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INTERNATIONAL LAW STUDIES

Volume 75

International Law Across the Spectrum of Conflict:

Essays in Honour of Professor L.C. Green On the Occasion of His Eightieth Birthday

Michael N. Schmitt
Editor



Naval War College
Newport, Rhode Island
2000

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Foreword

The International Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. With this, the seventy-fifth volume of the historic series, we honor and recognize Professor Leslie C. Green for his many decades of outstanding scholarship and contributions to the study and practice of the law of war.

We also express our appreciation to Professor Green for his service to the Naval War College during the two years from 1996-1998 that he held the Charles H. Stockton Chair of International Law, as the first non-United States scholar to fill the College's most prestigious and respected Chair. It was a wonderful opportunity and privilege for our faculty and students to learn from him.

It is fitting that this volume is published on the occasion of Professor Green's eightieth birthday, for his mentor, Professor Georg Schwarzenberger, another international legal thinker of great renown, was also honored on his eightieth birthday through the publication of a treatise dedicated to him. Just as that volume contained articles authored by eminent scholars, Professor Green and the Naval War College are honored and complimented that so many of the world's most highly respected international law scholars would contribute to this work. While the opinions expressed herein are those of the individual authors, and not necessarily those of the United States Navy or the Naval War College, they make a valuable contribution to the study of the varied areas of international law that are addressed.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend to Professor Green, the contributing authors, and to the editor, Professor Michael N. Schmitt, our gratitude and thanks.

A. K. CEBROWSKI
Vice Admiral, U.S. Navy
President, Naval War College

Preface

God grant that men of principle shall be our principal men.

Thomas Jefferson

Some years ago, I was fortunate to be posted as the Air Force judge advocate on the faculty of the United States Naval War College. It was fascinating and fulfilling work in a truly joint environment, and I was blessed with a dynamic group of colleagues in the Oceans Law and Policy Department, then led by a living legend in the field of operational law, Professor Jack Grunawalt. The year of my arrival also marked Professor Leslie Green's appointment to the first of his two terms as holder of the Stockton Chair of International Law. Although I knew his work, for it would be difficult to participate seriously in the law of war field and not be familiar with his voluminous writings, I had never met Professor Green. As we awaited his arrival at the College, advance billing portrayed him as a brilliant and rigorous scholar of international repute, one charged with irrepressible vitality and unafraid of controversy. We were not to be disappointed.

I will leave it to Bill Fenrick's introductory contribution to recount Leslie Green's impact on the study and application of international law over the decades. Few know him as well as Bill, who has benefited from the Professor's mentorship over the years. However, I would be remiss if—as both a student and faculty alumnus of the Naval War College—I failed to highlight the extent to which he contributed to the revitalization of international law at this institution long renowned for its study of the subject. He co-edited two volumes of the acclaimed International Law Studies (Blue Book) series, completed the second editions of his *Essays on the Modern Law of War* and *The Contemporary Law of Armed Conflict*, and represented the War College at conferences spanning the globe. Perhaps most importantly, he shared his great wisdom on the legal aspects of conflict with the many hundreds of senior military officers that attended the College during his tenure. Those officers have since gone on to such momentous duties as commanding major surface combatants and air wings,

conducting peace operations, and leading troops in combat. Some have already achieved flag rank. There is not one doubt that Leslie Green profoundly shaped the way in which they approach such tasks—no officer left the War College during his watch unaware of the normative and humanitarian aspects of their chosen profession.

During his time in Newport (and indeed since then), Professor Green also dedicated himself to mentoring the College's law faculty. I know I speak for all of the beneficiaries of his guidance when I say his influence on our attitude towards, and understanding of, the law of armed conflict was profound. If Jack Grunawalt was the "Father" of the Oceans Law and Policy Department extended family, Leslie Green was surely our "Grandfather." For my part, his encouragement and support, as well as the many doors he opened, made possible my transition to civilian academia, a dream long held. Not unexpectedly, his mentorship continues today, a gift that I and the rest of the Oceans Law and Policy family cherish deeply.

Given the extraordinary scope and nature of his contributions to the Naval War College and, more generally, to furthering the role of law in limiting the violence that international conflict so tragically and far too frequently visits on the global citizenry, the then Dean of the Naval War College's Center for Naval Warfare Studies, Dr. Bob Wood, enthusiastically supported the proposal to honor Professor Green with a collection of essays in the Blue Book series. This volume is the product of that effort, and it is my great honor to have played a part in its realization.

The first quandary the project organizers had to resolve was how to frame it. Our goal was a *liber amicorum* that held together as an integrated whole, but one with subject matter wide enough to avoid excluding any "significant others" who wished to contribute. We finally settled on international conflict in the context of normative systems and structures. Though many of the pieces address armed conflict, others take up "peaceful" conflict and resolution mechanisms therefor. This common thread of conflict writ large characterizes Professor Green's own contributions to the field of international law, not only as a scholar but also as a government legal adviser, diplomat, and soldier.

We then turned to the easy task—finding contributors. Indeed, the dilemma at this point was not a paucity of contributors but rather the extraordinary reach of Professor Green's influence on international law and its practitioners/thinkers. In the end, the offers to contribute were made somewhat arbitrarily, based upon individuals whom I had heard him speak highly of in our all too short time together. Surely, many of those whom he regards with special affection and respect were not given an opportunity to contribute. I offer them

my apologies, but ask that they forgive the oversight if only on the basis that an all-inclusive collection would have run many volumes and taken years to complete.

As to those that have honored Professor Green with a chapter, a quick glance at the table of contents will immediately illustrate the high regard in which the international legal community holds him. Contributors come from Canada, Germany, Israel, Sweden, the United States, and the United Kingdom. They include professors, diplomats, a university president, civil servants, military officers, human rights experts, and practitioners before international tribunals. Each is an extraordinary individual in his or her own right, with a reputation that is international in scope. That every one of them took on the not insignificant task of writing to honor their friend is a true testament. Of perhaps particular note is the contribution by Georg Schwarzenberger, the great University of London international law scholar. As many may know, Professor Schwarzenberger was the young Leslie Green's first true mentor. Indeed, Professor Green once confided in me that even after he had developed an international reputation, he still sent a copy of every publication to Professor Schwarzenberger—and waited on pins and needles for the always-frank verdict. The particular article that has been included, reprinted here with the kind permission of the American Society of International Law, is, in Professor Green's estimation, Schwarzenberger's finest work of article length.

All books are the products of many hands; this one more than most. First, I would like to thank each of the contributors. As they know, publication of the book encountered a number of unforeseeable obstacles. Their patience in the face of delays was much appreciated. This volume of the International Law Studies series also marks the reunion of the Oceans Law and Policy Department and the Naval War College Press. The Editor-in-Chief of the Press, Professor Tom Grassey, has always been a champion of international law, and his support and personal friendship is warmly appreciated. The Press editor of this volume, Ms. Pat Goodrich, deserves particular commendation. Few can understand the difficulties she encountered—and overcame—in pulling together a project that involved an editor based in Germany, authors on three continents, and a new word-processing department which had never before done a Naval War College publication. But for her selfless efforts, this book would simply not exist. It would also have remained a mere aspiration without the financial and personal support of the College's then Dean of the Center for Naval Warfare Studies, Dr. Bob Wood. That his successor, Dr. Alberto Coll, himself a former Blue Book editor, continues to back the College's cutting edge work in international law is a tribute to his vision. Of course, primary responsibility for

production of the Blue Books falls on the shoulders of the superb attorneys of the Oceans Law and Policy Department who operate under the guidance of Professor Dennis Mandsager. Of this group, Captain Ralph Thomas merits special praise. His efforts to keep the project on track, and the many hundreds of hours he spent in tirelessly proofreading, are evidence of his legendary selflessness. He retired from the Navy earlier this year, thereby leaving a void in operational law expertise that will not soon be filled. Finally, and as always, I reserve my warmest thanks for Lorraine and Danielle . . . who cheerfully put up with the late hours and short tempers that all too often accompany such projects.

It is my singular privilege to have been allowed to edit this small effort to honor Professor Leslie C. Green—a great scholar and practitioner, my mentor, and a very dear and cherished friend. May he, with his ever-charming Lilian at his side, continue to work in the support of humanitarian principles for many years to come. We are all indeed fortunate that he is one of our principal men.

Professor Michael N. Schmitt
George C. Marshall European Center for Security Studies
Garmisch-Patenkirchen, Germany

Introduction

Leslie Claude Green International Law Teacher

William J. Fenrick

LESLIE C. GREEN HAS TAUGHT INTERNATIONAL LAW for over fifty years, and throughout that period he has influenced international law significantly through his writings, teaching, conference participation, advising, and informal exchanges of views. The peer group for international lawyers, at least for those who reside outside the single superpower, is that of other international lawyers throughout the world. Describing Leslie Green as the leading international lawyer in the Canadian province of Alberta, where he has resided for most of the last thirty years, or as a leading Canadian law of war expert is not necessarily conferring an effusive compliment. For non-American international lawyers, the standard must be that set by the world community of international lawyers. By that standard, Leslie Green, author of nine books and of over three hundred articles, and teacher of thousands of students and colleagues, is a major figure in contemporary international law, particularly in law of armed conflict, a field of international law to which he has devoted much of his finest work.

Comments are made in a personal capacity and necessarily reflect neither the view of the Office of the Prosecutor nor of the United Nations.

Leslie was born in London, England, on November 6, 1920. He graduated from the University of London in 1941 with an LLB with first-class honours. As the Second World War began while he was studying, international law became one of his fields of specialization. On graduation, he joined the British Army, King's Royal Rifle Corps, and was then sent to the School of Oriental and African Studies where he was taught to read and translate Japanese. In 1943 he was commissioned as a lieutenant in the Intelligence Corps and posted to GHQ (India) as a translator. He was stationed in India from 1943 to 1946. In the later stages of his time there, he was made available to the Adjutant-General's Department, first to defend and later to prosecute members of the (British) Indian Army who had joined the Japanese-sponsored Indian National Army; they had been charged with waging war against the King and with war crimes. Many years later, Leslie wrote an article in which he recounted his experiences as a defending officer and as a prosecutor, including the fact that his first two clients were hung.[1] In 1946, he was discharged from the army in the rank of major.

Although his wartime experience heightened his interest in international law, Leslie and his many friends would unanimously agree that his most important wartime experience was meeting and, on September 1, 1945, marrying 2nd Officer Lilian Meyer of the Women's Royal Indian Naval Service. Leslie and Lilian have now been married for over fifty years and, as befits any happy and loving marriage, their lives are centred around each other. It is not possible to picture them apart, and their lives together have kept them young. Lilian's grace, sense of style, and intelligence have contributed immeasurably to Leslie's success. Their marriage has been blessed with one daughter, Anne, an authority on Canadian theater.

Leslie commenced his teaching career in 1946 and from 1946–1960 he was Lecturer in International Law at University College, London. While in London, he published the first two editions of *International Law Through the Cases*. This casebook, now in its fourth edition, is widely used in law schools throughout the British Commonwealth. Under the rigorous mentorship of Georg Schwartzenberger, Leslie also began his prolific writing career. In all of his work, Schwartzenberger focused on what States actually do. Thus, for instance, in international relations, he emphasized power politics. In international law, he belonged to the inductive school, focusing rigorously on State documents, treaties and judicial decisions to determine the law's content. Leslie was deeply influenced by Schwartzenberger's approach to international law and to international relations, and also by his insistence on high scholarly standards as well as high productivity. Schwartzenberger insisted that at least

one scholarly article be produced per quarter. Leslie published sixty articles between 1946 and 1960.

In 1960, he moved to the University of Singapore, where he was Professor of International Law from 1960–1965 and also Dean of the Law Faculty in 1964–1965. He published another twenty-seven articles during this period.

In 1965, Leslie moved to the University of Alberta in Edmonton, where he was a Professor of Political Science from 1965–1969, and then a University Professor affiliated with the Department of Political Science until he became Professor Emeritus in 1992. During his time at Alberta, he produced numerous articles, two more editions of his casebook, and several other books: *Law and Society* (1975), *Superior Orders in National and International Law* (1976), *International Law—A Canadian Perspective* (1984, 2nd ed. 1988), *Essays on the Modern Law of War* (1985, 2nd ed. 1999), and *The Law of Nations and the New World* (1989) (with O.P. Dickason).

Following his retirement from the University of Alberta in 1997, Leslie continued to teach on a full-time basis. He was a Distinguished Visiting Professor at the College of Law, University of Denver, in 1995–1996. The culmination of his teaching career, to date, consists of two one-year appointments to the U.S. Naval War College as Charles H. Stockton Professor of International Law from 1996–1998. He continues to write numerous articles and has just completed the 2nd edition to his most recent book, *The Contemporary Law of Armed Conflict* (1993).

Although most of his professional life has been spent in an academic environment, Leslie has devoted a substantial part of his professional career to advising government officials. In particular: during 1972–1975, he was a consultant to the Judge Advocate General of the Canadian Forces on the superior orders issue; during 1974–1975, he was Academic in Residence to the Legal Bureau of the Canadian Department of External Affairs; during 1975–1977, he was a member of the Canadian delegation participating in the negotiation of the Additional Protocols of 1977; and during 1979–1980, he was a resident consultant to the Judge Advocate General of the Canadian Forces and wrote the first draft of the Canadian Forces Manual on the Law of Armed Conflict. Today, in 2000, he is updating the Canadian Forces Manual.

Professor Leslie Green has received many awards for his outstanding service to international law and to Canada. In 1976 he was awarded an LLD by the University of London for his contribution to international law and sociology of law. He became a Fellow of the Royal Society of Canada in 1980 and a member of the Order of Canada in 1993. In 1994 he received an honorary LLD from the University of Alberta. His Canadian colleagues honoured him for his

contribution to the discipline by awarding him the John Read Medal in International Law in 1997.

Hence, while notable for his life's work, the sum of Leslie Green is much more, as evidenced in his friendship, valued so highly by so many. Although Leslie has performed some tasks at the request of governments, he is an outstanding example of the independent scholar, reaching his own conclusions and standing by them, come what may. By intellectual predisposition, he is a gadfly, not a legal cheerleader. He has acted as a mentor to younger international lawyers, encouraging them to write and assisting in the development of their careers. As a mentor, however, he did not foster the development of a Green school in international law. He encouraged those who sat at his feet—many of whom are no longer so young—to develop in their individual ways. Thus, disagreement on legal issues has never been a barrier to friendship.

Leslie's influence on international law developments may at times be inadvertent. In the latter half of the 1980s, the Government of Canada was considering ratification of the Additional Protocols of 1977. An interdepartmental review was completed and everything was set to go. The then Legal Adviser to the Department of External Affairs put everything on hold because he understood that Leslie Green had indicated he was opposed to ratification and that he would go public if implementing legislation was introduced in the House of Commons. I was somewhat surprised to learn about Leslie's opposition. I had spoken to him about the protocols on many occasions, and it was my impression that he regarded them as more or less acceptable. Some weeks later I met Leslie at a conference, informed him of the legal advisor's understanding about his position on the protocols, and asked him when and why he had become opposed to ratification. Leslie began to laugh when I outlined the situation. He explained that he had been to a cocktail party some months before, where he had had a conversation with the legal adviser. They had not spoken about the Additional Protocols, but Leslie had indicated with characteristic vigour his opposition to certain war crimes legislation that had been recommended by a Royal Commission on Nazi War Criminals in Canada. The legal adviser had confused the two issues. Leslie was delighted to learn that he could hold up the Government of Canada for some months by expressing his opinion, even if it was misunderstood. Some time later, Canada did ratify the two Additional Protocols.

As an example of both the depth of Professor Green's research and the width of his readership, I can recollect a relatively recent incident that occurred during the oral argument on a jurisdictional motion before the International Criminal Tribunal for the former Yugoslavia (ICTY). Just as I was about to

commence what I hoped would be a cogent and inspiring argument to the effect that the conflict in Bosnia must be classified as international, counsel for the defence quoted a passage from page 299 of Professor Green's *The Contemporary Law of Armed Conflict*, which appeared to indicate that I had earlier held the position that, at the time in question, the conflict was internal.

A substantial amount of Professor Green's best work has focused on the law of war, in particular his books on *Superior Orders in National and International Law*, *Essays on the Modern Law of War* (the second edition of which has just been published), and *The Contemporary Law of Armed Conflict*. All of Leslie's articles and books are written in an extremely lucid style, rooted in history, and sensitive to current military and political realities as well as to trends in scholarly writing and decided cases. He has a tendency to throw buckets of cold water on overheated and overly progressive legal arguments.

Although he may criticize impractical suggestions for development of the law, Leslie continues to favour pragmatic progressive development to address practical problems. Indeed, in one of his recent articles, he put forward quite a radical suggestion:

> ...it is time to dispense with the differentiation between genocide, grave breaches and war crimes. All of these are but examples of the more generically termed "crimes against humanity," in respect of which there is no longer any doubt as to their amenability to universal jurisdiction. Issues relating to classification of a conflict, the significance of the law of war to that conflict, or the jurisdiction of a tribunal over an alleged act of genocide would all fade into insignificance if they were brought within the rubric of crimes against humanity.[2]

Professor Green does, of course, go on to concede that under current international law, crimes against humanity have not yet supplanted war crimes. He suggests that perhaps the International Committee of the Red Cross should support the idea of merging the two concepts and, simultaneously, add depth to the concept by, for example, specifying precisely which acts constitute crimes against humanity.

The underlying reason for Leslie's suggestion is that reliance on the concept of crimes against humanity would provide a common list of crimes which could be prosecuted on the basis of the universality principle without requiring a prosecutor to establish facts such as the existence of an international conflict which would be difficult to prove but irrelevant to moral fault. It is probable that a catalyst for this suggestion is the experience of the ICTY, which is compelled to grapple with the conflict classification issue on a daily basis because of the complexity of the recent conflict(s) in the territory of the former

Yugoslavia. Indeed, in some cases, presentation of evidence related to conflict classification can occupy more time than presentation of evidence related to the alleged misdeeds of the accused.

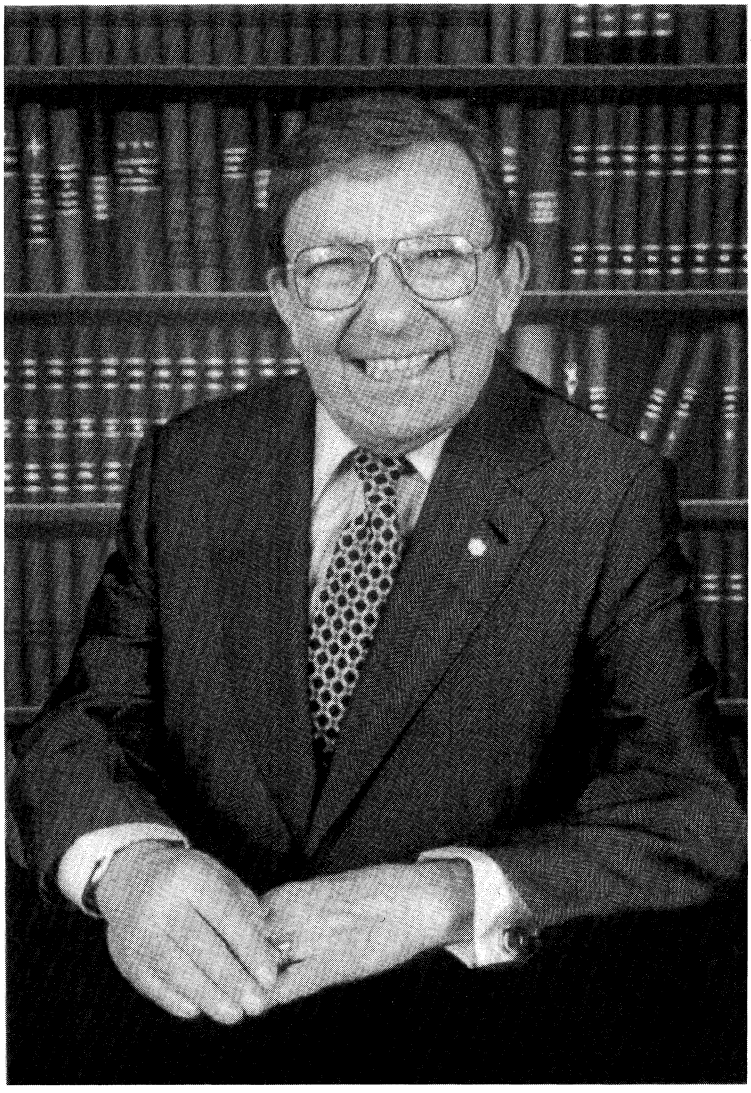
One can disagree with Professor Green on this issue, or at least regard his proposed solution as premature. I do.[3] At the same time, one can but admire his continuing creativity and love for new ideas. His lifelong and continuing dedication to international law teaching and to independent scholarship is a model for others to follow in their individual paths.

Notes

1. *Problems of a Wartime International Lawyer*, (1990) 2 PACE UNIVERSITY YEARBOOK OF INTERNATIONAL LAW 93.

2. *"Grave Breaches" or Crimes Against Humanity*, 8 USAF ACADEMY JOURNAL OF LEGAL STUDIES (1997-98) 19, at 29.

3. W.J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (1999) at 767–85.



Professor L.C. Green

I

The Normative Framework of International Humanitarian Law

Overlaps, Gaps and Ambiguities

M. Cherif Bassiouni

THE YEAR 1998 MARKED THE FIFTIETH ANNIVERSARY of the Universal Declaration of Human Rights[1] and the Convention on the Prevention and Punishment of the Crime of Genocide,[2] respectively adopted on the tenth and ninth of December 1948. The year 1998 marked also the birth date of the Treaty on the Establishment of an International Criminal Court adopted in Rome on July 17, 1998. On this occasion, it is important to take stock of international law's progress, to assess how much its veneer has thickened, and to determine what needs to be done to make more effective its goals of prevention and control. Since most of the world's victimization occurs in violation of international law's proscriptions against war crimes, crimes against humanity, and genocide, this article will deal with the weaknesses of the normative framework of these three *jus cogens* crimes. My purpose is to eliminate, or at least substantially narrow, the legal loopholes through which the perpetrators of war crimes, crimes against humanity, and genocide are able, with impunity,

An earlier version of this article was published in 8 TRANSNAT'L L & CONT. PROB 199 (1998).

to escape accountability for their international crimes and widespread violations of fundamental human rights.

International humanitarian law is that body of norms that protects certain categories of persons and property and prohibits attacks against them during the course of armed conflicts be they of an international or non-international character.[3] These norms derive from conventional and customary international law which are respectively referred to as the "Law of Geneva" (for the conventional law of armed conflicts) and the "Law of The Hague" (for the customary law of armed conflicts). The "Law of The Hague" is not, however, exclusively customary law because it is in part treaty law and the "Law of Geneva" is also not exclusively treaty law because it includes customary law. Thus, the traditional distinction between conventional and customary law is substantially eroded. Additionally, the treaty law that applies to weapons derives from customary as well as conventional law, and some of its specific norms have become part of customary law. In sum, in the last one hundred years, the evolution of the dual sources of international humanitarian law, namely conventional and customary law, have become so intertwined and so overlapping that they can be said to be two sides of the same coin. The nomenclature the "Law of Geneva" and the "Law of The Hague" is therefore only a useful shorthand label.

In addition to this historic dual-track evolution of the law of armed conflicts, two additional developments have expanded the general scope of the term "international humanitarian law," namely, the proscriptions against crimes against humanity[4] and genocide.[5] The first originated as an outgrowth of war crimes even though it subsequently evolved into a distinct category of international crimes; the second, though originally intended to encompass crimes against humanity, also evolved into a distinct and separate category of international crimes. The norms contained in these three major international crimes—war crimes, crimes against humanity, and genocide—have become part of *jus cogens*.[6] Deriving from multiple legal sources, they overlap relative to their context, content, purpose, scope, application, perpetrators, and protected interests.[7]

These norms also contain certain ambiguities and gaps, the existence of which is due essentially to two factors. The first is the haphazard evolution of international criminal law.[8] The second is that governments, which control the international legislative processes, are not, for a variety of reasons, though mostly for political reasons, desirous of eliminating the overlaps, closing the gaps, and removing the ambiguities[9]—not a surprising fact given that two of the three categories of crimes, crimes against humanity and genocide, occur

with deliberate State action or policy, and that governments are not particularly inclined to criminalize the conduct of their high officials.[10] War crimes can also be a product of State action or policy, but frequently are committed by individual combatants acting on their own, which probably explains why there is less reluctance to criminalize this type of individual criminal conduct.[11]

Crimes against humanity and genocide are essentially crimes of State, as are sometimes war crimes, because they need the substantial involvement of State organs, including the army, police, paramilitary groups, and the State's bureaucracy.[12] These crimes generate significant victimization and must be strenuously deterred. Nevertheless, governments are reluctant to remove the ambiguities in the relevant normative provisions applicable to crimes against humanity and genocide, and to fill the existing gaps in these proscriptions.[13] The individual criminal responsibility of soldiers and others in the lower echelons of State power is much more easily accepted by governments than that of political leaders and senior government officials and, as well, those in the governmental bureaucracy who carry out, execute, and facilitate the policies and practices of crimes against humanity, genocide, and even war crimes. Indeed, the articulation of relevant international norms effectively shields them from criminal responsibility; existing international norms of criminal responsibility relative to crimes against humanity, crimes of genocide, and even war crimes, are too ambiguous to reach effectively into this category of violators. This renders their prosecution virtually impossible.

Since World War II, there have been an estimated 250 conflicts of an international, non-international, and purely internal legal character. The estimates of the resulting casualties reach as high as 170 million.[14] Most of that victimization occurred at the hands of tyrannical regimes and by non-State actors during internal conflicts. This tragic new dimension in world victimization requires a reexamination of international humanitarian law to make it unambiguously applicable to non-State actors, and to reconcile their overlapping application, fill in their gaps, and clarify their ambiguities so as to render their enforcement sufficiently effective to prevent, deter, and punish the perpetrators of such crimes. This article discusses these questions.

Crimes Against Humanity

Crimes against humanity originated after World War I[15] in the concept of "crimes against the laws of humanity," a term found in the Preamble to the 1907 Hague Convention.[16]

> Until a more complete code of 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 from the dictates of the public conscience.[17]

After the war, in 1919, the Allies established a Commission to investigate war crimes[18] which thereafter found that the killing of Armenians by the Turks around 1915[19] constituted "crimes against the laws of humanity." The United States and Japan strongly objected to the concept and insisted on having their dissenting positions reflected in the Report.[20] In 1923, after the failure of ratification of the 1919 Treaty of Sèvres,[21] which required that the Turkish government turn over to the Allies those responsible for such crimes, the Treaty of Lausanne[22] excluded such a provision and a protocol was attached, giving amnesty to the Turks who had committed the crime irrespective of whether they acted as State actors or non-State actors.[23] By 1942, the Allies realized that they would have to revisit that crime,[24] and in 1945 the London Charter provided, in Article 6(c), for the prosecution of those who committed "crimes against humanity:"

> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[25]

But that article linked Article 6(c) crimes to "crimes against peace" (the initiation and conduct of war) as defined in Article 6(a) and to "war crimes" as defined in Article 6(b). This meant that all "crimes against humanity" committed before the initiation of the war, between 1932 and 1939, were not prosecutable.[26]

The war-connecting link was removed in a 1950 Report of the International Law Commission (ILC).[27] The question that remained, however, was the legally binding effect of such a report.[28] On its face, a report of the ILC has no binding effect, unless it is deemed to be the embodiment of customary international law, in which case the ILC report can be seen as the progressive codification of customary international law and therefore binding as to its content. However, the practice of States remains an important element in addition to

the element of *opino juris* to establish customary international law,[29] and this practice seems to be somewhat wanting because there are few States that have prosecuted persons for such crimes.[30] Moreover, no convention on crimes against humanity has been developed since 1945,[31] even though many other conventions on various international crimes have been adopted since that time.[32] There is no rational explanation for this gap other than the lack of political will by governments.

The next opportunity to reaffirm the London Charter's "crimes against humanity" arose in 1993 when the Security Council adopted the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).[33] In this statute, however, the connection to an armed conflict was preserved[34] with Article 5 requiring that "crimes against humanity" take place in the context of "an armed conflict" of an international or internal character. The difference between the war-connecting link of the London Charter's Article 6(c) and the ICTY's Article 5 is the addition in Article 5 of a conflict of an internal character.

In 1994, however, when the same Security Council adopted the Statute for the International Criminal Tribunal for Rwanda (ICTR),[35] it did not include any war-connection whatsoever.[36] Why the change? One explanation is that the ICTY's formulators sought to preserve the London Charter's requirement, though expanding it to internal conflicts, to offset arguments that Article 5 of the ICTY departed from existing customary law.[37] Since there was no convention on crimes against humanity, that category of crimes had to be deemed as falling within customary law.[38] But with respect to the ICTR, the Government of Rwanda was not expected to challenge the absence of such a requirement.[39] To have included such a war-connecting requirement in the ICTR statute would have meant that prosecutions for such crimes would have been impossible because that conflict was purely internal.[40]

An examination of the contents of crimes against humanity as defined in Article 6(c) of the Nuremberg Charter reveals that it covers the following acts: "murder, extermination, enslavement, imprisonment, deportation or other inhumane acts," and "persecution".[41] The ICTY and ICTR added "rape" for specificity.[42] However, the ICTR also added the restrictive requirement not present in the ICTY; that the acts constituting the crime must be the result of "widespread or systematic" practices.[43] Furthermore, some of the terms used in the London Charter's Article 6(c), the ICTY's Article 5, and the ICTR's Article 3 may be deemed to lack sufficient specificity to satisfy the "principles of legality" required in the world's major legal systems.[44] For example, "other inhumane acts" can be deemed vague, "murder" overlaps with "extermination,"

and "imprisonment" and "deportation" can be lawful. Of course, careful judicial interpretation can avoid such vagueness and ambiguity, but that presupposes the existence of a judicial process that can develop a clear and precise jurisprudence, and in that respect much is expected from the ICTY and ICTR.

Another issue concerning "crimes against humanity" is whether it is essentially a category of mass victimization crimes, which is predicated on the existence of State-action or State-policy, or whether it is but a catch-all category for mass crimes even when committed by non-State actors.[45] The formulation of Article 6(c) raises that issue relative to whether "persecution" is a required policy element or simply another *genre* of the specific crimes listed in Article 6(c), or indeed, whether it is both a specific type of prohibited act as well as a policy element applicable to State and non-State actors alike.[46] In this writer's judgment, "crimes against humanity" as set forth in Article 6(c) is no mere catch-all category for mass victimization, but rather a category of international crimes, distinguishable from other forms of mass victimization by the jurisdictional policy element of a "State action or policy." But when the ICTR's Article 3 was made to qualify Article 6(c)'s policy of persecution by the addition of the terms "widespread *or* systematic,"[47] the drafters, while doubtless seeking to tailor the definition of "crimes against humanity" to the Rwandan conflict, brought about a progressive development. This is evidenced in the disjunctive "or" as opposed to the conjunctive "and." If the mass victimization can be only "widespread" and not also "systematic," then it can be the spontaneous consequence of a given conflict[48] and not necessarily a reflection of "State action or policy."

The statute of the ICC adopted in Rome on July 17, 1998, follows the ICTR's precedent in that it states in its Article 7 that "[f]or the purpose of this statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread *or* systematic attack directed against any civilian population with knowledge of the attack . . ."[49] At the same time, the ICC Statute's Article 7(h) makes "persecution" specifically prohibited conduct;[50] and while it is one of the forms of carrying out an "attack directed against any civilian population," the persecution of a group of persons is by its very nature possible only as a consequence of State action or policy carried out by State actors or non-State actors, or the product of policy carried out by non-State actors. In fact, most of the specific crimes listed within the meaning of this definition can occur only as a result of State action or policy carried out by State actors or non-State actors: "(b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; . . . (j) the crime of Apartheid." [51] The other specifically listed crimes presumably can be committed by individuals without the existence of State action or policy. But clearly if such crimes are directed against

a "civilian population," they are necessarily the product of State action or policy carried out by State actors or the product of policy of non-State actors. These specific crimes are:

> (a) murder; . . . (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; . . . (i) enforced disappearance of persons; . . . (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[52]

Thus, the element of State policy for State actors and that of policy for non-State actors is dominant throughout this latest definition of "crimes against humanity."

The element of State action or policy is not the only distinguishing international jurisdictional characteristic of crimes against humanity;[53] it carries with it also certain implications concerning the criminal responsibility of a State's agents who contribute to the overall execution of the State's plan or policy. Thus, if it is established that a State has developed a policy, or carried out a plan, or engaged in acts whose outcomes include the crimes contained in the definition of crimes against humanity, then those persons in the bureaucratic apparatus who brought about, or contributed to, that result could be charged with complicity to commit crimes against humanity. Further those who intended to carry out the policy could be charged with the commission of that crime, or at least, with complicity to commit that crime.[54] The responsibility of State agents arises in this case irrespective of whether their conduct was lawful under national law. However, it is important to note that the policy element, whether developed or carried out by State actors or non-State actors, is the jurisdictional element that makes "crimes against humanity" a category of international crimes and that distinguishes it from other forms of mass victimization which otherwise are within national criminal jurisdiction. On June 30, 2000, the Preparatory Commission adopted the Elements of Crimes[55] for the three ICC crimes.[56]

Between the Nuremberg formulation of Article 6(c) in 1945 and the ICTR's formulation of Article 3 in 1994, "crimes against humanity" have shifted from a category of crimes applicable only to situations involving State policy or action to situations involving non-State actors. This shift has been evidenced in the ICTR and ICC Statutes which provide the requirements of "widespread or systematic" and "attack against any civilian population." The combination of the

two requirements makes the crime applicable to both State and non-State actors; and also applicable in time of peace and war, without any connecting link to the initiation or conduct of war or to war crimes.

Other than these two formulations, "crimes against humanity" never have been the subject of a specialized international convention, thus leaving some doubt as to some of the specific contents of that category of international crimes and as to their applicability to non-State actors.[57] This is evident in the eleven international instruments that have been elaborated between 1907 and 1998 and that define, in different though similar ways, "crimes against humanity." Thus, "crimes against humanity" remain part of customary law, with a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-State actors.

A textual comparison of these formulations evidences the differences between them. It also evidences the overlap that exists between genocide and war crimes relative to the protected targets and prohibited conduct.

Genocide

In defining protected groups the Convention on the Prevention and Punishment of the Crime of Genocide, specifies only three, namely: national, ethnic, and religious groups. This enumeration excludes political and social groups,[58] an omission that was no accident. The Convention was elaborated in 1948, and at that time the USSR was not desirous of having political and social groups included in those being given protection because Stalin and his regime already had begun their purges which targeted these very groups.[59] As a consequence of this omission, the killing of an estimated one million persons in Cambodia by the Khmer Rouge between 1975 and 1985, almost forty percent of the population, can be argued to have not constituted genocide because the perpetrators and victims were of the same ethnic group and because the targeted victim group was a political group which is not covered by the Convention.[60]

This gap in the Genocide Convention is well-known, but at no time since 1948 has there been any effort to fill it. In fact, three opportunities were never seized. The Statutes of the ICTY[61] in 1993 and the ICTR[62] in 1994 were adopted with the same formulation as Article II of the Genocide Convention. Later, in connection with the elaboration of the Statute of the International Criminal Court, the Preparatory Committee failed to support any changes to Article II of the Genocide Convention.[63]

As stated, the Genocide Convention protects three groups, national, ethnic, and religious.[64] It also specifies that there must be a specific "intent to destroy

[the protected group] in whole or in part."[65] This requirement makes it appear that the criminal responsibility befalls essentially those who plan, initiate, or carry out the policy that is specifically intended to produce the result of destroying the protected group "in whole or in part," and leaves open the questions of the responsibility of those in the lower echelons of the execution of such a policy and the legal standards required to prove it.[66] The requirement of specific intent in the criminal laws of most legal systems is more difficult to prove than that of general intent. General intent can be proven inferentially by the legal standard of what the ordinary reasonable person would have known under existing circumstances.[67] This difficulty is especially true of lower echelons of executors where typically there exists no "paper trail." But to prove specific intent by higher echelons may also be arduous if there is no paper trail. The reason is that the Genocide Convention was drafted with the Nazi experience in mind; the Germans, who were meticulous in everything, left behind a detailed paper trail.[68] But this situation never has been repeated. In the Yugoslav[69] and Rwandan[70] conflicts, for example, a paper trail, if it exists, has yet to be found, and it may never be made public by those who have the information.[71] The same is true of other conflicts such as Cambodia.[72] There are, moreover, conflicts where a paper trail exists but has not been made public.[73]

In addition to the issue of specific genocidal intent, which is fraught with evidentiary difficulties, there is the question of whether the protected group can be identified differently. For example, can it be based on gender, or limited to a group in a given area? The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), which investigated violations of international humanitarian law in the former Yugoslavia, concluded that these two questions can be answered in the positive.[74] In the French trial of Papon who was convicted on April 2, 1998 of complicity for "crimes against humanity" as defined in French criminal law,[75] the central issue, where "genocide" was frequently referred to though the charge was only "crimes against humanity," was how to prove complicity in these types of crimes by agents of the State. When a person charged is a bureaucrat operating in a large bureaucracy,[76] it is so far unclear how individual criminal responsibility can be established for such a person where no specific criminal act is accomplished, but whose administrative function aids in the ultimate conduct.[77] These questions remain unanswered by the norms applicable both to "genocide" and to "crimes against humanity."

Lastly, a question arises as to "genocide," and that is the nature and size of the "group" targeted for elimination "in whole or in part." Is it the entire group as it exists in the world, or a smaller portion of that group which is identified and targeted by the perpetrators? Could it be, for example, that portion of

the group that inhabits a certain area, or a given town, or a segment of that group such as the intellectuals or the women in that group? That was the issue that faced the Commission of Experts[78] in determining whether "ethnic cleansing"[79] could be deemed a form of genocide. Similarly, the issue arose with respect to the policy of systematic rape of the women of a certain identifiable group.[80]

The Genocide Convention leaves these questions unanswered, but it would be valid to consider the Convention as susceptible of progressive interpretation in light of the new techniques that nefarious planners devise to achieve their evil goals. The Genocide Convention justifies an evolving interpretation that fulfills its goals and purposes.[81]

Since 1948, "genocide," as defined in the Genocide Convention,[82] has been embodied in three international instruments, to wit, the statutes of the ICTY,[83] ICTR,[84] and the Statute of the International Criminal Court,[85] and the incorporation of Article II of the Genocide Convention into these three instruments has been without change.[86] Accordingly, none of the problems evident since 1948 have been addressed to date.

The ICC Statute, Article 6, basically adopted the Genocide Convention's formulation with almost no change,[87] except that of combining in one article the provisions contained in Articles 2 and 3 of the Genocide Convention.

War Crimes

The regulation of armed conflicts has two sources: (1) conventional law, also referred to as the "Law of Geneva," consisting of the four Geneva conventions of 1949[88] plus two additional protocols of 1977[89] relating to "conflicts of an international character" and to "conflicts of a non-international character;" and (2) customary law, also referred to as the "Law of The Hague," which refers to the customary practices of States.[90]

As stated above, however, the "Law of The Hague" is not exclusively customary law because it is in part treaty law and the "Law of Geneva" is also not exclusively treaty law because it incorporates customary law. Thus, the traditional distinction between conventional and customary law is substantially eroded. Additionally, the treaty law that applies to weapons derives from both customary and conventional law, and that body of treaty law, as well as some of its specific norms, has become part of customary law. Customary law, however, is binding only on the States that share in the custom and that express their will to be bound by it unless it becomes a general custom that is binding on all States. Consequently, States that do not follow the custom, unless it is a general custom, are not bound by it as a legal obligation. Nevertheless, a custom can

rise to such a level of general acceptance that it may become binding even on those States that do not share in the custom or that may express their will not to be bound by it. This applies to those general customs that rise to a higher level of acceptance and which reflect a universal sense of opprobrium, namely *jus cogens* or a peremptory norm of international law.[91] Among the international crimes that fall within this category are: aggression, genocide, "crimes against humanity," war crimes, slavery and slave-related practices, torture, and piracy. In time, other international crimes[92] may rise to that level and be deemed *jus cogens* crimes.

In 1899 and then again in 1907, the customary law of armed conflicts was "codified" in the Hague Convention Respecting the Laws and Customs of War on Land.[93] But that codification was applicable only to States and only when a conflict was between States—in other words, a "conflict of an international character," as that term was developed subsequently in the 1949 Geneva Conventions. Contrary to general belief, the 1907 Hague Convention did not establish the principle of individual criminal responsibility for the enunciated violations, but only the principle of compensation, which was incumbent upon the violating State. It was only in time, starting with the aftermath of World War I, but more particularly in the aftermath of World War II, that the principles of individual criminal responsibility, and of command responsibility under international law, were made part of customary law.[94]

In addition to this original customary law of armed conflicts, a number of international instruments have been executed. Most of these cover the use or prohibition of use of certain weapons in time of war, the prohibition of certain weapons at all times, and the prohibition of emplacement of weapons in certain places at any time;[95] as well as the protection from destruction and pillage of cultural property in the time of war.[96] There is a divergence of views among governments and experts as to which of these treaties rise to the level of a general custom and which do not. Nevertheless, a general custom has evolved from the cumulative effect of these treaties that weapons that "cause unnecessary pain and suffering" are prohibited even though what these weapons are is still the subject of debate.[97]

The "Law of Geneva" (four Geneva Conventions of 1949 and portions of Protocols I and II which embody customary law) are also deemed to have risen to the level of a general custom.[98] They are therefore binding on all States irrespective of whether a given State has or has not ratified one of them.[99] But it should be noted that some States maintain that not all of Protocols I and II codify customary international law and therefore some of their provisions are still deemed to be part of conventional law which is applicable only to States parties.

As a result, there is an overlap in the binding legal effect of these conventions since they are first binding on their signatories, then also binding on the same signatories and on all other States because they are part of customary law. But some governments, like the United States, argue that only portions of Protocols I and II, which the United States has not yet ratified, have risen to the level of a general custom. Selecting what is and what is not part of custom is not only a challenging legal exercise, but one that is fraught with political considerations.[100]

As earlier noted, the "Law of Geneva" is divided into two categories: (1) "conflicts of an international character" where violations (war crimes) are referred to as "grave breaches"[101]—well defined, but applicable only to armed conflicts taking place between States; and (2) "conflicts of a non-international character" where violations are not referred to as "grave breaches"—involving a foreign element, according to some, but applicable mainly to armed conflicts between a State and a belligerent or insurgent group within that State. There are, therefore, two regimes applicable to war crimes within the "Law of Geneva:" the "grave breaches" regime of the four Geneva Conventions of 1949 and Protocol I, in addition to the "violations" regime of common Article 3 of the four Geneva Conventions of 1949 and Protocol II. Within the first "grave breaches" regime, war crimes are not limited to "grave breaches" but extend to other transgressions of norms contained in these codifications which also incorporate customary law. Within the second "violations" regime there is lingering reluctance to consider all the transgressions of norms contained in Protocol II as war crimes. In that regime, "violations" of common Article 3 are deemed war crimes and require no foreign element to make common Article 3 applicable; but, Protocol II, which applies to this regime, precludes the application of common Article 3 to conflicts between dissident groups within a given State. Thus, the two regimes of the "Law of Geneva" exclude most of those conflicts that may be deemed purely internal conflicts, including tyrannical regime victimization, even though these types of conflicts have caused most of the world's wartime victimization since World War II.

As noted, conflicts of a "non-international character" are regulated in the 1949 Geneva Conventions by a single article, common to all four conventions—common Article 3.[102] Protocol II expands upon common Article 3[103] relative to what that article deems to be "violations" and not "grave breaches." But, common Article 3 and Protocol II are limited in scope and do not have the specificity or detail contained in the articles defining "grave breaches." The "grave breaches" contained in common Articles 50, 51, 130, and 147 of the 1949 Geneva Conventions embrace nine categories of war crimes:

1. wilful killing (I-IV Conventions);
2. torture or inhuman treatment, including biological experiments (I-IV Conventions);
3. wilfully causing great suffering or serious injury to body or health (I-IV Conventions);
4. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (I, II, and IV Conventions);
5. compelling a prisoner of war or a protected person to serve in the forces of the hostile Power (III and IV Conventions);
6. wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Convention (III and IV Conventions);
7. unlawful deportation or transfer of a protected person (IV Convention);
8. unlawful confinement of a protected person (IV Convention); and
9. taking of hostages (IV Convention).

