackson to take the newly created position of Chief of Counsel for the Prosecution of Axis Criminality. Characteristically, Jackson took immediate charge of U.S. policy, moving quickly and boldly to shape it to his liking. Over the next month, he and his new staff formulated an executive agreement for an “International Military Tribunal” with one judge and one alternate each from the United States, Great Britain, Soviet Union, and France to try the “major criminals” of the Axis powers. The agreement did not define the crimes to be charged, though it did define several “criminal” acts, including “[l]aunching a war of aggression” and post-1933 “[a]trocities and offenses[,] . . . including atrocities and persecutions on racial or religious grounds” that were “in violation of any applicable provision of the domestic law of the country in which committed.”

The chief advantage of the conspiracy theory had been that it could reach all acts of the Nazi government and party from 1933. In the end, however, the defendants would be found guilty of conspiracy and not the acts themselves, which were thought to be beyond the competence of international law. Jackson’s early theory was that the crimes themselves could be punished if they were crimes under local law at the time they were committed. The obvious drawback to this theory, however, was that Hitler’s administration had changed many of Germany’s laws in the 1930s to allow precisely the persecution that followed. Jack-

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33 American Road: The Documentary record, supra note 4, at 138.
34 Id.
35 Executive Agreement Relating to the Prosecution of European Axis War Criminals (Drafts 3 & 4) (May 19, 1945), in American Road: The Documentary Record, supra note 4, at 206.
36 Id.
son’s plan preserved the principle of conspiracy by providing that the IMT should “apply the general rule” that crimes committed by one participant in a “criminal plan” are attributable to all participants.\(^{37}\) The agreement he drafted was not centered on conspiracy as the unifying theme of the charges, as earlier U.S. versions had. That role was filled, in Jackson’s vision, by the charge of waging a war of aggression.

Jackson’s plan did preserve the idea that organizations could be tried and convicted by the IMT, but it took a further step away from making individual membership enough for conviction in future trials. Rather, an individual member of a convicted organization would bear the burden of proving “any circumstances relating to his membership or participation therein which are relevant either in defense or in mitigation.”\(^ {38}\) This was profoundly ambiguous because Jackson’s plan did not even hint at what “defense” might be enough for an individual to establish or what “circumstances” might be “relevant” to that end. The plan left that task for further study by Jackson and the other prosecutors.

In the face of this strong U.S. proposal, Jackson’s considerable persuasive powers, and the assent of France and the Soviet Union, the British War Cabinet gave in and abandoned its opposition to a trial. Plans were made for a conference in London to draw up the Charter of the Tribunal itself, based on Jackson’s plan.

2. The Road to the Charter

As he departed for London in June 1945, Jackson briefed President Truman on his plan. The plan to proceed against the organizations had changed little, though Jackson acknowledged that individual members, following the presumed conviction of the organizations, would be allowed to prove “personal defenses or extenuating circumstances, such as that he joined under duress.”\(^ {39}\) It was the case against the individual major Nazi criminals—though it was still uncertain who the defendants would be—that gave Jackson the stage on which to lay out the three charges that would eventually form the nucleus of the Charter. His orientation was both political and legal:

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized coun-

\(^{37}\) Id.

\(^{38}\) Id. at 208.

tries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted.40

Nazi Germany was not “a legitimate state pursuing the legitimate objective of a member of the international community” but rather “a band of brigands who had seized the instrumentality of a state.”41

Having thus separated the defendants from the state itself to charge them as individual bandits who had conspired with each other in a monstrous plan of persecution, aggression, and mass murder, Jackson laid out the three substantive charges. First, war crimes.42 Second, “atrocities and offenses, including atrocities and persecutions on racial and religious grounds, committed since 1933.”43 Though he did not call them “crimes against humanity” at this point, Jackson boldly asserted that they had been “assimilated as a part of international law” by the Hague Convention of 1907.44 Jackson knew that no one could argue, or would want to, that the Nazi horrors had not offended civilized peoples, the “laws” of humanity, and the “dictates” of the public conscience, but he surely knew that the Hague Convention had no thought of instituting these principles as international law.45 He used the Hague Convention as the legal platform on which to support “[t]he feeling of outrage” in the U.S. over the course of the war, so as to “punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.”46

As the third charge, Jackson specified “[i]nvasions of other countries and initiation of wars of aggression in violation of International Law and treaties.”47 This crime came to be called “the crime against peace” in the Charter, or the “crime of aggressive war,” and he relied chiefly on the Kellogg-Briand Pact of 1928, signed by most nations of the world, that renounced war as an instrument of national policy and

40 Id. at 1074–1075.
41 Id. at 1075.
42 See id. at 1076.
43 Id. at 1076.
44 Jackson Report, supra note 39, at 1076.
45 The DeMartens Clause of the Hague Convention had appealed to “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” See Smith, Road to Nuremberg, supra note 7, at 241.
46 Jackson Report, supra note 39, at 1075.
47 Id. at 1076.
pledged to resolve international disputes by “pacific” means. 48 “This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime,” Jackson wrote to the President. 49 He continued:

An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community. . . . We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. 50

Jackson did not pretend, and indeed could not, that the trial would be applying well-settled principles. It would advance international law into places it had never been, which is exactly what Jackson wanted:

International Law is. . . . an outgrowth of treaties or agreements between nations and of accepted customs. . . . Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. . . . Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct . . . . 51

Telford Taylor, a gifted young Army lawyer on Jackson’s staff (and who succeeded Jackson as Chief of Counsel for the trials after the IMT), provided trenchant analysis that significantly influenced Jackson’s presentation of his case at Nuremberg. According to Taylor, the trial’s most important accomplishment was:

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48 Id. at 1077.
49 Id.
50 Id.
51 Jackson Report, supra note 39, at 1076.
To give meaning to the war against Germany. To validate the casualties we have suffered and the destruction and casualties we have caused. To show why those things had to be done. The conviction and punishment of Axis criminals are desirable objectives in themselves, but in order to accomplish the larger objectives the conviction and punishment must be obtained by procedures and for reasons which will help to make the war meaningful and valid for the people of the Allied Nations and, it is not beyond hope, for at least some people of the Axis nations.\footnote{52 Telford Taylor, An Approach to the Preparation of the Prosecution of Axis Criminality (Early June, 1945) [hereinafter Taylor, Axis Criminality], in American Road: The Documentary Record, supra note 4, at 209.}

Dividing the prosecution’s case into the “illegal launching” of wars of aggression phase and the “commission of atrocities” phase, Taylor dryly noted that the first phase was:

[B]ased on the assumption that it is, or will be declared, a punishable offense to plan and launch (and lose?) an aggressive war, particularly if treaties are thereby violated. Although the phrase “illegal launching” is a “law idea”, and although much legal paraphernalia will be and must be invoked to validate the assumption, the thing we want to accomplish is not a legal thing but a political thing.\footnote{53 Id. at 210.}

No one has ever analyzed the crime of aggressive war so well in so few words. Whether it is a punishable offense to launch an aggressive war, only those who lose it are likely to be tried, and therein lies the abiding criticism of Nuremberg: that it was “victors’ justice,” the winners lashing out at the losers. Taylor’s recognition that acceptance of the illegal war doctrine would have to come from political consensus, not a judicial decree, is inarguably correct. Taylor dismissed “victors’ justice” in a single sentence: “Only the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of aggressive war is a crime.”\footnote{54 Id. at 211.} As to the atrocities, still a legal dilemma insofar as they were not traditional war crimes, Taylor had a similar rebuttal:
No one will be shocked by the doctrine that people who direct or do inhuman and barbarous things in the course of losing a war will be punished. Many would be shocked by the conclusion that such people may go scot-free unless a pre-existent law or rule can be cited.\textsuperscript{55}

Taylor had brilliantly identified the plan’s greatest strength and its most prominent weakness. Contrary to the assumptions that had guided U.S. war crimes planning up to that point, Taylor declared punishment incidental, for how can there be meaningful “punishment” for crimes so calculated, vast, and hideous? The purpose of the trial was the trial itself: to show the world, present and future, by fair procedures, that the destruction and casualties that the Allies had caused were necessary to end the Third Reich.

Jackson and his counterparts met in London during the summer of 1945 to draft the Charter of the Tribunal, to prescribe the procedures that it would follow, to choose the defendants, and to draft the indictment. It was not a smooth summer. Jackson was innately suspicious of the Russians, and held out until the end the possibility that the U.S. might go their own way, with or without the British and French, leaving the Russians to try what they would. The idea of conspiracy as a separate crime baffled the French and the Russians, and the British and the U.S. were at loggerheads over the size of the trial. The idea of aggressive war as a crime concerned the other three nations, and the French-Soviet counterproposal—that aggressive war be characterized as a crime only when undertaken by the Axis—was anathema to Jackson, who saw that aggressive war could only be a crime under international law if it applied to all nations. The British, meanwhile, were reluctant to explore too deeply the economic and fiscal aspect of the rise of the Reich, lest it cast too much light on the role of British banks in the 1930s. The idea of trying organizations first, and then running their members through summary trials afterwards, continued to pose persistent questions of procedure and fairness, and the Soviets could not understand why it was necessary to put the organizations on trial when the Allies had already condemned them as criminal outfits.

The very nature of the trial itself was proving difficult to agree upon, with the French and the Russians accustomed to the continental, or inquisitorial, system where the judge marshaled the evidence and

\textsuperscript{55} Id. at 212.
questioned the witnesses, and the British and the Americans pushing for an adversarial process, with lawyers presenting the evidence before neutral judges and each side vigorously cross-examining the witnesses called by the other. Even the logistics of preparing for the trial were vexing: there were not enough translators for the documents being brought in by the boxful, and the parties did not even agree that Nuremberg should be the site until late in the summer. On top of that, the search for evidence was not proceeding quickly, nor producing very auspicious results, particularly on the critical elements of conspiracy. Jackson had begun the summer thinking that the other Allies would quickly understand that his plan was the obvious roadmap for a trial. They did not, and he had little patience for their criticism, questions, and redrafted charters.

II. Discussion

In the end, Jackson—largely—prevailed. The Charter of the IMT, issued on August 8, 1945, was an enormously important document—more important in many ways than the eventual judgment of the Tribunal itself, because the Charter created the Tribunal and bound the judges to its terms. The Charter defined three charges: (1) war crimes, which had never been controversial; (2) “crimes against humanity,” which was intended to reach the depredations against civilians before and during the war; and (3) “crimes against peace,” the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.”

A. The Definition of Crimes Under the Charter

The drafting and redrafting of the Charter in such a contentious atmosphere had left its definitions far from perfect. The Charter defined crimes against humanity to include crimes “before or during the war” and the drafters specifically rejected the requirement that they be in violation of the domestic law in the country of their commission. At first reading the definition seemed broad enough: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds . . . .” But there was an important

57 Taylor, Axis Criminality, supra note 52, at 215.
58 See id. at 215.
59 Id.
qualification: such crimes must have been committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.” Since the Nazi campaign against the Jews before the war began could not fairly be characterized as “in execution of” or “in connection with” either aggressive war or war crimes, the effect of this limitation was to exclude the persecution of Jews before 1939.

In addition, the Charter sharply curtailed the conspiracy theory, which had been the foundation of U.S. policy. As Jackson had originally drafted it, conspiracy was a fourth crime, equal to the other enumerated categories of crimes. A British revision, however, had placed the conspiracy provision within the paragraph defining crimes against peace, so the Charter provided that conspiracy to wage aggressive war was a crime, but there was no similar provision for a conspiracy to commit war crimes or, significantly, crimes against humanity. This was a “disastrous blow” to the original U.S. proposal. It might plausibly be urged that prewar anti-Jewish actions were a necessary part of a conspiracy to perpetrate greater atrocities after the war came, it was difficult to argue that the prewar harassment of Jews was a necessary preparation for aggressive war.

In the end, these provisions caused less mischief than they might have caused. The Tribunal, in its judgment, appeared to make a point of declaring the limitations technical and unimportant:

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. . . . The persecution of Jews during the same period is established beyond all doubt. . . . The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the begin-

60 See id.
62 Id.
ning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.63

1. Rejection of the Acts of State and Superior Order Defenses

In addition to the definition of the crimes, Article 7 of the Charter specifically provided that the “official position” of the defendants as high government officials “shall not be considered as freeing them from responsibility or mitigating punishment.”64 As Jackson stated: “We do not accept the paradox that legal responsibility should be the least where power is the greatest.”65 Related to that was the Article 8 provision, which stated that “the fact that a Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”66 Contrary to what has become popular opinion, the IMT at Nuremberg did not introduce the theory that “I was just following orders” is not a defense. That prohibition had existed under the codes of many nations, including the United States and Germany, since World War I or before. The Nuremberg Charter, however, applied it directly and forcefully. The very act of bringing charges against individual men, and putting them in the dock to answer those charges, stripped of any defense of official immunity or superior orders, was an enormous step.67 In his opening statement, Jackson told the judges:

[T]he idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in

63 Judgment of the International Military Tribunal (Sept. 30–Oct. 1, 1946) [hereinafter IMT Judgment], in 22 Trial of the Major War Criminals Before the International Military Tribunal 498 (1948) [hereinafter Trial of the Major War Criminals].
64 Charter of the International Military Tribunal (Aug. 8, 1945) [hereinafter IMT Charter], in 1 Trial of the Major War Criminals, supra note 63, at 12 (1947).
65 Jackson Report, supra note 39, at 1073.
66 See IMT Charter, supra note 64, at 215–16.
67 See id.
the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. . . . Under the Charter, no defense based on either of these doctrines can be entertained.  

B. The Indictment and the Trial

The trial itself began with Jackson’s opening, followed by opening statements by the chief prosecutors of the three other nations, on November 21, 1945.  There were twenty-two individual defendants.  The prosecution also charged six organizations as being criminal organizations under Article 9 of the Charter.

The indictment was a lengthy document, alleging four counts. Count I charged each defendant with having “participated as leaders, organizers, instigators or accomplices in the formulation or execution of a Common Plan or Conspiracy to commit, or which involved the commission of, Crimes Against Peace, War Crimes, and Crimes against Humanity” and, as co-conspirators are, “individually responsible for their own acts and for all the acts committed by any persons in the execution of” the plan or conspiracy. Count II charged sixteen of the twenty-two defendants with crimes against peace, in that they “participated in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.”

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68 Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945 [hereinafter Jackson, Prosecutor’s Address], in 2 TRIAL OF THE MAJOR WAR CRIMINALS, supra note 63, at 150.
69 Id.
71 The six organizations charged were the Reich Cabinet; the Leadership Corps of the Nazi Party; the SS, generally speaking the Party’s executive branch, and also its security and intelligence arm; the SD, the secret state police, known as the Gestapo; the SA, or Brownshirts, an early group of Party fascists who were subjugated by the SS in 1934; and the General Staff and High Command of the German Armed Forces.
72 It took an entire day to read the indictment at trial. See Indictment, International Military Tribunal [hereinafter IMT Indictment], in 22 TRIAL OF THE MAJOR WAR CRIMINALS, supra note 63, at 30–94.
73 Id. at 31.
74 Id. at 43–44.
Count III charged eighteen of the defendants with war crimes between the invasion of Poland on September 1, 1939 and surrender. Specifically, the indictment charged “methods of combat and of military occupation in direct conflict with the laws and customs of war, and the perpetration of crimes committed on the field of battle during encounters with enemy armies, against prisoners of war, and in occupied territories against the civilian population of such territories.” There followed fourteen pages of specifics, setting forth in considerable detail such events as murder and ill-treatment of civilians in occupied areas, deportation of civilians for slave labor, murder and ill-treatment of prisoners of war, killing of hostages, plunder of public and private property, and the wanton destruction of towns not justified by military necessity.

Finally, Count IV charged eighteen defendants with crimes against humanity, specifying (in broad detail but with considerably less detail than Counts II and III), the murder, extermination, enslavement, and deportation of civilian populations before and during the war, and the persecution on political, racial, and religious grounds of Jews and of others thought to be “in conflict with the aims of the Nazis.”

C. The Judgment of the Tribunal

The trial continued, with some breaks, until August 31, 1946 when the eight judges retired to consider their verdicts. They deliberated for a month and read their judgment over the course of two days before a packed courtroom and the world’s press. The judgment itself, though justly famous, is somewhat anticlimactic. The Tribunal did not consider itself at liberty to expand or contract the Charter’s provisions, or even to question them. The crimes it judged were the crimes the Charter defined, no more and no less; the defenses it disallowed, such as the doctrine of superior orders, it disallowed because the Charter said that it must do so. “The law of the Charter is decisive,” said the judges, “and binding upon the Tribunal.”

75 Id. at 45.
76 See id. at 45–59.
77 IMT Indictment, supra note 72, at 70.
78 Strictly speaking, there were four judges and four alternates, but all eight men sat on the bench, deliberated, and signed the judgment. The two U.S. judges were Francis Biddle, a former Attorney General, and John J. Parker, a federal appeals court judge from West Virginia.
79 See IMT Judgment, supra note 63, at 411–589.
80 Id. at 461.
the indictment, the Court returned guilty verdicts on fifty-two and not-guilty verdicts on twenty-two. Fifteen of the defendants were acquitted of at least one charge while seven were convicted on all counts.\(^\text{81}\)

Count I of the Indictment, charging participation in a common plan or conspiracy, fared the worst; although the indictment charged all twenty-two of the defendants with it, the court acquitted fourteen of them after first ruling that, because of the way the Charter was drafted, the conspiracy count pertained only to the charge of aggressive war, and thus the indictments alleging conspiracy to commit war crimes and crimes against humanity were invalid.\(^\text{82}\) Each of the eight defendants convicted of conspiracy in that respect was also convicted of Count II, which was the charge of aggressive war itself (or “crimes against peace” in the Charter’s terminology). Four of the defendants convicted of aggressive war were acquitted of the conspiracy count and four more were acquitted of both. As to war crimes, sixteen of the eighteen defendants so charged were convicted, and as to crimes against humanity, there were likewise sixteen convictions on eighteen indictments. Apart from the misfit conspiracy count, there were convictions on forty-four of the remaining fifty-two counts, including twenty-eight on the thirty-two counts of war crimes or crimes against humanity.

1. The Court’s Reasoning

The Charter required that the Tribunal give the reasons on which its judgment was based, and the judges produced a 154-page document that discussed the evidence in detail and weighed each of the counts of the indictment against each individual defendant and the six organizations charged as criminal. It is an orderly and lawyerly treatise, beginning with a lengthy historical account of the rise of Nazism in Germany; the re-armament and the planning of war and the occupations of Austria and Czechoslovakia in 1938; the opening of war against Poland in 1939, followed by the invasions of Norway and Denmark in 1940, Belgium, the Netherlands, and Luxembourg, and then Yugoslavia and Greece, and finally the Soviet Union, all in 1941; and the declaration of war against the United States six months later. The judges concluded that these were aggressive acts of war, not undertaken in self-defense or at the invitation of the victims. They were

\(^{81}\) Schacht, Papen, and Fritzsche were acquitted on all counts. The Russian judge filed a dissenting opinion on these acquittals but did not quarrel with the decision to acquit the other defendants on one or more charges.

\(^{82}\) See IMT Judgment, supra note 63, at 524–87.
undertaken to expand German power and territory; to secure critical natural resources, ports and other strategic advantages for the continuation of the war; to neutralize neighboring countries that might threaten German expansion; and to strengthen Germany’s grip on Europe. Because the Charter defined the crime against peace as a war of aggression or a war “in violation of international treaties, agreements or assurances,” the court went on to point out that the German invasion of Western Europe violated a number of treaties and agreements of nonaggression that Germany had made with its victims, both before and during the defendants’ reign.

In addition, the Court was plainly concerned at the defense, vigorously asserted by the defendants’ lawyers and which lingers today, that the charge of crimes against peace was fundamentally unfair because aggressive war had never before been defined as a crime. *Nullem crimen sine lege* was the time-honored principle: no crime unless a law makes it so, at the time it was done. The Court stated that the maxim reflects a “principle of justice,” and as such it cannot be applied to protect those “who in defiance of treaties and assurances have attacked neighboring states without warning . . . for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.” The defendants “must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.”

Turning aside this argument did not solve the more troublesome underlying contention that the Tribunal clearly wanted some affirmative ground to justify a conclusion that aggressive war was not merely unlawful but an actual crime. It turned to the Kellogg-Briand Treaty

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83 IMT Charter, *supra* note 64, at 12 (art. 6(a)).
85 See id. at 462. The principle of *nullem crimen sine lege* is included in the U.S. Constitution, which prohibits Congress from passing any “ex post facto law.” U.S. Const. art. I, § 9.
86 IMT Judgment, supra note 63, at 462.
87 Id.
88 The point was not a technical one: in ordinary civil law, one who breaches a contract may have to pay, but he does not get indicted or go to jail for his act. The rules of international law were considerably looser than those governing ordinary contracts; a government that breaches an agreement cannot be haled into court and made to pay. It can be cajoled, criticized, sanctioned, or shunned, but these are political and not legal reactions. Violating a pact of peace by sending Panzer divisions across the border is no ordinary breach of agreement, but the defendants’ best hope on the aggressive war charge was to have the Court view the charge as an attempt to make a legal issue out of what was really a political issue and to toss the entire charge out. The Court did not.
of 1928. That treaty had committed its signatories to resolve “disputes or conflicts of whatever nature or whatever origin” only by “peaceful means.” According to the Tribunal, “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.” The Court invoked the words of U.S. Secretary of State (later Secretary of War) Stimson in 1932—significantly, before the Nazis came to power in Germany and thus not a self-serving criticism of Hitler’s aggression—that the Kellogg-Briand Treaty had made war “an illegal thing” and those nations that engage in it “law breakers.”

Still, Stimson had not said—quite—that it was a crime. The Court pointed out that the Hague Convention of 1907, prohibiting mistreatment of prisoners and the use of poisoned weapons among other forbidden acts of war, had not actually said that those were crimes, and yet military courts had no difficulty in punishing those who had done them; waging war was “equally illegal, and of much greater moment,” than those. Clearly echoing Jackson, the judges went on,

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.

Further seeking to shore up the Kellogg-Briand Pact, the Court cited a resolution of the League of Nations in 1927, and two earlier League protocols that had never been formally ratified, all of which explicitly condemned wars of aggression as an “international crime.” It pronounced itself satisfied that “[t]he prohibition of aggressive war demanded by the conscience of the world” means that “resort to a war

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89 See IMT Judgment, supra note 63, at 460–61.
90 See id. at 463.
91 See id.
92 See id.
93 See id.
94 See IMT Judgment, supra note 63, at 464.
95 Id. at 464–65.
of aggression is not merely illegal, but is criminal.”96 “War is essentially an evil thing,” the Court said.97 It continued:

Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.98

With that point out of the way, the Tribunal had no difficulty rejecting defendants’ arguments that the law of war applied only to states, not to individuals. The Charter itself obviously foreclosed that argument, because it authorized the indictment and conviction of these very defendants, and the Court could hardly entertain an argument that it should overturn the Charter that had created it and had directed it to pass judgment on those defendants. It did point out that individual soldiers had long been tried and sentenced for mistreatment of prisoners and other war crimes—as if to suggest, perhaps, that the idea of subjecting individuals to international law was not a particularly new or startling idea.99

But of course it was. Soldiers, and before them, pirates, had indeed been put on trial for war crimes or piracy, though always by one-nation courts or military tribunals. The law applied to them was “international” law in the sense that all nations, more or less, adhered to it, but this was not a very important part of those proceedings. The defendants were on trial for individual acts of violence. Nuremberg was altogether new and different: the court was convened by four nations acting together (and supported by many others); the defendants were not soldiers; and the charges went far beyond war crimes, although they were included. The defendants were government officials, generals and admirals, a publisher, a banker, and diplomats; their crimes were state policies they had developed and implemented. The head of state would have been in the dock had he not killed himself. The Court was covering a lot of territory when, reflecting Robert Jackson’s rhetoric, it pronounced, “Crimes against international law are committed by men, not

96 Id. at 427.
97 Id.
98 Id.
by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

2. Elaboration on the Superior Orders Defense

Then, in one of its few truly inscrutable passages, the Tribunal summarily rejected the defendants’ argument that they were only carrying out Hitler’s orders. Article 8 of the Charter had specifically taken that defense off the table, but the Court went on to add:

> The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

“Moral choice” has an odd ring in this context. Neither the Charter nor the “law of most nations” takes “moral choice” as the test of whether a soldier may plead superior orders as a valid defense, and that would be a very difficult test to apply. When does a soldier not have a moral choice? The choice may put him in a perilous position indeed, if he elects to disobey the order, but nonetheless it is there. A soldier who is given a direct order to kill a prisoner of war, for example, or to lay mortar fire on a known hospital, is required to disobey it and if he does not he is guilty of a war crime, the order notwithstanding. It is easy to imagine circumstances in which disobedience of such an order is such an intimidating prospect for a young private in a war zone that a judge might be compassionate in handing down a sentence, but the order does not wash the crime away. If soldiers “do not cease on this account to be moral beings, responsible to one another and to God,” one might ask the Tribunal, when is moral choice not possible? The Tribunal did not elaborate on what it might have meant, and its pronouncement has been generally ignored in the subsequent development of the law of war.

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100 Id. at 466.
101 Id.
It is also worth noting the very careful wording of Article 8: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility” for his act.\(^\text{103}\) The existence of the order does not, in and of itself, exculpate the defendant. The accepted law of superior orders is actually a bit more subtle than that. It provides that superior orders is not a defense if the soldier knew or should have known that the order was illegal. One can imagine a situation where a soldier does not know an order is illegal, not because he is ignorant of the law but because he might be ignorant of the facts. If he is ordered to shell a church because it is being used as an enemy observation post, and if it should turn out that it is still being used only as a church, then he has committed an act that violates the laws of war—destroying a place of worship. Here, however, he can plead superior orders as a defense, because he did not know and could not have been expected to know, given the circumstances, that what he was doing was illegal. Thus, Article 8 provided that a superior’s order was not an automatic defense, which is certainly true, but it did not delve into the circumstances that might make it a defense, and the Tribunal added nothing of value by its enigmatic observation that “moral choice” was the true test of a superior-orders defense.

3. Setbacks in the Judgment

Returning to the charges of the indictment, the Court handed the prosecution two setbacks. First, it ruled that the indictment was invalid under the Charter insofar as it charged conspiracy to commit war crimes and conspiracy to commit crimes against humanity.\(^\text{104}\) It had always been the U.S. intention to make conspiracy a crime that incorporated the entire Nazi scheme—not only waging the war but committing war crimes and crimes against humanity. However, as the Charter was shuffled and reshuffled in the London negotiations, the critical language—“or participation in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”—was moved from the end of Article 6, where “foregoing” would have included all the crimes, to the paragraph defining crimes

\(^{103}\) IMT Charter, supra note 64, at 12 (art. 8).

\(^{104}\) See IMT Judgment, supra note 63, at 467–68.
against peace.\textsuperscript{105} Thus “foregoing” related only to that crime, not the others.

Second, the Court held that while a conspiracy to wage aggressive war “has been established beyond doubt,” that conspiracy did not begin in the early days of the Nazi party, as the prosecution had contended.\textsuperscript{106} To be a conspiracy, there must be a “concrete plan,” and there was no such plan for aggressive war until the mid-1930s.\textsuperscript{107} Consequently, the Court would look to what each defendant had done beginning at that time to determine his guilt. Those who had left the scene before then, as a few of the defendants had, would be acquitted on that charge.

4. Tribunal’s Findings on War Crimes

With the difficulties of aggressive war and conspiracy behind it, the Tribunal turned to the evidence of war crimes, and here it had no difficulty. War crimes had always been the least controversial of the four charges, because it was firmly rooted in the law of the nineteenth and twentieth centuries, and each of the four Allies was entirely familiar with what “violations of the laws or customs of war” comprised.\textsuperscript{108} Moreover, the evidence was overpowering. “The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. . . . [W]ar crimes were committed when and wherever . . . thought . . . to be advantageous. They were for the most part the result of cold and criminal calculation.”\textsuperscript{109}

5. Charges Against Nazi Organizations

The Court then turned to its penultimate task—the charges against the organizations. It was a nightmarish task just to determine how these organizations were defined, particularly those that went through repeated rounds of reorganization and consolidation with both state and party offices, and whose missions and responsibilities were constantly adjusted, officially and unofficially. Was someone who joined the \textit{Sicherheitsdienst} (SD) (the German intelligence service) in
1944 joining the same organization that had existed in 1939? Was a soldier in the Waffen SS—its military arm—a member of the same organization as a henchman in its domestic security operation?

But the Tribunal had a more serious concern. Mindful that under the Charter a declaration of an organization’s criminality would lead the way to summary convictions of its members, the Tribunal warned, “this is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.” More-
over, it was plainly troubled by the thought of assembly-line convictions by a host of U.S., British, French, and Soviet courts operating independently, under their own laws and subject to domestic political demands, and handing out penalties including death. It recommended that “so far as possible,” the Four Powers should agree on a standard set of “classifications, sanctions, and penalties” for use in the subsequent trials.

The Tribunal’s most significant pronouncement was that membership in a criminal organization alone would not be enough to convict an individual. In doing so, the Tribunal came very close to negating the Charter itself, but the judges finessed this point by reasoning that an organization, to be criminal, must be “a group bound together and organized for a common purpose,” a definition which would “exclude persons who had no knowledge of the criminal purposes or acts of the organization . . . .” Membership alone, therefore, could not support a conviction because some members might have had no knowledge of the organization’s criminal purposes. Whether the judges intended it or not, this ruling sounded the death knell for subsequent trials based on group membership. The prosecution would have had to prove each individual’s state of knowledge at the time he joined, and perhaps prove his intent and even his actual role in the organization as well. It would have been impossible to do that for the hundreds of thousands of SS and Nazi “Leadership Corps” members; even the Gestapo, with 15,000 or so members, presented a daunting prospect. The idea was abandoned and no one was tried by the U.S. for membership alone.

110 Id. at 499.
111 Id.
112 See IMT Charter, supra note 64, at 12 (art. 10).
113 IMT Judgment, supra note 63, at 500.
114 Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10, at 16–17 [hereinafter Taylor, Final Report]. The French followed suit and the British likewise limited their subsequent proceedings to charges of war crimes. Id. at 7–8. The Soviet Union’s record of
Dealing with each of the groups in turn, the Court held that the Leadership Corps of the Nazi Party was a criminal organization, but it exempted those who had left the leadership before the beginning of the war. It reached similar conclusions as to the Gestapo, the SD, and the SS—each one a criminal organization—as to those who knew its purposes and became or remained members after the war began. The tribunal found that the SA was a criminal organization within the meaning of the Charter, though it was virtually defunct after 1934. Both the Reich Cabinet and the General Staff and High Command (the highest-ranking military advisers to Hitler) were found not criminal, on grounds that they were not really “organizations” but a few score officials who could be tried one by one for their individual acts as the evidence might justify. Perhaps fearing that the “acquittal” of the General Staff and High Command as a criminal organization might be read as an exoneration of the German military leadership (whose defense at trial had been that everything was Hitler’s idea and they could do nothing to stop him), the judges had particularly harsh words:

[These officers] have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow-Nazis would have been academic and sterile. . . . When it suits their defense they say they had to obey; when confronted with Hitler’s brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know . . . .

The judges concluded their written opinion with a final section discussing the evidence as it pertained to each individual defendant, reaching its verdict on each charge against that particular defendant.
before moving on to the next. Of the nineteen convicted, twelve were hung and seven imprisoned on terms ranging from ten years to life.\textsuperscript{119}

### IV. Analysis

Was it a fair trial? The fact that nineteen of twenty-two were convicted does not by itself tell us anything on that score; one should never confuse the fairness of the trial with the strength of the prosecution’s case. Nor does the fact that not all defendants were truly “major” war criminals, or that many others of equal responsibility might have been, but were not, tried with them, shed light on the question of how these defendants, however chosen, were treated. As Telford Taylor stated:

In Germany the widespread responsibility for these crimes among the German leaders in the fields of government, arms, and industry posed problems not only of law but of judicial administration which were of truly staggering proportions. At the same time, the collapse and virtual disappearance of the German Government, the total and crushing defeat of Japan, and the intellectual and moral vacuum created in both those countries by years of tyranny followed by utter disaster, meant that the entire responsibility for stating the principles and shaping the policies in the field of war crimes was and had to be discharged by the victorious powers.\textsuperscript{120}

But, Jackson cautioned:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.\textsuperscript{121}

Did the Nuremberg process do that? While fairness is to some extent a subjective judgment, one may identify specific procedures that, in the United States and elsewhere since the eighteenth century, have been generally accepted as providing such protection to the defendant

\textsuperscript{119} See id. at 588–89.

\textsuperscript{120} Taylor, Final Report, supra note 114, at 103.

\textsuperscript{121} Jackson, Prosecutor’s Address, supra note 68, at 101.
that it might be said that any trial that includes them is a fair one. Such procedures would include:

- Notice to the defendants of the charges against them, and adequate opportunity before trial to prepare a defense to the charges.
- The assistance of counsel.
- The right to be present at the trial, and to have it conducted in one’s own language or with full translation.
- A presumption of innocence, and the burden of proving guilt on the prosecution, with the defendant to be acquitted if guilt is not clearly proven (“beyond a reasonable doubt” or some comparable standard).
- A verdict rendered by a neutral and objective judge or jury, based only on the evidence properly brought before the court.
- The right to confront witnesses for the prosecution, and to cross-examine them.
- The right to call witnesses or introduce other evidence on one’s own behalf.
- Trial open to the public and the press.
- The right not to be a witness against one’s self, but to testify on one’s own behalf if desired.
- The right to an appeal of the judgment.

Measured against these ten criteria, the IMT was plainly a “fair” one. The Charter safeguarded all of the protections save the right to appeal. The defendants were given notice of the charges through the indictment, thirty days before the trial began, and they had German counsel of their choosing, many of whom were high caliber. The prosecution had the burden of proof and the judges—with the likely exception of the two Soviet judges, whose system did not acknowledge an independent judiciary, and who dissented from all acquittals—were in every objective sense neutral, basing their decisions of guilt or innocence on the evidence and the law as defined by the Charter. The Tribunal allowed the defendants to testify or not as they chose, to call witnesses, and to introduce documentary evidence.¹²²

¹²² One noteworthy event in the trial illustrates the interplay of several of these protections. Admiral Doenitz was charged with war crimes for having conducted unrestricted submarine warfare, including disregard of the provisions of a 1936 treaty requiring submarines to give notice to merchant ships that they were about to be torpedoed and to ensure the safety of passengers, crew, and papers before letting loose the torpedoes. It was a poor law—submarines are not capable of taking on survivors—and an ill-considered charge. Otto Kranzbuehler, Doenitz’s very capable attorney, succeeded in obtaining an affidavit...
It is impossible to read the lengthy opinion of the judges and not conclude that they diligently and responsibly weighed the evidence against the law and reached careful decisions on each count. One can of course quarrel with some of the individual verdicts, but if the fairness of the trial is to be judged by the care and restraint in the judgment itself, the Tribunal comes out well. The judges rejected the prosecution’s assumption that conspiracy applied to all counts; it strongly curbed the case against the organizations; it acquitted a majority of the defendants on at least one count and set three of them free altogether. Although the Court condemned the Nazis’ deeds in the strongest language, the judgments themselves were measured and always anchored to the evidence.

For some, the cloud of suspicion lingering over the trial has not been dispelled because the crimes of which the defendants stood charged were to some extent reflected in the Allies’ own conduct—the internment of Japanese-Americans in the United States, the destruction of cities by Allied bombing raids, and the massacre of Polish officers by Soviets at Katyn Forest in Poland in 1942 (a charge which, incredibly, the Soviets pressed to have included in the indictment as having been done by Germans). While it is true that the Allies’ conduct was not, at all times and in every respect, above reproach, there was, literally, a world of difference between Germany’s aggressive conquests and devastating persecution and death, and the Allies’ response. The purpose of the trial, after all, was to judge the Nazis, not the Allies, and the Allies did not forfeit their moral authority because they had sometimes acted unwisely or excessively in responding to the Nazi threat. By that time, this was also the consensus of the world community: the General Assembly of the U.N., a few weeks after the IMT’s judgment, unanimously affirmed the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”

from Admiral Chester Nimitz, commander of U.S. naval forces in the Pacific, stating that U.S. submarines had engaged in unrestricted submarine warfare as well. Based on that affidavit, the Tribunal absolved Doenitz of the charge. Although perhaps atypical, it is one example of how the protections of due process were extended in fact, not just in theory. Taylor, supra note 61, at 399–409. As Taylor points out, the defense tactic had to do with the definition of “merchant ship,” and thus it was not, at least formally, an argument that Doenitz could not be convicted because the U.S. was guilty too. Nevertheless, it was close. “[I]t was as clear as clear could be,” wrote Taylor, “that if Doenitz and Raeder deserved to hang for sinking ships without warning, so did Nimitz.” Id. at 409. The Tribunal sentenced Doenitz to ten years, the lightest sentence of any defendant.

Conclusion

The trial at Nuremberg would not have taken place without the determination of the United States and its Allies to make it happen. It was conceived and shaped by months of internal debate in Washington and a long summer of negotiation in London that gave birth to the Charter, which produced the trial and gave the law to the judges. From that process, political in its conception and juridical in its execution, came a renovation of international law that has defined human rights, and even created human rights law. Individual responsibility for violations of human rights, international concern with a government’s treatment of its own citizens, and accountability through a judicial process that gives the defendants important rights and places the final decision in the hands of judges and not military commanders or even presidents, are all, now, fundamental principles of international law and politics. Nuremberg made them so.
BEYOND TRADITIONAL NOTIONS OF TRANSITIONAL JUSTICE: HOW TRIALS, TRUTH COMMISSIONS, AND OTHER TOOLS FOR ACCOUNTABILITY CAN AND SHOULD WORK TOGETHER

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Abstract: Civil conflicts marked by human rights violations leave devastated communities in their wake. The international community has an interest in assuring that justice is done, an interest which the recent establishment of the International Criminal Court (ICC) confirms. The authors argue the ICC should be augmented by additional mechanisms to bear the burden of doing justice and reconstructing communities after such civil conflicts. This Article explores the potential tensions among such mechanisms, including national human rights trials, truth commissions, and community-based gacaca, and emphasizes the importance of consulting victims in resolving these tensions. The authors conclude that the ICC should take the lead in coordinating the different mechanisms discussed in the Article as part of post-conflict reconstruction.

INTRODUCTION

In the aftermath of civil conflict marked by widespread human rights violations, international criminal tribunals alone cannot bear the full burden of doing justice and stitching polities back together. They must be augmented by other mechanisms. Yet it is far from clear how to do this without each mechanism undercutting the effectiveness of the others.

The last thirty years have witnessed a great proliferation of approaches to doing justice and restoring community after civil conflict. To the International Criminal Court (ICC) and the three international

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tribunals for the former Yugoslavia, Rwanda, and Sierra Leone can be added roughly eleven national trials, thirty-one variations on official truth commissions, plus at least eight other panels of inquiry.¹ The sheer variety reflects the application of cumulative experience, and yet as one observer has noted, “[n]o architect of these institutions has proceeded by deduction from general principles.”² Even where they have drawn on prior experience, each of these mechanisms has been crafted by the fine art of political compromise. Yet once in place, each variation has also attracted its partisans and critics, sparking sometimes constructive, sometimes invidious, comparisons about which mechanism serves best.

Perhaps because the original ambitions for international tribunals were so expansive, both the record of tribunals and the initial aspirations for them have become targets of disappointment and even cynicism. This is unfortunate and requires a swift and thoughtful response, because we have no grounds for supposing that the need for international vigor in protecting against human rights abuses has abated. Moreover, it would be lamentable if the inauguration of a permanent International Criminal Tribunal occurred simultaneously with the collapse of confidence in, and international support for, tribunals generally. Fortunately, even critics of tribunals generally share the same aspirations as the advocates:

Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for society as a whole. By holding individuals responsible for their misdeeds, crimi-


nal trials may also deter the commission of abuses in the future. Moreover, if conducted in strict accordance with legal due process, criminal prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.\(^3\)

These are all worthy aspirations, yet it is improbable that all can be achieved by any single way of doing justice. The criteria and pacing of meticulous criminal prosecutions will be very different from the social-psychological requirements for community catharsis and restoration of individual dignity, or the scholarly requirements for an objective and thorough historical record. Among those who care about the success of criminal tribunals, there seems growing acknowledgement that tribunals *should* be meshed with other mechanisms in order to serve all these aspirations—and wide agreement that this has not yet been achieved. The challenge here should not be underestimated. The aspirations and claims made for both tribunals and other mechanisms extend across several disciplines, including law, politics, ethics, and social and individual psychology. For this reason, finding commonly intelligible language, common measures of effect, and common agreement on how to balance conflicting purposes against each other will not be easy. Nor should we expect a single moment of agreement and resolution; this will inevitably be a continuing conversation and debate.

This conversation must start with candor about the principal shortcoming of past and current international tribunals: the faint voice they grant to the actual communities torn by conflict.\(^4\) For a tribunal to

\(^3\) Timothy Phillips & Mary Albon, *When Prosecution Is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, in *War Crimes: The Legacy of Nuremberg* 244, 244 (Belinda Cooper ed., 1999); see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 79, 88 (1998) (offering a summary of aspirations for truth commissions: “to overcome communal and official denial”; “to obtain the facts”; “to end and prevent violence”; “to forge the basis for a democratic order”; “to support the legitimacy and stability of the new regime”; “to promote reconciliation”; “to promote psychological healing”; “to restore dignity to victims”; “to punish, exclude, shame, and diminish offenders”; “to restore dignity to victims”; “to express and seek to achieve the aspiration that ‘never again’”; “to build an international order to try to prevent . . . aggression, torture, and atrocities”; “to accomplish each of these goals in ways that are compatible with the other goals”); see also id. at 79 (describing Bryan Hehir’s observations on the function of truth commissions); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. Int’l Crim. Just. 427, 428 (2004).

\(^4\) Neither tribunals nor truth and reconciliation committees (TRCs) have been especially effective in engaging local communities. See Hugh van der Merwe, *National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission*, in *Burying the Past: Making Peace and Doing Justice After Civil Conflict* 85, 102–04 (Nigel Biggar ed., 2001). Neither have they served well in providing psychological
serve a community scorched by atrocity, that community and its victims must be consulted on any plans for societal reconstruction and must be heard in meaningful ways. The importance of asking victims cannot be stressed enough. This consultation has been the great strength of alternatives to tribunals that have emerged in the past thirty years; if a tribunal is to be for the victims, it also needs, at least in part, to be by them. There has been some imaginative tinkering with tribunals in this direction. For a while, the International Criminal Tribunal for the Former Yugoslavia (ICTY) used Rule 61 of its Rules of Procedures and Evidence in a manner akin to a truth commission.5 In Rwanda, a community-based system of adjudication analogous to traditional gacaca has been appended to national tribunals to speed up the resolution of local disputes and foster community re-integration. The ICC has established a Victims and Witnesses Unit to provide “protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”6 Yet there are limits to what mere tinkering can accomplish; tinkering concedes the shortcomings without fully meeting them. As one critic notes, “[t]he tribunals cannot be ‘fixed’ to address what is missing; instead, additional avenues must be found.”7 What is needed is a comprehensive set of mechanisms, operating in complementary ways with tribunals.

Two points must be made at the outset. First, those who care about the success of tribunals cannot simply protest that some tasks, such as

support for victims and survivors. See Debra Kaminer et al., The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses, 178 Br. J. Psychiatry 373, 373–76 (2001). They have not, in our judgment, been shaped by any well-established theory of, or experience with, what has been termed “political healing.”

5 See Yael Tamir, Symposium Comments, in TRUTH COMMISSIONS, supra note 2, at 35; see also Rachel Kerr, The International Criminal Tribunal of the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy 100 (2004). Kerr notes that Richard Goldstone’s successor as prosecutor, Louise Arbour, abandoned this practice.

6 Rome Statute of the International Criminal Court art. 43(6), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. The Victims and Witnesses Unit helps witnesses obtain medical and psychological care, and its staff includes persons with expertise in trauma, including trauma related to crimes of sexual violence. The International Criminal Tribunal for Rwanda has a comparable unit to provide psychological care for victims/witnesses and to accompany witnesses when they testify before the court, ensuring that they are mentally as well as physically supported throughout the experience. The reach of these units, of course, extends only to the few who appear as witnesses. See Statute of International Criminal Tribunal for Rwanda art. 21, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

7 Julie Mertus, Only a War Crimes Tribunal, in WAR CRIMES, supra note 3, at 242.
individual or political “healing,” are not judicial responsibilities appropriate for a judicial institution. It would be cruel to suppose that communities devastated by civil conflict will always be able to handle the non-judicial tasks all on their own, and naïve to suppose that the international community will spontaneously step in to take up the burden. If these are important tasks in doing justice, then a proper international tribunal system should include multi-layered mechanisms able to achieve them. Second, the mechanisms for these tasks cannot simply be appended to tribunals in a thoughtless or casual fashion. There are fundamental tensions in missions and methods between tribunals and these other mechanisms that must be addressed. Unless they are integrated and coordinated in a careful way, each will wander off in response to its own organizational imperatives and enthusiasms. In the confusion and conflicts that result, tribunals will lose the cooperation and respect of states and publics that are vital to their success.

Consider, for instance, potential conflicts that arise from the complementary roles of international tribunals on the one hand, and national human rights trials, truth and reconciliation commissions (TRCs), and community-based gacaca systems on the other.\(^8\) We take each of these cases in turn.

I. International Tribunals and National Human Rights Trials

The value of having international tribunals work in coordination with national human rights trials is that both the national and the international communities can have a role in determining accountability and restoring the state. When a country has the capacity, national trials have several advantages over international trials in adjudicating human rights cases. International criminal tribunals are limited by their mandate and generally only have jurisdiction over the gravest crimes.\(^9\) As

\(^8\) We use the labels TRCs and gacaca in a generic sense here, not as specific references to the South African Truth and Reconciliation Commission or the Rwanda gacaca system. South Africa’s version of a truth and reconciliation commission is perhaps the best known, but it was not the first to use this label. Rwanda has adopted the traditional term gacaca for its community-based courts, but their structure is not distinctively Rwandan and could be adapted to other settings. See Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes Against Humanity in the Context of Armed Conflict and Failed Political Transition, in Burying the Past*, supra note 4, at 223–53.

such, they cannot try the vast number of cases left after the oppressors have been displaced from authority. National trials, however, are not so limited and can thus adjudicate many more cases.\textsuperscript{10} In situations where the number of cases is too numerous for any one court system, national and international tribunals can share the caseload to prevent undue delay.

Trials in the state where the atrocities occurred also help the state reestablish itself with its new and presumably more democratic government. Having the capacity to try perpetrators is evidence of a functioning judiciary and helps introduce the rule of law,\textsuperscript{11} and it may help prevent revenge killings.\textsuperscript{12} If the public views the trials as fair and just, the trials may also have the effect of increasing public confidence in the new government.\textsuperscript{13} Thus, national trials have the potential to show the citizens of the state, as well as the international community, that the government is able to function and embodies a new distribution of political power. The empowering nature of national trials for victims can be significant for political reconstruction:

Victims of mass human rights violations are usually the least powerful in their own countries, and their countries are themselves often among the least powerful globally. Their victimization is only part of a larger context of disempowerment. As a result, any remedy to the victim’s problems must, as much as possible, empower them by involving them in all aspects... In many countries the formerly oppressed would be punishing their former oppressors for the first time, through the medium of a justice system that was traditionally itself an instrument of oppression.\textsuperscript{14}

National trials offer the new government, its citizenry, and the wider international community benefits that international tribunals simply cannot, either because of their mandate or because of their location.

\textsuperscript{10} See Concannon, supra note 9, at 225.


\textsuperscript{12} Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 95 Am. J. Int’l L. 7, 23 (2001) (explaining that “[t]he detention and trial of tens of thousands of génocidaires before Rwandese courts may be viewed as an alternative to mass expulsions or widespread extrajudicial executions and private revenge killings”); see Landsman, supra note 11, at 83–84.

\textsuperscript{13} See Concannon, supra note 9, at 229.

\textsuperscript{14} Id. at 228–29.
National and international trials can and should complement each other. Indeed, the Rome Statute establishing the ICC anticipates that states will hold domestic trials concurrently with the ICC’s trials. Article 17 of the Rome Statute provides for complementarity, meaning that the ICC gives primacy to the nation-state for adjudicating cases and that an international tribunal will only interfere where national courts are unwilling or unable to prosecute cases. This doctrine of complementarity recognizes the sovereignty of states and their desire to hold domestic trials, but also provides for the possibility that some states may be “unwilling or unable” to do so and that in those instances the international community has a legitimate interest in seeing justice done. Complementarity serves the needs of the country rebuilding after atrocity by giving it the option to hold trials. It also serves the needs of the international community by allowing it to have a role in the adjudication of these heinous crimes. States and the ICC alike can even reap the benefits of concurrent trials, as has happened in Rwanda:

The initial distrust and tensions between the [International Criminal Tribunal for Rwanda (ICTR)] and Rwanda have been replaced by increasing cooperation and understanding. The ICTR Office of the Prosecutor has had greater contact with Rwandese magistrates in various communes and cooperated in investigations. More and more Rwandese officials—including lawyers from the court of appeals and the Supreme Court—have been attending ICTR proceedings in Arusha. The Rwandese government has appointed an official representative to the ICTR to expedite the investigative access needed for effective prosecutions. Thus, the symbiosis between international and national trials has become increasingly apparent.

As long as the nation-state and the international community work together, it is possible to have concurrent trials that aid in the restoration of the rule of law in a country reeling from mass violence.

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15 See Rome Statute, supra note 6, art. 17.
16 See id. However, “[u]njustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC.” ICC Criminal Court, Jurisdiction, http://www.icc-cpi.int/about/ataglance/jurisdiction.html (last visited Nov. 13, 2006).
17 See Rome Statute, supra note 6, art. 17.
18 Akhavan, supra note 12, at 26.
19 It is worth noting that attorney Brian Concannon Jr., who has been working in Haiti for over ten years, proposes that the ICC employ attorneys and judges from countries who
Despite their complementary potential, international tribunals and national trials can undermine each other, unless they act in coordination. Even if it is a party to the Rome Statute, for instance, any government that wishes to impede the effectiveness of the ICC has ample latitude to do so within the treaty’s terms. However, the worrisome case is not where a government acts in bad faith with the deliberate intent of using national trials to thwart an international tribunal, but where its own well-intentioned, but independent, action has the same effect. A state may make a political judgment that prosecutions for human rights abuses committed during a recently ended conflict might reignite the conflict or impede “national healing,” so it may grant wide amnesty to perpetrators. Such amnesties may not technically prevent an international tribunal from its own prosecutions, yet they may shift political sentiment within the state in a way that makes witnesses less willing to cooperate and the government less willing to pursue or surrender defendants. A state may judge that it

are soon to be in need of the ICC’s assistance. His idea is that these attorneys and judges would then be able to go back to their countries and assist in national trials. See Concannon, supra note 9, at 230.

20 Notwithstanding its general obligations to cooperate found in Part 9 of the Treaty, a State Party to the Rome Statute that wishes to forestall or entangle action by the ICC can do at least the following: seek a Security Council resolution that defers an investigation or prosecution (Article 16); pre-empt ICC action by undertaking an investigation or prosecution of its own (Article 17.1.a and Article 18.2); undertake an investigation of its own and reach a decision not to prosecute (Article 17.1.b); challenge the jurisdiction of the ICC or the admissibility of the specific case (Article 19.2.b and c); generally drag its feet with respect to required cooperation under the Statute, e.g., in providing information about the status of its own investigation or prosecution (Article 18.5), in arresting and/or surrendering persons sought by the ICC (Articles 19, 59, and 89), in aiding in the preservation and submission of evidence (Article 18.6 and Article 69.3), or in withholding information on grounds of national security concerns (Article 72). Rome Statute, supra note 6.

21 See Minow, supra note 3, at 127:

Leading participants in the South African Truth and Reconciliation Commission differ over the relationship between its work and prosecutions. Justice Minister Dullah Omar, who helped design the TRC, emphasizes that its work is not inconsistent with domestically conducted criminal prosecutions and instead can build the factual bases for them. Archbishop Desmond Tutu, who heads the commission, in contrast writes that “the purpose of finding out the truth is not in order for people to be prosecuted. It is so that we can use the truth as part of the process of healing our nation.”


22 The drafters of the Rome Statute were unable to reach consensus regarding the treatment of national amnesties, so the Statute lacks any specific reference to them. Of the treaty negotiations, Darryl Robinson says that:
must move swiftly with national trials to convict and exclude human rights abusers from political office or authority and to consolidate a shift in political power.\textsuperscript{23} To achieve this objective, it may settle for lesser charges and more lenient sentences in order to clear cases as quickly as possible, with the paradoxical effect of tying its own hands politically when an international tribunal later seeks to press more serious charges.

The greatest potential for friction between international tribunals and national trials, however, may stem simply from the weakness of national judiciaries following civil conflict. In order for national trials to be effective, there must be a functioning and independent judiciary. Such independence is not always possible, especially in situations where the incoming government does not purge the former judiciary of unskilled, biased, or corrupt judges and lawyers.\textsuperscript{24} Where there has been

\begin{quote}
First of all, agreement would likely have been impossible, given the sharply clashing views on the matter. Second, even if there were agreement in principle, it would have been unwise to attempt to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures and to lock such a test into the Statute. Thus, the drafters turned to the faithful and familiar friend of diplomats, \textit{ambiguity}, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.
\end{quote}


\textsuperscript{23} Roland Paris argues that both national and international actors have an interest in resurrecting national court systems promptly after civil conflict, as a way of regulating who may compete for public office:

Although international peace-building agencies have assisted in the drafting and oversight of electoral laws in war-shattered states, they have generally been reluctant to become directly involved in regulating the activities of political parties. In only one mission—Bosnia—did international officials prohibit certain individuals from contesting public office: namely, individuals indicted for war crimes. . . . Holding elections soon after the termination of hostilities is still treated as a top priority that trumps virtually all others, including the question of whether peace can survive the pressures of electoral mobilization, given the character of the political parties that are likely to contest the election. If local parties preach intolerance and hatred toward their rivals, or display little commitment to sustaining democracy once in power, there is little to be gained by proceeding with elections. Instead, peace-builders should use the period leading up to elections to promote moderation within existing parties, to foster the growth of new democratic and moderate parties, and if necessary, prevent the most intolerant individuals and parties from running for public office.


\textsuperscript{24} See Landsman, \textit{supra} note 11, at 84–85.
wholesale regime change, the new government must have established laws to prosecute cases, which implies a functioning parliament. It also must have the necessary human resources: judges, prosecutors, police investigators, and defense counsel. Security concerns in a post-conflict state can also impede national trials. Unless judges, lawyers, and victims can be protected from retaliation, they are not likely to participate in trials where their former oppressors are the defendants, especially if the defendants still wield some power.\textsuperscript{25} Rwanda demonstrates both the challenges and the possibilities. Rwanda was party to the 1948 Genocide Convention prior to 1994, but it had not incorporated the Convention into domestic law and thus had no law against genocide. The ranks of attorneys were depleted by those who had been killed, had fled, were implicated in the genocide, or had lost family and property and were unwilling to defend perpetrators.\textsuperscript{26} Despite these setbacks, Rwanda enacted laws covering the genocide, made imaginative use of national and international resources to form a cadre of attorneys, and now stands as an example of how concurrent national and international trials can be conducted.

Nonetheless, there is substantial risk. If a government proceeds with trials even though the national court system is neither stable, independent, nor secure, the trials may end up backfiring, undercutting the ability of the government to cooperate with subsequent international tribunal prosecutions. Greater collaboration from the outset between international tribunals and national authorities would diminish these risks; widespread and continuing consultation with the population will be indispensable in giving legitimacy to this collaboration.\textsuperscript{27}

\section*{II. International Tribunals and Truth Commissions}

The value of having international tribunals work in coordination with truth commissions lies in the latitude available to TRCs for sketching a larger picture of the extent of atrocity and responsibility than might be feasible with the more focused indictments and prosecutions of tribunals or national trials. This latitude in turn may help clarify the

\begin{footnotesize}
\begin{enumerate}
\item See Vandeginste, \textit{supra} note 8, at 23–34; see also Widner, \textit{supra} note 25, at 65, 69.
\item The Nuremberg prosecutions after WWII were not especially effective in earning legitimacy from the German population, not even among those who felt betrayed by their own leaders, apparently because the Allies failed to grasp how the public perceived their efforts. See Jörg Friedrich, \textit{Nuremberg and the Germans, in War Crimes}, \textit{supra} note 3, at 87–106.
\end{enumerate}
\end{footnotesize}
historical record, counteract communal and official denials, and per-
haps grant to victims the dignity of formal acknowledgment of their 
suffering, even if they personally do not appear as witnesses.28 More-
over, precisely because TRCs are not judicial bodies with complex rules 
of procedure and evidence, they may be able to set about their work 
more swiftly than tribunals, with greater participation of the commu-
nity in setting the focus of inquiry, and with fewer resources. This may 
be true even where TRCs are given a quasi-judicial power to grant am-
nesty in exchange for testimony. TRCs may also aid political reconstruc-
tion by signaling and adding momentum to a shift in political power 
away from perpetrators and toward victims and human rights defend-
ers.29 To the extent that TRCs are seen by the community as connected 
to tribunals, they can lend legitimacy to, and encourage cooperation 
with, the tribunals’ actions.

On the other hand, in the absence of coordination, the fact that 
TRCs can move more swiftly can complicate or undermine the effec-
tiveness of international tribunals. Whether responding to a legislative 
mandate, community expectations, or its own organizational dynamic 
in shaping its inquiries, a TRC will generate a version of “truth” and of 
appropriate “justice” to which any subsequent tribunal will be com-
pelled to respond if it values its own legitimacy, even though the TRC 
may have radically departed from judicial rules and procedures that a 
tribunal must follow. Victims who pour out their souls before a TRC 
have expectations that punishments will follow and therefore will ex-

28 We are skeptical that TRCs in fact do much, in themselves, to bring about commu-
nal reconciliation, and even more skeptical that they promote psychological healing for 
individuals or communities. As Hayner notes, “The Trauma Centre for Victims of Violence 
and Torture in Cape Town has estimated, judging from the hundreds of victims they’ve 
worked with, that 50 to 60 percent of those who gave testimony to the commission suffered 
difficulties after testifying, or expressed regret for having taken part . . . .” HAYNER, supra 
note 1, at 144. Nonetheless, properly employed, TRCs can be a valuable tool in the transi-
tional justice process.

29 Elizabeth Kiss commented on the Chilean National Commission on Truth and Rec-
conciliation:

I also want to address the question of how political the process of truth-telling 
really is. . . . The first level involves the commission’s official imprimatur. It is 
not just that someone is interested in listening to the experience, but that the 
listener has official status. Chileans who came to tell their story to the truth 
commission were moved by the Chilean flag that was prominently displayed 
on the table.

Elizabeth Kiss, Symposium Comments, in TRUTH COMMISSIONS, supra note 2, at 25.
pect a tribunal to take note of their agonies.\(^{30}\) If a TRC offers amnesty to perpetrators in exchange for testimony, or alerts perpetrators to their vulnerability and sends them into hiding, it can impede the tribunal’s subsequent ability to gain their custody as defendants or their cooperation as material witnesses.\(^{31}\) If the TRC performs its tasks badly—due to political constraints, insufficient resources, or errors in judgment—it can generate disillusionment among victims and survivors and increase their sense of vulnerability, undercutting the tribunal’s ability to gain their cooperation as well.\(^{32}\)

Unless closely coordinated with other institutions, TRCs may be subject to their own organizational dynamics in ways that send them off on unanticipated paths. The South African TRC, for instance, was conceived by some as a complement to national and international prosecutions for deeds committed (on either side) during the apartheid era. Indeed, if there had been no possibility of such prosecutions, then the TRC’s offer of amnesty in exchange for testimony might not have had much appeal to perpetrators. Along the way, however:

The commission’s objectives shifted as different actors and constituencies became involved in the process. Although amnesty to the perpetrators was initially the central objective, at later stages, the victims became the focal point. As religious leaders and churches became increasingly involved in the commission’s work, the influence of religious style and symbolism supplanted political and human rights concerns.\(^{33}\)


\(^{31}\) When Louise Arbour replaced Richard Goldstone as Chief Prosecutor with the ICTY, she dropped Goldstone’s use of public hearings under Rule 61 in a fashion analogous to TRCs and shifted to secret indictments instead, on the reasoning that open hearings complicated the task of arresting suspects. See Kerr, supra note 5, at 100, 159, 183.

\(^{32}\) See van der Merwe, supra note 4, at 86.

\(^{33}\) Andre du Toit, Symposium Comments, *in Truth Commissions*, supra note 2, at 20. du Toit also notes:

Archbishop Tutu, as well as many other commission members, interprets the truth commission’s role in terms of justice, truth, and reconciliation. When I participated in the earlier preparations for the commission, we discussed reconciliation in a more political sense. A religious terminology has become more prevalent. Reconciliation now means something akin to forgiveness. While criminal prosecution is clearly an alternative to political reconciliation, it is not so clearly related to spiritual forgiveness. The religious framework has resulted in a shifting of the alternatives. Some observers have commented that this new framework is useful. People must be able to open their wounds,
In turn, as the TRC redefined its objectives, it moved increasingly away from judicial methods:

Criminal prosecutions involve an adversarial system. Consider, for example, whether cross-examination of witnesses, including victims, is appropriate in the context of a truth commission. Trials focus on the perpetrators, whereas truth commissions may choose to focus on victims. Perhaps we assume in trials that the focus on the perpetrator is compatible with the victim’s interests. We assume, then, that the victim desires punishment of the perpetrator. If that means the victim must be cross-examined, he is willing to accept it. I do not believe all victims think this way. Many are more interested in the restoration of their human and civic dignity. This may be difficult to attain in the adversarial context of trials.\textsuperscript{34}

Such changes in motive and method may serve worthy purposes, yet they clearly put TRCs in tension with the judicial and adversarial method of establishing truth and dispensing justice.

III. INTERNATIONAL TRIBUNALS AND COMMUNITY-BASED GACACA

The value of having international tribunals work in coordination with community-based adjudication systems lies in the direct contact that gacaca can establish with the local communities that must ultimately grant legitimacy and stability to national and international tribunals—an intimacy of contact that even truth commissions cannot provide.\textsuperscript{35} Trials are an important tool in doing justice and restoring

\begin{flushright}
\textit{yet accept the fact that this will not result in punishment of the perpetrators. The religious theme of forgiveness helps people make sense of this situation.}
\end{flushright}

\textsuperscript{34} du Toit, \textit{supra} note 33, at 36.

\textsuperscript{35} van der Merwe notes:

\begin{flushleft}
The [South African Truth and Reconciliation] Commission’s consultations with local communities in preparation for the hearing were usually very limited. It often only consulted significantly with the local town council, who in turn were expected to communicate with other parties. Stakeholders not represented in this formal structure often felt left out. This was particularly the case with groups explicitly representing victims’ concerns. . . . In many communities, the hearings were often only one day in length, covering only ten or eleven cases of victimization. Less than ten percent of the victims who made statements [to the TRC staff] had the opportunity to testify in public. Many more victims wanted the opportunity to tell their stories, and felt angered that the TRC seemingly did not see their experiences as sufficiently sig-
political community, yet the “assumption that holding individuals accountable for atrocities alleviates despair, provides closure, assists in creating and strengthening democratic institutions, and promotes community rebuilding overstates the results that trials can achieve.”

Tribunals are too remote from the people to accomplish all that has been expected of them.

At the most basic level, international tribunals are geographically remote. The ICC and the ICTY sit in The Hague. The seat of the ICTR is in Arusha, Tanzania, and even television broadcasts of the trials in Rwanda cannot bring them close to the vast majority of Rwandans who lack access to televisions. Tribunals are also procedurally remote from all but the smallest fraction of victims and survivors. In a trial system, the focus is on the offenders—determining their guilt or innocence—while the victims are essentially treated as tools in the prosecutors’ case, confined in their testimony to only those fragments of their experience that meet the legal standard of relevant evidence. Tribunals may also be culturally remote, designed and conducted in the main from a European perspective. As one critic notes:

[W]e occasionally come dangerously close to determining from a long distance what societies torn by violence actually require, and we do not stop to consider the views of the people who have to live with the legacy of the abuse and also with the consequences of a policy to deal with that legacy.

Finally, tribunals are remote from the daily life of communities where victims and perpetrators confront each other. Where the violence of civil conflict was widespread, eventually partisans from both sides are going to return to communities and often will have to live alongside the

van der Merwe, supra note 4, at 93–94.


people they once considered enemies. Even where a human rights abuser has been punished by the court, this does not assure that in the eyes of the community, justice has been done and all debts paid.\footnote{It is important to note that re-integration does not necessarily mean forgiveness. Often, the most one can hope for is that those on opposites cease to hate one another. BBC journalist Robert Walker observed this in a Rwandan gacaca session:} Other mechanisms for accountability at the community level must supplement trials.

_Gacaca_, the community adjudication system in Rwanda, is part court, part truth commission, and part community council. The hope was that _gacaca_ would help resolve the massive number of grievances of neighbor against neighbor, restore communities, reintegrate perpetrators who had served their time back into their villages, and provide victims with a sense of justice.\footnote{One estimate is that at the end of the genocide, over 130,000 people were in prison for allegedly committing acts of genocide. See Alana Erin Tiemessen, _After Arusha: Gacaca Justice in Post-Conflict Rwanda_, 8 AFRI. STUD. Q. 57, 57 (2004). Another estimate puts the number at around 122,000. See Vandeginste, supra note 8, at 234. By either count, at the rate the national courts were resolving cases, it would have taken over two hundred years to try all those being held. See id.} In the process, they can also signal at the community level that a shift in political power has put an end to the rule of human-rights abusers.

_Gacaca_ is a local tradition in Rwanda that has historically been used to resolve local community conflicts.\footnote{Mark A. Drumbl, _Law and Atrocity: Settling Accounts in Rwanda_, 31 OHIO N. U. L. REV. 41, 55 (2005) [hereinafter Drumbl, _Law and Atrocity_].} In the typical _gacaca_ setting, members of the community come together and resolve conflicts in a participatory way: “members of local communities settle interpersonal differences through the election of sages and leaders who endeavor to
bring the disputants together in the pursuit of communal justice.”

In these public hearings, wrongdoers may receive sentences other than jail time: community service, public shaming, obligations to make reparations or apologies, or other alternative forms of punishment.

The gacaca system fashioned by the Rwandan government in October 2000 is a mutated version of the traditional gacaca, and as such, it could be broadly adopted elsewhere. Crimes connected with the genocide were divided into categories of severity. Several levels of gacaca courts were established, and each successive level handles crimes of higher severity as well as hearing appeals from the judgments of lower gacaca. The gacaca were given jurisdiction over crimes committed between October 1, 1990 and December 31, 1994, and only over intentional and unintentional homicides, property crimes, and assaults. They do not, however, have jurisdiction over crimes relating to inciting or organizing the genocide, nor do they have jurisdiction over crimes of sexual violence. Gacaca judges apply the same law as the national

43 See id.
44 See id. at 1264–65.
45 See Vandeginste, supra note 8, at 234; see also Drumbl, Law and Atrocity, supra note 41, at 58–59 (discussing how gacaca now also have such powers as the ability to summon witnesses and issue search warrants).
46 See Tiemessen, supra note 40, at 61. This jurisdiction period is, however, longer than that of the ICTR, which is January 1, 1994 through December 31, 1994. See ICTR Statute, supra note 6, art. 7. The temporal jurisdiction of the gacaca has been criticized for having the effect of focusing on the crimes of the Hutu and ignoring the long prior history of human rights abuses by the Tutsi as well. See Sarah L. Wells, Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda, 14 S. Cal. Rev. L. & Women’s Stud. 167, 179 (2004).
47 The International Criminal Tribunal for Rwanda and the national courts deal with the most serious crimes, with the ICTR having primacy. Although the maximum penalty at the ICTR is life in prison, the national courts can impose the death penalty. This difference resulted in the leaders of the genocide tried at the ICTR being able to escape the death penalty, while lower-level offenders tried in Rwandan courts were sentenced to death. See Madeline Morris, Justice in the Wake of Genocide: Rwanda, in War Crimes, supra note 3, at 213–14. A survey done in 1996, before the gacaca system was established, found that Rwandans wanted the state and not the gacaca to deal with the genocide. Respondents also stated that when perpetrators were found guilty, they (or a member of their family) should be killed, thus “enable[ing] forgetting and forgiveness and lead[ing] to a reconciliation of the families involved.” Vandeginste, supra note 8, at 239.
courts, but they can hand down remedies aimed at restoring community, such as reparations or community service.\textsuperscript{49}

The \textit{gacaca} system does have shortcomings. Reliance on community courts can be problematic if the sense of “community” has been destroyed by civil conflict.\textsuperscript{50} In Rwanda, for instance, post-genocide reconstruction has involved setting up new villages, often peopled by some of the 3.2 million refugees who returned to Rwanda between 1993 and 2002.\textsuperscript{51} Some of these refugees had been living outside Rwanda for fifty years or more and had doubtful ties to the country, let alone to a community.\textsuperscript{52} Rwanda also demonstrates that the collapse of civil order and effective police forces may make it difficult to protect \textit{gacaca} participants from intimidation.\textsuperscript{53} The fact that the vast majority of \textit{gacaca} have yet to initiate proceedings raises questions about whether this extension of the state court system down to the local level has been accepted as legitimate by communities.\textsuperscript{54} Finally, the use of these informal courts brings up issues of fairness and due process. Defendants at \textit{gacaca} are not represented by legal counsel,\textsuperscript{55} and they have limited rights to appeal.\textsuperscript{56} \textit{Gacaca} judges receive little training, which has given rise to challenges of bias.\textsuperscript{57} Furthermore, the judges’ ability to reduce sentences in favor of community service may have the effect of encouraging false confessions, especially for

\textsuperscript{49} The community service might include building schools, roads, and community buildings, first aid or educational initiatives, or cultivating crops. See Maya Goldstein-Bolocan, \textit{Rwandan Gacaca: An Experiment in Transitional Justice}, 2004 J. Disp. Resol. 355, 394–95; see also Drumbl, \textit{Law and Atrocity}, supra note 41, at 56; Drumbl, \textit{Punishment, Post-genocide}, supra note 42, at 1265.

\textsuperscript{50} See Wells, supra note 46, at 177–78.


\textsuperscript{52} See Daly, supra note 48, at 380.

\textsuperscript{53} In March 2004, for example, fourteen people were sentenced to death for killing survivors of the genocide who were expected to testify in the \textit{gacaca}. See Goldstein-Bolocan, supra note 49, at 392.

\textsuperscript{54} As of December 2004, only 750 of over 10,000 \textit{gacaca} were actively involved in trials. See Wells, supra note 46, at 174. Nonetheless, by the end of 2005, 1,521 trials had been completed by \textit{gacaca}. Fawzia Sheikh, \textit{Trial and Error: Community Courts}, New Internationalist, Dec. 2005, No. 385, at 17.

\textsuperscript{55} See Daly, supra note 48, at 382.

\textsuperscript{56} See Drumbl, \textit{Law and Atrocity}, supra note 41, at 58.

\textsuperscript{57} See Goldstein-Bolocan, supra note 49, at 386.
those alleged perpetrators who have already been in prison for years.58

Although the gacaca courts have met with mixed success, they can provide a useful complement to national or international courts, truth commissions, and other mechanisms of justice. Moreover, at least in the configuration adopted in Rwanda, the gacaca system poses rather minor complications for the operation of international tribunals. In principle, gacaca might complicate the work of tribunals in the same ways that national trials and TRCs can—by shaping public perceptions of truth, making witnesses or defendants less willing to cooperate, etc. In practice, gacaca handle low-level crimes and disputes that may be vital to political reconstruction at the community level and yet are of little bearing on tribunal prosecutions. The greater risk is that a poorly-managed and poorly-staffed gacaca system will erode community confidence in judicial action generally—whether national or international—as the proper way to do justice after civil conflict. For this reason, international tribunals have an interest in seeing that gacaca mechanisms are wisely constructed and adequately supported.

Conclusion

Civil conflicts marked by mass human rights violations leave devastated societies in their wake. Increasingly these conflicts involve genocide, mutilation, rape, abduction and coerced conscription of children, destruction of villages, forced migration, and other horrors. The international community has an interest and a stake in assuring that justice is done, in the broadest sense, in the resolution of these conflicts. The recent establishment of the ICC affirms this, and arguably, the ICC now stands at the pinnacle of international obligations to see that justice is served. It is therefore reasonable that the ICC should take the lead in coordinating the array of mechanisms needed in any post-conflict reconstruction. Such coordination would yield greater effect than if each entity just fumbles along on its own. Coordination certainly would help the ICC mitigate the clashes of method and purpose that have been discussed in this paper.

We can anticipate an objection that if the ICC (or any other international tribunal) were to take on this coordinating task, it may mean delaying its own proceedings while it gets all the other mechanisms ar-

58 See Daly, supra note 48, at 382. Some 30,000 prisoners in Rwanda “have confessed to participating in the genocide with a view to facing gacaca proceedings instead of the national court system.” Drumbl, Law and Atrocity, supra note 41, at 54.
rayed in proper sequence. On this point, we are persuaded by the argument of Louise Arbour, former Chief Prosecutor with the ICTY: Human rights trials are an important contribution to peace and reconciliation.

[T]hey should be conducted solemnly and with gravitas. There is an international interest, as well as the interest of the victims, which should be set above the rights of accused to a speedy trial . . . in assessing where the correct balance lies between the rights of the accused and the international interest, the Tribunal should err on the side of the international interest, which is concomitant with the interest of the victims . . . .

Justice demands no less.

59 Kerr, supra note 5, at 98 (quoting from an interview with Arbour).
RIDING THE RHINO: ATTEMPTING TO DEVELOP USABLE LEGAL STANDARDS FOR COMBAT ACTIVITIES

WILLIAM J. FENRICK*

Abstract: The body of law regulating combat activities is, essentially, a body of preventive law which should be applied in military training, planning, and operations to minimize net human suffering and net destruction of civilian objects in armed conflict. Prosecution for violations of such law is uncommon. Such prosecutions have, however, been conducted before the International Criminal Tribunal for the former Yugoslavia (ICTY). This Article reviews the relevant jurisprudence of the ICTY and asserts that effective prosecution for combat offences, such as unlawful attacks, can be conducted before non-specialist tribunals and that these prosecutions can both strengthen the law and elaborate upon its substantive provisions.

Introduction

When new civilian staff members arrive in Baghdad, they land at the airport and then travel to the well-protected Green Zone in a heavily armored bus, which is in convoy with helicopter gunships flying overhead and armored vehicles as ground escorts. The bus is known colloquially as the Rhino. Riding the Rhino gives the passengers an acute sense of the dangers of the combat environment and of both the fragility and the importance of the body of law that purports to govern combat. Regrettably, but inevitably, combat is about killing people and breaking things.

The body of law regulating combat activities is International Humanitarian Law (IHL). The fundamental objective of IHL is to reduce net human suffering and net destruction of civilian objects in armed conflict. It is, essentially, a body of preventive law that, to be effective, must be incorporated into the training and doctrine of armed forces

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before armed conflict occurs, and then applied by armed forces, and others engaged in the conduct of armed conflict, once a conflict occurs. Generally speaking, its practitioners are lawyers affiliated with the Red Cross or lawyers advising armed forces. IHL practitioners practice preventive law, the avoidance of violations, not litigation. IHL is a field of public international law and its sources are the accepted sources of public international law, primarily treaties and custom. The treaties have been developed in international negotiating forums by delegations from foreign ministries and defense departments. The treaties have been applied, and customary law has been developed by states, primarily foreign ministries and defense departments. Traditionally, IHL expertise has reposed in a relatively small group of lawyers in government or in the academic community.

More recently, lawyers from human rights-oriented nongovernmental organizations (NGOs), such as Human Rights Watch and Amnesty International, have had an increasing impact on the development of IHL treaties, such as the Ottawa Convention on Anti-Personnel Land Mines. In addition, NGOs have become much more vigorous critics of ongoing military combat activity.1 Somewhat similarly, developments in international criminal law, specifically the establishment of ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and their consequential jurisprudence have had an impact on the content of IHL. The International Criminal Court (ICC) is expected to have a similar impact in future.

IHL can no longer be regarded as the exclusive professional preserve of a relatively small group of law professors or of a slightly larger group of practitioners engaged in the practice of preventive law. It is entering the legal mainstream and, as a result, one can expect IHL issues to be addressed by non-traditional groups and, on occasion, by legal generalists. Although the benefits of ignorance as a spur to creativity or outside the box thinking can easily be exaggerated, this is not necessarily an entirely negative development. IHL must be, or become, healthy enough to withstand an assault by legal generalists. At the same time, one must ensure that the tail does not wag the dog and that due regard continues to be paid to the primarily preventive role of IHL. In

particular, one must not develop perfect standards in the courtroom or in academic literature which are simply impossible for the soldiers to obey while still surviving.

The principle of distinction is the fundamental principle of IHL. Essentially, military forces are obligated to distinguish between military objectives, such as combatants and civilians taking a direct part in hostilities, on the one hand, and civilian objects and civilians not taking a direct part in hostilities on the other hand. If this principle is not accepted, there is no body of law regulating combat activities. The application of this principle implicitly contains a prohibition of (1) attacks directed against civilians or civilian objects; (2) indiscriminate attacks that fail to distinguish between those people and objects who may be attacked and those who may not be attacked; and (3) attacks directed against legitimate targets that are expected to inflict disproportionate death, injury, or damage to people or objects who should not be attacked. As an unavoidable statement of fact, there is such a thing as lawful collateral injury that may be inflicted during the course of a lawful attack. Prior to the establishment of the ICTY, there was no significant body of case law purporting to address combat activities, particularly the unlawful attack issue, or the related issues of what constitutes a military objective: when is a civilian taking a direct part in hostilities, how does one measure (dis)proportionality, and when is an attack indiscriminate? The purpose of this Article is to address how the tribunals, particularly the ICTY, have addressed the application of the principle of distinction, and whether they may be expected to contribute to the development of common standards which legal advisers (involved in advising military commanders) and those who may be perceived by the military community as officious bystanders (such as lawyers and judges involved in administering justice in related cases and NGOs engaged in critiquing military conduct) may use.

Assuming a judicial hierarchy and an elaborated rule of precedent is necessary for the existence of a body of common law, it is unlikely there will be a common law for the various international or mixed tribunals addressing IHL issues. Tribunal jurisprudence, however, may contribute to a common discourse, which may become customary law if decisions are well reasoned and deal with common problems. This contribution may, of course, be attenuated if the vari-

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2 See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 80–171 (July 15, 1999) (ICTY Appeals Chamber discussing and discarding the approach taken by the International Court of Justice in the Nicaragua case in determining whether or not a conflict should be regarded as international).
ous tribunals are rooted in statutes or treaties which use different words to address similar problems.

The common discourse concerning the principle of distinction involves a variety of participants in a variety of forums, not all of which are essentially “legal,” including both military/legal training, planning and operations forums, and officious bystanders/external reviewers such as those involved in the judicial process or NGOs. There is a high risk of a two-track approach to the development of this body of law because military participants in the discourse are, perhaps excessively, security conscious. We may see one version of the law developed by military participants, with an in-depth understanding of relevant facts and relevant technology (i.e., hothouse law) and another version developed by external reviewers denied access to such information. The two-track approach can result in distortions on each track. The military participants may develop a version that is too pro-military and does not benefit from informed external criticism, while the external reviewers may develop a version that is simply unrealistic. There will always be a degree of tension between military participants, who wish to preserve the maximum degree of discretion for their clients, and external reviewers, with the desire to develop the law in a progressive direction. Increased interaction between the groups is desirable, however, to improve the quality of analysis and perhaps encourage the emergence of an informed progressive view.

This Article will first provide an overview of ICTY unlawful attack decisions as they involve the application of the principle of distinction. It will then address the concept of military objectives, the concept of proportionality, the legal basis for unlawful attack charges, and the elements of unlawful attack charges. This Article will then address two issues specifically related to criminal prosecution: the relationship between unlawful attack charges and other charges, and how to establish a broad picture from a limited number of instances.

I. OVERVIEW OF ICTY UNLAWFUL ATTACK DECISIONS

There is a dearth of war crimes cases focusing on unlawful attacks, perhaps because such cases have been regarded as simply too difficult to prosecute.3 Recently, the Office of the Prosecutor (OTP) of the

3 In the only marginally relevant World War II war crimes decision, it was considered lawful to direct fire at civilians attempting to flee a besieged area in order to keep them within the besieged area where they might drain the resources available to the besieged
ICTY has conducted such prosecutions. Unlawful attack charges have been or are being considered by the ICTY in four cases to date.

In *Prosecutor v. Tihomir Blaskic* and in *Prosecutor v. Dario Kordic and Mario Cerkez*, the accused were Bosnian-Croat leaders and the cases revolved around several incidents in the Lasva River Valley in Bosnia, in particular the Ahmici massacre in which many of the inhabitants of a small Bosnian Muslim village were killed when it was overrun by Bosnian-Croat forces. *Blaskic* was the first case before the ICTY to address unlawful attack charges. At trial, Blaskic was found guilty of the crime against humanity of persecution and of the war crime of unlawful attacks on civilians, among other charges, and sentenced to forty-five years’ imprisonment.

The *Blaskic* Trial Chamber decision contained very little legal analysis and what there was focused primarily on the crime against humanity of persecution. A substantial amount of new evidence was considered in the *Blaskic* Appeal Decision and the findings were reversed on several counts and the accused’s sentence reduced to nine years’ imprisonment, the time he had served at the date of judgment. Both Kordic and Cerkez were convicted at trial of a number of counts related to persecutions, unlawful attacks, and other crimes and sentenced to twenty-five years’ imprisonment and fifteen years’ imprisonment respectively, although Cerkez was acquitted with respect to...
to the charges related to the Ahmici massacre.\textsuperscript{10} As with Blaskic, the Kordic and Cerkez Trial Chamber decision contained very little legal analysis related to unlawful attacks.\textsuperscript{11} Kordic’s sentence was affirmed on appeal and that of Cerkez was reduced to six years’ imprisonment.

General Galic was the commander of the Bosnian Serb Army (RSK) Sarajevo Rumania Corps, the force surrounding Sarajevo, from September 10, 1992 to August 10, 1994. He was charged with individual criminal responsibility for inflicting terror on the civilian population of Sarajevo, for attacking civilians, and for the crimes against humanity of murder and causing inhumane acts.\textsuperscript{12} The underlying basis for the charges were alleged protracted sniping and shelling campaigns upon the civilian population during which large numbers of civilians were killed or wounded. General Galic was convicted of ordering the infliction of terror and crimes against humanity and given a sentence of twenty years’ imprisonment.\textsuperscript{13} The Court dismissed the unlawful attack counts because they were regarded as being assimilated into the infliction of terror count.\textsuperscript{14} Judge Nieto-Navia filed a strong dissenting opinion.\textsuperscript{15} The decision, which is currently under appeal,\textsuperscript{16} contains a thorough analysis of the law relating to unlawful attacks and to the infliction of terrorism and also addresses how one must prove the existence of a sustained campaign.\textsuperscript{17}

The Strugar case\textsuperscript{18} revolves primarily around the events of a single day, although evidence of what happened before and after is essential to appraising culpability for these events. General Strugar, Commander of the Jugoslovenska Narodna Armija (JNA) (the Yugoslav People’s Army) 2nd Operational Group (2 OG), which surrounded the Croatian city of Dubrovnik, was charged with responsibility for the unlawful attacks on civilian and civilian objects in the Old Town of Dubrovnik on December 6, 1991. In the early morning of December 6, a small unit of the JNA attempted to capture a strong point at Srd, a hill above Du-

\textsuperscript{11} Id. ¶¶ 321–328.
\textsuperscript{12} Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion (Dec. 5, 2003).
\textsuperscript{13} Id. pt. VI.
\textsuperscript{14} Id. ¶ 752.
\textsuperscript{16} Prosecutor v. Galic, Case No. IT-98-29-A, Judgement (Nov. 30, 2006).
brovnik. Croatian forces in and around Dubrovnik responded and the attacking JNA unit became bogged down and began taking casualties. JNA mortars, recoilless guns, and wire-guided rockets were fired at Dubrovnik. A large number of these munitions landed in the Old Town of Dubrovnik, a distinct area adjacent to the rest of Dubrovnik which contained nothing but specially protected civilian objects and civilians, causing death or injury to civilians and substantial damage to several specially protected civilian structures.

Initially, four persons were indicted in connection with the incident: Army Captain Kovacevic, who commanded the Third Battalion of the 472nd Motorized Brigade, the unit principally responsible for the unlawful attack; Admiral Jokic, Captain Kovacevic’s superior and commander of the Ninth Military Naval Sector; Naval Captain Zec, Admiral Jokic’s Chief of Staff; and General Strugar, commander the 2 OG and Admiral Jokic’s superior. Charges were withdrawn without prejudice against Naval Captain Zec. Army Captain Kovacevic was the subject of the Prosecutor’s Rule 11 bis motion for referral of the indictment to another court. Admiral Jokic submitted a guilty plea and was sentenced to seven years’ imprisonment, and the trial of General Strugar proceeded with Admiral Jokic as one of the main witnesses against him. General Strugar was found guilty, based on command responsibility, of attacks on civilians and of destruction or willful damage to protected buildings and sentenced to eight years’ imprisonment. Although the court found that all of the elements of the other counts, including attacks on civilian objects, had been established, it considered the offenses for which it did make a guilty finding to most accurately encapsulate the criminal conduct.

I. Military Objectives

Military objectives, that is, persons and objects subject to attack, are:

(i) combatants;
(ii) civilians taking a direct part in hostilities;\textsuperscript{23} and (iii) in so far as objects are concerned, those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.\textsuperscript{24}

The major IHL treaty instruments at present are the two Additional Protocols of 1977 to the Geneva Conventions of 1949. Protocol I (AP I) addresses international armed conflict and Protocol II (AP II) refers to internal armed conflict.\textsuperscript{25} The United States has not ratified either treaty, although the countries of the former Yugoslavia have done so. For the most part, however, the provisions of AP I and AP II referred to in this article would be regarded as binding all states because they reflect current customary law.

\textbf{A. Definition of Combatants}

Military objectives, in terms of people, are combatants and civilians directly participating in hostilities. Combatants are members of the armed forces of a party to a conflict, other than medical personnel and chaplains.\textsuperscript{26} Combatants have the right to participate directly in hostilities (i.e., shoot at the enemy) at any time and, for that reason, they may also be attacked at any time—sleeping, eating, and marching to the rear, unless they have surrendered or are injured and have ceased to take part in hostilities. Wounded combatants who continue to fight may be lawfully attacked. Although, strictly speaking, the concept of combatant status is legally relevant only during international armed conflicts, as is the related concept of prisoner of war status, the concept is applicable by analogy to internal conflict. As a result, the members of the armed forces of all parties to an internal conflict (other than medical personnel and chaplains) would also be subject to lawful attack at all times unless they have surrendered or are injured and have ceased to take part in hostilities. The ICTY Appeals Chamber has explicitly addressed the situation of members of a Territorial Defense (TO) organization in the territory of the former Yugoslavia, and whether they should be con-

\textsuperscript{23} Id. art. 51(3).
\textsuperscript{24} Id. art. 52(2).
\textsuperscript{26} AP I, \textit{supra} note 22, art. 43(2).
sidered combatants at all times during a conflict or only when they directly take part in hostilities. The Chamber concluded that “members of the armed forces residing in their homes in the area of the conflict, as well as members of the TO residing in their homes, remain combatants whether or not they are in combat, or for the time being armed.”

B. Definition of Civilians Directly Participating in Hostilities

The concept of civilians directly participating in hostilities is much more contentious and much more complicated. Armed forces of many western states have begun to outsource to meet many of their requirements. As a result, private contractors may provide both specialist services (such as technical representatives for the maintenance of complicated weapons systems) and more routine services (such as logistical support and provision of food services), which had previously been provided by military personnel. This is a return to the beginning of the modern period when specialists, even artillery personnel, were civilians. Furthermore, some key civilian personnel, defense scientists for example, may be much more important to the war effort than most military personnel. In the territory of the former Yugoslavia, an additional complicating factor was the fact that, at least in the early stages, new states were emerging and were required to create new armed forces as the conflict went on. Although the matter is not beyond dispute, the concept of civilians participating directly in hostilities should be narrowly construed. “Direct participation in hostilities implies a direct causal relationship between the activity engaged in and harm done to the enemy at the time and place where the activity takes place.”

Hostile acts:

[S]hould be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. . . . There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without

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28 Id. ¶ 1679, at 516.
such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless.29

 Civilians are military objectives only while they are taking a direct part in hostilities, not before and not after. When making targeting decisions, in case of doubt whether a person is a civilian, that person shall be considered a civilian. These propositions reflect customary law and are codified in AP I.30 Essentially the same standard applies to internal conflicts as a result of Article 13 of AP II and Article 3 common to the four Geneva Conventions of 1949, although the latter uses the expression “persons taking no active part in hostilities” which, it is submitted, is synonymous with taking no direct part in hostilities.31

The direct participation in hostilities issue was addressed, but not in depth, in the Strugar Judgment. Civilian Mato Valjalo, who was wounded in the shelling of the Old Town of Dubrovnik, was a driver for the Dubrovnik Municipal Crisis Staff. The Chamber concluded, without analysis, that there was nothing in the evidence to suggest that, as a driver, he was taking an active part in hostilities.32

C. Military Objectives

Article 52(2) of AP I states in part:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.33

29 AP I, supra note 22, ¶¶ 1942, 1945; see also Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 618–619 (Yves Sandoz et al. eds., 1987).

30 AP I, supra note 22, arts. 43(1), 50(1), 51(2)–(3).


33 AP I, supra note 22, art. 52(2).
Paragraph 3 of the Article indicates that in case of doubt over whether an object, which is normally dedicated to civilian purposes, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The definition has two elements:

(i) That the nature, location, purpose, or use of the object must make an effective contribution to military action; and

(ii) That the total or partial destruction, capture, or neutralisation of the object must offer a definite military advantage in the circumstances ruling at the time.

States which have ratified AP I, and most other states, would accept the AP I definition of military objective as a reasonably accurate definition applicable as a matter of customary law to all conflicts. The definition is supposed to provide a means whereby informed objective observers (and decision makers in a conflict) can determine whether a particular object constitutes a military objective. It accomplishes this purpose in simple cases. Everyone will agree that a munitions factory is a military objective and that an unoccupied church is a civilian object. When the definition is applied to dual-use objects, which have some civilian uses and some actual or potential military uses (such as communications systems, transportation systems, petrochemical complexes, or manufacturing plants of some types), opinions may differ. The application of the definition to particular objects may also differ depending on the scope and objectives of the conflict. Further, the scope and objectives of the conflict may change during the conflict. Although representatives of the U.S. government have at times indicated that the AP I definition of military objective does reflect customary law, it should be noted that the United States appears to have adopted a substantially broader definition of military objective for its Military Commission Instructions:

“Military objectives” are those potential targets during an armed conflict which by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military ad-

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vantage to the attacker under the circumstances at the times of the attack.\textsuperscript{36}

Certainly the reference to “war-sustaining capability” appears to be an extension beyond the AP I definition.