To be considered a "grave breach," each of the categories listed above must be committed against persons or property protected by the relevant conventions.

Common Article 3 of the four Geneva Conventions does not categorically establish that "violations" of that provision are war crimes, but scholars have interpreted common Article 3 violations as constituting war crimes.[104] Article 4(2) of Protocol II, expanding on Article 3 of the four Geneva Conventions, provides:

> Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) collective punishments;
> (c) taking of hostages;
> (d) acts of terrorism;
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) slavery and the slave trade in all their forms;
> (g) pillage; and
> (h) threats to commit any of the foregoing acts.

Cognate provisions[105] further provide that certain fundamental protections be observed: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking, and acts of terrorism of persons who take no part in hostilities; (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. However, Article 4(2) of Protocol II is narrow in scope: (1) it applies only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations; (2) it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area; (3) it does not guarantee all the protections of the Conventions for international armed conflicts, *e.g.*, prisoner-of-war treatment for captured combatants; and (4) it does not contain provisions to punish offenders—non-international conflicts are not covered by the definition of "grave breaches" contained in the 1949 Geneva Conventions and its Protocol I.

The essential differences between the explicit obligations arising from the two normative regimes deemed "grave breaches" and "violations" arise with respect to the duties and rights associated with their enforcement. For "grave breaches" the duties are: (1) to investigate; (2) to prosecute; (3) to extradite; and (4) to assist through judicial cooperation of investigations; and the rights include (1) the right for any State to rely on universal jurisdiction to investigate, prosecute and punish; (2) the non-applicability in national or international processes of statutes of limitations;[106] (3) the non-applicability of the defense of "obedience to superior orders;" [107] and (4) the non-applicability of immunities including that of Head of State.[108] The same duties and rights are not explicit relative to "violations" of common Article 3, and thus a normative gap exists with respect to the enforcement consequences that arise out of transgressions of these two regimes.[109] There is, however, a notable trend among legal experts to consider such formalism as historically *dépassé* and to consider the same enforcement consequences applicable to both legal regimes.

The formal distinctions discussed above, and the gaps that exist in their scope, application, protection, and enforcement, are no longer tenable. The "writings of the most distinguished publicists" [110] agree that there should be no

distinctions between "grave breaches" and "violations" of common Article 3 and Protocol II; they agree that both contain equally enforceable prohibitions carrying the same enforcement consequences.[111] They do so at least in part because the overwhelming majority of post-World War II conflicts have been of a "non-international character,"[112] and because these conflicts have produced an overwhelming number of victims. As noted above, there have been, since World War II, some 250 conflicts and internal tyrannical regime victimizations that have produced an estimated 170 million casualties.[113] Thus, to maintain a distinction between these two legal regimes and their enforcement consequences ignores the purpose of these regimes, which is to protect innocent victims from harm.

For purposes of war crimes, however, the distinction between types of conflicts and the legal regimes applicable to them does not apply with respect to crimes against humanity and genocide. These two categories of crimes are deemed applicable in time of peace as well as in time of war. The most significant problems arising out of overlaps and gaps in the law of armed conflict are the legal standards applicable in distinguishing between conflicts of an international and non-international character, and in ascertaining the relevant parts of conventional and customary law of armed conflicts applicable to these contexts, considering that the two sets of norms mirror one another.[114] Another layer of confusion originates in doctrines of international law from which improvident extrapolations are made into the law of armed conflicts; legal interpretation and analysis of these two overlapping areas are thus frequently more confusing than they are elucidating.

The foregoing observations were evidenced in two related judgments by the ICTY. The first was in connection with the *Tadič* jurisdictional appeal case.[115] Commenting on that judgment Professor Meron notes:

> The appeals chamber's expansive interpretation that "laws or customs of war" in Article 3 of the Tribunal's Statute reach noninternational armed conflicts largely avoided the worst possible consequences. However, the chamber refused to use Article 3 of its Statute (laws and customs of war) as a conduit to bring in as customary law conduct comprising grave breaches of the Geneva Conventions (grave breaches are the subject of Article 2 of the Statute; these can be regarded as customary law whose content parallels the pertinent provisions of these Conventions). The grave breaches are the principal crimes under the Conventions. Thus deprived of the core of international criminal law in cases deemed to be noninternational, the Tribunal can only raise the level of actionable violations to crimes against humanity and perhaps, in the future, genocide. Not only does this handicap the Tribunal's ability to carry out its

> mandate, but some commentators also criticize the resort to such heavy artillery against evil, but relatively minor, actors. Disregarding considerations of judicial economy, the appeals chamber has therefore enabled the creation of a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or noninternational. No less, the potential for unequal and inconsistent treatment of the accused is great. Fortunately, until *Tadič*, the decisions of the trial chambers on indictments pursuant to Article 61 of the Tribunal's Rules of Procedure and Evidence found that the situations involved international armed conflicts and that the grave breaches provisions were therefore applicable, avoiding potential chaos.[116]

Meron then further notes that the decision was not inevitable, as the proposition that the fighting was part of an international armed conflict—a proposition advanced by the Commission of Experts, the U.S. Government, and many scholars—was a position known to the majority of the appeals chamber though one they chose not to adopt. Further, Meron notes, Judge Georges Abi-Saab proposed terming the fighting as part of non-international armed conflicts, but including "grave breaches" within the applicable customary law.[117]

The fact remains, however, that the ICTY eschewed this reasoning. Worse, the subsequent *Tadič* judgment on the merits erroneously applied another international law standard to the issue presented.[118] In that decision, the *Tadič* majority erroneously applied the international law standard of State responsibility to determine whether a conflict is or is not of an international character. In so doing, the Tribunal relied on the opinion of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*.[119] The Court, however, failed to appreciate that the agency relationship needed to establish State responsibility, essentially for the purposes of civil damages, is distinguishable from the legal standard required to establish whether a given conflict is of an international or non-international character. Meron, aptly commenting on this confusion, writes:[120]

> [The Tadič case] was not an issue of (state) responsibility at all. Identifying the foreign intervenor was relevant to characterizing the conflict. . . . Conceptually . . . [the Nicaragua test] cannot determine whether a conflict is international or internal. In practice, applying the Nicaragua test to the question in Tadič produces artificial and incongruous conclusions.

Indeed, even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of

those rules of international humanitarian law that govern armed conflicts of an international character.

This decision led several government experts at the ICC Diplomatic Conference to express their fear that, unless the war crimes provision of Article 8 was clearly and unambiguously drafted, judges may, in the future, interpret Article 8 in a confusing or expansive manner, and thus create new law by judicial fiat. Such concern for strict judicial interpretation did not however produce the desired lack of ambiguity. On the contrary, it gave, in my opinion, more opportunities for non-strict interpretative approaches.

Thus, in these two judgments, which are the first of an international jurisdiction since the close of World War II and the subsequent proceedings at Nuremburg[121] and in the Far East,[122] we find more confusion than clarity regarding the following issues:

A. Generally

1. What norms of conventional law of armed conflicts have become part of customary law, and how is that evidenced?

2. What norms of customary law have been codified in conventional law, and how is that evidenced?

B. Specifically

1. Does customary law include all the "grave breaches" of the 1949 Geneva Conventions?

2. Does customary law include all or some of the "grave breaches" of Protocol I, and, if so, which ones?

3. Does customary law include common Article 3 of the 1949 Geneva Conventions?

4. Does customary law include all or some of the provisions of Protocol II, and, if so, which ones?

5. What other treaties on the regulation of armed conflicts, particularly those concerning the prohibition and use of certain weapons, have become part of customary law,[123] and on what basis?

C. Legal Standards

1. Are the standards applicable to State responsibility applicable also to the determination of whether a conflict is of an international or non-international character; and, if applicable, is it exclusively applicable or simply applicable as one of several legal standards?

2. Is the determination of the nature of a given armed conflict based on one or more standards deemed part of customary law, and, if so, to what extent does customary law rely on legal standards that derive from:

   (a) Common Article 3 of the 1949 Conventions; and

   (b) Protocol II.

These and other questions still loom large in the law of armed conflicts; and, as stated above, they were reflected in the range of governmental positions on the definition of war crimes in the draft statute of the ICC.[124]

In 1995, the United Nations General Assembly established an *Ad Hoc* Committee for the Establishment of an International Criminal Court.[125] In 1996, it established a Preparatory Committee for an International Criminal Court.[126] Subsequently, during three-and-a-half-years of deliberations, the question of defining war crimes became the subject of detailed discussions. Questions were raised, in particular, about whether all of the contents of Protocols I and II have risen to the level of customary law, about the specific contents of customary law, and still more particularly, about the rules governing conflicts of a non-international character and the prohibitions of the use of certain weapons in all categories of conflicts. While there was no dispute that the "grave breaches" provisions of the 1949 Geneva Conventions are applicable, and substantial agreement that most of the "grave breaches" in Protocol I are included, there was less agreement that some of the Protocol II prohibitions can be deemed part of custom. In fact, the texts proposed, and the one adopted reflect, a partial regression from the norms contained in Protocol I and a substantial regression from the norms contained in Protocol II. The draft provision submitted to the diplomatic conference evidences these divergent views.[127] The chart was developed and circulated at the Preparatory Committee for the Establishment of an International Criminal Court[128] and, in setting forth the various sources for the provisions, highlights the overlaps and gaps.

The ICC adopted a similar text but the distinction between conflicts of an international and non-international character is reflected in the distinction between "grave breaches" and other violations of common Article 3 in this instance. Protocols I and II are neither specifically nor entirely applied, but norms are taken selectively therefrom and are listed under what can be termed "war crimes" under customary law. Subparagraph 2(a) of Article 8 refers specifically to the "Grave Breaches of the Geneva Conventions of 12 August 1949 . . ." and lists eight such under this heading:

(i) Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;
(iii) Wilfully causing great suffering, or serious injury to body or health;
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii) Unlawful deportation or transfer or unlawful confinement;
(viii) Taking of hostages.[129]

Subparagraph 2(b) of Article 8 refers to "Other serious violations of the laws and customs applicable in international armed conflict . . . ."[130] It incorporates the customary law of armed conflict and some of the provisions of Protocol I.

In subparagraphs 2(c) and 2(d) of Article 8, the ICC Statute then focuses on the distinction between conflicts of an international character and those of a non-international character. In so doing, it invokes the domain of common Article 3 of the four 1949 Geneva Conventions. Subparagraph 2(c), focusing on "the case of armed conflict not of an international character," refers to the serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949,"[131] thus adding the limitation of "serious" to the "violations" of common Article 3 for the exclusive purposes of the ICC's statute. Subparagraph 2(c), like subparagraph 2(a), embodies the contents of the 1949 Geneva Conventions, the former relative to "grave breaches" and the latter relative to the prohibitions contained in common Article 3. The latter prohibits the following acts:

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[132]

Subparagraph 2(d) of Article 8 emphasizes, like Protocol II, that subparagraph 2(c) "does not apply to situations of internal disturbances and tensions, such as riots, isolated and specific acts of violence or other acts of a similar nature."[133] The specificity contained herein by far exceeds what Protocol II contains and it is therefore specific to this statute.

Subparagraph 2(e) of Article 8 is the counterpart of subparagraph 2(b) and it applies customary law to armed conflicts not of an international character. What follows is an extensive list that includes most of the provisions of Protocol II and overlaps in part with common Article 3. It also adds several specifics that Protocol II does not contain, but which have come to be recognized as part of customary law. Further, it is progressive when it comes to sexual violence in (vi) and to the protection of children in (vii). It reads as follows:

> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
>
> (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva conventions in conformity with international law;
>
> (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
>
> (iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
>
> (v) pillaging a town or place, even when taken by assault;
>
> (vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
>
> (vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups using them to participate actively in hostilities;
>
> (viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
>
> (ix) killing or wounding treacherously a combatant adversary;
>
> (x) declaring that no quarter will be given;
>
> (xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the

person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The structure of the foregoing formulation of "war crimes" is thus divided into four parts, reflecting the different sources of applicable law, conventional and customary, and the two relevant contexts, of international and non-international conflicts. Regrettably, these distinctions were maintained even though the overlaps are glaringly evident. Suffice it to compare subparagraphs 2(b) and 2(e) which incorporate what the drafters believed to be customary law, even though it also clearly reflects existing conventional law, to wit, Protocol II.[134] The ICC missed the opportunity to eliminate these distinctions and to focus on the protected persons and protected targets irrespective of the conflicts' context. But, then, the ICC was an exercise in political feasibility, not progressive codification. From this perspective, it must be said that the definition of "war crimes" is as good as can be achieved at the present time, taking into account the diversity of concerns and interests.[135]

Overlapping Prohibitions: Genocide, Crimes Against Humanity and War Crimes

The crimes of genocide, crimes against humanity, and war crimes are contained in the Statute of the ICTY, ICTR and ICC. As discussed above, the definition and elements of these crimes differ slightly in the three statutes.

It is important to understand that in the common law's approach, an accused's conduct can be the basis of multiple criminal charges, all of which may be presented to the court and, of course, to the jury, simultaneously, even though some of the charges may have different legal elements. The reason is that the trier of fact, expected to be the jury, is free to determine whether the facts, as presented and proven, satisfy the elements of any or all of the crimes charged on the basis of the judges instructions on the law. This approach

eliminates the need for the Prosecutor to make an outcome-determinative decision at the charging stage of the criminal proceedings as to what crime or crimes to charge, thus leaving the Prosecutor with some leeway that may at times permit what is commonly referred to as the "shotgun approach."[136] The Romanist/Civilist/Germanic-influenced systems are positivistic systems, whereby a Prosecutor must charge the crime that the law requires based on the facts of the case. The Prosecutor does not have the leeway of presenting alternative charges that differ as to their elements unless they are what is considered to be "lesser included crimes." Even so, the Prosecutor is bound by law to charge and press for the crime which the law presupposes applies best to the facts.

The common law's pragmatic approach which gives the Prosecutor some leeway in presenting multiple charges for the same conduct, even though they may differ as to their elements, in effect transfers the problem of specificity of charges and outcomes to the stage of sentencing. Thus, the issue is no longer a technical legal issue of deciding specifically on the legally appropriate crime to charge, as opposed to multiple charges that may apply to the conduct in question, but whether the penalty shall be a single penalty, multiple penalties running concurrently, or multiple penalties running consecutively. [137]

The Romanist/Civilist/Germanic systems are more positivistic than the common law that relies on customary law more than on codified law. Consequently, they are more rigid in their approaches, and they require, in the event that a given conduct can give rise to different criminal charges, that the Prosecutor make such an election at the stage of the formal charges. Therefore, a person must be charged with a specific crime and not with alternative crimes or different crimes requiring different elements depending on how, in the case of the common law, a jury may determine which facts satisfy what crime. Nevertheless, the Romanist/Civilist/Germanic-influenced legal systems recognize two eventualities of overlap. The first is the *concours idéal d'infraction*, which is when the legislation promulgates multiple crimes that have the same legal elements. This is essentially the case with respect to certain aspects of the crimes of genocide, crimes against humanity, and war crimes, as defined in the ICC's Articles 6, 7, and 8, and as developed in the "elements of crimes" adopted by the Preparatory Commission at its Fifth Session of June 30, 2000.[138] The second eventuality arises whenever a given criminal conduct is sufficient to satisfy the elements of more than one crime. That too is the case with respect to the ICC's three crimes. The distinction between the two approaches is that the first deals with an overlap of the law and the second deals with a factual situation that may satisfy the required legal elements of more than one provision of the law.

To the common law jurist this Romanist/Civilist/Germanic conception of overlap may appear highly doctrinal. Instead, it is simply the result of a positivist legal approach which relies on codification and on the strict interpretation of the law by the judge without the existence of a jury.[139] These legal systems require that in the case where the same facts can be the basis of a conviction for more than one crime, or, in the case of the *concours idéal d'infraction*, that the conviction be only for that specific crimes which the court ultimately finds have been committed and where that is factually impossible, then the Court is to decide whether the more serious or less serious of the crimes is to apply, depending upon the social interest protected. This approach essentially means that there will be only one sentence for the crime, which can of course be subject to mitigation or aggravation.

In the three crimes in question, if all else is equal, the distinguishing factor is the nature of the protected interests, or what is called in the French legal system and others in the Romanist/Civilist tradition, *le bien social protégé*.[140] Thus, in genocide the protected social interest is the racial, ethnic, religious, or national group, irrespective of the degree to which the plan was carried out or accomplished to "eliminate that group in whole or in part." Whereas the protected social interest in crimes against humanity is the combination of a "widespread or systematic" harm committed against "any civilian population" in pursuit of a State "policy" or the policy of a non-State-actor. The policy element in crimes against humanity is the international jurisdictional element that distinguishes between large scale crimes which, even though committed by State agents, remain part of domestic criminal jurisdiction and the category of an international crime called crimes against humanity. Furthermore, the distinguishing legal element between genocide and crimes against humanity is the requirement of a specific intent in genocide which is the "intent to eliminate in all or in part," while crimes against humanity do not necessarily require specific intent as to the ultimate goal pursued, carried out or executed in pursuance of the policy manifested by the "widespread or systematic" commission of certain described acts against any "civilian population." Thus, general intent is sufficient for crimes against humanity.

War crimes do not require a policy, either by a State or non-State-actor; they also do not necessarily require specific intent. Most war crimes require knowledge as the requisite mental element, while, in some cases, recklessness might suffice. War crimes is a category of international crimes that prohibit harm from being perpetrated on certain protected persons and targets against whom harmful conduct will expose the perpetrator to individual criminal responsibility. Furthermore, what distinguishes war crimes from the other two crimes of

genocide and crimes against humanity are three legal elements:[141] (a) the prohibited conduct occurred in the context of an armed conflict whether international or non-international; (b) by a combatant; and (c) against another combatant, a member of the civilian population, a protected person, or against a protected target. Both customary and convention law of armed conflict define the legal context, the persons to whom the prohibitions apply and the persons and circumstances under which the protections apply. That body of law also provides for factual and legal defenses.

The overlap in legal norms also extends beyond these three crimes. It includes, for example, the commission of torture and the placing of persons under slavery and slave-related conditions. Torture[142] and slavery and slave-related practices[143] are the subject of specialized international criminal law conventions, but their underlying conduct is also included in the three crimes which are within the jurisdiction. Torture may indeed be a classic example where commission of torture can be the basis of a criminal charge for: (1) the violation of the Torture Convention;[144] (2) a war crime, if conducted by a combatant in time of conflict against, for example, a prisoner of war; (3) a crime against humanity, if torture is used in a widespread and systematic way by State agents; and (4) genocide, if torture is used as an international means of destroying a given group in whole or in part.

Regrettably, the ICC Statute did not take into consideration the problems of overlap between the three crimes contained in Articles 6, 7, and 8 and . . . for the Elements of Crimes.[145] For the ICC however, the problem extends beyond what the Prosecutor should charge and what judges should find as the appropriate crime committed when the provisions of the law are overlapping or when the facts appear to be sufficient to satisfy the elements of more than one of these crimes. The ICC Statute also failed to take the problems discussed above into account with respect to the penalties.[146] The Preparatory Commission also failed to take the opportunity in working on rules of procedure and evidence to deal with the questions of concurrent and consecutive sentencing. Furthermore, the ICC Statute contains a provision in Article 20 on *ne bis in idem*.[147] Thus the problem of overlap will also reach the Court not only by means of what is an appropriate charge and what the judges should appropriately convict on, and what penalty to mete out, but also on how the Court, and for that matter how the Prosecutor, will determine whether a given criminal conviction by a national court will be deemed a bar to another prosecution before the ICC and whether a given conviction by the ICC will bar prosecution before the ICC or before national courts for another crime which may be based on substantially the same facts.

It is therefore expected that the ICTY, ICTR, and ICC will have to struggle with these problems and hopefully arrive at a conclusion which will provide certainty of the law and predictability of outcomes.

The ICTY

The ICTY confronted that issue in the case of *Prosecutor v. Kupreškić, et al.*[148] In that judgment, the trial chamber posited the problem as follows:

> (ii) Relationship between the various Offences Charged in the Indictment
>
> 696. Having set out the general principles of criminal law governing multiple offences in international law, the Trial Chamber will now apply these principles to the relations between the various substantive provisions of the Statute relied upon by the parties in the instant case.
>
> 697. Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain *general* legal ingredients. It follows that, for instance, a crime against humanity may consist of such diverse acts as the systematic extermination of civilians with poison gas or the widespread persecution of a group on racial grounds. Similarly, a war crime may for instance consist in the summary execution of a prisoner of war or the carpet bombing of a town.
>
> 698. In addition, under the Statute of the International Tribunal, some provisions have such a broad scope that they may overlap. True, some acts may only be characterised as war crimes (Article 3): e.g., the use of prohibited weapons against enemy combatants, attacking undefended towns, etc. Other acts or transactions may only be defined as crimes against humanity (Article 5): e.g., persecution of civilians, whatever their nationality, on racial, religious or political grounds. However, other acts, depending upon certain circumstances, may either be characterised as war crimes or both as war crimes and crimes against humanity. For instance, murder, torture or rape of enemy civilians normally constitute war crimes; however, if these acts are part of a widespread or systematic practice, they may also be defined as crimes against humanity. Plainly, Articles 3 and 5 have a different scope, which, however, may sometimes coincide or overlap.

699. In order to apply the principles on cumulation of offences set out above specific offences rather than diverse sets of crimes must be considered. The Trial Chamber will therefore analyse the relationship between the single offences with which the accused are charged, such as murder as a war crime, murder as a crime against humanity, etc.

1. Relationship Between "Murder" under Article 3 (War Crimes) and "Murder" under Article 5(a) (Crimes Against Humanity)

700. Following the principles set out above, the relevant question here is whether murder as a war crime requires proof of facts which murder as a crime against humanity does not require, and *vice versa* (the *Blockburger* test). Another relevant question is whether the prohibition of murder as a war crime protects different values from those safeguarded by the prohibition of murder as a crime against humanity.

701. With regard to the former question, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the *Blockburger* test is not fulfilled, or in other words the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime [footnote 958].[149]

702. In addressing the latter question, it can generally be said that the substantive provisions of the Statute pursue the same general objective (deterring serious breaches of humanitarian law and, if these breaches are committed, punishing those responsible for them). In addition, they protect the same general values in that they are designed to ensure respect for human dignity. Admittedly, within this common general framework, Articles 3 and 5 may pursue some specific aims and protect certain specific values. Thus, for instance, the prohibition of war crimes aims at ensuring a minimum of humanitarian concern between belligerents as well as maintaining a distinction between combatants' behaviour toward enemy combatants and persons not participating in hostilities. The prohibition of crimes against humanity, on the other hand, is more focused on discouraging attacks on the civilian population and the persecution of identifiable groups of civilians.

703. However, as under Article 5 of the Statute crimes against humanity fall within the Tribunal's jurisdiction only when committed

in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential.

704. As explained above, the validity of the criterion based on the difference in values protected is disputable if it is not also supported by reciprocal speciality between the two offences. It follows that, given also the marginal difference in values protected, the Trial Chamber may convict the Accused in violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 and under Article 5 are proved.

2. Relationship Between "Persecution" under Article 5(h) (Crimes Against Humanity) and "Murder" under Article 5(a) (Crimes Against Humanity)

705. On the grounds set out above, the Trial Chamber agrees with the Prosecutor that "persecution" may comprise not only murder carried out with a discriminatory intent but also crimes other than murder. Count 1 of the indictment, which charges persecution, refers not only to killing, but also to "the comprehensive destruction of Bosnian Muslim homes and property" (para. 21(b)) and "the organised detention and expulsion of the Bosnian Muslims from Ahmići-Đantići and its environs" (para. 21(c)); in short, what in non-legal terms is commonly referred to as "ethnic cleansing". There are clearly additional elements here beyond murder.

706. As for the relations between murder as a crime against humanity and persecution as a crime against humanity, it should be noted that persecution requires a discriminatory element which murder, albeit as a crime against humanity, does not. The Trial Chamber is of the view therefore that there is reciprocal speciality between these crimes; indeed, both may have unique elements. An accused may be guilty of persecution for destroying the homes of persons belonging to another ethnic group and expelling the occupants, without however being found guilty of any acts of killing. The destruction of homes and the expulsion of persons, if carried out with a discriminatory intent, may in and of themselves be sufficient to constitute persecution. Equally, an accused may commit a non-discriminatory murder as part of a widespread attack on a civilian population which, because it is non-discriminatory, fails to satisfy the definition of persecution. These, then, are two separate offences, which may be equally charged.

707. If an accused is found guilty of persecution, *inter alia* because of the commission of murders, it seems that he should be found guilty of persecution only, and not of murder *and* persecution, because in that case the *Blockburger* test is not met: murder is in that case already encompassed within persecution as a form of aggravated murder, and it does not possess any elements which the persecutory murders do not. Hence, in that case, murder may be seen as either falling under *lex generalis* or as a lesser included offence, and a conviction should not ensue when there is already a conviction under *lex specialis* or for the more serious office, i.e. persecutory murder.

708. Things however are different when a person is charged both with murder as a crime against humanity and with persecution (including murder) as a crime against humanity. In this case the same acts of murder may be material to both crimes. This is so if it is proved that (i) murder as a form of persecution meets both the requirement of discriminatory intent and that of the widespread or systematic practice of persecution, and (ii) murder as a crime against humanity fulfils the requirement for the wilful taking of life of innocent civilians and that of a widespread or systematic practice of murder of civilians. If these requirements are met, we are clearly faced with a case of reciprocal speciality or in other words the requirements of the *Blockburger* test are fulfilled. Consequently, murder will constitute an offence under both provisions of the Statute (Article 5(h) and (a)).

709. Let us now consider whether the prohibition of persecution as a crime against humanity protects different values from those safeguarded by the prohibition of murder as a crime against humanity. It is clear that the criminalisation of murder and persecution may serve different values. The prohibition of murder aims at protecting innocent civilians from being obliterated on a large scale. More generally, it intends to safeguard human life in terms of armed conflicts. On the other hand, the ban on persecution intends to safeguard civilians from severe forms of discrimination. This ban is designed to reaffirm and impose respect for the principle of equality between groups and human beings.

710. This test then bears out and corroborates the result achieved by using the other test. Under the conditions described above, the test based on protection of values leads to the conclusion that the same act or transaction (murder) may infringe two different provisions of Article 5 of the Statute.

3. Relationship Between "Inhumane Acts" under Article 5(i) (Crimes Against Humanity) and "Cruel Treatment" under Article 3 (War Crimes)

711. These two crimes are clearly presented as alternatives in the Indictment and should be considered as such. Except for the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of elements not required by the other. In other words, it is clear that every time an inhumane act under Article 5(i) is committed, *ipso facto* cruel treatment under Article 3 is inflicted. The reverse is however not true: cruel treatment under Article 3 may not be covered by Article 5(i) if the element of widespread or systematic practice is missing. Thus if the evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhumane acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime. Given this, it is not strictly necessary to consider the "different values test", since the *Blockburger* test is ultimately dispositive of the issue.

4. Relationship Between the Charges for Inhumane Acts (or Cruel Treatment) and the Charges for Murder

712. A brief word here should be said about the relationship between charges for inhumane acts/cruel treatment and murder. In Counts 2-9, for example, the accused are charged with the murder of the Ahmići family, and in Counts 10-11 for inhumane acts/cruel treatment of Witness KL by murdering his family before his eyes. These are clearly separate offences. Not only are the elements different, but the victims are even different. Witness KL's family are the victims of the murder counts, while KL himself is the victim of the inhumane acts/cruel treatment counts.

(iii) The Sentence to be Imposed in the Event of More Than One Conviction for A Single Action

713. The question remains as to how a double conviction for a single action shall be reflected in sentencing. Both parties seem to agree that a defendant should not suffer two distinct penalties, to be served consecutively, for the same transaction. However, the Trial Chamber is under a duty to apply the provisions of the Statute and customary international law. Article 24(1) of the Statute provides that:

> The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the term of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

714. Pursuant to Article 48 of the former SFRY Criminal Code, which is still applied in the successor States of the SFRY, if the accused has committed several criminal offences by one action, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments [footnote 959].[150]

715. The 1997 Criminal Code of the Republic of Croatia contains similar rules on sentencing in the case of multiple offences committed by one action [footnote 960].[151] Outside the former Yugoslavia, the Italian Criminal Code includes a similar rule [footnote 961].[152]

716. As was held by the Trial Chamber in the *Tadić* case, "[t]he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person" [footnote 962].[153] In numerous legal systems, the penalty imposed in case of multiple convictions for offences committed by one action is limited to the punishment provided for the most serious offence. An instance of this approach is represented by Article 52(2) of the German Penal Code [footnote 963].[154]

718. The following proposition commends itself as sound. If under the principles set out above a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may [increase] the sentence for the more serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence, for instance because the less serious offence is characterised by distinct, highly reprehensible elements of its

own (e.g. the use of poisonous weapons in conjunction with the more serious crime of genocide).

719. On the other hand, if a Trial Chamber finds under the principles set out above that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only. For example, if the more specialised offence, e.g. genocide in the form of murder, is made out on the evidence beyond a reasonable doubt, then a conviction should be recorded for that offence and not for the offence of murder as a war crime. In that case only one conviction will be recorded and only one sentence will be imposed.

The ICTR

The ICTR also faced that question in *Prosecutor v. Akeyusu.*[155] In that case, the trial chamber took a different approach from that of the ICTY trial chamber in the *Kupreškić* case referred to above. Thus the difference may well be due to the fact that the ICTR Trial Chamber was more influenced by French Civilist legal concepts while the ICTY took another approach, which happened to be akin to a common law pragmatic approach. In the *Kupreškić* case, the ICTY relied on the Yugoslavian criminal law, while in the *Akeyusu* case, the ICTR relied on the criminal law of Rwanda, which originally derived from Belgian law, influenced by French law. Yugoslavian criminal law is also influenced by French law, though as well by certain so-called socialist conceptions of criminal law which had developed during the prior regime. The *Akeyusu* case posed the problem in terms of what French criminal law doctrine refers to as *concours idéal d'infractions.*[156] The issue was addressed as follows:

196. 6. THE LAW: 6.1 Cumulative Charges

. . .

199. The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the Indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of

double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

[paragraph omitted]

201. The Chamber notes that this question has been posed, and answered, by the Trial Chamber of the ICTY in the first case before that Tribunal, *The Prosecutor v. Dusko Tadič*. Trial Chamber II, confronted with this issue, stated:

202. "In any event, since this is a matter that will only be relevant insofar as it might affect penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." (*Prosecutor v. Tadič*, Decision on Defence Motion on Form of the Indictment at p. 10 (No. IT-94-1—T, T.Ch.II, 14 Nov, 1995).

203. In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing *concurrent* sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

[paragraph omitted]

205. The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime.

[paragraph omitted]

207. It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify the prosecutorial practice of accumulating criminal charges.

[paragraph omitted]

209. The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under ceratin circumstances. Rwandan law allows multiple convictions in the following circumstances:

210. Code pénal du Rwanda: Chapitre VI—Du concours d'infractions:

> Article 92.- Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le même auteur sans qu'une condamnation soit intervenue entre ces infractions.
>
> Article 93.- Il y concours idéal:
>
> 1° lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications;
>
> 2° lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.
>
> Seront seules prononcées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra être alors élevé de moitié.

211. On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other

offence charges liability as a principal, e.g. genocide and complicity in genocide.

[paragraph omitted]

213. Having regard to its Statute, the Chamber believes that the offences under the Statute—genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II—have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes in relation to the same set purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.

[paragraph omitted]

215. Conversely, the Chamber does not consider that any of the genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offenses are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and Additional Protocol II are in all circumstances alternative charges to genocide and thus lesser include offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible.

The ICC

The Statute did not take into account the various issues raised by the overlap between these three crimes. This is evident in the absence of any reference to that question in connection to the definition of crimes as well as in connection with the Elements developed by the Preparatory Commission.[157] The problem of overlap has been particularly aggravated by the elements of crime which seem, in so many cases, to be identical particularly with respect to the material conduct of the perpetrator (such as that of killing or torturing). It should be noted that the Statute does not contain a provision on the material element of the crime which is a significant omission. This was due to the fact that the delegates did not seem to be able to agree on the distinctions between commission and omission.[158] A distinguishing feature as to these three crimes, particularly when the material conduct is identical, is the mental element. Article 30 on the mental element in the Statute lacks sufficient clarity to allow for the subtle distinctions that would be required. It appears that the Elements sought to partially remedy the situation by adding throughout the different descriptive elements such words as "intended," "aware of," and "knew or should have known of the conduct."[159] In the opinion of this writer, the drafting of the Elements produces further confusion with respect to the problem of overlap (not to speak of other problems they are likely to create when the Court will seek to apply them).

Articles 77 to 79 deal with penalties, but these articles do not address the issues that arise out of a conviction for multiple crimes arising out of the same conduct.[160] Thus the problem of overlap which could have been resolved in the sentencing was not addressed in the Statute. Thus it is theoretically possible not only to have the same conduct give rise to a conviction for more than one crime, but for this conviction to give rise to multiple penalties. One can assume that the judges will have the good sense of at least having the sentences run concurrently as opposed to consecutively, but it would have surely been better if the Statute would have provided for it.

Lastly, these overlaps raise a series of questions with respect to *ne bis in idem*.[161] If a given conduct can be the basis of multiple convictions because of overlap of three crimes, what legal criteria should be relied upon by the ICC to determine whether a conviction in a national legal system falls within the meaning of *ne bis in idem*. The converse is also true with respect to States parties who are required to recognize ICC judgements and not to prosecute the same person for the crime for which that person was previously prosecuted before the ICC.

One would have hoped that the Statute and the Elements would have resolved these issues. Instead, they have simply avoided them entirely.

Not only are there overlaps in some applications of the sources of law relevant to war crimes, crimes against humanity, and genocide, there also are gaps and ambiguities in their content and scope. So far, however, there is no political will to close the gaps and eliminate the ambiguities. Thus, it is necessary to examine these sources of law separately in order to establish which source applies to which context and then to determine whether the legal elements contained in the applicable sources apply to the facts.[162]

Some 188 States have so far embodied "war crimes" in their military codes. This is a requirement of the Geneva Conventions and therefore every State party must domesticate their provisions and criminalize "grave breaches" violations. However, prosecutions for "war crimes" or "grave breaches" or an equivalent term (such as violations of the military code) have, with the exception of the prosecutions arising out of World War II,[163] been few and far between. Since 1949, Germany has prosecuted an estimated 60,000 cases mostly in the categories of genocide and war crimes, but the United States, in relation to the Vietnam War, prosecuted only two cases for war crimes—the *Calley*[164] and *Medina*[165] cases. It is noteworthy, too, that the only case brought against one of the World War II Allies for war crimes, by Japanese citizens for the use by the United States of atomic weapons against Japan, which killed and injured an estimated 225,000 innocent civilians,[166] was dismissed by the Supreme Court of Japan on technical jurisdictional grounds.[167]

With respect to "crimes against humanity," Canada, France, and Israel have been the only countries to have carried out prosecutions. In Israel, the *Eichmann*[168] and *Demjanjuk*[169] cases were carried out, both for crimes not committed in the territory of the prosecuting State. Demjanjuk was acquitted because he turned out to be the wrong person. In France, prosecutions have occurred for *Barbie*,[170] *Touvier*,[171] and *Papon*.[172] In 1989, Canada prosecuted the first case under a 1987 statute that permits retrospective application of international law.[173] This writer served as Canada's chief legal expert in testifying on what constituted "crimes against humanity" before 1945. *Regina* resulted in the acquittal of Hungarian Gendarmerie Captain Finta on the facts but the judgment recognized the existence of "crimes against humanity" under international law before 1945. Prosecutions before the ICTY and ICTR have included "war crimes," "crimes against humanity," and "genocide," but when

the opportunity arose to prosecute Pol Pot for such crimes in Cambodia, it was not seized.[174]

Many of the specific acts deemed criminal are contained within the definitions of "war crimes," "crimes against humanity," and "genocide." That is where the overlap exists. Thus, legal questions arise as to when the same acts constitute one or the other of these three crimes. At this point, a jurist must examine the other legal elements required in the sources of law applicable to these three categories of crime. The "grave breaches" of the 1949 Geneva conventions[175] and Protocol I[176] are the clearest enunciation of what the elements of "war crimes" are, but that is because they apply to the context of conflicts of an international character. This is not quite the case with respect to common Article 3 of the 1949 Geneva conventions[177] and Protocol II,[178] which apply to conflicts of a non-international character, but with the exclusion in Protocol II of conflicts between internal dissident groups. Still, the gap between normative proscriptions applicable to the two contexts of conflicts exists, as does the overlap between these violations. The overlaps essentially are aimed at individual deviant conduct, the same type of criminal conduct that falls also within the scope of crimes against humanity and genocide, since the latter two crimes apply to all contexts of armed conflicts as well as to other non-armed conflicts contexts and to tyrannical regime victimization. Clearly, such a situation need not exist since it would be easy to articulate the elements of each of these three categories of crimes clearly, in a way that prevents these unnecessary overlaps and gaps. So far, however, the political will to do so is nonexistent.

Because there is a connection between the rigors of evidentiary requirements to prove "war crimes," "crimes against humanity," and "genocide," and access to that evidence, the major governments who have the capacity to obtain such evidence remain in control of its use, and thereby in control of any eventual prosecution. This leaves such governments with the option to barter the pursuit of justice in exchange for political settlements.[179] An examination of what happened in all types of post-World War II conflicts clearly indicates that the pursuit of justice has been almost always bartered away for the pursuit of political settlements.[180] Consequently, the pursuit of justice has become part of the toolbox of political settlement negotiations.[181] This is true for all three major crimes, essentially because they are committed by armies, police, and paramilitary groups which act pursuant to orders from the State's highest authorities. The need for an integrated codification of these three categories of crimes is self-evident. But when that opportunity arose in connection with the establishment of a permanent international criminal court, it was carefully

avoided for lack of political will by many governments, including the major powers.

The road ahead is arduous and the same hurdles that have long existed continue to bar the way for the effective protection of the victims of these three major crimes. The voices of millions of victims since World War I continue to cry out, unheard by the politicians of this world, and the sway of conscience represented by civil society is insufficient to overcome the steadfastness of *realpolitik*. To recall the words of a popular ballad of the sixties: "When will they ever learn."

Impunity for international crimes, and systematic and widespread violations of fundamental human rights, is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and redress. To remember and to bring perpetrators to justice is a duty we owe also to our own humanity and to the prevention of future victimization.[182] To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

> No man is an island, entire of itself;
> every man is a piece of the continent, a part of the main . . .
> Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls;
> it tolls for thee . . . .[183]

Notes

1. G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948), reprinted in 3 INTERNATIONAL LAW & WORLD ORDER: BASIC DOCUMENTS III.A.1 (Burns H. Weston ed., 5 vols., 1994).

2. Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (entered into force with respect to the United States Nov. 25, 1989) [hereinafter Genocide Convention], reprinted in 28 I.L.M. 763, and 2 INTERNATIONAL LAW & WORLD ORDER: BASIC DOCUMENTS II.E.3 (Burns H. Weston ed., 5 vols., 1994) [hereinafter 2 Weston].

3. See generally THE LAW OF WAR : A DOCUMENTARY HISTORY (Leon Friedman ed., 2 vols., 1972); THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler & Jiri Toman eds., 1988); HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (1993); and HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT (2 vols., 1986).

4. See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1992) (2d rev. ed. in print 1998) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY].

5. See, e.g., PIETER N. DROST, THE CRIME OF STATE (2 vols., 1959); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1984); and Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide*, in 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d ed., 1998).

6. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996). The *Tadić* majority opinion dealt with several aspects of international humanitarian law in an overlapping manner when it held:

> The second aspect, determining which individuals of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict," provides that in an armed conflict "not of an international character" Contracting States are obliged "as a minimum" to comply with the following: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the *Commentary*, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term "civilian." They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in the furtherance or as part of an attack directed against a civilian population.

Prosecutor v. Duško Tadić, (IT-94-I-T), reprinted in 36 I.L.M. 908 at 939–940 (1997) (citations and footnotes omitted). It is unclear, in the understanding of the majority, what are the legal boundaries between the customary law of armed conflicts applicable to conflicts of a non-international character and, respectively, Common Article 3 of the 1949 Geneva Conventions. See also Protocol II, *infra* note 89, reprinted in 2 II.B.11 Weston, *supra* note 2. See also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

7. For example, the International Criminal Tribunal for the Former Yugoslavia, in the *Tadić* majority opinion, erroneously applied the standards of "State responsibility" reflected in the I.C.J.'s *Nicaragua v. U.S.* to the determination of whether a conflict is of an international or non-international character. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 331–47 (June 27). The majority also did not contribute to clarity when it very broadly concluded that:

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Prosecutor v. Duško Tadič, (IT-94-1-T), May 7, 1997, reprinted in 36 I.L.M. 908, 939–940 (1997) (citations and footnotes omitted). See also Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236 (1998).

8. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 21–31 (1997), [hereinafter BASSIOUNI, ICL CONVENTIONS].

9. This is evidenced by the position of different governments in the Preparatory Committee on the Establishment of an International Criminal Court. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (1998).

10. One reason will be the fact that international crimes involving State action or policy potentially reach all the way to the top of the military and civilian hierarchy. See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997), [hereinafter Bassiouni, *From Versailles to Rwanda*], describing the history of international criminal investigatory bodies and international criminal tribunals. With respect to the limits of command responsibility, see INTERNATIONAL CRIMINAL LAW, *supra* note 5, at 21–74.

11. The regulation of armed conflicts benefits from the fact that regular armies are usually well disciplined and have a tight command structure that controls discipline and the observance of the laws of armed conflicts. Furthermore, regular armies have a shared interest in the observance of the laws of armed conflicts because violations by one side to a conflict can result in actions by the other side, even though reprisals are limited. See FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971). Conversely, however, when genocide or crimes against humanity occur, the same constraints that exist in armies arising out of the considerations stated above, are not usually present in the course of genocide and crimes against humanity.

12. Genocide and crimes against humanity, as discussed below, are, however, also applicable to non-State actors. The problem of non-State actors, acting by themselves or in concert with State actors nevertheless remains, as the definitions of genocide and crimes against humanity do not specifically contemplate non-State actors, particularly when there is no concert of action with State actors. By implication, however, it should be clear that genocide and crimes against humanity apply to non-State actors as well.

13. The most recent example of such governmental reluctance to remove ambiguities and fill gaps is that of the ICC Diplomatic Conference in Rome, June 15—July 17, 1998, whose statute has not removed the overlaps, gaps, and ambiguities with respect to genocide, crimes against humanity, and war crimes. See *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998), reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (M. Cherif Bassiouni ed., 1998) [hereinafter ICC Statute].

14. This estimate is by some accounts for all conflicts since World War I, and by others for all victimization since World War II. See Jennifer L. Balint, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress*, 14 NOUVELLES ÉTUDES PÉNALES 101 (Christopher C. Joyner, Special Ed. & M. Cherif Bassiouni, General Ed., 1998); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9 (1996). See, e.g., R.J. RUMMEL, STATISTICS OF DEMOCIDE, GENOCIDE AND MASS MURDER SINCE 1900

(1997); Margareta Sollenberg & Peter Wallesteen, *Major Armed Conflicts in 1995*, in SIPRI YEARBOOK 1996 (1996). There were two studies reported in the PIOOM Newsletter and Progress Report in 1994 and 1995: A.J. Jongman & A.P. Schmid, *Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflicts and Serious Disputes*, 7 PIOOM NEWSLETTER AND PROGRESS REPORT 14 (Winter, 1995) and *Study*, 6 PIOOM NEWSLETTER AND PROGRESS REPORT 17 (1994). See also Alex P. Schmid, *Early Warning of Violent Conflicts: Causal Approaches*, in VIOLENT CRIME & CONFLICTS 47 (ISPAC 1997); "PIOOM World Conflict and Human Rights Map 1998" at (last visited Oct. 30, 1998) <http://www.fsw.leiden.univ.nl>.

15. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 4.

16. Convention Respecting the Laws and Customs of War on Land [Second Hague, IV], Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Jan. 26, 1910) (entered into force with respect to the United States Jan. 26, 1910) [hereinafter 1907 Hague Convention], reprinted in 2 Weston, *supra* note 2, at II.B.1.

17. *Id.*, Preamble.

18. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919*, 14 AM. J. INT'L L. 95 (1920).

19. VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS (1985).

20. See *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II, April 4, 1919, reprinted in 14 AM. J. INT'L L. 127, 144–51 (1920); *Reservation by the Japanese Delegation*, Annex III, April 4, 1919, reprinted in 14 AM. J. INT'L L. 151 (1920).

21. Treaty of Peace Between the Allied Powers and Turkey, Aug. 10, 1920 (Treaty of Sèvres), reprinted in 15 AM. J. INT'L L. 179 (Supp. 1921).

22. Treaty with Turkey and Other Instruments Signed at Lausanne July 24, 1923, Final Act, reprinted in 18 AM. J. INT'L L. 1 (Supp. 1925).

23. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982).

24. THE PUNISHMENT OF WAR CRIMINALS: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY (Report of Commission I) (1944).

25. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 3 Bevans 1238, entered into force Aug. 8, 1945 [hereinafter London Charter], reprinted in 2 Weston, *supra* note 2, at II.E.1. See also Special Prosecution Establishing an International Military Tribunal for the Far East and Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20 [hereinafter IMTFE], reprinted in 2 Weston, *supra* note 2, at II.E.2. Article 5(c) is similar to Article 6(c) of the London Charter, as is Article II(c) of Control Council Law No. 10, though it removes the war connecting requirement.

26. LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS: 1933–1945 (1975).

27. See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 U.N. GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950), 44 AM. J. INT'L L. 126, [hereinafter 1950 ILC Report], reprinted in 2 Weston, *supra* note 2, at II.E.4.

28. Hans-Heinrich Jescheck, *Development and Future Prospects*, in INTERNATIONAL CRIMINAL LAW 83 (M. Cherif Bassiouni ed., 1986).

29. See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974–75); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

30. The States that have done so are Canada, France, and Israel.

31. See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 4.

32. BASSIOUNI, ICL CONVENTIONS, *supra* note 8.

33. See Statute of the International Tribunal (for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia) May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); [hereinafter ICTY Statute], reprinted in 32 I.L.M. 1159, and 2 Weston, *supra* note 2, at II.E.10.

34. *Prosecutor v. Duško Tadič*, (IT-94-I-T), reprinted in 36 I.L.M. 908 (1997). See also ICTY Statute, *supra* note 33. Concerning the war-connecting link, the *Tadič* decision stated:

> Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict." The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter which limited the Nürnberg Tribunal's jurisdiction to crimes against humanity committed "before or during the war," although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed "in execution of or in connection with" war crimes or crimes against peace. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that acts be committed as part of an attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law," having stated earlier that "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict... Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal." Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.
>
> The Appeals Chamber, as discussed in greater detail in Section VI.A of this Opinion and Judgment, stated that "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Consequently, this is the test which the Trial Chamber has applied and it has concluded that the evidence establishes the existence of an armed conflict.
>
> The next issue which must be addressed is the required nexus between the act or omission and the armed conflict. The Prosecution argues that to establish the nexus for a

violation of Article 5 it is sufficient to demonstrate that the crimes were committed at some point in the course or duration of an armed conflict, even if such crimes were not committed in direct relation to or as part of the conduct of hostilities, occupation, or other integral aspects of the armed conflict. In contrast the Defence argues that the act must be committed "in" armed conflict.

The Statute does not elaborate on the required link between the act and the armed conflict. Nor, for that matter, does the Appeals Chamber Decision, although it contains several statements that are relevant in this regard. First is the finding, noted above, that the Statute is more restrictive than custom in that "customary international law no longer requires any nexus between crimes against humanity and armed conflict." Accordingly, it is necessary to determine the degree of nexus which is imported by the Statute by its inclusion of the requirement of an armed conflict. This, then, is a question of statutory interpretation.

The Appeals Chamber Decision is relevant to this question of statutory interpretation. In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations "they can be regarded as providing an authoritative interpretation" of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret "when committed in armed conflict" in Article 5 of the Statute to mean "during a period of armed conflict." These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5.

The Appeals Chamber, in dismissing the Defense argument that the concept of armed conflict covers only the precise time and place of actual hostilities, said: "It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." Thus it is not necessary that the acts occur in the heat of battle.

Prosecutor v. Duško Tadič, (IT-94-1-T), reprinted in 36 I.L.M. 908, 913 (1997) (citations and footnotes omitted).

35. See Resolution 955 (1994) Establishing the International Tribunal For Rwanda, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *supra* Appendix I [hereinafter ICTR Statute], reprinted in 33 I.L.M. 1598, *and* 2 Weston, *supra* note 2, at II.E.12.

36. See *id.*, art. 3.

37. See, *e.g.*, Ch. 2, "Establishment of the Tribunal and Legislative History" of M. CHERIF BASSIOUNI, & PETER MANIKAS, THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 199–235 (1996). The Appeals Chamber in the *Tadič* case noted that "it is by now a settled Rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all." Decision in *Prosecutor v. Duško Tadič*, (IT-94-1-AR72), reprinted in 35 I.L.M. 32, at 72 (1996). Further, the *Tadič* decision stated:

> If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law. As such, the commission of crimes against humanity violates customary international law, of which Article 5 of the Statute is, for the most part, reflective. As stated by the Appeals Chamber: "There is no question . . . that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*."

Id. at 937. The Appeals Chamber in the *Nikolić* case noted that a crime against humanity must be shown to have been committed in the course of an armed conflict. *Nikolić Rule 61 Hearing*, (IT-95-2-R61).

38. See, *e.g.*, Bassiouni, *supra* note 6.

39. See Bassiouni, *From Versailles to Rwanda*, *supra* note 10, at 46–49.

40. For an insight into the establishment of the ICTR, see VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).

41. See London Charter, *supra* note 25, art. 6(c).

42. See ICTY Statute art. 5(g), *supra* note 33; ICTR Statute art. 3(g), *supra* note 35.

43. See ICTR Statute *supra* note 35, art. 3. It is interesting to note that Article 5 of the ICTY does not refer to the words "widespread or systematic" contained in Article 3 of the ICTR. Yet, in the *Tadić* opinion the Trial Chamber referred to the words "widespread or systematic" using the disjunctive. See generally MICHAEL P. SCHARF, BALKAN JUSTICE (1997).

44. See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 4, at Ch. 4 "The Principles of Legality."

45. See *id.*, Ch. 5.

46. See *id.* See also Roger S. Clark, *Crimes Against Humanity at Nuremberg*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 177 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990); Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946).

47. ICTR Statute, *supra* note 35, art. 3 (emphasis added).

48. For sure, the terms "widespread or systematic" as used in Article 3 of the ICTR cannot be interpreted as a characteristic of the specific crimes listed in the definition because, for example, there can be no particular crime called "widespread extermination."

49. ICC Statute, *supra* note 13, art. 7 (emphasis added).

50. Article 7 states:

> Persecution against any identifiable group or collectivity on political, social, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court. . . .

Id.

51. *Id.*

52. *Id.* For a commentary, see generally Herman von Hebel & Daryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 79–126, (Roy S. Lee ed., 1999); Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. (2000).

53. For example, genocide requires a specific "intent to eliminate in whole or in part," while war crimes, no matter how widespread or systematic or both, do not require any element of State action or policy in connection with the commission of these crimes.

54. This was the case with the *Touvier* and *Papon* cases in France. See generally sources cited *infra* notes 167, 168, and 169. See also SORJ CHALANDON & PASCALE NIVELLE, CRIMES CONTRA L'HUMANITÉ: BARBIE, TOUVIER, BOUSQUET, PAPON (1998).

55. See ICC Statute, *supra* note 13, art. 9; *Finalized Draft of Elements of Crime*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000).

56. See ICC Statute, *supra* note 13, art. 6–8. The chapeau for crimes against humanity (Article 7) states: "For the purposes of this statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian poulation, with knowledge of the attack."

57. See generally M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994). See also BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 4, at Ch. 7.

58. See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (entered into force with respect to the United States Nov. 25, 1989) [hereinafter Genocide Convention], reprinted in 28 I.L.M. 763, *and* 2 Weston, *supra* note 2, at II.E.3. See also *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 5.

59. See, *e.g.*, ROBERT CONQUEST, THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES (1973). See also CHALANDON & NIVELLE, *supra* note 54.

60. See generally, JASON S. ABRAMS & STEVE R. RATNER, STRIVING FOR JUSTICE: ACCOUNTABILITY AND THE CRIMES OF THE KHMER ROUGE (1995); DAVID P. CHANDLER ET AL., POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA (1988); GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed. 1993). See also CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS (Samuel Totten et al. eds., 1997).

61. See ICTY Statute, *supra* note 33, art. 4.

62. See ICTR Statute, *supra* note 35, art. 2.

63. See ICC Statute, *supra* note 13, art. 6.

64. See Genocide Convention, *supra* note 58, art. II.

65. *Id.*

66. See generally BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 4, at Ch. 8 "Elements of Criminal Responsibility."

67. That standard exists in the criminal laws in those legal systems influenced by the Romanist/Civilist/Germanic legal traditions, as well as those legal systems influenced by the Common Law tradition.

68. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 57 (1992).

69. See M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279–340 (1994). See also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994).

70. See generally GÈRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF GENOCIDE (1995). See also MORRIS & SCHARF, *supra* note 40; Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997).

71. It is also believed that in the Yugoslav conflict the U.S. had satellite and other air-reconnaissance pictures and probably recorded air-waves and telephone communications that would establish certain facts constituting any one of the three major crimes mentioned, but for political reasons had elected not to make them available to the ICTY Prosecutor.

72. See sources cited *supra* note 60, particularly ABRAMS & RATNER.

73. In the Arabian Gulf, the U.S. has amassed substantial documentation of war crimes committed by the Iraqi regime against Kuwaitis, Iraqi Kurds and Shià, and Iranians, but the documentation has not yet been made public. See *Indictment and Prosecution of Saddam Hussein*, S. Con. Res. 78, 105th Cong. (March 13, 1998). See also 144 CONG. REC. NOS. 12–13 (daily ed. Feb. 23, 1998) (Senate Resolution 179, Relating to the Indictment and Prosecution of Saddam Hussein for War Crimes and Other Crimes Against Humanity). See also *War Crimes: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives*, 102d Cong., 1st Sess. (Mar. 13, 1991); *International Criminal Court*, SENATE REP. NO. 103–71 (1993); Senate J. Res. 93, 103d Cong. (1993); Senate J. Res. 32, 103d Cong. (1993).

74. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. A/1994/674 (1994); *Annexes to the Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994); Bassiouni, *supra* note 69.

75. Craig R. Whitney, *Vichy Official Found Guilty of Helping Deport Jews*, N.Y. TIMES, Apr. 2, 1998, at A8.

76. See generally Jacques Francillon, *Crimes de guerre, Crimes contre l'humanité*, JURIS-CLASSEUR, DROIT INT'L, FASCICULE 410 (1993); Leila Sadat Wexler, *National Prosecutions for International Crimes: The French Experience*, *in* 3 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d rev. ed. 1999) [hereinafter BASSIOUNI, ICL]; Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, in ASIL PROCEEDINGS 270–76 (1997).

77. See, *e.g.*, Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995).

78. See *Final Report*, *supra* note 74.

79. *Id.*

80. *Id.* See also M. Cherif Bassiouni, *Investigating Serious Violations of International Humanitarian Law in the Former Yugoslavia* (DePaul University, Occasional paper); Meron, *supra* note 6. See also the indictment of Karadzič and Mladič, in which the judge referred to "ethnic cleansing" as a form of genocide, (IT-95-18-I).

81. See *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 5.

82. See Genocide Convention, *supra* note 58, art. II.

83. See ICTY Statute, *supra* note 33, art. 4.

84. See ICTR Statute, *supra* note 35, art. 2.

85. ICC Statute, *supra* note 13, art. 2.

86. See Genocide Convention, *supra* note 58.

87. See von Hebel & Robinson, *supra* note 52.

88. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, 4 Bevans 853 (entered into force Oct. 21, 1950), (entered into force with respect to the United States Feb. 2, 1956), reprinted in 2 Weston, *supra* note 2, at II.B.11; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) (entered into force with

respect to the United States Feb. 2, 1956) reprinted in 2 Weston, *supra* note 2, at II.B.12; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 47 AM. J. INT'L L. 119 (1953) (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956), reprinted in 2 Weston, *supra* note 2, at II.B.13; 53 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, 50 AM. J. INT'L L. 119 (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956), reprinted in 2 Weston, *supra* note 2, at II.B.14.

89. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 [hereinafter 1977 Protocol I], opened for signature at Berne, Dec. 12, 1977, U.N. Doc. A/32/144 (1977), Annex I, (entered into force Dec. 7, 1978), reprinted in 16 I.L.M. 1391, and 2 Weston, *supra* note 2, at II.B.20; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter 1977 Protocol II], Dec. 12, 1977, U.N. Doc. A/32/144 (1977) Annex II, (entered into force Dec. 17, 1978), reprinted in 16 I.L.M. 1391, and 2 Weston, *supra* note 2, at II.B.21.

90. Customary international law consists of the practice of states confirmed by their intention to be legally bound by the practice. See Akehurst, *supra* note 29; Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973 (1995); D'AMATO, *supra* note 29; Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 61 (1990); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

91. See Bassiouni, *supra* note 6, and the authorities cited therein.

92. At present there are 25 categories of international crimes. They are: (1) aggression; (2) genocide; (3) crimes against humanity; (4) war crimes; (5) crimes against United Nations and associated personnel; (6) unlawful possession or use or emplacement of weapons; (7) theft of nuclear materials; (8) mercenarism; (9) apartheid; (10) slavery and slave-related practices; (11) torture and other forms of cruel, inhuman, or degrading treatment; (12) unlawful human experimentation; (13) piracy; (14) aircraft hijacking and unlawful acts against international air safety; (15) unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; (16) threat and use of force against internationally protected persons; (17) taking of civilian hostages; (18) unlawful use of the mail; (19) unlawful traffic in drugs and related drug offenses; (20) destruction and/or theft of national treasures; (21) unlawful acts against certain internationally protected elements of the environment; (22) international traffic in obscene materials; (23) falsification and counterfeiting; (24) unlawful interference with submarine cables; and, (25) bribery of foreign public officials. These crimes are reflected in 323 international instruments elaborated between 1815–1997. See BASSIOUNI, ICL CONVENTIONS, *supra* note 8.

93. See Hague Convention, reprinted in 2, Weston, *supra* note 2, at II.B.1.

94. See Bassiouni, *From Versailles to Rwanda*, *supra* note 10.

95. There are 35 treaties on the control of weapons. See BASSIOUNI, ICL CONVENTIONS, *supra* note 8.

96. See BASSIOUNI, ICL CONVENTIONS, *supra* note 8; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May

1954, 249 U.N.T.S. 240 (entered into force 7 Aug. 1956), reprinted in 2 Weston, *supra* note 2, at II.B.15.

97. For example, the U.S. takes the position that incendiary and laser weapons and land mines are not included in that category.

98. See 3 INTERNATIONAL CRIMINAL LAW, *supra* note 76; Jordan Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990). See also, *e.g.*, Meron, *supra* note 6; Theodor Meron, *The Continuing Role of Custom in the Formation of International Law*, 90 AM. J. INT'L L. 238 (1996).

99. See Geneva Conventions of 12 August 1949 and Additional Protocols of June 1977: ratifications, accessions and successions (Oct. 5, 1998), <http://www.icrc.org/unicc/icrnews>. See also BASSIOUNI, ICL CONVENTIONS, *supra* note 8, at, respectively, pp. 416–17, 426–27, 434–35, 440–41, 457–60 and 486–87. This position is bolstered by the number of ratifications for these conventions. They are:

The First Geneva Convention of 1949:	188
The Second Geneva Convention of 1949:	188
The Third Geneva Convention of 1949:	188
The Fourth Geneva Convention of 1949:	188
Protocol I of 1977:	152
Protocol II of 1977:	144

See *supra* note 88 for the full citation to the first four Geneva Conventions. See *supra* note 89 for the citations to Protocol I and Protocol II.

100. This was obvious in the 1997 Preparatory Committee for an International Criminal Court at its second and third sessions.

101. See Geneva Conventions *supra* note 88, arts. 50 and 51 of the First and Second Convention, reprinted in 2 Weston, *supra* note 2, at II.B.11–12 and arts. 130 and 147 of the Third and Fourth Conventions, respectively, reprinted in 2 Weston, *supra* note 2, at II.B.13–14; 1977 Protocol I, *supra* note 89.

102. See Common Article 3, *supra* note 88.

103. See Protocol II, *supra* note 89.

104. See generally LEVIE, *supra* note 3; Meron, *supra* note 6.

105. See Conventions cited *supra* note 88, arts. 5 and 6.

106. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970), reprinted in 8 I.L.M. 68, and 2 Weston, *supra* note 2, at II.E.16; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European), Jan., 25, 1974, Europ. T.S. No. 82, reprinted in 13 I.L.M. 540 (not yet in force). See also Christine van den Wyngaert, *War Crimes, Crimes Against Humanity and Statutory Limitations*, *in* BASSIOUNI, ICL, *supra* note 76, at 227–239.

107. Article 8 of the London Charter removed the defense of "obedience to superior orders." See London Charter, *supra* note 25, art. 8. Further, Article 7 of the ICTY and Article 6 of the ICTR both removed the defense of "obedience to superior orders" as well. See ICTY Statute, *supra* note 33, art. 7; ICTR Statute *supra* note 35, art. 6. For a historical evolution of the defense, see Leslie C. Green, *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT'L L. 167 (1989); Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973). See also Leslie C. Green, *The Defence of Superior Orders in the Modern Law of Armed Conflict*, 31 ALBERTA L. REV. 320 (1993).

108. Article 7 of the London Charter removed the defense of immunity for "head of state." See London Charter, *supra* note 25, art. 7. Further, Principle III of the "Nuremberg Principles"

removed the defense of immunity from heads of state. See 1950 ILC Report, *supra* note 27, at Principle III. The defense was also removed in the statutes for the ICTY and the ICTR. See ICTY Statute, *supra* note 33, at art. 7; ICTR Statute *supra* note 35, at art. 6.

109. Compare Common Article 3, *supra* note 88, with "grave breaches" of the Third and Fourth Conventions, respectively Articles 130 and 147.

110. One of the sources of international law as stated in Article 38 of the Statute of the International Court of Justice. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, U.N.T.S. No. 993, art. 38.

111. See generally Meron, *supra* note 6.

112. See Bassiouni, *supra* note 14. See also, *e.g.*, sources cited *supra* note 14.

113. See Balint, *supra* note 14. See generally sources cited *supra* note 14 and accompanying text.

114. These difficulties were evident in the work of the General Assembly's Preparatory Committee for the Establishment of an International Criminal Court on the Definition of War Crimes. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996); *Report of the Inter-Sessional Meeting From 19 to 30 Jan. 1998 in Zutphen, The Netherlands*, U.N. Doc. A/AC.249/1998/L.13, (1998); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (1998) [hereinafter PrepCom Committee]. See also the Commentaries of Jordan Paust in 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed. 1997) and 13*bis* NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed. 1998).

115. *Prosecutor v. Duško Tadič*, (IT-94-I-T), reprinted in 36 I.L.M. 908. For a critical appraisal, see George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

116. Meron, *supra* note 7, at 238.

117. *Id.*

118. *Prosecutor v. Duško Tadič*, (IT-94-I-T), reprinted in 36 I.L.M. 908 (1997). See also, *e.g.*, SCHARF, *supra* note 43.

119. 1986 ICJ Rep. 14.

120. Meron, *supra* note 7, at 237. Professor Dinstein agrees that intervention by a foreign State on behalf of the insurgents turns a civil war into an interstate war. Specifically, with regard to Yugoslavia Meron writes:

> The *Tadič* trial chamber has already accepted that, before the announced withdrawal of JNA forces from the territory of Bosnia-Herzegovina, the conflict was an international armed conflict. The facts of the situation and the rules of international humanitarian law should determine whether the JNA continued to be involved after that date and during the period pertinent to the indictments; if so, the international character of the conflict would have remained unchanged. The provisions of the Fourth Geneva Convention on termination of the application of the Convention, including Article 6, are relevant, not the legal tests of imputability and state responsibility. Finally, the appeals chamber would also be well-advised to abandon its adherence to the literal requirements of the definition of protected persons and help adapt it to the principal challenges of contemporary conflicts.

Meron, *supra* note 7, at 242.

121. See London Charter, *supra* note 25. For the proceedings before the IMT, see International Military Tribunal sitting at Nuremberg, reported in TRIAL OF THE MAJOR WAR

CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949) (commonly known as the "Blue Series"). For the subsequent proceedings of the IMT, see TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949) (commonly known as the "Green Series").

122. See Special Proclamation Establishing an International Military Tribunal for the Far East and Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20 (IMTFE Proclamation), reprinted in 2 Weston, *supra* note 2, at II.E.2. On the same day General MacArthur issued his proclamation, the Charter for the IMTFE was adopted. Pursuant to a policy decision by the Far Eastern Commission, the Charter was later amended by General Order No. 20, issued by MacArthur. See Charter for the International Military Tribunal for the Far East, Apr. 29, 1946, T.I.A.S. No. 1589, at 11, (IMTFE Charter), reprinted in 2 Weston, *supra* note 2, at II.E.2. See generally THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); THE TOKYO WAR CRIMES TRIAL: COMPREHENSIVE INDEX AND GUIDE TO THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN FIVE VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II (1996).

123. See BASSIOUNI, *supra* note 8.

124. See PrepCom Committee, *supra* note 114.

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

126. See PrepCom Committee, *supra* note 114.

127. *Id.*

128. Non-paper circulated at the December 1997 session of the Preparatory Committee for the Establishment of an International Court, entitled *Synopsis on War Crimes Relating to the Informal Working Paper on War Crimes (A/AC.249/1997/WG.1/CRP.7), Dec. 3, 1997.*

129. ICC Statute, *supra* note 13, at art. 8, para. 2(a).

130. *Id.*, para. 2(b).

131. *Id.*, para 2(c).

132. *Id.*

133. *Id.*, para 2(d).

134. The United States did not ratify either Protocol and wanted to avoid any references to these Protocols, insisting that whatever norms were derived therefrom should be drafted as part of customary law. In a sense, the United States' position is defensible because the Protocols essentially embody customary law and that too evidences the overlap between the two sources of applicable law.

135. See von Hebel & Robinson, *supra* note 52.

136. That approach comes from the analogy to the use of a shotgun in hunting which spreads pellets across a certain range and is thus more capable of having some of the pellets hit the target than if the weapon was a rifle with a single bullet following a single projectory.

137. It is beyond the scope of this paper to go into detail as to the different doctrines on what constitutes a single or multiple criminal transactions or how sentences shall be meted out. See, *e.g.*, JOHN DECKER, 1 ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 1.19 (3rd ed. 2000).

138. *Report of the Preparatory Commission of the International Criminal Court, Finalized Draft of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (30 June 2000) [hereinafter Elements of Crimes].

139. Except in cases where lay jurors sit along with professional judges in certain cases as established in the applicable code of criminal procedure. The origin of such lay jury participation in the French legal system is the cour d'Assizes.

140. See *e.g.*, for the Italian system, Alfonso Stile, Il Bene Giuridico.

141. It should be noted that these legal elements also include facts. They are therefore a cumulation of law and facts.

142. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46,Feb. 4, 1985, reprinted in 23 I.L.M. 1027 [Torture Convention]. See also Daniel H. Derby, *Torture*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 5, at 705; HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (1988).

143. See M. Cherif Bassiouni, *Enslavement*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 5, at 663.

144. Torture Convention, *supra* note 142.

145. See Elements of Crimes, *supra* note 138.

146. See ICC Statute, *supra* note 13, at Articles 77–80.

147. See *id.* at Article 20. The principle *ne bis in idem* prevents persons from being tried before the Court twice for conduct that formed the basis of crimes for which the person had either been convicted or acquitted by the Court [Article 20(1)]. Moreover, it prevents a national legal system of a State party from prosecuting an individual for the same conduct that formed the basis of a crime for which the person had previously been convicted or acquitted by the Court [Article 20(2)]. In addition, an individual, who has been either previously acquitted or convicted by a national court for conduct that formed the basis of crimes under the Statute, may not be prosecuted by the Court. [Article 20(3)]. However, a conviction or acquittal by a national jurisdiction will not bar subsequent prosecution by the ICC if: (a) the purposes of the State proceedings were to "shield the person concerned from criminal responsibility" [Article 20(3)(a)]; or (b) the domestic proceedings were not conducted independently or impartially [Article 20(3)(b)].

Thus, *ne bis in idem* only prevents a second prosecution of an accused in two circumstances: (1) when the first attempt was either made by the ICC, and the second effort is by either a State party or the ICC; or (2) when the first attempt was by a national legal system (assuming that the first prosecution was independent, impartial, and not for the purposes of shielding the accused from criminal responsibility [Article 20(3)(a)-(b)]) and the second prosecution is by the Court. The principle is plainly only applicable when the ICC is involved, and, as such, a conviction or acquittal by one national legal system, while barring a second prosecution by the ICC, seemingly does not then bar subsequent prosecution in another national jurisdiction.

148. IT-95-16-T Judgement of the Trial Chamber of 14 January 2000.

149. [Footnote 958 in original] This result is borne out by the Appeals Chamber in its Decision on Jurisdiction: "Article 3 thus confers on the International Tribunal jurisdiction over [any] serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Art. 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal (emphasis added)". See *Tadić*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 91.

150. [Footnote 959 in original] The text of Art. 48 reads as follows:

(1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.

(2) The single sentence shall be imposed according to the following rules:

i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

iii) if a sentence of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

151. [Footnote 960 in original] See Art. 60 of the Croatian Penal Code of 1997.

152. [Footnote 961 in original] Art. 81 of the *Codice Penale* reads:

(1) Anyone who, by a single act or omission, violates different provisions of law or commits more than one violation of the same provision of law, shall be punished with the punishment which would be imposed for the most serious violation, increased *up to no more than three times that sentence*. [. . .]

153. [Footnote 962 in original] *Tadić*, Sentencing Judgement, 14 July 1997, at para. 9.

154. [Footnote 963 in original] Art. 52 reads:

(1) If the same act violates several criminal statutes or violates the same statute more than once, only one punishment may be imposed.

(2) If several criminal statutes have been violated, the punishment shall be determined by the statute which provides the most severe kind of punishment. It may not be any less severe than the other applicable statutes permit.

155. *The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-T) (judgement), reprinted in 37 I.L.M. 1399 (1998); see also www.ictr.org/english/judgements/akeysu.html

156. That same concept exists in all Romanist/Civilist/Germanic-influenced legal systems.

157. See Elements of Crimes, *supra* note 138; The Diplomatic Conference provided in Resolution F that a Preparatory Commission be established to *inter alia* develop the Elements of Crimes in accordance with Article 9 of the ICC Statute. The Elements for war crimes contain significant overlaps with those for genocide and crimes against humanity.

158. See M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, at 454:

The Statute's omission of the material elements of crimes, or *actus reus*, creates another problem area. During the Conference, an article defining *actus reus* was dropped from the Statute because some delegations could not agree on its content. However, until the last moment, the Drafting Committee expected to receive such a provision. Lacking a provision on the elements of crimes, the Court will have to determine what constitutes an act or omission by analogy to national legal systems. However, Article 22(2) specifically excludes interpretation by analogy. Furthermore, Article 22(2)'s prohibition on interpretation by analogy also conflicts with Article 31(3), which allows the Court to develop other grounds for exclusion from criminal responsibility.

159. *Id.*

160. See ICC Statute, *supra* note 13, at Articles 77 to 79.

161. See ICC Statute, *supra* note 13, at Article 20.

162. For a distinction between humanitarian law norms and human rights law norms as customary law, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

163. See Bassiouni, *From Versailles to Rwanda*, *supra* note 10.

164. *U.S. v. Calley*, C.M. 426402, 46 C.M.R. 1131 (1971); 48 C.M.R. 19 (1973); 22 C.M.A. 534 (1973).

165. *U.S. v. Medina*, C.M.A. 403; 43 C.M.R. 243 (1971).

166. 29 THE NEW ENCYCLOPEDIA BRITANNICA 1022 (1990).

167. *Shimoda v. The State*, 355 Hanrel Jiho (Supreme Court of Japan 7 December 1963); also quoted in part in 2 Friedman, *supra* note 1, at 1688. See also Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965). The claim in that case was against the United States of America for dropping atomic bombs on Nagasaki and Hiroshima in violation of the laws and customs of war.

168. See *Attorney General of Israel v. Eichmann* (Israel Dist. Court of Jerusalem, 1961), 36 I.L.R. 5 (1962), (Supreme Court of Israel 1962), 36 I.L.R. 277 (1962). See also, *e.g.*, GIDEON HAUSNER, JUSTICE IN JERUSALEM (1966).

169. See *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

170. The *Barbie* judgments:

> Matter of Barbie, GAZ. PAL. JUR. 710 (Cass. Crim. Oct. 6, 1983); Judgment of Oct. 6, 1983, Cass. Crim., 1984 D.S. Jur. 113, Gaz. Pal. Nos. 352–54 (Dec. 18–20, 1983), 1983 J.C.P. II G, No. 20,107, J.D.I. 779 (1983); Judgment of Jan. 26, 1984, Cass. Crim., 1984 J.C.P. II G, No. 20,197 (Note Ruzié), J.D.I. 308 (1984); Judgment of Dec. 20, 1985, Cass. Crim., 1986 J.C.P. II G, No. 20,655, 1986 J.D.I.; Judgment of June 3, 1988, Cass. Crim., 1988 J.C.P. II G, No. 21,149 (Report of Counselor Angevin).

For information on the Barbie case, see generally LADISLAS DE HOYAS, KLAUS BARBIE (Nicholas Courtin trans., 1985); BRENDAN MURPHY, THE BUTCHER OF LYON (1983).

171. The *Touvier* judgments:

> Judgment of Feb. 6, 1975, Cass. Crim., 1975 D.S. Jur. 386, 387 (Report of Counselor Chapan), 1975 Gaz. Pal. Nos. 124–26 (May 4–6, 1975); Judgment of Oct. 27, 1975 Chambre d'accusation de la cour d'appel de Paris, 1976 D.S. Jur. 260 (Note Coste-Floret), 1976 Gaz. Pal. Nos. 154–55, at 382; Judgment of June 30, 1976, Cass. Crim., 1977 D.S. Jur. 1, 1976 Gaz. Pal. Nos. 322, 323, 1976 J.C.P. II G, No. 18,435; Judgment of Nov. 27, 1992, Cass. Crim., 1993 J.C.P. II G, No. 21,977; Judgment of Apr. 13, 1992, Cour d'appel de Paris, Premiére chambre d'accusation, at 133–62, reprinted in part in 1992 Gaz. Pal. 387, 387–417; Judgment of June 2, 1993, Cour d'appel de Versailles, Premiére chambre d'accusation 31.

For information on the Touvier case, see generally ÉRIC CONAN & HENRY ROUSSO, VICHY, UN PASSÉ QUI NE PASSE PAS (1994); ALAIN JAKUBOWICZ & RENÉ RAFFIN, TOUVIER HISTOIRE DU PROCÈS (1995); ARNO KLARSFELD, TOUVIER UN CRIME FRANÇAIS (1994); JACQUES TRÉMOLET DE VILLERS, L'AFFAIRE TOUVIER, CHRONIQUE D'UN PROCÈS EN IDÉOLOGIE (1994).

172. The *Papon* case:

> Papon was indicted on September 18, 1996; the indictment was confirmed on January 23, 1997; Judgment of Sept. 18, 1996, Chambre d'accusation de la cour d'appel de Bordeaux (unpublished), affirmed Judgment of Jan. 23, 1997, Cass. Crim., 1997 J.C.P. II G, No. 22,812. In April 1998 Maurice Papon was convicted for "crimes against humanity" and sentenced to 10 years imprisonment. See Craig R. Whitney, *Ex-Vichy Aide Is Convicted and Reaction Ranges Wide*, N. Y. TIMES, Apr. 3, 1998, at A1; Craig R. Whitney, *Vichy Official Found Guilty of Helping Deport Jews*, N.Y. TIMES, Apr. 2, 1998, at A8; and Charles Trueheart, *Verdict Nears in Trial of Vichy Official*, WASH. POST, Apr. 1, 1998, at A21.

For information on the Papon case, see generally Laurent Greilsamer, *Maurice Papon, la vie masquée*, LE MONDE, Dec. 19, 1995, *available in* LEXIS, Nexis Library, Monde File; Barry James, *The Final Trial for Vichy? A Model French Bureaucrat Accused*, INT'L HERALD TRIB., Jan. 6–7, 1996, at 2.

For additional information on these cases and French prosecution of war criminals in general, see generally Leila Sadat Wexler, *National Prosecutions for International Crimes: The French Experience*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 76; Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, in ASIL PROCEEDINGS 270–76 (1997); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 J. L. & SOC. INQUIRY 191 (1995); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications* (Working Paper No. 97-4-3, Washington University School of Law, 1997). See also CHALANDON & NIVELLE, *supra* note 54; Jacques Francillon, *Crimes de guerre, Crimes contra l'humanité*, JURIS-CLASSEUR, DROIT INT'L, FASCICULE 410 (1993).

173. *Regina v. Finta*, [1994] 1 S.C.R. 701. See Irwin Cotler, *Bringing Nazi War Criminals in Canada to Justice: A Case Study*, in ASIL PROCEEDINGS 262–69 (1997); Leslie C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 BRIT. Y.B. INT'L L. 217 (1988); Michèle Jacquart, *La notion de crime contre l'Humanité en droit international contemporain et en droit Canadien*, 21 REVUE GÉNÉRALE DE DROIT 607 (1990). See also Barry H. Dubner, *The Law of International Sea Piracy*, 11 N.Y.U. J. INT'L L. & POLITICS 471 (1979); *Report of the Commission of Inquiry on War Criminals* (Jules Deschênes ed. 1986); Sharon A. Williams, *Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada*, in THE LAW OF WAR CRIMES 151 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

174. See sources cited *supra* note 60. See also Seth Mydans, *Death of Pol Pot: Pol Pot, Brutal Dictator Who Forced Cambodians to Killing Fields, Dies at 73*, N.Y. TIMES, Apr. 17, 1998, at A14.

175. See Conventions cited *supra* note 88.

176. See 1977 Protocol I, *supra* note 89.

177. See Conventions cited *supra* note 88.

178. See 1977 Protocol II, *supra* note 89.

179. See Bassiouni, *supra* note 14.

180. See *id.* See also Bassiouni, *From Versailles to Rwanda*, *supra* note 10; TRANSNATIONAL JUSTICE (3 vols., Neil Kritz ed., 1995).

181. W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

182. To paraphrase the classic and profoundly insightful characterization of George Orwell, "Who controls the past, controls the future; who controls the present, controls the past." GEORGE ORWELL, 1984 (2d ed. 1977). Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. See Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policy of the Past*, 20 L. & SOC. INQUIRY 7, 49 (1995).

183. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS XVII (1624).

The views expressed herein are solely those of the author.

II

The Westphalian Peace Tradition in International Law

From *Jus ad Bellum* to *Jus contra Bellum*

Ove Bring

DURING THE COURSE OF 1998, the 350th Anniversary of the Peace of Westphalia was celebrated in different European countries, and throughout 1999 the Centennial of the First Hague Peace Conference repeatedly received solemn attention.[1] This article, written in honour of Professor Leslie C. Green, will use the years of 1648 and 1899 as assessment points in relation to developments in international law regarding the use of force by States. As concerns the emerging law of collective security, the account will probe somewhat beyond the year of 1899, but not beyond the establishment of the League of Nations in 1920. The chosen topic is thus one of legal history, which is not inappropriate when one takes into account the achievements of Leslie Green; he himself became part of legal history through participation in war treason trials in India after World War II, and he has written on international humanitarian law and the UN Charter law on the use of force from both a historical and contemporary perspective. The historical approach of this contribution may be timely—at a juncture in international relations when the world community is at a crossroads (as before in history) between multilateralism and unilateralism, between global and regional decision making, and between the

idealism of ambitious blueprints for the future[2] and laissez-faire oriented realism.

The Peace of Westphalia and the Grotian Legacy

In October 1648, after 30 years of war and almost four years of negotiations, two peace treaties were signed in the Westphalian cities of Osnabrück and Münster. Most of the international actors of 17th-century Europe were represented at the peace congress: the Holy Roman Empire; nation-States like France, Sweden, Spain, and Portugal; an emerging State, the Netherlands (then called the United Provinces); the Holy See; i.e., the Swiss Confederation; Italian units such as Venice, Tuscany, and Savoy; and various German principalities and bishoprics, etc.[3] It was the first general peace congress in the history of Europe. Among its immediate results were the introduction of a principle of religious tolerance, the breakdown of medieval imperial and clerical universalism, and the downgrading of the papacy to the status of a second-class international actor. Moreover, in a longer term perspective, the peace contributed to the emergence of the modern international system of territorial and sovereign States, a system where actors were (and are) maximizing their own State interests, while at the same time striving for a balance of power.

From a legal point of view, the principle of national sovereignty was now in the foreground, while at the same time restrictions in sovereign rights were recognized as a consequence of, *inter alia*, the Westphalian Peace Treaties. Against a backdrop of natural law perceptions, nation-States, city-States, and principalities alike perceived themselves as being part of a European collective bound together by an emerging law of nations (*jus inter gentes*). The traditional Roman concept of *jus gentium* survived, but took on a more State-oriented meaning. International law, as we know it today, started to develop through new (more efficient) forms of diplomacy, relying to a greater extent on permanent missions and an increased registration of State practice.

Hugo Grotius died in 1645, but left behind[4] a conception of an *international society* which, at least in part, seemed to materialize after the Peace of Westphalia. To some extent, this conception was realist in the sense that he was aware of the importance of sovereignty, stressing that a sovereign State is a power "whose actions are not subject to the legal control of another."[5] Moreover, Grotius did not promote a doctrine of equality of States but rather recognized power differences and legal relationships based on non-equality.[6] Yet the conception was idealistic in the sense that, consistent with stoic doctrine, a society of mankind, not one of States alone, was envisaged.[7] In this society, the

individual possessed fundamental rights and freedoms and was not merely an object.[8] It is possible to deduce from his thinking, as Hedley Bull has done, the interpretation that Grotius was alluding to an international society of a more advanced nature—an international community—which implied a vision of "solidarism" and consensus in international relations.[9]

As Bull himself and others have pointed out, Grotius said little or nothing about crisis management, balance of power, great power responsibilities, international institutions, multilateral conferences, or collective suppression of aggression[10]—in other words, nothing about collective security. Benedict Kingsbury and Adam Roberts have noted that certain "solidarist" principles are nevertheless discernible in his writings. They are, however, difficult to concretize, a point made by Kingsbury.

> Grotius' positions on such solidarist themes as the consequences of the justice or injustice of a war . . . and the enforcement of law by third parties generally, are all complex and often difficult to reduce to rules of decision.[11]

In these areas, the treaties of Osnabrück and Münster did, as we shall see, carry things somewhat further and with greater clarity than the doctrines of Grotius. His view of the law was "registrative" and backward-looking. He wanted to remind his contemporaries of the nature of the existing legal system, that it was almost as old as humanity itself and was "supposed to be as valid in his time as it had been in Roman times."[12] As a consequence, Grotius' thinking was not in full harmony with the Westphalian Peace regime, which was future-oriented and designed to expound a new legal order relating to the use of force in Europe.

In *De Jure Belli ac Pacis,* Grotius picked up the medieval and theological Just War Doctrine and elaborated his own version of it. Although he circumscribed the right to wage war to a number of instances in order to curb wars of conquest, his immediate legacy tended to be counterproductive to that purpose. His basic *bellum justum* principle is reasonably clear: "war ought not to be undertaken except for the enforcement of rights."[13] Since Grotius wrote this at a time when acts of violence for the enforcement of rights occurred between actors other than States, such as families, cities, and corporations, and since he was not ready to exclude such *bellum privatum* from the legal sphere, but rather draw analogies from it with regard to inter-State relations, his position could be described as admissive vis-à-vis the use of force generally. However, at the same time he tried to introduce, *de lege ferenda,* a State monopoly on the use of force, for he perceived it to be conducive to law and order.

When Grotius listed the legitimate reasons for resorting to use of force, he deduced them from a citizen's reasons for commencing a law suit.[14] Any denial of existing rights would justify a victimized State's reaction with military force. For example, force could be used for the recovery of lost property or the repair of economic damage. This position meant that Grotius' *jus ad bellum* doctrine (like other *jus ad bellum* doctrines) included first use of force as a natural element. It also included second use reactions to other States' use of force. Grotius' view on self-defence in fact foreshadows the *Caroline* case. He only admitted preventive action if it was "necessary" and in response to an immediate threat where one was "certain" about the intentions of the opponent. Arguing somewhat loosely, he asserted that "the degree of certainty required is that which is accepted in morals."[15]

Morality also played a role in Grotius' view on punitive actions. Punishment was a just cause in response to injustice done to oneself or third States. There was a general right of participation in a just war. Moreover, Grotius recognized the justness of a war "against men who act like beasts,"[16] and thus came close to what today is called humanitarian intervention. He based his "just causes" on natural law and the voluntary or positive law of nations (agreements and practice).

The just causes of Grotian doctrine can be summarized as follows:

- recovery of what is legally due to an aggrieved State;
- territorial defence against an attack, actual or threatening, but not against a potential threat;
- economic defence to protect one's property; and
- the infliction of punishment upon a wrongdoing State.[17]

Wars waged without any cause were "unjust," a categorization that entailed certain practical consequences. One was to assume relevance for later legal developments, namely Grotius' doctrine on qualified neutrality. Absolute impartiality was impossible in relation to the aggressor and his opponent. In Book III of *De Jure Belli ac Pacis,* Grotius wrote that neutrals should do nothing to support the "wicked case" or hamper "him who wages a just war."[18] There was no suggestion of a duty to assist actively the "just side," but Grotius asserted that the right of passage ought to be granted to the party fighting for a just cause and denied to one motivated by an unjust cause.[19] However, Grotius did not envisage collective action on the part of the international society. His doctrines expressed a "law of coexistence," not a "law of co-operation" (to use Wolfgang Friedmann's terminology).[20] This does not exclude perceptions of "the Grotian image of war as a fight for the common good," as Michael Donelan would argue, or fighting for a just cause "on behalf of the community as a whole," as

Hedley Bull would put it.[21] Nevertheless, this "solidarist" theme is more pronounced in the provisions of the Westphalian Peace regime.

The Treaty of Münster contains three articles of relevance in this context. First, Article I stated:

> That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, . . . That this Peace and Amity be observed and cultivated with such a Sincerity and Zeal, that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other; etc. . . .[22]

That this general pronouncement on maintenance of peace also amounted to an international obligation to solve existing disputes by peaceful means was made clear by the 123rd Article of the Treaty. Even if violations of the Treaty should occur

> . . . The Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.[23]

These provisions were, in a sense, forerunners to Articles 12, 13 and 15 of the Covenant of the League of Nations (on certain procedures for crisis management) and Articles 2(3) and 33 of the UN Charter (on obligatory peaceful settlement of disputes).

In fact, the Peace of Westphalia contained an embryo of what later would be called collective security. The Article quoted above also obliged the parties (individually) "to defend and protect all and every Article of this Peace against any one, without distinction of Religion." This obligation was supplemented by a rule on collective sanctions in the following (124th) Article:

> [I]f for the space of three years the Difference cannot be terminated by any one of those [peaceful] means, all and every one of those concerned in this Transaction shall be obliged to join the injured Party, and assist him with Counsel and Force to repel the Injury . . . and the Contravener shall be regarded as an Infringer of the Peace.[24]

Thus, there was an obligation to identify the aggressor and join forces to repel the aggression. This Westphalian formula on a mutual guarantee of security to be triggered after the failure of peaceful settlement efforts would influence later

State practice and can today be compared with Articles 10 and 16 of the League Covenant and Chapters VI and VII of the UN Charter.

Grotius' *jus ad bellum* doctrine was not reflected in the Peace provisions. The more ambitious approach of *jus contra bellum* was introduced in State (treaty) practice for the first time (although in a loose manner). It would not prevail in actual practice during the following centuries, but after 1648 it was once and for all ideologically implanted in political thinking on law and diplomacy.

It is definitely an overstatement to say, as Hedley Bull has done, that Grotius "may be considered the intellectual father of this first general peace settlement of modern times."[25] Grotius did not recommend a general conference of European powers and did not envisage that a comprehensive peace settlement would have the potential of providing the international society with an institutional foundation. However, Grotius' conception of international society is bound to have influenced the negotiators in Osnabrück and Münster to some extent. Hedley Bull may be correct in his assessment that "in their impact on the course of international history the theory of Grotius and the practice of Westphalia marched together."[26]

The Westphalian Balance of Power System 1648–1789

In the immediate aftermath of 1648, it seemed that the old international system had been transformed into an international society, if not into an international community guided by common values, common policy prescriptions, and common legal rules of coexistence. Nevertheless, the weakness of the Westphalian peace and security system soon became apparent. In modern parlance, it had no institutional backing and contained no mechanism for implementing crisis management procedures. Moreover, there was more often than not a lack of political will in the ensuing era of absolutism. Non-peaceful settlement of disputes seemed to be the rule. The first trade war between the Netherlands and Britain was fought between 1652–54. During the same decade, Spanish troops recaptured Barcelona from French occupation, Sweden intervened in the Polish-Russian war, Denmark attacked Sweden's territories in northern Germany, Britain and France jointly attacked Spain, etc. However, the area of main concern to the Westphalian Peace negotiators, central Europe, was still peaceful.

Westphalia left a legacy of balance of power diplomacy that in many respects was conducive to peace. Although the treaties of Osnabrück and Münster contained no explicit wording on balance of power, the concept was inherent in the treaties. The rule on collective sanctions implied a potential of deterrence

that could curb aggressive tendencies in balance-threatening situations. Moreover, a form of collective self-defence materialized in 1663 and 1683 when Turkish troops threatened Vienna (and the Habsburg Empire), but were repelled through the collective efforts of countries (France and others) that came to Austria's assistance. The perception of a threat posed by a strong Islamic presence in central Europe was enough to cause various powers to join forces (in all probability, irrespective of the Münster Treaty).

When the European balance of power system was threatened again in 1688, a coalition against the peace-breaker was forged soon enough. This time the expansionist policy of Louis XIV had manifested itself in a French invasion of the Palatinate (Pfalz). In this and similar cases, most States wanted to preserve some basic status quo as a way to prevent other States from gaining a position of dominance. Balance of power diplomacy was thus directed more towards limiting the political/territorial consequences of war than towards abolishing war as such. The (anti-French) coalition war ended with the Peace of Rijswijk in 1697, where Louis XIV had to give up most of the conquered territories and accept arbitration on numerous territorial claims. The *jus contra bellum* element of the Westphalian heritage had been diluted beyond recognition in actual practice, but traces of it remained in peace treaties for years to come.

Louis XIV threatened the balance of power once again in 1700 when he advanced a claim on the Spanish throne on behalf of his grandson. This led to a new anti-French coalition being formed the following year[27] and to the outbreak of the War of the Spanish Succession (1701–1714), which ended in French defeat. The balance of power was upheld through the peace treaties of Utrecht (1713) and Rastatt (1714). The Peace of Utrecht consisted of a number of bilateral agreements which explicitly confirmed what in Westphalia had been a general understanding—that peace had to be built on a just geopolitical equilibrium *(justum potentiae equilibrium)*.[28] In this sense the treaties of Utrecht reconfirmed a Westphalian tradition. However, since France was successful in "bilateralizing" the peace conditions in relation to its different adversaries, the Peace of Utrecht did not mark the existence of an international society or community in the same way as the Peace of Westphalia had done. The Westphalian embryo of collective security was not taken up further. Although Europe had raised a coalition of the willing against the peace-breaker, no obligations as to collective action or sanctions were envisaged for the future. Louis XIV had been forced to respect the European balance, but the powers upholding it could neither impose an efficient *status quo* nor secure peaceful change in the relations of States.[29] Utrecht did not reconfirm the Westphalian principle of European public law requiring peaceful settlement of disputes. The

embryonic element of *jus contra bellum* was not revived; the doctrine of *jus ad bellum* prevailed.

In 1699 Denmark, Poland and Russia formed an aggressive alliance against Sweden, their plan being to launch simultaneous attacks the following year. As a consequence, the Great Northern War (1700–1721) was unleashed, during which Charles XII of Sweden rejected several peace offers. During the war, the 1712 edition of Grotius' *De Jure Belli ac Pacis* was translated into Russian, and inspired the Russian diplomat P.P. Shafirov to defend Peter the Great's first-use-of-force against Sweden. In 1717 Shafirov published *A Discourse Concerning the Just Causes of War Between Sweden and Russia* (as it was called in the later English version).[30] Voltaire, who did not believe that Grotius had influenced anything regarding the restraint of war, ironically rejected (in his book on Charles XII) the just causes advanced by Russian diplomacy during the Northern War.[31] Under the Peace of Nystad (1721), Sweden lost her Baltic provinces and Russia emerged as a major coastal State in the region and as a new Great Power. The northern balance had shifted to a new equilibrium.

In the discourse of international lawyers there have been different views on the matter of balance of power as it relates to the law on war and peace. Some have (since the 18th century) seen the balancing system as a precondition of international law, others have viewed it as a peace-oriented policy of preserving the *status quo*, a few may have understood its preservation as amounting to a legal obligation on the part of States, and many have considered it a formula giving rise to legal rights of intervention and resort to force.[32] The legal consequences of the 18th century political realities amounted *inter alia* to an extensive interpretation of the law of individual and collective self-defence, although Grotius had not included preventive war among his categories of *bellum justum*. Christian Wolff, writing in 1749, thought that the balance of power was "useful to protect the common security." He did not believe that "the preservation of equilibrium" was in itself a just cause of war, but he nevertheless found that nations under threat of subjugation had the right to resort to force.[33]

Wolff's disciple, Emmerich de Vattel, rejected conquest, property claims, and religious differences as just causes of war, but admitted that in order to protect their interests, States had a right to resort to war in response to what they regarded as injuries. As a consequence of this "realist" approach, Vattel's book, *Le Droit des gens* (first edition 1758) became very popular in government chancelleries and diplomatic circles. Vattel did not, however, completely accept the so-called probabilist doctrine (embraced by Wolff and others before him) that war could be just on both sides since "probable reasons" for legality could be offered in the concrete case. Vattel maintained that it was impossible that two

contrary claims were simultaneously true, although both parties to a conflict could act *bona fide* and accusations of unjustness should be avoided in such situations. Nevertheless, he rejected all suggestions that the end justifies the means and that might is right. He recognized the need for collective action against aggressors that upset the balance of power. The common safety of the society of nations would permit joint action to restrain and punish rogue States.[34]

While Wolff and Vattel were busy authoring their volumes on "the law of nations," the international scene around them was characterized by power politics. In 1740 Frederick the Great of Prussia embarked upon the Austrian War of Succession, from which Prussia emerged in 1748 as a new Great Power. Again the balance of power had shifted. Other wars followed: the Seven Year War (1756–63) and the Bavarian War of Succession (1778–79). Although during this era an unprovoked attack was regarded as immoral behaviour, a war of aggression was not necessarily looked upon as illegal under the public law of Europe or the law of nations. The Articles of the Treaty of Münster, indicating the contrary, had yielded to what Schwarzenberger has called the Grotian "elasticity of just causes of resort to war."[35] In retrospect it could be argued that Grotius' *jus ad bellum* doctrine had served to license war rather than to restrict it. One of Grotius' purposes was to curb wars of conquest. Sharon Korman has made the point in a recent thesis that Prussia's conquest of Silesia (1740) and the three partitions of Poland (1772, 1793, 1795) were accepted by the European States and thereby confirmed the existence of a right of conquest.[36] At the time, balance of power arguments were used to legitimize both the conquest of Silesia and the enforced partitions of Poland. The Westphalian Peace concept (where the balance of power ideology was linked to the *non-use* of force) had vanished from State practice, but it survived in different variants in political and philosophical literature.

Elements of *Jus contra Bellum* in Political Philosophy 1713–1806

During the negotiations leading up to the Peace of Utrecht, the French Abbé de Saint-Pierre served as a secretary to the French delegation and, in his spare time, elaborated a peace plan for Europe. It first appeared in 1712 as *Projet de la Paix Universelle*. The following year a more extended version under the less ambitious title *Projet pour rendre la Paix perpituelle en Europe* was published. Saint-Pierre may have been influenced by the Quaker William Penn's booklet, *Essays Towards the Present and Future Peace of Europe* (1693), in which Penn put forward the idea of a federation of European States (including Russia

and Turkey) as a peace maintenance mechanism. Saint-Pierre advocated a federation of European/Christian States based on the post-Utrecht *status quo*. He saw the proposed federal structure as a way to prevent international and internal armed conflict. Disputes would be resolved by peaceful means, i.e., by arbitration or judicial process within the framework of a permanent assembly of State representatives. The Assembly (or Senate) would function under the leadership of the existing major powers. These States would possess more votes than others under the decision-making procedure. Common decisions on enforcement measures could be taken to uphold the *status quo* or implement the desired order. War as a means of coercion, on the part of the Federation, was envisaged as the ultimate sanction against recalcitrant States.[37] In this respect, Saint-Pierre's thinking was part of a Westphalian heritage of collective security. His peace project included an important element of *jus contra bellum*, not in the strict and direct UN Charter "Article 2(4) sense," but in the broader and more general perspective that will always be intertwined with any peace plan for common or collective security.

Saint-Pierre's ideas became well known in Europe and they were commented upon by Frederick the Great, Voltaire, Rousseau and others—although often in a sceptical or even ironic fashion. Rousseau abridged and reviewed his project in an essay—*Extrait du projet de paix perpétuelle d. M. l'Abbi de St. Pierre* (1760)—and has, therefore (at times), been perceived as a strong supporter of Saint Pierre and his peace plan. In fact, Rousseau thought it naive, but applauded Saint-Pierre's aspirations.

Montesquieu, in *De l'Esprit des lois* (1748), came close to embracing the stricter *jus contra bellum* approach when he rejected the right of conquest (except as a matter of self-defence) and advocated the principles that "nations, without prejudicing their true interests, in time of peace ought to do one another all good they can, and in time of war, as little injury as possible."[38] The former proposition would today include the peaceful settlement obligation of Articles 2(3) and 33 of the UN Charter, while the latter would refer to the principles underlying the international humanitarian law of armed conflict. Montesquieu's views on natural law in this respect supplements this proposition. In arguing against Thomas Hobbes' thesis of men by nature being in a state of war, he claimed that "peace would be the first law of nature."[39]

In the 1780's, Jeremy Bentham crafted a peace project—"Plan for a Universal and Perpetual Peace"—but it was not published until after his death in the volume *Principles of International Law* (1843) and thus could not exert any influence during the period under consideration. In it, Bentham criticized Vattel and other naturalists. He aimed at a codification of international law that

would rule out war and colonization and rely on public opinion as a sanction for peace.

The French Revolution conveyed an ideology which had important implications for the development of certain international legal concepts. Internal freedom (civil and political rights) was seen as a condition for peace and the competence to wage war ought to, in accord with this perception, be placed under the authority of the representatives of the people. The idea was advanced that "all unjust aggression" was contrary to natural law. War should only be used to repress a grave injustice and conquest should be forbidden. A constitutional proposal by Mirabeau provided that if the legislative assembly found a minister or other executive agent guilty of international aggression, he would be punished for criminal acts against the State.[40] The ensuing Decree of the National Assembly of May 22, 1790, was not that far-reaching, but did contain a rejection of wars of conquest, and its text was later incorporated in the Revolutionary Constitution. The 1791 Constitution included the following formula:

> The French Nation renounces the undertaking of any war with a view to making conquests and will never use its forces against the liberty of any people.[41]

A follow-up Decree of April 13, 1793, pronounced the principle of non-intervention in the affairs of other States. These revolutionary conceptions also found expression in the *Déclaration du droit des gens*, which in 1795 was submitted to the French Convention by one of its members, Abbé Grégoire. It was intended as a corollary to the *Déclaration des droits de l'homme* of 1789, a parallelism inspired by 18th century natural law thinking. The new (draft) declaration contained a number of lofty principles, including the proposition that an armed attack by one nation upon the liberty of another would be an offense against all nations, and the principle that the interests of individual nations should be subordinated to the "general interests of the human race."[42] The Declaration was not adopted.

Edmund Burke's well-known condemnation of the French Revolution was linked to his concern about the future of the balance of power in Europe. With the outbreak of the Revolution, Westphalia had become "an antiquated fable," he wrote in 1791.[43] Any attempt to upset the European balance of power system was for Burke a just cause of war. There was a duty to intervene in the internal affairs of France in order to protect "the public laws of Europe."

When Thomas Paine published Part II of his *Rights of Man, Being an Answer to Mr Burke's Attack on the French Revolution* in 1792, he also opposed Burke's

view on war. Instead of finding a "public law of Europe," Paine noted the "uncivilized state of European governments" and the fact that those governments were "almost continually at war."[44] He denounced war as such as harmful to the "principles of commerce and its universal operation" and made the point that commercial development is dependant on the maintenance of peace. Thus, it was in everyone's interest to avoid war.[45] Paine was here to some extent foreshadowing the plans of Robert Schumann and Jean Monnet for a European Community. He did not, however, draw any legal conclusions from this reasoning, other than that he implicitly denied a *jus ad bellum* based on an alleged public law of Europe.

When Immanuel Kant published his famous essay *Zum ewigen Frieden* in 1795, he argued, like Paine, that "the *spirit of trade* cannot coexist with war, and sooner or later this spirit dominates every people. For among all those powers (or means) that belong to a nation, financial power may be the most reliable in forcing nations to pursue the noble cause of peace."[46]

Kant was critical of Grotius, Vattel, and other naturalists and their pretension of stating a valid legal prohibition against certain uses of force. Thus, he denied any *lex lata* on the subject (although he did not put it in these terms). He noted, however, a "dormant moral aptitude to master the evil principle in himself" and claimed that "from the throne of its moral legislative power, *reason* [emphasis added] absolutely condemns war as a means of determining the right and makes seeking the state of peace a matter of unmitigated duty."[47] He thereafter embarked upon an idealistic reasoning *de lege ferenda:*

> But without a contract among nations peace can be neither inaugurated nor guaranteed. A league of a special sort must therefore be established, one that we can call a *league of peace (foedus pacificum)*, which will be distinguished from a *treaty of peace (pactum pacis)* because the latter seeks merely to stop one war, while the former seeks to end all wars forever. This league does not seek any power of the sort possessed by nations, but only the maintenance and security of each nation's freedom, as well as that of the other nations leagued with it, . . ."[48]

Although accepting the decentralized Westphalian State system of equal nations, Kant wanted to improve upon it through agreement. His proposal amounted to a loose federation of free nations, without any supranational mechanisms for collective sanctions (not to erode national sovereignty), but kept together by the moral force of leading States. He was not aiming for a universal world State but a universal moral order. This could be achieved by one or two States inspiring others to join in a federation:

> It can be shown that this *idea of federalism* should eventually include all nations and thus lead to perpetual peace. For if good fortune should so dispose matters that a powerful and enlightened people should form a republic (which by its nature must be inclined to seek perpetual peace), it will provide a focal point for a federal association among other nations that will join in order to guarantee a state of peace . . ., and through several associations of this sort such a federation can extend further and further.[49]

As indicated above, Kant did not (in *Zum ewigen Frieden)* support a collective security system based on enforcement or sanctions. In an essay published two years earlier, he had written:

> But it will be said that nations will never subject themselves to such coercive laws; and the proposal for a universal cosmopolitan nation, to whose power all individual nations should voluntarily submit, and whose laws they should obey, may sound ever so nice in the theory of the Abbé St. Pierre or of a Rousseau, yet it is of no practical use. For this proposal has always been ridiculed by great statesmen, and even more by leaders of nations, as a pedantically childish academic idea.[50]

A modern reading of Kant would confirm key-words/concepts like national sovereignty, international agreement, constitutional basis, peaceful settlement of disputes, non-use of force, non-intervention, the right to self-defence, and national self-determination (Kant opposed colonization).[51] All in all, his *jus contra bellum* approach was reasonably modern.

The Westphalian tradition would include concepts like peaceful coexistence, equality of sovereign States, peaceful settlement of disputes, non-use of force, balance of power, mutual security guarantees, and collective sanctions. One or more of these concepts have on and off appeared in the State practice or doctrine touched upon so far.

When, during the Napoleonic Wars, the Austrian statesman Friedrich von Gentz published *Fragmente aus den neuesten Geschichte des Politischen Gleichgewichts in Europa* (1806), he singled out some of these Westphalian concepts: balance of power, equality of States, peaceful coexistence, and joint action against peace breakers. He was, of course, heavily influenced by Napoleon's upheaval of the traditional European balance and wanted to see the feature of national self-determination reestablished on the European continent. As a consequence, von Gentz supported normative development towards a prohibition of first use of force in the relations between States, but, in light of his later association with Metternich and the post-1815 doctrine of armed

intervention against revolutionary movements in other States, his commitment to a genuine *jus contra bellum* approach can be doubted.

The Concert of Europe and European Peace Diplomacy 1815–1897

Revolutionary France, in spite of its "peace-loving" constitution, hurled itself into an armed conflict with the rest of continental Europe in 1792. Following Napoleon's ascendancy to power a few years later, the European balance was threatened anew. In 1804, Alexander I of Russia presented a peace plan for a European order after the expected fall of Napoleon. As with the Peace of Westphalia, the new peace was to be guaranteed by articulation of rules for the behaviour of and relations between States laid down in treaty form. Every State would pledge not to start a war without first having exhausted all available means for a peaceful solution of the dispute. Acceptance of mediation would be the rule. A State that violated these norms risked facing the joint armed forces of the European powers. This initiative from St. Petersburg was, however, not politically credible and was soon eroded by the capriciousness of the Czar.

A more promising initiative of a less ambitious nature was taken by the British foreign minister, Lord Castlereagh, at the Congress of Vienna in 1815, when he proposed a Final Declaration of the Congress in which States would oblige themselves to strengthen and maintain the dearly-bought peace. The result was a Proclamation, adopted on March 13, 1815, consisting of a pledge by the eight peace-concluding parties to protect the peace, in particular against revolutionary upheavals. It seemed that political *status quo* was more important than protection of the peace as such.

The decade following the Congress of Vienna was characterized by Great Power initiatives for management of international affairs. First, Czar Alexander initiated the Holy Alliance with its religious overtones, and thereafter Fürst Metternich started to orchestrate a European military preparedness to preserve the "legitimate" position of existing governments. The Concert of Europe brought with it a form of political cooperation that was unprecedented in the history of the continent. The emphasis was on common security, rather than on non-use of force. Lord Castlereagh had said in Parliament in May 1815, apropos of the need for reassurances against a revitalized France, that

> . . . in order to render this security as complete as possible, it seems necessary, at the point of a general Pacification, to form a Treaty to which all the principal Powers of Europe should be Parties, fixed and recognized, and they should all bind themselves mutually to protect and support each other, against any attempt to infringe them.[52]

On making the statement, Lord Castlereagh noted that he desired a treaty which would "reestablish a general and comprehensive system of Public Law in Europe." It was *jus contra bellum*, but primarily in the collective security sense. First use of force mandated by the Powers was not excluded.

The balance of power was monitored through consultations at international conferences: Vienna 1815; Aix-la-Chapelle (Aachen) 1818; Troppau (Opava) 1820; Laibach (Ljublana) 1821; and Verona 1822. The conference majority in Troppau agreed upon a legitimization of intervention in the affairs of other States (where the current political order was threatened), although British diplomacy had resisted and done its best to prevent this development. When Austria under Metternich intervened against the revolutionaries in Naples in 1820, Britain objected. Three years later, when France intervened against the liberal insurgents in Spain, Britain objected again.

Conference diplomacy took a more constructive turn in 1830 when the risk that France and Prussia would intervene on either side of the Belgian uprising against the Dutch supremacy surfaced. In order to maintain European peace and security, a diplomatic conference was convened in London. Under the leadership of Lord Palmerston, a process of crisis management was initiated, one which yielded concrete results; Belgian independence was recognized in 1830 and Belgian neutrality in 1831. When the Netherlands attempted to undo the results of the conference through armed force, Britain and France intervened militarily and secured the conference solution.

It is often said that the Congress system and the European Concert broke down after a relatively short time, but in the mind of many political participants during the latter part of the century (e.g., William Gladstone) the European Concert retained its relevance as an ideological project. The important thing, from a historical point of view, is the observation that conference diplomacy as a phenomenon was there to stay. The fact that this diplomacy, if not preventive, at least was crisis management oriented, is of relevance for the history of the law of collective security. However, it is of limited importance for our theme of *jus contra bellum* developments.

The Ministerial Congresses and the Diplomatic Conferences of the time were reactive, not proactive, as regards interstate use of force. With the exception of treaties on neutralization of small areas, international negotiations were not concerned with normative blueprints in order to forestall aggression and other uses of force; rather, they were concerned with crisis management after the outbreak of war. This is true for the 1841 Turkish Straits Agreement (concluded between the five Great Powers and Turkey), the 1850 London Peace Agreement after the first Schleswig-Holstein War (between Prussia and

Denmark), the 1856 Peace Conference of Paris after the Crimean War, the 1878 Congress of Berlin after the Russian-Turkish War, and the 1897 Great Power mediation after the Greek-Turkish War.

It should be noted, however, that the 1856 peace settlement of Paris included one element of *jus contra bellum*. The specially adopted Declaration of Maritime Law prohibited States from licensing piracy through the following text: "Privateering is, and remains, abolished." The prohibition was applicable in armed conflict, and—one would presume—in peacetime as well.

One of the frequent London Conferences was not a reaction to an outbreak of war, but an attempt to avert such an outbreak. During the crisis of 1867 over Luxemburg (which Bismarck was not prepared to let Napoleon III purchase from the Netherlands), British diplomacy engineered the solution of an independent and neutralized principality of Luxemburg. A war between Prussia and France may have been prevented in the process.

Still, a number of wars of aggression occurred during this period, indicating the prevalence of Clausewitz's thinking that war is an extension of national policy. The concept of *jus ad bellum* did not seem to imply any restrictions on the sovereign decision-making power of nations. Troops of the German Confederation invaded parts of Denmark in 1848, Prussian-Austrian troops repeated this in 1864 (and conquered Schleswig-Holstein), and Prussia embarked upon a war with its former ally Austria in 1866.

In July 1870, Bismarck had managed to provoke France into declaring war on Prussia. "The German nation . . . is the victim of aggression" declared a representative of the German Social Democratic Workers Party.[53] Karl Marx saw the war on the German side as one of self-defence. But in September 1870, the war of territorial self-defence was over and German troops were fighting for territorial expansion in Alsace-Lorraine. Karl Marx, in his *Second Address of the International*, described the war after Sedan "as an act of aggression" against the territorial integrity of France and against the people of Alsace-Lorraine. Marx was hovering between the poles of justifiability (self-defence) and non-justifiability (aggression), between perceived legality and illegality. As Michael Walzer has pointed out, he was "working within the terms set by the theory of aggression."[54]

At about this time, public opinion was in tune with an emerging *opinio juris* (within rather than between States) that aggression was a crime under international law. Public opinion also greeted the news of the *Alabama Claims* arbitration in 1872. A serious dispute between two major powers had been settled through peaceful means, an occurrence which thereby indicated an alternative

to armed conflict. Expectations *de lege ferenda* pointed towards a future legal regime of obligatory settlement procedures, towards a *jus contra bellum.*

This was a time when the peace movement was on the move again, after a period of decline following the nationalistic sentiments of the Crimean War. The outlawing of war had been on the agenda since the first peace conferences were held in New York, London, Paris, and Geneva between 1815–1830. The first international Peace Congress was held in London in 1843, and in 1867 Victor Hugo and Giuseppe Garibaldi founded the first peace-oriented NGO —*Ligue de la Paix et de la Liberté*—in Geneva. In the aftermath of the judicial settlement of the *Alabama Claims,* international lawyers became active and founded two peace-oriented organisations of their own in 1873: first, the Institut de Droit International in Gent; and thereafter the Association for the Reform and Codification of the Law of Nations (later International Law Association) in Brussels.

In 1888, the Interparliamentary Union was founded in order to unite parliamentarians in a struggle against war, and the following year the first World Peace Conference was convened with representatives from different national peace associations. Both events took place in Paris. In 1889 the Austrian baroness Bertha von Suttner published the best-selling novel *Down with Arms (Die Waffen nieder).* Her friend, Alfred Nobel, died in 1896 (he had been active in his way for the cause of peace) and left behind a will that, *inter alia,* resulted in the Nobel Peace Prize. All this private activity may have influenced individual statesmen, politicians and diplomats, but it did not result in any normative proposals sponsored by governments. All the same, a political principle of non-aggression had emerged in conformity with the opinion of many actors in national societies.

Emphasis in the international society remained on *ad hoc* crisis-management. In 1897, when Greece wanted to liberate Crete for reasons of nationalistic fulfilment *(enosis)* power rather than international morality, it was warned by the Great Powers not to attack Turkey. Notwithstanding the warnings, Greece sent a fleet to Crete and mounted operations in Thrace. It has been said that the six Great Powers (Britain, France, Germany, Austria, Russia, and Italy) "laid down the rules of the game—for instance, that the aggressor would not be allowed to obtain any advantage from the conflict, whatever the result might be."[55] One gets an impression of an emerging *opinio juris* corresponding to the principle *ex injuria jus non oritur.* But it is probably too much to say that the international law on the use of force was developed through State practice at this instant. Nevertheless, international law thinking seemed to have played a certain part in the crisis management. Greece started the war, lost it, was saved by

international mediation, and thereafter put under international administrative control not only for reasons of economic necessity but also in order to secure the payment of war compensation to Turkey under the peace agreement. The principles of non-aggression and *pacta sunt servanda* were important for reasons of balance of power.

The turn of the century was close. Although nothing indicated any substantial legal developments in the near future, in fact, the road of diplomacy had been paved for a new turn in the area of international law and organization.

The Hague Peace Conference of 1899 and Beyond

When the heads of the various diplomatic missions in St. Petersburg attended the weekly reception of the Russian foreign minister, Count Mouravieff, on August 24, 1898, they were in for a surprise. Mouravieff presented a manifesto of the Czar amounting to an invitation to an International Peace Conference to discuss the most effective means of assuring a lasting peace and a reduction of excessive armaments. The diplomats realized that no government could express anything else than sympathy for such a proposal, but they also realized that no major States could be expected to agree on any disarmament proposals, since preservation of freedom of action was considered vital in this context. A circular was sent out to the different capitals and replies were requested. At a later stage, Mouravieff travelled around in Europe and assured chancelleries that the conference should not discuss disarmament proper—that would be utopian—but try to find limits for the arms race (arms control). The reason behind the initiative, many believed, was Russia's financial situation. The finance minister, Count Witte, was said to refuse to assign the funds necessary for the introduction of new weapons (Russia needed to match the rapid-firing field artillery of Germany) and Witte was perceived as the driving force behind the idea of an international agreement on limitation of armaments in order to save costs.

Reactions to the invitation included suggestions on the need for adoption of rules for settlement of international disputes by arbitration. A new circular of January 11, 1899, enumerated eight items which could usefully be discussed at the Conference. In the terminology of today, items 1–4 concerned arms control, items 5–7 international humanitarian law of armed conflict, and item 8 arbitration. Representatives of the peace movement disliked many of the first seven items, since "war should be abolished, not alleviated." Already at this preparatory stage, there was a shift of emphasis from the issue of modern weapons developments to the Westphalian concepts of peaceful settlement of

disputes and equality of States, concepts which were strongly supported by smaller States and the peace movement. It is unlikely that these attitudes were directly influenced by the European history of political ideas, but they nevertheless belonged to the Westphalian peace tradition.

The new circular of January 1899 also touched upon the venue of the Conference. The Czar was no longer considering St. Petersburg and thought it better to avoid any of the Great Power capitals. In diplomatic circles this was seen as damage limitation, a consequence of the less than encouraging reactions of the major powers. Change of venue would minimize disgrace if the Czar's initiative should fail. Preparations soon focused on a "neutral" capital, with the Hague finally chosen as the site for the Conference.

When the Conference opened on May 18, 1899, representatives of 26 States were present. Europe dominated with 20 delegations, including Turkey. Other participating nations were the United States, China, Japan, Persia, Siam, and Mexico.

Delegations were composed of seasoned diplomats, military and naval men, and "technical experts." The latter group included experts in international law, such as the Russian professor Fjodor de Martens, a proponent of arbitration and humanitarian law of armed conflict and soon to be famous for the "Martens' Clause" (adopted in its first version in 1899). The British delegation included Sir Julian Pauncefote, the Ambassador in Washington who was well known for his work in 1897 on an (abortive) arbitration treaty with the United States. The U.S. delegation included Andrew D. White, Ambassador in Berlin, who, like Martens and Pauncefote, was a firm believer in the peaceful settlement of disputes. However, most of the military and naval delegates from the major powers seemed to be of the opinion that "might is right."

The Conference was also followed by enthusiastic activists of the peace movement, like the British journalist William T. Stead, the Russian author and industrialist Ivan Bloch, Bertha von Suttner, and others. The popular demand for arbitration had to be taken seriously by politicians. The general atmosphere of Hague 1899, outside the conference rooms in the Royal summer palace, was filled with optimism and expectations. Delegates, for reasons of self-esteem, found themselves slowly trying to respond constructively to these expectations.[56]

The arms control proposals were soon shelved, not to be taken up seriously again, but the second Committee that dealt with the *jus in bello* under Martens' chairmanship achieved some useful results [the Convention with Respect to the Laws and Customs of War on Land, its Annex of Regulations on Land Warfare, the Convention for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva Convention, and the Declarations concerning

Asphyxiating Gases and Expanding ("dum-dum") Bullets].[57] But ultimately the work of the Conference centred on the third Committee and the proposal for a permanent court of arbitration.

The initial objective was to make arbitration compulsory in disputes of a less important nature, namely those which did not affect "vital national interests." In the end, after German recalcitrance, the idea of compulsory arbitration was completely abandoned, although a permanent body (the Permanent Court of Arbitration) was established through the agreed-upon Convention for the Pacific Settlement of International Disputes. Article 1 of the Convention, signed on July 29, 1899, stipulates:

> With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.[58]

This non-obligatory wording leaves it to the parties of a dispute to find ways and means of solving their differences. There is no binding renunciation of the use of force, merely a declared intention to avoid resorting to force "as far as possible."

Article 2 deals with good offices and mediation. Here the contracting parties agree, "before [they chose] an appeal to arms," to have recourse to such procedures, but only "as far as circumstances permit."

Articles 15–57 lay down the system for international arbitration and Articles 20–29 concern "the Permanent Court" (consisting of an International Bureau, which serves as a record office, and a list of Arbitrators/Members of the Court). Arbitral procedure is set forth in Articles 30–57 and Article 56 makes clear that an award "is only binding on the parties who concluded the [specially regulated] '*Compromis*'." Despite all the deferences to national sovereignty and State consent, the Convention represented considerable progress at its adoption. Since Westphalia, it was the first step taken in international law to place legal restrictions upon the right of States to resort to war as an instrument of national policy. It was a *jus contra bellum* in a limited sense. A permanent institution had been established and the rules of procedure facilitated arbitration considerably, since such rules no longer had to be agreed upon in each case.

It has been said that

> The importance of the First Hague Peace Conference lay not so much in *what* it actually accomplished as in the fact that it accomplished *something* and that it set a precedent for future meetings. . . . Earlier opinions of the work done were not very enthusiastic, and it was only later, when the second Conference met in

> 1907, that the realization gradually spread that in 1899 the first step had been taken in the direction of international organization.[59]

The Second Hague Peace Conference of 1907 reaffirmed the modest step taken to restrict the use of force through the adoption of a new Convention for the Pacific Settlement of Disputes (which refined the earlier convention) and a convention which prohibited the use of force to recover public contract debts unless arbitration had been refused (the so called Porter Convention, named after a U.S. delegate). That these Conventions (Hague I and II) only amounted to an extremely incomplete *jus contra bellum* was made clear through the adoption of Convention III relative to the Opening of Hostilities, which required a declaration of war or ultimatum before hostilities began.

Still, the first link in a chain towards a more complete non-use of force regime was emerging in 1899 and 1907. The Westphalian Peace treaties had linked together the concepts of peaceful settlement of disputes, equality of States, non-use of force, joint action, and collective sanctions (all of which were in some way included in the 1920 Covenant of the League of Nations and are now ingredients in the UN system). The principle of sovereign equality of States was implicit at the Hague Conferences, it became more explicit upon the creation of the League of Nations (*cf* Article 5 of the Covenant) and today it is enshrined in Article 2 of the UN Charter. The League Covenant marked one step in the legal development by combining equality of States with non-use of force. Article 10 of the Covenant contained the following wording:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threats or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.[60]

A non-binding arbitration requirement was included in Article 13 of the Covenant. The imperfection of the Covenant system as regards non-use of force and collective sanctions is well known and need not be explored here. The point—at the end of this contribution—is rather, that the development towards the UN system was underway in 1907 and 1920, and that behind this development the Westphalian Peace agreements and the 1899 Hague Conference played their distinctive roles—although not as indispensable points on a continuum, but as expressions of a recurring theme in legal and political history, as manifestations of ideas with normative potential that were bound to have an impact on the development of international law.

Notes

1. E.g., the International Congress (PEACE – Reconstruction of a European Vision) on the Occasion of the Anniversary of the Conclusion of the Peace Treaties of Münster and Osnabrück, held by the University of Osnabrück, October 25–31, 1998, and the Asia-Pacific Regional Conference in Commemoration of the Centenary of the 1899 Hague Peace Conference, held by the University of Melbourne, February 19, 1999. At the 300-year anniversary of the Westphalian peace settlement, Leo Gross wrote a commemorative article in the American Journal of International Law, *The Peace of Westphalia, 1648–1948*, 42 AJIL 1948, pp. 20–41.

2. Cf. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE, UN Doc A/47/277 (1992), and SUPPLEMENT TO AN AGENDA FOR PEACE, UN Doc. A/50/60 (1995); GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990S AND BEYOND (1993); and The Report of the Commission on Global Governance (Co-Chairmen: Ingvar Carlsson and Shridath Ramphal), OUR GLOBAL NEIGHBOURHOOD (1995).

3. England, Russia, Denmark and Turkey were not represented in Osnabrück or Münster.

4. De Jure Belli ac Pacis was first published in 1625 and new editions appeared in 1631, 1632, 1642 and 1646.

5. DE JURE BELLI AC PACIS, Book I, Chapter 3, Paragraph 7, English translation by A.C. Campbell, The Universal Classics (1901) and in James Brown Scott (Ed.), CLASSICS OF INTERNATIONAL LAW, Vol. 2 (1925).

6. Benedict Kingsbury, *A Grotian Tradition of Theory and Practice? Grotius, Law and Moral Skepticism in the Thought of Hedley Bull*, 17 QLR (Quinnipiac Law Review) 1997, p. 15.

7. See Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas Holland's Inaugural Lecture*, in Hedley Bull et al. (Eds.), HUGO GROTIUS AND INTERNATIONAL RELATIONS (1990), p. 172.

8. Hersch Lauterpacht, *The "Grotian Tradition" in International Law*, BYBIL 1946, pp. 43–45.

9. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977), pp. 148–49, 156–58.

10. Benedict Kingsbury, *supra* note 6, pp. 24–25.

11. *Ibid.*, p. 25.

12. Peter Haggenmacher, *supra* note 7, pp. 173–74.

13. DE JURE BELLI AC PACIS, Prolegomena, Paragraph 25.

14. Bert Röling, *Jus ad bellum and the Grotian Heritage* in T.M.C. Asser Institute (Ed.), INTERNATIONAL LAW AND THE GROTIAN HERITAGE (1985), p. 115.

15. DE JURE BELLI AC PACIS, Book II, Chapter 22, Paragraph 5.1.

16. *Ibid.*, Book II, Chapter 20, Paragraph 40.3.

17. *Cf.* the listing made by Haggenmacher and Draper in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 7, pp. 165 and 195.

18. Book III, Chapter 17, Paragraph 3.1. *Cf.* Article 2(5) of the UN Charter: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

19. DE JURE BELLI AC PACIS, Book II, Chapter 2, Paragraphs 13.1 and 13.4.

20. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964), pp. 60–63.

21. See Benedict Kingsbury and Adam Roberts, *Introduction: Grotian Thought in International Relations*, in HUGO GROTIUS IN INTERNATIONAL RELATIONS, *supra* note 7, pp. 15–16,

discussing Hedley Bull's THE ANARCHICAL SOCIETY, *supra* note 9, and Michael Donelan's article *Grotius and the Image of War*, 12 MILLENNIUM (1983).

22. Treaty of Westphalia, Münster, October 24, 1648, in Fred Israel (Ed.), MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, Vol. I (1967), p. 9.

23. Article CXXIII, *ibid.*, p. 46.

24. Article CXXIV, *ibid.*, p. 47.

25. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 7, p. 75.

26. *Ibid.*, p. 77.

27. The alliance of 1701 included Austria, Netherlands, Great Britain, Prussia, Hannover and some German states. Savoy and Portugal joined the alliance in 1703.

28. See MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, *supra* note 22, Vol. I, pp. 183, 187, 195, 197 and 200.

29. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW (1957), p. 23.

30. P.P. SHAFIROV, A DISCOURSE CONCERNING THE JUST CAUSES OF WAR BETWEEN SWEDEN AND RUSSIA: 1700–1721, reprinted by Oceana Publications (1973).

31. See the Second Book of FRANCOISE DE VOLTAIRE, HISTOIRE DE CHARLES XII - ROI DE SUEDE, first edition in 1731, last edition updated by Voltaire in 1775. A modern version is included in LES OEUVRES COMPLETES DE VOLTAIRE, Vol. 4, edition critique par Gunnar von Proschwitz, Oxford 1996.

32. See Alfred Vagts and Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AJIL 1979, pp. 555–57.

33. CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM, The Law of Nations Treated According to a Scientific Method (1934), translated by J.H. Drake, Carnegie Classics of International Law, pp. 330–35.

34. EMMERICH DE VATTEL, LE DROIT DES GENS; OU PRINCIPES DE LA LOI NATURELLE, The Law of Nations or the Principles of Natural Law (1916), translated by Charles G. Fenwick, Carnegie Classics of International Law, Book III, Chapter 3, paragraphs 34 and 49. *Cf.* DAVID BOUCHER, POLITICAL THEORIES OF INTERNATIONAL RELATIONS (1998), pp. 265–67.

35. Georg Schwarzenberger, *The Grotius Factor in International Law and Relations: A Functional Approach*, in HUGO GROTIUS IN INTERNATIONAL RELATIONS, *supra* note 7, p. 307. *Cf.* the well-known quotation from *De Jure Belli ac Pacis* that a just war implies "the obtaining of that which belongs to us or is our due." Book II, Chapter 1, Paras 1.4 and 2. John Locke used Grotius' just war doctrine as the basis of justifying not only wars between States, but also armed struggle within States against oppression and tyranny. Like Grotius, Locke rejected wars of conquest and admitted wars of punishment against offenders. Unlike Grotius, he may have come close to ideas on collective security. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), Chapter XVI, paragraphs 11, 176 and 230, modern version edited by C.B. MacPherson (1980), pp. 11, 91 ff. and 115 ff.

36. SHARON KERMAN, THE RIGHT OF CONQUEST, THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1996), pp. 67–93.

37. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1958), p. 142; and BOUCHER, *supra* note 34, pp. 300–302.

38. Quoted from MONTESQUIEU, SELECTED POLITICAL WRITINGS, edited and translated by Melvin Richter (1990), p. 113.

39. *Ibid.*, p. 112.

40. See C.A. POMPE, AGGRESSIVE WAR AN INTERNATIONAL CRIME (1953), pp. 148–49.

41. Titre VI. Quoted by Pompe, *supra*, p. 149.

42. See NUSSBAUM, *supra* note 37, p. 119.

43. Edmund Burke, *Thoughts on French Affairs, Works of Edmund Burke,* Vol. IV, quoted by BOUCHER, *supra* note 34, p. 322.

44. THOMAS PAINE, RIGHTS OF MAN (1987 edition), pp. 181 and 179.

45. *Ibid.*, p. 182.

46. IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS, edited and translated by Ted Humphrey 1983, p. 125.

47. *Ibid.*, p. 116.

48. *Ibid.*, pp. 116–17.

49. *Ibid.*, p. 117.

50. Immanuel Kant, *On the Proverb: That may be true in theory, but is of no practical use* (1793), in PERPETUAL PEACE AND OTHER ESSAYS, *supra* note 46, p. 89.

51. Kant's Federation of Free States was based on consent and national self-determination. Sovereignty was important. His philosophical concept of "moral self-determination" should not be touched upon here.

52. Quoted by RENÉ ALBRECHT-CARRIE, BRITAIN AND FRANCE: ADAPTATIONS TO A CHANGING CONTEXT OF POWER (1970), p. 33.

53. Quoted by MICHAEL WALZER, JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977), p. 65.

54. *Ibid.*, p. 66.

55. Sir Charles Eliot, quoted by WILLIAM L. LANGER, THE DIPLOMACY OF IMPERIALISM 1890-1902 (1951), p. 372.

56. See BARBARA W. TUCHMAN, THE PROUD TOWER, A PORTRAIT OF THE WORLD BEFORE THE WAR: 1890–1914 (1962 and later editions), Chapter 5; and ARTHUR EYFFINGER, THE 1899 HAGUE PEACE CONFERENCE, 'THE PARLIAMENT OF MAN, THE PREPARATION OF THE WORLD' (1999), *passim.*

57. See JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, Vol. II, DOCUMENTS (1909).

58. *Ibid.*, p. 83.

59. WILLIAM L. LANGER, *supra* note 55, p. 591.

60. See Franz Knipping, Hans Von Mangoldt, Volker Rittberger (Eds.), THE UNITED NATIONS SYSTEM AND ITS PREDECESSORS (1997), Vol. II, p. 204.

III

Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space

Bin Cheng

Till Cant cease, nothing else can begin.
—Thomas Carlyle

ON OCTOBER 4, 1957, FOR THE FIRST TIME IN HUMAN HISTORY, man succeeded in sending an object into outer space. The world was electrified. There was an overwhelming yearning that the whole of outer space, including all the celestial bodies, should be reserved for exploration and use for peaceful purposes only—in other words, completely demilitarised as Antarctica was being demilitarised in 1959 in the Antarctic Treaty.[1] Almost immediately, the General Assembly of the United Nations, in Resolution 1148 (XII), adopted on the 14th of the following month,[2] urged all the States concerned, particularly those in the Sub-Committee of the Disarmament Commission that were negotiating an agreement on reduction, limitation and open inspection of armament and armed forces, to give priority to reach a disarmament agreement which, upon its entry into force, will provide for the following:

. . . .

(f) the joint study of an inspection system designed to ensure that the sending of objects through outer space shall be exclusively for peaceful and scientific purposes;

. . . .

A year later, on December 13, 1958, the General Assembly, in another resolution,[3] reiterated "the common interest of mankind in outer space and . . . that it is the common aim that outer space should be used for peaceful purposes only." However, it was clear at the same time that the prime motive and incentive of the "space" Powers in reaching outer space were obviously military.