A number of issues remain unresolved in connection with the scope of the military objective concept, including:

(i) Should more or fewer things be regarded as military objectives by the intervening side during a humanitarian intervention or by the “good” side during an international armed conflict?\textsuperscript{37}

(ii) Is civilian morale a military objective?\textsuperscript{38}

(iii) Is the political leadership a legitimate target?\textsuperscript{39}

To a considerable extent, the debate concerning what should constitute a military objective has yet to be commenced and it clearly will be when, and if, a case concerning air bombardment is prosecuted. Cases brought before the ICTY to date have been concerned primarily with ground combat, and identification of military objectives has tended to be a relatively simple task since the objectives are usually troop concentrations or weapons emplacements.\textsuperscript{40}

\section*{III. Proportionality}

Where unlawful attacks are concerned, proportionality is the ratio between the concrete and direct military advantage anticipated and the


\textsuperscript{37} The author tends to be a bit reluctant to distinguish between the good and the bad side for the purposes of applying IHL. \textit{But see} Charles.J. Dunlap, Jr., \textit{The End of Innocence: Rethinking Non-Combatancy in the Post-Kosovo Era, in Strategic Review} 4 (Summer 2000).

\textsuperscript{38} \textit{See} Jeanne M. Meyer, \textit{Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine}, 51 \textit{Air Force L. Rev.} 143, 143–82 (2001) (for a vigorous statement of the view that enemy civilian moral has traditionally been a legitimate military objective and that the AP I definition of military objective should be interpreted to encompass attacks on morale targets).

\textsuperscript{39} \textit{Human Rights Watch, supra note 1, at 21–40.}

\textsuperscript{40} \textit{See ICTY: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia} (June 8, 2001), 39 I.L.M. 1257–1283 (2000) [hereinafter OTP Report] (discussing the one exception to this rule, and in particular, the NATO attack on the headquarters and studios of Serbian State Television and Radio in central Belgrade on April 23, 1999, which did not involve litigation).
incidental loss of civilian life, injury to civilians, and damage to civilian objects anticipated from an attack directed against a military objective.

The concept of proportionality is linked to the principle of distinction, which is the fundamental legal principle underlying combat activity. Although the concept has been a part of IHL for a long time, it did not appear in treaty texts until the development of AP I in 1974–77. The concept is important because military objectives, civilians, and civilian objects are too frequently located in the same area. Civilians and civilian objects do not have absolute immunity from the effects of combat. Attacks directed against military objectives are lawful unless they are anticipated to cause disproportionate civilian losses. It is not practicable to determine whether civilian casualties are lawful or unlawful until there have been prior determinations of whether the attack, which caused the civilian casualties, was directed against a military objective, and if so, whether disproportionate civilian casualties were anticipated. If disproportionate civilian casualties are caused, that may provide the basis for an inference that such casualties were anticipated.

The word “proportionality” is not used in AP I, but is implicitly contained in several of its provisions, which refer to a prohibition on attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” “Excessive,” considered in context, is synonymous with “disproportionate.” In the context of the law related to unlawful attacks, proportionality is relevant simply for assessing the relative values of two essentially unlike concepts, military advantage and civilian losses. Since the relative values are essentially unlike, precise valuation is difficult. It is not a simple accounting exercise. The best one can say is that if similar things are being measured, such as human lives, usually each life must be given a similar value.

A. Application of the Proportionality Concept

Unfortunately, it is not possible to provide simple answers concerning the application of the concept of proportionality to concrete mili-

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41 See AP I, supra note 22, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b), 85(3)(c).
42 Id. art. 51(5)(b) (emphasis added).
tary situations, because of a lack of examples in legal decisions or legal literature. The following analysis provides a rough frame of reference.

First, who decides whether an action is disproportionate? The Galic Trial Chamber held that the decision maker should be regarded as “a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her.”44 Second, what is compared? The comparison is between the *anticipated* concrete and direct military advantage and the *anticipated* incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof. The actual results of the attack may assist in inferring the intent of the attacker, but what counts is what was in the mind of the decision maker when the attack was launched. Third, what is the standard? The attack is prohibited if it is anticipated that it will result in *excessive* civilian losses.45 Fourth, what is the scope of the “concrete and direct military advantage anticipated?” The Galic Trial Chamber referred to several sources in addressing this point:

The *travaux préparatoires* of Additional Protocol I indicate that the expression “concrete and direct” was intended to show that the advantage must be “substantial and relatively close”, and that “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded. . . .” The [International Committee of the Red Cross] Commentary explains that “a military advantage can only consist in ground gained or in annihilating or in weakening the enemy armed forces.”46

The military advantage gained by a successful attack on a military objective may vary depending on the circumstances. For example, a successful attack on a military objective, such as an artillery emplacement, always gives the attacker a military advantage, but the extent of the direct and concrete direct military advantage gained may vary depending on several factors, such as location of the objective and its current or potential use.

Fifth, what scale should be used in assessing proportionality? Should proportionality be assessed based on an attack on a single military objective, a battle, a campaign, or a war? Several states made statements of understanding concerning the application of “military advan-

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45 See AP I, *supra* note 22, art. 51(5)(b).
46 Galic, Case No. IT-98-29-T, ¶ 58, n. 106, (citing Yves Sandoz et al., *supra* note 29, ¶¶ 2209, 2218).
tage,” considered in the context of Articles 51, 52, and 57 when ratifying or acceding to AP I. The Statement by Canada is representative:

It is the understanding of the Government of Canada in relation to Articles 51(5)(b), 52(2), and 57(2)(a)(iii) that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.

These Statements of Understanding notwithstanding, it is suggested that proportionality can be determined using a variety of scales ranging from the tactical level (military objective by military objective), to a much bigger scale, as long as the more general context is also taken into account. For example, if it is essential to block military traffic across a river and the enemy forces may use three bridges to cross the river, it may well be permissible to inflict greater collateral losses for destroying the last bridge because of the resultant greater military advantage. The military objective scale is commonly used in modern state practice, particularly in assessing the legitimacy of aerial attacks. It was also used by the Galic Trial Chamber.

No tribunal to date has ever explicitly determined, in a well articulated manner, that disproportionate damage was caused when assessing an incident in which the disproportionate impact of the attack was not blatant or conspicuous. The Galic Trial Chamber, however, was compelled to grapple with the issue in its discussion of one shelling incident, the shelling of the Dobrinje football tournament on June 1, 1993. In that incident, about 200 spectators, including women and children,

48 Id. at 503.
49 In an earlier article, the author expressed the view that the AP I proportionality provisions would probably not be applicable below a divisional level attack. The earlier view was premised on the assumption that there could be such a thing as an attack which was disproportionate but which was not, in substance, directed against civilians or civilian objects. Whether or not that assumption was valid, in the cases which have been prosecuted to date a de facto higher threshold has been used and the argument advanced has been that the attack was so disproportionate that it must be regarded as directed against civilians or civilian objects. See William J. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 MIL. L. REV. 91, 112 (1982).
were watching a football game in the corner of a parking lot, which was bound on three sides by six story apartments and on the fourth side by a hill. Two shells exploded in the parking lot killing between 12 and 16 persons and wounding between 80 and 140 persons. The players and many of the spectators were military personnel and, as such, military objectives. The Commander of the Army of Bosnia and Herzegovina (ABiH 5th Motorized Dobrinja Brigade), to which the soldiers belonged, filed a report indicating there were 11 killed and 87 wounded (6 combatants killed and 55 wounded, 5 civilians killed and 32 wounded). Although assessing proportionality is not a simple exercise in number crunching, it would be difficult to conclude that, in this incident, there were disproportionate civilian casualties, unless one makes the arbitrary determination that civilian lives count more than military lives. The majority of the chamber finessed a requirement to assess the proportionality of the result by focusing on the mens rea of the perpetrators and on the fact that civilian casualties were caused:

Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.\(^5\)

IV. **Legal Basis for Unlawful Attack Charges**

Unlawful attacks are not enumerated offences in the ICTY Statute. Before the ICTY unlawful attacks must be charged as unenumerated offences under Article 3 of the Statute, which is concerned with violations of the laws or customs of war. As a result of the *Tadic* Jurisdiction Appeal Decision, all unenumerated offences must meet the following four general criteria:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, [the treaty must

\(^{52}\) *Id.* ¶ 377.

\(^{53}\) *Id.* ¶ 387.
(a) bind the parties at the time of the offence (including being applicable to the type of conflict in which the incident occurred), and
(b) not be in conflict with or derogate from a peremptory norm of international law\textsuperscript{54}

(iii) the 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 . . . ;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.\textsuperscript{55}

The potential legal sources for the unlawful attack offenses were customary international law, the APs,\textsuperscript{56} and the Statute of the International Criminal Court (ICC).\textsuperscript{57} Since the ICC Statute was not adopted until 1998, well after most of the offences within the jurisdiction of the ICTY were committed, and since that Statute (i) applies only to crimes committed after it came into force,\textsuperscript{58} and (ii) formulates unlawful attack offences in a way which might be more restrictive than customary law or pre-existing treaty law, the OTP relied upon customary law and the APs to provide the legal basis for its unlawful attack charges.

The OTP charged unlawful attacks in the \textit{Strugar} case using the following representative formulations, which were upheld by the Appeals Chamber:\textsuperscript{59}

(i) “[A]ttacks on civilians, a Violation of the Laws or Customs of War, as recognized by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949”, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.

(ii) “[U]nlawful attacks on civilian objects, a violation of the laws or customs of war, as recognized by Article 52 of Additional Protocol I to the Geneva Conventions of 1949”, and

\textsuperscript{54} See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 143 (Oct. 2, 1995).
\textsuperscript{55} \textit{Id.} ¶ 94.
\textsuperscript{56} AP I, \textit{supra} note 22, art. 48; AP II, \textit{supra} note 25, art. 13.
\textsuperscript{57} ICC Statute, \textit{supra} note 43, art. 8.
\textsuperscript{58} \textit{Id.} art. 11.
customary law, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.  

Bearing in mind the precise wording of the Appeals Chamber in the Strugar Jurisdiction Decision, in the future it might be preferable: (a) to include a reference to customary law before the reference to Article 51 in the attack on civilians charge because of the importance of customary law to underpin the offense; and (b) to delete “unlawful” from the formulation of the attack on civilian objects charge, as all attacks on civilian objects are unlawful. In accordance with the Galic Trial Judgment, these formulations embrace direct, indiscriminate, and disproportionate attacks. In its judgment, the Blaskic Trial Chamber considered the duration of the unlawful attack (the overrunning of small villages) to include actions that occurred while control over the villages was still in dispute. The Appeals Chamber also held in the Strugar Jurisdiction Decision that attacks on civilians and on civilian objects were prohibited under customary law. Although the Chamber was not extremely explicit, it would appear that the customary law prohibition applies in all conflicts.  

A. Attacks on Civilian Populations

The Tadic Jurisdiction Appeal Decision has provided the OTP with a basis for arguing that certain offenses have a substantially similar legal content in both international and internal conflicts. The OTP has, therefore, developed and defended the practice of alleging unlawful attack charges, which are common to all conflicts. In order to evade the conflict classification issue, the ICTY OTP has rooted its unlawful attack-on-civilians charges in identically worded provisions of AP I (which applies to international conflicts) and AP II (which applies to internal conflicts). Both Article 51(2) of AP I and Article 13(2) of AP II state in part: “The civilian population as such, as well as individual civilians,
shall not be the object of attack.”\textsuperscript{65} AP I, however, goes on to refer to other forms of unlawful attack. In particular, Article 51 refers to indiscriminate attacks, including disproportionate attacks, and refers to five forms of indiscriminate attack, all of which are prohibited.\textsuperscript{66} In addition, Article 85 contains grave breach provisions relating to unlawful attacks. By contrast, AP II has no provisions related to unlawful attacks on civilians beyond the single sentence in Article 13(2) quoted earlier.\textsuperscript{67}

ICTY OTP practice has been to focus on the common sentence in Article 51(2) of AP I and Article 13(2) of AP II, and to argue that proof of the occurrence of the various types of indiscriminate attacks, including disproportionate attacks, may provide an evidentiary basis for the Trial Chamber to draw an inference that the attacks were, in substance, directed against the civilian population. In other words, the OTP has argued that the essential substance of the detailed AP I provisions, concerning unlawful attacks applicable to international conflicts, are also contained in the single relevant sentence in AP II, which is applicable to internal conflicts. This is a conscious effort on the part of the OTP, successful to date, to argue that the law concerning unlawful attacks against civilians is the same substantively in both international and internal conflicts. An essentially similar approach has been accepted in the ICRC Customary International Humanitarian Law Study.\textsuperscript{68}

B. Attacks on Civilian Objects

The basis for the unlawful attack against civilian objects charge is a bit different. Article 52(1) of AP I states in part: “Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives . . . .”\textsuperscript{69} There is no similar general provision in AP II. There are, however, prohibitions on attacking specific civilian objects, including objects indispensable to the survival of the civilian population,\textsuperscript{70} works and installations containing dangerous forces,\textsuperscript{71} and cultural objects and places of worship.\textsuperscript{72} In addition, the

\textsuperscript{65} AP I, supra note 22, art. 51(2); AP II, supra note 25, art. 13(2).
\textsuperscript{66} See AP I, supra note 22, art. 51.
\textsuperscript{67} AP II, supra note 25, art. 13(2).
\textsuperscript{68} Henckaerts & Doswald-Beck, Vol. I, supra note 34, at 3–8, 37–50 (Rules 1, 11–14).
\textsuperscript{69} AP I, supra note 22, art. 52(1).
\textsuperscript{70} AP II, supra note 25, art. 14.
\textsuperscript{71} Id. art. 15.
\textsuperscript{72} Id. art. 16.
U.N. General Assembly adopted Resolution 2675, on Basic Principles for the Protection of the Civilian Population, on Dec. 9, 1970.\textsuperscript{73} These Principles include:

In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations. . . . Dwellings and other installations that are used only by civilian populations should not be the object of military operations.\textsuperscript{74}

UNGA Res 2675 applies to all armed conflicts. As indicated in the \textit{Tadic} Jurisdiction Appeal Decision, these resolutions were “declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind . . . .”\textsuperscript{75} The ICRC customary law study adopts a similar approach.\textsuperscript{76}

As indicated above, the OTP has rooted its unlawful attack charges in customary law and in the APs, and not in the ICC Statute where the wording is somewhat different. The APs were initially adopted in 1977 and have a firmer customary law basis than the 1998 ICC Statute. The ICC Statute contains different enumerated lists of war crimes for international conflicts\textsuperscript{77} and for internal conflicts.\textsuperscript{78} Unenumerated offences may not be charged under the ICC Statute. The relevant ICC offences include: (1) for international conflicts—intentional attacks on civilians,\textsuperscript{79} intentional attacks on civilian objects,\textsuperscript{80} intentionally launching attacks that are expected to cause disproportionate incidental civilian losses or damage;\textsuperscript{81} and (2) for internal conflicts—intentional attacks on civilians.\textsuperscript{82}

Reliance on the ICC Statute by the OTP, which is debatable because it was not drafted until after most of the offenses within the ICTY’s jurisdiction were committed, would be helpful because proof of the effect of the unlawful attack (death or injury to civilians, damage to

\textsuperscript{74} Id. § 3, 5.
\textsuperscript{75} Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 112 (Oct. 2, 1995).
\textsuperscript{77} ICC Statute, supra note 43, art. 8(2)(a) and (b).
\textsuperscript{78} Id. art. 8(2)(c) and (e).
\textsuperscript{79} Id. art. 8(2)(a) and (b)(i).
\textsuperscript{80} Id. art. 8(2)(b)(ii).
\textsuperscript{81} Id. art. 8(2)(b)(iv).
\textsuperscript{82} ICC Statute, supra note 43, art. 8(2)(d)(i).
civilian objects) is not an element of the offense. As a purely practical matter, however, it is unlikely that the offence would ever be charged unless the effect actually occurred, and it would usually be necessary to prove the effect as part of the circumstantial evidence for proof of the mental element. The OTP has utilized the grave breach provisions of Article 85(3) of AP I in developing its elements and AP I does require proof of effect. There are, however, aspects of the ICC unlawful attack offences that are not helpful. In particular: (1) the OTP uses the AP I mental element of “willful,” which includes a degree of recklessness, while the ICC mental element is intentional, which may not include a degree of recklessness; (2) the OTP uses the AP I formulation for proportionality which is “excessive” while the ICC formulation is “clearly excessive,” which may be higher; and (3) the ICC Statute prohibits a narrower range of attacks in internal conflicts that the OTP, relying on the Tadic Jurisdiction decision, has not been able to prosecute.

V. ELEMENTS OF UNLAWFUL ATTACK CHARGES

A. The Charge of Unlawful Attacks on Civilians

For cases before the ICTY, the elements of the unlawful attacks on civilians charge are as indicated in the Galic Trial Judgment (subject to the modification of the mens rea element required by the Blaskic Appeal Judgment). In Galic, the Trial Chamber accepted that the mental element for the offense of unlawful attack was “willful” and that the approach taken in the grave breach provisions of AP I was appropriate. Specifically, it held:

The Commentary to Article 85 of Additional Protocol I explains the term as follows:

*wilfully*: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e.*, when a man acts without having his mind on the act or its consequences.

The Trial Chamber accepts this explanation, according to which the notion of “wilfully” incorporates the concept of
recklessness, whilst excluding mere negligence. The perpetra-
tor who recklessly attacks civilians acts “wilfully”.83

The approach to the concept of recklessness must, however, be modi-
fied as a result of the holding of the Appeal Chamber in Blaskic to the
effect that the knowledge of any sort of risk is not sufficient for the im-
position of criminal responsibility, and that an accused must be aware
of the “substantial likelihood” that the actus reus of the crime will oc-
cur.84

The Galic Trial Chamber then went on to decide that the elements
for the charge are the elements common to all unenumerated offences
under Article 3 of the ICTY Statute, and the following specific ele-
ments:

1. Acts of violence directed against the civilian population
or individual civilians not taking direct part in hostilities caus-
ing death or serious injury to body or health within the civil-
ian population.
2. The offender wilfully made the civilian population or in-
dividual civilians not taking direct part in hostilities the object
of those acts of violence.85

It added, “indiscriminate attacks, that is to say, attacks which strike civil-
ians or civilian objects and military objectives without distinction, may
qualify as direct attacks against civilians.”86 Further, the Trial Chamber
considered that “certain apparently disproportionate attacks may give
rise to the inference that civilians were actually the object of attack.
This is to be determined on a case-by-case basis in light of the available
evidence.”87 “To establish the mens rea of a disproportionate attack the
Prosecution must prove...that the attack was launched wilfully and in
knowledge of circumstances giving rise to the expectation of excessive
civilian casualties.”88 The Trial Chamber went on to observe that the
failure of a party to comply with its obligation to remove civilians, to the

83 Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 54 (Dec. 5,
84 Prosecutor v. Blaskic, Case No. IT--95-14-A, Appeals Judgement, ¶¶ 41–42 (July 29,
2004).
85 Galic, Case No. IT-98-29-T, ¶ 56.
86 Id. ¶ 57.
87 Id. ¶ 60.
88 Id. ¶ 59; see Kravetz, supra note 17, at 532 (criticizing that court’s finding by arguing
that disproportionate attacks should not come within the definition of the crime of attack
on civilians).
maximum extent feasible, from the vicinity of military objectives did not “relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.” The Trial Chamber did allude to the possibility that proof of results was not an element of the offence of unlawful attack on civilians.

The Appeals Chamber, in the Kordic Judgment, issued after the Galic Trial Judgment, reviewed the state of the law concerning the requirement for proof of results, and concluded that there was such a requirement under customary law at the time of the offence. In a corrigendum to the same judgment, the Appeals Chamber corrected an error made in earlier trial judgments, which appeared to hold that civilians or civilian objects could be attacked if justified by military necessity and held “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”

B. The Charge of Unlawful Attacks on Civilian Objects

The specific elements for the unlawful attacks on civilian objects charge are, mutatis mutandis, the same as those for unlawful attacks on civilians spelled out in the Galic Trial Judgment:

1. Acts of violence directed against civilian objects causing damage to civilian objects; and
2. The offender wilfully made civilian objects the object of these acts of violence.

“Wilfull” has the same meaning here as it does for attacks on civilians.

Although the elements for the analogous ICC offences do not require proof of results (with the exception of Article 8(2)(b)(iv)—war crime of excessive incidental death, injury, or damage), the ICC offences appear to be narrower than the ICTY offences prosecuted to date as the ICTY has prosecuted for unlawful attacks against civilian objects in all conflicts. In addition, the elements are more restrictive
than the offenses set forth in the APs, as they appear to have a narrower *mens rea* ("intentional" in lieu of "willfulness").

VI. RELATIONSHIP BETWEEN UNLAWFUL ATTACK CHARGES AND OTHER CHARGES

Proof that an unlawful attack occurred is a prerequisite for determining whether other offenses also occurred in a combat situation. Where the crime base consists of shelling or sniping incidents in a combat environment, it must first be proved that death, injury, or damage was caused by an unlawful attack (that is, one directed against civilians or civilian objects, or one directed against a military objective that may be expected to cause disproportionate incidental losses), before determining whether the additional elements necessary to establish the commission of other offenses have been established. If the attack was not unlawful then the resultant death, injury, or damage cannot be unlawful. If a civilian is killed or injured during an attack on a military objective, which was not reasonably expected to result in civilian casualties or damage to civilian objects disproportionate to the expected military advantage, then no crime has been committed because it is a lawful act of war. This is true even if there is an expectation that some civilians may be killed or injured during the attack.

There is no basis for a crime against humanity charge because the attack was directed against a military objective, not against civilians or civilian objects. There is no basis for a war crimes charge of murder because the *mens rea* is lacking. The intent was to perform a lawful act. The unlawful attack foundation is essential to the assessment of legality, even if there is no unlawful attack charge relating to a particular combat related incident. The issue cannot be avoided by simply avoiding the charge. There can be some incidents in which it is so clear that the attack is directed against civilians that one can proceed with a persecution count, or a war crime, or crime against humanity count of murder. Even in such circumstances, however, it is essential that the prosecutor, in making charging decisions, and the court in assessing the facts, take into account the unlawful attack elements, at least implicitly, before coming to the conclusion that counts charged have been proven.

The Galić Trial Chamber, seemingly without enthusiasm, accepted and applied the OTP submission that proof of an unlawful attack was a prerequisite for proof of other offenses related to shelling or sniping:

The Prosecution submits that, in the context of an armed conflict, the determination that an attack is unlawful in light of treaty and customary international law with respect to the
principles of distinction and proportionality is critical in determining whether the general requirements of Article 5 have been met. Otherwise, according to the Prosecution, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible. It therefore submits that an accused may be found guilty of a crime against humanity if he launches an unlawful attack against persons taking no active part in the hostilities when the general requirements of Article 5 have been established. The Trial Chamber accepts that when considering the general requirements of Article 5, the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such.94

VII. Establishing the Big Picture

Since unlawful attack counts will require reference to multiple incidents, and it would be impracticable to introduce detailed evidence concerning each incident, it will be necessary to develop a way for getting from the micro to the macro level in presenting the case.

In the Galic case, hundreds of civilians were killed or wounded in Sarajevo by shelling or sniping during the period covered by the indictment, 1992–1994. It would be impracticable to treat each incident of killing as a separate murder case. A way had to be developed to get from the specific incident at the micro level to what was alleged to be an unlawful shelling or sniping campaign at the macro level. Indeed, the link from the micro to the macro level was essential to the case. If, for example, the prosecution could prove, with a degree of precision in a manageable time, that twenty sniping incidents have occurred over a two-year period while the accused was responsible for 15,000 soldiers in the front lines, in the absence of direct evidence of relevant orders being given, would a reasonable court conclude that the commander bears command responsibility for the sniping or that he must have ordered such acts? On the other hand, if the prosecutor could establish both the occurrence of the twenty incidents and an

adequate link to what appears to be a much broader crime base, it might be much easier for the court to reach such conclusions.

Presumably, the preferred approach would be to determine in some scientifically valid fashion the entire apparent crime base. For example, if it appears from sound medical evidence that 1000 civilians have been killed by sniper fire from forces under the command of X, the prosecutor could pick a statistically valid sample on something similar to a random numbers basis for a more detailed examination. Detailed evidence concerning all cases in the sample group would then be put before the court. If that was done, or if the prosecutor made the court aware of incidents or situations in the sample group, which do not indicate unlawful acts occurred, then the court could conclude that seventy percent of the cases in the sample group constituted crimes, therefore seventy percent of the larger group also constituted crimes, and therefore a campaign of unlawful sniping occurred.

Desirable as the mathematical/scientific approach might be, it is not always practicable. The Galic prosecution team listed scheduled sniping and shelling incidents as “representative allegations” in annexes to the indictment. The prosecution also introduced evidence of unscheduled incidents, survey or impressionistic evidence, and solid demographic evidence, which could adequately establish cause of death or injury, but which did not, in and of itself, establish whether the death or injury was the result of unlawful acts.

The majority in the Trial Chamber held that a campaign of military actions in the area of Sarajevo, involving widespread or systematic shelling and sniping of civilians, resulting in civilian death or injury existed together with a lawful military campaign directed against military objectives.95 Civilians were directly or indiscriminately attacked and, at a minimum, hundreds of civilians were killed, and thousands of others were injured.96 The reasons for this finding included:

(a) No civilian activity and no areas of Sarajevo held by the ABiH seemed to be safe from sniping or shelling attacks from SRK-held territory;97

(b) Indeed, specific areas of the city became notorious as sources of sniper fire directed at civilians;98

95 Id. ¶¶ 582–583.
96 Id. ¶ 591.
97 Id. ¶ 584.
98 Id. ¶ 585.
(c) Although civilians adapted to the environment by taking precautionary measures, they were still not safe from deliberate attack;\(^99\)

(d) The evidence of residents of Sarajevo and of victims was supported by the evidence of international military personnel;\(^100\)

(e) Although there was some evidence that ABiH forces attacked their own civilians to attract the attention of the international community, that stray bullets may have struck some civilians, and that some civilians were shot in the honest belief they were combatants, evidence in the Trial Record conclusively establishes that the pattern of fire throughout the city of Sarajevo was that of indiscriminate or direct fire at civilians in ABiH-held areas of Sarajevo from SRK-controlled territory not that of combat fire where civilians were accidentally hit;\(^101\) and

(f) Fire into ABiH-held areas of Sarajevo followed a temporal pattern.\(^102\)

**Conclusion**

There are some things judicial decisions can contribute and some they are unlikely to contribute to the common discourse on the principle of distinction. In particular, it is unlikely there will be many decisions clarifying the scope of the military objective concept because, as a matter of prosecutorial discretion (and cost), it is unlikely prosecutors will submit indictments related to “gray area” targets. The most important contribution of ICTY jurisprudence is the simple demonstration that competent prosecution, defense, and adjudication of unlawful attack cases is not only possible, but that it is not beyond the practical competence of non-specialist tribunals. ICTY cases, such as *Galic* and *Strugar*, demonstrate how such cases can be prosecuted in the future. As a former military legal adviser, I would be the last to downgrade the importance of preventive law in ensuring that appropriate legal advice is injected into the operational decision making process so that breaches of the law do not occur in the first place. It is, however, extremely reassuring to know that there is now an additional arrow in the legal quiver and that effective prosecution is also practicable when necessary.


\(^{100}\) Id. ¶ 587.

\(^{101}\) Id. ¶ 589.

\(^{102}\) Id. ¶ 590.
CREATING NORMS OF ATTORNEY CONDUCT IN INTERNATIONAL TRIBUNALS: A CASE STUDY OF THE ICTY

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Abstract: Using the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a case study, this Article explores the merger of legal cultures at the ICTY. The ICTY was crafted in a high-stakes international environment and brings together lawyers and judges who have been trained and inculcated typically in a common law/adversarial system or a civil law/non-adversarial system. Lawyers and judges come to the ICTY not only with a distinct understanding of their roles within their home jurisdictions, but also with different skill sets. Merging the legal cultures has not always been smooth. By comparing how attorney-conduct norms are created in the United States—socialization, malpractice, market controls, regulatory processes, and procedural rules—with the practice at the ICTY, it becomes evident that the judges are the dominant source of norm creation in this international court. These norms are created, however, in an environment in which it appears that most of the substantive interaction between the judges, prosecutors, and defense counsel occurs in formal court settings. Future international courts would benefit from additional discussion among the judicial, prosecutorial, and defense functions as norms are created, including shared discussion about codes of conduct for judges, prosecutors, and defense counsel.

Introduction

The implementation of international war crimes tribunals in the 1990s provides us an extraordinary laboratory to examine how legal cultures interact in the international arena. The International Criminal Tribunal for the Former Yugoslavia (ICTY) is the most mature of these tribunals. With twelve years of experience, the tribunal has indicted 161

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persons for serious violations.\(^1\) The ICTY is a substantial legal community, with over 1000 employees (436 professionals), 200 interns, and 185 consultants and individual contractors.\(^2\) These figures do not include defense counsel, who are treated as distinct from the ICTY—with some positive and negative consequences discussed below.\(^3\) The ICTY budget is around 270 million dollars, with about fifteen percent of that budget devoted to legal aid.\(^4\) Crafted as a blend of the common law/adversarial and civil law/non-adversarial models, it has a predominantly adversarial methodology.\(^5\) The lawyers, judges, investigators, administrators, and support personnel, however, come from a range of backgrounds and training. Some come from a civil law tradition, in which the judge typically has the power to oversee a methodical investigation in a search for truth.\(^6\) Many of the civil law-trained defense


\(^{4}\) ICTY at a Glance, supra note 1; see also Tolbert, supra note 3, at 982–83.

\(^{5}\) Rachel Kerr, The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy 95 (2004) (“[T]he drafters of the statute did not have time properly to consider the amalgamation of common law and civil law systems. Instead, the Statute, drafted primarily by common law experts, was greatly influenced by common law, but tempered with concessions to civil law.”). The heavy use of common law approaches has some interesting political consequences; see Pierre Hazan, Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia 99 (James T. Snyder trans., 2004) (“From the beginning, the dominance of the common law system, followed by the Americans’ activism in the tribunal, has France convinced that Washington is ‘dictating’ justice in the former Yugoslavia.”); see also Gregory A. McClelland, A Non-Adversary Approach to International Criminal Tribunals, 26 Suffolk Transnat’l L. Rev. 1, 26–28 (2002) (arguing that ICTY and other international criminal tribunals would be more effective if they adopted procedural features borrowed from the civil law/non-adversary tradition).

Using a comparative law analysis, Maximo Langer examines the procedures of the ICTY and concludes that while the early ICTY procedures were predominantly adversarial, the more recent changes have moved toward a managerial judging model. Maximo Langer, The Rise of Managerial Judging in International Criminal Law, 53 Am. J. Comp. L. 835, 908 (2005).

\(^{6}\) Charles H. Koch, Jr., The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems, 11 Ind. J. Global Legal Stud. 139, 139–40 (2004); Langer, supra note 5, at 840.
counsel were trained under the former Yugoslavia socialist structure, with its own vision of legal process.⁷ Others come from a common law/adversarial model, in which the judge plays a much more passive role, and counsel are charged with developing and presenting facts and often define their role as an aggressive pursuit of that goal.⁸ Creating a new legal system drawn from a variety of traditions along a spectrum of adversarial to inquisitorial also creates a range of related attorney conduct issues. A rich body of literature explores the comparative sociology of lawyers.⁹ Because these legal approaches result in strikingly different procedural and evidentiary rules, the lawyers and judges have different roles, resulting in quite different approaches to confidentiality, conflicts of interest, duty to the courts, and the like.¹⁰ For example, prosecutors from a civil law tradition might assume that it is quite appropriate to talk privately with judges about the case, conduct that would be forbidden in an adversarial model. Some U.S.-trained lawyers come with an adversarial aggressiveness that is jarring to lawyers outside the U.S. system (and sometimes jarring to those trained in the

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⁷ See Mark S. Ellis, The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia, 37 NEW ENG. L. REV. 949, 957 (2003) (“Many of the ‘qualified’ non-western attorneys were trained in the communist/socialist era, in a system that is antithetical to the Tribunal’s substantive and procedural laws.”). For example, only recently has a detained person in the former Yugoslavia had the right to speak confidentially to an attorney. LEGAL DEPARTMENT, WORLD BANK, FEDERAL REPUBLIC OF YUGOSLAVIA LEGAL AND JUDICIAL DIAGNOSTIC 12 (2002) [hereinafter WORLD BANK LEGAL REPORT].

⁸ See generally, MODEL RULES OF PROF’L CONDUCT (2005) (setting out client-centered model); see also Antonio Cassese, The ICTY: A Living and Vital Reality, 2 J. INT’L CRIM. JUST. 585, 594 (2004) (“One should not underestimate the difficulty of getting judges from different legal traditions or with different backgrounds and training to get together and work smoothly, side by side.”).


¹⁰ Mark S. Ellis, Developing a Global Program for Enhancing Accountability: Key Ethical Tenets for the Legal Profession in the 21st Century, 54 S.C. L. REV. 1011, 1013–14 (2003) (all codes examined contained principles on professional independence, diligence, conflict of interest, and guidelines governing relations with the court, although specifics differed; there was less commonality on disciplinary measures, guidelines for lawyer/client communication, standards of personal integrity, confidentiality, methods of financial arrangements, and legal training); Langer, supra note 5, at 852–68 (discussing internal disposition of lawyers from various systems and emergence of predominantly adversarial methodology at ICTY).
U.S. system as well). Even within common law traditions, expectations vary. For example, a British-trained defense counsel would not prepare a witness in advance of trial because it is forbidden in Great Britain.\footnote{Colloquy, Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practice, 7 GEO. J. LEGAL ETHICS 865, 868–73 (1994).} For U.S.-trained defense counsel, however, it would be considered inappropriate\footnote{The ICTY has also recognized that it would not be reasonable for defense counsel to compel attendance of a prospective witness without first knowing what the witness would say. Prosecutor v. Krstić, Case No. IT-98-33-A, Decision on Application For Subpoenas, ¶ 8 (July 1, 2003) (forcing an uncooperative witness to testify without knowing the content of the testimony would be “contrary to the duty owed by counsel to their client to act skillfully and with loyalty”).} not to interview and prepare a witness for the rigors of trial if there were an opportunity to do so.\footnote{Model Rules of Prof’l Conduct § 4.2 (2006) (governing communication with person represented by counsel).} U.S. lawyers cannot directly contact a person who has counsel and must go through the designated counsel;\footnote{See, e.g., id. § 1.2. The Model Rules of Professional Conduct, which serve as the template for most U.S. codes of conduct for attorneys, speaks of the “client-attorney” relationship instead of the lawyer-centered “attorney-client” relationship to reinforce that the client (not the attorney) is the central actor in the relationship.} British lawyers do not face that concern. Understanding one’s role shapes more subtle issues as well. For example, for U.S. lawyers the client-attorney relationship is shaped by ethical values, including a client-centered model that requires communication and provides the client significant choices.\footnote{See Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, art. 4, ICTY Doc. IT/125/Rev. 2 (June 29, 2006), available at http://www.un.org/icty/legaldoc-e/index.htm (“If there is any inconsistency between this Code and any other codes of practice and ethics governing counsel, the terms of this Code prevail in respect of counsel’s conduct before the Tribunal.”) [hereinafter ICTY Code of Conduct].}

The merger of legal cultures involves more than merely training lawyers in the ways of the ICTY. The ICTY lawyers are licensed by their home jurisdictions and are required to comply with the obligations of that licensing jurisdiction, whether France, Serbia, Sweden, Canada, the United States, Great Britain, or another country. The shadow of the home licensing requirements is omnipresent for the lawyers and judges. Consequently, if the home jurisdiction forbids preparing witnesses, the lawyer has a momentary choice of law concern: which rules will govern? Quite appropriately, the ICTY proceeds with the understanding that the rules of the tribunal prevail when assessing conduct before the ICTY.\footnote{See ICTY Code of Conduct § 4.2 (2006) (governing communication with person represented by counsel).} While it would be logical for the home jurisdiction
to defer to the ICTY rules, the home jurisdiction is typically silent on this issue. The move toward having at least two defense counsel for defendants has eased some of these concerns because lawyers can assign tasks within the team based on their individual competence and any residual concerns the lawyers have about home licensing requirements.

These different systems not only have different requirements for attorney conduct, they also develop different skill sets on the part of both lawyers and judges. For example, defense lawyers who come from a civil law tradition typically do not develop skills of cross-examination or aggressive fact development. Most lawyers trained in a civil law tradition have not had as much opportunity to move from prosecutor to the defense role, which allows the lawyer to hone skills. The ICTY procedures are complex, resulting in lengthy and sometimes dull trials, punctuated by painful testimony when victims are allowed to speak (which is not always the case). The ICTY cases also involve complicated historical, forensic, and witness protection issues that require special expertise that needs to be developed by lawyers from all traditions. While the ICTY has developed a very helpful Manual for Practitioners and Practice Directions, this cannot substitute for a full inculcation into the norms and practice of the Tribunal.

The judicial skills are particularly complicated because the ICTY judges fall into three models: the judge-judge, the diplomat-judge, and

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17 See, e.g., Ellis, supra note 7, at 959.
18 Id. at 957 (“Often the local Yugoslav attorneys who appear in front of the ICTY lack the skills necessary to undertake a massive international war crimes case.”).
19 HAZAN, supra note 5, at 187 (“Caught in their own logic as lawyers, they did not weigh the heaviness of the procedures created. The result: From appeal to appeal, the Tadic case lasts five years; that of General Blaskic, two years with periods of interruption that give the ICTY a sense of judicial self-absorption.”).
20 Richard J. Wilson, Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach, 2 INT’L CRIM. L. REV. 145, 147 (2002) (“The law of war crimes itself is a rapidly developing blend of international and domestic concepts and procedures, requiring unique skills, experience, knowledge, strategic sense and training on the part of defense counsel.”).
21 Ellis, supra note 7, at 970 (“Though helpful and very solid, the Manual cannot substitute for trial advocacy experience.”). See also Practice Directions, http://www.un.org/icty/legaldoc-e/index.htm (last visited Nov. 18, 2006).
the professor-judge. The judge-judge comes to the ICTY with significant experience trying cases in the judge’s home jurisdiction, whether in a civil law model, in which the judge would be significantly more active, or in an adversarial model, in which the judge plays a more passive role. The diplomat-judge comes to the ICTY with a strong diplomatic background, but little or no experience managing a courtroom. The academic-judge typically comes to the ICTY with a rich and deep background in international human rights or criminal law, but often with little or no experience managing a courtroom. The early judicial pool was heavily populated with academic judges. Yet management skills are critical in running long and complicated trials, with defendants who may actively challenge the legitimacy of the Tribunal and evidentiary and other issues that require prompt rulings by the court.

Finally, infused throughout these structural and skill differences lies the underlying context of a war crimes tribunal. The ICTY is not a traditional court charged with trying cases that come before it. The ICTY is designed for “the prosecution” of those charged with perpetrating atrocities in the former Yugoslavia. While many of the atrocities were documented, the factual link between the crime and the perpetrators is still in dispute. A series of not guilty verdicts would be a failure of the system, an acknowledgement that the ICTY could not make the link between the horrible crimes and the wrongdoers. While this natural tendency to push toward conviction exists in all criminal tribunals, it may be even stronger at the ICTY in the face of the significant and horrifying human rights abuses during the Balkan conflict.

22 Interview with ICTY judge, in The Hague, Netherlands (May 15, 2006) (summary on file with author). This interview was conducted as part of a long-term project interviewing judges to identify how judges address ethical issues within the courtroom.

23 See Kerr, supra note 5, at 95.

24 See Langer, supra note 5, at 886. Professor Langer explores “procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible.” Id. at 878. This is related to but somewhat distinct from the skill set of controlling a trial under whatever model of judging is being used. Id. at 883–84. Cf. Penny J. White, Judicial Independence: Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations, 29 Fordham Urban L.J. 1053, 1072–73 (2002) (describing methods to measure judicial management skills).


26 The Milosevic trial demonstrated this dynamic. Establishing the crimes was relatively straightforward. The challenge was “to demonstrate that the chain of command leads to Milosevic.” Hazan, supra note 5, at 168.
The ICTY is also not a typical post-hoc tribunal, but rather was created by the U.N. Security Council, a political body, while the Balkan conflict was still raging. The political context is an omnipresent concern. The initial prosecution strategy to indict only second tier offenders, and not commanders and those who appeared to have orchestrated many atrocities, caused serious concern among the judges. Not surprisingly, it was the continental law judges who most aggressively intervened to challenge the prosecutor’s decision-making, rather than the common law judges, who traditionally take a more neutral role in the charging process. Eventually the common law judges joined in the criticism. This blending of roles once again demonstrates the complexity of merging legal traditions with different actors having varying visions of their role. Meanwhile, diplomats who were attempting to negotiate a settlement were in communication with the Office of the Prosecutor (OTP). They were sending signals that the interests in seeking justice (the goal of the ICTY) should not jeopardize the interests of a negotiated peace (the goal of the negotiators). Since the worst massacre, the deaths of 6000 to 9000 Muslims after the fall of Srebrenica in 1995, occurred during this period, it was apparent that the cautiousness of the ICTY did not benefit the peace process. (Whether it would have prevented Srebrenica is another question beyond the scope of this Article.) The ICTY chief Prosecutor was presented with a “moral nightmare,” a challenge that could be the final exam for a course on prosecutorial ethics.

28 Kerr, supra note 5, at 3 (noting that “the Tribunal must perform a delicate balancing act at the interface of law and politics, so that it is able to manipulate the political environment in order to serve the judicial function, without the judicial process becoming politicized”).
29 See Hazan, supra note 5, at 56–63.
30 Id. at 58 (“The most active judges are nicknamed the Three Musketeers . . . all representing continental law . . . .”).
31 Id. at 59; see generally Cassese, supra note 8.
32 For example, while some diplomats were roundly condemning Slobodan Milosevic and Radovan Karadzic, other diplomats were actively negotiating with these same actors for peace. Meanwhile, the ICTY judges were urging more aggressive action against these commanders. Hazan, supra note 5, at 30–34, 61–63.
33 Id. at 61–62.
What happens when you craft a new system in a high-stake international environment, bring in lawyers trained and inculcated into the norms of their own system, toss them in a salad bowl, and mix them up? A typical ICTY case would involve a three-judge panel that hears evidence and makes both findings of fact and conclusions of law. Each defendant typically has two defense counsel. The prosecutor’s office staffs cases with at least two prosecutors. Consequently, each case has a minimum of seven legal professionals and often many more, especially if multiple defendants are tried together. What happens in an individual case—think of it as a single salad plate—where the mix from the salad bowl might include judges and lawyers steeped in a civil law model, a blend of models, or a predominantly adversarially-trained group? What happens when the judges come from one model, the lawyers from another? What happens if you have a panel with predominantly diplomat or academic judges, who lack experience in managing a courtroom? How do you bring disparate systems closer together on the ground? Of course, you will create procedural rules that address some of the specific bottom-line obligations to the court (when do you have to inform the other side of your witnesses, rights to cross examination, etc.), but there are a host of unanswered questions even when you spell out a procedure.

To help frame the inquiry, this Article looks at the multiple ways that attorney-conduct norms are created in the United States—socialization, malpractice, market controls, regulatory processes, and procedural rules—and compares them to what appears to be the legal practice community emerging in the ICTY.\(^{35}\) With socialization as a weak harmonizing force, malpractice a non-existent factor, and market controls of little effect, the more likely places for norm setting at the ICTY is through regulatory processes (Rules of Conduct) and procedural rules. Both of these methods lead directly to the judges as the dominant source of norm setting within the ICTY. By necessity, the ICTY judges have taken a more active role than their U.S. counterparts have in creating norms of conduct. The experience at the ICTY suggests that future international courts would benefit from more direct interaction

\(^{35}\) This Article uses the idea of professional norms to include statements of conduct that have the force of law (such as procedural rules), self regulation rules that have quasi-legal force (such as rules of professional conduct that subject the lawyer to professional sanction if violated), and norms or claims of right behavior that may not be imposed by law, but shape our decision-making. In other words, this article will discuss both the law that directs and prohibits lawyer behavior and the values that help shape our discretionary choices.
between the judicial, prosecutorial, and defense functions as norms are created.\textsuperscript{36}

\section*{I. Creation of Attorney Conduct Norms}

\subsection*{A. Social Norms}

Abraham Lincoln “read” for the law, reading and learning by his own wits, and picking up some insights from more knowledgeable lawyers who passed on the skills and culture of the legal profession.\textsuperscript{37} That quaint world has been supplanted by formal legal education, where social norms are transmitted from the beginning of law school.\textsuperscript{38} Most students come into U.S. law schools infused with a pop culture understanding of our adversary system shaped by years of television and news exposure. Students develop a more sophisticated perspective as they proceed through law school. Classroom methodology reinforces the role-based approach that dominates the adversary system. This socialization process continues as students move into temporary practice settings as law clerks and interns, observing and picking up the social cues. Through conversations with friends who are practicing in a variety of areas, students begin to construct an understanding of the dynamics of practice and social norms. U.S. law students eventually become steeped in the adversarial model, with a healthy understanding (we hope) of its strengths and weaknesses. Through acculturation, law students slowly learn “best practice” in a variety of settings. This is an incomplete process and rightly criticized for failing to do a better job, but the shared educational experiences creates foundation expectations.\textsuperscript{39} After law school, newly minted lawyers move into practice settings that will hopefully continue to inculcate best practices, whether in the role

\textsuperscript{36} In proceeding, I write from the perspective of an American law professor with a strong understanding of U.S. litigation ethics, but without a deep background in international tribunals. This Article has benefited greatly from the emerging and extremely helpful commentaries of practitioners before the ICTY and the many people who agreed to speak with me during my visit to the ICTY.