The diplomats of the Soviet Union and of the United States, at the time the only countries with space capability, consequently were faced with the seemingly impossible task of how not to appear to defy an almost universal desire for the exclusively peaceful uses of outer space, while preserving their countries' need to explore and exploit all the military potentials of outer space. For the Soviet Union, with its closed society and authoritarian regime, it was relatively simple. It had only to lie about its military activities, by either denying their existence or labelling them as scientific (as it in fact did, for example, for a considerable time with its own reconnaissance satellites), while denouncing the U.S. ones as unlawful. For the United States, there obviously would be practical difficulties in following such a course. However, its diplomats, assisted, no doubt ably, by highly effective lawyers, also succeeded in minimal time in squaring the circle by simply re-inventing the word "peaceful" and changing its meaning from "non-military," to "non-aggressive."[4]

It thus became possible to create a highly misleading impression that all were agreed that the whole of outer space was to be used exclusively for peaceful purposes, while the space Powers carried on with their military ambitions in outer space. This impression was somehow carried over into the 1967 Space Treaty,[5] the first and the most important treaty relating to outer space concluded under the auspices of the United Nations, and one intended to establish the international legal framework for man's exploration and use of outer space.[6] Since, by its nature and because of the wide acceptance of most, if not necessarily all, of the provisions of the Space Treaty as rules of general international law by contracting and non-contracting parties to the Treaty alike, the myth has also grown up that outer space, including the moon and other celestial bodies, has been reserved for exploration and use for exclusively peaceful purposes only, not only under the Space Treaty but also under general international law. The present paper is a re-examination of the 1967 Space Treaty,

and in particular its Article IV, in order to clarify their impact on the military use of outer space.

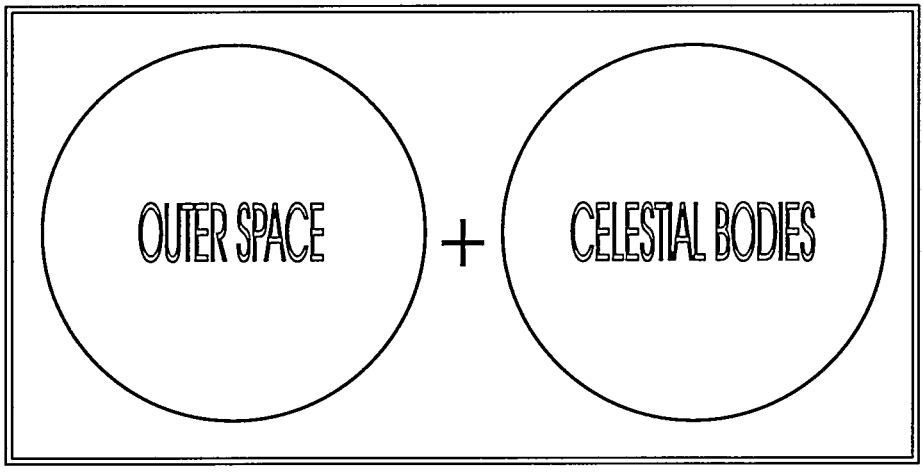
Clarification of the Terms "Outer Space" and "Outer Void Space"

First of all, it may be necessary to clarify the meaning of the term "outer space" and to introduce the term "outer void space." Up to and including the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space in General Assembly Resolution 1962, adopted on December 13, 1963,[7] the United Nations, including its Committee on the Peaceful Uses of Outer Space (COPUOS), where international space law was constantly being discussed with a view to its progressive development, always referred to outer space separately from celestial bodies. For instance, Article 3 of the Declaration provides:

> "Outer space *and* celestial bodies are not subject to national appropriation. . . ." (emphasis added).

According to this terminology, extraterrestrial space consists, therefore, of "outer space" and "celestial bodies." Celestial bodies are thus treated as a category apart from outer space as such, as illustrated in figure 1. However, since the 1967 Space Treaty, which in other respects follows the 1963 Declaration closely in form and in substance, the United Nations always speaks of "outer

Figure 1: Meaning of "Outer Space" Up to the 1963 Resolution

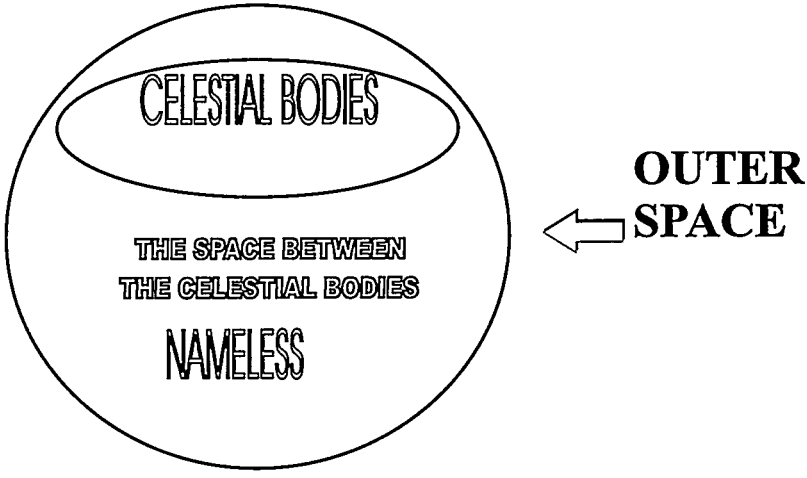


space, including the moon and other celestial bodies" in treaties and other instruments relating to outer space which it has sponsored. Thus, the 1967 Space Treaty, in its Article II, which is equivalent to the above-quoted Article 3 of the 1963 Declaration, provides:

> "Outer space, *including* the moon and other celestial bodies, is not subject to national appropriation. . . ." (emphasis added).

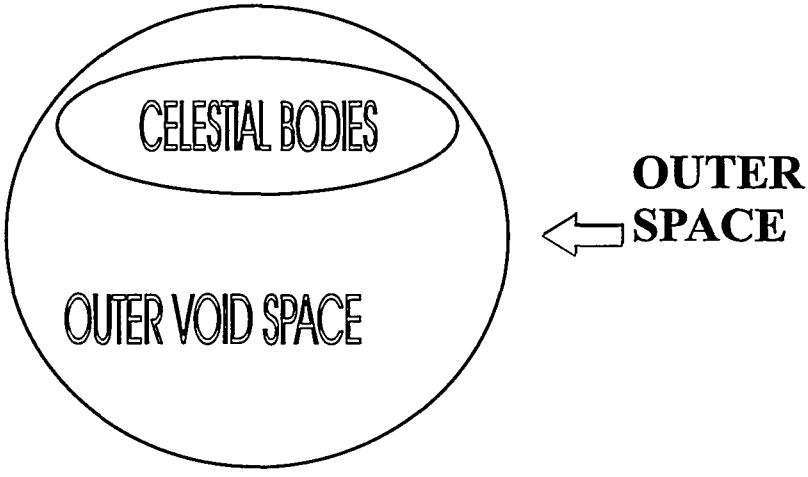
In other words, henceforth the moon and other celestial bodies were no longer treated as being separate from outer space as such, but rather as forming part of it, as shown in figure 2. It follows that whenever reference is made to "outer

Figure 2: Meaning of "Outer Space" since the 1967 Space Treaty, Which, by Including Celestial Bodies Within It, Deprives the Space Outside Celestial Bodies, Previously Known as Outer Space, of a Name of Its Own



space," the moon and all the other celestial bodies are automatically included. One of the consequences of this change in the use of the term outer space is that the vast space in between all the celestial bodies has lost any specific designation. It has become nameless, causing a great deal of confusion and misunderstanding. What I have done is to name it the "outer void space,"[8] as can be seen in figure 3, hoping thereby to clarify the nomenclature of the different parts of outer space before we embark on the meaning of the word "peaceful."

Figure 3: Need to Introduce the Term "Outer Void Space"



The Meaning of "Peaceful": A Legal *Trompe-L'Oeil*

In 1604, Sir Henry Wotton, one of King James I's ambassadors, while on his way from England to Venice to take up his post, wrote in the album of his friend Christopher Fleckamore at Augsburg:

> *"Legatus est vir bonus peregre missus ad mentiendum reipublicae causa."*

Translated into English, it means:

> "An ambassador is an honest man, sent to lie abroad for the good of his country."

One sometimes wonders whether, especially since power politics in disguise took over from open power politics after World War II,[9] some international lawyers, spurred on perhaps at one time by the Cold War, when advising or assisting their diplomatic colleagues in international discussions or negotiations, or even in their own approach to the subject, have not consciously or unconsciously allowed their calling to be abused in order to help create an illusion, presumably for our benefit, that we are now all living in some brave and cozy New World Order, free from all the restraints of the past.

Nowhere is this more clearly shown than the attempt to transfigure "peaceful" from meaning "non-military" to meaning "non-aggressive," which appears to have started with international space law.[10] We need to go back no further

than the fifties to find the original meaning of the word, when Atoms for Peace was then the world's most fashionable preoccupation. International agreements for assistance and co-operation in the *peaceful* uses of nuclear energy proliferated.[11] Peace then definitely meant non-military. Imagine someone, at that time or even now, trying to justify the diversion of nuclear fuel and technology supplied under such agreements to making what one would like to describe as a peaceful and non-aggressive nuclear bomb to be used only when threatened! Even in 1959, the Antarctic Treaty in its Article I made it crystal clear that "peaceful" meant "non-military."[12]

Yet, only three years and two days after the signing of the Antarctic Treaty on December 1, 1959, which was, after all, done in Washington, Senator Albert Gore, Sr., representing the United States, stated on December 3, 1962, before the First Committee of the United Nations in New York that:

> It is the view of the United States that outer space should be used only for peaceful—that is, non-aggressive and beneficial—purposes. The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities in both environments we must continue our efforts for general and complete disarmament with adequate safeguards. Until this is achieved, the test of any space activities must not be whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of law.[13]

It is clear that the United States was at this point trying hard to attribute an entirely new meaning to the word "peaceful." This piece of semantic and legal acrobatics was obviously a bold attempt to bypass and circumvent the then still prevalent attitude that all military activities should be banned from outer space, while seemingly accepting it, thus reaping the benefit, as the saying goes, of having the cake and eating it too. Apart from the two General Assembly resolutions quoted at the beginning of this chapter, another example of this common attitude at the time was a statement by the Indian delegate to COPUOS earlier the same year, when he declaimed:

> My delegation cannot contemplate any prospect other than that outer space should be a kind of warless world, where all military concepts of this earth should be totally inapplicable. . . . There should be only one governing concept, that of humanity and the sovereignty of mankind.[14]

However, this highly emotive, understandable and popular desire was unrealistic for at least two reasons. First, the motive and incentive of the space

Powers in pouring astronomical amounts of money into the space programmes were first and foremost military, and from that point of view their expectations were amply vindicated in no time.[15] Thus, although the launching of Sputnik I in 1957 was part of the scientific International Geophysical Year programme,[16] there is little doubt as to the effect Sputnik I was perceived to have on the world's balance of military power. Whilst, until Sputnik I, the Soviet delegate sat alone with delegates of four Western Powers in the five-Power Disarmament Sub-Committee of the Conference of Foreign Ministers, two years after Sputnik I it was decided to replace this Sub-Committee with a ten-Power Disarmament Committee consisting of five NATO States and five Warsaw Pact States—in other words, parity instead of being outnumbered one to four![17] After all, if a State can put several tons of hardware into earth orbit, it is demonstrably capable of sending missiles with nuclear warheads practically anywhere in the world, without the need of foreign military bases or an extensive navy. To expect the space Powers or near-space Powers, after acquiring or about to acquire space capability, to abandon the use of outer space for military purposes was wholly unrealistic.

Secondly, as Senator Gore quite rightly pointed out, disarmament in outer space cannot take place in isolation from the problem of disarmament on earth. The Soviet Union took the same line, and for a long time declined to discuss the control of the military use of outer space in COPUOS, maintaining that it fell within the jurisdiction of the Disarmament Commission.[18] Thus in the negotiations of the 1967 Space Treaty, attempts by some delegations to bring about a complete demilitarisation of outer space were clearly rejected by both superpowers.[19]

The problem for the superpowers was how, from the standpoint of public relations, not merely to not appear to flatly reject the emotive demand that was sweeping the world for an outer space devoted exclusively to peaceful uses, but also to appear as if to endorse it, while, from the legal point of view, fully maintaining their rights to use outer space for military purposes. As mentioned before, the two superpowers each developed their own way of accomplishing the seemingly impossible. For the Soviet Union, with its closed society, totalitarian regime, and strict control over the media, the solution was relatively simple.[20] It had in fact jumped on the peace bandwagon. It even submitted a proposal in the United Nations to prohibit the use of outer space for military purposes.[21] All it had to do, as it was wont to, was pretend that all its military space missions were for scientific, and therefore solely peaceful, purposes, while of course resisting all suggestions of verification. Thus, in the beginning, it pretended that it did not use satellites for military reconnaissance and maintained that it was illegal to "spy" from outer space, while of course it was doing so all the time.[22] For the United States, while one cannot rule out that it might have

resorted to such methods on occasions, to sustain such a course on a long-term basis would have been difficult. Here is where its diplomats, advised no doubt by their ingenious legal colleagues, started, as we have seen, to re-invent the word "peaceful," turning its meaning from "non-military" to "non-aggressive" so that all its military space missions, not being aggressive, would also be for peaceful purposes. In so doing, an illusion was created by both space Powers that outer space has in fact been kept exclusively for peaceful uses. Mission impossible was accomplished.

Our task here is primarily to re-examine the effects of the 1967 Space Treaty,[23] in particular Article IV, on the military use of outer space as well as the impact, if any, which this masterpiece of legal *trompe-l'oeil* has had on the Treaty.[24]

Background to Article IV of the 1967 Space Treaty

The 1967 Treaty represents a compromise reached by the then two superpowers during a thaw in their relations after Nikita Khrushchev came to power in the Soviet Union, and especially following the inauguration of John Kennedy as President of the United States;[25] the thaw continued during the presidency of Lyndon Johnson. The first real breakthrough on the disarmament front was the signing of the Partial Test Ban Treaty on August 5, 1963.[26] It will be recalled that the contracting States "undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion . . . in the atmosphere; beyond its limits, *including outer space*."[27] The Treaty was not only the first multilateral agreement with a specific reference to outer space, it also related to disarmament. This move was accompanied by announcements from both the U.S. and the USSR the same year that they would not station any objects carrying nuclear weapons or other weapons of mass destruction in outer space. These superpower expressions of intentions were welcomed by the UN General Assembly, which adopted Resolution 1884 (XVIII) on October 17, 1963, calling on all States:

> to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner.

Article IV(1) of the 1967 Space Treaty adopted the wording from Resolution 1884 almost verbatim. In other words, by then, agreements had already been reached between the Soviet Union and the United States on the subject.[28] Article IV(1) provides:

> States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

Before proceeding further to examine the meaning and effect of Article IV, let us examine those of the remaining provisions in the 1967 Space Treaty which might have an effect on the military use of outer space.

Provisions Other Than Article IV

The Preamble. If we consider the 1967 Treaty carefully, and exclude Article IV, we find that only the Preamble contains references to both peaceful purposes and weapons. The Preamble has often been cited as evidence that outer space can only be used for "peaceful purposes." However, if we look at the Preamble with care, we find this view difficult to sustain.

The Preamble begins with the opening paragraph: "The States Parties to this Treaty," and ends with the paragraph: "Have agreed on the following." The relevant passages in the Preamble relating to peaceful use are the third, fifth, and eighth paragraphs. They are respectively as follows:

> Recognising the common interest of all mankind in the progress of the exploration and use of outer space *for peaceful purposes*,
>
> . . . .
>
> Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,
>
> . . . .
>
> Recalling Resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,
>
> . . . .[29]

A close look at paragraphs 3 and 5 of the Preamble will show that the contracting Parties "recognise" that mankind is interested in the "progress of the exploration and use of outer space for peaceful purposes," and "desire" to contribute to broad international co-operation in such exploration and use. Paragraph 8 merely recalls a resolution of the General Assembly, which in itself has no legally binding force. All that paragraph 8 does is to remind one that the

obligation undertaken in Article IV(1) of the Treaty has already been the subject of a General Assembly resolution exhorting all States to do likewise.

In law, it is well established that preambles to treaties do not normally contain provisions with binding obligations. They may at best serve as an aid in interpreting the substantive provisions of the Treaty. As the last paragraph of this Preamble notes, what the contracting States have "agreed on" is to be found only in the "following" articles.

In sum, contrary to a fairly prevalent misconception, there is nothing in the Preamble which says or even suggests that outer space can only be used for peaceful purposes.

Article I(1). The same can be said of Article I(1) of the Treaty, which provides:

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific developments, and shall be the province of all mankind.

Although framed in apparently obligatory language with the imperative "shall," the article is extremely general and unspecific, so much so that during the negotiations some delegates actually suggested that it should be transferred to the Preamble.[30] After all, what constitutes the benefit and interests of all countries is highly subjective. This provision, as a legally binding command, can easily lead to various kinds of legal sophism. Thus at the height of the Cold War in the fifties, the United States, under the first incarnation of its Open Skies policy[31] (a term which currently is used to mean various other things), justified its U-2 programme of overflying other countries as legitimate surveillance in defence of the free world.[32] Atmospheric nuclear tests at the time in the Pacific were also justified on the same basis. No doubt the Soviet Union would consider the defence and advance of Socialism or Communism as good for the soul of the world. So, of course, did the Inquisition about the work of the Inquisitor-General! Article I(1) as such can, therefore, hardly justify the view that it obliges the contracting Parties to the Space Treaty to use outer space solely for peaceful purposes, or solely for non-military purposes.[33] Moreover, the Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, adopted by the General Assembly of the United Nations on December 13, 1996, in Resolution 51/122, has now made it quite clear that the exploration and use of outer space for purposes such as those enumerated in Article I of the Space Treaty are matters of

free and voluntary co-operation between States "on an equitable and mutually acceptable basis." The pursuit of those purposes is, therefore, not a condition governing the contracting States' space activities.

Articles IX and XI. Articles IX and XI are the only articles, other than Article IV, where the word peaceful is found. They are worded as follows:

> Article IX: In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principles of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potential harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.
>
> Article XI: In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, location and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Both provisions make it abundantly clear that they are merely promoting international co-operation in the "peaceful exploration and use of outer space." Like the Preamble and Article I, they carry no suggestion that outer space can be used only for peaceful or non-military purposes. The reference to "peaceful"

in Article IX is clearly intended to limit the benefit of consultation in case of potential interference with space activities to solely "the peaceful exploration and use of outer space." Similarly, Article XI intends merely to promote "co-operation in the peaceful exploration and use of outer space." Furthermore, in so doing, Article XI obviously is using the term "peaceful" to mean "non-military" and not "non-aggressive." Otherwise, the contracting Parties would carry a duty, however attenuated by the escape phrase "to the greatest extent feasible and practicable," "to inform the Secretary-General of the United Nations as well as the public and the international scientific community...of the nature, conduct, locations and results" of even their *military* space activities, in order to promote international co-operation in the "non-aggressive," including *military*, exploration and use of outer space. One can hardly ascribe to the extremely sophisticated negotiators such a degree of naivety! And why only "the public and the international scientific community"? If such co-operation were to include "non-aggressive" military exploration and use, surely government departments and the military community would be acutely interested and deserve to be expressly included.

In short, neither in the Preamble, nor in any provisions of the Space Treaty other than Article IV, do we find any restriction of outer space to exploration or use exclusively for peaceful purposes, or limiting the military use of outer space. While there is a desire to promote peaceful exploration and use, even the most extreme form of teleological interpretation cannot ferret out any shared resolve in these provisions to impose any restriction on the contracting States to use outer space solely for peaceful purposes, and not to use it for military purposes. We are consequently left with only Article IV in the whole Treaty which deals with the military use of outer space. Furthermore, to the extent to which the word "peaceful" is used in any of the text we have so far examined, the word "peaceful" is used to mean, and is clearly intended to mean, "non-military" and not "non-aggressive."

The Eisenhower Proposal 1960

Article IV of the Space Treaty can be traced back to a proposal made by President Dwight Eisenhower before the General Assembly of the United Nations on September 22, 1960. After recalling the recent example of the Antarctic Treaty and the missed opportunity of 1946 when the Soviet Union turned down the United States' Atoms for Peace Plan for placing atomic energy under international control, he proposed:

1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.

2. We agree that the nations of the world shall not engage in warlike activities on these bodies.

3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of space craft should be verified in advance by the United Nations.

4. We press forward with a programme of international co-operation for constructive peaceful uses of outer space under the United Nations. . . .[34]

Although the Paris Summit meeting between Eisenhower and Khrushchev planned for late May 1960 collapsed owing to the U-2 incident on the first of that month,[35] it is apparent how closely the 1967 Space Treaty was patterned on the Eisenhower proposal. The exception is, of course, on advance monitoring of all launchings of spacecraft. This was obviously due to Soviet opposition. All that the United Nations was at first able to do on this score was to adopt General Assembly Resolution 1721 (XVI) the following year on December 20, 1961, calling upon States launching objects into orbit or beyond to inform promptly the United Nations of such launchings, and asking the Secretary-General to establish a public register to record them. But such reporting was voluntary and the register very incomplete.[36] It was not until the conclusion of the 1975 Registration Convention[37] that a "mandatory"—to use the word in its Preamble—system of registering of objects launched into space was established by the contracting States. However, owing to Soviet opposition, the system is far from watertight. The Soviet Union persistently objected to having to make available advance information about launching. Thus, under the Convention, the duty to register a space object on the *national* register arises in reality only when an object has been launched (Article II), and nothing is said as to how soon after launching the registration should take place. Moreover, the duty is to notify the United Nations of such launchings "as soon as practicable" (Article IV), which can mean, and in some cases does mean, at no time. Finally, the Registration Convention, in addition to some general details and the basic orbital parameters to be provided to the United Nations, only requires the launching State to indicate the "general function of the space object" (Article IV). It is believed that many of the Soviet satellites described as scientific in notifications to the United Nations were in fact military.[38]

The objective of verifying all launchings has obviously not been achieved. A rather similar idea was that proposed by France in 1978. This was for an international satellite monitoring agency (ISMA) to verify arms control treaties, as well as to monitor crisis areas.[39] Even more ambiguous proposals were subsequently made by, among others, Italy,[40] Australia and Canada,[41] and in due course, in a complete volte-face, probably not uninfluenced by the United States Strategic Defense Initiative, by the Soviet Union itself, which in 1988 put forward the idea of a international body of inspectors to carry out on-site inspections to ensure that no object carrying weapons would be launched into space.[42] However, such ideas appear to be some distance away from fruition,[43] although, as things turn out, remote sensing satellites have become one of the most useful tools in the verification of arms limitation and disarmament agreements.[44]

But, returning to the Space Treaty, it can be seen that, for the rest, the basic ideas of the 1960 Eisenhower proposal have been largely agreed to by the Soviet Union and the other States and translated into binding obligations in the 1967 Space Treaty. Although, following item 1 of the Eisenhower proposal, the initial United States draft of a treaty put forward by the Johnson administration was limited to celestial bodies,[45] the United States was quick to agree with the overwhelming desire in COPUOS, including that of the Soviet Union, to enlarge the scope of the Treaty to the whole of outer space.[46] Item 1 thus finds expression in Article II of the Space Treaty. Article IV of the Treaty is clearly inspired by items 2 and 3.

As regards item 4, this is, of course, what the rest of the Space Treaty is all about: a programme of international co-operation for "constructive *peaceful* uses of outer space under the United Nations." Thus the phrase "international co-operation" or "co-operation" is expressly referred to in at least five of the thirteen substantive articles of the Treaty, including, as mentioned before, Articles I, IX and XI, whilst several of the remaining articles are concerned with mutual assistance in the event of accident, distress or emergency, such as Articles V and VIII.[47] In order further to drive home the point that "peaceful" can only mean "non-military" and not "non-aggressive" in the context of outer space, one merely has to reflect whether President Eisenhower, especially as he was harking back to the Antarctic Treaty and the Atoms for Peace Plan, could really and realistically have suggested that States should establish a programme under the United Nations for international co-operation in the non-aggressive uses of outer space, including military uses. At the same time, it may also be useful to recall that up to this point, we have come across no hint from the superpowers or the actual drafts to the Treaty that the whole of outer space should be reserved in law exclusively for peaceful purposes. The only provision on use exclusively for peaceful purposes is in Article IV(2), and this applies

solely to the moon and other celestial bodies, and definitely not to the space in between the celestial bodies, which we call the *outer void space*.

Article IV(2)

The Meaning of Peaceful in Sentence One. Insofar as Article IV(2) is concerned, there is little doubt that the word "peaceful" means "non-military" and not "non-aggressive." Article IV(2) provides:

> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manœuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

1. *Textual and Semantic Prestidigitation.* A comparison of Article IV(2) with item 2 of the Eisenhower proposal may provide an additional clue as to the reason behind the switch in the meaning of the word "peaceful." It will be seen that the Eisenhower proposal, which was presumably the fruit of some inter-agency consultation in the Administration, intended merely to ban "warlike activities on these bodies," i.e., hostile or aggressive activities, but not necessarily all military activities. At that initial stage of space exploration, it is not inconceivable that one might perhaps have thought of a military telecommunications centre on the moon, or using it for the training of troops for space combat, or some other non-aggressive military activities. In the sixties, it was probably premature to rule out such possibilities and in the negotiations of the Space Treaty that could well have been the brief of the United States negotiators. It should further be remembered that at first the United States had proposed a treaty limited to celestial bodies. It was only after the negotiations had started that it agreed to extend the scope of the treaty to include also the outer void space. As to outer void space, there was no question of accepting complete demilitarisation.

They were then faced with a problem. There was the precedent set by Article I of the 1959 Antarctic Treaty which had been mentioned by President Eisenhower himself when introducing the United States proposal before the General Assembly, and which was fresh in everyone's mind. The negotiators might well have thought that to apply the Antarctic precedent 100 percent to all celestial bodies, including the moon, which would preclude any military

activities thereon, would already exceed their brief, but to also apply it to the outer void space would be completely out of the question. However, as mentioned earlier, there was immense clamour from all quarters for outer space as a whole to be reserved exclusively for peaceful use. To reject this demand outright would hardly have been politic.

This would explain why the United States negotiators decided to carry their newly invented semantic prestidigitation[48] into the Space Treaty, and at the same time to omit the clear and unambiguous introductory words in the second sentence of Article I of the Antarctic Treaty.[49] In so doing, they probably thought they had achieved the seemingly impossible. According to their own interpretation, while nominally acceding, if not totally, at least partially, to the popular demand for an outer space reserved exclusively for peaceful purposes, they would have banned only warlike (i.e., aggressive) activities on the moon and other celestial bodies in accordance with the original brief, but kept them completely free for non-warlike (i.e., not aggressive) military activities, save for a few specific prohibitions enumerated in the second sentence of Article IV(2). However, it is not believed that they have succeeded in doing so.

2. *The Antarctic Analogy and the Plain Meaning of the Word "Peaceful."* In the first place, it may be of interest to compare the wording of Article I of the Antarctic Treaty with Article IV(2) of the Space Treaty:

1959 Antarctic Treaty	1967 Space Treaty
ARTICLE I. 1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manœuvres, as well as the testing of any type of weapons. 2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purposes.	ARTICLE IV(2). The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manœuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

That the word "peaceful" in Article 1 of the Antarctic Treaty means "non-military" is clear. A comparison of the wording of Article IV(2) of the

Space Treaty with that of Article 1 of the Antarctic Treaty shows that it is the obvious intent of Article IV(2) of the Space Treaty to lay down basically the same kind of obligation in regard to celestial bodies as Article I of the Antarctic Treaty in respect of Antarctica, with the same kind of provisos, and with "peaceful" meaning definitely "non-military". The few departures here and there in the actual wording in no way detract from it. It is hoped that this paper will succeed in demonstrating that nothing in Article IV(2) or anywhere else in the Space Treaty even faintly suggests that "peaceful" means anything else, least of all "non-aggressive." Only the reverse is true. It is submitted that no amount of efforts on the part of the United States during the negotiations of the Space Treaty and ever since to attribute to the word "peaceful" in it the novel meaning of "non-aggressive" can be of any avail. The reason is simple. The United States having accepted the wording of Article IV(2) as it stands, must accept what it actually provides, whatever its own mental reservations.

Notwithstanding some doctrinal support of the United States' position,[50] one has only to consider the implications of the expression "peaceful" meaning "non-aggressive" and not "non-military." In the words of Professor Ivan Vlasic, "If 'peaceful' means 'non-aggressive,' then it follows logically—and absurdly—that all nuclear and chemical weapons are also 'peaceful,' as long as they are not used for aggressive purposes."[51] Further, if "non-aggressive" is truly the meaning of "peaceful," then does the specific provision in Article IV(2) that the moon and other celestial bodies shall be used by all States Parties "exclusively for non-aggressive purposes" mean that elsewhere, especially in outer void space, the contracting Parties are contrariwise not so restricted and may engage in activities which are partly or wholly for aggressive purposes? Would it be possible, for instance, to deliberately ram someone else's satellites in orbit, geostationary or otherwise, or fire on them? Since the Space Treaty cannot be interpreted to yield such absurd results, and since acts "for aggressive or aggression purposes" are under international law and the United Nations Charter, especially Article 2(4), permitted nowhere in the universe, the specific provision as found in the first sentence of Article IV(2) must consequently mean something different: it must mean that the moon and other celestial bodies shall be used exclusively for non-military purposes. Otherwise, there would be no point in having that first sentence. "Peaceful" in that first sentence means "non-military," whatever mental reservation the most powerful contracting Party to the Treaty might have had on the subject.

3. *Subsequent Practice.* However, Professor Vlasic, in reliance on Article 31(3) of the 1969 Vienna Convention on the Law of Treaties[52] on interpretation

based on the parties' subsequent practice, and the International Court of Justice's *North Sea Continental Shelf Cases* (1969)[53] regarding the role of the States "specially affected" in the formation of rules of general international law, seemed to have conceded that the United States usage of the word "peaceful" may now be its accepted meaning. He cited the enormous amount of military activities of both the United States and the Soviet Union in outer space, and remarked: "No State has ever *formally* protested the U.S. interpretation of the phrase 'peaceful uses' in the context of outer space activities."[54]

With respect, such a conclusion is unwarranted. Article 31(3)(b) of the Vienna Convention, which is itself based on the International Court of Justice's *Temple of Preah Vihear Case* (1962),[55] provides quite explicitly that interpretation can take into account "any subsequent practice in the application of the treaty which *establishes the agreement of the parties regarding its interpretation.*"[56] But here, it does not appear justified to mix what is expressly provided for in Article 31(3)(b) of the Vienna Convention with what was said in relation to the formation of general international law by the Court in the *North Sea Continental Shelf Cases* concerning parties "specially affected." In any case, in the present instance, there cannot be said to have been any subsequent practice regarding the interpretation of the phrase "exclusively for peaceful purposes" in Article IV(2) of the 1967 Space Treaty, and certainly no subsequent practice which "establishes the agreement of the parties regarding its interpretation."

As regards the point that there has been no protest, it needs to be pointed out that all the military activities of the United States and the Soviet Union are actually in outer void space, not on celestial bodies. Insofar as the moon and other celestial bodies are concerned, there has been no known or even suspected exploration or use of the moon or other celestial bodies for *military* purposes. There has, therefore, so far been no reason why any contracting State which believes in "peaceful" meaning "non-military" and not "non-aggressive" should lodge a protest. As a result, one can definitely not speak of any subsequent practice acquiescing in the United States' interpretation of the term "peaceful" based on the absence of any protest insofar as Article IV(2) is concerned, since States are certainly not required to monitor and correct other States' mistakes in their understanding of the law or legal malapropisms, as long as they do not put their misinterpretation into practice.

Insofar as the *outer void space* is concerned, where Professor Vlasic said all kinds of military space activities were widely known to be taking place without protest, there would be even less reason to protest. There would be grounds for protest only if any contracting State were to orbit or station weapons of mass destruction in outer space. Up to now, it does not appear that any party to the

Space Treaty, or any State at all, has done so or tried to do so. Outer void space has *not* been reserved for exclusively peaceful purposes, or, as for that matter, for any specific purposes, and all the military activities cited by Professor Vlasic as taking place there are perfectly legal under the Space Treaty.[57] Consequently, up to now, there has been neither reason nor ground for protest. One can, therefore, hardly base a case of subsequent practice in relation to the word "peaceful" in Article IV(2) on what has been going on in outer void space, to which the restriction to peaceful uses does not apply.

On the question of either practice or subsequent practice, as both the *Temple of Preah Vihear Case*[58] and the *Anglo-Norwegian Fisheries Case*[59] show, a State's legal rights can be adversely affected by the conduct of others only if it can be proved to have accepted, or to have over a period of time failed to protest when it had cause to protest against, a situation which actually impinged on its rights or interests. In our case, the fact that the contracting States to the Space Treaty have not protested the practice of one or two of them choosing to misuse the term peaceful to describe their perfectly lawful military activities in outer void space certainly cannot amount to what Article 31(3)(b) of the Vienna Convention on the Law of Treaties calls "agreement of the parties" regarding such a use of the term in relation to the treaty. Indeed, if every time some foreign State official commits a legal malapropism, one were required to protest, whether or not one's rights are affected, government offices would hardly have time to do anything else!

4. *Preparatory Work.* As a matter of fact, nor can one invoke Article 32 of the Vienna Convention, which allows the preparatory work of the Treaty to be used as a "supplementary means of interpretation," even though the United States negotiators of the Treaty appeared to have spent much effort in the corridors propagating the notion that "peaceful" meant "non-aggressive" and not "non-military." In the first place, this novel and bizarre use of a familiar word was never, as far as known, recorded officially as a reservation in any of the preparatory work concerned with the Treaty itself, and still less is there any record of the other negotiators acquiescing in such an extraordinary interpretation. There has been only hearsay, which certainly does not count. It is true that treaties can use any term in any meaning they wish to assign to it. The Moon Treaty,[60] for example, more or less proclaims in Article 1 that insofar as the treaty is concerned, when it says moon, it means all the celestial bodies within the solar system other than the earth. But there is no such provision in the 1967 Space Treaty. With a use of the term as upside down as the United States is propagating, the only way that it can be acceptable without ambiguity would be

for this usage to be defined explicitly in the Treaty, as the Moon Treaty has done with the word "moon." If there was an equivalent provision in the 1967 Treaty, then there would be no problem, but there is no such provision.

It is true that Article 32 of the Vienna Convention provides that resort can be made to the preparatory work of a treaty in interpretation, but the provision makes it clear that doing so is but a "*supplementary means*," one which may be used only:

> in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure, or
> (b) leads to a result which is manifestly absurd or unreasonable.

There is nothing ambiguous, obscure, manifestly absurd or unreasonable in interpreting "peaceful" to mean "non-military," which is the ordinary and normal meaning of the word. There is no need therefore to invoke preparatory work. On the contrary, to interpret "peaceful" as meaning "non-aggressive" is, to use the words of Article 32, "manifestly absurd and unreasonable."

It is unreasonable because such an interpretation renders the first sentence of Article IV(2) of the Space Treaty totally useless. First, States under current international law and the Charter of the United Nations are already bound not to engage in aggressive activities, and parties to the Space Treaty have already pledged themselves in Article III to abide by international law and the UN Charter in their exploration and use of outer space. Consequently, under this interpretation, the first sentence would be redundant and only the second sentence of Article IV(2) would be relevant. Instead of being merely exemplificative, as it should be, if the first sentence is controlling, as in Article I of the Antarctic Treaty, the second sentence would be the only material provision in Article IV(2). Its enumeration of the contracting Parties' obligations would be exhaustive. Sentences three and four would also become totally redundant; for there would be nothing in the first sentence even remotely to suggest that either military personnel or military equipment might not be used for "non-aggressive" exploration or use. Such an interpretation would be totally unreasonable.

But to interpret "peaceful" in Article IV(2) as "non-aggressive" would in fact be "manifestly absurd," for reasons already given by Professor Vlasic. In addition, if this is the correct interpretation, since Article IV(2) applies only to celestial bodies and not the outer void space, the absence of such a stipulation in, say, Article IV(1) or anywhere else in the Treaty immediately gives rise to the argument, as we have said, that contrariwise *aggressive* activities are permissible in outer void space! Otherwise, why an express provision providing that

the moon and other celestial bodies shall be used exclusively for non-aggressive purposes?

The provision of the Vienna Convention that is applicable in this case is, therefore, neither Article 31(3) on subsequent practice, nor Article 32 on preparatory work, but Article 1(1), which provides as follows:

> A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.[61]

In sum, the conclusion is inevitable that "peaceful" in the Space Treaty as a whole and in Article IV(2) in particular, means, has always meant and continues to mean "non-military," and not "non-aggressive," notwithstanding United States attempts to maintain otherwise.

Sentence Two of Article IV(2). If, as we have just shown, "peaceful" in the first sentence of Article IV(2) means "non-military," then it becomes obvious that the second sentence of Article IV(2), as in Article I of the Antarctic Treaty, is purely exemplificative. No activity whatsoever of a military nature is permitted on the moon and the other celestial bodies. As for the fact that only celestial bodies, but not the moon, are mentioned in the second sentence—this cannot possibly have any significance, since throughout the Treaty the moon has always been treated as one of the celestial bodies. Besides, the first sentence having explicitly referred to the moon and *other* celestial bodies, it would have been purely repetitive, in the next sentence intended to give examples of what may not be done on all celestial bodies, to again add an express reference to the moon.[62]

The Last Two Sentences of Article IV(2). The same applies to the omission of any qualification before "equipment and facility" in the last sentence. The last two sentences, following the example of the Antarctic Treaty, set out two permitted, or seeming, exceptions to the principle laid down in the first sentence. They are both of a similar character. Provided that the research or exploration is for peaceful purposes, what might otherwise be thought prohibited is expressly allowed, namely military personnel and equipment or facility. The omission of the qualification "military" insofar as equipment and facility are concerned is purely elliptical. Furthermore, the fact that, apart from the mention of weapon testing being forbidden, which falls clearly under the heading of a military activity, every item in the second and third sentences of Article IV(2) is

qualified by the adjective "military," namely, "*military* bases, installations and fortifications," "*military* manœuvres," and "*military* personnel" also confirms that what is meant in the last sentence is "*military* equipment or facility."

The existence of the last two sentences in Article IV(2) permitting the use of military personnel and equipment or facilities for respectively peaceful purposes and peaceful exploration[63] shows clearly that Article IV(2) of the Space Treaty, like Article I of the Antarctic Treaty, must have felt that such explicit exemptions were necessary, and this could only be because there is a blanket prohibition of *military* uses in the first sentence. Otherwise, since the research and exploration need be only for "non-aggressive purposes" and not "non-military," it goes without saying that any personnel and equipment can be used.

As to these last two sentences, the opinion is sometimes voiced that, since military personnel and equipment can be used, Article IV(2) cannot possibly intend to prohibit the use of celestial bodies for military purposes, and "peaceful" must mean non-aggressive, or at least something in between.[64] Such views ignore the precedent of the Antarctic Treaty, and what was so well explained by Edwin B. Parker, the umpire in the United States-German Mixed Claims Commission (1922) in *Opinion Construing the Phrase "Naval and Military Works or Materials" as Applied to Hull Losses and Also Dealing with Requisitioned Dutch Ships* (1924), which graphically shows that the test of whether an activity or equipment is of a military or non-military character can be an essentially functional one and not one of nominal status. He said in that case:

> The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials, but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners. The automobile belonging to the United States assigned to its President and constitutional commander-in-chief of its Army for use in Washington is in no sense military materials. But had the same automobile been transported to the battlefront in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character.[65]

Thus, in reverse, the fact that the first person in space was a Soviet military officer, and two of the three men who first flew to the moon were respectively a United States Air Force colonel and Air Force lieutenant colonel did not preclude their flights from being explorations of outer space for peaceful purposes. The essential criterion is the *purpose* of the activity.

This is not to deny that there are activities and uses which can serve both military and civilian purposes. From the standpoint of maintaining international peace and security, this is a serious problem which causes much concern,[66] but insofar as the law is concerned, Article IV(2) is quite explicit. The moon and other celestial bodies may only be used by the contracting States to the Treaty "*exclusively* for peaceful purposes"; in other words, no admixture of any military purpose. From this point of view, the law can only look at the present and actual purpose, whether overt or covert, but not speculative ulterior motives.

After all, as we have seen before, the whole space programme has tremendous military and strategical significance. To be realistic, the total demilitarisation of the moon and other celestial bodies is possible largely because they are, at least as things stand at the moment, militarily and strategically of no, or little, significance. As far as one is aware, none of the space Powers is contemplating using the moon or any other celestial bodies for military purposes. This tenacity of holding on to a misleading interpretation of the word "peaceful" in relation to the Space Treaty is difficult to understand, especially since the banning of military activities in the Treaty does not apply to outer void space, as a careful examination of Article IV(1) will show.

In any event, the last two sentences of Article IV(2) of the Space Treaty, far from modifying the ordinary meaning of the word "peaceful" in the article's first sentence, serve only to confirm that it means "non-military."

The 1979 Moon Treaty.[67] Insofar as the demilitarisation of the moon and the other celestial bodies is concerned, Article 3 of the Moon Treaty basically repeats Article IV of the Space Treaty, especially Article IV(2), except that the scope of the Moon Treaty is limited to the moon and only the celestial bodies within the solar system other than the earth, and, therefore, does not extend to celestial bodies outside the solar system. The specific mention of the moon in Article 3(4), which was omitted in the second sentence of Article IV(2) of the Space Treaty, for reasons which have been given above, in fact does not add anything of significance to the latter.[68] Apart from the express prohibition of placing weapons of mass destruction in a "trajectory to" the moon, the only difference lies in the Moon Treaty's Article 3(2), which specifically prohibits the threat or use of force or other hostile act. Since Article 2 of the Moon Treaty already binds the contracting States to observe international law and the Charter of the United Nations, and since Article 2(4) of the United Nations Charter already prohibits the threat or use of force, and no doubt also the launching of any weapon of mass destruction against any place in the universe without

lawful justification, the only real addition consists in the prohibition of "the threat or use of . . . other hostile act." The nature of these hostile acts remains, however, unclear, unless they refer to acts of individuals to which in principle international law is not applicable. But since, under both Article VI of the Space Treaty and Article 14(1) of the Moon Treaty, contracting States bear "international responsibility" for national activities in space carried on whether by themselves or by non-governmental entities, including individuals, and for assuring that they are carried out in conformity with the respective treaties, both of which provide for compliance with international law and the Charter of the United Nations, they would already have the responsibility of ensuring that the acts of such individuals comply with the States' international obligations.[69]

Article IV(1)

Article IV(1) of the Space Treaty provides:

> States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

As we have seen, this provision in the Space Treaty is directly inspired by item 3 of the Eisenhower Proposal, except for the omission of the condition of verification. In addition, Article IV(1) also specifies that outer space includes celestial bodies.

In that connection, the omission of a specific mention of the moon, like the similar omission in the second sentence of Article IV(2), is again of no significance.[70] It will also readily be seen that Article IV(1) reproduces almost verbatim the relevant paragraph of General Assembly Resolution 1884 (XVIII) of 17 October 1963, when the long-winded formula of "outer space, including the moon and other celestial bodies" had not yet been developed, and as we have seen in the case of Resolution 1962 of the same year, the usage then was always to refer to "outer space *and* celestial bodies," without any specific mention of the moon. In any event, the moon is obviously a celestial body.

Resolution 1884 was, of course, itself based on a mutual understanding between the Soviet Union and the United States. From this point of view, the 1967 Treaty merely put into a multilateral treaty a mutual undertaking which the superpowers had reached between themselves, and to which the United Nations had already called on all States to subscribe. Consequently, it added

relatively little to the restriction on their freedom of action in outer space, especially that of the superpowers. All that Article IV(1) provides is that no "nuclear weapons or any other kinds of weapons of mass destruction" may be stationed in any manner anywhere in outer space, including the moon and other celestial bodies.