\textsuperscript{37} Frederick Trevor Hill, Lincoln The Lawyer 27–34, 50–51, 70–81 (Fred B. Rothman & Co. 1986) (1906).

\textsuperscript{38} Since the 1970s, the field has heard critiques that law school is a dominant actor in the socialization of lawyers. See Duncan Kennedy, Legal Education and the Reproduction of Hierarchy, 32 J. Legal Educ. 591, 591–615 (1982).

of prosecutor, defense counsel, or state attorney general. Social norms are a small but important part of creating expectations of behavior.

Compare this acculturation process to the ICTY, which has twenty-five judges from twenty-three different countries. The defense bar of the ICTY has 257 members, drawn from multiple legal traditions, with roughly half of the defense bar from the former Yugoslavia, which has a civil law tradition. Prosecutors come from variety of jurisdictions, although their background and experience are not readily ascertainable from the public record. While all ICTY lawyers have access to the procedural rules, they bring quite divergent socialization experiences. However flawed we believe our U.S. adversarial system to be, actors have some basic understanding of the role they should play, even if they have different views of how to execute that role.

In the ICTY, all of the norms were created from scratch. Civil and common law lawyers had to understand this new hybrid trial model and their role within that model. Judges were faced with challenging questions, ones that U.S. judges face and continue to struggle with, but often without the background or experience in how to address the issues. For example, what should judges, prosecutors, or defense counsel do when it appears that one lawyer is of questionable competence? When and to what degree should a judge intervene? How should a lawyer proceed when representing an uncooperative defendant? When is a conflict of interest present? What norms should a judge refer to when assessing these questions? One can imagine that some of the earliest judges and lawyers felt like deer caught in the headlights, frozen with uncertainty about how to proceed. There was no shared history, background, or culture to help determine the best course of action.

40 Twelfth Annual Report, supra note 2, at 3.
42 This issue was particularly challenging in the trial of Slobodan Milosevic, who maintained a strategy “not of disruption, but of perversion” by using the court’s own rules to serve as a bully pulpit to put forth his view of history. Hazan, supra note 5, at 161.
43 This challenge of what norms or rules should govern attorney conduct has an interesting parallel in the United States, where judges in federal courts generally, but not always, rely on the rules of conduct of the state in which the court sits. See Judith A. McMorrow, The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. Rev. 3, 6 (2005).
Even as norms slowly emerged, as discussed below, there was a steady turnover of judges and counsel. At any one time there are fourteen permanent judges, who are elected by the U.N. General Assembly for a four-year term and eligible for re-election. The judge pool can also include up to nine ad litem judges drawn from a pool of judges elected by the General Assembly. They may serve for only a single four-year term. This system assures that at least one-third of the judges turn over every four years. There is no systematic requirement for turnover of prosecutors or defense counsel, but there appears to have been a regular movement of lawyers in and out of those roles. For example, four individuals have served as the chief prosecutor. The pool of defense counsel has also turned over. Each time there are new prosecutors, defense counsel, or judges, self-education begins anew. Because of both the disparate legal cultures and turnover, socialization through shared norms could not act as a strong harmonizing force at the ICTY.

Shared educational experience has more subtle effects. In the United States, the prosecution and defense counsel may have gone to the same school and had the same professors. Even if they did not share that common bond, they still had similar educational experiences. In addition, they might live in the same community, vote in the same political election, and be exposed to the same pop culture. They often belong to the same bar association or Inns of Court, which provides opportunities to interact outside the courtroom. If they talk outside of the office, they can sometimes build bonds of connection so that they do not see the opposing counsel as just a “hack,” the usual disparaging caricature for defense counsel, or “zealot,” the usual disparaging caricature of a prosecutor.

45 Id. at 13 ter.
47 See Martha Walsh, The International Bar Association Proposal for a Code of Professional Conduct for Counsel Before the ICC, 1 J. Int’l CRIM JUST. 490, 494 (2003) (noting of the ICTY that “appearances before the tribunal are more irregular compared with either national bars or indeed more established international tribunals, thus lessening ‘gentleman’s peer pressure’ to comply” with a Code of Conduct).
48 The World Bank’s Legal and Judicial Diagnostic of the Federal Republic of Yugoslavia identified the value of conversation:
Too much cozy interaction of the prosecution and defense sometimes raises a question of collusion—that the legal system is just a big club of insiders.49 This is a special danger in the war crimes tribunals, which require credibility in the world community if the decisions of the war crimes tribunals are to have long-term effect. The ICTY is creating important human rights law that will help shape international norms if the legal standard applied, and the factual findings on which it is based, are deemed credible.50 The ICTY decisions are further developing the jurisprudence of crimes against humanity,51 law of genocide,52 command responsibility,53 and rape as a war crime.54 The ICTY already faces a high hurdle in maintaining credibility as it survives political pressures, diplomatic exigencies, increased demands for efficiency, conflicting goals, and ambivalent support.55 If the ICTY is seen as an insider’s club, then the legal determinations will have less credibility in the world community. Creating sharp separations among judges, prosecutors, and defense counsel helps assure that each unit functions independently and without collusion. Providing a mix of lawyers from a variety of legal traditions also prevents the appearance of capture from any one or two nationalities. The ICTY has the additional challenge of establishing credibility within the former Yugoslavia. This lack of credibility can flow not just from perceived victor’s justice, but also from a perception (and,

An association of the entire legal profession, including lawyers in private practice, the government, the judiciary and the academia, should effectively promote the interests of the entire profession and improve legal culture through facilitating communication and cooperation among jurists, providing a forum for discussion of topical issues in legislation, legal practice and legal reform, and organizing educational and public information initiatives.


50 See McClelland, supra note 5, at 10.

51 Guenael Mettraux, International Crimes and the ad hoc Tribunals 147 (2005) (“The [ad hoc] Tribunals have had an immense influence on the law of crimes against humanity, turning a set of abstract concepts into a fully fledged and well-defined body of law.”).

52 Id. at 199–202.

53 See McClelland, supra note 5, at 5–10.

54 See generally Richard P. Barrett & Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 (2003) (discussing the evolution of rape as a war crime).

even worse, the reality) that the Tribunal is directly or indirectly protecting State leadership from prosecution. 56

Too little interaction among prosecutors, defense, and judges, however, risks demonization of those playing a different role. 57 The ICTY appears to be a system of relatively little professional interaction with prosecutors, defense, and judges outside of the courtroom. In addition to the cultural divides that might exist, there is no common bar association. 58 Prosecutors, judges, and defense counsel must be fluent in either English or French, with some leeway for defense counsel. 59 Particularly where defense counsel is primarily skilled in the language of the accused, language barriers may impair the ability to communicate outside the courtroom. Yet in some ways, the ICTY work setting might unintentionally cause insufficient respect for boundaries between roles. Many of the lawyers at the ICTY are young expatriates who are living in a relatively small community, which raises a concern that information might not be as secure as one would wish. 60

The structure of the ICTY encourages the separation of roles, at least between prosecutor and defense counsel. The ICTY is organized as a three-legged stool with a Registrar who oversees the administration of the tribunal, judges, and prosecutors. Individuals who work in

56 The contempt judgment against Milan Vujin sets out accusations by a journalist that the Serbian legal profession was protecting state leadership at the expense of individual defendants at the ICTY. Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 111–112 (Jan. 31, 2000). That two of the most prominent defendants, Ratko Mladic and Radovan Karadzic, are still at large eleven years after the massacres at Srebrenica reinforces this perception that the world community is not truly committed to bringing perpetrators to justice. Yet another dimension is concern by Dutch authorities “about attempts by Bosnian, Croat, and Serb spies to infiltrate the tribunal.” Hazan, supra note 5, at 181.

57 Dominic Raab, Legal Advisor to the British Embassy in The Hague, has argued that independent functioning also “has undermined the development of any coherent and collective responsibility within the ICTY.” In his critique he focuses on “the three organs of the Tribunal—the Chambers, Registry and [Office of the Prosecutor].” This structural choice places the defense function as a subset of the Registry rather than as an independent and coequal concern. Raab, supra note 2, at 98.

58 A natural tendency would be for those ICTY lawyers with a shared language (English, French, or Serbian, for example) to gravitate toward similar social settings. Anecdotal evidence suggests this is true.


60 Interview with ICTY prosecutor #4, in The Hague, Netherlands (May 15, 2006) (notes on file with author).
these three branches are all U.N. employees and work in the same building. This structure is vintage civil law model, in which you would expect close interaction between judges and prosecutors. Since the procedural rules are heavily adversarial, however, the ICTY has created separation of the judge and prosecutor function within the building.

Defense counsel are separate and are not officially recognized as part of the ICTY. As such, the ICTY annual report has no section discussing the defense function. Any defense issues are filtered through the Registrar, who has primary responsibility for assuring a defense function. Because most defendants cannot afford lawyers, legal fees for indigent defendants—who make up ninety percent of all defendants—are paid by the Registrar. Defense counsel are housed away from the main ICTY building and are provided small offices in the ICTY building to use during trial. Only in the last few years have defense counsel had access to the ICTY cafeteria without requiring a security escort. These issues reflect the growing pains of a new tribunal. They also reinforce a social isolation of defense counsel.

The ICTY professionals do not appear to have systems of talking to each other concerning professional issues on neutral territory—no international court bar association and no regular in-house conferences. The relentless pressure of high-stakes litigation appears to absorb the energy of all participants, keeping them in their respective roles during long workdays. There are conferences around the world about war crimes, but as one defense counsel stated, “[W]e don’t usually get invited to the table.” You can understand how easily the defense function gets marginalized. The nobility in prosecuting a war criminal is evident. You have to believe fundamentally in the rule of law to see the nobility of giving vigorous defense to people charged with war crimes.

A passionate justification of the defense function is beyond the scope of

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61 R. P. & Evid., supra note 59, at 44, 45, 45(c).
62 See Tolbert, supra note 3, at 976 (“[F]or those who have visited the ICTY, one can hardly fail to notice that in its very physical layout, with the Prosecutor and Court located ‘cheek by jowl’ and defense counsel situated generally offsite, there is perhaps a metaphor where the defense fits into the scheme of things.”).
63 Telephone Interview with ICTY defense counsel #2 (Mar. 23, 2006) (interview on file with author).
64 This challenge to representation is particularly difficult for lawyers with a strong faith, political, social, or gender identity. For a fascinating analysis of the challenges of being a Jewish lawyer representing a Muslim defendant charged with terrorism, see Amy Porter, Representing the Reprehensible and Identity Conflicts in Legal Representation, 14 Temp. Pol. & Civ. Rts. L. Rev. 143 (2004) (exploring the question of “why you?”).
this Article. Nevertheless, it is necessary to note that history is replete with scapegoats—people who were assumed to be bad because they were too close to the bad actors or were socially undesirable. You need full processes that test the facts to make sure that we have not fallen into the same wrong. Without a credible and vigilant defense, there is a risk that war crimes tribunals become victor’s justice and a predominantly political rather than legal body. Indeed, eight defendants have been acquitted at ICTY trials.

The disparate legal backgrounds of the legal actors at the ICTY and the need for strict separation of functions means that socialization—the creation of shared norms through common background and reinforced through social interactions—does not appear to be a strong source of norms at the ICTY. There are too many different actors from too many different legal cultures, and it is not clear how much they are talking across roles (i.e., defense talking to prosecutors, prosecutors to defense, etc.).

B. The Market

In the United States, the market also serves as a source of norms for attorney conduct. Client selection gives preference to certain kinds of lawyering services or styles, although we can concede it is an imperfect market. In other words, lawyers who offer certain kinds of services and behave in certain ways will attract certain kinds of clients. Certain practices will thrive, others not. As with social norms, the market serves like a sheep dog, setting the outer boundaries for lawyering.

A market analysis of client choice obviously does not work as we consider prosecutorial ethics because the chief prosecutor hires prosecutors. While in theory the defense side could have market

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65 Flaws in the adjudication process have made some of these cases legendary. See generally Haywood Patterson & Earl Conrad, Scottsboro Boy (1950).

66 See ICTY at a Glance, supra note 1 (follow “Key Figures” hyperlink).


68 During the early years of the ICTY the Tribunal received very little financial support from the United Nations for its work. To fill the gap, for a two year period beginning in 1994, the United States placed twenty-two high-level functionaries (analysts, specialists, and lawyers) at the disposal of the Tribunal. This group served as the core of the Office of the Prosecutor. Hazan, supra note 5, at 52.
forces shaping attorney conduct, the ICTY defense practice is not an open market where client selection can trump. Over ninety percent of the defendants have appointed counsel, which generally limits their choice to counsel on an approved list. Qualifications to be placed on the list are relatively low. Counsel must be admitted to practice in any country (or have a position as a university professor), and be proficient in English or French, the two official languages of the tribunal. Language proficiency can be waived with approval of the court in the interests of justice. In addition, defendants can request lawyers from the list—so a certain market thrives—and those requests appear to be honored as long as a conflict is not present. The ICTY tribunal sits in The Hague, however, remote from the former Yugoslavia and from centers with pools of highly trained advocates. Initial compensation for assigned counsel was too low to provide even subsistence to defense counsel, but it has improved significantly.

This small, closed market did give rise to a serious attorney conduct issues in the early days of the ICTY, when there were some instances of fee sharing by lawyers and clients. Because defense fees are set based on a world market, legal fees paid to U.S. lawyers might be seen as fairly modest, while the same fees paid to a lawyer from a less affluent country could be huge financial benefit to the defense lawyer. As a result, some clients requested a certain lawyer if the lawyer agreed to kick back some of the legal fees, either through direct payment or by hiring a member of the defendant’s family to serve on

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69 Ellis, supra note 7, at 972.
70 R. P. & Evid., supra note 59, at 44 (Appointment, Qualification and Duties of Counsel).
71 See, e.g., Prosecutor v. Kupreskic, Case No. IT-95-16-T, Decision on Defence Requests for Assignment of Counsel (Mar. 10, 1998) (authorizing the Registrar to allow counsel of choice even though counsel does not speak the languages of the Tribunal, on condition that counsel seek co-counsel who speaks one of the working languages).
72 Ellis, supra note 7, at 963. The minimum qualifications drew David Tolbert, former Chef de Cabinet to the President and Senior Legal Adviser to the Registrar at the ICTY, to state that, “in practice, the right to choose counsel has reigned supreme for all accused.” Tolbert, supra note 3, at 978.
73 Ellis, supra note 7, at 951–54.
the legal team. Fee splitting, and the perception of the practice, had a very negative effect on the credibility of the Tribunal when the accused flourished financially from the trial. In addition, fee splitting was identified as prolonging ICTY proceedings and encouraging bill padding. In the short term, the problem was addressed on a case-by-case basis by judges, who penalized lawyers for submitting frivolous motions. In the long term, the issue was addressed by forbidding the practice in the Defense Counsel Code of Conduct, discussed below. In effect, this intervention served as a market correction.

As with U.S. tribunals, the ICTY has limited a defendant’s ability to change counsel once assigned. In particular, claims of breakdown in communication and lack of trust in counsel alone does not justify removal of counsel. While the ICTY has a clear interest in preventing manipulation of the process by defendants, this issue presents a challenge to all involved. Trust is a long-standing and legitimate aspect of the attorney-client relationship in the United States, and a breakdown in trust is of serious concern. This issue is particularly acute where the defendant denies the legitimacy of the Tribunal. For example, Slobodan Milosevic was initially allowed to represent himself. Due to Milosevic’s ill health, the Trial Chamber assigned counsel, who had previously acted as amici curiae for Milosevic. When Milosevic refused to cooperate with the assigned counsel, they moved to withdraw, but the Tribunal denied their motion. The President of the ICTY, who affirmed the denial to withdraw, was rather curt in advising counsel: “Representing criminal defendants is not an easy task. Assigned Counsel would do well to recognize that fact, to realize the breadth of activities that they can carry out... and continue making the best professional efforts on his behalf that are possible under the

75 Id. ¶¶ 16-44; see also Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Decision (July 8, 2002) (withdrawing legal aid to Zoran Zigic after investigation revealed that defendant had received substantial means by cash transfers from defense team).
76 See Fee Splitting Report, supra note 74, ¶ 42.
77 See id. ¶ 68.
78 See Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶¶ 115–121 (July 3, 2003) (denying accused’s request to force withdrawal of counsel).
79 See id. ¶ 120.
80 Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 11 (Nov. 1, 2004) (holding “defendants have a presumptive right to represent themselves before the Tribunal”).
circumstances.”\textsuperscript{81} The accused’s preferences played no role and without the ability to act upon preferences, there can be no market factor in regulating attorney conduct.

C. Malpractice

In the United States, malpractice lawsuits are an additional source of norms as courts identify specific fiduciary obligations of attorneys. Malpractice is an omnipresent concern for solo practitioners and lawyers who practice in large firms.\textsuperscript{82} For example, it only took a few malpractice suits arising from a lawyer serving the board of director of clients, or the fear of such suits, to cause many firms to forbid lawyers from being both lawyer for a corporation and serving on that corporation’s board of directors.\textsuperscript{83} Some malpractice insurers have also imposed “best practices” on the law firms they insure as part of a loss-prevention program.\textsuperscript{84}

Malpractice, however, has never been a vibrant source of attorney conduct norms in criminal cases. Prosecutors in the United States are generally immune from suit.\textsuperscript{85} For most criminal defendants, malpractice does not offer a meaningful source of norms.\textsuperscript{86} We would anticipate the same problems for ICTY defendants who had poor counsel. If it would be hard in the United States for a criminal defendant to bring and win a malpractice claim against his or her attorney, imagine someone accused of war crimes coming into court and complaining about inadequate representation. They would not make very sympathetic tort defendants. Jurisdiction and choice of law issues would be painfully complex. Not surprisingly, there does not appear to have been any malpractice claims brought against a defense counsel practicing before

\textsuperscript{81} Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, ¶ 13 (Feb. 7, 2005).


\textsuperscript{84} See id. at 38 (describing Attorney’s Liability Assurance Society’s vigorous loss prevention program).


\textsuperscript{86} Criminal defendants seek reversals of convictions as their first remedy. See Judith A. McMorrow & Daniel R. Coquillette, \textit{The Federal Law of Attorney Conduct}, Moore’s Federal Practice § 813.01 (3d ed. 2006). Malpractice is a poor substitute if the conviction is not overturned. The ICTY limits a defendant’s ability to introduce new evidence on appeal to circumstances in which the evidence could not have been discovered through the exercise of due diligence. R. P. & Evid., supra note 59, 115 (Additional Evidence).
the ICTY. As in the United States, malpractice is a source of norms only in civil cases.

D. Self Regulation—Codes of Conduct

1. Overview

Codes of conduct for attorneys imposed as part of a licensing system are another important source of norms. Jurisdictions have varying regulatory frameworks for lawyers. Foreign lawyers are often surprised to learn that the United States maintains a long-standing, decentralized state-based licensing of lawyers. U.S. lawyers must pass a state bar exam, demonstrate that they meet the requirements for the character and fitness threshold, and be sworn into the bar. As a requirement to practice, the lawyer is required to abide by the Rules of Professional Conduct of the state in which the lawyer is admitted. Because over forty states base their Rules of Conduct on a Model version, there is strong commonality among the lawyer codes, with some subtle variations. These rules of conduct have significant force since failure to abide by them can cause the lawyer to lose his or her license to practice law. This is a powerful sanction, but as a practical matter is used only for rogue actors. Data on disbarment suggests that rates of suspension from practice and disbarment have increased somewhat in recent years, but still represents a very small percentage—far less than one percent—of licensed lawyers. Experience of other countries, including the bar dis-

87 Telephone Interview with Gregor Guy-Smith, President, Ass’n of Def. Counsel of ICTY (ADC) (Mar. 23, 2006) (notes on file with author) (stating he was not aware of any malpractice suits). The ADC opposed a draft provision in the International Criminal Court’s proposed Code of Conduct that would require liability insurance. They noted:

Finally, the obligation with regard to professional liability insurance is clearly misplaced in a Code of Conduct. In addition, as a practical matter, is has to be taken into consideration that professional liability insurance is extremely expensive in some States (e.g. in the United States), and in many other countries is impossible to obtain. Therefore such a provision would be an impediment to representation by people from many countries and be prohibitively expensive for many criminal practitioners.


disciplinary process of the former Yugoslavia, is similar. Nevertheless, codes of conduct serve as a theoretical floor for lawyer conduct.

The ICTY requires that counsel be licensed in their home jurisdiction, but initially did not require their lawyers to conform to any additional codes of conduct. It took more than ten years for the ICTY to create an enforceable code of conduct.

2. Defense Counsel

The first movement toward a code of conduct for ICTY attorneys emerged on the defense side. The impetus for a code of conduct, and a body to enforce it, is fascinating. The Registrar initially created a Code of Conduct for defense counsel in 1997, with the assistance of an advisory panel. It initially functioned as largely precatory. In addition, the Code of Conduct was drafted by the judges, which meant that the Code drafting process itself did not become a strong source of norm creation.

It is not surprising that the Registrar took on the initial role of creating a code of conduct for defense counsel since the Registrar is impliedly authorized under the rules of procedure to ensure that only qualified practitioners appear before the court. Defense counsel have serious challenges to collective action at the ICTY. While prosecutors work full-time for the Tribunal, defense counsel are hired on a case-by-case basis, and many maintain a legal role in their home jurisdiction. Defense counsel may not have the time, travel flexibility, or financial resources to invest in improving the community of defense counsel when they are intensely involved, but often for only one or two cases. Certainly in the waning days of the ICTY, with its express

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90 World Bank Legal Report, supra note 7, at 52 (describing regulatory framework, noting that “many attorneys believe the disciplinary system to be very weak”).

91 It is interesting to note that the early efforts to create a code of conduct at the International Criminal Court (ICC) were criticized as “premature.” See Walsh, supra note 47, at 500. The ICC process had the benefit of two modern criminal courts—the ICTY and the International Criminal Court for Rwanda—to draw upon.

92 Tolbert, supra note 3, at 985. Rule 46(c) now establishes the authority of the registrar: “Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for Defence Counsel.” R. P. & Evid., supra note 59, at 46(c); see also Walsh, supra note 47, at 492–96.

93 Ellis, supra note 7, at 966–67.

94 See Bohlander, supra note 41, at 82.
and controversial “completion strategy” underway, such a community of interest is unlikely to emerge.  

In 2002, nine years into the work of the ICTY, the Association of Defense Counsel Practicing Before the ICTY was born.  

Most intriguing is the impetus for this organization. It was the judges who created this entity. As the Association of Defence Counsel-ICTY states:

The Judges felt that there was a need to have an association which could first ensure a higher quality for defense counsel and make collective representations to the organs of the Tribunal on behalf of all Defence Counsel involved in cases. Moreover, it was necessary to have such an association in the context of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal the Judges adopted and its associated Disciplinary mechanism.

The Judges adopted modifications to the Rules of Procedure and Evidence, making membership of a recognized association of counsel a necessary requirement to be put on the so-called Rule 45 List (list of qualified counsel). This requirement can be found in Rule 44.  

This Association of Defense Counsel (ADC) was intended to facilitate collective action by defense and serve as a regulatory body to identify and expel rogue actors who failed to comply with the Code of Professional Conduct for Counsel Appearing Before the ICTY. The ADC has a disciplinary committee and a procedural apparatus to determine if a lawyer has violated the Code of Conduct. Like the U.S. experience, there have not been a flood of cases. Since inception, three cases have been brought to the ADC disciplinary committee. The cases are confidential, so we do not know the facts, circumstances, or outcomes. Without public disclosure of the resolution, or at least disclosure

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95 See generally Raab, supra note 2 (explaining and evaluating the ICTY completion strategy).


97 Id.

98 A similar model exists in the United States in states with an integrated bar, where the state “bar association” also serves as the licensing body for lawyers. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 36–38 (1986).

99 Email from Peter Murphy, Chair of Disciplinary Committee of ADC to Judith McMorrow, Professor of Law, Boston College Law School (Mar. 22, 2006 18:33 EST) (on file with author).
among the ICTY practitioners, the findings will not be a strong source of norms.

Because the Code of Conduct reinforces the counsel’s role, it is infused with the value judgments of the procedural system adopted by the ICTY, which is heavily adversarial. The Code of Conduct creates a client-centered relationship that requires the lawyer to counsel the client and abide by the client’s decisions concerning the objectives of the representation (unless they would otherwise violate the Code). The lawyer retains the power to determine the means by which the objectives are pursued. The Code of Conduct contains express provisions on confidentiality, conflict of interest, conduct before the Tribunal, responsibility of supervisory and subordinate counsel, and the like. The U.S. influence on the ICTY Code of Conduct is apparent, and not surprising given the adversarial model that predominates at the ICTY.

We can garner some insights into the Defense Counsel’s view of the Code of Conduct by their comments to the International Criminal Court’s proposed Code of Conduct. The ADC embraces the concept of a statement of norms and appears to embrace the core content of the Code. At the margins, they disagree with specific issues, including the obligation to inform the Registrar if a client requests fee splitting. The obligation to the client’s interest above all still does not sit well for the ADC, suggesting an adversarial excess.

In the end, however, the ICTY has already confronted the problem that U.S. courts have discovered. A Code of Conduct often has general norms that require courts and context to bring them to life. Consider Article 27 on Obligations of Counsel to Others:

100 ICTY Code of Conduct, supra note 15, art. 8 (defining the scope of representation).
101 Id.
102 See generally Bohlander, supra note 41 (explaining the U.S. influence on the ICTY Code of Conduct).
103 ICTY Code of Conduct, supra note 15, art. 18 (when client requested, induced, or encouraged fee splitting “[Counsel] shall advise their clients on the prohibition of such practices and shall report the incident to the Registrar forthwith”). A similar provision of the ICC Code imposing an obligation to inform the Registrar is criticized as “absolutely inconsistent with Counsel’s duty to act loyal and to respect the confidentiality of all information that becomes known to him in the course of his professional activity.” Stefan Kirsch, Draft Code of Conduct for Counsel Before the ICC 12 (2004), http://www.adcicty.org/documents/icc-codeconduct.pdf.
104 In criticizing the conflict of interest provision of the ICC draft code of conduct, the ADC commented that “[i]t is submitted that it might be excessive to require putting the client’s interests before counsel’s own interests or those of any other person, organization or State from Counsel.” Kirsch, supra note 103, at 13.
C. Counsel shall recognise the representatives of the parties as professional colleagues and shall act fairly, honestly and courteously towards them.\textsuperscript{105}

What does this mean? It requires specific circumstances to be interpreted. The judges are the actors in the position to provide an interpretation, or at least a reminder to the counsel that these values are required.\textsuperscript{106}

The open-textured nature of the Code of Conduct is demonstrated by a 2003 decision from the Trial Chamber on a motion to replace counsel. The ICTY Code contains an obligation to represent the client “diligently and promptly” and “keep a client informed about the status of a matter before the Tribunal.”\textsuperscript{107} The provision on Scope of the Representation states, among other requirements, that counsel shall (i) “abide by the client’s decision concerning the objectives of representation” and (ii) “consult with the client about the means by which those objectives are to be pursued, but is not bound by the client’s decision.”\textsuperscript{108} Vidoje Blagojevic (the accused) initially became dissatisfied with the appointment of co-counsel and eventually sought removal of his chief counsel.\textsuperscript{109} The Registrar declined to remove counsel and provided a written justification for the decision. The Trial Chamber then appointed an independent counsel to bring a motion to review the Registrar’s decision. The Trial Chamber’s opinion runs forty-two pages long and, in a detailed analysis unlikely to be seen from a U.S. courtroom, delves into the foundation of the right to counsel, including the relationship between the accused and his appointed counsel. The Trial Chamber evaluated whether counsel had met the obligations as required by the Code of Conduct. The Trial Chamber concluded that no act of misconduct or manifest negligence

\textsuperscript{105} ICTY Code of Conduct, supra note 15, art. 27.


\textsuperscript{107} ICTY Code of Conduct, supra note 15, art. 11 (Diligence), art. 12 (Communication).

\textsuperscript{108} Id. art. 8.

\textsuperscript{109} This decision leaves a lurking concern about what role the gender of the co-counsel played, since the accused complained that co-counsel was not a “strong person.” Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶ 36 (July 3, 2003). The Accused also sought to have a third person assigned as counsel, but lead counsel interviewed that third person and found that he lacked the necessary qualifications. Id. ¶ 84.
had occurred. Additionally, the Trial Chamber concluded that a client’s decision “to cease communication with counsel is not equivalent to counsel breaching their obligation to communicate and consult with their client.” The Trial Chamber also recognized that defense counsel “have an ethical obligation to promote trust and to build trust.” Rather than remove counsel, whom the Court concluded had not acted improperly, the Court appointed a legal representative for a fixed period to help improve relations between the accused and counsel. The Court was breathing life and context into the Code of Conduct.

Not just the interpretation but also the content of the Code of Conduct ultimately rests in part on the judges. Initially drafted under the auspices of the Registrar, Article 6 of the Code of Conduct states, “[u]nder the supervision of the President, amendments shall be promulgated by the Registrar after consultation with the permanent Judges, the Association of Counsel and the Advisory Panel.” This provision assures that the judges continue to play a central role in defining proper attorney conduct.

3. Prosecutors

The OTP issued Standards of Professional Conduct for Prosecution in 1999, under the leadership of Louise Arbour, then the Chief Prosecutor of the ICTY. The standards consist of a three page document, with fifteen statements, such as a duty to: “serve and protect the public interest;” “be consistent, objective and independent, and avoid all conflicts of interest;” “demonstrate respect and candor before the Tribunal;” “assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused;” “preserve professional confidentiality;” and “avoid communication with a Judge . . . about the merits of a particular case, except within the proper context of the proceedings in the case.” This document has been

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110 Id. ¶ 120.
111 Id.
112 Id. ¶ 121.
113 Id. ¶ 114, Disposition ¶¶ 1–3.
114 ICTY Code of Conduct, supra note 15, art. 6 (Amendment).
115 Prosecutor’s Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel, available at http://69.94.11.53/ENGLISH/basicdocs/prosecutor/pros_2.doc. At the time this Regulation was issued the Office of the Prosecutor directed prosecutions both at the ICTY and for the Rwanda Tribunal.
116 Id. ¶ 2.
noted a few times in ICTY opinions, to serve as a frame of reference or to reinforce what would constitute good practices.\footnote{117} For example, the Standards have been cited to suggest that the prosecution could use its own resources and persuasive power to facilitate an interview between defense counsel and a prospective uncooperative witness.\footnote{118} Unlike the Code of Conduct for Defence Counsel, however, it is not an officially embraced document of the ICTY.

The OTP is a powerful body whose actions reflect a vision of professional conduct. There appears to be little public discussion about a need for a more developed and publicly distributed prosecutorial code of conduct. The individual prosecutors are part of a unit—a bureaucratic structure that implements a more detailed screening of assistant prosecutors, periodic review, and term contracts—which perhaps provides more internal sanctioning and control of errant behavior than is available for defense counsel.\footnote{119} This is difficult to assess, however, because the internal functioning of the OTP is not transparent.

From my discussions with prosecutors, there is every indication that prosecutors care deeply about professional responsibility and discuss issues internally as they arise. The challenge for prosecutors, as with defense counsel, is that many structural choices have ethical consequences. Some prosecutorial issues overlap with political issues: what priority to give to prosecutions, indicting lower-level actors first as an effort to squeeze higher-level actors, individual charging decisions (such as charging only those items that are most likely to be proved), and plea bargaining and all its cultural and adversarial notions. The chief prosecutor of an international tribunal holds a very powerful po-

\footnote{117} Section one addresses the considerations used by the prosecutor in setting out the regulation. The important substantive comments include a statement that prosecutors “represent the international community” and that the standards “should promote principles of fairness and professionalism.” \textit{Id.} In addition, the considerations state that “the duties and responsibilities of the Prosecutor differ from, and are broader than, those of defense counsel.” \textit{Id.}

\footnote{118} Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 13, n.19 (July 1, 2003); see also Prosecutor v. Hadzihasonovic, Case No. IT-01-47-PT, Decision on the Prosecutor’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura (Mar. 24, 2002) (examining the Standards and refraining from answering the conflict issue presented to the court); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant’s Briefs (May 11, 2001) (citing Prosecutor’s Regulation No. 2 in describing prosecutor’s duty to assist in the administration of justice).

\footnote{119} Interview with prosecutor #3, in The Hague, Netherlands (May 15, 2006) (notes on file with author).
sition with comparatively little oversight.\textsuperscript{120} These decisions have not been immune from public criticism by commentators.\textsuperscript{121}

Even excluding issues that overlap directly with the political and legal goals of the Tribunal, there are still legitimate ambiguities that need to be addressed when merging legal cultures. As noted above, prosecutors should be concerned about how and when they can communicate with judges, issues of confidentiality, providing timely discovery, conduct during plea bargaining, trial conduct, and conflicts of interest (particularly when shifting roles from prosecutor to defense counsel).\textsuperscript{122} For example, in 2001 the Registrar allowed a former prosecutor to join a defense team, even though the lawyer “during his assignment with the Office of the Prosecutor . . . had provided advice, drafted documents on legal issues and assisted with two cases against accused relating to the central Bosnia region.”\textsuperscript{123} The Registrar placed the burden on the OTP to come forward with evidence of a conflict. The former prosecutor agreed to “respect the confidentiality of any information to which he had had access whilst working with the Office of the Prosecutor . . . .”\textsuperscript{124} While the Registrar and the lawyers involved agreed that the representation could not proceed if a conflict was present, that term was never defined. Under a U.S. understanding of conflict, the prosecutor would be prohibited from representing a defendant when the prosecutor had worked personally and substantially on the matter, unless the government agency involved gave its informed consent in writing.\textsuperscript{125} We do not have sufficient information from the public record to fully critique this decision. Certainly, the Registrar would have benefited from more detailed criteria on what constitutes an impermissible conflict of interest when a prosecutor moves to the defense function.

\textsuperscript{120} See Allison Marston Danner, \textit{Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel}, 55 \textit{Stan. L. Rev.} 1633, 1651 (2003) (arguing that the broad prosecutorial discretion of the U.S. independent counsel scheme is not a good foundation to reflexively object to the ICC); see also Danner, infra note 127.


\textsuperscript{124} Id.

\textsuperscript{125} \textit{Model Rules of Prof’l Conduct} § 1.11(a) (2) (2002).
The OTP is in the process of crafting a new code to set expectations about behavior. This process, however, is currently entirely an internal process. The prosecutor’s role is not crafted in isolation, however, but benefits from informed discussion. For example, significant policy issues arise from switching sides, and all those interested in a well-functioning Tribunal should at least have an opportunity to comment on these policy choices. The defense function can be enriched by employing individuals who understand the prosecutorial process, yet the prosecutor has a keen interest in assuring the integrity and confidentiality of its internal deliberations. Greater transparency and more input in rule development would itself aide the dialogue about roles.

4. Judges

While much has been written about the Code of Conduct for defense counsel at both the ICTY and the emerging International Criminal Court, very little has been written on the need for a code of judicial conduct. Judges would also benefit from written norms that clarify their role. As with both defense and prosecutor codes of conduct, this is no panacea, but a written code of judicial conduct would give new judges a common ground for discussion. It would help clarify what constitutes judicial independence and serve as a check on abuses and mistakes. A publicly developed document would allow both the prosecutors and defense to see more vividly how the roles of each of the three key units—prosecution, defense, and judges—are defined. The need is more acute because the actors are coming from a variety of legal cultures. With a completion strategy underway, it is probably too late for the ICTY to develop a code of judicial conduct, but the next tribunals may benefit from the simultaneous development of defense, prosecution, and judicial codes.

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127 Cf. Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 Am. J. Int’l L. 510, 511 (2003) (suggesting that “for the Prosecutor, good process should include the public articulation of prosecutorial guidelines that will shape and constrain his discretionary decisions”).
E. Rules of Procedure and Inherent Powers

1. Overview

The ICTY Rules of Procedure and Evidence, crafted and modified by the Tribunal judges, have several provisions that provide express or implied power to address attorney conduct issues. This is part of what Judge Patricia Wald identifies as the “soft law” of the Tribunal.\(^\text{130}\) Some rules establish the Registrar and judge’s control over entry into the ICTY defense function. Yet other rules deal with courtroom behavior, including the specific power to address obstructive behavior and contempt of court. A catchall concept of “inherent powers” also serves as a basis for addressing attorney conduct issues. Each of these powers is addressed below. They all have in common the dominant power of the judges to shape, directly or indirectly, the contours of attorney conduct.

2. Control over Entry

The judges and the Registrar hold the power of entry. Rule 44 governs the appointment, qualifications, and duties of defense counsel.\(^\text{131}\) Under Rule 44, the baseline requirements are minimal. Lawyers who appear before the ICTY must be licensed to practice in a state or be a university professor of law, have written and oral proficiency in English or French (or obtain a waiver), be a member in good standing of the ADC, have no disciplinary findings or criminal convictions, and not have provided false or misleading information in relation to his or her qualifications and fitness to practice.\(^\text{132}\) In addition, there is a catch-all provision stating that counsel “has not engaged in conduct . . . which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal . . . .”\(^\text{133}\) This latter provision was one of several of the qualifications that was added in 2004.\(^\text{134}\) These requirements allow the Registrar to exclude counsel with a history of misconduct. Even without express rules, the ICTY has also interpreted


\(^{131}\) R. P. & EVID., supra note 59, at 44(A) (“a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she . . . .”).

\(^{132}\) Id. at 44(A) (i)-(v), (vii).

\(^{133}\) Id. at 44(vi).

its inherent power to allow the Court to deny audience to an attorney who engages in significant misconduct.\textsuperscript{135} ICTY judges also have the ability under Rule 46 to “refuse audience to counsel for acting in an offensive, abusive, or otherwise obstructive manner.”\textsuperscript{136} Rule 46 provides an independent basis to deny counsel the right to practice.

Once an attorney has met the minimum standards to be eligible to practice before the ICTY, actually being assigned to an indigent defendant is a separate step.\textsuperscript{137} The ten percent of defendants who have means to pay for their own counsel do so. The remaining ninety percent of defendants are appointed counsel from an approved list. To be eligible for assignment, the lawyer must demonstrate additional qualifications, including competence in criminal law, international humanitarian law, or international human rights law, possess at least seven years of relevant experience, and be readily available for assignment.\textsuperscript{138}

As noted above, the defendant’s requests for appointment of counsel are typically honored, but once appointed the defendant will have less influence. Just as in the United States, barriers to entry do not attempt to harmonize values; entry requirements set a floor of behavior.

3. Contempt (Rule 77) and Inherent Powers

ICTY judges have express contempt power under Rule 77 and have used it against attorneys. Rule 77 contempt power is penal in nature and requires a beyond-a-reasonable-doubt standard of proof.\textsuperscript{139} Consequently, it is used only for the most egregious misconduct of “knowingly and wilfully interfering with the administration of justice.”\textsuperscript{140} The jurisprudence of contempt initially appears to be code-based. In its application to attorneys, however, the Tribunal has read this statutory contempt power through the lens of its inherent power

\textsuperscript{135} Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, ¶ 13 (Mar. 14, 2000).

\textsuperscript{136} See R. P. & Evid., supra note 59, at 46; see also Bohlander, supra note 41, at 83.


\textsuperscript{138} Id. art. 14.

\textsuperscript{139} Tribunal Statute, art. 15, cited in Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 16, 22 (Feb. 27, 2001); R.P. & Evid., supra note 59, at 77(E) & 87(A).

\textsuperscript{140} Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Judgment, ¶ 5 (Feb. 27, 2001).
to control the proceedings before it. As such, the emerging doctrine is judge-made and fluid.

The idea of the inherent power of the court is a well established doctrine in the United States, where the court’s inherent power is significant, although not unlimited.\textsuperscript{141} In the United States, the inherent power doctrine has been used to sanction attorneys for conduct even when there is a specific rule in place that addresses the same conduct.\textsuperscript{142} The ICTY has also recognized the inherent power necessary to assure the proper administration of justice. This power exists even in the absence of a procedural rule addressing this power, a conclusion that is startling to lawyers from a civil law tradition.\textsuperscript{143} It also appears that the ICTY is developing a strong doctrine of inherent powers similar to the doctrine as it has emerged in the United States.

Contempt proceedings have been initiated against three attorneys at the ICTY. In its seminal case on contempt, \textit{Prosecutor v. Tadic}, the Court created the framework for its contempt jurisdiction, while at the same time it sent a strong message that attorney misbehavior will be addressed. Vujin was accused of manipulating witnesses, putting forth evidence known to be false, as well as bribing witnesses. He was co-counsel for Dusko Tadic, the first defendant to appear before the Tribunal. Consequently, the underlying trial was a test of legitimacy for the Tribunal itself. The Court needed to clarify norms of conduct promptly. The Tribunal found attorney Milan Vujin’s conduct to be so egregious that it recommended the Registrar strike his name from the list of assigned counsel in accordance with Rule 45 of the Tribunals Rules of Procedure and Evidence, along with a further recommendation that his misconduct be reported to his national bar association. The Court expressly relied on a desire to both punish Vujin and deter other attorneys from similar conduct.\textsuperscript{144}

The other two cases of contempt against attorneys were more factually ambiguous situations. In \textit{Prosecutor v. Simic, Simic, Tadic, Todorovic},


\textsuperscript{143} Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 28 (Jan. 31, 2000).

\textsuperscript{144} Id. ¶ 168 ("The contempt requires punishment which serves not only as retribution for what has been done but also as deterrence of others who may be tempted to do the same.").
& Zaric, the Court conducted an extensive hearing to determine whether defendant Milan Simic and his counsel, Branislav Avramovic, had knowingly and willfully interfered with the administration of justice (i.e., committed contempt) by threatening and bribing a witness. Witness intimidation is an ongoing and serious concern at the ICTY. The Court took evidence and ultimately concluded that the uncorroborated evidence of a witness, who ultimately was found to lack the necessary credibility, did not support proof beyond a reasonable doubt.

In *Prosecutor v. Aleksovski*, defense counsel Anto Nobilo was found in contempt and fined for having revealed the identity of a protected witness. The Appeals Chamber ultimately overturned that finding on the grounds that Mr. Nobilo did not have actual knowledge that there was a witness protection order applicable to the witness and did not act with willful blindness to the fact that the witness was protected. While clarifying the legal requirements for knowing violation of a court order, two other dimensions of the *Aleksovski* opinion are worthy of comment. First, a concurring opinion by Judge Patrick Robinson gave advice to the prosecutor, stating that “unless there is evidence of *mala fides*, counsel should be given the benefit of the doubt, and the prosecutorial discretion should be exercised in his favour” and stating that contempt proceedings should not have been brought. Whether the prosecutor gave weight to that view is not known. The Appeals Chamber’s main opinion is also interesting for what it did *not* address. The Court did not delve into the underlying structural pressures that made such errors more likely to occur. Mr. Nobilo testified that “because of the prosecution’s practice of revealing the identity of its witnesses only forty-eight hours in advance, he was obliged to research everyone who might be a witness, and that he relied upon a number of sources for that information.”

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146 *Id.* ¶¶ 91–100.

147 *Le Procureur c/ Aleksovski*, Case No. IT-95-14/1 (Dec. 11, 1998). The Trial Chamber opinion is only in French. Consequently, details of the Trial Chamber findings are taken from the Appeals Chamber opinion of May 30, 2001 *infra* note 147.


149 *Aleksovski*, Case No. IT-95-14/1-AR77, ¶ 12.
time to prepare for and obtain full information on witnesses is certain-
tly a contributing factor to errors such as inadvertent disclosure of
a witness’ identity.\footnote{Later procedural changes now require prosecu-
tors to provide a list of witnesses six weeks prior to the pre-trial con-
ference. R.P. & Evid., supra note 59, at 65 ter (E).}

4. Response to Courtroom Activity

The ICTY judges also have the full range of power to consider
counsel’s conduct at every stage of a proceeding and can communi-
cate their concerns by direct order or gentle reminder. While finding
that attorney Vujin’s payments to a witness were not intended as a
bribe, the Court gave advice to future counsel that “it is unwise for any
lawyer to give gifts to a prospective witness, for whatever reason, be-
cause such a gift can so easily be misinterpreted—either by the witness
or by others.”\footnote{Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judg-
ment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 157(a), 158 (Jan. 31, 2000).} The Tribunal has also suggested that fees be withheld
for frivolous motions.\footnote{Prosecutor v. Kupreskic, Case No. IT-95-
16-A, Decision on Motions by Zoran Kupreskic, et al., for Leave to Appeal the Decision of the Appeals Chamber dated 29 May 2001
(June 18, 2001), available at http://www.un.org/icty/Supplement/supp25-
e/kupreskic.htm (“The Registrar is requested to consider withholding payment of any fees or costs involved in the preparation of manifestly ill-founded and frivolous Motions which constitute an abuse of the court process.”).}

Like their U.S. counterparts, the ICTY judges
have a distaste for broad accusations of misconduct\footnote{Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Decision on Motion to Seek
Leave to Respond to the Prosecution’s Final Brief, ¶ 16 (Sept. 28, 2004).}
and have been urged to have open communication and ascer-
tain the facts before making claims of professional misconduct.\footnote{Prosecutor v. Delalic, Mucic, Delic, and Landzo, Order Disposing of Defence Motion
http://www.un.org/icty/celebici/trialc2/order-e/71008de2.htm.}
The ICTY judges also must consider whether claims of misconduct are
made for strategic advantage.\footnote{See, e.g., Tadic, Case No. IT-94-1-A-R77, ¶¶ 117–118.}

Through these court pronouncements, judges indicate what con-
stitutes appropriate or inappropriate behavior. But the ICTY judges
have relatively little guidance on how to refine attorney conduct
norms beyond inferences from the rules of procedure and whatever
guidance is available from codes of conduct. Even within the U.S. ad-
dversarial system, judges have different levels of tolerance for adversar-
ial behavior of lawyers. Only through both case-by-case experience in litigation and conversation in professional settings outside the courtroom can a shared understanding of good practice be developed.