In other words, insofar as the immense void space in between the innumerable celestial bodies (the outer void space) is concerned, apart from the limitation on the stationing of weapons of mass destruction, the 1967 Treaty as a whole, including its Article IV(1), leaves the contracting States entirely free to use outer void space in any way they wish, including using it for military purposes, particularly in self-defence in accordance with the rules of international law and Article 51 of the United Nations Charter,[71] subject only to applicable rules of general international law, the United Nations Charter, in particular its Article 2(4), and any other treaty obligations States may have. In brief, *outer void space has NOT been reserved for use exclusively for peaceful (non-military) purposes*, contrary to a very prevalent view.[72]

From this point of view, Article 3(3) of the Moon Treaty adds nothing to Article IV(1) of the Space Treaty, which already prohibits not only the installation of nuclear weapons and other weapons of mass destruction "on celestial bodies," but also stationing them "in outer space in any other manner." The Moon Treaty has remedied the omission of a specific reference to the "moon" in the second sentence of Article IV(1), but as we have already pointed out, this omission is of no significance.[73] The only addition made by Article 3(3) of the Moon Treaty, if addition it really be, is the prohibition of placing of any space object carrying nuclear weapons or any other kinds of weapons of mass destruction in a "trajectory to or around the moon," again in the sense the word moon is used in the Moon Treaty. The essential condition of outer void space has not been affected.

Thus, insofar as Article IV of the 1967 Space Treaty is concerned, as well as, for that matter, the Treaty itself and the 1979 Moon Treaty, the contracting States remain free to deploy *IN OUTER VOID SPACE* any type of *military satellite*, including reconnaissance; communications, early warning, navigational, meteorological, geodetic and other satellites; construct *manned or unmanned military space stations*; carry out *military exercises and manœuvres*; station or use *any non-nuclear or non-mass destruction weapon* there, including anti-satellite weapons (*ASAT*) and ballistic missile defence systems (*BMD*); and last but not least, though this enumeration is by no means exhaustive, *send through or into outer void space any weapon*, whether or not nuclear[74] or of mass destruction, *against any target on earth or in outer space*[75]—of course, always subject to

applicable rules of international law and specific treaty obligations, including the United Nations Charter, particularly Articles 2(4) and 51.

With this immense freedom that the contracting States have in outer void space, it is hard to understand how, first, one can fail to see the difference between Article IV(1) and Article IV(2) of the Space Treaty, and maintain that "peaceful" in Article IV(2) is intended to mean no more than "non-aggressive," and second, how one can possibly claim or think that the whole of outer space is limited to use for peaceful purposes only, without reducing the word "peaceful" to meaninglessness.

The American arbitrator F. K. Nielsen, in his 1923 U.S.-Mexican General Claims Commission dissenting opinion in the *International Fisheries Co. Case* (1931), rightly pointed out:

> An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely a quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the understanding or application of proper rules or principles of law.[76]

Irrespective of whether or not Article IV of the Space Treaty has now become a matter of general international law, there is no doubt that the 1967 Space Treaty, as President Johnson said of it at the time, was "the most important arms control development since the limited test ban treaty of 1963."[77] It is consequently extremely important that there should be a clear understanding of what it means. The world has cause to be deeply concerned about the military use of space.[78] However, arms limitation and control in space cannot be divorced from the much wider political problems and extremely complex relations that exist between nations. Yet to begin with, one must be clear as to what one has at the moment, namely, Article IV of the Space Treaty, which is the obvious starting point. For the rest, the three indispensable conditions of successful international lawmaking are: 1) perceived need; 2) propitious political climate; and 3) due representation and consequential support of the dominant section of international society, including what the International Court of Justice calls the States "specially affected."[79] However, those who seek to secure the whole of outer space exclusively for peaceful exploration and use need first of all to ensure that the word "peaceful" is correctly interpreted. Otherwise, they could score an entirely empty victory and fall into the kind of meaningless self-deception typified by Article 88 of the United Nations Law of the Sea Convention (1982),[80] which tells us that the "high seas shall be reserved for peaceful purposes"!

Summary and Conclusions

1. The 1967 Space Treaty remains very close to the United States' policy on space first announced by President Eisenhower in 1960.

2. The original United States intention as regards the celestial bodies was that there should be no "warlike" activities on them, which may not mean that they should be completely demilitarised.

3. Popular opinion and a number of governments were clamouring for the whole of outer space, including all the celestial bodies, to be preserved for exclusively peaceful, i.e., non-military, exploration and use.

4. The two superpowers evidently did not wish to be seen as opposing this wish, while seeking ways of keeping all options open, in view of the obvious importance of outer space for military purposes. The Soviets, well used to concealing the true nature of practically everything they did, simply carried on with their practice of dissimulating all their military activities in space as non-military, and thus peaceful. The United States negotiators, instead, propagated the novel idea that "peaceful" meant merely "non-aggressive" and not "non-military." Every effort was made not to disturb the popular illusion that everyone was using outer space, including the moon and the other celestial bodies, only for peaceful purposes.

5. In the 1967 Space Treaty, the only article that concerns the military use of the whole of outer space is Article IV. Neither the Preamble nor Articles I(1), IX or XI of the Treaty affect the contracting States' freedom to use outer space for military purposes, though they all intend to promote its peaceful use. Although the Space Treaty makes much of international co-operation in the peaceful uses of outer space, there is no provision, contrary to a very prevalent misconception, anywhere in the entire Treaty which reserves the whole of outer space exclusively for peaceful use or exploration.

6. Only the moon and the other celestial bodies have been so reserved in Article IV(2), which does not apply to the void in between—what I have called "the outer void space." The first sentence of Article IV(2), in providing that the "moon and other celestial bodies shall be used . . . exclusively for peaceful purposes," has the effect of completely demilitarising all the celestial bodies.

7. Notwithstanding the stance taken by the United States, the word "peaceful" in the Treaty as a whole, and in its Article IV(2) in particular, by all the rules of treaty interpretation, retains its ordinary and well-established meaning of "non-military." To argue that it means "non-aggressive" leads to illogical, unreasonable, and even absurd consequences.

8. It is unwarranted to conclude from the fact that the United States has persistently interpreted the word "peaceful" in Article IV(2) as meaning "non-aggressive" and not "non-military," and that there has been "no protest" from other States, that the United States interpretation has consequently been confirmed by subsequent practice in accordance with Article 31(3) of the 1969 Vienna Convention on the Law of Treaties. The reason is simply that there has up to now not been any known occasion when the United States tried to implement its interpretation in regard to Article IV(2), by carrying on "non-aggressive" *military* activities on the moon or other celestial bodies. The result is that there has been no violation of Article IV(2) and, therefore, no need for any other State to protest.

9. The fact that the United States has long qualified its military activities in outer void space as peaceful without evoking any protest proves even less, inasmuch as such activities are, insofar as the Treaty is concerned, governed by its Article IV(1) and lawful under it. There is no reason or ground for other contracting States to protest simply because the United States wishes to give such activities a whimsical description.

10. Nor can one invoke the history of the Treaty to justify the United States interpretation under Article 32 of the Vienna Convention, inasmuch as not only has there been no express reservation on the part of the United States in this regard, but there has also been no recorded pronouncement on the part of the United States accompanying the presentation or adoption of this Article or of the Treaty to this effect that has been accepted by the other negotiating parties.

11. The applicable provision of the Vienna Convention is Article 31(1), which provides that the terms of a treaty are to be interpreted in good faith and given their "ordinary meaning." The ordinary meaning of "peaceful" is, of course, "non-military."

12. The first sentence of Article IV(2) being categoric, the second sentence is purely exemplificative.

13. The omission in the second sentence of Article IV(2) of a specific reference to the moon when dealing with celestial bodies is without significance, inasmuch as the previous sentence has already mentioned "the moon and *other* celestial bodies," thus clearly indicating that the moon is one of the celestial bodies. The omission is purely elliptical.

14. Similarly, the omission of any qualification as to the nature of the equipment and facility in the last sentence of Article IV(2) must be understood to mean *military* equipment and facility, in view of the reference to *military* personnel in the previous sentence. Such ellipses are perfectly normal.

15. The express authorisation of the use of military personnel, equipment and facilities for peaceful purposes, far from showing that the word "peaceful" in the first sentence does not mean "non-military," on the contrary conclusively demonstrates that it does mean "non-military," for sentences three and four in Article IV(2) constitute clear and express exemptions from the prohibition laid down in the first sentence. Otherwise, they would not be thought to be necessary, even if only out of an abundance of caution, since the exemptions are perfectly compatible with the spirit of the first sentence.

16. Article 3 of the Moon Treaty basically repeats Article IV of the Space Treaty insofar as the latter concerns the moon in the sense the word is used in the Moon Treaty, namely the moon and all the celestial bodies within the solar system other than the earth.

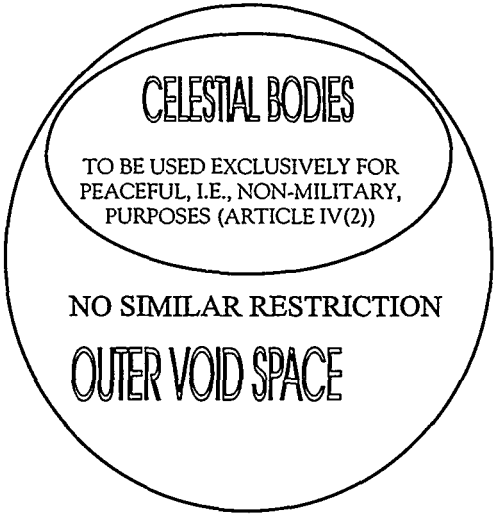
17. Insofar as the whole of outer void space in between the celestial bodies is concerned, the only provision in the Space Treaty concerning military use is to be found in its Article IV(1), in which the contracting States "undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, . . . or station such weapons in outer space in any other manner." It follows that, subject to the observance of applicable rules of international law and of the United Nations Charter, as well as relevant treaty obligations, contracting States may otherwise use outer void space for military purposes in any manner they wish, particularly in legitimate self-defence in accordance with the applicable rules of international law. Article IV(1) has definitely not excluded all military uses of outer void space.

18. In sum, the 1967 Space Treaty has by no means reserved the whole of outer space for exclusively peaceful exploration or use. Its Article IV(1) merely prohibits the stationing of weapons of mass destruction in the whole of outer space, a measure which the United States and the Soviet Union had agreed to between them even before the Treaty. Whether "peaceful" means "non-military" or "non-aggressive" consequently has no effect whatsoever on the contracting States' freedom to use the outer void space for military purposes in accordance with international law. Only Article IV(2) of the Treaty has completely demilitarised celestial bodies by saying that they shall be used solely for peaceful purposes. The legal position of the military use of outer space under the Space Treaty is summed up in Figure 4.

It results that only if the United States intends to use any of the celestial bodies for military purposes does it make sense to distort the meaning of "peaceful" from "non-military" to "non-aggressive." Since it is not believed that the United States has any such intention, and since the world has now become far more realistic regarding the use of outer space, the United States'

deliberate and continuing misinterpretation of "peaceful" in the Space Treaty to mean "non-aggressive" and not "non-military" appears to be wholly without purpose and behind the times, while gratuitously ruining a most useful and desirable word, and at the same time opening the door to possible mischief. It should be dropped forthwith.

Figure 4: The Military Use of Outer Space
Under the 1967 Space Treaty



OUTER SPACE

GENERAL RESTRICTIONS GOVERNING USE

1. International law and UN Charter applicable (Article III), which prohibit aggression and the use or threat of force (Charter, Article 2(4));

2. No stationing of "nuclear weapons or any other kinds of weapons of mass destruction" anywhere in outer space in any manner (Article IV(1)).

19. The world's fervent hope is not only that Article IV of the Space Treaty has by now acquired a sufficient *opinio generalis juris generalis* to qualify as a rule of general international law,[81] but also that States would, especially in the wake of the official celebration in 1997 of the end of the Cold War,[82] make rapid progress not merely in further limiting the military use of outer void space, but also in using outer space for the purpose of assisting limitations of armament or even general disarmament everywhere by providing an effective means of verification. In order to do so, one has first to be clear as to the meaning and scope of Article IV of the Space Treaty, which is the obvious starting point, and the precise meaning of the word "peaceful." There is definitely the need to ensure that real Peace prevails on earth, as well as in space. The political climate is propitious. All that is needed to satisfy the three indispensable conditions for successful international lawmaking to achieve this end is the political will of the leading nations of the world.

Notes

1. 402 UNTS 71; 12 UST 794; TIAS No. 4780. Signed at Washington on 1 December 1959; entered into force on 23 June 1961.

2. 14 November 1957.

3. Resolution 1348 (XII).

4. According to Professor Vlasic, one of the earliest uses of the term "peaceful" as an antonym for "aggressive" appeared in a 1959 report of the American Bar Association Committee on the Law of Outer Space [Proceedings of the American Bar Association, Section of International and Comparative Law, 1959, pp. 215–233, reproduced in Senate Committee on Aeronautical and Space Science, Legal Problems of Space Exploration: A Symposium, S. Doc. No. 26, 87th Cong., 1st Sess. (1961), pp. 571–594, at p. 576, citing M. MCDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963), at p. 397]. I. A. Vlasic, *Space Law and the Military Application of Space Technology*, in N. Jasentuliyana (ed.), PERSPECTIVES ON INTERNATIONAL LAW, London: Kluwer Law International (1995), pp. 385–410, at p. 391. It may be added that the learned authors of LAW AND PUBLIC ORDER IN SPACE not only endorsed this approach in their book, but also vigorously elaborated on the same theme (pp. 394–401), and their powerful voice must have greatly contributed to forming the official U.S. view on the subject. It may be of interest to mention that Professor McDougal was a member of the ABA Space Law Committee, whilst at the same time Professor J. C. Cooper, another Committee member, declined to sign the report. *Inter alia*, he expressed doubts, in a separate statement, about the report's invocation of the UN Charter (*Senate 1961 Symposium*, p. 592), which was used by the Committee to justify its line of argument on this topic (*ibid.*, pp. 574–577). Andrew Haley, another Committee member, while voting for the report, added a Comment endorsing John Cobb Cooper's statement and stating that he did "not believe that this is an appropriate document in which to discuss such philosophical and political concepts as 'non-aggressive military uses' of outer space" (*ibid.*, p. 593). Such concepts are, however, perfectly consonant with Professor McDougal's legal philosophy as exemplified, for instance, in his well-known article *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AMERICAN JOURNAL OF INTERNATIONAL LAW (1955), pp. 356–361. The end justifies all! But the dilemma faced by the ABA Committee of having to choose between on the one hand reserving outer space for use for exclusively peaceful purposes and on the other hand the needs of the United States and its allies to defend themselves could no doubt have been resolved by simply acknowledging openly that it was just not realistic in the circumstances to reserve the whole of outer space for use for exclusively peaceful purposes.

5. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205; 18 UST 2410; TIAS No. 6347. Opened for signature at London, Moscow, and Washington on 27 January 1967; entered into force on 10 October 1967.

6. For an analysis of the 1967 Space Treaty, see B. CHENG, STUDIES IN INTERNATIONAL SPACE LAW, Oxford: Clarendon Press (1997), Ch. 9, pp. 215–264.

7. Resolution 1962 (XVIII).

8. See B. Cheng, *The 1967 Space Treaty: Thirty Years On*, keynote address at the International Institute of Space Law's special dinner to celebrate the 30th anniversary of the Space Treaty, 40 SPACE LAW COLLOQUIUM (1997), pp. XVII–XXIX, s. III.1: Filing in Lacunae, e.g., "Outer Void Space," at p. XIX. See further B. Cheng, *Outer Void Space: The Reasons for This Neologism in Space Law*, AUSTRALIAN INTERNATIONAL LAW JOURNAL (1999), pp. 1–8.

9. *Cf.* G. SCHWARZENBERGER, POWER POLITICS, 3rd ed., London: Stevens (1964), Part II: Power Politics in Disguise, pp. 249–515.

10. See, e.g., CHENG, *op. cit.* in note 6 above, Ch. 19: Definitional Issues in Space Law: The "Peaceful Use" of Outer Space, pp. 513–522. See also note 4 above.

11. See CHENG, *op. cit.* in note 6 above, Ch. 4: International Co-operation and Control: From Atoms to Space, pp. 52–69.

12. The text of Art I is reproduced below.

13. UN Doc. A/C.1/PV.1289 (3.12.62), p. 13.

14. UN Doc. A/AC.105/PV.3 (20.3.62), p. 63.

15. As to the expectations at the time, even before the actual launch of Sputnik I, see CHENG, *op. cit.* in note 6 above, Ch. 2: International Law and High Altitude Flights, pp. 14–51, notes 12 and 13 and text thereto, at p. 17.

16. See *ibid.*, Ch. 1: In the Beginning: The International Geophysical Year, pp. 3–13.

17. See *ibid.*, Ch. 6: The United Nations and Outer Space, pp. 91–124, text to note 134, at p. 121.

18. See *ibid.*, Ch. 6, s. VI: Demilitarisation and Disarmament, at pp. 119–124.

19. *Cf.* UN Doc. A/AC/105/C.2/SR.65 (22.7.66), pp. 9–10; *ibid.*, /SR.66 (23.7.66), pp. 6–7 (USSR).

20. *Cf.*, e.g., Soviet behaviour in the 1960 RB-47 incident (see CHENG, *op. cit.* in note 6 above, Ch. 6, s. V.B: Peripheral Reconnaissance, at pp. 107–119), and the 1983 Korean Airlines incident (see B. Cheng, *The Destruction of KAL Flight KE007 and Article 3bis of the Chicago Convention*, in J. W. E. Storm van s Gravesande and A. van der Veen Vonk (eds.), AIR WORTHY (Liber Amicorum I. H. Ph. Diederiks-Verschoor), Daventer: Kluwer (1985), p. 47. And see text to note 38 below.

21. UN Doc. A/C.1/L.219 (16.3.58).

22. See *op. cit.* in note 6 above, Ch. 6 : The Extraterrestrial Application of International Law, note 39 and text thereto, at p. 83.

23. A number of other treaties, bilateral or multilateral, concluded or proposed, affect the military use of outer space, which time and space do not permit us to enter into here. Mention may be made of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water (480 UNTS 43); the 1972 US-USSR agreement on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) [11 ILM (1972) 784]; the 1972 US/USSR Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I Agreement) [11 ILM (1972) 791]; 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [16 ILM (1977) 88]; 1979 US/USSR Treaty on the Limitation of Strategic Offensive Arms (SALT II Treaty) [18 ILM (1979) 1112]; the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies(Moon Treaty)[18 ILM (1979) 1434; 1363 UNTS 3]; the 1981 Soviet proposal for a Treaty on the Prohibition of the Stationing of Weapons of Any Kind in Outer Space [UN Doc. A/36/192 (22.8.81)]; the 1983 Soviet proposal for a Treaty on the Prohibition of the Use of Force in Outer Space and from Space against the Earth [UN Doc. A/38/194 (20.8.83)]. See B. Jasani, *Outer Space: Militarization Outpaces Legal Controls*, in N. Jasentuliyana (ed.), MAINTAINING OUTER SPACE FOR PEACEFUL USES, Japan: The UN University (1984), pp. 221–252, Table 2, at pp. 234–237, where some of the key provisions of these treaties are cited.

24. On various other terms and aspects of the 1967 Space Treaty, particularly from the standpoint of interpretation and definition, *cf.* S. Gorove, *Article IV of the 1967 Outer Space Treaty and Some Alternatives for Further Arms Control*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 77–89.

25. *Cf.* bilateral agreement reached on 8 June 1962 between the Academy of Sciences of the USSR and the National Aeronautics and Space Administration (NASA) of the US on co-operation in satellite meteorology, world geomagnetic survey and satellite telecommunications, following an exchange of views between Khrushchev and Kennedy, and subsequently communicated by the two governments to the United Nations, UN Doc: A/C.1/880 (5.12.62); reprinted 2 ILM (1963) 195, with a note on its having been confirmed by both governments, and its coming into effect. C. W. JENKS, SPACE LAW, London: Stevens (1965), prints the First Memorandum of Understanding to implement the above agreement among its appendices, at p. 382.

26. 480 UNTS 43; 14 UST 1313; TIAS No. 5433; 2 ILM (1963) 883.

27. Art. 1, emphasis added.

28. It may be worthwhile pointing out that the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space [GA Res. 1962 (XVIII)] of 13 December 1963, the year before, which represents an earlier agreement between the superpowers and which is the forerunner of the 1967 Treaty, does not include a principle similar to Article IV of the Treaty.

29. Emphasis added.

30. Italy, UN Doc. A/AC.105/C.2/SR.64 (21.7.66), p. 4–5; France, *ibid.*, p. 6.

31. *Cf. op. cit.* in note 6 above, Ch. 2: International Law and High Altitude Flights, note 11, at p. 17, and text thereto; Ch. 6: The United Nations and Outer Space, notes 75 and 89, at pp. 103 and 106, and text thereto; V. S. Vereshchetin, *'Open Skies': The Metamorphosis of a Concept*, in T. L. Masson-Zwaan and P. M. J. Mendes de Leon (eds.), AIR AND SPACE LAW: DE LEGE FERENDA (Liber Amicorum Henri A. Wassenbergh), Dordrecht: Martinus Nijhoff (1992), pp. 283–290. It should be added that the term is now also used in air law to describe a liberal policy in international air transport of opening a country's airspace to foreign airlines. See H. Wassenbergh, *'Open Skies'/ 'Open Markets': The Limits to Competition*, in Chia-Jui Cheng (ed.), THE USE OF AIRSPACE AND OUTER SPACE FOR ALL MANKIND IN THE 21ST CENTURY, The Hague: Kluwer (1995), pp.195–204.

32. N. M. Matte in *Military Uses of Outer Space and the 1967 Outer Space Treaty*, in Storm van s Gravesande and van der Veen Vonk (eds.), *op. cit.* in note 13 above, pp. 117–134, using a more recent example, likewise points out that, while reconnaissance satellites may be good for their owner-States, they are not necessarily good for the benefit and in the interests of all countries (at p. 125).

33. See, e.g., in agreement, D. Goedhuis, *Legal Implications of the Present and Projected Military Uses of Outer Space*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 253–269, at pp. 260–261; *contra*, Matte, *loc. cit.* in note 32 above, at p. 128. On Art. I of the Space Treaty, see further CHENG, *op. cit.* in note 6 above, Ch. 9: The 1967 Space Treaty, s.V.E.: Exploration and Use for the Benefit of All Countries, at pp. 234–236.

34. Eisenhower's speech as put out by U.S. Information Service in London, Official Text (22.9.60), pp. 5–6. Text differs slightly from the Official Records of the General Assembly, GA(XV) A/PV.868 (22.9.60), p. 45, at p. 48, which was based on a transcript of the recording of the speech. In reply to an inquiry from the writer, the State Department confirmed the accuracy of the text quoted above. See further CHENG, *op. cit.* in note 6 above, Ch. 6: The United Nations and Outer Space, note 142 and text thereto, at p. 123.

35. See CHENG, *op. cit.* in note 6 above, Ch. 6, s. V.A.: Penetrative Reconnaissance, at pp. 104–107.

36. See C. S. Sheldon II and B. M. DeVoe, *United Nations Registry of Space Vehicles*, 13 SPACE LAW COLLOQUIUM (1970), pp. 127–141.

37. Convention on Registration of Objects Launched into Outer Space, 14 January 1975, 1023 UNTS 15; 28 UST 695; TIAS No. 8480. Opened for signature on 29 March 1972; entered into force on 1 September 1972.

38. *Cf.* UN Secretary-General, Report on Application of the Convention on Registration of Objects Launched into Outer Space. UN Doc. A/AC.105/382 (2.3.87); A. J. Young, *A Decennial Review of the Registration Convention*, 9 ANNALS OF AIR AND SPACE LAW (1986), pp. 287–308.

39. UN Doc. A/S-10.1/7 (May-June 1978).

40. CD Doc. CD/9 (26.3.79); CD/PV.274 (19.7.84), p. 5–8; CD/540, p. 171.

41. CD Doc. CD/OS/WP.25 (25.8.88).

42. CD Doc. CD/817, CD/OS/WP.19 (17.3.88). See I. I. Kuskuvelis, *The Importance of Structures in the Future of the Military Space Regime*, in E. J. Palyga (ed.), INTERNATIONAL SPACE LAW MISCELLANEA (Liber Amicorum Andrzej Górbiel), Warsaw: Instytut Humanistyczny (1955), p. 115, at pp. 116–117.

43. *Cf.* Bhupendra Jasani (ed.), PEACEFUL AND NON-PEACEFUL USES OF SPACE, New York: Taylor & Francis (1991), pp. 14–16; *idem*, *Outer Space: Militarisation Outpaces Legal Controls*, *loc. cit.* in note 23 above, at pp. 244–250.

44. *Cf.* CHENG, *op. cit.* in note 6 above, Ch. 22: Remote Sensing, s. VII: Capability and Uses, at pp. 584–589; S. Sur (ed.), VERIFICATION OF CURRENT DISARMAMENT AND ARMS LIMITATION AGREEMENTS: WAYS, MEANS AND PRACTICES, Aldershot: Dartmouth for UNIDIR (1991); Y. Hashimoto, *Verification Systems from Outer Space—Revival of International Satellite Monitoring Agency*, 37 SPACE LAW COLLOQUIUM (1994), p. 230; W. von Kries, *Satellite Verification and European Arms Control*, 33 *ibid.* (1990), p. 375.

45. UN Doc. A/AC.105/32, and Corr. 1 (16.6.66).

46. See further CHENG, *op. cit.* in note 6 above, Ch. 9, s. III.B: The 1967 Space Treaty, at pp. 221–223.

47. See *ibid.*, Ch. 9, s. VII: International Co-operation and Mutual Assistance, at pp. 252–261.

48. See Senator Gore's speech referred to in note 13 above. The point was apparently hammered home in informal discussions without it being officially recorded in any of the summary records or procès-verbaux. See, e.g., the Indian representative to the First Committee, who, when criticising the limited scope of Article IV, went on to say, "the use of military personnel and any necessary equipment or facility was expressly permitted, and where it was emphatically asserted that 'peaceful' meant not 'non-military' but merely 'non-aggressive.' " UN Doc. A/C.1/SR.1493 (17.12.66), p. 436 (9).

49. Article IV(1) was based largely on Article 9 of the U.S. first draft transmitted to the Chairman of COPUOS on 16 June 1966, UN Doc. A/AC.105/32, and Corr. 1. A comparative text of Article 1 of the Antarctic Treaty and Article IV(2) of the Space Treaty is to be found below. It would, however, be only fair to mention that, for reasons which were not fully apparent, the Soviet Union was also reluctant to follow the example of the Antarctic Treaty, UN Doc. A/AC.105/C.2/SR.65(22.7.66), p. 11.

50. *Cf.*, e.g., E. R. Finch, *Outer Space for "Peaceful Purposes,"* 54 AMERICAN BAR ASSOCIATION JOURNAL (1968), p. 365; A. Meyer, *Interpretation of the Term "Peaceful" in the Light of the Space Treaty*, 11 SPACE LAW COLLOQUIUM (1968), p. 105; M. Menter, *Peaceful Uses of Outer Space and National Security*, 17(3) INTERNATIONAL LAWYER (1983), p. 381; L. Haeck, *Le droit de la guerre spatiale*, 16 ANNALS OF AIR AND SPACE LAW (1991), p. 307, at p. 309.

51. *The Legal Aspects of Peaceful and Non-Peaceful Uses of Outer Space*, in Jasani, *op. cit.* in note 43 above, p. 37, at pp. 44–45.

52. 1155 UNTS 331; 8 ILM (1969), 679.

53. ICJ Rep. 1969, p. 3, para. 73.

54. *Loc. cit.* in note 51 above, p. 45. Original italics.

55. ICJ Rep. 1962, p. 6.

56. Emphasis added.

57. See "Article IV(1)" below.

58. ICJ Rep. 1962, p. 6.

59. ICJ Rep. 1951, p. 116.

60. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 December 1978, New York, 1363 UNTS 3; 18 ILM (1979) 1434. Opened for signature on 18 December 1979; entered into force on 11 July 1984. See CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, at pp. 357–380.

61. Emphasis added.

62. *Cf. contra* N. Jasentuliyana, *The Moon Treaty*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 121–139, at p. 130, who seems to believe that the second sentence is not applicable to the moon, and this omission is only remedied by Article 3(4) of the 1979 Moon Treaty. Such an interpretation, if combined with the U.S. interpretation of "peaceful," would deprive Article IV(2) of any practical effect for probably many decades to come, if not forever, since the military use of celestial bodies other than the terrestrial moon is at present, to say the least, somewhat speculative.

63. There is a rather subtle difference between the third and fourth sentences in that military personnel can be used for "any . . . peaceful purposes," military equipment and facilities can only be used "if necessary for peaceful exploration." This makes sense inasmuch as military equipment and facilities, unless "necessary for peaceful exploration," are likely to be capable of military use. The military risks presented by military personnel without military equipment or facilities would be much less.

64. *Cf.* Gorove, *loc. cit.* in note above, p. 77, at pp. 81–2; N. Jasentuliyana, *The Moon Treaty*, *loc. cit.* in note 62 above, at pp. 128–129.

65. *Decisions and Opinions*, p. 75, at p. 97.

66. See, e.g., S. E. DOYLE, CIVIL SPACE SYSTEMS: IMPLICATIONS FOR INTERNATIONAL SECURITY, Aldershot: Dartmouth for UNIDIR (1994).

67. See CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, at pp. 357–380.

68. See notes 62 above and 75 below with accompanying text. See also Haeck, *loc. cit.* in note 50 above, by no means the only writer who appears to be rather unclear on the subject (p. 321), and on the distinction that ought to be made, insofar as Article IV is concerned, between (i) outer space in the sense used by the Space Treaty, which includes the moon and the other celestial bodies, (ii) the outer void space, and (iii) celestial bodies (at p. 315).

69. See further CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, s. IV.C: Non-militarisation, at pp. 367–368, and Ch. 24: International Responsibility and Liability for National Activities in Outer Space, at pp. 621–640; B. Cheng, *Article VI of the 1967 Space Treaty Revisited: "International Responsibility," "National Activities," and "The Appropriate State,"* 26 JOURNAL OF SPACE LAW (1998), pp. 7–32.

70. *Cf. contra* Jasentuliyana, *loc. cit.* in note 64 above, at p. 130.

71. Some politicians and writers appear to have a mistaken notion of a State's right of self-defence, treating it as authorising whatever is desirable in the interest of national security. The international law right of self-defence is a legal concept derived from or at least comparable to the canon law notion of *defensio legitima*, legitimate (self-) defence. It is subject to strict legal rules and conditions. On the position in international law, see B. CHENG, GENERAL PRINCIPLES

OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Cambridge: Grotius (1987), Ch. 2, s. B: Self-Defence, pp. 77–97.

72. *Cf.*, among numerous others, Menter and Finch, *loc. cit.* in note 50 above, and Jasani *loc. cit.* in note 23 above, at p. 244.

73. *Cf. contra* Jasentuliyana, *loc. cit.* in note 64 above, at p. 130, who believes that Article 3(3) of the Moon Treaty has added "vast new areas that were not specifically covered by the outer space treaty," seemingly referring to the applicability of the moon treaty to all the celestial bodies within the solar system under its Article 1(2). However, this is difficult to understand because Article IV(1) of the Space Treaty applies to all celestial bodies in the whole universe, which would include all celestial bodies in the solar system. The prohibition of the "use" of weapons of mass destruction "on or in the moon" mentioned in Article 3(3) of the Moon Treaty and not in Article IV(1) of the Space Treaty is covered by Article IV(2) of the Space Treaty, first sentence. See also notes 62 above and 75 below.

74. On the use of nuclear weapons, see the rather hesitant tone of the International Court of Justice's Advisory Opinion in *Legality of the Use of Nuclear Weapons*, ICJ Rep. 1996, p. 66.

75. Insofar as outer void space is concerned, for parties which are parties to the Partial Test Ban Treaty (see note 26 above and text thereto), the Treaty may be applicable. It may, however, possibly be argued that the Treaty applies only to the *test* of nuclear weapons and devices, but not to their use. The Treaty may further arguably be said to apply to not only outer void space, but also celestial bodies, even though, as previously mentioned, the usage at the time was to speak of outer space *and* celestial bodies. However, Article IV(2) of the Space Treaty and Article 3 of the Moon Treaty are obviously applicable. Article 3(3) of the Moon Treaty, by forbidding the placing of space objects carrying nuclear weapons or any other kinds of weapons of mass destruction in a "trajectory to . . . the moon," may possibly prevent the use of such weapons against targets on the moon in the sense the word moon is used in the Moon Treaty. Moreover, the prohibition of "any threat or use of force" on the moon may also prevent the *use* of any weapon on the moon, even though the specific prohibition of "the testing of any type of weapon" in Article 3(4) of the Moon Treaty, and Article IV(2) of the Space Treaty may give rise to the same argument as that just mentioned regarding the Partial Test Ban Treaty, that they apply only to testing, but not actual use. Finally, the question remains as to whether the reservation of celestial bodies for use for exclusively peaceful purposes in both treaties means that no weapon whatsoever may be used against any target on celestial bodies from either the earth or outer void space, however evil, illegal, and even criminal the target may be, although in such a case it can be argued that the assault would not constitute a "use" of the celestial body, whilst the target most probably would. However, under neither treaty may such an assault be mounted from another celestial body other than the earth. See further CHENG, *op. cit.* in note 6 above, Ch. 20: The Military Use of Outer Space and International Law, s. III.B(viii), at pp. 529–532. See also, e.g., Jasani, *loc. cit.* in note 23 above, at pp. 222–244, and I. V. Vlasic, *Space Law and the Military Applications of Space Technology*, *loc. cit.* in note 4 above, on some of the current military uses of outer void space. As mentioned by Professor Vlasic, the United States in the 1991 Gulf War had at its disposal seven imaging satellites, making an average of 12 passes over the theatre of operations each day, between 15 and 20 signals intelligence satellites, intercepting radio communications of the Iraqis, three defence weather satellites, at least four military communications satellites and up to 16 "Navstar" Global Positioning System (GPS) satellites, assisted by images acquired by the French SPOT and U.S. Landsat civilian remote sensing satellites which were used to update maps for the operational forces (at p. 388).

76. Opinions of Commissioners, October 1930 to July 1931, p. 207, at pp. 265–266.

77. 55 DEPT. OF STATE BULL. (1966), p. 952; statement released on 8 December 1966, when agreement was actually reached between the major space Powers.

78. *Cf.*, e.g., V. Kopal, *Concerns Expressed in the United Nations over the Military Uses of Outer Space*, in Jasentuliyana, (ed.), *op. cit.* in note 23 above, p. 59, and several other papers in the same volume. See also José Monserrat Filho, *Total Militarization of Space and Space Law: The Future of the Article IV of the '67 Outer Space Treaty*, 40 SPACE LAW COLLOQUIUM (1997), pp. 356–369.

79. See CHENG, *op. cit.* in note 6 above, Epilogue, s. IV: Conditions Governing International Rule-Making, pp. 671–697.

80. UN Publ. Sales No. E.83.V.5.

81. On the formation of rules of general international law, see B. Cheng, *Custom: The Future of General State Practice In a Divided World*, in R. St. J. MacDonald and D. M. Johnston (eds.), THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW, The Hague: Martinus Nijhoff (1983), pp. 513–554. N.B.: pp. 545 and 546 are in the wrong order and have been wrongly paginated.

82. See THE TIMES LONDON (28 May 1997), p. 1, col. 1: *Russia and NATO Bury the Cold War*, reporting the signing by NATO and Russia at Paris on 27 May 1997 of the Founding Act on Mutual Relations, Co-operation and Security, and the surprise promise by President Yeltsin afterwards that Russian warheads would not be targeted at the signatories to the Founding Act. For text of the Founding Act, see 36 ILM (1997) 1006.

IV

On Genocide

Anthony D'Amato

I'D LIKE TO BE MENTIONED, AT LEAST IN A FOOTNOTE, in the biography someone will write someday about that great gentleman and scholar, Leslie C. Green. A number of years ago, when Professor Green was not well known in the United States, he submitted some of his essays on international law to Transnational Publishers, Inc. As a member of that board, the publisher, Heike Fenton, called me up and asked for my appraisal of a book containing these essays. She let me know that it would probably be a losing proposition, since essay collections (at that time at least) hardly ever repaid their cost of publication. I had an idea that could suit her and Professor Green at the same time. I suggested to Heike that she might want to consider going back to Professor Green and saying that although she would not be able to publish the particular essays he had submitted to her, she would be very interested if he would submit all the essays he had written on the law of war. Of course, I was familiar with these essays, and I thought that their collection in a single volume might work from a publisher's standpoint.

The rest is history. Leslie Green graciously complied by submitting a number of his essays on the law of war, resulting in the book *Essays on the Modern Law of War*. Its fame and fortune grew, and it is now in its second edition. It has often been used as a text in military academies and undoubtedly influenced the Naval War College to extend to Professor Green an invitation to become a holder of the Stockton Chair—unusual for a scholar who is not an American citizen.

Professor Green has served with distinction as the Stockton Professor of International Law at the Naval War College and has continued to contribute to the development of the law of war as a leading scholar in that field. I feel lucky to have helped steer his (scholar)ship in the right direction at the right time.

I am contributing some thoughts about genocide to this collection of essays in honor of my dear friend Leslie Green, precisely because genocide is not a topic that appears among his many essays on the law of war. If it did, I would feel preempted. Of course, Professor Green has talked about genocide in his discussions of the laws of war, including crimes against humanity (it would have been astounding if he had not done so). There is nothing he has said about the topic that I could criticize even if I were bold enough to do so. But because he has not contributed a specific essay on the topic, I submit the following essay as a compliment (complement) to his works. Of course, in a way it is too soon to write about genocide. The law on that subject is developing rapidly as the result of the work of the two ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda. In addition, various national courts have recently had occasion to consider charges of genocide. If I were to attempt here an essay that dealt with all the judicial glosses to date on the crime of genocide, it would be outdated the minute it is published. Thus, I will confine myself to considerations of a greater generality. I hope these can help illuminate two major underlying factors in the recent and unique international crime of genocide, factors that will undoubtedly persist as a theme in the many judicial developments in the near future that will elaborate upon, specify, and further explicate the crime of genocide as applied to particular cases.

The Need for a Coherent Definition

The term "genocide" is popular with journalists because it seems to give an immediate and sensational dimension to their reports. Its overuse extends to academics who see no need to be careful about the terms they use. For example, the well-known political scientist Rudolph Rummel cited as instances of "genocide" (1) "the denial of ethnic Hawaiian culture by the American-run public school system in Hawaii"; (2) "government policies letting one race adopt the children of another race"; (3) "South African Apartheid"; and (4) "the Jewish Holocaust."[1] As early as 1951, Paul Robeson and William Patterson submitted a petition to the United Nations charging "genocidal crimes of federal, state, and municipal governments in the United States against 15,000,000 African-Americans."[2] Clearly, the term "genocide" can be stretched so far as to lose any distinctive or coherent meaning.

Coherence is a virtue not just in legal definitions, but in enabling us to think about the relation of any given term to all nearby terms. Ken Kress writes:

> An idea or theory is coherent if it hangs or fits together. If its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single, unified viewpoint. An idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another.[3]

Coherence is important because it relates to the core responsibility of the judicial enterprise.[4] Ronald Dworkin has argued forcefully for the overarching imperative of "law as integrity,"[5] which

> requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.[6]

Professor Dworkin's reference in this quotation to a "coherent set of principles" is later expanded:

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation.[7]

These general propositions take on special significance when applied to the judicial definition of genocide, the world's most heinous crime. Genocide is ancient in fact and new in definition. In Biblical times there were acts of deliberate destruction of national, ethnical, racial, or religious groups as such. The Turkish slaughter of Armenians in 1915 is now widely regarded as genocide. But the precise term was coined by Raphael Lemkin in 1944.[8] Lemkin used the new word loosely, including within its scope attacks on political and social institutions, attacks on culture and language, and even attacks on national feelings. His use of the word was so broad that it did not necessarily include the killing or harming of persons.

However, when the horrors of the Holocaust gradually became known to the public at the end of the Second World War, the General Assembly of the United Nations passed a resolution affirming genocide to be a crime under international law. Included in the 1946 resolution were acts of destruction against groups on "religious, racial, political, or any other grounds."[9] Although the UN's definition was narrower than Lemkin's, the inclusion of "political" and "or any other"

grounds still made it overly broad. For example, any civil war would automatically constitute genocide because each side would be attempting to destroy the other in order to take over the government—in short, for political reasons. And by adding "or any other grounds," genocide would apply to any war at all.

If in 1944 the concept of genocide was vastly overinclusive, and in 1946 plainly overinclusive, in 1948 the definition was finally pinned down. Not only did the Convention for the Prevention and Punishment of Genocide[10] present an internationally binding definition, but the words of that definition have been repeated verbatim many times in constitutive instruments of ad hoc international criminal tribunals, the statute of the proposed International Criminal Court, and in various judicial decisions in national as well as international tribunals:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

This language formulated in 1948 was well-chosen. Even though many of the delegates to the drafting of the Genocide Convention had their own agendas to promote, the result of their deliberations is a definition that is remarkably coherent in the sense I have been discussing. This is not to say that the definition is without difficulties; hardly any definition can ever be said to be perfect. Yet with this definition as a reference point, let us consider some of the specific issues that have caused some problems in relation to the coherency of the crime of genocide: "group," "specific intent," and the relation to "ethnic cleansing." Of course, other issues will arise in cases yet unlitigated, but as of the time of this writing, these three topics seem most salient.

Restrictions as to Group Membership

The most immediately notable restriction in the 1948 definition of "genocide" is the exclusion of political groups and the concomitant decision not to make the idea of groups open-ended (in contrast to the 1946 resolution's inclusion of "or any other grounds"). Why were political groups excluded in the

1948 Convention even though they had been included in the 1946 resolution? A sufficient historical reason is that the Soviet Union insisted upon the exclusion of political groups, probably out of a well-founded fear that Josef Stalin could be accused of genocide when he presided over the largest political slaughter in history in the 1930s. But there is a much better logical reason for the exclusion of membership in political groups: such membership is voluntary. Thus, a person who joins such a group in a sense controls her own destiny. To be sure, if she is killed because she is a member of a particular political group, it is still murder. From the international point of view, if civilians are killed because of their membership in a political group (or any group at all), it is still a crime against humanity or (if the killing occurs during armed conflict) a war crime.

"Genocide," to have standing as a separate crime, must be distinguishable from group destruction. The framers of the Geneva Convention settled on a definition that appears to have singled out victims of genocide as *involuntary* members of a group. There is something universally felt to be particularly heinous in murder based on a group affiliation that the victim could not have avoided. Thus, of the four groups listed in the Genocide Convention, it is at the outset clear that membership in "racial" or "ethnic" groups is involuntary; a child is born into such groups by parentage. The "national" group is for the most part involuntary, as it is conferred by birth. In a small percentage of cases people may be able to emigrate and obtain a new nationality, but for the vast majority of people their nationality effectively remains involuntary. Only "religion," of the four categories, is of mixed voluntariness. Most people are born into a religion, and therefore their religious status is involuntary into their teenage years. Later, they may "drop out" or affirmatively join a different religious group. Yet they may be targeted in a genocidal campaign because of the religion into which they were born. During the Yugoslavian civil wars in the past decade, where in some provinces Serbs were in the minority and in other provinces Muslims were the minority group, group membership was identified in many cases by the victim's name. Under the Islamic religion, children are given one of a distinctive list of Muslim names, and in former Yugoslavia at least, non-Muslim children were not given any of those Muslim names. Hence, the name itself was enough to identify a person as belonging to the religious minority or majority in any given town. If a minority person stated that he had changed his religion, he probably would not have been believed by the persecutors.

An instructive analogue can be drawn between genocide and the recent legislative phenomenon of "hate crimes" in the domestic law of several countries. A hate crime is generally defined as a crime against a person because that

person is a member of a group that the perpetrator hates. Although the underlying crime is of course punishable under the criminal law, the penalty for the crime is enhanced if it constitutes a hate crime. In a recent shocking case in the United States, a black teenager was walking along on the sidewalk of a white Northern suburb, minding his own business, when he was suddenly attacked and killed by a white teenage gang. The gang had simply determined to kill the next black person who walked by. Although the murder itself was punishable by life imprisonment, the fact that it was motivated by a hatred of the group to which the victim belonged led the sentencing judge to deny the possibility of parole.