II. The Judges as Norm Setters

When analyzing how norms of attorney conduct are established in international tribunals, all roads lead back to the judges. As with U.S. courts, the judges at the ICTY have been the dominant source of creating norms of attorney conduct at the tribunal. Judges ultimately control the Code of Conduct for defense counsel. Indeed, they will likely control any Code of Judicial Conduct that might be created. While they do not control any incipient code of conduct for prosecutors, they also have no obligation to give deference to a solely internal document from the OTP. Judges control the procedures, which shape the institutional pressures that push lawyer conduct in certain directions. This inherent power allows the judges to fill in the blanks left in attorney conduct issues. In addition, judges signal lawyers through their rulings on motions and other interactions within the courtroom.

From the U.S. experience, this is obvious and almost inevitable. Despite the U.S. regime of fairly well-developed state schemes of regulation, litigation ethics has been overwhelmingly shaped by what judges will accept in their courtrooms. U.S. judges typically do not see themselves as the guardian of legal ethics—but rather as the guardian of a fair proceeding in the case before them. U.S. judges tend to be concerned about ethics issues if they affect the integrity of the proceeding before them. Efficiency is also a concern.

The ICTY judges appear to have a broader view of their role to assure legitimacy of the ICTY tribunal. The ICTY judges have captured their goals in a variety of cases, describing their role as “to guarantee and protect the rights of those who appear as accused before it” and “first and foremost [an] interest in an outcome that is just, accurate, and reasonably expeditious.” Their decision to intervene to question


159 Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, ¶ 11 (Feb. 7, 2005).
prosecutorial charging discretion, their willingness to create the ADC (rather than leave the issue solely to the Registrar), and sanctioning of attorneys all support a broader role. Some issues, such as fee splitting between defendants and counsel, may not directly affect the quality of the advocacy except to the extent that defendants are choosing counsel on their willingness to share fees rather than on their legal skill. The practice seriously undermines the integrity of the war crimes process by allowing defendants to benefit financially from being charged with a war crime. For that reason, the judges intervened.

Much of the judicial norm-setting reinforces some basic requirements of an adversary system, including an obligation not to present false statements, intimidate witnesses, or fail to protect the client’s interests in a legally appropriate manner. In the lengthy opinion on contempt charges against attorney Milan Vujin, the Court sent a clear signal that it will treat credible claims of misconduct—in that case intimidating witnesses—seriously. It demanded credible evidence and disregarded many pieces of evidence as hearsay. The Court was not hesitant to make findings of fact against an attorney. In assessing the credibility of an attorney, issues of character were clearly relevant. While character and virtue ethics may not be a dominant theme in the judicial discussions of attorney conduct, it percolates up in cases, such as Vujin and the separate opinion of Judge Jackson in the contempt proceeding against attorney Nobulo. Judge Jackson writes succinctly that:

No court can function efficiently without a relationship of trust between counsel and the judges. Counsel is an officer of the court, and in judicial proceedings quite often a court must act on counsel’s word, which, given as an officer of the

160 Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 130 (Jan. 31, 2000). The Court wrote:

[T]he appeals Chamber has also taken into account as relevant to the guilt or innocence of the Respondent the evidence which was given as to his character. Such evidence is relevant because it bears on the questions as to whether the conduct alleged to constitute contempt was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged.

Id.
court, is accepted as true, unless there is good reason to doubt his *bona fides.*\(^{161}\)

Trust can be demanded, but ultimately must be earned by all the professional actors in this drama—prosecutors, defense counsel, and judges.

**Conclusion**

A judge’s power is awesome. A claim of misconduct is deeply personal to most lawyers. It is interesting that having spoken with both prosecutors and defense counsel on this issue—hardly an empirical base, but worthy of some weight—both sides expressed frustration that judges seemed to come down hard on *their* side. This suggests that the judges have drawn a correct balance (no one is happy), or that perhaps there is room for further conversation.

It is striking that in the ICTY’s annual report, the Rules Committee consists of five judges and six non-voting members: two representatives each from the prosecutor’s office, the Registry, and the Association for Defense Counsel. Other than this Rules Committee, there appear to be no structural methods by which the major role actors—judge, prosecutor, and defense counsel—sit down and talk to each other about larger goals, issues, and tensions inherent in this system. Even supposedly structural enemies, like labor and management, get together on neutral turf periodically to talk with each other and humanize the enterprise.

What would happen if each of the three groups—judges, prosecutors, and defense counsel—brought in their top five most compelling structural issues and heard what the other side thought? What if each was to develop a series of “best practices” and obtain critiques from the opposing side? It is inefficient. It is risky (especially if you do not come to agreement). It needs to be done with great caution because of the concern that the ICTY might “capture” defense counsel. But the ICTY is furrowing the ground for future tribunals and it may be worth the enterprise. The impetus for such action is likely to be the judges because, in the end, the judges in litigation are the true gatekeepers of fairness.

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\(^{161}\) Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, Separate Opinion of Judge Patrick Robinson, ¶ 2 (May 20, 2001).
RULE 11 BIS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: REFERRAL OF INDICTMENTS TO NATIONAL COURTS

SUSAN SOMERS*

Abstract: The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia in an effort to restore peace and security to the region. The Tribunal is an ad hoc institution and has a limited existence. A Completion Strategy was established by the U.N. Security Council to bring the work of the Tribunal to a conclusion. An important aspect of this Completion Strategy is the use of Rule 11 bis to transfer certain cases from the Tribunal to national courts. This article looks at the background, process, and judicial determination of Rule 11 bis requests.

I. BACKGROUND TO RULE 11 BIS1 PROCEEDINGS

All cases indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) are by definition serious violations of international humanitarian law.2 The Tribunal’s status as an ad hoc institution established by the U.N. Security Council3 pursuant to Chapter VII,4 as a measure aimed at the restoration of peace and security to

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3 Id.; see Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 40 (Oct. 2, 1995) ("[T]he Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under
the region, therefore has a finite existence. A Completion Strategy—a schedule—was put in place with targeted deadlines for the discharge of the various stages of the Tribunal’s mandate.\(^5\) Requests under Rule 11 \(\textit{bis}\) to transfer certain cases indicted at the Tribunal to national courts offer one means of furthering implementation of the Completion Strategy.

\subsection*{A. The Process of Winding Down}

Security Council Resolutions 1503 and 1534 direct the ICTY to concentrate on the prosecution of the senior leaders under indictment\(^6\) and to refer the indictments of lower and intermediate level accused to national courts.\(^7\)

The selection by the Prosecutor for referral of cases does not minimize the seriousness of the crimes, but rather reflects the reality of the time limits. This requires determination of cases in which the level of the accused, i.e. lower or intermediate, and the gravity of the crimes alleged do not \textit{demand} that the case be tried before the Tribunal.\(^8\)

\subsection*{B. A Retreat from Primacy}

Referral under Rule 11 \(\textit{bis}\) represents a retreat from the Tribunal’s exercise of primacy as to certain cases for which it had already confi-

\footnotesize{\begin{quote}
\textit{Chapter VII of the Charter.}); \textit{see also id. \S 36 (“In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”).}
\end{quote}}

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\textit{6 See S.C. Res. 1503, supra note 5, pmbl. (“Recalling and reaffirming in the strongest terms the statement of 25 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions . . . .”).}
\end{quote}}

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\textit{8 Prosecutor v. Rajic, Case No. IT-95-12-PT, Prosecutor’s Further Submissions Pursuant to Referral Bench’s Decision of 8 September 2005, \S 4 (filed on Sept. 14, 2005) (“While these crimes are serious, the Prosecutor submits that they do not \textit{demand} to be tried at the International Tribunal, and that the gravity is compatible with referral.”).}
\end{quote}}
mediated an indictment. The Appeals Chamber stated, “It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region.”

At this stage of the Tribunal’s existence, the decision by the ICTY not to assert primacy with respect to indictments meeting the criteria of Rule 11 bis, but rather to affirmatively allow for the exercise of concurrent jurisdiction through referral to national courts, is key to meeting the Completion Strategy. This helps to ensure that those persons indicted by the ICTY for serious violations of international humanitarian law whose cases are not incompatible with referral will be brought to justice before the appropriate national court, notwithstanding the time constraints of the Completion Strategy.

II. Rule 11 bis Proceedings

Rule 11 bis (A) provides that case referrals must be made after an indictment has been confirmed, but prior to the commencement of trial. Even accused whose cases have been before the Tribunal and have already progressed into the pre-trial stage may be the subject of a referral. The panel of Judges who decide whether to refer under Rule 11 bis is called the Referral Bench, consisting of three Permanent Judges from the Trial Chambers. The Referral Bench exclusively determines Rule 11 bis requests, which may be pending simultaneously with proceedings in a Trial Chamber. The Trial Chambers, however, have tended to continue to adjudicate certain issues, such as amendment of the indictment or provisional release.

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10 Prosecutor v. Stankovic, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 bis Referral, ¶ 14 (Sept. 1, 2005).

11 R. P. & Evid., supra note 1, at 8 (Rule 11 bis (A)).

12 See id.

13 See Prosecutor v. Todovic, Case No. 97–25/1-AR11bis.1, Decision on Rule 11 bis Referral (Feb. 23, 2006) (co-accused Rasevic did not appeal).

14 Prosecutor v. Mrksic et al., Case No. IT-95-13/1-PT, Decision on Defence Motion for Provisional Release (Mar. 9, 2005). In paragraph 15 the Trial Chamber discussed the relevance of the pending request for referral with respect to provisional release, stating that
Rule 11 bis (B) provides that referral may be initiated either *proprio motu* by the Referral Bench, or at the request of the Prosecutor. Neither an accused nor a state has the *locus standi* to file a formal request to refer a case to that state. The cases which have been the subject of requests for referral are: *Prosecutor v. Radovan Stankovic* (to Bosnia and Herzegovina [BiH]); *Prosecutor v. Mitar Rasevic and Savo Todovic* (to BiH); *Prosecutor v. Zeljko Mejakic et al.*, (to BiH); *Prosecutor v. Mile Mrksic et al.*, (to Serbia and Montenegro or Croatia); *Prosecutor v. Rahim Ademi and Mirko Norac* (to Croatia); *Prosecutor v. Ivica Rajic* (to BiH); *Prosecutor v. Dragomir Milosevic* (to BiH); *Prosecutor v. Gojko Jankovic* (to BiH); *Prosecutor v. Pasko Ljubicic* (to BiH); *Prosecutor v. Milan Lukic and Sredoje Lukic* (to BiH); *Prosecutor v. Vladimir Kovacevic* (to BiH).

while not a new factor, “its relevance may well be to aggravate the risk that the Accused will not appear for trial.” *Id.*

15 R. P. & Evid., *supra* note 1, at 8. There is no provision in the Rule for an accused to initiate referral.


17 Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 bis Referral (Sept. 1, 2005) (referral to BiH was ordered).

18 Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 bis, ¶ 9 (July 22, 2005).

19 Case No. IT-02-65-PT, Decision on Prosecutor’s Motion For Referral of Case Pursuant to Rule 11 bis, ¶ 137 (July 20, 2005) (referral to BiH was ordered).

20 Case No. IT-95-13-1-PT, Decision on Prosecutor’s Motion To Withdraw Motion and Request for Referral of Indictment Under Rule 11 bis (June 30, 2005). The Prosecutor’s Motion to Withdraw Motion and Request for Referral of Indictment Under Rule 11 bis was granted. The case remained before the Tribunal.

21 Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (Sept. 14, 2005) (referral to Croatia ordered).

22 The accused pleaded guilty before the Trial Chamber and the Rule 11 bis request was withdrawn once sentencing occurred. See Case No. IT-95-12-S, Sentencing Judgement (May 8, 2006); Case No. IT-95-12-PT, Decision for Further Information in the Context of the Prosecutor’s Motion for Referral of the Case Under Rule 11 bis (Sept. 8, 2005).

23 Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 bis, ¶ 24 (July 8, 2005) (referral was denied and the case remained before the Tribunal).

24 Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 bis (July 22, 2005).

25 Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 bis, ¶ 53 (Apr. 12, 2006) (referral to BiH ordered).

26 Case No. IT-98-32-I, Decision on Prosecutor’s Motion to Suspend Consideration of Rule 11 bis Request (Dec. 15, 2005) (suspending consideration of the request until Milan Lukic has been transferred to the seat of the Tribunal).
Serbia and Montenegro);\textsuperscript{27} Prosecutor \textit{v.} Dragan Zelenovic (to BiH) (co-accused with Jankovic);\textsuperscript{28} and Prosecutor \textit{v.} Milorad Trbic (to BiH).\textsuperscript{29}

Pursuant to Rule 11 \textit{bis} (I), an appeal by the accused or the Prosecutor lies as a matter of right from a decision granting or denying referral. Rule 11 \textit{bis} proceedings form a unique aspect of the practice before the Tribunal. Consequently, it was necessary to establish time limits for appeals, which the Appeals Chamber proceeded to do in the Stankovic case.\textsuperscript{30} The Appeals Chamber described an appeal from a Rule 11 \textit{bis} decision as “more akin to an interlocutory appeal.”\textsuperscript{31} Accordingly, the relevant time limits for appeals under Rule 11 \textit{bis} (I) require that notice of appeal must be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced. Fifteen days after filing the notice of appeal, the appellant must file his brief. A party will have ten days to respond to the appeal brief and four days in which to reply to the response briefs.\textsuperscript{32} Appeals of Rule 11 \textit{bis} decisions come under the Expedited Appeals Procedure.

A. Judicial Determination of Rule 11 \textit{bis} Requests

1. Gravity of the Crimes Charged and Level of Responsibility of the Accused

Under Rule 11 \textit{bis} (C), the Referral Bench shall consider both the gravity of the crimes charged and the level of the responsibility of the accused. This assessment must be made along with a determination that there are sufficient indicators to satisfy the Referral Bench that the accused will receive a fair trial in the state designated for referral and that the death penalty will not be imposed or carried out, in accordance with Rule 11 \textit{bis} (B). The Referral Bench “will consider only

\begin{itemize}
\item \textsuperscript{27} Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11 \textit{bis}, ¶ 92 (Nov. 17, 2006). Following the recent independence of Montenegro, the case has been referred solely to Serbia.
\item \textsuperscript{28} As of publication, the accused has plead guilty before the Tribunal. Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 \textit{bis}, ¶ 105 (July 22, 2005).
\item \textsuperscript{29} Case Information Sheet, Milorad Trbic, at 3, available at http://www.un.org/icty/cases-e/cis/trbic/cis-trbic.pdf (decision by Referral Bench pending).
\item \textsuperscript{30} Prosecutor \textit{v.} Stankovic, Case No. IT-96–23/2-AR11bis.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, ¶ 12 (June 9, 2005) (“Because this is the first appeal from a decision by the Referral Bench, it necessarily involves some novel procedural issues with regard to the appropriate briefing schedule to be followed.”).
\item \textsuperscript{31} \textit{Id.} ¶ 16.
\item \textsuperscript{32} \textit{Id.} ¶ 18.
\end{itemize}
those facts alleged in the Indictment” and no additional factual determinations are made as to the allegations in the Indictment.

Referral is aimed at lower and intermediate level accused. A determination of the characterization of the level, however, is made in the context of a particular case and set of facts. For example, while the Ademi-Norac case involved two generals, the Referral Bench stated that “the level of responsibility should be interpreted to include both the military rank of the Accused and their actual role in the commission of the crimes.” The Referral Bench further stated that “[w]hether or not the gravity of these particular crimes is so serious as to demand trial before the Tribunal, however, depends on the circumstances and context in which the crimes were committed and must also be viewed in the context of the other cases tried by this Tribunal.”

The Appeals Chamber has stated that, “Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it.” Further:

The Referral Bench . . . considers that individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both de jure and de facto, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”.

Following a determination by the Referral Bench that the gravity of the crimes alleged and the level of responsibility of the accused are compatible with referral, it must then determine the state to which the case should be referred. In determining the appropriate state for refer-

33 Prosecutor v. Stankovic, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 bis, ¶ 18 (May 17, 2005); see also Prosecutor v. Mejakic et al., Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 bis, ¶ 20 (July 20, 2005).


35 Id. ¶ 28.


37 Prosecutor v. Milosevic, Case No. IT-98-29/1-PT, Decision on Referral of a Case Pursuant to Rule 11 bis, ¶ 22 (July 8, 2005). The Referral Bench denied referral in this case, involving a commander with the rank of general, who was charged with crimes occurring in the course of his 15-month command during the siege of Sarajevo.
ral, the Referral Bench relies on the greater nexus analysis.\textsuperscript{38} Rule 11 bis (A) provides for referral to the authorities of a State: (i) in whose territory the crime was committed; (ii) in which the accused was arrested; or (iii) which has jurisdiction and is willing and adequately prepared to accept such a case.\textsuperscript{39} The Referral Bench has rejected the notion that the options for referral listed in Rule 11 bis (A) reflect a hierarchy.\textsuperscript{40}

The Referral Bench is not bound by the state designated by the Prosecutor; it may \textit{proprio motu} decide to refer to other states.\textsuperscript{41} Further, citizenship has not been deemed to have a “significant relevance to the determination of the issue to which State should referral be ordered.”\textsuperscript{42}

2. Referral Is Not Extradition

Challenges to referral suggesting that it is “extradition” have been rejected:

The Referral Bench properly concluded that the treaty or national law governing extradition does not apply to prevent the referral of the Appellants’ case pursuant to Rule 11 bis of the Rules because, as with the initial transfer of the Appellants to the International Tribunal, their transfer to the State authorities under Rule 11 bis is not the result of an agreement between the State and the International Tribunal. The Appeals Chamber recalls that the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter. Accordingly, a State cannot impose conditions on the transfer of an accused, or invoke the rule of specialty or non-transfer concerning its nationals. The referral procedure envisaged in Rule 11 bis is implemented pursuant to a Security Council resolution, which, under the United Nations Charter, over-

\begin{itemize}
  \item \textsuperscript{38} \textit{Mejakic}, Case No. IT-02-65-AR11bis, Decision on Defence Appeal Against Decision on Referral Under Rule 11bis, ¶ 43.
  \item \textsuperscript{39} R. P. \& EVID., \textit{supra} note 1, at 8.
  \item \textsuperscript{40} \textit{Mejakic}, Case No. IT-02-65-AR11bis, Decision on Defence Appeal Against Decision on Referral Under Rule 11bis, ¶ 43.
  \item \textsuperscript{41} \textit{Id.} ¶ 41.
  \item \textsuperscript{42} Prosecutor v. Mejakic et al., Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 bis, ¶ 38 (July 20, 2005).
\end{itemize}
rides any State’s extradition requirements under treaty or national law.\textsuperscript{43}

3. Fair Trial Considerations

Rule 11 \textit{bis} (B) requires that the Bench must be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. General fair trial considerations include, but are not limited to, those listed in paragraph 68 and footnote 89 of the \textit{Mejakic} Referral Bench Decision.\textsuperscript{44}

4. Substantive Law to Be Applied

The Referral Bench in the \textit{Mejakic} decision held that it is not the “competent authority to decide in any binding way which law is to be applied. . . . That is a matter which would be within the competence of the State Court of Bosnia and Herzegovina . . . .”\textsuperscript{45} It is for the state court to determine the law applicable to each of the alleged criminal acts of the accused.\textsuperscript{46} The Referral Bench must be satisfied that “if the case were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework\textsuperscript{47} which not only criminalizes the alleged conduct of the Accused, but which also provides for appropriate punishment.”\textsuperscript{48}

III. Monitoring the Proceedings of Referred Cases

Rule 11 \textit{bis} (D)(iv) provides for the Prosecutor to send observers to monitor the proceedings in national courts. Although the language appears to be permissive, the Appeals Chamber has found that “the Referral Bench acted within its authority when it ordered the Prosecution to report back in six months concerning developments in the

\footnotesize
\textsuperscript{43} Id. ¶ 31.
\textsuperscript{44} Id. ¶ 68 (citing Article 21 of the Statute of the Tribunal and Article 14 of the International Covenant on Civil and Political Rights).
\textsuperscript{45} Id. ¶ 43.
\textsuperscript{46} Id. ¶ 63.
\textsuperscript{47} Protective measures for witnesses are an important aspect of the legal framework. Measures such as pseudonyms or facial or voice distortion, which may already be in place at the time referral is ordered, may also be included in the order granting referral as provided for in Rule 11 \textit{bis} (D)(ii). R. P. & Evid., \textit{supra} note 1, at 9.
\textsuperscript{48} Prosecutor v. Mejakic et al., Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 \textit{bis}, ¶ 43 (July 20, 2005).
The Referral Bench described the monitoring mechanism as one which:

enables a measure of continuing oversight over trial proceedings should a case be referred. Although the monitoring mechanism serves also to guarantee the fairness of the trial to the Accused, as repeatedly expressed by the Referral Bench and accepted by the Appeals Chamber, it was primarily created to ensure that a case would be diligently prosecuted once it had been referred.\textsuperscript{50}

Rule 11 \textit{bis} (F) provides that “the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.”\textsuperscript{51}

CONCLUSION

The challenge of meeting the projected dates of the Completion Strategy requires that the ICTY concentrate on those cases involving the most senior level accused charged with the most grave offences. The ICTY must equally ensure that the lower and intermediate level accused are brought to justice in the appropriate state courts. To that end, Referral under Rule 11 \textit{bis} has been and continues to be a significant tool.

\textsuperscript{49} Prosecutor v. Stankovic, Case No. IT-96-23/2-AR11\textit{bis}.1, Decision on Rule 11 \textit{bis} Referral, ¶ 55 (Sept. 1, 2005).

\textsuperscript{50} Prosecutor v. Ademi and Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 \textit{bis}, ¶ 57 (Sept. 14, 2005).

\textsuperscript{51} Rule 10 is entitled “Formal Request for Deferral.” This rule refers to grounds specified in Rule 9 and provides for deferral of investigations or proceedings where, \textit{inter alia}, a crime over which the ICTY has jurisdiction has been characterized in the courts of a potential referral State as an ordinary crime or where there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted. R. P. \& Evid., \textit{supra} note 1, at 7.
Abstract: This Article examines the Strugar decision and its role in establishing the standards for a defendant’s fitness to stand trial before an international tribunal. While fitness to stand trial was an issue in three cases at Nuremberg, those cases failed to establish any standards for the international criminal justice community. In contrast, the Strugar standards have been followed in other Trial Chambers at the International Criminal Tribunal for the Former Yugoslavia, and at The Special Panels for Serious Crimes at the United Nations Tribunal at East Timor. Therefore, the author argues that Strugar may be viewed as the seminal decision on the issue of fitness to stand trial before an international tribunal.

Introduction

In April of 2004, the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) held the first competency hearing in an international war crimes tribunal since Nuremberg. The hearing occurred during the trial of Major-General Pavle Strugar (of the former Yugoslavian People’s Army, commonly referred to as the JNA), who was charged with serious violations of international humanitarian law (war crimes) relating to the shelling of the Old Town of Dubrovnik in Croatia. The Trial Court’s decision provides precedent for future war crimes cases and tribunals.
I. Background

The Socialist Federal Republic of Yugoslavia (SFRY) was established after World War II by Josip Broz Tito. Tito bridged the SFRY’s economic, political, ethnic, and nationalistic problems until his death in 1980. After the SFRY tinkered on the verge of disintegration for a decade, the republics of Slovenia and Croatia declared independence for a decade, the republics of Slovenia and Croatia declared independence from Yugoslavia in 1991.4

Within Croatia, along the Dalmatian Coast, lies the City of Dubrovnik. It contains an ancient, walled city known as the “Old Town.” This ancient city has been described as the “jewel of the Adriatic” and had served as the most famous tourist attraction in the former Yugoslavia. It possesses over ten Catholic churches (including a cathedral and monasteries), a mosque, an Orthodox church, and the third oldest synagogue in Europe. It also has one of the oldest pharmacies in Europe, small museums, and the finest remaining walls or ramparts of any medieval city. The Old Town was recognized as a “World Heritage Center” by United Nations Economic, Scientific and Cultural Organization in 1979. The Old Town, however, is not a museum but a living city. Seven to eight thousand residents lived there and worked in its businesses, restaurants, shops, and cafes.5

A. Attacks on the Old Town

In the fall of 1991, the JNA maintained a naval blockade of Dubrovnik as well as a land siege of the area. JNA forces under the command of General Pavle Strugar began to shell the Old Town of Dubrovnik in October 1991. The October shelling was limited and the resulting damage was minimal. In November, however, General Strugar’s forces intensified the shelling of the Old Town. A television news team (from the International Television Network of Great Britain) filmed missiles being fired into the Old Town’s walls and the boats within its harbor. In November, the attacks emanated from the land and sea.

On the same day as an agreed-upon cease-fire, December 6, 1991, JNA troops launched an early morning attack on the Croatian fortress on Mount Srd, which overlooks the Old Town. The assault lasted for approximately ten hours, causing death and injury, as well as exten-

sive damage and destruction. The damage was widespread and included six buildings that were totally destroyed. In addition, statues, fountains, and religious and historic property were damaged.

As a result of this military action, General Pavle Strugar was charged with the crimes of (1) murder, (2) cruel treatment, (3) attacks on civilians, (4) devastation not justified by military necessity, (5) unlawful attacks on civilian objects, and (6) destruction or willful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments, and works of arts and science.6

II. The Trial

On the day prior to trial, the Defense unexpectedly requested a postponement and moved for an immediate medical examination alleging lack of fitness of the Accused to stand trial. The Pre-Trial Judge, following consideration of a number of factors, denied the motion.7 The Defense renewed the request the following day before the Trial Chamber. The Court refused to continue the matter and proceeded to trial.8 The Court, however, allowed the Defense to obtain its own medical expert to perform the allegedly necessary psychological tests without disrupting the trial.9

A. Defense’s Medical Expert

The Defense retained Dr. Dusica Lecic-Tosevski, a neuro-psychiatrist from Belgrade, Serbia to examine the Accused. She examined the Accused, reviewed his medical records, and had conversations with his family members. She concluded that the Accused suffered from somatic and mental illnesses including chronic renal failure, joint problems at the hip and knee, lower back pain, hearing impairment, and ringing in his ears.10 The Accused’s psychological problems included depression, vascular dementia, and posttraumatic stress disorder.11

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8 Strugar, Case No. IT-01-42-T, Transcript, at 259–60 (Dec. 16, 2003).
9 Strugar, Case No. IT-01-42-T, Transcript, at 490 (Dec. 19, 2003).
Dr. Lecic-Tosevski concluded that these illnesses would reduce his mental functions.\textsuperscript{12} She further testified that he had psychological problems, which resulted in a reduction in concentration and attention span as well as making him passive and apathetic.\textsuperscript{13} She reported that the dementia and post-traumatic stress disorder impaired his memory process, which resulted in his forgetting life’s important and traumatic events. The Defense expert also concluded that the Accused’s short-term memory was impaired and that his intellectual abilities had deteriorated significantly.\textsuperscript{14}

Although Dr. Lecic-Tosevski concluded that the Accused understood where he was, what was happening, the nature of the charges, and partially understood the consequences of the proceedings against him, she found that he could not participate at trial “at a high intellectual level.”\textsuperscript{15} She further concluded that he understood the roles of the personnel involved in the trial (the judge, prosecutor, and defense counsel), but could only plan his defense with great difficulty.\textsuperscript{16} The Defense expert’s overall conclusion was that the Accused did not meet the requirements of fitness to stand trial as defined in the \textit{New Oxford Textbook of Psychiatry}.\textsuperscript{17}

B. \textit{Prosecution’s Medical Experts}

The Prosecution retained three forensic psychiatrists (one of whom was Serbian/Croatian speaking) to examine the Accused. As part of their examination, the experts reviewed the Accused’s medical records, interviewed the guards and nurse at the United Nations Detention Unit, viewed videotapes of the Accused interacting with the judges, observed him during a court session, and conducted a two-day forensic examination. They focused their analysis on the Accused’s abilities and understanding in relation to the trial process. (In contrast, the Defense’s ex-

\textsuperscript{12} Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5632 (Apr. 29, 2004).
\textsuperscript{13} \textit{Id.} at 5633, 5638.
\textsuperscript{14} \textit{Id.} at 5637–8. \textit{See generally} Strugar Defense Exhibits D83 and D84.
\textsuperscript{15} \textit{Strugar}, Case No. IT-01-42-T, Transcript, at 5639 (Apr. 29, 2004). \textit{See generally} Strugar Defense Exhibit D84.
\textsuperscript{16} \textit{Strugar}, Case No. IT-01-42-T, Transcript, at 5639 (Apr. 29, 2004). \textit{See generally} Strugar Defense Exhibit D84.
\textsuperscript{17} The Expert indicated that the \textit{New Oxford Textbook of Psychiatry} states in part that “[t]he defendant should have the capacity to fully comprehend the course of the proceedings in the trial, so as to make a proper defence, and to comprehend details of the evidence” (emphasis added). \textit{See} Strugar Defense Exhibit D83, at 14. This is a misquotation of the standard/definition as provided in the textbook and will be discussed later in this Article. \textit{See id.}
pert considered the medical problems already possessed by the Accused and their alleged effect.\textsuperscript{18}

The Prosecution experts found that the Accused understood the nature of the charges against him and the roles of the persons involved in the trial, as well as the consequences of a conviction.\textsuperscript{19} They also found him to be quite intelligent.\textsuperscript{20} They reported that he was able to describe the circumstances surrounding the charges against him (which occurred over twelve years earlier) and portions of testimony from a hearing earlier in the day.\textsuperscript{21} A review of the trial videotapes indicated that the Accused was engaged in and would act appropriately during the trial.\textsuperscript{22} They observed that the Accused was perfectly able to communicate with the Court and answer its questions “with good decorum, with some eloquence even.”\textsuperscript{23}

The Prosecution experts concluded that the Accused’s physical illnesses did not “impact upon his cognitive abilities.”\textsuperscript{24} Additionally, they did not find him to be “passive”\textsuperscript{25} or diagnose him as having post-traumatic stress disorder.\textsuperscript{26} They concluded that he did not suffer from depression as a mental disorder; rather, that he had a depressed mental state, which is common to all persons at various times in life\textsuperscript{27} and especially common to prisoners.\textsuperscript{28} Finally, they concluded that the Accused possessed a mild form of dementia\textsuperscript{29} with no serious memory impairment.\textsuperscript{30}

C. Issues and the History of Fitness Hearings

Once the Prosecution and Defense filed their expert reports, the Court had several issues to consider. First, the Trial Chamber had to determine whether to hold a hearing, and if so, what type of hearing was needed. Further, there was no set of rules or law indicating: (1) the

\textsuperscript{18} See Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5631 (Apr. 29, 2004).
\textsuperscript{19} See generally Strugar Prosecution Exhibit P185.
\textsuperscript{20} Id.; Strugar, Case No. IT-01-42-T, Transcript, at 5681 (Apr. 29, 2004).
\textsuperscript{21} Exhibit P185; see Strugar, Case No. IT-01-42-T, Transcript, at 5682–83 (Apr. 29, 2004).
\textsuperscript{22} Strugar, Case No. IT-01-42-T, Transcript, at 5683 (Apr. 29, 2004).
\textsuperscript{24} Strugar, Case No. IT-01-42-T, Transcript, at 5520 (Apr. 28, 2004).
\textsuperscript{25} Strugar, Case No. IT-01-42-T, Transcript, at 5681 (Apr. 29, 2004).
\textsuperscript{26} Id. at 5689.
\textsuperscript{27} Id. at 5694–95.
\textsuperscript{28} Id. at 5684–85.
\textsuperscript{29} Id. at 5687, 5699–700.
\textsuperscript{30} Prosecutor v. Strugar, Case No. IT-01-42-T, Transcript, at 5703 (Apr. 29, 2004).
criteria to be considered for fitness; (2) which party has the burden of proof; or (3) the standard or level of proof. Significantly, the last hearings held before an international tribunal on the issue of fitness occurred almost sixty years earlier in Nuremberg.\(^31\)

During the Nuremberg trials, the issue of fitness to stand trial arose in relation to three defendants.\(^32\) The matters will be reviewed in the order of complexity, beginning with the least difficult.

At a pre-trial hearing on November 15, 1945, the attorney for defendant Julius Streicher requested that a psychiatric examination be performed on his client. Since the defendant did not want such an examination, he did not file a formal motion.\(^33\) On the following day, the Soviet Prosecutor filed a motion for a psychiatric examination of the defendant Streicher based on the request by Defense counsel and their concern over a strange statement made by the accused during a recent interrogation.\(^34\) The Tribunal ordered an examination of the defendant in order to determine the following questions:

1. Is he sane or insane?  
2. Is he fit to appear before the Tribunal and present his defense?  
3. If he is insane, was he for that reason incapable of understanding the nature and quality of his acts during the period of time covered by the Indictment?\(^35\)

Three physicians examined the defendant, and concluded that he was sane and fit to appear at the Tribunal and present his defense.\(^36\) Based on these findings, the Court ruled that the trial against the defendant proceed.\(^37\)

\(^{31}\) The most recent issue of fitness of note occurred in the extradition case of *The Kingdom of Spain v Augusto Pinochet Ugarte*. 39 I.L.M. 135 (Bos St. Mag. Ct. 2000). There, the court authorized the extradition of the defendant, but the British Secretary of State pursuant to his discretionary powers refused to send Pinochet to Spain on the grounds of his poor health. *Id.* at 140.

\(^{32}\) *See infra* notes 35–37, 42–46, 48–55.

\(^{33}\) *Proceedings, Preliminary Hearing, Thursday, 15 November 1945, in 2 Trial of the Major War Criminals Before the International Military Tribunal 22–23* (1947) [hereinafter *Trial of the Major War Criminals*].

\(^{34}\) *Motion of the Soviet Prosecution for a Psychiatric Examination of Defendant Streicher (Nov. 16, 1945), in 1 Trial of the Major War Criminals, supra* note 33, at 152.

\(^{35}\) *Order of the Tribunal Regarding a Psychiatric Examination of Defendant Streicher (Nov. 17, 1945), in 1 Trial of the Major War Criminals, supra* note 33, at 153.

\(^{36}\) *Report of Examination of Defendant Streicher (Nov. 18, 1945), in 1 Trial of the Major War Criminals, supra* note 33, at 154.

\(^{37}\) *Proceedings, Third Day, Thursday, 22 November 1945, 2 Trial of the Major War Criminals, supra* note 33, at 156.
The Defendant Gustav Krupp von Bohlen was seventy-five years old at the time of his indictment. Physicians from the United States military examined him twice in October of 1945.\textsuperscript{38} In the initial examination, a doctor found that he was “not mentally competent to stand trial.”\textsuperscript{39} Two weeks later, another physician concluded that the defendant “[had] lost all capacity for memory, reasoning or understanding of statements made to him . . . .”\textsuperscript{40} The doctors also agreed that transporting the defendant for trial could have endangered his life.\textsuperscript{41}

On November 4, 1945, Defense counsel filed a motion for postponement of Krupp’s trial based on his lack of fitness.\textsuperscript{42} A team of physicians examined the defendant and found that he suffered from “an organic cerebral disorder. . . . He remains uniformly apathetic and disinterested, intellectually retarded to a very marked degree, and shows no evidence of spontaneous activity.”\textsuperscript{43} Therefore, the team of physicians concluded that “he is incapable of understanding court procedure, and of understanding or cooperating with interrogation;” nor could he be “moved without endangering his life.”\textsuperscript{44}

At a hearing, three of the Prosecutors opposed the Motion, arguing either that he should be tried in \textit{absentia} or that the indictment should be amended by substituting his son (also a member of the family armaments business).\textsuperscript{45} The Tribunal rejected both requests and granted the postponement of the Accused Krupp von Bohlen’s trial until he became physically and mentally fit.\textsuperscript{46}

\textsuperscript{38} Medical Certificates Attached to Certificate of Service on Defendant Gustav Krupp Von Bohlen (Oct. 6, 1945), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 119–22.

\textsuperscript{39} Id. at 119.

\textsuperscript{40} Id. at 122.

\textsuperscript{41} Id. at 119, 122.

\textsuperscript{42} Id. at 120; Motion on Behalf of Defendant Gustav Krupp Von Bohlen for Postponement of the Trial as to Him (Nov. 4, 1945), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 124–26.

\textsuperscript{43} Report of Medical Commission Appointed to Examine Defendant Gustav Krupp Von Bohlen (Nov. 7, 1945), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 127–33.

\textsuperscript{44} Id. at 127.

\textsuperscript{45} Answer of the United States Prosecution to the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 12, 1945); Memorandum of the British Prosecution on the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 12, 1945); Memorandum of the French Prosecution on the Motion on Behalf of Defendant Gustav Krupp Von Bohlen (Nov. 13, 1945), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 134–41.

\textsuperscript{46} Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp Von Bohlen (Nov. 15, 1945), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 143; Order of the Tribunal Rejecting the Motion to Amend the Indictment by Add-
The issue of Rudolph Hess’s competency remains controversial. In fact, the Assistant of Chief Counsel, Telford Taylor, who observed Hess during trial, did not believe that he was fit to stand trial. The process began on November 7, 1945 when counsel filed a motion for an evaluation of the Accused’s fitness to stand trial. Counsel based his motion on the grounds that the Accused “has completely lost his memory” and could not provide any information in relation to the alleged crimes.

The Tribunal assigned a panel of ten physicians to determine “whether he is able to take his part in the Trial, specifically” addressing the following questions:

1. Is the defendant able to plead to the Indictment?
2. Is the defendant sane or not, and on this last issue the Tribunal wishes to be advised whether the defendant is of sufficient intellect to comprehend the course of the proceedings of the trial so as to make a proper defense, to challenge a witness to whom he might wish to object and to understand the details of the evidence.

The doctors filed three similar reports in which they agreed the defendant was not insane but had suffered a memory loss due to hysteria. They concluded his amnesia “will not entirely interfere with his comprehension of the proceedings, but it will interfere with his ability to make his defense and to understand details of the past which arise in evidence.”

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48 Motion on Behalf of Defendant Hess for an Examination by a Neutral Expert with Reference to his Mental Competence and Capacity to Stand Trial (Nov. 7, 1945), in 1 Trial of the Major War Criminals, supra note 33, at 155–56.

49 Order of the Tribunal Rejecting the Motion on Behalf of Defendant Hess, and Designating a Commission to Examine Defendant Hess with Reference to his Mental Competence and Capacity to Stand Trial (Nov. 24, 1945), in 1 Trial of the Major War Criminals, supra note 33, at 158.


51 Report of Commission to Examine Defendant Hess (Nov. 17, 1945), in 1 Trial of the Major War Criminals, supra note 33, at 160, 163–64. The American physicians further concluded that “there is a conscious exaggeration of his loss of memory.” Id. at 164.
The Court held a hearing concerning Hess’s fitness to stand trial.\textsuperscript{52} After hearing arguments from both parties, the Court provided Hess the opportunity to address them. Shockingly, Hess announced that he had been feigning amnesia for tactical reasons unbeknownst to his counsel and was ready to stand trial.\textsuperscript{53} The hearing was adjourned and on the following day, the Court ruled that Hess was fit to stand trial.\textsuperscript{54} Despite this ruling, the question of his competence was raised again during trial.\textsuperscript{55} Hess was ultimately convicted, sentenced, and years later committed suicide in prison.

As noted in these three matters, the Nuremberg Tribunal described some of the criteria for evaluating competency, but did not establish the burden of proof or evidentiary standards for such determination.\textsuperscript{56}

\section*{III. The Strugar Trial: The Necessity of a Fitness Inquiry}

The Trial Chamber’s decision in the \textit{Strugar} case consists of three sections.\textsuperscript{57} The first part concerns whether a court is obligated to evaluate the fitness of an accused when the question is raised, or alternatively, whether fitness for trial is even a requirement. After confirming the need to make a determination of fitness, the Court estab-

\begin{itemize}
\item \textsuperscript{52} Proceedings, Ninth Day, Friday, 30 November 1945, Afternoon Session, \textit{in 2 Trial of the Major War Criminals}, supra note 33, at 478–96.
\item \textsuperscript{53} Id. at 496.
\item \textsuperscript{54} Proceedings, Tenth Day, Saturday, 1 December 1945, Morning Session, \textit{in 3 Trial of the Major War Criminals}, supra note 33, at 1.
\item \textsuperscript{55} Report of Commission to Examine Defendant Hess (Nov. 17, 1945) \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 159–65; Report of Prison Psychologist on Mental Competence of Defendant Hess (Aug. 17, 1946), \textit{in 1 Trial of the Major War Criminals}, supra note 33, at 166–67. See generally J.R. Rees, \textit{The Case of Rudolf Hess: A Problem in Diagnosis and Forensic Psychiatry} (1948) (providing the medical reports of the doctors who examined and treated Hess from the time of his capture in 1941 through the trial).
\item \textsuperscript{56} The issue of fitness was also raised before the International Military Tribunal For The Far East in relation to the accused Shumei Okawa. On the first day of trial, Dr. Okawa struck General Tojo several times on the head. He was sent to a hospital for psychiatric examination and diagnosed with tertiary syphilis. He was declared unfit for trial. See John L. Ginn, \textit{Sugamo Prison, Tokyo: An Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a U.S. Participant} 25–26 (1992); see also 42 \textit{Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East} 19637–38 (R. John Pritchard ed., 1998) (after reviewing the findings of medical experts, the Court held that Okawa had not “recovered the intellectual capacity and judgment to make him capable of standing trial and of conducting his defense . . . .”).
\item \textsuperscript{57} Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings (May 26, 2004).
\end{itemize}
lished the standards for such a determination and then proceeded to apply the facts to these newly-created standards.

Initially, the Court noted that neither the Statute of the Tribunal (Statute) nor the Rules of Procedure and Evidence, refers to the fitness of an accused to stand trial. The Court, however, reasoned by implication that fitness for trial was mandated by the procedural rights provided by Articles 20 and 21 of the Statute. Specifically, these Articles provide that an accused is entitled to defend himself in person, to examine witnesses, and to have the free assistance of an interpreter. The Articles also require that an accused be provided with the assistance of counsel and that the Trial Chamber confirm that an accused understands the indictment.

The Trial Chamber explained that “[t]he enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity.” For example, the right of counsel may only be enjoyed if an accused “has the capacity to be able to instruct counsel sufficiently . . . .” Similarly, the right to defend oneself and examine witnesses presupposes the capacity to testify and understand the evidence as well as the purpose, course, and consequences of the proceedings. The Trial Chamber held that an accused must possess these capacities and be able to exercise them with the assistance of counsel in order to present his defense. They found that “any question whether the accused is fit to stand trial, i.e. has the necessary capacities, or is able with assistance to exercise them, should be determined by the Tribunal.”

58 Id. ¶¶ 19–49.
60 Id. art. 21(4) (d).
61 Id. art. 20(3).
63 Id. ¶ 22.
64 Id.
65 Id. ¶ 24. The Court further notes at paragraph 23 that “[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded, if an accused’s mental and bodily capacities, especially the ability to understand, i.e. to comprehend, is affected by mental or somatic disorder.”
66 Id. ¶ 25. In further support of its holding on fitness, the Court surveyed decisions from various national jurisdictions as well as the European Court of Human Rights. Id. ¶¶ 29–31 It noted that the principle that an accused be fit to stand trial enjoyed “general acceptance.” Id. ¶ 29.
Finally, the Court noted that trials in *absentia* are prohibited before the Tribunal and reasoned that requiring an accused to be present presupposes that he is able to assist in the presentation of his defense.67 Consequently, the presence of an accused who is incapable of understanding or following the proceedings or assisting in his defense would render the prohibition against trials in *absentia* “devoid of any substance.”68

A. The Standards

After determining that an accused must be fit for trial, the Trial Chamber established the standards for evaluating fitness. Initially, the Court held that a finding of incompetence may arise from either mental or physical illnesses.69 It emphasized, however, that “the issue is not whether the accused suffers from particular disorders, but rather . . . whether he is able to exercise effectively his rights in the proceedings against him.”70

The Court reasoned that it should evaluate certain capacities in order to determine whether an accused can exercise his rights provided under Articles 20 and 21 of the Statute.71 In determining the fitness of an accused to stand trial, consideration must be given to the capacity of the accused “to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.”72

The Court in *Strugar* recognized that some difficulties would occur in the process of measuring these capacities and setting a threshold for fitness.73 Based on decisions from various national jurisdictions, the Trial Chamber adopted a “minimum standard of overall capacity below which an accused cannot be tried without unfairness or injustice.”74

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67 Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 32 (May 26, 2004).
68 See id.
69 Id. ¶ 35.
70 Id.
71 Id. ¶ 36.
72 Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 36 (May 26, 2004). The Court also notes in this paragraph that the list of capacities is not “exhaustive,” but sufficient for the matter at hand.
73 Id. ¶ 37.
74 Id. The Court explains in this paragraph that “[i]t would be entirely inappropriate, and unjustified . . . to require that each of these capacities must be present at their notion-
The Court concluded that the threshold for fitness to stand trial is satisfied when:

[A]n accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, i.e. to make his or her defence.75

The Trial Chamber placed the burden of proving that an accused is not fit to stand trial upon the Defense.76 It should be noted, however, that in its conclusion on General Strugar’s fitness, the Court indicated that “this finding does not depend on the onus of proof.”77 The Trial Chamber then ruled that the standard for the burden of proof is “merely the ‘balance of probabilities.’”78 Following the jurisprudence of other nations, the Court rejected the use of the higher standard employed to establish guilt (proof beyond a reasonable doubt).79

B. The Determination of Fitness

The Trial Chamber determined General Strugar’s fitness by applying the facts to the standards. In evaluating the evidence provided by the experts, the Court reviewed the differing approaches the experts utilized. The Defense expert “placed considerable emphasis” on diagnosing the various physical and mental illnesses that the Accused suffered and the “possible effects of such disorders.”80 This approach resulted in “an inadequate linkage of the various diagnoses and their

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75 Id.
76 Id. ¶ 38. The jurisdictions vary as to the placement of the burden of proof in fitness or competency hearings. See Prosecutor v. Nahak, Criminal Case No. 01A/2004/PD.Dil. of the Special Crimes Panel of Dili District Court, Findings and Order on Defendant Nahak’s Competence to Stand Trial, ¶¶ 61–67 (Mar. 1, 2005).
77 Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 52 (May 26, 2004).
78 Id. ¶ 38.
79 Id.; see also Nahak, Criminal Case No. 01A/2004, Findings and Order on Defendant Nahak’s Competence to Stand Trial, ¶¶ 61–67. “[I]t must be remembered that competence to stand trial is not an element of the offense with which the Defendant is charged. This is significant because every element of an offense must be proved beyond a reasonable doubt . . . .” Id. ¶ 58.
80 Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 47.
possible or potential effects, with the issue of the actual effects experienced by this Accused on his relevant capacities.”  