Many criminologists and lay observers have lobbied against the enactment of hate crimes on the deceptively simple ground that "a crime is a crime, regardless of motive." To the contrary, I think it is a civilizational improvement to deter especially the crimes and harms committed against people just because of their status as involuntary members of a group. To be sure, this kind of "discrimination" has been around since Biblical times, and in the past few centuries the Jews in many countries have been the special target of such discriminatory maltreatment. The Third Reich brought this discrimination to a legislative focus, and if any "good" can be said to have come of the Holocaust, it can only be an enduring legacy that genocide under international law and "hate crimes" under domestic law are a coherent category all their own—a crime more heinous than the underlying criminal act itself.

Specific Intent

There is no doubt that, from a prosecutor's point of view, genocide is a harder crime to prove than most international violations of humanitarian law. It is difficult for the prosecutor to discharge the burden of proving a specific intent to commit genocide. Contrary to popular belief, this difficulty is not due to the fact that genocide is a more serious crime with more serious consequences. Rather, it relates to the fact that motive is a specific intent of the crime itself. Thus, in its opening clause, the 1948 Convention uses the word "intent," and each of the enumerated actions begins with the language of intent—"killing," "causing," "deliberately inflicting," "imposing measures intended to," and "forcibly transferring."

Defense attorneys will typically argue that in order to prove genocidal intent, the prosecutor must present evidence of a "plan" of genocide. This might consist of transcripts of a conspiratorial meeting, or a military directive, or some other evidence of a prearranged policy to destroy a national, ethnical, religious,

or racial group. Presumably these defense attorneys have a mental image like that of the Wanassee Conference depicted in a chilling film of that same name. The movie shows the meeting that took place in a Berlin suburb in January 1942 in which Nazi leaders calmly discussed the complex plans of the "Final Solution." The movie, matching in running time the actual conference, was based on minutes taken at the conference itself and recovered when Germany surrendered in 1945.

I doubt that any international criminal court will accept a defense request that the prosecutor prove a "plan" based on actual minutes or documents of such a meeting as the Wanassee Conference. As a practical matter, it is highly unlikely that any minutes or records will ever be taken again of a conspiratorial meeting to commit genocide; the threat to the participants of future prosecution based on those minutes or documents is sufficient to rule out any such evidentiary compilation in the future. Indeed, a plausible hypothesis based on evidence coming out of the civil wars in Yugoslavia in the 1990s may be that some political and military leaders may have deliberately created records, documents, minutes, and directives that were directly contrary to their verbal instructions. It would be contrary to rational self-interest for any political or military commander these days to expose himself or herself to future prosecution based on command responsibility. Instead, "plausible denial" might be created by giving face-to-face verbal orders that are contrary to the "paper record" of directives and documents that forbid recourse to violations of international humanitarian law.

But even apart from sophisticated cover-ups and deniability, the need for a plan is overstated by my hypothetical defense counsel. If a person intends in his own mind to harm or kill another person based on the victim's membership in one of the enumerated groups, that is sufficient for a charge of genocide. Perhaps if it is a single murder a prosecutor would not prosecute the defendant for "genocide" but only for murder; however, if it is part of an event where the defendant and others are killing innocent people based on the victims' group membership, or if the defendant himself is killing a number of people for that reason, then the charge of "genocide" is in my view supportable.

A more nuanced problem concerning the proof of specific motive to commit genocide came up in the course of the preliminary briefing and truncated trial of Dr. Milan Kovacevic at the International Criminal Tribunal for the Former Yugoslavia. The prosecutor, Michael Keegan, cited public speeches and television appearances by Dr. Kovacevic in which he urged Muslim citizens of Prijedor to leave the town and go elsewhere because, as he put it, Serbs and Muslims cannot live peaceably together. These speeches occurred some

months prior to the civil war that raged through Prijedor, resulting in a takeover by the Serbs and the killing, raping, and forcible evacuation of most of the Muslim population. Dr. Kovacevic was charged with genocide—the first Serb to be so charged by the Tribunal. The question was whether his public speeches constituted evidence of genocidal intent sufficient to satisfy the requisites of the crime.[11]

As the lead counsel of Dr. Kovacevic's defense team, I met alone with Prosecutor Keegan to discuss plea-bargaining possibilities. He seemed quite convinced that my client's public speeches and television appearances constituted proof of the specific intent to commit genocide. The indictment against Dr. Kovacevic did not charge him with any genocidal decisions or acts; it simply pointed to the existence of the speeches and television tapes and linked them to Dr. Kovacevic's political position as deputy mayor of the town of Prijedor. I asked Mr. Keegan whether the prosecution had any evidence of any directive signed by my client that ordered the commission of any harm toward any persons in Prijedor, and Mr. Keegan said he had no such evidence. In fact, there was no evidence that my client did anything except the making of public speeches and the signing of routine municipal orders (such as the hour for turning off street lights, decisions as to water supply, and the like).

As a plea bargain, Mr. Keegan would consider a reduced sentence, but was not willing to discuss changing the charge of genocide to a lesser war crimes charge. I argued that my client, as the director of the Prijedor general hospital, was a man of healing and not a man of killing. In addition, Dr. Kovacevic invariably treated Serbian and Muslim patients equally, and he invited to join his staff at the hospital a number of Muslim doctors who had been the victims of prejudice in other Serbian towns. But Mr. Keegan replied with the image of the Nazi "death doctor" who may have been a man of healing but who did not hesitate to carry out inhuman and deadly experiments on Jewish victims. Our meeting was a standstill; we were too far apart for any plea bargain.

I decided that Mr. Keegan's point was well taken. If he could demonstrate a genocidal intent from the inflammatory speeches that Dr. Kovacevic made, it would be very difficult for me to rebut that intent by testimonials as to Dr. Kovacevic's character as a man of healing. Yet I was convinced from the voluminous evidence and interviews with his family and friends that Dr. Kovacevic would never intentionally harm anyone. Whether I was right or wrong about this was not something I could know for sure, but I was sufficiently convinced of it to throw all my energies into a vigorous defense of this man. I would never argue to the Tribunal that heinous crimes did not occur, or that the Serbs were justified because of historical brutalities against them to commit such crimes.

Rather, my entire defense would consist of the specific innocence of my client to the charge of genocide.

This brings me to my client's speeches and television interviews which, I was sure, would have a highly negative emotional impact upon the judges of the Tribunal when they were read out in court or shown on the courtroom television monitors. They suggested that Dr. Kovacevic was something of a firebrand and idealogue, one who could be held guilty of contributing to a negative atmosphere in Prijedor that made the subsequent attack by the Serbian army and paramilitaries all the more effective and brutal. I was certain that the prosecutor would provide the requisite rhetorical underpinning to the speeches and interviews, leaving me with an uphill battle to explain why those speeches and interviews did not constitute evidence of a specific motive of genocide.

I believed that there was a completely different way to interpret my client's speeches and television interviews. He was doing his best to exhort the Muslim population of Prijedor to leave town before it was too late. Although the Muslim and Serb population in the town was at that time practically equal (at close to 43 percent each), Dr. Kovacevic knew from his position as deputy mayor that the strategic importance of the Prijedor corridor from the Serbian military point of view made inevitable a military takeover by the Serbian army. And indeed that is what happened in April 1992, followed by forced evacuations of Muslims and internment in detention centers, often under brutal conditions. Some Muslims were tortured and killed in those camps.

I go into this level of detail to show that two diametrically opposite interpretations are possible of the same speeches by a public official such as Dr. Kovacevic. He could either have been contributing to an atmosphere of hatred or doing his best to protect people whom he knew would inevitably be victims of a forcible military takeover. How this would have played out at trial we'll never know; Dr. Kovacevic died of an aneurism in the detention center at The Hague after two weeks of his trial. How indeed would the prosecutor have proved specific intent? To be sure, Dr. Kovacevic never said to the Muslims in his audience that they would be better off getting out of town. The prosecutor would have underlined this omission. Yet a public official is not free to say anything he desires in public. If he had put the matter so plainly to the citizens of Prijedor, he would have been accused of not doing his job properly as deputy mayor. He would have been criticized for trying to get rid of half the population of the city instead of working with them and establishing conditions of peace and mutual trust. Thus, knowing what he knew about Serbian military plans, he could only speak in a kind of code. He said things such as "The Serbs and Muslims can never live in peace together even in a hundred years." Coming

from a Serb, this kind of talk could signal to the Muslims in his audience, "get out of town while you can." But the opposite interpretation is also possible: that Dr. Kovacevic was contributing to an atmosphere of hatred. Surely if he had himself acted overtly—such as signing an order for the destruction or harm or even incarceration of Muslim citizens, or himself participating in any acts of torture or murder—then his public speeches would have been sufficient, in my opinion, to satisfy the prosecution's burden to prove genocide. But without any overt act, with only the attribution of genocide to Dr. Kovacevic by virtue of his position as deputy mayor of the town, then the interpretation of his speeches as amounting to a specific genocidal motive would not appear to me to satisfy the prosecution's burden of proof. [12]

The foregoing dilemma of interpretation is, I suggest, often applicable to officials accused of participating in genocide. An individual official may have been doing his or her best to mitigate the evil, to spare as many lives as possible. It is easy after the fact for us to say that such an official should simply have resigned. But in a situation where the official is bucking a pervasive tide, resignation would simply lead to his or her replacement by a less principled person. The argument is a logical one: if a person of principle is morally required to resign rather than participate in a genocidal plan (a plan that she would do her best to frustrate if she stayed in office), then if she is replaced by another person of equal or higher principles, the same logic would compel the latter to resign as well. Hence, resignation out of moral scruples will tend to lead to replacement by persons who have no moral scruples. Accordingly, courts should be alert to these individual moral dilemmas and not be too ready to condemn any official "associated" with a genocidal plan (or other violations of humanitarian war) as legally complicitous with the crime. To do so would be to swing too far in a counterproductive direction. The requirement of specific intent in the definition of genocide should be proven by convincing evidence even if it may result in a protracted trial, due to the danger (of which the Kovacevic case may be an example) not only of convicting an innocent person but of convicting a moral hero.

Conclusion: Coherence and Distinctiveness

The crime of genocide is the newest international crime. It must be kept as a separate, distinct, and coherent concept. It is the first truly subjective crime; all other crime, though requiring *mens rea,* requires only that the defendant consciously committed the criminal acts. In the case of genocide, however, the underlying criminal acts are no different from the acts required to prove ordinary

crimes. The difference is one of motive. What is being punished by the crime of genocide is the selection of victims according to their involuntary membership in four kinds of groups: national, ethnical, racial, or religious. The distinctiveness of this new crime turns on how seriously prosecutors, defense counsel, and judges in future cases take and examine evidence of a defendant's motives.

The coherence of the crime of genocide is partly a result of taking specific motive seriously, but also a result of keeping the four enumerated groups clearly in mind. To extend the crime of genocide to killings—even mass killings—that are not based on membership in the four groups is to cheapen the concept and eventually render it redundant. If genocide, as I have argued, constitutes an advance in the development of human rights in our civilization, it ought to be interpreted and applied in accordance with a coherent and distinct interpretation of the remarkable language defining the crime that was brought into being by the Genocide Convention.

Notes

1. Rudolf J. Rummel, *The Holocaust in Comparative and Historical Perspective*, Conference on The "Other" Threat: Demonization and Anti-Semitism, Hebrew University of Jerusalem, June 12, 1995.

2. CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (1951).

3. Ken Kress, *Coherence*, in Dennis Patterson, ed., A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533 (Blackwell, 1996). He adds: "[C]oherence theories of *law* have a special claim on us. The idea that law is a seamless web, that it is holistic, that precedents have a gravitational force throughout the law, that argument by analogy has an especial significance in law, and the principle that all are equal under the law, provide strong *prima facie* support for a coherence theory of law." *Id.* at 536.

4. The responsibility of the judicial enterprise in this regard may be contrasted with the freedom of legislatures. In the absence of a constitutional imperative requiring legislative rationality or coherence, a legislature is theoretically free to enact statutes that conflict with or contradict one another. Even so, a court faced with inconsistent or conflicting legislation will typically apply various *judicial* tools of coherence—e.g., a rule that a more recently enacted statute supersedes a prior statute with which it conflicts.

5. RONALD DWORKIN, LAW'S EMPIRE 167 (Harvard Univ. Press, 1986).

6. *Id.* at 217.

7. *Id.* at 219.

8. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

9. GA Res. 96(I), UN Doc. A/64/Add.1 (1946).

10. Convention on the Prevention and Punishment of the Crime of Genocide, UNTS No. 1021 (1951). The term "genocide" had appeared in the indictments of the Nazi defendants at Nuremberg, but not in the Charter of the International Military Tribunal nor in the opinions of the Tribunal.

11. I omit here the critical issue of whether Dr. Kovacevic was part of the authority and command structure of the town such that any genocidal acts could be attributed to him; i.e., did he give any such commands, or did he fail to stop any genocidal acts when he was in a position to do so? Because Dr. Kovacevic died while in detention at The Hague, this factual issue did not go beyond a preliminary exploration.

12. Of course, the reader should discount any bias in this argument due to my position as Dr. Kovacevic's lawyer. I've disclosed that relationship and trust that my arguments will be read on their merits if any.

V

The Initiation, Suspension, and Termination of War

Yoram Dinstein

THIS ESSAY WILL DEAL WITH THE PROGRESSION OF HOSTILITIES in an inter-State war.[1] More specifically, the various modes for the initiation, suspension and termination of hostilities will be addressed.

I. The Initiation of War

(a) War in the Technical Sense

War in the technical sense starts with a declaration of war. A declaration of war is a unilateral and formal announcement, issued by the constitutionally competent authority of a State, setting the exact point at which war begins with a designated enemy (or enemies). Notwithstanding its unilateral character, a declaration of war "brings about a state of war irrespective of the attitude of the state to which it is addressed."[2]

According to Article 1 of Hague Convention (III) of 1907 Relative to the Commencement of Hostilities,

> The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a

declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war.[3]

Article 1 explicitly mentions that reasons for a declaration of war must be given. But the causes of wars cannot be seriously established on the basis of a self-serving unilateral declaration. The main value of a declaration of war is derived from the fact that it pinpoints the precise time when a state of war enters into force.

An ultimatum may take one of two forms: (i) a threat that, if certain demands are not complied with, hostilities will be initiated; or (ii) a warning that, unless specific conditions are fulfilled by a designated deadline, war will commence *ipso facto*.[4] Article 1 requires an ultimatum of the second type, incorporating a conditional declaration of war. Britain and France dispatched such ultimatums to Germany in September 1939.[5]An ultimatum of the first category is not deemed sufficient by itself under Article 1, and it must be followed by a formal declaration of war. Only the subsequent declaration, rather than the preliminary threat, would be in conformity with Hague Convention (III).[6]

An ultimatum, almost by definition, entails a lapse of time (brief as it may be) providing an opportunity for compliance with the demands made. Hostilities are not supposed to begin unless that period has expired and the response is considered unsatisfactory.

Insofar as an outright declaration of war is concerned, Hague Convention (III) does not insist on any meaningful interval before combat starts.[7] Article 1 does prescribe that the declaration must be made "previous" to the commencement of hostilities, and even refers to it (on a par with an ultimatum) as a warning. However, it is significant that a proposed amendment of the Article, to the effect that 24 hours must pass between the issuance of the declaration and the outbreak of hostilities, was defeated in the course of the Hague Conference.[8] The upshot is that fire may be opened almost immediately after the announcement has been made.[9] A declaration of war under the Convention constitutes merely a formal measure, and it does not necessarily deny the advantage of surprise to the attacking State.

Hague Convention (III) cannot be considered a reflection of customary international law.[10] Before the Convention, most wars were precipitated without a prelude in the form of a declaration of war.[11] The practice of States has not changed substantially since the conclusion of the Convention. Some hostilities are preceded by declarations of war, but this is the exception rather than the rule. There are many reasons for the contemporary reluctance to engage in a declaration of war. Some of these reasons are pragmatic, stemming, for

instance, from a desire to avert the automatic application of the (international no less than domestic) laws of neutrality activated during war. The paucity of declarations of war at the present juncture is also linked, paradoxically, to the illegality and criminality of wars of aggression. The contemporary injunction against war has not yet eliminated its incidence. Nevertheless, the prohibition has definitely created a psychological environment in which belligerents prefer using a different terminology, such as "international armed conflict."[12] Since States are indisposed to employ the expression "war," they naturally eschew declarations of "war."

Even when a declaration of war is issued, in many instances this is done after the first strike, so that the act constitutes no more than an acknowledgement of a state of war already in progress; occasionally, the declaration is articulated by the State under attack, and it merely records that the enemy has launched war.[13] Of course, a post-attack declaration of war (by either party) is not in accordance with Hague Convention (III).

When enunciated, a declaration of war does not require "any particular *form*," although it must be authorized by a competent organ of the State.[14] Lack of prescribed form should not be confused with rhetorical flourish. It must be appreciated that not every bellicose turn of phrase in a harangue delivered by a Head of State before a public gathering can be deemed a declaration of war. In the *Dalmia Cement* International Chamber of Commerce arbitration of 1976, P. Lalive held that a broadcast aired by the President of Pakistan in 1965—in which a statement was made that Pakistan and India were "at war"—did not amount to a declaration of war pursuant to international law, inasmuch as it "in no way was, or purported to be, a 'communication' to India."[15] The insistence on the transmittal of an official communication to the antagonist may be exaggerated, but surely a declaration of war—in whatever form—must (at the very least) be publicly announced in an explicit and lucid manner. One cannot accept the assertion by a United States Federal District Court in 1958, in the *Ulysses* case, that Egypt had declared war (consonant with international law) against Britain and France, in November 1956, in a public speech made by President Nasser before a large crowd in Cairo.[16] The Court admitted that the speech had been misunderstood or disregarded at the time, but it relied on the fact that a subsequent official Egyptian statement confirmed that it had been intended as a declaration of war.[17] However, the very misunderstanding of the purport of the speech at the point of delivery weakens the Court's position. President Nasser's speech was simply "neither definite nor unequivocal" enough as a declaration of war.[18] If it is to have any value at all, a declaration of war must impart an unambiguous signal to all concerned.

(b) War in the Material Sense

War in the material sense unfolds irrespective of any formal steps. Its occurrence is contingent only on the actual outbreak of comprehensive hostilities between two or more States. Hence, war in the material sense commences with an invasion or another mode of an armed attack. In the past, an air raid (*à la* Pearl Harbor) or an artillery bombardment would be emblematic. In the future, a devastating computer network attack (with massive lethal consequences) is equally likely to occur.[19] Actual hostilities may begin (i) without a declaration of war ever being made; (ii) prior to a declaration of war, which follows afterwards; (iii) simultaneously with a declaration of war; or (iv) subsequent to a declaration of war. Moreover, war in the material sense (*viz* active hostilities) may not commence at all, notwithstanding a declaration of war. This is what transpired between a number of Latin American countries and Germany during World War II.[20]

When the outbreak of comprehensive hostilities does not coincide with a declaration of war (especially when the declaration lags behind the inception of the actual fighting and, more particularly, when it is issued by the State under attack), there is likely to be some doubt as to whether war was triggered by the action or by the declaration.[21] In such a setting, it is quite possible that different dates for the outbreak of the war will be used for disparate purposes, such as the status of enemy nationals and the application of neutrality laws.[22]

Article 2 of Hague Convention (III)[23] stipulates that the existence of a state of war must be notified to neutral States without delay, and it shall not take effect in regard to them as long as the notification has not been received. All the same, the article lays down that, if a neutral country is in fact aware of the state of war, it cannot rely on the absence of notification. Under modern conditions, since a state of war habitually gets wide coverage in the news media, any special notification to neutrals may well be redundant. Still, should there be any doubt whether the hostilities qualify as an all-out war or are short of war, the communication to neutral countries (or the absence thereof) is of practical importance even in the present day.

II. The Termination of War

(a) Treaties of Peace

i. The Significance of a Treaty of Peace

The classical and ideal method for the termination of inter-State war is the conclusion of a treaty of peace between the belligerents. Traditionally, treaties

of peace have had an extraordinary impact on the evolution of international law, from Westphalia (1648) to Versailles (1919). The series of treaties of peace signed at the close of the World War I even encompassed, in their first part (Articles 1-26), the Covenant of the League of Nations[24] (the predecessor of the United Nations). Despite their unique political standing, treaties of peace are no different juridically from other types of inter-State agreements, and they are governed by the general law of treaties.[25]

After World War II, and as a direct consequence of the "Cold War," no treaty of peace could be reached with the principal vanquished country (Germany), which was divided for 45 years. It was only in 1990, following a sea change in world politics, that a Treaty on the Final Settlement with Respect to Germany[26] could be formulated. The Preamble of this instrument records the fact that the peoples of the contracting parties (the United States, the USSR, the United Kingdom, France and the two Germanies) "have been living together in peace since 1945."[27] In Article 1, a united Germany (comprising the territories of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin) is established, and "the definitive nature" of its borders—especially with Poland—is confirmed.[28] The 1990 Treaty may be deemed a final peace settlement for Germany.[29]

Treaties of Peace with five minor Axis countries—Italy, Bulgaria, Hungary, Romania, and Finland—were concluded already in 1947 at Paris.[30] The Western Allied Powers arrived at a Treaty of Peace with Japan in San Francisco in 1951.[31] The USSR was not a contracting party to the latter instrument. Instead, a Joint Declaration was adopted by the USSR and Japan, in 1956, whereby the state of war between the two parties was brought to an end.[32] The Joint Declaration sets forth that negotiations aimed at a treaty of peace will continue.[33] However, since it proclaims that the state of war is ended, and that peace, friendship, and good neighborly relations are restored,[34] including diplomatic and consular relations,[35] the Declaration already attains most of the objectives of an ordinary treaty of peace.

In the international armed conflicts of the post-World War II era, States commonly try to avoid not only the term "war" but also its corollary "treaty of peace." Two outstanding exceptions are the Treaties of Peace concluded by Israel with Egypt (in 1979),[36] and with Jordan (in 1994).[37]

The hallmark of a treaty of peace is that it both (i) puts an end to a preexisting state of war and (ii) introduces or restores amicable relations between the parties. Two temporal matters are noteworthy in this context. The first relates to the fixed point in time in which the conclusion of war is effected (the *terminus ad quem*). Upon signing a treaty of peace, the parties—at

their discretion—may choose to employ language indicating that the termination of the war has either occurred already in the past, is happening at the present moment, or will take place in the future. The Israeli practice illustrates all three options. In the Treaty of Peace with Egypt, Article I(1) resorts to future language:

> The state of war between the Parties will be terminated and peace will be established between them upon the exchange of instruments of ratification of this Treaty.[38]

That is to say, the state of war between Israel and Egypt continued even after the signature of the Treaty of Peace (in March 1979), and its termination occurred only upon the subsequent exchange of the instruments of ratification (the following month).

A different legal technique characterized the peace process between Israel and Jordan. Article 1 of the Treaty of Peace between the two countries (signed at the Arava in October 1994) proclaims:

> Peace is hereby established between the State of Israel and the Hashemite Kingdom of Jordan (the "Parties") effective from the exchange of the instruments of ratification of this Treaty.[39]

But as for the state of war, the Preamble of the Treaty reads:

> Bearing in mind that in their Washington Declaration of 25th July, 1994, they [Israel and Jordan] declared the termination of the state of belligerency between them.[40]

The Washington Declaration of July 1994 incorporates the following clause:

> The long conflict between the two states is now coming to an end. In this spirit, the state of belligerency between Israel and Jordan has been terminated.[41]

The upshot is that, whereas peace between Israel and Jordan was established only upon the ratification of the Arava Treaty of October 1994, the state of war between the two countries had ended already in July of that year (the date of the Washington Declaration, which was not subject to ratification).

Unlike the future tense (used in the Treaty of Peace with Egypt) and the present tense (employed in the Washington Declaration with Jordan), there is also recourse to the past tense in the Israeli practice. This occurred in the abortive Treaty of Peace between Israel and Lebanon,[42] which was signed in May

1983 (at Qiryat Shemona and Khaldeh) but never entered into force since Lebanon declined to ratify it.[43] The instrument is significant only because it sets forth in Article 1(2) that

> The Parties confirm that the state of war between Israel and Lebanon has been terminated and no longer exists.[44]

It is clear that at Khaldeh and Qiryat Shemona, Lebanon and Israel did not terminate the war between them at the moment of signature (using the present tense) or undertake to end it upon ratification (in the future): they confirmed that the state of war had already ended at some indeterminate stage (in the past), and that it therefore no longer existed. In contradistinction to the termination of war in the present or in the future—which, in both instances, is a constitutive step—the notation that the war has already ended in the past is merely a declaratory measure.

The second temporal matter is that the dual cardinal aspects of the establishment of peace—the termination of war and the normalization of relations—need not be synchronized. Thus, under Article I of the Egyptian-Israeli Treaty of Peace, while the state of war between the parties is to be terminated (as shown) upon ratification, "normal and friendly relations" are to be effected only after a further interim period of three years.[45] The gradual time-table is a marginal matter. The decisive element is that a treaty of peace is not just a negative instrument (in the sense of the negation of war); it is also a positive document (regulating the normalization of friendly relations between the former belligerents).[46] Normalization produces repercussions in diverse areas, ranging from diplomatic to cultural exchanges, from navigation to aviation, and from trade to scientific cooperation. The quintessence of a treaty of peace is writing *finis* not only to the armed phase of the conflict between the parties, but to the conflict as a whole. Hence, in appropriate circumstances, the conclusion of a treaty of peace constitutes an implied recognition of a contracting party as a State.[47]

Patently, a treaty of peace is no guarantee of lasting peace. If the root causes of the war are not eradicated, another armed conflict may erupt in time. In addition, the same treaty of peace which closes one war can lay the foundation for the next one: the Treaty of Versailles is a prime example of this deplorable state of affairs. But notwithstanding any factual nexus linking the two periods of hostilities, the interjection of a treaty of peace signifies that legally they must be viewed as separate wars. Of course, new bones of contention, not foreseen at the point of signature of a treaty of peace, may also become catalysts to another

war. When a treaty of peace is acclaimed as a "final" settlement, and statesmen indulge in high-sounding prognostications as to its power of endurance, it is advisable to recall that most wars commence between parties that have earlier engaged themselves in treaties of peace. The life expectancy of an average treaty of peace does not necessarily exceed the span of a generation or two. Each generation must work out for itself a fresh formula for peaceful coexistence.

ii. Peace Preliminaries

Prior to the entry into force of a definitive treaty of peace, the parties may agree on preliminaries of peace. Such a procedure generates the following results:

a. In the past, the peace preliminaries themselves might have brought hostilities to an end,[48] whereas the ultimate treaty of peace would focus on the process of normalizing relations between the former belligerents. Nowadays, the function of peace preliminaries of this type will usually be served by an armistice agreement (see *infra, (b)*).

b. At the present time, peace preliminaries generally represent a mere "*pactum de contrahendo* on the outline of a prospective peace treaty."[49] Unless and until the projected treaty of peace actually materializes, the final curtain is not drawn on the war. As an illustration, one can draw attention to the two Camp David Framework Agreements of 1978 for Peace in the Middle East and for the Conclusion of a Peace Treaty between Egypt and Israel.[50] Here the parties agreed on certain principles and some specifics, designed to serve as guidelines for a peace settlement. However, as mentioned, the war between Egypt and Israel was terminated only by dint of the Treaty of Peace (concluded, after further negotiations, in 1979).

iii. The Legal Validity of a Treaty of Peace

As long as war was regarded as a lawful course of action in international affairs, a treaty of peace was considered perfectly valid, even when imposed on the defeated party by the victor as an outcome of the use of force.[51] As soon as the use of inter-State force was forbidden by international law, some scholars began to argue that a treaty of peace dictated by an aggressor ought to be vitiated by duress.[52] This doctrinal approach has been endorsed in Article 52 of the 1969 Vienna Convention on the Law of Treaties:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.[53]

Article 52 reflects customary international law as it stands today. In 1973, the International Court of Justice held, in a dispute between the United Kingdom and Iceland, in the *Fisheries Jurisdiction* case:

> There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.[54]

The International Law Commission, in its commentary on the draft of Article 52, explained that the clause does not operate retroactively by invalidating treaties of peace procured by coercion prior to the development of the modern law banning the use of force by States.[55] The Commission expressed the opinion that the provision is applicable to all treaties concluded at least since 1945 (the entry into force of the Charter of the United Nations).[56]

Article 52 does not affect equally all treaties of peace. The text makes it plain that "only the *unlawful* use of force . . . can bring about the nullity of a treaty."[57] It follows that Article 52 invalidates solely those treaties of peace which are imposed by an aggressor State on the victim of aggression. As regards the reverse situation, Article 75 of the Convention proclaims:

> The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.[58]

The invalidity of a treaty of peace concluded under duress does not result from "vitiated consent": it is a sanction against an internationally unlawful and even a criminal act.[59] Hence, there is nothing legally wrong in a treaty of peace leaning in favor of a State which was the target of aggression (assuming that it has prevailed militarily).[60] In the words of Sir Humphrey Waldock, "[c]learly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor."[61] Only "unlawful coercion" invalidates a treaty.[62]

Article 44(5) of the Vienna Convention does not permit any separation of the provisions of a treaty falling under Article 52.[63] This means that a treaty procured by coercion is void in its entirety: none of its parts may be severed from the remainder of the instrument, with a view to being saved from abrogation. The general rule would apply, *inter alia*, to a treaty of peace accepted

under duress by the victim of aggression. But one must be mindful of the fact that such a treaty is not always confined to undertakings advantageous to the aggressor. Indeed, the most momentous clause in the text will presumably be the one terminating the war. If the whole juridical slate is swept clean by nullity, the section devoted to ending the war would also be wiped off. Is it to be understood that the former belligerents are put again on a war footing? The answer, as furnished by Article 43 of the Vienna Convention, is that the invalidity of a treaty does not impair duties embodied therein if these are independently binding on the parties by virtue of general international law.[64] All States must comply with the contemporary prohibition of the use of inter-State force, and the abrogation of a particular treaty of peace does not alter this basic position.

Article 52 refers to a treaty procured by unlawful use or threat of force as "void." The expression is expounded by Article 69(1), which states that the "provisions of a void treaty have no legal force."[65] The concept underlying Article 52 is one of "absolute nullity."[66] It is true that a party invoking a ground for impeaching the validity of a treaty must take certain steps enumerated in Article 65.[67] The obligation to observe the procedure set out in Article 65 might suggest that, should the aggrieved party (for reasons of its own) refrain from contesting the validity of the treaty, nullification would not take place.[68] However, if that were the case, the instrument would really be voidable rather than void. If a treaty of peace dictated by an aggressor is genuinely void, it must be tainted by nullity automatically and *ab initio*. Therefore, any competent forum should be authorized to recognize the treaty as void, even if no attempt to invoke invalidity has been made by the State directly concerned.[69]

(b) Armistice Agreements

Under orthodox international law, an armistice was construed as an interlude in the fighting, interchangeable in substance with a truce or a cease-fire (see *infra*, section III). It is characteristic that Articles 36 to 41 of the Hague Regulations, annexed to Hague Convention (II) of 1899 and (IV) of 1907 Respecting the Laws and Customs of War on Land, employ the expression "armistice" when the subject under discussion is the suspension of hostilities.[70] By contrast, in the current practice of States, an armistice chiefly denotes a termination of hostilities, completely divesting the parties of the right to renew military operations under any circumstances whatever. An armistice of this nature puts an end to the war, and does not merely suspend the combat.

The transformation undergone by "armistice" as a legal term of art had its origins in the armistices which brought about the termination of World War I.[71] A close look at the most famous armistice—that of November 11, 1918,

with Germany—discloses that, although concluded at the outset for a duration of only 36 days[72] (a period later extended several times[73]), its far-reaching provisions (obligating the German armed forces, *inter alia*, to surrender their arms, to withdraw from occupied territories as well as from certain areas within Germany itself, etc.) barred the possibility of resumption of hostilities by the vanquished side. Only the victorious allies reserved to themselves the option of resorting to force again in case of breach of the Armistice's conditions by Germany. This reading of the text is reinvigorated by the formulation of the last extension of the Armistice (without an expiry date) in February 1919.[74]

The innovative trend of terminating war by armistice continued, and became clearer, in the armistices of World War II, which resemble peace preliminaries (of the first category).[75] Significantly, in the Armistices with Romania (1944) and Hungary (1945), these two countries declared that they had "withdrawn from the war" against the Allied Powers.[76] Romania specifically announced that it "has entered the war and will wage war on the side of the Allied Powers against Germany and Hungary,"[77] and Hungary agreed to the condition that it "has declared war on Germany."[78] Likewise, Italy—which concluded an armistice with the Allies in September 1943[79]—declared war against Germany in October of that year. The Preamble to the 1947 Paris Treaty of Peace with Italy directs attention to the fact that (as a result of the declaration of war) Italy "thereby became a co-belligerent against Germany."[80] For a traditionalist, adhering to the notion of an armistice as a mere suspension of hostilities, "Italy's co-belligerency created a highly anomalous situation juridically, and one which to some extent defies legal analysis and classification."[81] After all, if the war between the Allied Powers and Italy did not end until the Treaty of Peace of 1947, Italy—the armed forces of which were fighting, after 1943, alongside Allied formations against a common foe (Germany)[82]—was the co-belligerent of its enemies! Yet, once it is perceived that an armistice signifies the termination of war, there is no anomaly in the status of Italy during World War II. Earlier, Italy was a co-belligerent with Germany against the Allies. Following the termination of its war with the Allies—by virtue of the 1943 Armistice—nothing prevented Italy from declaring war against Germany and becoming a co-belligerent with the Allies. The same is true of Romania and Hungary.

The evolution in the perception of armistice reached its zenith at a later stage, with a series of General Armistice Agreements signed in 1949 between Israel, on the one hand, and Egypt, Lebanon, Jordan, and Syria, on the other,[83] followed by the 1953 Panmunjom Agreement Concerning a Military Armistice in Korea.[84] These Armistice Agreements terminated the Israeli War of Independence and

the Korean War, respectively, although they did not produce peace in the full meaning of the term. Typically, the Panmunjom Agreement states as its objective the establishment of an armistice ensuring "a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved."[85] The thesis (advanced in 1992) that "the Korean War is still legally in effect"[86] is untenable.

A closer look at the Israeli Armistice Agreements may illuminate the special features and the problematics of armistice as a mechanism for ending wars. The first article of all four Agreements prescribes that, with a view to promoting the return to permanent peace in Palestine, the parties affirm a number of principles, including a prohibition of resort to military force and aggressive action.[87] In keeping with these principles, the parties are forbidden to commit any warlike or hostile act against one another.[88] The Agreements clarify that they are concluded without prejudice to the "rights, claims and positions"[89] of the parties in the ultimate peaceful settlement of the Palestine Question.[90] The purpose of the armistice is described in terms of a transition from truce to a permanent peace[91] (in the case of Egypt, the Armistice Agreement expressly supersedes a previous General Cease-Fire Agreement.)[92] Above all, the Agreements lay down that they will remain in force until a peaceful settlement between the parties is achieved.[93]

The "without prejudice" formula (so popular among lawyers) was introduced to forestall future claims of estoppel in the course of peace negotiations. The formula must not obscure the salient point that the parties reserve only their right to reopen all outstanding issues when they eventually get to negotiate an amicable settlement of the conflict. During the intervening time, the conflict continues, but it is no longer an armed conflict. The thrust of each Agreement is that both parties waive in an unqualified manner any legal option that either of them may have had to resume hostilities and to resolve the conflict by force. The Agreements can be considered transitional, inasmuch as they were intended to be ultimately replaced by definitive peace treaties; yet, there is nothing temporary about them.[94]

Article V(2) of the Agreement with Egypt avers that the Armistice Demarcation Line "is not to be construed in any sense as a political or territorial boundary" and, again, that the line is drawn "without prejudice."[95] This clause is not replicated in the other Agreements, although a more diluted version has been inserted into Article VI(9) of the Agreement with Jordan[96] and Article V(l) of the Agreement with Syria[97] (there is no counterpart in the Agreement with Lebanon). Once more, the disclaimer may be taken as lip-service. An analysis of the Agreements in all their aspects shows that "the armistice

demarcation lines can be regarded as equivalent to international frontiers, with all the consequences which that entails."[98] When a line of demarcation between States is sanctioned in such a way that it can be revised only by mutual consent (and not by force), it becomes a political or territorial border.[99] The line may not be deemed "final," but the frontiers of no country in the world are impressed with a stamp of finality. All international frontiers can be altered by mutual consent, and history shows that many of them undergo kaleidoscopic modifications through agreements.[100]

It is noteworthy that when the United Nations Security Council, in 1951, had to deal with an Israeli complaint concerning restrictions imposed by Egypt on the passage of ships through the Suez Canal, the Council adopted Resolution 95 pronouncing that the armistice between the two countries "is of a permanent character" and that, accordingly, "neither party can reasonably assert that it is actively a belligerent,"[101] It emerges from the text of the Resolution, and the thorough discussion preceding it, that the Council totally rejected an Egyptian contention that a state of war continued to exist with Israel after the Armistice.[102]

The Israeli Armistice Agreements carry in their titles the adjective "General." This was done against the backdrop of Article 37 of the Hague Regulations,[103] which sets side by side a general and a local armistice (meaning suspension of hostilities (see *infra,* section III)). The Panmunjom Armistice Agreement already omits the adjective. The omission is consistent with the modern meaning of an armistice agreement as an end to war, for a local termination of war is an oxymoronic figure of speech. An authentic termination of war must be general in its scope.

No doubt, an armistice agreement is never the equivalent of a treaty of peace. When it brings war to a close, an armistice is like the first category of preliminaries of peace (*supra,* section II (a) ii). Whereas a treaty of peace is multi-dimensional (both negating war and providing for amicable relations), an armistice agreement is restricted to the negative aspect of the demise of war. To the extent that a distinction is drawn between associative and dissociative peace (the latter amounting to "the absence of war, a peace defined negatively"),[104] an armistice has to be marked as a dissociative peace.

Comparatively speaking, the negation of war is of greater import than the introduction or restoration of, say, trade or cultural relations. Still, when such relations are non-existent, a meaningful ingredient is missing from the fabric of peace. That is why the mere conclusion of an armistice agreement does not imply recognition of a new State. Furthermore, notwithstanding an armistice, diplomatic relations need not be established or reestablished. The frontiers (the Armistice Demarcation Lines) may remain closed, and, in general,

relations between the former belligerents will probably be strained. After all, the armed phase of the conflict is over, but the conflict itself may continue unabated.

As a result, even after an armistice agreement, the conclusion of a treaty of peace remains a high priority item on the agenda. The armistice ends the war, but the consummation of a fully-fledged peace requires a lot more. When the advent of a treaty of peace in the post-armistice period is delayed, as has been the case both in the Arab-Israeli conflict and in Korea, the chances of another conflagration always loom large on the political horizon. Nevertheless, should any of the former belligerents plunge again into hostilities, this would be considered the unleashing of a new war and not the resumption of fighting in an on-going armed conflict.

There is entrenched resistance in the legal literature to any reappraisal of the role assigned to armistice in the vocabulary of war.[105] *Pace* this doctrinal conservatism, the terminology has to be adjusted to fit the modern practice of States.[106] Scholars must open their eyes to the metamorphosis that has occurred over the years in the legal status of armistice.

(c) Other Modes of Terminating War

A war may be brought to its conclusion not only in a treaty of peace or in an armistice agreement. It may also come to an end in one of the following ways:

i. Implied Mutual Consent

When belligerents enter into a treaty of peace or an armistice agreement, war is terminated by mutual consent expressed in the instrument. It is not requisite, however, that the mutual consent to end a war be verbalized by the parties. Such consent can also be inferred by implication from their behavior: a state of war may come to a close thanks to a mere termination of hostilities on both sides.[107]

An examination of the legal consequences of the absence of warfare must be conducted prudently. The fact that all is quiet along the front line is not inescapably indicative of a tacit consent to put paid to hostilities. A lull in the fighting, or a formal cease-fire, may account for the military inactivity. War cannot be regarded as over unless some supplemental evidence is discernible that neither party proposes to resume the hostilities.[108] The evidence may be distilled from the establishment or resumption of diplomatic relations.[109]

To give tangible form to the scenario of a state of war continuing despite a lengthy hiatus in the fighting, one can take the case of Israel and Iraq. Iraq is one of the Arab countries that invaded Israel in 1948. Unlike its co-belligerents

(Egypt, Lebanon, Jordan, and Syria), Iraq took advantage of the fact that it has no common border with Israel and refused to sign an armistice agreement (simply pulling its troops out of the combat zone). After prolonged periods of avoiding a military confrontation, Iraqi and Israeli armed forces clashed again in June 1967 and in October 1973.[110] In 1981, Israeli aircraft destroyed an Iraqi nuclear reactor (under construction), which apparently had the capacity of manufacturing nuclear weapons.[111] In this writer's opinion, the only plausible legal justification for the bombing of the reactor is that the act represented another round of hostilities in an on-going armed conflict. In 1991—in the course of the Gulf War—Iraq launched dozens of Scud missiles against Israeli objectives (mostly, centers of population), despite the fact that Israel was not a member of the American-led coalition which had engaged in combat to restore the sovereignty of Kuwait. The indiscriminate bombardment of civilians, by missiles or otherwise, is unlawful under the *jus in bello*.[112] While the *jus* is the same in every *bellum*, it is useful to single out the relevant framework of hostilities. The Iraqi missile offensive against Israel must be observed in the legal context not of the Gulf War but of the war between Iraq and Israel which started in 1948 yet continues to this very day.[113] That war is still in progress, unhindered by its inordinate prolongation since 1948, for hostilities flare up intermittently.

ii. Debellatio

Debellatio is a situation in which one of the belligerents is utterly defeated, to the point of its total disintegration as a sovereign nation. Since the war is no longer inter-State in character, it is terminated by itself. Even though the extinction of an existing State as a result of war is not to be lightly assumed, there comes a time when it can no longer be denied.[114]

Debellatio necessarily involves effective military occupation of the local territory by the enemy, but it goes beyond that: all organized resistance has to disappear, and the occupied State must be "reduced to impotence."[115] The three basic parameters of *debellatio* are as follows: (i) the territory of the former belligerent is occupied in its entirety, no remnant being left for the exercise of sovereignty; (ii) the armed forces of the erstwhile belligerent are no longer in the field (usually there is an unconditional surrender), and no allied forces carry on fighting by proxy; and (iii) the Government of the former belligerent has passed out of existence, and no other Government (not even a Government in exile) continues to offer effective opposition.[116] Kuwait was saved from *debellatio in* the Gulf War, notwithstanding its total occupation by the Iraqi armed forces, because its Government went into exile and a large coalition soon came to its aid militarily.