The Court further noted that the Defense expert applied incorrect standards to her diagnostic findings. Specifically, the expert was under the misapprehension that English common law required that an accused “fully comprehend” the proceedings. This error—setting too high of a standard for evaluation—was further compounded when the Defense expert continued to measure the other capacities at an excessively high standard. The Court rejected these standards.

The Prosecution experts “concentrated on evaluating the relevant capacities of the Accused” as opposed to focusing on the various illnesses that the Accused suffered. For example, once finding that the Accused suffered from memory impairment, the Prosecution experts evaluated the problem and determined that the level of impairment was only mild and that his capacity to testify would not be impaired.

The Trial Chamber reviewed the evidence and findings of all the experts, and concluded that the Accused possessed the necessary capacities for exercising his rights at trial: i.e., the capacities to understand the nature of the charges, to understand the course of the proceedings and the details of the evidence, to testify, to instruct Defense counsel, and to understand the consequences of the proceedings. The Court deemed General Pavle Strugar fit to stand trial.

The Court found that, in contrast to determining the issue of fitness at the pre-trial stage, determination during trial provided them with the benefit of observing the Accused for a period of almost five months. When the Accused addressed the Trial Chamber, his comments were “collected, relevant, well structured and comprehensive.” When concerned over matters arising at trial, the Accused would raise the issue with his counsel or with the court, thus participating in the trial. His conduct and actions during trial were appropriate and did not

81 Id.
83 Id. ¶¶ 48–49.
84 Id. ¶ 47 (finding the approach of the Prosecution experts to be better for evaluating fitness).
85 Id. ¶ 49.
86 Id.
87 Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, ¶ 50 (May 26, 2004).
88 Id. ¶ 51.
89 Id.
provide “any reason for the Trial Chamber to hesitate in its acceptance of the opinion of the Prosecution experts that the Accused is fit to stand trial.”

CONCLUSION

The Strugar decision, unlike competency decisions at Nuremberg and Tokyo, sets standards for determining an accused’s fitness to stand trial. The standards protect both the rights of the accused and the interests of the prosecution. It is noteworthy that on appeal, the Accused did not challenge the standards established in the decision, but rather alleged error in the application of the facts to those standards. Other Trial Chambers at the ICTY and The Special Panels for Serious Crimes at the United Nations Tribunal at East Timor have followed Strugar. As such, Strugar may be viewed as the seminal decision on the issue of fitness before international tribunals.

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90 Id.
92 See generally Prosecutor v Stanisic & Simatovic, Case No. IT-03–69-PT, Decision on Stanisic Defence’s Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes (Apr. 27, 2006); Prosecutor v. Kovacivic, Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial (Apr. 12, 2006).
93 Prosecutor v. Nahak, Criminal Case No. 01A/2004/PD.Dil. of the Special Crimes Panel of Dili District Court, Findings and Order on Defendant Nahak’s Competence to Stand Trial, ¶¶ 57–67 (Mar. 1, 2005) (the Court followed all of the standards from the Strugar Decision Re The Defence Motion to Terminate Proceedings except for assigning the burden of proof on the defendant).
ENERGIZING THE INDIAN ECONOMY: OBSTACLES TO GROWTH IN THE INDIAN OIL AND GAS SECTOR AND STRATEGIES FOR REFORM

Krishnan A. Devidoss*

Abstract: India is rapidly becoming one of the largest consumers of energy in the world. At the same time, India continues to be hindered by bureaucratic delays, an archaic tax system, security problems and prohibitive investment regulations that have made expansion and consolidation in the petroleum sector difficult. This Note explores underlying structural problems in India’s investment, tax, and regulatory climate that have worked to the detriment of Indian oil and gas companies. This Note argues that corruption, problems associated with contractual stability, a restrictive investment climate, and security concerns have prevented meaningful mergers and acquisitions by Indian companies, prevented them from exploring oil and gas opportunities abroad, and have disadvantaged them with respect to their competitors in other countries. This Note further argues that despite India’s progress in liberalizing its economy, its government must work to address these core underlying problems in order to secure a stable and secure supply of energy to meet its growing demands.

Introduction

As India comes of age in the world economy its oil and natural gas needs continue to grow. Like China, which is becoming increasingly dependent on the importation of oil to meet surging demand, India, which currently imports seventy percent of its oil, will continue to seek access in foreign markets for its energy needs, particularly from its neighbors in the Near East, as well as from Russia. At the

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1 Jay Solomon, Rice Airs Concern Over Gas Pipeline from Iran to India, Wall St. J., Mar. 17, 2005, at A14.

same time, Indian petroleum companies will need to develop oil and gas fields off the coast of India so as not to become too dependent on these foreign sources of oil.\(^3\) As Indian energy companies seek to grow, they will invariably benefit from foreign capital and will also benefit from internal consolidation of the energy sector, much like companies from other countries that are better capitalized and that are winning bidding wars.\(^4\) Indian companies, however, face formidable obstacles to procuring foreign investment and capital due to administrative hurdles and corruption at the national level as well as foreign pressure against business ventures with Iran.\(^5\)

This Note addresses the state of the Indian energy sector, including obstacles to meeting future energy needs and proposals for reform. Part I considers India’s political climate and recent economic reforms and how they have affected the industry, as well as India’s current energy needs. Part II addresses obstacles to investment in the Indian oil and gas sector, including problems associated with corruption, contractual instability, and macroeconomic policies. Part III discusses what the Indian government can do to encourage foreign investment in the energy sector, addresses security concerns related to supply, and proposes strategies to bolster exploration opportunities domestically and internationally.

I. BACKGROUND

India is the second largest country in the world in terms of population, has the fourth largest economy in the world, and boasts the second largest Gross Domestic Product (GDP) among developing countries based on purchasing power parity.\(^6\) India’s economy continues to grow at an average of six to eight percent annually, driven by consumer and corporate spending.\(^7\) Despite rising oil prices and delays in eco-


\(^6\) Baker, supra note 5, at 390.

nomic reforms, India continues to remain an attractive site for foreign investment due to its large market and economic potential.\(^8\)

Unlike China, India has not achieved its potential because of its investment climate.\(^9\) Foreign direct investment (FDI) as a share of India’s GDP was less than one percent in 2002 and 2003, as compared to four percent in China during the same period.\(^10\)

For most of its post-independence history, India was ruled by the Congress Party.\(^11\) The Congress Party, founded by Indian freedom fighters molded in the British Fabian socialist tradition, believed in a social welfare state, advocated self-sufficiency, and was generally suspicious of foreign investment.\(^12\) The Indian economy remained closed to foreign investors for decades, until finance minister (now Prime Minister) Dr. Manmohan Singh, a Cambridge-trained economist, removed governmental obstacles and opened India’s doors to foreign investment under the Industrial Policy of 1991.\(^13\)

In 1998 the Congress Party was defeated by the Hindu nationalist Bharatiya Janata Party (BJP).\(^14\) Despite being a nationalist party, the BJP quickly proved itself to be a more economically liberal party, accelerating liberalization of the economy and beginning a process of privatization.\(^15\) The Indian economy experienced some of its fastest growth during BJP rule; however, there were concerns that the beneficial effects of liberalization were not being felt by its poorest citizens.\(^16\)

The BJP was voted out of office and the Congress Party, headed by Dr. Manmohan Singh and Finance Minister P. Chidambaram, regained power in 2004.\(^17\) Though the Singh government declared itself committed to the ideas embodied in the Industrial Policy of 1991, such as the privatization and labor flexibility initiated by Congress and

\(^8\) See Baker, supra note 5, at 390; Patel, supra note 5, at 389; Bellman, supra note 7, at A5.

\(^9\) See Baker, supra note 5, at 411.

\(^10\) Id.


\(^13\) Baker, supra note 5, at 392; John Lancaster, Sonia Gandhi Declines Prime Minister Position More Tumult in India Hindu Nationalists Protested Against Her, LEXINGTON HERALD LEADER (Kentucky), May 19, 2004, at A3; see Waldman, supra note 11, at A6.


\(^15\) See Alex Ninian, India’s New Government and Its Economic Outlook, 286 CONTEMP. REV. 1, 2 (2005).

\(^16\) See id.

\(^17\) See Waldman, supra note 11, at A6; Ninian, supra note 15.
accelerated by the BJP, it and its leftist coalition partners signaled that the pace of many of the reforms would slow down.\footnote{See Waldman, supra note 11, at A6; India Scraps Sales of State Firms, BBC News, Aug. 16, 2005, http://news.bbc.c.uk/go/pr/fr/-/2/hi/business/4156612.stm. But see Mazzini, supra note 4, at 352 (noting that the economic policies of Congress and BJP nationally differed greatly from their state counterparts, as in Maharashtra in that the BJP did not accelerate economic reform at the state level).}

Among the sectors where privatization and foreign investment was temporarily decelerated was the energy sector.\footnote{See India Scraps Sales of State Firms, supra note 18.} The Indian government committed itself instead to developing bilateral ties with its neighbors, including Iran and the Central Asian countries, in order to secure oil and natural gas.\footnote{See John Larkin & Jay Solomon, India’s Ties with Iran Pose Challenge for U.S., WALL ST. J., Mar. 25, 2005, at A7.} This partnership has frustrated efforts by the United States to isolate Teheran and has strained U.S.-India relations.\footnote{Id.}

II. Discussion

Indian law dictates that all natural resources embedded in the earth’s crust belong to the state and that all petroleum and natural gas found in situ is national property.\footnote{What Is NELP?, ECON. TIMES (India), Jan. 31, 2005, available at 2005 WLNR 1285513.} Private operators require a license, which is subject to open bidding, from the central government.\footnote{Id.} The regulatory framework in oil and gas exploration is governed through the New Exploration and Licensing Policy (NELP) and more broadly through the Industrial Policy of 1991, both of which aim to increase foreign participation in drilling and investment in India’s oil and gas sector.\footnote{See Baker, supra note 5, at 392, 414 (describing Industrial Policy of 1991); What Is NELP?, supra note 22.}

Though NELP and the Industrial Policy of 1991 have improved the investment climate for FDI, “delays, complexities, obfuscations, overlapping jurisdictions and endless request[s] for more information remain much the same as they have always been.”\footnote{Baker, supra note 5, at 414.} Underlying structural obstacles to the development of India’s oil sector can broadly be grouped into four categories.\footnote{See Baker, supra note 5, at 414 (describing problems associated with access to credit); Mazzini, supra note 4, at 352 (discussing contractual problems); Patel, supra note 5, at 389} The first set of problems includes
those related to corruption in the Indian bureaucracy.  

The next general category of problems can be broadly defined as contractual problems, based on investor fear of abrogation. Macroeconomic and finance problems, including difficult access to credit, obstacles to privatizations and mergers and acquisitions (M&A), and onerous tax laws constitute the third general category of problems. Finally, foreign policy and security issues related to opposition to a proposed pipeline with Iran also continue to frustrate the Indian government’s efforts to secure petroleum from abroad.

A. Corruption

Studies show that countries with high levels of corruption receive less foreign investment from all major source countries. Corruption has long been a problem for India in its quest to modernize and liberalize its economy. Indian law condemns bribery through the Indian Penal Code and the Prevention of Corruption Act of 1947. The laws punish public servants who accept gratuities to influence the exercise of their public functions with a fine and sentence of up to three years in prison. These laws, however, are frequently ignored. In addition, the laws only address corruption among public servants, and do not deal with persons who accept bribes in the course of private business. Companies are forced to deal with a large number of government officials from whom they must gain approval for licenses to conduct business. This ties up resources that could be used more

(discussing problems associated with corruption); Solomon, supra note 1, at A14 (discussing security concerns related to a proposed pipeline with Iran).

27 See Patel, supra note 5, at 389.
29 See Baker, supra note 5, 399–401; India Scraps Sales of State Firms, supra note 18; Puliyenthuruthel, supra note 4.
31 Baker, supra note 5, at 417.
32 See Patel, supra note 5, at 398–99.
33 Id. at 399.
34 Id. at 400.
35 Id. at 399.
36 Id. at 401.
37 Baker, supra note 5, at 416–17; see Patel, supra note 5, at 407.
productively and results in an additional burden on their enterprises as companies incur unnecessary interest costs.\textsuperscript{38}

Significantly, bureaucratic delays in the form of red tape continue to exist, even though they have loosened considerably from before.\textsuperscript{39} These bureaucratic delays have resulted in the forfeiture of significant business opportunities.\textsuperscript{40}

**B. Contract Instability**

An additional concern for foreign companies seeking to invest in India or to lend capital to Indian companies for project finance is the instability of contracts due to corruption, fear of a change of government, and ultimately, contract abrogation.\textsuperscript{41} One of the first companies to receive fast-track approval from India’s new policy towards foreign investment was Enron, which formed a joint venture with Reliance Industries, Inc., India’s state-owned oil and gas company.\textsuperscript{42} The aim of the project was exploration, development, production, and operation of oil and gas fields off the coast of Mumbai (formerly known as Bombay).\textsuperscript{43} The BJP coalition government of Maharashtra, the Indian state where Mumbai is located, unilaterally cancelled the contract previously negotiated by the Congress-led state government, claiming that the project (known as Dabhol) would result in electricity rates unaffordable for the general population, and that the country could undertake the project on its own.\textsuperscript{44} Such nationalistic concerns, often cloaked in the mantle of democracy, have made many companies averse to entering the Indian market.\textsuperscript{45} Indeed, non-payment for power supply to Dabhol from its sole customer, the utility authority of Maharashtra, resulted in the collapse of Dabhol.\textsuperscript{46}

The Indian courts have been habitually overburdened by large caseloads.\textsuperscript{47} Businesses in India, hesitant to resort to foreign courts in the first place, find litigation expensive, uncertain, subject to proce-

\textsuperscript{38} See Baker, supra note 5, at 417.
\textsuperscript{40} See Baker, supra note 5, at 416; Luce, supra note 39.
\textsuperscript{41} See Mazzini, supra note 4, at 352, 359; Patel, supra note 5, at 397.
\textsuperscript{42} Mazzini, supra note 4, at 351.
\textsuperscript{43} Id.
\textsuperscript{44} See Salacuse, supra note 12, at 1351–52.
\textsuperscript{45} Id.; see Mazzini, supra note 4, at 359.
\textsuperscript{46} See Duong, supra note 28, at 106.
\textsuperscript{47} See Work, supra note 39, at 224.
dural delay, and a source of negative publicity.\textsuperscript{48} The overburdened court system has also contributed to delays that have affected the business environment, since businesses desire easy access to the court system.\textsuperscript{49} These concerns resulted in the passage of a revised arbitration act in 1996.\textsuperscript{50} With the passage of the revised arbitration law, the Indian government has shown its commitment to arbitration, but it is still unclear whether Indian courts will enforce awards from alternative dispute resolution (ADR) proceedings.\textsuperscript{51}

\textbf{C. Credit Restrictions, Fiscal Policies, and the Tax Environment}

India’s investment climate is also a source of concern both to companies seeking to do business in India and for Indian companies looking to do business abroad.\textsuperscript{52} Indian fiscal policies have worked to the detriment of Indian companies looking for financing for strategic M&As, and have provided unnecessary obstacles to the development of oil and gas fields located off India’s coast and within its borders.\textsuperscript{53}

India’s need for capital still exceeds its supply, working to the detriment of its companies that require foreign investment to finance their expansion and growth.\textsuperscript{54} Credit has been expensive and difficult to access, which has restricted the development of Indian companies.\textsuperscript{55} While regulations often serve legitimate purposes in other countries, in India restrictions on credit and bureaucratic regulations provide opportunities for harassment.\textsuperscript{56} The interest cost to Indian companies is 1.5% higher than in other countries in Asia, making expansion difficult.\textsuperscript{57} Credit problems have made it difficult for Indian companies to compete with China, whose companies have benefited from greater consolidation and larger cash reserves that have allowed them to compete in acquisitions that Indian companies are not financially able to pursue.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} See id.
\item \textsuperscript{50} Id. at 228.
\item \textsuperscript{51} Id. at 242.
\item \textsuperscript{52} See Mazzini, supra note 4, at 352, 359; Luce, supra note 39.
\item \textsuperscript{53} See Baker supra note 5, at 424; Mazzini, supra note 4, at 350, 358; A Rage for Oil, supra note 2.
\item \textsuperscript{54} Mazzini, supra note 4, at 350.
\item \textsuperscript{55} Baker, supra note 5, at 417, 424.
\item \textsuperscript{56} See Baker, supra note 5, at 423–24.
\item \textsuperscript{57} Id. at 424–25.
\item \textsuperscript{58} See A Rage for Oil, supra note 2.
\end{itemize}
The Indian government has not pursued mergers or privatization as vigorously as its rhetoric claims. Resistance to privatization comes from oil sector workers fearing loss of jobs, as well as pressure from Congress’s leftist coalition partners. The Indian Supreme Court ruled that the government could not further plans to privatize the oil companies Bharat Petroleum and Hindustan Petroleum, holding that only parliament could sign off on privatization. This makes privatization extremely difficult given the fractious nature of Indian politics and lack of consensus regarding economic policy. The Congress-led government put off plans to privatize Bharat Petroleum and Hindustan Petroleum, and has so far not completed plans for the merger of the largest oil companies, Indian Oil and Oil and Natural Gas Corp. (ONGC), to create a national behemoth, though it maintains plans to do so in the future.

Tax laws also contribute to the negative investment climate in India, including the oil and gas sector. Though India’s tax laws have been relaxed to increase foreign investment, companies engaged in business in India are still subject to a variety of tax regulations, including a service tax and a minimum alternate tax. Companies seeking to engage in oil and gas exploration in India also do not benefit from an extended tax holiday, which often discourages them from exploring in India. These taxes on exploration constitute a significant burden on oil and gas companies, especially when no gas is found.

D. The Iran-Pakistan-India Pipeline

Foreign policy and security concerns continue to hinder the importation of liquefied natural gas from India’s near-abroad, particularly from Iran. The Indian and Iranian governments have explored
the building of a 1.6 billion cubic feet (bcf) gas line that would travel from southern Iran through Pakistan to India. This pipeline would cost $3.5 billion and would potentially provide 3.2 bcf of gas per day. While the United States has sought to financially isolate Teheran due to concerns over its alleged acquisition of nuclear technology, India has continued to court Iran. The United States has indicated, however, that it is willing to separate the Iranian nuclear technology issue from that of the pipeline, and dropped its previously staunch opposition to the project. Domestic security concerns have also played a role in opposition to the pipeline, as the pipeline could be a potential target for terrorist groups and militants from Pakistan. India must deal with pleasing Washington and ensuring the security of the proposed pipeline if it seeks to gain access to foreign energy to keep pace with its domestic demand.

III. Analysis

India must address the structural problems in its economy and modify aspects of its regulatory environment in order to meet its energy needs. India must look within its borders to secure part of its oil and natural gas needs. As India seeks to increase its supply of oil and natural gas, however, it will necessarily have to look abroad. This certainly entails looking to Central Asia, the Caspian Sea, and the Middle East for its supply.

A. Addressing Corruption

New Delhi should strengthen anti-corruption laws and apply them in equal force to private business and government officials. The government can also reduce the number of intermediaries in-

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69 Khan & Jillani, supra note 30, at 154.
70 Id.
71 See Khan & Jillani, supra note 30, at 153; Solomon, supra note 1, at A14.
73 See Khan & Jillani, supra note 30, at 155.
74 See id.; Solomon, supra note 1, at A14.
75 See Baker, supra note 5, at 391; Mazzini, supra note 4, at 355; Patel, supra note 5, at 389.
76 See Larkin, supra note 3, at A11.
77 See Solomon, supra note 1, at A14.
78 See Dutta, supra note 2; Larkin & Solomon, supra note 20, at A7; Solomon, supra note 1, at A14.
79 Patel, supra note 5, at 401, 407.
volved in license-granting procedures and eliminate requirements for the consent or authorization of more than one person for non-clerical decisions.\textsuperscript{80} New Delhi should also ensure that the process of privatization is more transparent, including the use of competitive bidding and public hearings.\textsuperscript{81}

\section*{B. Ensuring Contract Stability}

To protect themselves against unilateral sovereign or private cancellation, companies that invest in India also need to negotiate stabilization or compensation clauses in all contracts.\textsuperscript{82} Renegotiation clauses might be a mechanism that would permit parties to avoid default, and may guard against the possibility of business being perceived in fundamentally different ways across the cultural divide.\textsuperscript{83} While India has already strengthened its arbitration laws, it should continue to actively encourage the use of arbitration as a dispute resolution mechanism to decrease the burden on India’s court system and provide for increased contractual stability.\textsuperscript{84} In addition, to the extent permitted by the new arbitration law, the courts should enforce awards resulting from alternative dispute resolution (ADR) proceedings as decrees of the court.\textsuperscript{85}

\section*{C. Facilitating Access to Credit and Easing Tax Restrictions}

Reducing obstacles to FDI flows will be a major concern as India seeks to accommodate companies who require financing for M&A and technology development.\textsuperscript{86} India should ease access to credit by decreasing the interest cost.\textsuperscript{87} By reducing the percentage of costs going to service debt, this will make India a more attractive site for foreign investment as well as facilitate expansion by Indian companies seeking to make foreign acquisitions.\textsuperscript{88}

India should also simplify its tax laws.\textsuperscript{89} Reducing taxes on exploration and extending the tax holiday will have the effect of freeing up

\textsuperscript{80} Id. at 407.
\textsuperscript{81} Id. at 408.
\textsuperscript{82} See Mazzini, \textit{supra} note 4, at 360.
\textsuperscript{83} Salacuse, \textit{supra} note 12, at 1329.
\textsuperscript{84} See Work, \textit{supra} note 39, at 242.
\textsuperscript{85} See id.
\textsuperscript{86} See Baker, \textit{supra} note 5, at 417.
\textsuperscript{87} See id. at 424–25.
\textsuperscript{88} See id. at 417, 424.
\textsuperscript{89} See Mahajan & Chakrabarti, \textit{supra} note 4.
resources for growth and expansion. This is especially true as Indian companies compete with China for access to oil and gas.

The central government should proceed with consolidation efforts to merge Indian Oil with ONGC, India’s largest state owned company, to create a competitive player in the world energy market. It should also privatize its petroleum companies, such as Bharat Petroleum and Hindustan Petroleum, to foreign investors. By privatizing, the country could raise hundreds of billions of dollars to fund acquisitions and growth.

Under NELP, India has already taken steps to strengthen foreign investment in its petroleum sector and to lure more drillers with better technology. The government should continue to encourage such investment. India has started to recognize the need for exploration within its borders, which is why, beginning in the late 1990s, the state began allocating blocks of territory to Indian and foreign drillers. Due to the limited supply of oil within India’s borders, the government needs to pay particular attention to attracting a wider variety of foreign drillers for oil and gas exploration.

Interestingly, the source of reluctance may be large foreign oil companies themselves, which often find that the discoveries in India are not worth pursuing. Given India’s limited supply of domestic oil, it must continue to look to smaller companies from other countries for exploration. In addition to oil fields located off the coast of Mumbai, Cairn Energy, PLC, a Scottish energy concern, has located an oil deposit in the desert of Rajasthan that holds about one billion barrels of oil. Experts say that India’s geology of subterranean layers with fault lines should certainly contain oil and gas. If this is the case, small foreign companies like Cairn would certainly help to yield

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90 See id.; Sharon, supra note 66.
91 See Puliyenthuruthel, supra note 4.
92 See id.
93 See id.
94 See id.
96 See id.
97 Larkin, supra note 3, at A11.
98 Khan & Jallani, supra note 30, at 152 (noting that India has proven reserves of just 66 to 70 trillion cubic feet); Larkin, supra note 3, at A11.
99 See Larkin, supra note 3, at A11.
100 See India’s Energy Needs, supra note 95.
101 See Larkin, supra note 3, at A11.
102 Id.
discoveries within India’s borders and offshore.\textsuperscript{103} If the latest proposals under NELP are implemented, smaller oil exploration concerns can expect to see a reduction in the time taken to award an exploration contract, a greater availability of geo-scientific data online, and a single window for clearances.\textsuperscript{104}

D. Resolve Foreign Policy Hindrances

Finally, India must address the lingering doubts of the United States concerning India’s ties with Teheran and national skepticism regarding its relations with Pakistan because the proposed pipeline is vital to India’s energy needs and would serve the ancillary function of building up Indo-Pakistani ties.\textsuperscript{105} The government should pursue U.S. Secretary of State Condoleezza Rice’s suggestion that Washington and New Delhi engage in a broad energy dialogue.\textsuperscript{106} It might also accept a greater role in participating in talks with Iran, the European Union, and the United States over Iran’s nuclear program as a result of its energy partnership with Teheran.\textsuperscript{107}

Conclusion

While the Indian economy has significantly liberalized over the past decade, obstacles to investment in the form of corruption, contract instability, and poor macroeconomic policies continue to hamper foreign direct investment and business expansion.\textsuperscript{108} For India to meet its surging oil and gas needs, it must address these problems by tackling corruption at all levels, promote the use of ADR, facilitate access to credit, and expose its oil and gas sector to market forces.\textsuperscript{109} India must also engage in broad energy and security dialogues with its neighbors and the United States.\textsuperscript{110} India should not return to its policy of self-reliance, but must instead learn to open up to the world in a way that will ultimately benefit the nation.\textsuperscript{111}

\textsuperscript{103} See id.

\textsuperscript{104} New Indian Policy, supra note 95.

\textsuperscript{105} See Khan & Jallani, supra note 30, at 156-57 (discussing how the U.S.-Iran-Libya Sanctions Act of 1996 bars foreign investment in Iran); Solomon, supra note 1, at A14.

\textsuperscript{106} See Solomon, supra note 1, at A14.

\textsuperscript{107} See Larkin & Solomon, supra note 20, at A7.

\textsuperscript{108} See Baker, supra note 5, at 417; Patel, supra note 5, at 407; Puliyenthuruthel, supra note 4.

\textsuperscript{109} See Baker, supra note 5, at 417; Work, supra note 39, at 242; Patel, supra note 5, at 407; Puliyenthuruthel, supra note 4.

\textsuperscript{110} See Khan & Jallani, supra note 30, at 153; Solomon, supra note 1, at A14.

\textsuperscript{111} See Baker, supra note 5, at 417; Bellman, supra note 7, at A5.
WHEN IS A STATE A STATE? THE CASE FOR RECOGNITION OF SOMALILAND

Alison K. Eggers*

Abstract: It has been well over a decade since the world attempted to save Somalia from the dustbin of “failed states.” During that decade, one region of Somalia has pulled away from its post-colonial union with Somalia, established its own government, kept the peace, and managed to flourish in a kind of stability that is only a faint memory to most Somalis outside the region. Somaliland, once a British colony, argues it should be recognized as an independent state. This Note explores the legal conception of statehood, from the Montevideo Convention to the more recent emphasis on self-determination, and then turns to the case of Somaliland, arguing that Somaliland should be recognized as a state by the international community.

Introduction

There have been few state-specific success stories emanating from the Horn of Africa since the early 1990s. Somalia itself, once the focus of world-wide attention and aid, has lapsed into what many scholars call a “failed state.”¹ Special attention is frequently drawn to the deligitimization of the state, uneven development, and lack of public services, including the lack of an effective security apparatus.² One region of what the world recognizes as Somalia, a northwestern province called Somaliland, seems to be resisting the “failed state” fate of Somalia as a whole.³ After providing a brief overview on Somaliland’s claim to statehood, this note will discuss the international conception of statehood. The most frequently cited definition of a state, taken from the Monte-

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² See generally id.

video Convention, serves as a starting point. After discussing the legal conception of statehood, the Note turns to the case of Somaliland and analyzes what prerequisites for statehood Somaliland meets or fails to achieve. The Note argues that Somaliland, which has operated as a self-sustaining state since it declared independence in 1991, should be recognized as such by the international community. The analysis leads to several conclusions, notably that the alarm with which the nation-state system views breakaway states is both unnecessary and counter-productive to the peaceful conduct of world affairs.

I. BACKGROUND AND HISTORY

The Republic of Somaliland is located on the eastern Horn of Africa and occupies the same land colonized by the British prior to 1960. Upon independence, in June 1960, Somaliland became the first Somali country recognized by the U.N. A week later, in early July 1960, Somaliland joined with Somalia Italiana to form one state with the seat of government in Mogadishu. Somalia had no history as a stable state prior to its colonial rule, but Somaliland did, thanks in part to a significant trade axis centered in its territory. Shortly after undertaking the union of the two states, Somalilanders voted against the union in a unification referendum. In May 1991, following decades of attacks led by the Said Barre regime and during extensive famine (which brought

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4 The Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933) [hereinafter Montevideo Convention]. In recent years, scholars have criticized the definition, arguing it is both under- and over-inclusive and lacks analytical room for developments over the past few decades, such as rising concerns regarding self-determination. See Thomas D. Grant, Defining Statehood: The Montevideo Convention and Its Discontents, 37 Colum. J. Transnat’l L. 403, 435, 437, 449 (1999).

5 See generally Montevideo Convention, supra note 4.


7 Günther Schlee, Redrawing the Map of the Horn: The Politics of Difference, 73 Afr. 343, 348 (2003); see Doornbos, supra note 6, at 95.


9 See id.; Somalilandgov.com, Country Profile, supra note 3 (contains basic country profile, including history of relationship with Somalia).


U.N. efforts and U.S. forces to Somalia),\textsuperscript{12} Somaliland withdrew from its union with Somalia and moved its state capitol back to Hargeisa.\textsuperscript{13}

A series of grassroots reconciliation conferences have been held by Somaliland’s elders since 1992 to resolve outstanding community conflicts across the territory.\textsuperscript{14} Somaliland’s population of 3.5 million, scattered across an estimated area of 137,600 square kilometers, is represented by men (and, as “clan ambassadors,” women) chosen by virtue of personal attributes such as fairness and wisdom, not merely age.\textsuperscript{15}

Over the past decade and a half Somaliland has repatriated refugees, rebuilt war-torn infrastructure, and demobilized rival militias.\textsuperscript{16} Despite the marked decline in inter-clan tension, the re-establishment of trust between communities, and its overall success in pursuing stability and security for its population, Somaliland’s pleas for recognition have fallen on deaf ears.\textsuperscript{17}

Ethiopia has gone the furthest of all states in its unofficial recognition of Somaliland by entering into bilateral agreements for cooperation in various arenas.\textsuperscript{18} Yemen has also engaged in increasingly warm relations with Somaliland, largely for inter-regional political reasons.\textsuperscript{19} Despite formal ministerial-level meetings between Somaliland and its former colonial ruler, the United Kingdom has resisted calls to recog-

\textsuperscript{12} The U.S. intervention and on-going U.N. involvement in Somalia raise a variety of complicated issues of international law, foreign affairs, and humanitarian considerations which are not addressed in this Note. For an analysis of forcible intervention, see generally T. Modibo Ocran, \textit{The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping}, 25 B.C. Int’l & Comp. L. Rev. 1 (2002).


\textsuperscript{14} \textit{See} Ahmed & Green, \textit{supra} note 10, at 123.


\textsuperscript{16} \textit{See} Stefan Simanowitz, \textit{Democracy Comes of Age in Somaliland}, 287 CONTEMP. REV. 335, 336 (2005). Simanowitz also notes that Somaliland “now boasts modern airports, hospitals, ports, power plants and universities. There is a free press and the central bank manages an official currency with relatively stable exchange rates. An unarmed police force and independent judiciary maintain order.” \textit{Id.}

\textsuperscript{17} \textit{See} Doornbos, \textit{supra} note 6, at 106; Ahmed & Green, \textit{supra} note 10, at 124. Dan Simpson, former U.S. ambassador and special envoy to Somalia, agreed, at the time, that Somaliland was a part of Somalia and should not be recognized as an independent state. He has since changed his mind, especially now that disputes over borders and control of the government have long been resolved. \textit{See} Dan Simpson, \textit{The Ghost of Somalia: Somaliland Should Be Allowed to Depart a Chaotic Country in Transition}, \textit{PITTSBURGH POST-GAZETTE}, July 12, 2006, at B7.

\textsuperscript{18} \textit{See} Doornbos, \textit{supra} note 6, at 105.

\textsuperscript{19} \textit{See id.}. 
nize Somaliland’s independence.20 Both the United States and the United Kingdom regard the issue of recognition as a matter for the African Union, to which Somaliland applied for membership in December 2005.21

II. Statehood and the Inviolability of Borders

The Montevideo Convention lists four basic elements required for statehood: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other states.22 This definition is so oft-repeated that it is duplicated, nearly verbatim, in dozens of cases, treaties, and tomes.23 The Convention also states that although the “political existence of the state is independent of recognition by the other states,” such recognition may be explicit or tacit.24

The United States has been fairly consistent in its application of the Montevideo standard.25 In Kadic v. Karadzic, the Second Circuit was presented with the question of whether a self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, referred to as Srpska, was a state whose leadership could be held to account for various atrocities committed by the proclaimed leaders.26 The court summarized its conclusion that Srpska met the definition of a state by noting that it “is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all respects of international law.”27 Srpska, by virtue of its state-like characteristics, was indeed a de facto state entitled to the rights and encumbered by the responsibilities of a state within the international system.28

22 Montevideo Convention, supra note 4, art. 1.
24 Montevideo Convention, supra note 4, arts. 3, 7; see also Restatement (Third) of Foreign Relations Law of the United States § 202 cmt. b (1987).
27 See id. at 245.
28 See id.
hardly a stretch for the Circuit court, as the Supreme Court has long recognized that “any government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation . . . .”

Although some definitions of statehood require the capacity to engage in formal relations with other states, they rarely require recognition by other states. The Restatement (Third) of Foreign Relations Law succinctly points out that “[a]n entity that satisfies the requirements of [the] § 201 [definition of a state] is a state whether or not its statehood is formally recognized by other states.”

International law appears to emphasize the importance of the territorial integrity of states. Generally, the preference is to rely on internal domestic laws of existing states to adjudicate the succession and establishment of new states.

Many states and international bodies view the disposition of national territory as a question for the sovereign state to decide: “Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.” Individual states have echoed this belief, noting that “international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‘parent’ state.”

The dogged reliance on the inviolability of borders and inherent worth of territorial integrity, however, has its fair share of detractors. One such scholar, Thomas M. Franck, argues it is incorrect to assert that international law has always favored the territorial integrity of states, pointing out that the “entire history of the dismantling of the

31 See id.
32 See U.N. Charter art. 2, para. 4 (considered the touchtone of the U.N., art. 2, para. 4 states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”); Report on the International Committee of Jurists on the Legal Aspects of the Aaland Islands Question, League of Nations O.J., Special Supp. No. 3(1920), reprinted in International Law: Cases and Commentary 439 (Mark W. Janis & John E. Noyes eds., 2001) [hereinafter Aaland Islands Report].
33 See Aaland Islands Report, supra note 32, at 439.
34 Reference Re Succession of Quebec, 37 I.L.M. 1340, 1368 (Can. 1998).
35 See generally Doornbos, supra note 6; Ahmed & Green, supra note 10.
German, Austro-Hungarian, Ottoman and Russian empires after 1918 reveals a bias of international preference toward a right of nationalities to assert their preference in determining [their final arrangements of statehood].”\(^{36}\) In light of the great period of decolonization, whose territorial break-ups and reconfigurations worldwide assisted one billion people in seceding from the remaining empires, Franck finds it “absurd” to maintain international law has always favored the territorial integrity of states.\(^{37}\)

Franck feels that even a careful reading of the Declaration on Friendly Relations reveals that it contains no absolute bias toward territorial integrity, but restates well-known rules, namely, “(1) that states shall not dismember other states (i.e. use force unlawfully) under the pretext of aiding self-determination; and (2) the international law and its system is neutral as to secessionist movements (i.e., does not ‘authorize or encourage’ those) that seek the break-up of established sovereign states.”\(^{38}\) Franck’s argument, perfectly applicable to the case of Somaliland, boils down to the stark reality that while international law neither prohibits nor encourages secession outside the particular colonial experience, it will recognize secession when it is successful.\(^{39}\)

And so while international law does not recognize a right of secession outside such a context, this alone does not mean that international law prohibits secession.\(^{40}\) What international law clearly does prohibit is the encroachment of other states onto the territory of their neighbors, a violation of the generally accepted principles requiring states to respect the integrity of other states.\(^{41}\) This principle, however, does not apply within the state:

Thus, unless a secession is controlled from outside or is carried out by elements that either come from outside or seek to establish a state based on denial of the right of self-determination of the majority or a part of the population, the fact

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\(^{36}\) See Thomas M. Franck, *Opinion Directed at Question 2 of the Reference, in Self-determination in International Law: Quebec and Lessons Learned* 75, 82 (Anne Bayefsky ed., 2000) (Franck points to the examples of Poland (pursuit of national independence), Schleswig and Saar (the choice to join an adjoining cohort state) and Yugoslavia, Czechoslovakia and Silesia (the choice to remain part of a multi-ethnic state)).

\(^{37}\) See id.

\(^{38}\) Id. at 84.

\(^{39}\) See id.

\(^{40}\) George Abi-Saab, *The Effectivity Required of an Entity That Declares Its Independence in Order for It to Be Considered a State in International Law, in Self-determination in International Law, supra* note 36, at 69, 72.

\(^{41}\) See id. at 72–73.
that the process of creation of the new state can be characterized as secession does not affect or in any way influence its legal existence from the standpoint of international law, once the primary fact—i.e., its effectivity as a state—has materialized.\textsuperscript{42}

For a newly-formed state, which meets the basic elements of statehood (population, territory, government, and the capacity for relations) in an international system that does not forbid secession, continued reliance on the inviolability of state borders also breeds a certain amount of tension with the right of peoples to self-determination, now considered a basic principle of international law.\textsuperscript{43} The bind in which states like Somaliland find themselves is neatly summarized by the dueling notions of self-determination and territorial integrity found in one section of the U.N. General Assembly’s Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.\textsuperscript{44} The section provides that member states will “[c]ontinue to reaffirm the right of self-determination of all peoples” but that recognition of the “inalienable right of self determination . . . shall not be construed as authorizing or encouraging any action that would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States . . . .”\textsuperscript{45}

III. THE INDEPENDENT NATION-STATE OF SOMALILAND

As international law expects that the right to self-determination be exercised within the framework of existing sovereign states, Somaliland finds itself at an impasse, because it lacks an effective parent state from which to apply for secession.\textsuperscript{46} With no coherent “parent” state with which to negotiate its independence, international law and the nation-state system leave Somaliland with little alternative but to declare its independence and begin to act as an independent state, which it has done.\textsuperscript{47} The territory of Somaliland easily meets the criteria set forth by the Montevideo Convention.\textsuperscript{48} Somaliland has a permanent population

\textsuperscript{42} Id. at 73.


\textsuperscript{44} G.A. Res. 50/6, ¶ 1, U.N. Doc. A/RES/50/6 (Oct. 24, 1995).

\textsuperscript{45} Id.

\textsuperscript{46} See Aaland Islands Report, supra note 32, at 439.

\textsuperscript{47} See id.

\textsuperscript{48} See Montevideo Convention, supra note 4.
estimated at 3.5 million which reaffirmed its support for sovereignty in a 2001 Constitutional Referendum. A decade after its initial declaration of independence another referendum showed ninety-seven percent of the population in favor of independence. Somaliland also has clearly defined territory dating back to the colonial era when it was known as British Somaliland. The country is bordered by the Red Sea and the Gulf of Aden to the north, Puntland to the east, Ethiopia to the west, and Djibouti to the northwest. When leaders of the Puntland region of Somalia “sold” oil leases in Somaliland waters to foreign investors, the Somaliland government took steps to ensure its sovereign waters would not be claimed by Puntland, thus defending its territorial integrity and sovereign waters. Tacitly recognizing these borders, land-locked Ethiopia recently signed a long-term use agreement with Somaliland for use of its Port of Berbera.

Somaliland also has a clearly defined government and governance structure which relies heavily on community-based leadership, including highly effective councils of elders. Its constitution calls for separation of powers among the branches of government and serves as the basic law of the land. In December 2002, Somaliland held its first local government elections, followed by a presidential election the following spring. The presidential election was closer than the one in which George W. Bush beat Al Gore; the courts declared current President Kahin the victor, and the population and the candidates, accepted the decision. The results of parliamentary elections held in October 2005 were accepted and endorsed by all three major political parties.

At first glance, it appears Somaliland might struggle to meet the fourth criteria, the capacity to enter into relations with other states.

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49 African Success Story, supra note 8; see Somaliland.Org, supra note 3.
51 See African Success Story, supra note 8; Somaliland.Org, supra note 3.
54 See African Success Story, supra note 8; Somaliland.Org, supra note 3.
55 See Ahmed & Green, supra note 10, at 123.
56 Oluoch, supra note 52.
57 African Success Story, supra note 8.
58 Lacey, supra note 50, at A4.
60 See Montevideo Convention, supra note 4, art. 1.
This impression is incorrect.\(^{61}\) First, while no other state has established formal diplomatic ties with Somaliland, it is quite clear that Somaliland has the capacity to do so.\(^{62}\) Somaliland’s elected government is in consolidated control of the state; there are no rival parties or factions which challenge its claim to be the international “voice” of Somaliland’s people the way clan fractionalism has splintered control of Somalia itself.\(^{63}\) Elected and appointed officials inhabit offices such as the Presidency to the Ministries of Foreign Affairs, Interior, and Finance.\(^{64}\) Somaliland clearly meets the minimum standard of international law in that it has the capacity to engage in diplomatic relations, a mark of statehood.\(^{65}\)

Second, in addition to having the capacity to maintain foreign relations, Somaliland routinely engages in “state-like” behavior, such as negotiating agreements with other states.\(^{66}\) Somaliland has been received by ministers and governmental representatives in foreign states, including the United Kingdom and the United States.\(^{67}\) In June 2006 Somaliland President Dahir Riyale Kahin visited five African states, Kenya, Tanzania, Zambia, Rwanda, and Uganda, pressing his case for independence.\(^{68}\) In September 2006, President Kahin met Ethiopian Prime Minister Meles Zenawi on his way back to Somaliland from a working visit in the United Kingdom and Germany.\(^{69}\) While maintaining that its diplomatic overtures do not constitute recognition of Somaliland, Ethiopia has recently opened an embassy there.\(^{70}\)

Equally persuasive, and consistent with Franck’s contention that successful secession is clearly permissible under international law, is

\(^{61}\) See discussion infra pp. 218–19.

\(^{62}\) See Restatement (Third) of Foreign Relations Law of the United States § 201 (1987); Schlee, supra note 7, at 348.

\(^{63}\) See Schlee, supra note 7, at 348.


\(^{66}\) See Doornbos, supra note 6, at 105.


the fact that Somaliland “is by no means the first African state to have entered into a voluntary union with another state and subsequently withdrawn from that union intact.”\textsuperscript{71} Egypt and Syria, Cape Verde and Guinea Bissau, Senegal and Mali, and Senegal and Gambia have all taken similar steps in their histories, with no effect on the status of their independence.\textsuperscript{72}

The duration of Somaliland’s \textit{de facto} independence should also quell the international community’s fears that recognizing Somaliland will spark a round of secessionist movements around the world.\textsuperscript{73} Recognition of Somaliland fourteen years after it declared its independence, during which time it stabilized its internal political strife and began successfully rebuilding community services and civil society, sets the bar high enough that few states will attempt to follow its path.\textsuperscript{74} The African Union’s fact-finding mission agreed when it declared that Somaliland’s status was “unique and self-justified in African political history,” and that ‘the case should not be linked to the notion of ‘opening a Pandora’s box.’”\textsuperscript{75}

Finally, recent events in Somalia make an excellent case for recognition of Somaliland as part of a larger international goal of stability and harmony.\textsuperscript{76} In early August 2006, Somalia’s President Abdullahi Yusuf announced the dismissal of Somalia’s official government.\textsuperscript{77} By mid-August, the Union of Islamic Courts, promising to restore national unity under sharia law, captured Mogadishu.\textsuperscript{78} In response to growing chaos and tension, Ethiopia dispatched troops to Baidoa, temporary seat of the TFG, and Eritrea sent arms to the Islamists.\textsuperscript{79}

\textsuperscript{71} African Success Story, supra note 8; see Franck, supra note 36, at 84.
\textsuperscript{72} See African Success Story, supra note 8; \textit{Dilemma of the Horn}, supra note 53, at 8.
\textsuperscript{73} See Doornbos, supra note 6, at 106. Doornbos writes that despite “all their various differences, the clubs of states, especially the [Organization of African Unity], the [European Union] and the UN, tend to share a members only vision, from which they can see the globe only as divided up into formally independent states that are recognized as members.” Id.
\textsuperscript{74} See Ahmed & Green, supra note 10, at 125–26 (concluding that Somaliland’s “phoenix-like” emergence was so successful it should provide insights to the international aid community); Lacey, supra note 50, at A4.
\textsuperscript{75} Lacey, supra note 50, at A4.
\textsuperscript{79} These developments are merely new plays in a long-running border war between Ethiopia and Eritrea. See id.
With the help of Ethiopian troops, the TFG succeeded in taking control of the capital of Mogadishu in January 2007, but has been under constant attack from remnants of the Union of Islamic Courts; Somali refugees see little point in returning home and news about the “return of violence, lawlessness and questionable moves by the U.S.- and Ethiopian-backed transitional government in Mogadishu confirms fears” about life in Somalia.\textsuperscript{80} Some observers note it is difficult to say whether Somalia is “slipping back into anarchy or limping toward reformed statehood,” but the signs are not promising.\textsuperscript{81}

Concern in Somaliland over the threat of terrorism, exacerbated by porous borders, has been heightened by terrorism’s prominent rise in Somalia and nascent beginnings in Somaliland.\textsuperscript{82} While extremists have murdered four foreign aid workers in Somaliland over the past few years, Somaliland’s criminal justice system has taken an active role in ferreting out and punishing terrorists.\textsuperscript{83} For example, in 2005 four men were sentenced to death for the murder of a British couple in 2003.\textsuperscript{84} As undesirable as the problem is, it also presents an opportunity for Somaliland in terms of its strategic importance to the West.\textsuperscript{85} Somaliland leaders say they are “well placed to lend crucial support to Somalia’s U.N.-backed transitional government and strengthen cooperation against international terrorism.”\textsuperscript{86} The “enduring lesson” of post-Soviet Afghanistan in 1989—“that power vacuums are always a magnet for terrorism”—implies that a stable ally in an otherwise precarious neighborhood might be a welcome development for states the world over.\textsuperscript{87}
CONCLUSION

The question of whether Somaliland should be recognized as an independent state is hindered only by the blind adherence by the international community to the nation-state system’s inviolability of borders. While the nation-state system has legitimate cause for concern, as it seems nearly every corner of the world has a population agitating for independence, the case of Somaliland poses no threat to international order or peace. Somalia may be making progress toward stability, but it has a great deal of work ahead before it will enjoy the relative security and prosperity of Somaliland. Expecting Somaliland to “wait and see” pins its future on Somalia’s ability to re-build and re-stabilize, the very unpredictable characteristics that fueled its quest for independence in the first place. Somaliland has operated as an independent state for fifteen years and as it meets international legal standards for “statehood” is, in fact, a state. What Somaliland lacks is formal recognition of its statehood by other states, a simple act which would enable it to take its place on the world stage and provide a commendable example for other states faced with internal strife and turmoil.
A CRITICAL ASSESSMENT OF THE UNITED STATES’ IMPLEMENTATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Christopher N. Franciose*

Abstract: As Western corporations continue to expand internationally in search of natural resources and greater economies of scale, they increasingly find themselves operating amidst the political unrest and social conflict that afflicts many developing nations. In such contexts, multinational enterprises often turn a blind eye to human rights abuses, and in the worst cases, become active participants. As a result, many have called for a global system of corporate governance. This Note focuses on the OECD’s framework for influencing corporate behavior internationally: the “OECD Guidelines for Multinational Enterprises.” After explaining the mechanics of the Guidelines, this Note provides a critical analysis of the United States’ implementation by comparing U.S. methods with those of two other adherent states—the Netherlands and France. Ultimately, the Note concludes that U.S. practices leave much room for improvement and offers suggestions for a more robust implementation of the Guidelines.

Introduction

In late 1990, a damage-claims inspector set out to make a routine trip to an oil well in Aceh, a remote province of Indonesia.1 While driving on the road leading to “Well D2,” he noticed several pigs rooting around in what appeared to be recently bulldozed soil.2 Upon closer examination, the unnamed inspector made a gruesome discovery: “the pigs were rooting down there on a hip bone, around the white knobbly part.”3 What he observed were “obviously human bones.”4 Local villag-

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2 Id.
3 Id.
4 Id.
ers, when asked about the remains, told him that Indonesian security forces had captured and executed Acehenese villagers in retaliation for an attack on a nearby settlement which housed oil and natural gas company employees. Along the same road just a few months later, a soil testing team found a shoe while excavating about two-and-a-half miles from the D2 well. A machine operator jumped out, picked up the shoe, and collapsed in shock when he realized it was still on the foot of a detached human leg.

Stories like these serve as troubling reminders of the intense suffering and horrific human rights violations individuals endure in developing nations around the world. Yet, in the case of Aceh, there is an added element of concern for the international community: the events described above occurred on land owned in part by the multinational enterprise Mobil Oil, now ExxonMobil. Although violence in Aceh has waned in the wake of the tsunami that struck Indonesia in 2004, over fifteen years of human rights atrocities serve as a disturbing example of what can happen when multinational enterprises (“MNEs”) operate in the context of third-world political conflict, repression, and extreme poverty, often without the check of domestic monitoring and law enforcement. ExxonMobil, as well as Unocal, Nike, Dole, Chevron, and many other multinational enterprises, have all been criticized for providing “poster cases” for the negative consequences of globalization and the shift towards transnational production.

The international community has responded to the unique problem of influencing the behavior of multinational corporations with respect to human rights, as well as other areas of concern such as bribery, labor rights violations, and environmental degradation, in a variety of ways. This note focuses on the corporate governance approach of the

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5 Id.
6 Shari et al., supra note 1, at 72.
7 Id.
8 See id.
9 Id. at 68–74.
11 See Shari et al., supra note 1, at 68-74.
Organization for Economic Cooperation and Development (OECD). Specifically, it seeks to provide a critical analysis of the United States’s implementation of the OECD Guidelines for Multinational Enterprises (the Guidelines) through its primary implementation mechanism: the national contact point (NCP). This Note first provides a backdrop to assessing implementation successes and failures by explaining exactly what the Guidelines are, how they address structural limitations of the international legal system, and the implementation mechanisms they include. Next, this Note considers the strengths and weaknesses of the U.S. NCP approach to implementation by comparing U.S. practices with those of two other adherents to the Guidelines—the Netherlands and France. Finally, the Note concludes by offering suggestions for improving implementation by way of the national contact point.

I. BACKGROUND AND HISTORY

With the help human rights advocates, individual torture victims such as those in Indonesia, have made various attempts to influence the behavior of Western-based multinational corporations acting abroad. Some alleged victims, including a group of Acehnese villagers, have brought tort actions in U.S. federal court under the Alien Tort Claims Act. A shareholder resolution on the issue of ExxonMobil’s role in the violence in Aceh was also filed in 2001, receiving almost 8 percent of the votes cast. Yet, at the international level, voluntary principles have been the primary vehicle for influencing MNE actions with respect to human rights. In particular, individual states, non-governmental organizations such as Amnesty International, and inter-governmental organizations such as the United Nations (U.N.) and the OECD have promulgated guidelines and codes of conduct. These rules and principles, although voluntary and non-binding, represent

15 Id.
17 See, e.g., U.N. Global Compact, supra note 13; OECD GUIDELINES, supra note 13.
the international community’s most widely-accepted attempt at achieving some level of global corporate governance.  

A. The OECD Guidelines for Multinational Enterprises

In 1976, all thirty OECD members, plus nine non-member countries, adopted the Guidelines as “recommendations addressed by governments to multinational enterprises operating in or from adhering countries . . . .” The Guidelines set forth voluntary principles and standards for responsible corporate conduct that are not enforceable at law. At their broadest level, the Guidelines seek to ensure that MNEs act in accordance with government policies, and in doing so, “strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance [MNEs’] contribution to sustainable development . . . .” Specific areas addressed in the Guidelines include: information disclosure, employment and industrial relations, the environment, bribery, consumer interests, science and technology, competition, and taxation. There is no section solely dedicated to human rights violations, but MNEs are asked in the general policies chapter to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”

The Guidelines are designed to influence the behavior of a specific type of non-state actor—the multinational enterprise. As a private entity, a MNE cannot become a party to a binding instrument, i.e., a treaty under international law, for the very reason that it is not a state; only states may be parties to treaties. The Guidelines address this structural problem by requiring adhering states to promote a set of principles, rather than seeking to hold corporations directly accountable for their actions. Nevertheless, as a non-binding instrument, the

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20 THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: FREQUENTLY ASKED QUESTIONS, http://www.oecd.org/document/58/0,2340,en_2649_201185_2349370_1_1_1_1,00.html (last visited Jan. 5, 2006) [hereinafter FREQUENTLY ASKED QUESTIONS].

21 See OECD Guidelines, supra note 13, at 17.

22 Id. at 15.

23 Id. at 20–27.

24 Id. at 19.

25 See FREQUENTLY ASKED QUESTIONS, supra note 20.

26 See MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 18 (4th ed. 2003).

27 See FREQUENTLY ASKED QUESTIONS, supra note 20.
Guidelines cannot be enforced through legal action against a MNE or applied as law in any international court.\textsuperscript{28} Moreover, the Guidelines do not apply to multinationals that are based in a non-adhering nation and operate in a non-adhering nation or nations.\textsuperscript{29}

B. Implementation of the Guidelines

The institutional framework for promoting and implementing the Guidelines consists of two major elements: NCPs and the OECD’s Committee on International Investment and Multinational Enterprises (CIME).\textsuperscript{30} NCPs are at the heart of implementation: they promote the Guidelines, handle inquiries about their application, and help resolve problems that arise in specific instances of implementation.\textsuperscript{31} As a practical matter, NCPs frequently handle complaints submitted against companies for alleged violations of the Guidelines’ principles.\textsuperscript{32} In addition, NCPs gather information on national experiences with the Guidelines, meet annually to share experiences, and report annually to the CIME.\textsuperscript{33}

The CIME is responsible for overseeing the effectiveness of the OECD Guidelines, clarifying the meaning of specific provisions, reviewing and exchanging views on the Guidelines, and responding to various requests from adhering nations.\textsuperscript{34} Additionally, the Guidelines are periodically reviewed in accordance with terms set by the CIME.\textsuperscript{35} These reviews tend to provide guidance to NCPs; establish mechanisms for promoting transparency, accountability, and best practices; consult the business community, labor organizations, and non-member countries for feedback on ways to improve the Guidelines and their implementation; and incorporate public opinion input on MNE governance offered via the Internet.\textsuperscript{36}

\textsuperscript{28} See id.
\textsuperscript{29} Examples of nations which do not adhere to the Guidelines include China, Malaysia, Russia, and India, among others. Id; OECD Watch, Five years On: A Review of The OECD Guidelines and National Contact Points 11 (2005) http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf [hereinafter Five Years On].
\textsuperscript{30} OECD Guidelines, supra note 13, at 32.
\textsuperscript{32} See Five Years On, supra note 29, at 11.
\textsuperscript{33} Frequently Asked Questions, supra note 20.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} OECD Guidelines, supra note 13, at 6.
II. Discussion of Issues

A. OECD National Contact Points

As mentioned above, NCPs are the primary mechanism for implementing the OECD Guidelines for multinational enterprises.\(^{37}\) Most importantly, they must “further the effectiveness of the Guidelines” and “operate in accordance with core criteria of visibility, accessibility, transparency and accountability . . . .”\(^{38}\) The Guidelines additionally require that all NCPs be functional equivalents, although individual NCPs retain some discretion as to the exact manner in which they provide information, promote awareness, and handle implementation in specific instances.\(^{39}\) NCPs also may take a variety of institutional forms, but are most often composed of a government office headed by a senior government official.\(^{40}\) For instance, the U.S. NCP is the Office of Investment Affairs, a part of the Bureau of Economic and Business Affairs located in the Department of State.\(^{41}\) In contrast to the U.S. institutional arrangement, other adhering nations such as the Netherlands and France use interdepartmental offices, which assign different government ministries various bureaucratic roles.\(^{42}\)

NCPs must engage in promotional and informational activities, as well as encourage implementation of the Guidelines in specific instances.\(^{43}\) Promotional activities may be as simple as posting a web link to the OECD Guidelines on a national government website, but many NCPs have been more proactive in their approach.\(^{44}\) For instance, the American, Swedish, Korean, Polish, Spanish, Hungarian, Canadian, German, Australian, and British NCPs have all trained their embassy and consular staffs in compliance and application of the Guidelines.\(^{45}\) The Canadian NCP has sent representatives to appear before the Parliamentary Sub-Committee on Human Rights and International Devel-

\(^{37}\) See id.
\(^{38}\) Id. at 35.
\(^{39}\) Id. at 35,60.
\(^{40}\) See id. at 35.
\(^{42}\) OECD Guidelines for Multinational Enterprises: 2005 Annual Meeting of the National Contact Points: Report by the Chair 29, 31 (2005), http://www.oecd.org/dataoecd/20/13/35387363.pdf [hereinafter REPORT by the Chair].
\(^{43}\) OECD Guidelines, supra note 13, at 35–36.
\(^{44}\) REPORT by the Chair, supra note 42, at 8; OECD Guidelines, supra note 13, at 35.
\(^{45}\) REPORT by the Chair, supra note 42, at 8–9.
opment, and the Italian NCP cooperated with the Milan Chamber of Commerce to offer a training course for public utility workers.\textsuperscript{46}

Implementation in specific instances has been the most important and visible role for NCPs in recent years.\textsuperscript{47} As amended in 2000, the OECD Guidelines state that NCPs will “contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances” by: (1) making an initial assessment as to whether the issue(s) raised merits further examination; (2) offering good offices for the parties involved; (3) issuing a statement if an agreement is not reached and making recommendations on how the Guidelines should be implemented; (4) protecting sensitive business and other information; and (5) making publicly available the results of the implementation proceedings without violating due confidentiality.\textsuperscript{48} It is vital that NCPs provide a “forum for discussion” and facilitate “access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.”\textsuperscript{49} They must consider requests for implementation brought by non-governmental organizations (“NGOs”), employee and labor organizations, representatives from corporations, and other concerned parties.\textsuperscript{50} In most cases, issues will be addressed by the NCP in whose country the issue has arisen, although cooperation between NCPs is encouraged by the Guidelines.\textsuperscript{51}

B. Implementation in Specific Instances by the U.S., Dutch, and French National Contact Points

Sixteen requests for implementation in specific instances have been filed with the U.S. NCP since June of 2000, when the NCP mechanism first was established by amendment to the Guidelines.\textsuperscript{52} Requests for implementation are usually initiated by way of complaints in letter form, addressed to the NCP and sent by a concerned party such as a trade union or NGO.\textsuperscript{53} These sixteen instances represent the greatest number filed with any of the thirty-nine adherent countries.\textsuperscript{54} However, extremely brief descriptions of only half of those instances—

\textsuperscript{46} Id.
\textsuperscript{47} See id. at 14.
\textsuperscript{48} OECD Guidelines, supra note 13, at 36–37.
\textsuperscript{49} Id. at 36.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 32, 60.
\textsuperscript{52} Report by the Chair, supra note 42, at 14.
\textsuperscript{53} See Five Years On, supra note 29, at 11, 33.
\textsuperscript{54} Report by the Chair, supra note 42, at 14.
whether actively taken up by the U.S. NCP or not—have been made available by the United States for publication in OECD reports on Guideline-related activities.\textsuperscript{55} As a result, the data available for analysis of U.S. implementation is extremely scarce.\textsuperscript{56} The names of the parties requesting implementation are often not revealed in U.S. NCP or OECD documents, although various NGOs sometimes indicate in their own public materials that they have made requests for implementation.\textsuperscript{57} Moreover, the U.S. NCP routinely withholds company names and details pertaining to complaints, and does not make its annual reports to the CIME publicly available.\textsuperscript{58}

Two of the eight total instances submitted to the OECD for publication were classified as “ongoing” as of June 2005, leaving a mere six published cases where the U.S. NCP has concluded its involvement.\textsuperscript{59} As a result, these six completed cases provide a weak basis, but the only available one, for an assessment of U.S. NCP implementation successes and failures.\textsuperscript{60} Further frustrating the analysis is the fact that the U.S. NCP did not issue a final statement explaining what resolution had been achieved and how the NCP had contributed to that solution in any of the six concluded cases.\textsuperscript{61} Rather, in half of those cases, it simply recorded that the “parties reached an agreement.”\textsuperscript{62} In the remaining instances, the U.S. NCP determined either that a U.N. panel had adequately addressed all issues, that a U.N. Security Resolution was sufficient, or that the parties’ issues were being addressed appropriately through “other means.”\textsuperscript{63}

All but one recorded instance dealt with issues arising under the “Employment and Industrial Relations” section of the OECD Guidelines (excluding the issue addressed by a U.N. Security Resolution discussed above), suggesting that the scope of U.S. NCP implementation activities is extremely limited.\textsuperscript{64} Specifically, these requests involved questions of freedom of association, collective bargaining, and employee representation.\textsuperscript{65} Although it is not stated in the OECD June 2005

\begin{itemize}
  \item[\textsuperscript{55}] \textit{Id.} at 55–56.
  \item[\textsuperscript{56}] \textit{See id.}
  \item[\textsuperscript{57}] \textit{See Five Years On, supra note 29, at 5, 33.}
  \item[\textsuperscript{58}] \textit{See id. at 33; Report by the Chair, supra note 42, at 55–56.}
  \item[\textsuperscript{59}] \textit{Report by the Chair, supra note 42, at 55–56.}
  \item[\textsuperscript{60}] \textit{See id.}
  \item[\textsuperscript{61}] \textit{Id.}
  \item[\textsuperscript{62}] \textit{Id.}
  \item[\textsuperscript{63}] \textit{Id.}
  \item[\textsuperscript{64}] \textit{See Report by the Chair, supra note 42, at 55–56.}
  \item[\textsuperscript{65}] \textit{See id.}
\end{itemize}
Report by the Chair, it can reasonably be inferred that most, if not all, of the employee and industrial relations implementation requests were filed by trade unions.\textsuperscript{66} The single remaining instance that did not fall under that section touched on three different chapters of the Guidelines: “General Policies,” “Information and Disclosure” and “Combating Bribery.”\textsuperscript{67} However, this particular instance involved a request to investigate the conduct of an international ship registry, and the U.S. NCP simply found that the relevant issues had been “effectively addressed through other appropriate means . . . .”\textsuperscript{68} Thus, the U.S. NCP cannot credibly claim to have brokered a resolution between a MNE and complainant outside of the realm of employment and industrial relations conflicts.\textsuperscript{69}

The data available on the activities of the Netherlands NCP is similarly scarce.\textsuperscript{70} The OECD’s June 2005 Report by the Chair provides brief records of the Dutch NCP’s involvement in fourteen specific instances.\textsuperscript{71} Twelve of these cases have been classified as concluded, but agreements were reached in only five.\textsuperscript{72} Thus, the Dutch NCP can be said to have successfully brokered settlements in roughly five cases of specific implementation to date.\textsuperscript{73} Additionally, the Dutch NCP issued joint press releases with the parties involved in a sixth case, and a statement discussing lessons learned and a travel advisory were released in two other instances.\textsuperscript{74} These public statements, although not necessarily evidence of the Dutch NCP’s positive influence, at the very least helped further the NCP’s goal of meeting the openness and transparency requirements set forth in the Guidelines.\textsuperscript{75} In another five concluded cases, the Dutch NCP determined that the issue involved did not merit further examination for various reasons, including a “lack of an investment nexus” or because formal legal proceedings had resolved the concerns.\textsuperscript{76} The twelfth concluded case simply required that the

\textsuperscript{66} Five Years On, supra note 29, at 33; see Report by the Chair, supra note 42, at 55–56.
\textsuperscript{67} Report by the Chair, supra note 42, at 55–56.
\textsuperscript{68} Id. at 56
\textsuperscript{69} See id. at 55–56.
\textsuperscript{70} See id. at 51–53.
\textsuperscript{71} Id.
\textsuperscript{72} Report by the Chair, supra note 42, at 51–53.
\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} See Five Years On, supra note 29, at 33; Report by the Chair, supra note 42, at 55–56.
\textsuperscript{76} Report by the Chair, supra note 42, at 51–53.
Netherlands NCP act as a mediator between a Dutch NGO and the Chilean NCP.\textsuperscript{77}

The French NCP has been the third-most active in taking up specific instances for consideration, cataloguing nine of twelve total cases in the OECD report.\textsuperscript{78} Five of the nine recorded cases have been concluded, and in only one of those five has a final agreement been reached by the parties.\textsuperscript{79} However, the French NCP did issue press releases in relation to four concluded instances, furthering the OECD’s goal of transparency for NCP implementation activities.\textsuperscript{80} Lastly, the scope of French implementation has been limited to mostly employment and industrial relations cases, much like U.S. and Dutch activities.\textsuperscript{81}

III. Analysis

Although the information available concerning specific activities of the U.S. NCP is minimal, indications five years after the establishment of the NCP implementation mechanism suggest that there is much room for improvement.\textsuperscript{82} An extrapolative analysis of the most active NCPs—the U.S., Dutch and French—reveals that all NCPs probably have had a limited impact on MNE behavior.\textsuperscript{83} The total number of cases the three nations have actively undertaken is quite small, and implementation in areas outside of labor relations has not been substantial.\textsuperscript{84} The weak cumulative effect of NCP action can be, in part, attributed to the inherent limitations of the Guidelines and the associated difficulty of altering the behavior of private actors in the international arena.\textsuperscript{85} However, the U.S. NCP’s approach has some severe shortcomings even when measured against the Guidelines’ own requirements for NCPs.\textsuperscript{86}

\textsuperscript{77} Id. at 52.
\textsuperscript{78} Id. at 14, 47–48.
\textsuperscript{79} Id. at 47–48.
\textsuperscript{80} See id.
\textsuperscript{81} Report by the Chair, supra note 42, at 47–48, 51–53, 55–56.
\textsuperscript{82} See Five Years On, supra note 29, at 5; see Report by the Chair, supra note 42, at 47–48, 51–53, 55–56.
\textsuperscript{83} See Five Years On, supra note 29, at 5; see Report by the Chair, supra note 42, at 43–56.
\textsuperscript{84} See Five Years On, supra note 29, at 47–48, 51–53, 55–56.
\textsuperscript{85} See id. at 5, 7.
\textsuperscript{86} See Report by the Chair, supra note 42, at 47–48, 51–53, 55–56; OECD Guidelines, supra note 13, at 36.
A comparative analysis of U.S., Dutch, and French NCP activities shows that the United States has primarily failed to “operate in accordance with [the] core criterion of . . . transparency . . . .” The very problem of a lack of openness has made it difficult both to assess why the U.S. NCP has failed to bring about settlements between parties in failed cases, and how success was achieved in resolved cases. What is clear, however, is that the U.S. NCP, at a minimum, should reach a level of transparency achieved by the Dutch NCP and thus better meet its core responsibilities under the Guidelines.

As Appendix A demonstrates, the U.S. NCP has opted to publish summaries of only half of the instances filed with it. Rather than err on the side of openness as the Guidelines suggest, the U.S. NCP neither releases specifics concerning cases it has addressed, nor publishes its annual reports to the CIME. Moreover, the U.S. NCP has made it clear that it has no intention of ever acknowledging that a particular MNE has breached the Guidelines, regardless of the egregiousness of the behavior. It appears that the U.S. NCP’s emphasis on maintaining the confidentiality of the parties involved has been taken to such an extreme that it far outweighs any value placed on open and transparent NCP procedures.

Although under the Guidelines NCPs have flexibility as to how they handle implementation in specific instances, this does not justify institutional laziness on the part of the U.S. NCP, or worse, willful disregard for Guideline requirements. The “Procedural Guidance” section of the OECD Guidelines states that “if the parties involved do not reach agreement on the issues raised, [the NCP will] issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.” As discussed above, OECD annual reports indicate that the U.S. NCP has never issued a final statement concerning an instance of specific implementation, yet there are no sanctions.

87 OECD Guidelines, supra note 13, at 35; Five Years On, supra note 29, at 33; Report by the Chair, supra note 42, at 47–48, 51–53, 55–56.
88 See Report by the Chair, supra note 42, at 55–56.
89 See Five Years On, supra note 29, at 33; Report by the Chair, supra note 42, at 51–53, 55–56.
90 See Report by the Chair, supra note 42, at 55–56.
91 See Five Years On, supra note 29, at 25, 33.
92 Id. at 23.
93 See id. at 25
94 See OECD Guidelines, supra note 13, at 35.
95 Id. at 36.
for such inaction provided for in the Guidelines. Moreover, the U.S. NCP website does not provide access to or make mention of any sort of press release or final report relating to an implementation case.

In direct contrast, the Dutch NCP has issued at least four final statements after concluding its involvement in implementation instances. Specifically, in December of 2002, a resolution was negotiated and a joint statement issued by the Dutch NCP, Adidas, and the India Committee on the Netherlands (“ICN”) concerning an issue stemming from Adidas’s outsourcing of soccer ball production in India. The joint statement explained the relevant issue (Adidas’s conformity with the OECD Guidelines), discussed how the Dutch NCP helped each party clarify its point of view, and finally, stipulated the common ground and agreed upon changes that each Adidas and the ICN will make. In this case, the Dutch NCP fulfilled its responsibility under the Guidelines to make public the results of an implementation proceeding and in doing so, allowed the concerned public and complainant NGO to see that it had provided good offices for an interest group and MNE in dispute. Thus, the Dutch NCP provided a “forum for discussion,” facilitated “access to consensual and non-adversarial means . . . to assist in dealing with the issues,” and ultimately brought about a solution to a corporate governance problem in the case of Adidas and India.

In light of the more transparent and seemingly more effective practices of the Dutch NCP, it is clear that the U.S. NCP would benefit from changes to its approach to implementation in specific instances. As the analysis above suggests, the U.S. NCP must work to fundamentally increase the openness of its operations by issuing statements after concluding its involvement in disputes, whether a resolution has been reached or not. If a solution has not been reached, the U.S. NCP should explain why, as the Guidelines require,

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96 Report by the Chair, supra note 42, at 55–56. See generally OECD Guidelines, supra note 13.
97 See Bureau of Economic and Business Affairs, supra note 41.
98 See Report by the Chair, supra note 42, at 51–53.
99 See id. at 51.
101 See id.
102 OECD Guidelines, supra note 13, at 36; see Netherlands Nat’l Contact Point, supra note 101.
103 See Five Years On, supra note 29, at 33.
104 See id.
so that future complainants and corporations can learn from past mistakes. The quality and detail of such public releases also must sufficiently allow outside observers and interested parties such as U.S.-based MNEs and NGOs to understand how implementation proceedings work. If the NCP implementation mechanism is to have any real impact on MNE behavior, corporations and potential complainants must understand exactly how confidentiality will be protected, when and how mediation shall proceed, and what benefits they stand to receive by reaching out to an NCP for assistance.

Moreover, the U.S. NCP should work to increase the public nature of its implementation proceedings so that it can employ the “mobilization of shame” in order to affect corporate behavior. The more negative publicity and NGO scrutiny to which corporations are subject, the more likely they are to change their undesired practices. The non-binding and discretionary nature of the Guidelines makes public criticism all the more important as a tool for bringing about corporate reform. Although the confidentiality of sensitive business information must be maintained as the Guidelines stipulate, the U.S. NCP must work to strike a better balance between confidentiality and public accountability required for the mobilization of shame.

Conclusion

In a world where MNEs are often faced with a choice between employing responsible business practices and suffering a reduction in profit margins due to competitive disadvantage, voluntary guidelines such as the OECD Guidelines may simply be inadequate. While the voluntary aspect of the Guidelines contributes to their broad acceptance and addresses the problem of influencing private actors through international law, it also means that corporations can “opt out” of compliance if it makes economic sense to do so. Nonetheless, without a viable system for instituting binding, global business regulations, voluntary guidelines and principles represent the best method presently available for altering MNE behavior. Therefore, it is important that the

105 See id; see OECD Guidelines, supra note 13, at 36.
106 See Five Years On, supra note 29, at 33.
107 See id.
109 See id.
110 See id. See generally OECD Guidelines, supra note 13.
111 See OECD Guidelines, supra note 13, at 61.
U.S. NCP meet its responsibilities under the Guidelines and thus set an example for other OECD members and Guidelines adherents. Increased transparency and more all-around effort on the part of the U.S. NCP must be employed if the United States has any hope of making the OECD Guidelines a truly useful tool for influencing corporate practices around the globe.

**APPENDIX**

### Appendix A: Implementation in Specific Instances*

<table>
<thead>
<tr>
<th>NCP</th>
<th>Total Specific Instances</th>
<th>Published Specific Instances</th>
<th>Ongoing</th>
<th>Concluded</th>
<th>Parties Reached Agreement</th>
<th>Total Final Statements Issued</th>
<th>Relevant Guidelines Chapters</th>
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<td>2</td>
<td>6</td>
<td>3</td>
<td>0</td>
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<td>2</td>
<td>12</td>
<td>5</td>
<td>4</td>
<td>Employment &amp; Industrial Relations (14) General policies (1) Environment (1) Supply Chain (1)</td>
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<tr>
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<td>5</td>
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<td>Employment &amp; Industrial Relations (5) General policies (2) Environment (2) Competition (1) Information and Disclosure (1)</td>
</tr>
</tbody>
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THE ABORTION CRISIS IN PERU: FINDING A WOMAN’S RIGHT TO OBTAIN SAFE AND LEGAL ABORTIONS IN THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Sarah A. Huff*

Abstract: Under Peruvian law, abortion is illegal unless it is necessary to save the life of the mother. At the same time a woman can be imprisoned if she receives an illegal abortion. Yet, despite its illegality and the threat of punishment, there are over 350,000 illegal and clandestine abortions performed each year in Peru and nearly 65,000 of these women are hospitalized due to complications. Peru has the second-highest maternal mortality rate in South American and unsafe abortions account for nearly one quarter of the deaths. The Convention on the Elimination of All Forms of Discrimination Against Women may provide an answer to the problem of unsafe and illegal abortions in Peru. Although it doesn’t explicitly provide that a woman has a right to access safe and legal abortions, it impliedly does so. This Note argues that the actions of the Convention’s Committee reveal that a woman has a right to safe and legal abortions and that Peruvian women should take the next step by asserting their claim to this right through the formal complaint procedure.

INTRODUCTION

One woman’s story embodies the crisis that Peruvian women face because of their inability to obtain safe and legal abortions.1 Recently separated from her children’s father, she was impregnated by her new boyfriend after she received misleading advice on how to use birth control pills.2 She knew she could not afford to have the baby and to obtain an abortion she went to a “run down house in a back street”

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2 Id.
recommended by a friend. As she lay on the couch, a tube filled with hydrochloric acid was pushed into her uterus and she was told not to remove it for several hours. After hours of bleeding and delirium, she finally decided to go to the hospital. She knew that if the doctors found out she had had an abortion they could put her in jail, but her only alternative was death. The tube had perforated her uterus causing massive infection. The doctors removed her uterus and gave her only three hours to live. Fortunately, she survived, but she still suffers from infections in her internal organs and can no longer have children as a result of her inability to obtain a safe and legal abortion.

This Note examines the problem of illegal and clandestine abortions in Peru and analyzes the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and its potential use in establishing Peruvian women’s right to obtain safe and legal abortions. Part I of this Note examines the current abortion crises in Peru. Part II discusses the history and purpose of CEDAW and the CEDAW-Optional Protocol, as well as Peruvian laws and policies that deal with abortion. Part III argues that although CEDAW does not directly address or mention abortion, it nevertheless implies that women have the right to access safe and legal abortions. The lack of access to legal abortions in Peru violates CEDAW and women’s rights groups should utilize the Convention to expand Peruvian women’s access to abortion.

I. The Abortion Crisis in Peru

For centuries, women have been concerned with the ability to control their destinies with respect to the number and spacing of their children. Before women were aware of the biology of reproduction they resorted to several methods to control the number of children

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3 Id.
4 Id.
5 Id.
6 BBC News, supra note 1.
7 Id.
8 Id.
9 Id.
they had, including abortion. Despite increased knowledge surrounding pregnancy and the introduction of several safe and easy methods to control fertility, unwanted pregnancies still affect millions of women around the world. Regardless of their race or economic status, unwanted pregnancy negatively affects Peruvian women because of their unequal social status, limited decision-making possibilities, lack of education, and barriers to quality legal reproductive health services.

In an effort to prevent induced abortion, governments have continuously criminalized it, but rather than solve the problem, criminalization has only pushed abortion underground, leading to the widespread practice of clandestine abortions. When abortion is illegal or extremely difficult to obtain, women undergo abortions in unsanitary and unsafe conditions. This puts not only women’s health at risk, but also their liberty, because in Peru, like many countries, women face jail time for having an abortion.

Abortion is illegal in Peru, except in extreme circumstances when it is the only way to save a woman’s life or avoid serious and permanent damage to a woman’s health. Even then, the absence of clear regulations to ensure access to abortion services often leaves women at the mercy of public officials. Additionally, Peruvian law does not provide for abortions in the case of rape, incest, or fetal impairment. As such, a significant number of women who wish to limit

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12 Id.
13 See id.
14 Id.
15 Id.; see also Abortion Rights in Latin America, N.Y. Times, Jan. 6, 2006, at A1 (stating that over the course of a Peruvian woman’s reproductive years she will have an average of two abortions).
16 Ferrando, supra note 11, at 3.
19 Luisa Cabal et al., What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?, 7 Health & Hum. RTS. 51, 69–70 (2003) (describing the case of a seventeen-year-old girl fourteen weeks pregnant with a fetus that lacked most of its brain; the hospital director determined she did not fit the exception and denied her an abortion).
20 Abortion Policies, supra note 17, at 32.
the number of children they have lack adequate protection against unwanted pregnancy.\textsuperscript{21}

Despite the illegality of abortion, an estimated 352,000 abortions are performed each year in Peru.\textsuperscript{22} There are approximately one million pregnancies annually; forty percent of these pregnancies end in wanted births, twenty-five percent end in unwanted births, and thirty-five percent end in abortion.\textsuperscript{23} Additionally, nearly 65,000 (or approximately one in seven) women are hospitalized each year due to complications from unsafe abortions, and about 800 of those women die from such complications.\textsuperscript{24} From 1995 to 2000, there were seven million pregnancies; two million ended in abortion, and 1900 of those abortions ended in death.\textsuperscript{25} Peru has the second-highest maternal mortality rate in South America, more than twenty times the maternal mortality rate of the United States. Unsafe abortions account for nearly one-fourth of these deaths.\textsuperscript{26}

II. Convention on the Elimination of All Forms of Discrimination Against Women

A. The History of CEDAW and Peru’s Involvement

In an effort to afford women additional protections against discrimination, the United Nations (U.N.) adopted the CEDAW treaty in 1979, and ratified it on September 3, 1981.\textsuperscript{27} CEDAW has the second most signatories of any international treaty with 180 ratifications, which represents over ninety percent of the Members of the U.N.\textsuperscript{28}

\textsuperscript{21} See Ferrando, supra note 11, at 15 (stating that 25.5% of women aged nineteen to forty-nine, over 860,000 women, are at risk of an unwanted pregnancy).

\textsuperscript{22} Id. at 26.

\textsuperscript{23} Id. at 28.


\textsuperscript{26} Rayman-Read, supra note 24, at A21; see Pan American Health Organization, Health Situation in the Americas: Basic Indications, http://www.paho.org/English/DD/AIS/BI-brochure-2005 (2005) (estimating the maternal mortality rate in Peru at 185 deaths per 100,000 births and in the United States at 8.9 deaths per 100,000 births).

\textsuperscript{27} CEDAW, supra note 10.

\textsuperscript{28} See Rebecca L. Hillock, Comment, Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made
CEDAW is premised on the notion that discrimination creates obstacles for women’s full participation in the political, social, economic, and cultural spheres.\(^{29}\) In Article I, the Convention defines discrimination as:

\[
\text{[A]ny distinction, exclusion or restriction . . . [based on] sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.}\(^{30}\)
\]

This definition encompasses any difference in treatment based on sex that intentionally or unintentionally disadvantages women, prevents the recognition of women’s rights in the domestic and public spheres, or prevents the exercise of women’s rights and fundamental freedoms.\(^{31}\) By signing CEDAW, each State agrees to reform domestic legislation and amend its constitution to ensure equality for women.\(^{32}\) States must also establish legal protections for women’s rights and set up a tribunal system to hear complaints from women alleging violations of their rights.\(^{33}\) States must refrain from any act of discrimination against women and must take measures to eliminate all discrimination against women at any level.\(^{34}\) CEDAW thus binds the private sector as well as the public sector to the provisions of the treaty.\(^{35}\)

To manage the implementation of CEDAW, Article 17 establishes the Committee on the Elimination of Discrimination Against Women (Committee), which is made up of twenty-three “experts of high moral standing and competence in the field covered by the Convention,” elected by the State parties.\(^{36}\) Every four years, each State Party must submit a report to the Committee on the measures it has taken to effec-

\(^{29}\) See CEDAW, supra note 10, pmbl. (detailing the purposes behind the treaty).
\(^{30}\) Id. art. 1.
\(^{32}\) CEDAW, supra note 10, art. 2.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id. arts. 2, 3.
\(^{36}\) Id. arts. 17(1), 17(2).
tuate the Convention. The Committee examines these reports and asks questions, requests more information, or seeks clarification as needed. After the Committee examines the reports, it submits its suggestions and comments to the General Assembly and to the individual State Party. The questions and recommendations of the Committee demonstrate the Committee’s interpretation and understanding of CEDAW.

The Convention allows for reservations to certain articles, while allowing States to remain a party to the remaining parts of the treaty. Although several states took advantage of this provision, Peru did not make any reservations, signifying that it agrees with the entirety of CEDAW. Peru signed the treaty in 1981 and ratified it on September 13, 1982. Under Peruvian law, ratified international treaties are part of the Peruvian legal system and have the same effect as domestic laws.

1. Relevant CEDAW Articles

CEDAW requires State parties to provide “access to health care services, including those related to family planning” and to ensure appropriate care during pregnancy, childbirth and the post-natal period. CEDAW also contains an unambiguous right to reproductive freedom in Article 16:

37 CEDAW, supra note 10, art. 18 (asserting that the Committee may request reports at any time).
39 CEDAW, supra note 10, arts. 18, 20, 21.
41 CEDAW, supra note 10, art. 28.
43 U.N. Division for the Advancement of Women, State Parties to CEDAW, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Nov. 21, 2006) (listing the signatories to CEDAW and the date that each State signed and ratified the treaty).
44 See Const. Peru arts. 55–57.
45 CEDAW, supra note 10, arts. 12, 14.
States parties shall take all appropriate measures to eliminate discrimination . . . [and] shall ensure, on a basis of equality of men and women . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. . . . 46

This idea of reproductive freedom is premised on the notion that reproductive self-determination is essential for women’s ability to exercise their other rights. 47 The Committee has stated that Article 16, along with Article 2, embodies the ultimate goal of the Convention. 48 As such, the Committee views any reservation to Article 16 with concern and as contrary to the provisions of the Convention. 49

2. CEDAW-Optional Protocol

In 1999, the Committee expanded the treaty to include an Optional Protocol, which created two provisions that strengthen the enforcement power of CEDAW. 50 First, a communication procedure allows individuals or groups to bring complaints to the Committee against States that are parties to both CEDAW and the Optional Protocol. 51 A second procedure allows the Committee to investigate countries where evidence of grave or systematic violations of CEDAW exists. 52 Unlike CEDAW, the Optional Protocol does not allow for reservations. Peru ratified it on April 9, 2001. 53

46 Id. art. 16(1).
49 Id.
51 Id. arts. 2–7. See also U.N. Division for the Advancement of Women, Optional Protocol (Decisions/Views) http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm (last visited Nov. 16, 2006) (showing that since the Optional Protocol’s ratification, only six communications have been brought before the Committee).
52 CEDAW-OP, supra note 50, art. 8.
B. Relevant Peruvian Laws

The Peruvian Penal Code provides that a woman who causes herself to abort or allows another person to perform an abortion on her may be imprisoned for up to two years or sentenced to community service ranging from fifty-two to 104 days.54 A person who performs an abortion with a woman’s consent is subject to imprisonment from one to four years.55 If the woman dies and the “person performing the abortion could have foreseen that outcome,” the punishment increases to imprisonment to two to five years.56 A person who performs a non-consensual abortion is subject to three to five years’ imprisonment.57 As with a consensual abortion, the woman’s death constitutes an aggravating factor that can increase the sentence to five to ten years.58 Rape may act as a mitigating factor that reduces the woman’s penalty to three months imprisonment, but only if she reported the rape to the police, an investigation took place, and a doctor performed the abortion.59

The law also requires doctors to report women who show signs of abortion to the appropriate authorities and to provide the police with information about abortion cases when the police request it.60 The only exception to Peru’s restrictive abortion policies provides that a doctor who carries out a consensual abortion will not be penalized if it is the “only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.”61

According to the Peruvian Health Code, human life and the right to life begin with conception.62 Therefore, pregnancy should never end unnaturally, unless there are unavoidable natural occurrences or the life or health of the mother is in danger.63 The Health Code prohibits abortions performed on moral, social, or economic grounds, or as a

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54 Peru Report, supra note 18, ¶ 56.
55 Id.
56 Id.
57 Id.
58 Id.
61 Peru Report, supra note 18, ¶ 56 (noting that such an exception is referred to as a therapeutic abortion).
62 Abortion Policies, supra note 17, at 33.
63 Id.
means of birth control, but like the Penal Code, provides an exception for therapeutic abortions.\textsuperscript{64} Peru’s National Population Policy Law also excludes abortion as a method of family planning and guarantees the right to life from the time of conception.\textsuperscript{65}

III. Finding the Right to Safe and Legal Abortions in CEDAW

A. CEDAW Establishes a Women’s Right to Have Access to Safe and Legal Abortions

Although CEDAW does not explicitly address a woman’s right to obtain a safe and legal abortion, the treaty implicitly provides for the right within its terms.\textsuperscript{66} This argument is partially supported by Malta’s reservation to CEDAW, which stated that Malta did not consider itself bound by Article 16(1)(e) because “the same may be interpreted as imposing an obligation on Malta to legalize abortion.”\textsuperscript{67} Although Malta is the only State Party to have expressed concern that the treaty might include the right to an abortion, the work of the Committee makes it clear that CEDAW does include such a right.\textsuperscript{68}

In its work, the Committee has implied that the treaty includes the right to an abortion by expressing great concern about women’s lack of access to safe and legal abortion services.\textsuperscript{69} Importantly, the Committee

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} See discussion in section III. But see Eriksson, supra note 38, at 317 (asserting that there is no “strong support for the proposition that there is a formally recognized enforceable right to abortion under international law”); Corinne A. A. Packer, The Right to Reproductive Choice 74 (1996) (concluding that international law does not include the right for women to obtain an abortion).
\textsuperscript{67} See CEDAW Reservations, supra note 42 (emphasis added).
\textsuperscript{69} See, e.g., 21st Session Report, supra note 68, ¶ 228; 17th Session Report, supra note 68, ¶ 258.
has frequently stated that high maternal mortality rates due to unsafe abortions and restrictive abortion laws are indicative of violations of women’s right to life.\(^70\) The Committee further asserts that high maternal mortality rates and studies that show a large number of women “who would like to limit their family size, but lack access to or do not use any form of contraception” are indicators of State parties’ “[p]ossible breaches of their duties to ensure women’s access to health care.”\(^71\) The Committee also routinely asks questions about restrictive abortion laws, the rate of illegal abortions, and the accessibility of safe abortions, indicating that they are concerned about women’s lack of access to safe and legal abortions.\(^72\)

Moreover, the Committee regularly criticizes restrictive abortion laws with concern, noting “there is a close link between the number of abortions performed and the high maternal mortality rate, and . . . criminalizing abortion does not discourage abortions, but rather has the effect of making the procedure unsafe and dangerous for women.”\(^73\) The Committee has often asked State parties to review laws making abortion illegal and to revise punitive laws.\(^74\)

The Committee has maintained that children have a tremendous impact on women’s lives and health and that “women are entitled to

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\(^70\) See, e.g., 21st Session Report, supra note 68, ¶ 56 (proposing that the “level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens”); U.N. Comm. on the Elimination of Discrimination Against Women, Report of the Committee on the Elimination of Discrimination Against Women, 20th Sess., ¶ 393, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter 20th Session Report] (affirming the Committee’s belief that legal provisions, which punish women who seek illegal abortions or treatment for abortions and doctors who perform them, “constitute a violation of the rights of women to health and life and of article 12 of the Convention”).

\(^71\) 20th Session Report, supra note 70, ¶ 17.


\(^74\) See, e.g., 14th Session Report, supra note 72, ¶¶ 446–447 (urging Peru to suspend the penal punishment of women who have undergone an illegal abortion and to consider a more expansive interpretation of therapeutic abortion); U.N. Comm. on the Elimination of Discrimination Against Women, Report of the Committee on the Elimination of Discrimination Against Women, 15th Sess., ¶ 181, U.N. Doc A/51/38 (1996) (“The Committee noted with interest the decriminalization of voluntary interruption of pregnancy and the observance of confidentiality in counselling [sic] women who may or may not opt for it.”).
decide on the number and spacing of their children,” and has insisted that governments must not limit childbearing decisions. The Committee has further emphasized that State parties should take action to “prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.”

The nature and frequency of the Committee’s questions, recommendations, and expressions of concern about clandestine abortions and women’s lack of access to safe and legal abortions reveal that CEDAW implicitly provides for such a right.

B. Peru’s Failure to Provide for Safe and Legal Abortions Violates CEDAW

The large number of Peruvian women who would like to control the number of children they have and the high rate of clandestine abortions in Peru are indicators that Peru has breached its obligations under CEDAW.

The Government’s maintenance of restrictive rules on abortion forces women to bear the burden of unwanted pregnancies and creates discrimination. First, forced pregnancy only affects women and is not a burden that men must bear. Second, there is a clear discriminatory effect based on social status in that only five percent of urban women with financial resources in Peru will suffer serious complications from unsafe abortions, whereas almost half of women living in extreme poverty will suffer complications. Peruvian law also discriminates against

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76 Id. ¶ 22.
78 See e.g., 14th Session Report, supra note 72, ¶¶ 446-47.
79 See Abortion Policies, supra note 17, at 32.
80 See generally Ferrando, supra note 11.
81 See Chavez, supra note 24 (recognizing that forty-four percent of Peruvian women live in extreme poverty); Ferrando, supra note 11, at 20, 22 (indicating that abortion among rural women is infrequent and access to healthcare is dependent on women’s financial means and place of residence, and explaining that 44% percent of women who suffer complications from clandestine abortions are poor rural women, 27% are poor urban women, 24% are rural women who are not poor, and 5% are urban women who are not poor).
married women.\(^{82}\) If a woman is raped by her husband and has an abortion, she may be sentenced to two years in prison.\(^{83}\) However, if a woman is raped by someone other than her husband and has an abortion, she may only be sentenced to three months in prison.\(^{84}\)

Peru also continues to require doctors to report women who show signs of abortion to the police, even though the Committee has stated that such confidentiality violations act as barriers to health care and infringe on a women’s right to health care under the treaty.\(^{85}\) Additionally, by criminalizing abortion, Peru has further restricted women’s access to health care because “laws that criminalize medical procedures only needed by women punish women who undergo those procedures.”\(^{86}\) For the aforementioned reasons, Peru’s abortion policies and practices are currently in violation of CEDAW.

**Conclusion**

Peru’s restrictive abortion law and its high rate of clandestine abortions have created a significant crisis in Peru that affects the life and health of millions of women. Unfortunately, the Peruvian government is not giving proper attention to this problem. Implicit in the CEDAW treaty is the right to obtain safe and legal abortions and Peruvian women should assert their claim to this right through the complaint procedure available in Optional Protocol. This could be an important first maneuver not only for Peruvian women, but also for women in similar situations around the world.

\(^{82}\) Peru Report, *supra* note 18, ¶ 56; Equality Now, *supra* note 59.


\(^{84}\) Peru Report, *supra* note 18, ¶ 56; Equality Now, *supra* note 59.


THE NATIONAL STOLEN PROPERTY ACT
AND THE RETURN OF STOLEN CULTURAL
PROPERTY TO ITS RIGHTFUL
FOREIGN OWNERS

JESSICA EVE MORROW*

Abstract: Artifact-rich countries have recently begun to campaign more
vigorously for the return of their cultural property that has found its way
illegally into the United States. Whether blatantly stolen or taken in viola-
tion of a country’s export law, the National Stolen Property Act is the ve-

cicle through which these countries can hope to retrieve their property.

Its requirements, however, have often proven too difficult for countries to
overcome. The United States, on behalf of the source country, must meet
the mens rea requirement of the National Stolen Property Act, an often in-
surmountable goal because of the confusion surrounding the circum-
stances under which the property was taken. By relaxing the mens rea re-
quirement, the National Stolen Property Act will become more effective
and its goals of punishment and deterrence will be furthered.

Introduction

The issue of protecting cultural property has emerged in recent
years as one of critical importance to countries that are mostly develop-
ing but are rich in artifacts that attract the eye of collectors and mu-
seum-goers the world over.\(^1\) The illegal importation of cultural prop-
erty into the United States from such countries is a billion-dollar
industry that puts a strain on the relationship between the United
States and source countries.\(^2\) In response to this issue, the United States
has developed a series of progressive cultural property laws, such as the
National Stolen Property Act of 1961 (NSPA), that allow source coun-

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tries to retrieve stolen cultural property from the United States. This Note argues that by relaxing the NSPA requirement that the defendant knows that he or she is importing an artifact which has been stolen from the source country, these laws will be more effective in fighting the illegal importation of stolen cultural property. Relaxation of the *mens rea* requirement would not result in a loss of legally imported artifacts because the United States, on behalf of the source country, would still be required to establish a prima facie case against the defendant before it could benefit from the lessened evidentiary burden.

This Note’s Background section discusses the importance of protecting cultural property. The Discussion section examines the legal safeguards that the United States has developed, such as the NSPA and the Convention on Cultural Property Implementation Act (CPIA). These laws were enacted to stem the flow of stolen cultural property into this country, and to provide a forum for foreign countries to retrieve that property once it has entered into the United States.

The Analysis section proposes modifications to the NSPA that would make it easier for foreign countries to recover artifacts that have been stolen from within their borders and brought to the United States. This solution balances the source country’s right to recovery of stolen cultural property on the one hand, with the rights of private owners to retain lawfully acquired and imported artifacts, on the other.

I. Background

The term “cultural property” refers to objects that have “artistic, archaeological, ethnological or historical interest” and value. Cultural property is often found in “source” nations, such as many Central and South American countries, Egypt, Greece, and Cambodia, that are usually developing and rich in artifacts, but without the resources or infrastructure to protect those artifacts from looters or to properly care for them in national museums. “Market” nations, on the other hand, are

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5 See id. at 463.
9 See Jowers, supra note 1, at 147; Siegle, supra note 4, at 455.
Western, developed states, such as the United States and Great Britain, where a great many objects of cultural property are brought, and eventually wind up in museums, private collections, or packed away in crates.10

A. Why Protecting Cultural Property Is Important

Protecting cultural property at the original site from looting is vital for anthropologists, historians, and others who care about preserving cultural heritage.11 Looting results in the disappearance of an artifact into the miasma of the world of illegally exported and imported artifacts, and destroys any record of the context, history, and cultural affiliation of the object.12

Not only is protecting cultural property important for archeological and scientific communities, but it is also vital to a nation’s collective cultural identity.13 The theory of cultural nationalism suggests that cultural property should be protected because it links present inhabitants to their national heritage through identification with the location where the cultural property was found.14 This theory gives nations a singular interest in the specific object found, suggests the attribution of a national character to that artifact, and advocates that the item is thus best appreciated within the context of its place of origin.15 Another theory, cultural internationalism, suggests that cultural property is a part of a common human culture, whatever its place of origin.16 According to this theory, an artifact is best appreciated by being exhibited in a place easily accessible to the public, such as a museum in a large international city which is likely to be more accessible to the wider public than the place of the artifact’s origin.17 These two theories underlie the proliferation of laws aimed at curbing the illegal export and import of cultural property.18 Market nations have recognized that, in order to foster good international relations and protect stolen cultural property

10 See Jowers, supra note 1, at 147.
12 See id.
14 Id.
15 Merryman, supra note 8, at 832.
16 Id. at 831.
17 See Siegle, supra note 4, at 454.
18 See id. at 455.
from being lost in the black market, they must enact laws that allow foreign countries to seek the return of their cultural property.\textsuperscript{19} Cultural nationalism informs this Note’s argument that in order to effectuate the proper goals of the NSPA—punishment and repatriation—the burdens of proof for source nations must be relaxed.\textsuperscript{20}

\section*{B. National Patrimony Laws}

The difference between a stolen object of cultural property, and one that is illicitly exported is that for an object to be considered stolen, it must have an owner, while an illegally exported object is merely one that has been taken out of the source country in violation of that nation’s export laws.\textsuperscript{21}

Most source countries have national patrimony laws that vest ownership of all cultural property, whether known or unknown or above or below ground, in the state.\textsuperscript{22} Thus, after the enactment of a national patrimony law, private owners cannot acquire title to such property; if any such property is found after the passage of the law it automatically becomes property of the state and must be turned over to the government.\textsuperscript{23} This makes the source country the owner of all cultural property within it borders.\textsuperscript{24} Source countries can also enact national export laws that restrict the export of cultural objects except under limited circumstances.\textsuperscript{25} Thus, an illicit export occurs when an object is taken out of the source country without a permit, if one is required.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{19} See id.
\item \textsuperscript{20} See Sherry, \textit{supra} note 2, at 532-33.
\item \textsuperscript{21} U.S. State Dep’t, Bureau of Educ. and Dep’t Affairs, Int’l Cultural Property Protection, \url{http://exchanges.state.gov/culprop/faqs.html} (last visited Jan. 25, 2007) [hereinafter U.S. State Dep’t].
\item \textsuperscript{22} John Alan Cohan, \textit{An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)}, 28 Environ Envtl. L. & Pol’y J. 1, 51–52 (2004).
\item \textsuperscript{23} See id. at 67.
\item \textsuperscript{24} U.S. State Dep’t, \textit{supra} note 21.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\end{itemize}
II. Discussion


The 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership on Cultural Property (UNESCO Convention) is a multi-national agreement that attempts to unify international cultural property law. The long-term purpose of the convention is to protect the knowledge that can be gathered from excavated archaeological material and “to preserve ethnographic material that remains in its societal context” in the source country. UNESCO Convention defines “cultural property” broadly and places restrictions on imports, exports, and transfer of title of cultural property. In particular, Article 9 states:

The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Thus, parties to the UNESCO Convention agree to:

(1) prevent the transfer of ownership and illicit movement of cultural property; (2) insure the earliest possible restitution of property to rightful owners; (3) admit actions for recovery of cultural property brought by or on behalf of aggrieved parties; and (4) recognize the indefeasible right of each state to de-
clare certain cultural property inalienable and not susceptible to exportation.\textsuperscript{31}

B. The Cultural Property Implementation Act

The United States became a signatory to the UNESCO Convention in 1982, when Congress ratified the convention through the Cultural Property Implementation Act (CPIA).\textsuperscript{32} This Act codified UNESCO Convention into United States law and allowed the government to implement Article 9 and provide foreign plaintiffs with a cause of action in the United States.\textsuperscript{33} The Act allows the United States to recognize demands from countries for the United States to place import restrictions on archaeological artifacts that have been looted from within their boundaries.\textsuperscript{34} The recognition of these requests promotes licit and documented trade and reduces the incentive for pillage, thus protecting valuable archaeological and cultural material that resides \textit{in situ}.\textsuperscript{35} Under Section 308 of the CPIA, no article of stolen cultural property from a party to the UNESCO Convention may be imported into the United States after the date the convention entered into force with respect to that party, or the effective date of the CPIA (April 12, 1983), whichever is later.\textsuperscript{36} Violations of the CPIA result in seizure, forfeiture, and return of the cultural property to the rightful country owner.\textsuperscript{37} Under the CPIA, the United States has signed numerous bilateral agreements with foreign countries aimed at reducing the number of illegally exported works that enter the United States by enforcing the source country’s cultural property laws.\textsuperscript{38}

C. The National Stolen Property Act

The UNESCO Convention is also enforceable in the United States under the NSPA.\textsuperscript{39} While the CPIA provides for civil remedies, the

\textsuperscript{31} Cohan, supra note 22, at 43–44.
\textsuperscript{32} Kastenberg, supra note 27, at 49.
\textsuperscript{33} Id.
\textsuperscript{34} Cohan, supra note 22, at 46.
\textsuperscript{35} U.S. State Dep’t, supra note 21, http://exchanges.state.gov/culprop/backgrnd.html (last visited Jan. 25, 2007).
\textsuperscript{36} U.S State Department, supra note 21, http://exchanges.state.gov/culprop/backgrnd2.html (last visited Jan. 25, 2007).
\textsuperscript{37} Cunning, supra note 13, at 472.
\textsuperscript{39} Kastenberg, supra note 27, at 50.
NSPA creates an enforcement arm of the CPIA by taking source countries’ patrimony laws into consideration and making criminal sanctions available. The NSPA, which was enacted in 1948, states that “[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.” Additionally, “[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken” is subject to fine or imprisonment. United States courts have read the NSPA to provide for the enforcement of all international cultural property controls, including the UNESCO Convention, and to allow the United States to represent the interests of foreign countries by suing individuals for recovery of cultural property that has been stolen or illegally imported into the United States.

Under the NSPA, United States courts evaluate whether a source country’s national patrimony law sufficiently vests ownership in the artifact, such that it could be considered “stolen,” and therefore form the basis of a cognizable claim within the courts’ jurisdiction. The NSPA has been interpreted to apply to cases involving a defendant who sells or receives property that he or she knows has been illegally excavated in violation of a foreign country’s export laws. Thus, proving that the defendant had knowledge of the source country’s national patrimony law is a requirement for successful prosecution under the NSPA. Because of the often ambiguous circumstances surrounding the excavation and provenance of an object, this evidentiary burden of the NSPA often proves to be a barrier to source countries seeking the return of their property.

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40 Id.; Sharma, supra note 11, at 756.
43 Kastenberg, supra note 27, at 50.
44 Sharma, supra note 11, at 756.
45 Cohan, supra note 22, at 65.
46 See id.
47 See Sherry, supra note 2, at 532–33 (explaining concept through a hypothetical).
D. The Development of the Knowledge Requirement of the NSPA

1. The First Consideration of National Patrimony Laws: United States v. Hollinshead

The first case in which United States courts considered national patrimony laws under the NSPA was United States v. Hollinshead in 1974. The defendants, including a dealer in pre-Columbian artifacts, organized the removal and transport into the United States of a rare pre-Columbian stele that was found in a Mayan ruin in the Guatemalan jungle. The defendants were convicted under the NSPA for conspiracy to transport stolen property in interstate commerce. In upholding the conviction, the Ninth Circuit credited expert testimony that the stele and other such artifacts were property of the state under Guatemalan law, and therefore could not be removed without governmental permission. The court also found that there was “overwhelming evidence” that the defendants knew it was a violation of Guatemalan law to remove the stele and that they knew it was stolen. This case, however, presented a rare situation in which the stolen artifact was extensively documented by the source country, and therefore easily proven to be that country’s property without the need for the United States court to analyze the applicable national patrimony law.

2. Elements Necessary for a Conviction under the NSPA: United States v. McClain

In 1977, in United States v. McClain, the Fifth Circuit held that in order for the defendants to be convicted under the NSPA for stealing pre-Columbian artifacts from Mexico and selling them in the United States, the prosecution had to show that the defendants either knew that the items were stolen or that possessing or removing the objects violated Mexican law, and that the artifacts were owned by the Mexican government at the time they were removed. At trial, evidence,
such as forged documents regarding the artifacts history, was introduced to show that the defendants knew their actions were illegal.\footnote{McClain II, 593 F.2d at 660–63.} On appeal, the Fifth Circuit upheld Mexico’s national patrimony law by finding that the NSPA applied to ownership by foreign legislative declarations even if the objects in question had never been physically possessed by that government.\footnote{United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) [hereinafter McClain I].}

When the case was appealed a second time, the Fifth Circuit addressed the issue of whether Mexico’s patrimony laws were adequately clear in giving title to the Mexican government.\footnote{Sharma, \textit{supra} note 11, at 759.} While the court agreed with the defendants that the various Mexican patrimony laws were “vague and inaccessible except to a handful of experts who work for the Mexican government,” the court found that the most recent patrimony law was “clear and unequivocal in claiming ownership of all artifacts.”\footnote{McClain II, 593 F.2d at 664, 670–71.} The Court thus upheld the conspiracy conviction under the NSPA because the evidence showed that the defendants knew the artifacts were stolen.\footnote{Id. at 671.} The defendants knew about the most recent patrimony law, attempted to conceal their actions and falsified the origin of the artifacts.\footnote{Id. at 660–63.} McClain II thus exhibits the readiness of United States courts to uphold convictions under the NSPA for transporting stolen artifacts into the United States, but only if the applicable national patrimony law is clear and unambiguous and the defendants knew that the artifact was stolen.\footnote{Sharma, \textit{supra} note 11, at 759–60.}

3. The Future of NSPA Litigation: \textit{United States v. Schultz}

In \textit{United States v. Schultz}, the Second Circuit stated that the NSPA should be broadly construed to justify the federal courts’ application of the statute whenever they determine that the property was stolen in another country.\footnote{333 F.3d 393, 402 (2d Cir. 2003).} Schultz, a prominent New York art dealer, was convicted under the NSPA of smuggling Egyptian artifacts out of Egypt and selling them in the United States in violation of Egypt’s cultural patrimony law.\footnote{Id. at 395–98.} The defendant and his co-conspirator produced false
labels regarding the provenance of the objects, and created a fake art collection through which to sell the objects in the United States.\textsuperscript{64}

The Second Circuit held that an object is “stolen” under the NSPA if it has been taken from a country in violation of that country’s patrimony law.\textsuperscript{65} The Court then stated that the Egyptian national patrimony law was sufficiently clear in establishing Egyptian ownership of all artifacts found after 1983, the year that the national patrimony law was enacted.\textsuperscript{66}

The conviction in \textit{Schultz} signals the United States’ commitment to enforce the cultural patrimony laws of foreign countries, and to represent the interests of those countries in criminal actions in United States courts.\textsuperscript{67} Because of the difficulties that source countries face in proving that the defendant knew that the artifact was stolen and that their actions violated the source country’s national patrimony laws, however, the NSPA still does not provide foreign countries with complete relief in their quest to halt the disappearance of their cultural heritage.\textsuperscript{68}

III. Analysis

In order to be convicted under the NSPA, a defendant must have stolen or imported the object \textit{knowing} that he was doing so in violation of a country’s patrimony laws.\textsuperscript{69} The heavy evidentiary burden that source countries face begs the question of whether the goal of the NSPA is to return stolen cultural property, or merely to punish offenders.\textsuperscript{70} Were the knowledge burden relaxed, the NSPA would better effectuate both goals—offenders would be more easily convicted and the stolen object would be more likely to be returned.\textsuperscript{71}

A relaxation of the \textit{mens rea} requirement of the NSPA would not result in the United States’ losing artifacts that have been imported into the country legally.\textsuperscript{72} Because the foreign country would first be required to establish a prima facie case against the defendant before

\textsuperscript{64} \textit{Id.} at 396.
\textsuperscript{65} \textit{Id.} at 399, 404; Siegle, \textit{supra} note 4, at 461.
\textsuperscript{66} \textit{Schultz}, 333 F.3d at 399, 402.
\textsuperscript{67} \textit{See} Siegle, \textit{supra} note 4, at 455.
\textsuperscript{68} \textit{See id.} at 464.
\textsuperscript{70} \textit{See Siegle, \textit{supra} note 4, at 463.}
\textsuperscript{71} \textit{See Sherry, \textit{supra} note 2, at 534.}
\textsuperscript{72} \textit{See Siegle, \textit{supra} note 4, at 463.}
it can benefit from the presumption attendant to a national patrimony law crafted with regard to the guidelines of the NSPA, the existence of a well-crafted patrimony law alone does not mean that the artifact will be returned to the claiming country.\footnote{See Sharma, supra note 11, at 766–67.}

While a court will impute knowledge to the defendant based on the circumstances, it remains extremely difficult to prove that the defendant had sufficient knowledge of a foreign country’s patrimony laws.\footnote{See Ildiko Pogany DeAngelis, How Much Provenance is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archaeological Materials and Ancient Art, in Legal Problems of Museum Administration 241, 248 (ALI-ABA Course of Study) (Mar. 30–Apr. 1, 2005); Petr, supra note 69, at 506.} A country must also prove that the artifact was \textit{stolen}, meaning that the artifact must have been documented by the source country prior to its theft.\footnote{See DeAngelis, supra note 74, at 249.} This is often impossible, however, because many artifacts remain buried below ground, unknown to the government until they are dug up by a looter and shipped out of the country.\footnote{See Sharma, supra note 11, at 762.} Because the problem of documenting every artifact presents many of its own concerns that are better suited to discussion in a more in-depth forum, this Note focuses only on the NSPA’s knowledge requirement.\footnote{See McClain II, 593 F.2d at 670.}

While in \textit{Schultz} the elaborate deceptions the defendants engaged in, such as creating a fake collection and forging certificates, made it obvious that they knew they were violating Egyptian cultural patrimony law, in many cases a defendant would have bought something that he or she does not know has been illegally exported, or will take an artifact without knowing that the source country has declared ownership under a national patrimony law.\footnote{See Cohan supra note 22, at 67; DeAngelis, supra note 74, at 247.}

In situations such as these, a source country seeking the return of its stolen cultural property faces the difficult task of proving that the defendant both knew of and understood that country’s cultural patrimony law, and knew that his actions would result in the theft of the artifact under that law.\footnote{See Schultz, 333 F.3d at 402.} National cultural patrimony laws, however, are often inaccessible to any but the most informed, and might be written in a way that only experts can understand.\footnote{See Jowers, supra note 1, at 168.} In fact, United States courts have sometimes found that the governing national cul-

\footnote{See Jowers, supra note 1, at 168.}
tural patrimony statutes of a foreign country were too vague to be a basis for criminal liability in the United States.\textsuperscript{81}

In order to pave the way toward a potentially more successful recovery action under the NSPA, countries rich in artifacts should ensure that their national cultural patrimony laws are clear and comprehensive and as easily accessible as other laws.\textsuperscript{82} Having an accessible, clear and unambiguous patrimony law makes it much easier to prove that the defendant had knowledge of, and understood, such a law.\textsuperscript{83}

The NSPA should be amended to include guidelines for what it considers to be clear and comprehensive patrimony laws, to assist source countries in retrieving their stolen cultural property.\textsuperscript{84} These guidelines would offer source countries a model to follow in crafting their patrimony laws, and by following the NSPA’s suggestions, would evidence their desire to retrieve their stolen heritage.\textsuperscript{85} Foreign countries should not be penalized for not drafting their national patrimony laws in compliance with United States’ guidelines, so a source country’s failure to do so would not mean that a United States court would refuse to recognize the national patrimony law in question.\textsuperscript{86} The source country would still have the opportunity to prove the clarity and accessibility of its law through the use of experts and standard trial techniques.\textsuperscript{87} Thus, the guidelines would only act as a facilitator, rather than a bar to entry.\textsuperscript{88}

Once a country has crafted its patrimony law in consideration of the NSPA’s suggested guidelines, the presumption should then be that the defendant had knowledge of, and understood, the law.\textsuperscript{89} Thus, after the source country establishes a prima facie case that the defendant stole the object from within the country’s borders in violation of the country’s existing and enforced national patrimony law, the defendant would then have the burden of proving that he was unaware of the patrimony law and did not know that he was violating it by taking the artifact.\textsuperscript{90} This shift in the burden of proof from the source country to the defendant would likely result in an increased

\textsuperscript{81} Id. at 670; Cohan, supra note 22, at 66.
\textsuperscript{82} See Sharma, supra note 11, at 767.
\textsuperscript{83} See McClain II, 593 F.2d at 670.
\textsuperscript{84} See Sharma, supra note 11, at 756.
\textsuperscript{85} See id.
\textsuperscript{86} See id. at 767.
\textsuperscript{87} See Petr, supra note 69, at 508–10.
\textsuperscript{88} See Sharma, supra note 11, at 756.
\textsuperscript{89} But see Cunning, supra note 13, at 483.
\textsuperscript{90} But see id.
number of suits by the United States on behalf of source countries and a greater percentage of stolen cultural property being returned to their rightful owners.\textsuperscript{91}

\section*{Conclusion}

The National Stolen Property Act and its enforcement in \textit{Schultz} signals that the United States is committed to assisting source nations retrieve their stolen cultural property, and to stemming the flow of illegal cultural property looting in general. Nevertheless, the requirement of a heightened level of proof under the NSPA frustrates enforcement of the law, and concomitantly, the attainment of the law's goals of deterrence, punishment, and return. Relaxing the knowledge requirement of the NSPA would further the twin goals of penalty and return, and the United States would be seen as leading the international effort in the fight against disappearing culture.

\textsuperscript{91}\textit{See} DeAngelis, \textit{supra} note 74, at 248–49.
HANS OFF!: THE STRUGGLE FOR HANS ISLAND AND THE POTENTIAL RAMIFICATIONS FOR INTERNATIONAL BORDER DISPUTE RESOLUTION

Christopher Stevenson*

**Abstract:** As global warming continues to warm the Arctic seas, more of the Arctic is free of ice for longer periods. The possibilities for exploitation of natural resources and for control over Northern shipping lanes have prompted countries’ renewed interest in their competing claims to the region. Recently, Denmark and Canada have clashed over their competing claims to a small, uninhabitable rock known as Hans Island. While this island may not seem significant, the eventual resolution of this border dispute may have widespread ramifications for the resolution of international conflicts in other remote, uninhabited areas. This Note examines the International Court of Justice decisions in a number of border dispute cases, applies that jurisprudence to the Hans Island facts, and urges both parties to reach an equitable solution.

**Introduction**

On July 20, 2005, Bill Graham, the Foreign Defense Minister of Canada, made a helicopter trip to a small, rocky island in the Davis Strait, which separates Canada’s Ellesmere Island from Greenland.¹ The short visit, which followed a Canadian military flag planting and Inukshuk² raising on the island, raised diplomatic tensions between Canada and Denmark.³ Danish officials labeled the move an “occupa-

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² A traditional Inuit stone marker. See Laghi, supra note 1.

³ See Laghi, supra note 1; Disputed Ownership, supra note 1; Hans of Time, supra note 1.
tion," filed an official protest, and sent their own military expedition to the island. The two countries decided to discuss their disagreement and, on September 19, 2005 agreed to a “truce” in the dispute.

In early 2006, however, Conservative Stephen Harper was sworn in as Canada’s new Prime Minister. Harper’s campaign had promised increased assertion of the country’s sovereignty over Arctic territories through the construction of three heavy icebreaking ships, a northern deepwater port, and an underwater network of listening posts.

The events of 2005 and 2006 were only the latest acts in a dispute that has simmered since 1973. Although both countries assert that the issue is simply one of national sovereignty, there is speculation that the desire to exploit the natural resources of the region and control the passage of ships through the soon to be ice-free Northwest Passage may be playing a major role in the intensifying struggle for the island.

This Note will summarize the recent history of Hans Island and the origins of the competing claims of Canada and Denmark. It will explore possible factors behind the recent escalation of diplomatic hostilities. After an examination of the three rationales the International Court of Justice (ICJ) employs when deciding such disputes, the Note

5 See McIlroy, supra note 4; Hans of Time, supra note 1.
9 Disputed Island, supra note 6; Visit Angers Danes, supra note 1.
will explain how this case presents a unique challenge for the court because, under traditional ICJ jurisprudence, a decision in either country’s favor based on recent visits to the island is not in the best interest of the parties or the international community. The best scenario, in the absence of a negotiated political solution, may be an equitable division of the disputed land.

I. Background

The history of possession of the land surrounding the Davis Strait is long and interesting. Canada claims Ellesmere Island and the rest of its Arctic possessions on the basis of the British Adjacent Territories Order, which gave Canada all of Britain’s Arctic possessions on September 1, 1880. The United States claimed the Northern portions of Greenland adjacent to the Island until it relinquished those claims as part of its agreement to purchase the Danish West Indies from Denmark in 1917. Denmark gained the rest of Greenland in a 1933 decision of the Permanent Court of International Justice and has maintained it as a semi-autonomous possession ever since.

By most accounts, the first western explorer to discover and name Hans Island was American Charles Francis Hall. Hall, on an expedition to the North Pole, noted the tiny island and named it after his Inuit guide from Greenland, Hans Hendrik. There is little subsequent history surrounding the island itself until 1971 when, in the middle of discussions to determine the boundary between itself and Greenland, Canada first claimed sovereignty over Hans. Denmark did and has since disputed this claim for a number of reasons, including: its belief that the island was discovered by Hans Hendrik himself; certain geological similarities between Greenland and Hans Island; and evidence

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11 See e.g. Hans of Time, supra note 1.
that Inuit populations native to Greenland may have used the island in the past.\(^{18}\) The resulting treaty reflects the two countries’ inability to agree on the issue.\(^{19}\)

### A. The 1973 Delimitation Treaty

The boundary discussions culminated with the two countries signing an agreement on the delimitation of the Continental Shelf on December 17, 1973.\(^{20}\) This treaty established the dividing line in the “area between Greenland and the Canadian Arctic Islands . . . for the purpose of each Party’s exploration and exploitation of the natural resources” of the shelf.\(^{21}\)

The agreement draws the borderline between Canada and Greenland by connecting the midpoints of 127 straight baselines surveyed between the coasts of the two countries by the Canadian Hydrographic Service in 1964 and 1972.\(^{22}\) The line is unbroken except for an 857 meter gap between point 122 (lat. 80° 49’ 2, long 66° 29’ 0) and point 123 (lat. 80° 49’ 8, long. 66° 26’ 3).\(^{23}\) Hans Island sits in this gap.\(^{24}\) Unable to agree on ownership of the island during negotiations, the two countries simply decided to stop the border at the low water mark on one side of the island and restart it again at the low water mark on the opposite side.\(^{25}\)

### B. Visitors to Hans Island

The treaty having left the issue of Hans’ ownership unclear, both Denmark and Canada have seen fit to embark on visits to the island in the ensuing years.\(^{26}\) Canadian interests seem to have made the first move—a series of research trips to the island by Dome Petroleum in

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\(^{20}\) See Delimitation Treaty, supra note 19.

\(^{21}\) Id. art. 1.

\(^{22}\) See id. art. 2.

\(^{23}\) See id.

\(^{24}\) See id. Annex 3.

\(^{25}\) See Harper, supra note 15; Fine Line, supra note 6.

\(^{26}\) See Hans of Time, supra note 1.
1981 and 1983 to study the island’s ability to withstand the force of Arctic ice floes.27

After learning of this visit by the Canadians, the Danish government decided to undertake its own expedition to the island.28 On July 28, 1984, Tom Høyem, Denmark’s minister of Greenlandic Affairs, flew to the island.29 Høyem reportedly planted a Danish flag on the island and started a new visitor tradition by leaving a bottle of aquavit behind.30 The Danish military returned to the island in 1988, 1995, 2002, and 2003.31 Each time, they planted a new Danish flag.32

In 2000, a team of geologists from the Geographical Society of Canada flew to Hans while on a trip to map Ellesmere Island.33 They took geological samples from the island and mapped its location.34 In 2005, members of the Canadian armed forces visited the island in advance of Bill Graham’s visit.35 They planted a Canadian flag and built an Inukshuk.36

C. Why Fight Over Hans Island and Why Now?

While there are no known deposits of oil, natural gas, gold, or other minerals on Hans Island, there is speculation that the seafloor under the surrounding waters could contain such natural resources.37 As global warming has heated the Arctic seas, the waterways between Canada and Greenland have become navigable throughout more of the year.38 The countries have seized this opportunity to conduct research into possible oil and gas reserves, and Denmark has already licensed some of the area on its side of the Davis Strait for oil explora-

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29 See id.; Hans of Time, supra note 1; Visit Anger Dane, supra note 1.
31 Hans of Time, supra note 1.
32 Id.
33 Id.; George, supra note 18.
34 George, supra note 18.
35 Hans of Time, supra note 1.
37 See McIlroy, supra note 4; DeMille, supra note 10.
38 See McIlroy, supra note 4; DeMille, supra note 10.
tion—though, interestingly, the purchaser of this license is EnCana Corporation, a Canadian company.39

Global warming is also responsible for a second possible reason that interest in controlling the island is so strong.40 The warmer Arctic sea temperatures bring with them the promise that the Northwest sea passage will become passable throughout the year.41 Should this happen, the amount of shipping through the Arctic will increase dramatically and could represent a lucrative revenue source for whichever country regulates passage.42 Other countries, such as the United States, have already asserted their belief that the waters are international territory and have made their own, unannounced trips to the area.43

II. Discussion

The clear preference for most countries involved in territorial disputes is to solve their disagreements through political means.44 On several occasions, however, countries have decided to submit their disputes to third parties for binding legal settlements.45 Such a decision can stem from, inter alia, a treaty commitment to peaceful dispute resolution, the desire to acquire international legitimacy in the final outcome, or simply the inability of the parties to negotiate an agreement on their own.46

Although the International Court of Justice is not the only third party available to parties engaged in territorial disputes, it has become a more popular choice of late.47 It has heard many different border disputes and, while complicated and often lengthy (the border dispute between Bahrain and Qatar is the longest case ever heard by the court),48

39 DeMille, supra note 10.
40 See McIlroy, supra note 4; The Honourable Pierre Pettigrew, Canada’s Leadership in the Circumpolar World, Remarks at the Northern Strategy Consultations Round Table on Reinforcing Sovereignty, Security, and Circumpolar Cooperation (Mar. 22, 2005), available at http://w01.international.gc.ca/minpub/Publication.asp?publication_id=382497&Language=E.
41 See McIlroy, supra note 4; Rubin, supra note 10.
42 See McIlroy, supra note 4; Rubin, supra note 10.
43 See McIlroy, supra note 4; Rubin, supra note 10.
45 Id. at 205.
46 See id. at 208–13.
47 See id. at 205–06 and app. 1.
the decisions in these cases offer valuable insight into the bases of border dispute resolution and display a relatively predictable pattern of decision. With this in mind, and with Canada and Denmark no closer to agreeing about the island’s ownership, the possibility of the dispute being tried before the International Court of Justice looms and it is important for both countries to consider how the ICJ would analyze this case.

The court gives the most weight to territorial claims that are backed by treaty. Unless they are somehow defective, treaties are considered binding on the parties that have entered into them and are dispositive when they reflect past agreement on international boundaries.

In a dispute between Belgium and the Netherlands, for example, the court considered both an 1843 Boundary Convention establishing the border between the countries and the claim that Belgium, although granted the territory in the treaty, had effectively ceded control over the area to the Netherlands. The Netherlands had been collecting taxes and registering births, deaths, marriages, and property transfers. It even sold a plot of land in the disputed area. The court found the treaty dispositive, however, and held that Belgium had not ceded its rights to the territory simply because of the Netherlands’s “routine and administrative” acts.

When there is no clear delimiting of a disputed border by way of a treaty between the two parties, the ICJ proceeds to consider the doc-

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49 See generally Brian Taylor Sumner, Territorial Disputes at the International Court of Justice, 53 DUKE L.J. 1779, 1781 (2004) (explaining the hierarchical approach to fact analysis used by the I.C.J when deciding such cases).
50 See, e.g., Press Release, Secretary-General Congratulates Bahrain and Qatar on Resolution of Territorial Disputes, U.N. Doc. SG/SM/7751 (Mar. 23, 2001) (congratulating Bahrain and Qatar for settling their border dispute through the ICJ and stating that it is an excellent example to other States of how disputes of this nature should be resolved).
51 Sumner, supra note 49, at 1782, 1804; see also Statute of the International Court of Justice, art. 38, June 26, 1945, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicertext/ibasicstatute.htm. [hereinafter ICJ Statute] (stating that the court, when deciding international law disputes, shall apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”).
52 See Sumner, supra note 49, at 1804.
54 Id. at 228–29.
55 Id.
56 Id. at 229; see also Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 37–39, 40 (Feb. 3) (holding it unnecessary to consider uti possidetis, inherited title, or spheres of influence arguments because a treaty clearly defined all borders in dispute).
trine of *uti possidetis*.\(^\text{57}\) This type of claim generally arises when the two countries in dispute were once colonies of the same country.\(^\text{58}\) There are frequently no formal treaties defining the colonial borders, merely administrative boundaries, so, under the doctrine, these boundaries are deemed to be functionally equivalent to international borders.\(^\text{59}\)

In the case of Bahrain and Qatar’s dispute over possession of the Hawar Islands, for instance, the court examined a ruling by the British courts from 1939.\(^\text{60}\) That decision, made when both countries were British possessions, clearly granted ownership of the islands to Bahrain.\(^\text{61}\) The ICJ accepted that judgment and held that the islands still belonged to Bahrain.\(^\text{62}\) Bahrain and Qatar were also contesting possession of the island of Janan in their dispute.\(^\text{63}\) The court found no reference to Janan in the British decision of 1939 and instead relied on a 1947 British declaration that the grant of the Hawar Islands to Bahrain did not include Janan to make their determination that Janan belonged to Qatar.\(^\text{64}\) Although Bahrain put forth an effective control argument that the fishermen of Janan were required to obtain Bahraini permission before constructing huts on the island, that argument was not considered in the court’s decision.\(^\text{65}\)

When there is no documentation of a territory’s ownership either through treaty or *uti possidetis* or when that documentation is ambiguous, the court looks at the customary use of the area by the countries disputing ownership to see if either has established effective control over the territory.\(^\text{66}\) Effective control has been described by one commentator as “continuous administration and effective occupation of the land; ideally, the territory should be settled throughout and the natural resources of the area should be developed and

\(^{57}\) Sumner, *supra* note 49, at 1804. *Uti possidetis* is a doctrine under which newly independent states inherit the preindependence administrative boundaries established by the former colonial power. *Id.* at 1790.


\(^{59}\) See *id.*


\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 89–91.

\(^{64}\) *Id.* at 90–91.

\(^{65}\) See *id.* at 87, 90–91; see also Land, Island and Maritime Dispute (El. Sal. v. Hond.: Nicar. intervening), 1992 I.C.J. 351, 356, 391–93 (Sept. 11) (finding, in a case where a treaty failed to describe a disputed area, that Spanish documents indicating jurisdictions or territorial limits, where found, established the international border).

It has also been described in a broader sense as “a certain degree of political, military, or administrative power deemed appropriate in the given conditions and varying from case to case according to circumstances.”

This second formulation—that of adjusting the amount of control necessary to assert sovereignty based on the circumstances—is what the court has been using.

The ICJ resorted to an evaluation of effective control, for example, in a dispute between France and the United Kingdom over control of two English Channel islands. There were no colonial borders because the islands had never been considered colonies of either country, and the court rejected claims of feudal land grants and fisheries agreements as nondispositive on the border issue. Instead it found that the British government had exercised sovereign jurisdiction over both island groups through a number of administrative acts, such as holding judicial proceedings, establishing local ordinances regarding the handling of corpses, levying taxes, licensing commercial boats, registering deeds to property, and conducting censuses. Because it had exercised this control, the United Kingdom was awarded sovereignty over the islands.

In the dispute between Indonesia and Malaysia over control of the islands of Pulau Ligitan and Pulau Sipadan, however, the court used a less stringent standard to determine effective control. The court began its analysis by examining an 1891 agreement between the British and the Dutch, but found that it did not address the boundary area around the islands in question. Finding no other boundary authority, the court examined the countries’ competing claims of effective control. It found that Indonesia’s claims were insufficient to establish authority, but that Malaysia’s regulation of the commercial collection of turtle eggs, its establishment of a bird sanctuary, and its construction of

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68 Yehuda Z. Blum, Historic Titles in International Law 101 (1965).
71 See id. at 59, 60–63, 65–69.
72 Id.
73 Id. at 72.
75 See id. at 652–53.
76 See id. at 678.
light houses were all that were required to demonstrate effective control. Although these activities fell short of the standard set in Minquiers and Ecrehos, the court found them sufficient in the context of the disputed islands and awarded the islands to Malaysia.

If it ultimately decides that there is insufficient evidence of effective control, it is unlikely that the ICJ will move on to consider the countries’ geographical, economic, historical, ideological or cultural claims. Although it has frequently heard such claims, the court’s jurisprudence in territorial disputes is conspicuously void of reference to these issues. Instead, the court has shown a preference to decide such cases under equitable principles. If both parties agree to let the ICJ decide a case ex aequo et bono, the court is free to decide the case in the manner most equitable to both parties. Even without such an agreement, the court can resort to the similar principle of equity infra legem.

III. Analysis

In resolving the Hans Island dispute, the International Court of Justice would first look for treaty evidence establishing the border between Canada and Greenland. No agreements exist between any other countries who may have had claims to the area before Denmark and Canada, so the only treaty upon which the court could rely is the 1973 Delimitation Treaty. As discussed previously, however, the border described by this treaty is not established around Hans Island. The treaty, therefore, would not be viewed as dispositive by the court.

Without conclusive treaty evidence, the ICJ would examine the possibility of uti possidetis. A showing of uti possidetis would require one side or the other to show that the area encompassing Northern Greenland, Hans Island, and Ellesmere Island was once controlled by

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77 See id. at 683–85.
80 See id. at 1807.
81 Id. at 1806.
82 Statute of the International Court of Justice, art. 38, para. 2, June 26, 1945, http://www.icj-cij.org/icjwww/ibasic (allowing the Court decide a case ex aequo et bono, if the parties agree thereto).
84 See Sumner, supra note 49, at 1804.
85 Delimitation Treaty, supra note 19.
86 See id. at annex 3.
87 See Sumner, supra note 49, at 1804.
88 See id.
a single nation and that that nation employed administrative boundaries that could translate into current international borders.\textsuperscript{89} As stated above, the Canadian Arctic islands were British possessions that were transferred to Canada in 1880.\textsuperscript{90} It is unclear whether Hans Island was part of that transfer.\textsuperscript{91} Greenland, however, was clearly not part of the British possession at the time because its Southern areas were controlled by Denmark and the Northern area around Hans Island was claimed by the United States until 1917.\textsuperscript{92} Because the entire area was never under a single country’s control and because, therefore, no colonial boundaries exist, there can be no finding of \textit{uti possidetis}.\textsuperscript{93}

Unable to find a basis for decision under either treaty or the doctrine of \textit{uti possidetis}, the court’s examination of the merits would shift to effective control.\textsuperscript{94} The question here, of course, is how much effective control will be found to be sufficient to base a claim of sovereignty over an Arctic island.\textsuperscript{95}

Clearly, permanent settlement of Hans is not feasible and, if there are no natural resources in the area, Canada and Denmark cannot be expected to assert their sovereignty through their development and use of them.\textsuperscript{96} In the case of Pulau Ligitan and Pulau Sipadan, however, the court showed that it is willing to adjust its effective control requirements to fit the situation at hand.\textsuperscript{97} Thus, in Pulau, the establishment of a bird sanctuary was a sufficient exercise of control on a sparsely inhabited island, while in Minquiers and Erehos, more populated islands, a greater showing of control was necessary.\textsuperscript{98} The ICJ may well decide that periodic military visits and erections of stone markers are sufficient exercises of control for an uninhabited and largely inaccessible rock in the middle of the Arctic.\textsuperscript{99} Such a decision, far from being a boon to either Canada or Denmark, would have disastrous consequences for both countries and their attempts to assert sovereignty in other parts of the Arctic.

\textsuperscript{89} See Maritime Delimitation and Territorial Questions (Qatar v. Bahr.) 2001 I.C.J. 40, 83–84 (Mar. 16).
\textsuperscript{90} Adjacent Territories Order, July 31, 1880, R.S.C., No. 14 (Appendix 1985).
\textsuperscript{91} See \textit{id}.
\textsuperscript{92} See Treaty on Cession of Danish West Indies, \textit{supra} note 13.
\textsuperscript{93} See Sumner, \textit{supra} note 49, at 1790.
\textsuperscript{94} See \textit{id}. at 1806.
\textsuperscript{95} See Blum, \textit{supra} note 68, at 101.
\textsuperscript{96} See DeMille, \textit{supra} note 10.
\textsuperscript{99} See e.g., Sovereignty over Pulau Ligitan and Pulau Sipadan, 2002 I.C.J. at 684–85.
A decision granting either party sovereignty over Hans Island would set a dangerous precedent for other countries seeking to gain possession of remote territories. Essentially, it would send the message that uninhabited areas are available to the country which can make the most visits there. The ensuing land rush will be particularly noticeable in the Arctic, as a number of countries with competing claims in the region have become increasingly interested in enforcing those claims as global warming has made the area more accessible.\textsuperscript{100} Russia, for instance, has begun to lay claims to other areas of the Arctic currently claimed by Denmark.\textsuperscript{101} The United States also makes frequent naval forays to the Arctic and could potentially use these trips as a basis for sovereignty claims.\textsuperscript{102}

If ever there were a case for the ICJ to decide in equity, it is this one.\textsuperscript{103} The court should reject both Denmark’s and Canada’s claims of effective control as inadequate and award possession of the island under an equitable solution.\textsuperscript{104} This solution could be as simple as dividing the island in two by drawing a straight line between the delimitation points on either side of the island, or as complex as the court should decide necessary.\textsuperscript{105} Whatever the ultimate form of the division, a decision in equity would send a clear signal that the sovereignty of uninhabited lands will not be handed to whichever country can make the most frequent visits.\textsuperscript{106} This will, in the end, protect the interests of not only Canada and Denmark, but also those of many other nations whose possessions include remote, uninhabited areas.\textsuperscript{107}

**Conclusion**

This examination of the probable outcome of an ICJ analysis of the Hans Island dispute should assist both parties in assessing the strengths of their respective claims. Both should note that time and money spent developing cultural claims, such as former Inuit use of the

\begin{itemize}
\item \textsuperscript{101} Daniel Howden & Ben Holst, *The New Cold War*, \textsc{Independent}, Jan. 5, 2005, at 27.
\item \textsuperscript{102} See Rubin, *supra* note 10.
\item \textsuperscript{103} See Sumner, *supra* note 49, at 1806–07.
\item \textsuperscript{104} See Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 567–68 (Dec. 22).
\item \textsuperscript{105} See id.
\item \textsuperscript{106} See e.g., Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.) 2002 I.C.J. 625, 684 (Dec. 17).
\item \textsuperscript{107} See *Canada Steps Up Arctic Military Patrols*, *supra* note 100; Howden & Holst, *supra* note 101.
\end{itemize}
Island, and geographical claims, such as similarity to Greenland,\textsuperscript{108} are not likely to yield effective arguments for sovereignty. In 2005, Canada and Denmark seemed to realize that the best result may come from working together when they announced that they would be cooperating in a new geographical study of the area.\textsuperscript{109} Recently, however, Canada signaled that it may be changing its position by issuing a Vancouver geologist a prospecting permit for the island.\textsuperscript{110} Hopefully cooperation will prevail and lead to an agreeable solution and settle international tensions in this increasingly important part of the world.

\textsuperscript{108} See Howden & Holst, supra note 101.