The phenomenon of *debellatio* has been recognized in many instances in the past.[117] Some commentators contend that a *debellatio* of Germany occurred at the end of World War II,[118] following the unconditional surrender of the Nazi armed forces.[119] However, the legal status of Germany in the immediate post-War period was exceedingly complicated.[120] The position was so intricate that, in the same Allied country (the United Kingdom), different dates were used for different legal purposes to mark the termination of the war with Germany.[121]

iii. Unilateral Declaration

Just as war can—and, under Hague Convention (III), must—begin with a unilateral declaration of war, it can also end with a unilateral declaration.[122] In this way the United States proclaimed, in 1951, the termination of the state of war with Germany.[123]

The technique of a unilateral declaration can be looked upon not as an independent mode for bringing war to a close, but as an offshoot of one of the two preceding methods. State A can impose war on State B by a unilateral declaration or act. Just as State B is unable to prevent State A from submerging them both in war, State B cannot effectively terminate the war when State A is bent on continuing it. A unilateral declaration by State B ending the war is an inane gesture, if State A is able and willing to go on fighting. "For war can be started by one party, but its ending presupposes the consent of both parties, if the enemy state survives as a sovereign state."[124] A unilateral declaration by State B promulgating that the war is over has a valid effect only if State A is either completely defeated (undergoing *debellatio*) or is willing to abide by the declaration.[125] If both State A and State B exist at the end of the war, both must agree to finish it. Yet, such an agreement may consist of a formal declaration by State B and the tacit consent of State A (or vice versa).[126]

III. The Suspension of Hostilities

(a) Different Types of Suspension of Hostilities

A suspension of hostilities may evolve *de facto* when no military operations take place. A respite of this nature may endure for a long period of time. But since neither belligerent is legally committed to refrain from resuming hostilities, the fighting can break out again at any moment without warning.[127]

More importantly, belligerents may assume an obligation *de jure* to abstain from combat in the course of a war (which goes on). A number of terms are used to depict a legal undertaking to suspend hostilities: (i) truce, (ii)

cease-fire, and, in the past, (iii) armistice. As noted above, the last term—armistice—has undergone a drastic change in recent years and now principally conveys a termination, rather than a suspension, of hostilities. The current usage of the term "cease-fire," in lieu of "armistice," must be recalled when one examines the aforementioned Articles 36 to 41 of the Hague Regulations.[128] These clauses do not employ the phrase "cease-fire." Instead, they refer to "armistice," commensurately with the vocabulary prevalent at the turn of the century. However, since their avowed aim is to govern the suspension of hostilities, they must be deemed applicable to present-day cease-fires (as opposed to modern armistices).

The expression "truce" is embedded in tradition and history. It acquired particular resonance in the Middle Ages, in the form of the Truce of God (*Treuga Dei*). This was an ecclesiastical measure by which the Catholic Church suspended warfare in Christendom on certain days of the week, as well as during Lent and church festivals.[129] The phrase "cease-fire" has been introduced into international legal parlance in the present (post-World War II) era. Although some scholars ascribe to truce and cease-fire divergent implications, the present practice of States—for the most part—treats them as synonymous.[130] As examples for an indiscriminate use of the two terms, it is possible to adduce successive resolutions adopted by the Security Council during Israel's War of Independence in 1948.[131]

A cease-fire (or truce) may be partial or total in scope. Article 37 of the Hague Regulations differentiates between a general cease-fire (originally, "armistice") suspending all military operations everywhere, and a local cease-fire suspending such operations only between certain units at particular locations.[132]

i. Local Cease-Fire Agreement

A cease-fire (or truce) may apply to a limited sector of the front, without impinging on the continuation of combat elsewhere. The object of such a local suspension of hostilities is to enable the belligerents to evacuate the wounded, bury the dead, conduct negotiations, and so forth. A local cease-fire may be agreed upon on the spot by military commanders (who can be relatively junior in rank), without the involvement of their respective Governments. The agreement would then be informal, and it does not have to be in writing.[133]

Article 15 of Geneva Convention (I) of 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field stipulates that, whenever circumstances permit, a suspension of hostilities is to be arranged (generally or locally) so as to facilitate the removal, exchange, and

transport of the wounded left on the battlefield or within a besieged or encircled area.[134] The article employs the term "armistice," but what is actually meant in current terminology is a cease-fire.

ii. General Cease-Fire Agreement

Belligerents may enter into an agreement suspending hostilities everywhere within the region of war. The duration of a general cease-fire (or truce) may be predetermined in the agreement or it may be left open.

A general cease-fire agreement is normally made in writing by (or with the approval of) the Governments concerned. In that case, it has the status of a treaty under international law.[135] The essence of a general cease-fire is a detailed agreement on the conditions under which hostilities are suspended. There are two *sine qua non* specific elements: time (at which the cease-fire is due to enter into force on all fronts; there can also be different times for different geographic sectors) and place (fixing the demarcation line between the opposing military formations, with or without a buffer demilitarized zone).[136] However, nothing prevents the parties from appending to a general cease-fire agreement other clauses which transcend the technicalities of the suspension of hostilities and relate to such matters as the immediate release of prisoners of war. Semantically, this is liable to produce a result which may sound strange. Should the general cease-fire agreement set a date for release of prisoners of war, and should a belligerent extend their detention beyond that date, the act would constitute a cease-fire violation although no fire has been opened.

iii. Cease-Fire Ordered by the Security Council

The Security Council, performing its functions under Chapter VII of the Charter of the United Nations,[137] may order belligerents to cease fire. Unequivocal language to that effect is contained, for example, in Resolution 54 (1948),[138] adopted at the time of Israel's War of Independence. Under Article 25 of the Charter, UN members are legally bound to accept and carry out mandatory decisions of the Security Council.[139] However, the Council does not rush to issue direct orders. Ordinarily, it shows a proclivity for milder language. In the Falkland Islands War of 1982, the Council only requested the Secretary-General "to enter into contact with the parties with a view to negotiating mutually acceptable terms for cease-fire."[140] On other occasions, the Council called upon the parties to cease fire,[141] and less frequently demanded a cease-fire.[142] As long as the Council is merely calling for a cease-fire, its resolution has the hallmark of a non-binding recommendation. The parties are then given an opportunity to craft a cease-fire agreement of their choosing. But if

they fail to reach an agreement, the Council may be driven in time to ordain a cease-fire. In the Iran-Iraq War, the Security Council issued a call for a cease-fire in 1982,[143] demanding it only in 1987.[144] The text and the circumstances clearly imply that "the change in the wording from *calling* for a cease-fire to *demanding* one" conveyed a shift from a recommendation to a binding decision.[145]

The most peremptory and far-reaching cease-fire terms ever resorted to by the Security Council were imposed on Iraq in Resolution 687 (1991),[146] after the defeat of that country by an American-led coalition (with the direct blessing of the Council) in the Gulf War. Resolution 687 "is unparalleled in the extent to which the Security Council" was prepared to go in dictating cease-fire conditions (especially where disarmament is concerned).[147] Nevertheless, as the text of the Resolution explicitly elucidates, it brings into effect no more than "a formal cease-fire."[148] A labelling of Resolution 687 as a "permanent cease-fire"[149] is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement. The suggestion that "despite the terminology used in Resolution 687, it is clearly more than a mere suspension of hostilities"—for the substance "is that of a peace treaty"[150]—is not only completely inconsistent with the plain text of the resolution, it is also counterfactual, given subsequent history. At various points since 1991, and almost on a routine basis after December 1998, coalition (mostly U.S. and UK) warplanes have struck Iraqi military targets (especially in so-called "no-fly zones"). The air campaign must be seen as a resumption of military operations in the face of Iraqi violations of the cease-fire terms.[151] These are continued hostilities in a war, which commenced when Iraq invaded Kuwait in August 1990.

The General Assembly, too, may call upon belligerents to effect an immediate cease-fire. This is what the General Assembly did in December 1971,[152] after the outbreak of war between India and Pakistan (ultimately culminating in the creation of the independent State of Bangladesh). When such a resolution is passed by the General Assembly, it can only be issued as a recommendation and can never be binding. As a non-mandatory exhortation, the resolution may be ignored with impunity, just as India disregarded the resolution in question.[153]

In recent years, most cease-fires have come in the wake of Security Council resolutions. Either the parties carry out a mandatory decision of the Council or they arrive at an agreement at the behest of the Council. Even during the "Cold War," as long as the Council was not in disarray owing to the exercise or the threat of a veto, a cease-fire resolution became almost a conditioned reflex in response to the outbreak of hostilities. Generally speaking, the Council has tended to act as a fire brigade, viewing its paramount task as an attempt to extinguish the blaze rather than dealing with all the surrounding circumstances.

A cease-fire directive by the Council, like an agreement between the belligerents, may be limited to a predetermined time frame. A case in point is Resolution 50 (1948), adopted in the course of Israel's War of Independence, which called upon all the parties to cease fire for a period of four weeks.[154] When the prescribed time expired, fighting recommenced. More often, the Council avoids setting specific terminal dates for cease-fires, preferring to couch them in an open-ended manner.

(b) The Nature of Cease-Fire

The suspension of hostilities must not be confused with their termination.[155] A termination of hostilities means that the war is over—the parties are no longer belligerents, and any subsequent hostilities between them would indicate the outbreak of a new war. Conversely, a suspension of hostilities connotes that the state of war goes on, but temporarily there is no actual warfare. Psychologically, a protracted general cease-fire lasting indefinitely is a state of no-war and no-peace. Legally, this is a clear-cut case of war. The state of war is not terminated, despite the absence of combat in the interval.

Renewal of hostilities before a cease-fire expires would obviously contravene its provisions. Nonetheless, it must be grasped that hostilities are only continued, after an interruption, and no new war is started. For that reason, a cease-fire violation is irrelevant to the determination of armed attack and self-defense. That determination is made exclusively on the basis of the beginning of a new armed conflict. The reopening of fire in an on-going war is not germane to the issue.[156]

A cease-fire provides "a breathing space for the negotiation of more lasting agreements."[157] It gives the belligerents a chance to negotiate peace terms without being subjected to excessive pressure, and to turn the suspension into a termination of hostilities. But no indispensable bond ties cease-fire and peace. On the one hand, a treaty of peace may not be preceded by any cease-fire.[158] On the other hand, a cease-fire may break down, to be followed by further bloodshed.

The pause in the fighting, brought about by a cease-fire, is no more than a convenient juncture for peace negotiations. Even a binding cease-fire decree issued by the Security Council may prove "too brittle to withstand the strains between the parties" over a protracted period.[159] Should the parties fail to exploit the opportunity, the period of quiescence is likely to become a springboard for additional rounds of hostilities (perhaps more intense). This is only to be anticipated. A cease-fire, in freezing the military state of affairs extant at the moment when combat is suspended, places in an advantageous position that party which gained the most ground before the deadline. While the guns are

silent, the opposing sides will rearm and regroup. If no peace is attained, the belligerent most interested in a return to the *status quo ante* will look for a favorable moment (militarily as well as politically) to mount an offensive, in order to dislodge the enemy from the positions acquired on the eve of the cease-fire. A cease-fire in and of itself is, consequently, no harbinger of peace. All that a cease-fire can accomplish is set the stage for negotiations or any other mode of amicable settlement of disputes. If the parties contrive to hammer out peace terms, success will be due more to the exercise of diplomatic and political skills than to the cease-fire as such.

The Arab-Israeli conflict is a classical illustration of a whole host of cease-fires, either by consensual arrangement between the parties or by fiat of the Security Council, halting hostilities without bringing them to an end. Thus, if we take as an example the mislabelled "Six Days War" (sparked in June 1967 and proceeding through several cycles of hostilities), the Council insisted on immediate cease-fire, e.g., in June 1967[160] and in October 1973.[161] Israel and Egypt negotiated a cease-fire agreement, e.g., in November 1973.[162] Israel and Syria agreed on a cease-fire, e.g., in May 1974.[163] In none of these cases did the cease-fire, whether initiated by the parties or by the Council, terminate the war. In the relations between Israel, on the one hand, and Egypt and Jordan, on the other, the "Six Days War" ended only upon (or on the eve of) the conclusion of Treaties of Peace in 1979 and 1994 respectively (see *supra*, section II (a) i). In the relations between Israel and Syria, the "Six Days War" is not over yet, after more than three decades, since the bilateral peace process has not yet been crowned with success. A number of rounds of hostilities between Israel and Egypt or Syria (most conspicuously, the so-called "Yom Kippur War" of October 1973) are incorrectly adverted to as "wars." Far from qualifying as separate wars, these were merely non-consecutive time-frames of combat, punctuated by extended cease-fires, in the course of a single on-going war which had commenced in June 1967.

(c) Denunciation and Breach of Cease-Fire

Under Article 36 of the Hague Regulations, if the duration of a suspension of hostilities is not defined, each belligerent may resume military operations at any time, provided that an appropriate warning is given in accordance with the terms of the cease-fire (originally, "armistice").[164] The language of Article 36 seems to this writer to be imprecise. It is submitted that a general cease-fire, if concluded without specifying a finite date of expiry, ought to be read in good faith as if it were undertaken for a reasonable period. Within that (admittedly flexible) stretch of time, none of the parties can be allowed to denounce the

cease-fire unilaterally. Hence, it is not legitimate for a belligerent (relying on Article 36) to flout the cease-fire shortly after its conclusion. Only when a reasonable period has elapsed does the continued operation of the agreement depend on the good will of both parties, and the cease-fire can be unilaterally denounced at will.

Article 36 contains an obligation to give advance notice to the adversary when denunciation of a cease-fire agreement occurs. But the specifics depend on what the cease-fire agreement prescribes. It appears that when the agreement is silent on this issue, hostilities may be "recommenced at once after notification."[165] If fire can be opened at once, the practical value of notification becomes inconsequential.[166]

Cease-fire (originally, "armistice") violations are the theme of Articles 40 and 41 of the Hague Regulations. Article 41 pronounces that, should the violations be committed by private individuals acting on their own initiative, the injured party would be entitled to demand their punishment or compensation for any losses sustained.[167] Under Article 40, a serious violation of the cease-fire by one of the parties empowers the other side to denounce it and, in cases of urgency, to resume hostilities immediately.[168]

Articles 40 and 41 posit, in effect, a three-pronged classification of cease-fire violations: (i) ordinary violations, not justifying denunciation of the cease-fire (assuming that denunciation is not otherwise permissible under Article 36); (ii) serious violations, permitting the victim to denounce the cease-fire, but requiring advance notice before the recommencement of hostilities; and (iii) serious violations pregnant with urgency, enabling the victim to denounce the cease-fire and reopen hostilities immediately (without advance notice).[169]

The three categories of cease-fire violations are not easily applicable in reality. The question of whether a breach of the cease-fire is serious, or whether any urgency is involved, seldom lends itself to objective verification. It must not be overlooked that a violation considered a minor infraction by one party may assume grave proportions in the eyes of the antagonist.[170] At the same time, the emphasis placed by Article 40 on serious cease-fire violations is consistent with the reference to a "material breach" appearing in Article 60(1) of the 1969 Vienna Convention on the Law of Treaties (in the general context of termination of bilateral treaties).[171]

IV. Conclusion

The three separate stages in the course of war—its initiation, suspension and termination—are easy to tell apart in the abstract. Yet, frequently,

international lawyers sharply disagree with one another about the interpretation of international instruments, and the consequences of actions taken by belligerents, when expressions such as declarations of war, truces, cease-fires and armistices are employed. To some extent, the lack of consensus is due to the linguistic evolution of modern international law since its inception some 350 years ago. The passage of time has brought about alterations in international legal terms of art.

The purpose of the present essay is to shed some light on the correct meaning of the contemporary vocabulary of war. This vocabulary is bound to develop further in the years ahead. However, at the end of the second millennium, its definitional range can be fairly settled against the background of the recent practice of States. Terminological exactitude is not merely a matter of fastidiousness. It gives rise to a better understanding of the implications and ramifications of what States do in the world of reality.

This essay is a revised and updated version of Chapter 2 of the author's WAR, AGGRESSION AND SELF-DEFENCE 31–58 (2nd ed.,1994).

Notes

1. For a definition of war, see Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, 15–16 (2nd. ed., 1994).

2. M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 38 (1959).

3. Hague Convention (III) Relative to the Opening of Hostilities, 1907, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 57, 57–58 (D. Schindler & J. Toman eds., 3rd ed., 1988).

4. See N. Hill, *Was There an Ultimatum before Pearl Harbor?* 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 355, 357–358 (1948).

5. See *ibid.*, 358.

6. See *ibid.*, 358–359. Security Council Resolution 678 of November 1990 [45 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 27 (1990)] is referred to by some commentators as an ultimatum to Iraq. M. Voelckel, *Faut-il Encore Déclarer la Guerre?* 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7, 21 (1991). But this is not the case, inasmuch as the Gulf War had already been in progress since the Iraqi invasion of Kuwait in August 1990.

7. See E.C. Stowell, *Convention Relative to the Opening of Hostilities*, 2 AMERICAN JOURNAL OF INTERNATIONAL LAW 50, 53–54 (1908).

8. See A.P. HIGGINS, THE HAGUE PEACE CONFERENCES 204 (1909).

9. See T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 326 (7th ed., by P.H. Winfield, 1923).

10. See G. SCHWARZENBERGER, THE LAW OF ARMED CONFLICT 65–67 (1968).

11. See P.M. Brown, *Undeclared Wars*, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW 538, 539 (1939).

12. The coinage "international armed conflict," rather than war, is currently fashionable also in international legal instruments. A prime example is Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, [1977] UNITED NATIONS JURIDICAL YEARBOOK 95.

13. See C. Eagleton, *The Form and Function of the Declaration of War*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 19, 32–33 (1938).

14. E. CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 98 (1954).

15. Dalmia Cement Ltd. v. National Bank of Pakistan (1976), 67 INTERNATIONAL LAW REPORTS 611, 616.

16. Navios Corporation v. The Ulysses II et al. (1958), 161 F. Supp. 932, 942–943. The Judgment, and the reasons given therein, were affirmed by the U.S. Court of Appeals (4th Circuit) (260 F. 2d 959).

17. *Ibid.*, *id.*

18. G.O. Fuller, *Note*, 57 MICHIGAN LAW REVIEW 610, 612 (1958–1959).

19. On this subject, see Y. Dinstein, *Computer Network Attacks and Self-Defense*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (M. Schmitt & J. Pottorff eds., forthcoming 2001).

20. See J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 306 (1954).

21. *Cf.* E. Borchard, *When Did the War Begin?* 47 COLUMBIA LAW REVIEW 742–748 (1947); C. Eagleton, *Acts of War*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 321, 325 (1941).

22. See M.O. Hudson, *The Duration of the War between the United States and Germany*, 39 HARVARD LAW REVIEW 1020, 1021 (1925–1926).

23. Hague Convention (III), *supra* note 3, at 58.

24. Covenant of the League of Nations, 1919, 1 INTERNATIONAL LEGISLATION 1, *id.* (M.O. Hudson ed., 1931).

25. See G. Schwarzenberger, *Peace Treaties before International Courts and Tribunals*, 8 INDIAN JOURNAL OF INTERNATIONAL LAW 1, *id.* (1968).

26. Treaty on the Final Settlement with Respect to Germany, 1990, 29 INTERNATIONAL LEGAL MATERIALS 1186, 1187 (1990).

27. *Ibid.*, *id.*

28. *Ibid.*, 1186–1189.

29. See J.A. Frowein, *The Reunification of Germany*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 152, 157 (1992).

30. Paris Treaty of Peace with Bulgaria, 1947, 41 UNITED NATIONS TREATY SERIES 21; Paris Treaty of Peace with Hungary, 1947, *ibid.*, 135; Paris Treaty of Peace with Romania, 1947, 42 *ibid.*, 3; Paris Treaty of Peace with Finland, 1947, 48 *ibid.*, 203; Paris Treaty of Peace with Italy, 1947, 49 *ibid.*, 3.

31. San Francisco Treaty of Peace with Japan, 1951, 136 UNITED NATIONS TREATY SERIES 45.

32. USSR-Japan, Joint Declaration, 1956, 263 UNITED NATIONS TREATY SERIES 112, *id.* (Article 1).

33. *Ibid.*, 116 (Article 9).

34. *Ibid.*, 112 (Article 1).

35. *Ibid.*, 114 (Article 2).

36. Egypt-Israel, Treaty of Peace, 1979, 18 INTERNATIONAL LEGAL MATERIALS 362 (1979).

37. Jordan-Israel, Treaty of Peace, 1994, 34 INTERNATIONAL LEGAL MATERIALS 43 (1995).

38. Egypt-Israel, Treaty of Peace, *supra* note 36, at 363.

39. Jordan-Israel, Treaty of Peace, *supra* note 37, at 46.

40. *Ibid.*, 46.

41. Washington Declaration, July 25, 1994, 54 FACTS ON FILE YEARBOOK 526, *id.* (1994).

42. The text is published in 7 MIDDLE EAST CONTEMPORARY SURVEY 690 (1982–1983).

43. The requirement of ratification of the instrument—as a condition precedent to its entry into force—appears in Article 10(1), *ibid.*, 692.

44. *Ibid.*, 691. See also 43 FACTS ON FILE YEARBOOK 359, *id.* (1983).

45. Egypt-Israel, Treaty of Peace, *supra* note 36, at 363. See also *ibid.*, 364 [Article III(3)], 367 (Annex I, Article I).

46. On the distinction between positive and negative peace, see H. Rumpf, *The Concepts of Peace and War in International Law*, 27 GERMAN YEARBOOK OF INTERNATIONAL LAW 429, 431–433 (1984).

47. Express recognition is specifically agreed upon in Article III of the Egyptian-Israeli Treaty of Peace, *supra* note 36, at 363–364. But there is every reason to believe that recognition would have been implied from the treaty in any event. *Cf.* H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 378 (1947).

48. See L. OPPENHEIM, 2 INTERNATIONAL LAW 607 (7th ed., by H. Lauterpacht, 1952).

49. W.G. Grewe, *Peace Treaties*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 102, 105 (R. Bernhardt ed., 1982).

50. Egypt-Israel, Camp David Agreements, 1978: A Framework for Peace in the Middle East, 17 INTERNATIONAL LEGAL MATERIALS 1466 (1978); Framework for the Conclusion of a Peace Treaty between Egypt and Israel, *ibid.*, 1470.

51. See LORD MCNAIR, THE LAW OF TREATIES 207, 209 (1961).

52. See H. LAUTERPACHT, 1 INTERNATIONAL LAW 354 (E. Lauterpacht ed., 1979).

53. Vienna Convention on the Law of Treaties, 1969, [1969] UNITED NATIONS JURIDICAL YEARBOOK 140, 153.

54. Fisheries Jurisdiction Case (Jurisdiction of the Court), [1973] I.C.J. REPORTS 3, 14.

55. Report of the International Law Commission, 18th Session, [1966] II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 172, 247.

56. *Ibid.*, *id.*

57. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 180 (2nd ed., 1984).

58. Vienna Convention, *supra* note 53, at 159.

59. P. REUTER, INTRODUCTION TO THE LAW OF TREATIES 140 (J. Mico & P. Haggenmacher trans., 1989).

60. See L. OPPENHEIM, 1(2) INTERNATIONAL LAW 1292 (9th ed., by R. Jennings & A. Watts., 1992).

61. H. Waldock, *Second Report on the Law of Treaties*, [1963] II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 36, 52.

62. H.G. de Jong, *Coercion in the Conclusion of Treaties*, 15 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 209, 227 (1984).

63. Vienna Convention, *supra* note 53, at 152.

64. *Ibid.*, *id.*

65. *Ibid.*, 158.

66. See SINCLAIR, *supra* note 57, at 160–161.

67. Vienna Convention, *supra* note 53, at 157.

68. See C.L. Rozakis, *The Law on Invalidity of Treaties*, 16 ARCHIV DES VÖLKERRECHTS 150, 168–169 (1973–1975).

69. See E. Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 68 (1978).

70. Regulations Respecting the Laws and Customs of War on Land (Annexed to Hague Conventions (II) of 1899 and (IV) of 1907), THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 2, 69, 87–88.

71. The texts of all the armistices of World War I are reproduced in 1 A HISTORY OF THE PEACE CONFERENCE OF PARIS, Appendix V (H.W.V. Temperley ed., 1920).

72. Conditions of an Armistice with Germany, 1918, *ibid.*, 459, 469 (Article XXXIV).

73. See *ibid.*, 476–481.

74. *Ibid.*, 480.

75. See A. Klafkowski, *Les Formes de Cessation de l'Etat de Guerre en Droit International*, 149 RECUEIL DES COURS 217, 248–250 (1976).

76. Armistice Agreement with Rumania, 1944, 9 INTERNATIONAL LEGISLATION 139, 140 (M.O. Hudson ed., 1950) (Article l); Armistice Agreement with Hungary, 1945, *ibid.*, 276, 277 [Article l(a)].

77. *Ibid.*, 140 (Article 1).

78. *Ibid.*, 277 [Article 1(a)].

79. Conditions of an Armistice with Italy, 1943, *ibid.*, 50.

80. Paris Treaty of Peace with Italy, *supra* note 30, at 127.

81. G.G. Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 RECUEIL DES COURS 259, 272 (1948).

82. See Department of State, *Commentary on the Additional Conditions of the Armistice with Italy*, 1945, 40 AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., 18, *id.* (1946).

83. Israel-Egypt, General Armistice Agreement, 1949, 42 UNITED NATIONS TREATY SERIES 251; Israel-Lebanon, General Armistice Agreement, 1949, *ibid.*, 287; Israel-Jordan, General Armistice Agreement, 1949, *ibid.*, 303; Israel-Syria, General Armistice Agreement, 1949, *ibid.*, 327.

84. Panmunjom Agreement Concerning a Military Armistice in Korea, 1953, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., 186 (1953).

85. *Ibid.*, 186–187 (Preamble).

86. G. VON GLAHN, LAW AMONG NATIONS 727 (6th ed., 1992).

87. General Armistice Agreements, *supra* note 83, at 252–254 (Egypt), 288–290 (Lebanon), 304–306 (Jordan), 328–330 (Syria).

88. *Ibid.*, 254 (Egypt, Article II), 290 (Lebanon, Article III), 306 (Jordan, Article III), 330 (Syria, Article III).

89. For the origin of this formula, *cf.* Article 40 of the UN Charter (regarding provisional measures taken by the Security Council). Charter of the United Nations, 1945, 9 INTERNATIONAL LEGISLATION 327, 343 (M.O. Hudson ed., 1950).

90. General Armistice Agreements, *supra* note 83, at 268 (Egypt, Article XI), 290 (Lebanon, Article II), 306 (Jordan, Article II), 330 (Syria, Article II).

91. *Ibid.*, 268 (Egypt, Article XII), 296–298 (Lebanon, Article VIII), 318 (Jordan, Article XII), 340 (Syria, Article VIII).

92. *Ibid.*, 270 [Egypt, Article XII(5)].

93. *Ibid.*, 268 (Egypt, Article XII), 296–298 (Lebanon, Article VIII), 318 (Jordan, Article XII), 340 (Syria, Article VIII).

94. See S. ROSENNE, ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES 82 (1951).

95. General Armistice Agreements, *supra* note 83, at 256 (Egypt).

96. *Ibid.*, 312 (Jordan).

97. *Ibid.*, 332 (Syria).

98. ROSENNE, *supra* note 94, at 48.

99. A distinction between armistice demarcation lines and other international boundaries is made in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. General Assembly Resolution 2625 (XXV), 25 RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 121, 122 (1970). It is submitted that this distinction is no longer valid in most cases.

100. See J.H.W. VERZIJL, 6 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 459–553 (1973).

101. Security Council Resolution 95, 6 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 10, 11 (1951).

102. See N. FEINBERG, STUDIES IN INTERNATIONAL LAW 87–92 (1979).

103. Hague Regulations, *supra* note 70, at 87.

104. B.V.A. Röling, *International Law and the Maintenance of Peace*, 4 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 1, 7 (1973).

105. See, e.g., H.S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AMERICAN JOURNAL OF INTERNATIONAL LAW 880, 881–886 (1956). *Cf.* Italian-United States Conciliation Commission, Mergé Case (1955), 11 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 236, 241.

106. See STONE, *supra* note 20, at 641–642, 644. *Cf.* M.W. Graham, *Armistices–1944 Style*, 39 AMERICAN JOURNAL OF INTERNATIONAL LAW 286, 287 (1945).

107. See C.C. Tansill, *Termination of War by Mere Cessation of Hostilities*, 38 LAW QUARTERLY REVIEW 26–37 (1922).

108. See J.M. Mathews, *The Termination of War*, 19 MICHIGAN LAW REVIEW 819, 828 (1920–1921).

109. See L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 251 (1956).

110. See U. Shoham, *The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MILITARY LAW REVIEW 191, 206 n. 67 (1985).

111. See *ibid.*, 191, 207–210.

112. Protocol I, *supra* note 12, at 114 [Article 51(4)-(5)]. *Cf.* P. Bretton, *Remarques sur le Jus in Bello dans la Guerre du Golfe* (1991), 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 139, 149 (1991).

113. See L.R. Beres, *After the Gulf War: Israel, Pre-Emption, and Anticipatory Self-Defense*, 13 HOUSTON JOURNAL OF INTERNATIONAL LAW 259, *id.* (1990–1991).

114. See J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 418–420 (1979).

115. C. PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 9 (1916).

116. See GREENSPAN, *supra* note 2, at 600–603.

117. See J.H.W. VERZIJL, 3 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 361–362 (1970).

118. See SCHWARZENBERGER, *supra* note 10, at 467, 730. *Cf.* H. Kelsen, *The Legal Status of Germany according to the Declaration of Berlin*, 39 AMERICAN JOURNAL OF INTERNATIONAL LAW 518–526 (1945).

119. Act of Military Surrender of Germany, 1945, 9 INTERNATIONAL LEGISLATION 312 (M.O. Hudson ed., 1950).

120. See OPPENHEIM, *supra* note 60, at 699–700.

121. See F.A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS 33 (1986).

122. See Anonymous, *Judicial Determination of the End of the War*, 47 COLUMBIA LAW REVIEW 255, 258 (1947).

123. This was done in a Proclamation by President Truman pursuant to a joint resolution by Congress. Termination of the State of War with Germany, 1951, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., 12 (1952).

124. J.L. Kunz, *Ending the War with Germany*, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW 114, 115 (1952).

125. See D. Ottensooser, *Termination of War by Unilateral Declaration*, 29 BRITISH YEAR BOOK OF INTERNATIONAL LAW 435, 442 (1952).

126. See F.C. Balling, *Unconditional Surrender and a Unilateral Declaration of Peace*, 39 AMERICAN POLITICAL SCIENCE REVIEW 474, 476 (1945).

127. See M. Sibert, *L'Armistice*, 40 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 657, 660 (1933).

128. Hague Regulations, *supra* note 70.

129. See *God, Truce of*, 5 THE NEW ENCYCLOPAEDIA BRITANNICA 319, *id.* (15th ed., 1998).

130. See P. Mohn, *Problems of Truce Supervision*, 478 INTERNATIONAL CONCILIATION 51, 53–57 (1952).

131. Security Council Resolutions 49, 50, 53, 54, 56, 59, 61 and 62 (all of 1948), 3 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 19–30 (1948).

132. Hague Regulations, *supra* note 70, at 87.

133. See L. OPPENHEIM, *supra* note 48, at 550.

134. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNITED NATIONS TREATY SERIES 31, 40–42.

135. See R.R. Baxter, *Armistices and Other Forms of Suspension of Hostilities*, 149 RECUEIL DES COURS 353, 371–372 (1976). The author did not differentiate between the terms "cease-fire" and "armistice".

136. See S. Bastid, *The Cease-Fire*, 6(1) RECUEILS DE LA SOCIÉTÉ INTERNATIONALE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 31, 37 (1973).

137. Charter of the United Nations, *supra* note 89, at 343–346.

138. Security Council Resolution 54, *supra* note 131, at 22.

139. Charter of the United Nations, *supra* note 89, at 339. See also Article 48(1) of the Charter, *ibid.*, 345–346.

140. Security Council Resolution 505, 37 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 17, *id.* (1982).

141. See, e.g., Security Council Resolution 233, 22 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 2, *id.* (1967).

142. See, e.g., Security Council Resolutions 234 and 235, 22 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 3, *id.* (1967).

143. Security Council Resolution 514, 37 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 19, *id.* (1982).

144. Security Council Resolution 598, 42 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 5, 6 (1987).

145. M. Weller, *Comments: The Use of Force and Collective Security*, THE GULF WAR OF 1980–1988, 71, 85 (I.F. Dekker & H.H.G. Post eds., 1992).

146. Security Council Resolution 687, 30 INTERNATIONAL LEGAL MATERIALS 847–854 (1991).

147. D.M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 801, 891–892 (1995–1996).

148. Security Council Resolution 687, *supra* note 146, at 854 (Section I).

149. J. Lobel & M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 124, 148 (1999).

150. C. Gray, *After the Cease-Fire: Iraq, the Security Council and the Use of Force*, 65 BRITISH YEAR BOOK OF INTERNATIONAL LAW 135, 144 (1994).

151. See R. Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 724, 726 (1998).

152. General Assembly Resolution 2793 (XXVI), 26 RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 3, *id.* (1971).

153. See P. Bretton, *De Quelques Problèmes du Droit de la Guerre dans le Conflit Indo-Pakistanais*, 18 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 201, 211 (1972).

154. Security Council Resolution 50, *supra* note 131, at 20.

155. For an illustration of such confusion, see V.A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MILITARY LAW REVIEW 186, 187–192 (1995).

156. Vindication of the air campaign against Iraq is sometimes sought by invoking the right of self-defense. See, e.g., S.M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MILITARY LAW REVIEW 115–180 (1999). But the legitimacy of self-defense (in response to an armed attack) was fixed already in August 1990.

157. S.D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 461, 469 (1977).

158. See C. ROUSSEAU, LE DROIT DES CONFLITS ARMÉS 202 (1983).

159. Morriss, *supra* note 147, at 815.

160. Security Council Resolutions 233–235, *supra* notes 141–142, at 2–3.

161. Security Council Resolution 338, 28 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 10 (1973).

162. Egypt-Israel, Cease-Fire Agreement, 1973, 12 INTERNATIONAL LEGAL MATERIALS 1312 (1973).

163. Syria-Israel, Agreement on Disengagement between Forces, 1974, 13 INTERNATIONAL LEGAL MATERIALS 880 (1974).

164. Hague Regulations, *supra* note 70, at 87.

165. OPPENHEIM, *supra* note 48, at 556.

166. The *lex specialis* of Article 36 of the Hague Regulations apparently overrides the *lex generalis* of Article 56(2) of the Vienna Convention on the Law of Treaties (*supra* note 53, at 154), which requires a twelve months minimum notice of the intention to denounce a treaty.

167. Hague Regulations, *supra* note 70, at 88.

168. *Ibid.*, 87.

169. See OPPENHEIM, *supra* note 48, at 556.

170. See R. Monaco, *Les Conventions entre Belligérants*, 75 RECUEIL DES COURS 277, 337–338 (1949).

171. Vienna Convention, *supra* note 53, at 155. *Cf.* Baxter, *supra* note 135, at 386.

VI

Legal Issues of Multinational Military Units

Tasks and Missions, Stationing Law, Command and Control

Dieter Fleck

IN HIS LONG-STANDING LEGAL CAREER, Professor Leslie C. Green has always shown a very personal interest in new topics and developments, in particular with regard to European affairs. The following considerations on current legal issues surrounding multinational military units are, therefore, contributed to this volume, published in his honor. Multinational military units may lend a new quality to the European unification process by helping make it irreversible in the fields of security and defense. This process may contribute to the continuity and predictability of international relations. It will promote a common security and defense identity which in a very distinct way may increase the security of the nations involved. Although such trends are still unique, even in Europe today, they might well prove significant beyond the North Atlantic Alliance in the years to come.

Multinational military units can facilitate modernization despite dwindling resources. Due to force and budget reductions in certain participating countries, there have already been several cases of major formations no longer being sustainable on a national scale. Multinationality ensures the States concerned continue participating in military operations at corps level. What matters more, however, is a new chance to deepen cooperation within the Alliance and

further develop mutual understanding of the daily interests and requirements of the Allies.

Multinational military units are characterized by military-to-military coordination between States. They are not entities with a corporate, political element of their own, nor do they enjoy an independent status distinct from the contributing States. Nevertheless, they tend to mark the beginning of a trend in the larger context of overall European security.

The present study begins by describing existing agreements concerning multinational military units. It then turns to the right of presence of military contingents in a foreign host State, provisions relating to the status of the military and civilian personnel involved, and issues of command and control. Finally, some conclusions will be drawn on the relevance of the concept of multinational military units for further activities within the Alliance and beyond.

Present Agreements on Multinational Units

The concept of multinationality manifests itself especially clearly in the German Bundeswehr. For several decades, the German Air Force has increasingly developed multinational cooperation, a fact reflected in its daily training programs, doctrine, and Alliance integration. Much of the Air Force (fighter wings, surface-to-air missile units, and air combat operations centers) is already subordinate to NATO commanders in peacetime, receiving operation orders from the integrated NATO structure on the basis of NATO operation plans. The German Navy permanently contributes two destroyers or frigates, as well as a mine countermeasures unit, to NATO's Standing Naval Forces. The highest degree of multinationalization has been reached in the German Army. With only one exception (IVth Corps, with headquarters in Potsdam), all of its major formations are multinational today.

In the German case, three different models of multinational units have been developed simultaneously. First, two German/U.S. corps follow the so-called *lead nation model*, with the U.S. and Germany taking turns performing command functions and occupying key positions. The second, or *framework model*, is illustrated by the Allied Command Europe (ACE) Rapid Reaction Corps, in which the British Forces provide the framework, i.e., command, control, administration, and logistic support of the headquarters, and define procedures. By contrast, the framework is provided by the Bundeswehr for the Reaction Force Air Staff based in Kalkar. The Danish-German Corps LANDJUT was the first formation to be organized according to the third model, *deepening*

integration. The German-Netherlands Corps and the European Corps have provided an opportunity to further develop and deepen the integration model.

The German-Netherlands Corps, with its headquarters in Muenster, Westphalia, is the first example of a multinational unit with forces of each participating State stationed on the territory of the partner State. This Corps comprises German main defense forces (1st Armored Division/Military District Command II in Hanover) and the major part of the Netherlands Army, i.e., the 1st (NL) Division "7 December," the 41st Light Brigade which has been stationed in Seedorf (Lower Saxony) for decades. The binational Command Support Group (CSG), which includes more than 1,400 German military and civilian personnel, is stationed in Eibergen (Netherlands). In a joint declaration dated October 6, 1997, the respective Ministers of Defense designated the Corps Headquarters in Muenster as a Force Answerable to Western European Union (FAWEU). Moreover, the Convention on the German-Netherlands Corps, signed on October 6, 1997,[1] has been submitted to parliaments in Germany and in the Netherlands for approval. The Headquarters has been given legal authority to contract, hire civilian personnel, and pay claims, all from a multinational Corps budget and on behalf of the two participating States. Property acquired with common funds is to be considered as owned in common by the Federal Republic of Germany and the Kingdom of the Netherlands. Employment contracts of civilians hired to work at the Headquarters in Muenster are governed by German labor and social law.

The European Corps (Eurocorps), headquartered in Strasbourg, France, consists of personnel from five nations (Belgium, France, Germany, Luxembourg and Spain). It attained operational readiness on November 30, 1995. One of its core elements is the Franco-German Brigade, which has existed since 1988 and which, in part, is integrated down to the company level. Belgian and French military elements[2] of the Eurocorps are stationed in Germany; their status is determined by the NATO SOFA[3] and the Supplementary Agreement to the NATO SOFA with respect to foreign forces stationed in Germany.[4] A January 21, 1993 agreement with Supreme Allied Commander, Europe (SACEUR Agreement) defines the special terms of the employment of the Corps within the framework of the North Atlantic Alliance. By it, the Corps will serve as part of the main defense and reaction forces on the basis of operation plans prepared under the auspices of SACEUR. In any case, the participating nations will remain responsible for deciding on the employment of the Corps. The status of the headquarters in Strasbourg and of the formations operating jointly on the territories of each participating State are yet to be defined. To this end, a "Strasbourg Convention" is currently being negotiated to

establish the legal personality of the headquarters and describe the mission of the Corps. This agreement will be subject to approval by the parliaments of the participating States.

For other multinational Units, stationing issues are of less significance. The LANDJUT Corps had been based in the area of Jutland/Schleswig-Holstein since 1962, with the existing NATO headquarters of the Allied Land Forces Schleswig-Holstein and Jutland (HQ LANDJUT) in Rendsburg being used for command and control. HQ LANDJUT was supported by one headquarters company and one Danish and one German signal battalion. It exercises operational command over German and Danish units which remain national units deployed in their home countries, but which cooperate closely during exercises. HQ LANDJUT was disbanded in Spring 1999 following introduction of the new NATO command structure. However, close Danish-German army cooperation will continue together with a new ally, Poland, in the Multinational Corps Northeast. This formation was activated in September 1999, after Poland's accession to the North Atlantic Treaty. To this end, the Ministers of Defense of Denmark, Germany and Poland signed a Declaration of Intent and an agreement on initial preparations for the establishment of the trinational headquarters in Szczecin in March 1998. The Danish Division and the 14th (GE) Mechanized Infantry Division (Neubrandenburg) will continue to cooperate as they did in the LANDJUT Corps and be reinforced by the 12th (PL) Division as a new and equal partner. Permanent deployment in foreign countries will be restricted to the Danish and German elements of the Corps Headquarters based in Szczecin. As requested by the Parties involved, Danish-German-Polish negotiations on the Corps have been conducted under German chairmanship. The experience gained in Muenster and Strasbourg could thus be utilized for the new trilateral corps. On September 5, 1998, the Corps Convention[5] was signed in Szczecin following parliamentary approval in Denmark, Germany, and Poland. It entered into force in October 1999.

Possible tasks and missions of multinational units were considered in Germany against the backdrop of the constitutional discussion on Bundeswehr participation in out-of-area operations, which led to the Federal Constitutional Court's decision of 1994.[6] It is obvious that the armed forces are not only possible tools of collective defense in accordance with Article 5 of the North Atlantic Treaty and Article V of the Western European Union (WEU) Treaty, but must also be designated for multinational crisis management tasks under the auspices of the United Nations, NATO, or WEU or on the basis of regional agreements in accordance with Chapter VIII of the UN Charter. In addition, they serve to plan, prepare and execute humanitarian aid activities and rescue

operations, including disaster relief. It is in this context that the appropriate authorities of each participating State have to decide on missions within the scope of their national constitutions and in accordance with the provisions of the Charter of the United Nations.

The Eurocorps is fully available for each of the three basic mission types. In peacetime, only main defense forces are assigned to the German-Netherlands Corps on the German side. This, however, does not preclude crisis reaction forces of the Bundeswehr from being assigned also to the Corps for specific missions. The fact that the Corps Headquarters has been designated FAWEU underlines the interest that both sides have in the capability to jointly accomplish this part of the spectrum of tasks as well. Similar arrangements are being considered for the Multinational Corps Northeast, even though the 14th (GE) Mechanized Infantry Division forms part of the German Army's main defense forces.

Other multinational units in Europe (to which the Bundeswehr does not contribute) also demonstrate the attractiveness of the integration model far beyond the German borders. For many years, the United Kingdom/Netherlands Amphibious Force has developed close and effective cooperation in accordance with NATO plans and national commitments. The European Rapid Operational Force (EUROFOR), with its headquarters in Verona, Italy, comprises personnel from France, Italy, Portugal, and Spain, although an agreement on the formation remains to be concluded. The same Parties also created a non-standing naval force, EUROMARFOR, which has no permanent headquarters of its own. EUROFOR and EUROMARFOR are designed to operate in missions laid down in the Petersberg Declaration of the Ministerial Meeting of the Western European Union of 19 June 1992,[7] namely humanitarian missions or evacuation of nationals, peacekeeping missions, and combat force missions for crisis management, including peace-enforcement missions. They will support the European Security and Defence Identity (ESDI) and are open for participation by other European forces. Under UN auspices, the Standby High Readiness Brigade (SHIRBRIG) has been established with headquarters in Birkeröd, Denmark. Multinational Land Forces (MLF) in brigade strength are planned by Italy, Hungary, and Slovenia, with Italy taking a lead. The Central European Nations Cooperation in Peace Support (CENCOOP) is being developed by five partner States (Austria, Hungary, Romania, Slovak Republic, and Slovenia) and two observers (Czech Republic and Switzerland). A Letter of Intent was signed by the five participating ministers of defence on March 19, 1998. The tasks and mission of CENCOOP are to improve peacekeeping capabilities and achieve a higher profile through regional cooperation based on

complexity, multifunctionality, non-traditional tasks, multinationality within contingents, interoperability, interlocking components, as well as role specialization, readiness, mobility, rapid and flexible reaction and mission tailoring according to the mandate. Finally, the Baltic Battalion (BALTBATT) and the Baltic Naval Squadron (BALTRON) have proven their usefulness for many different operations, while a Hungarian-Romanian Battery and other multinational military units are planned to assume specific tasks in the near future.

Agreements Concerning the Right of Presence

The permanent or temporary presence of foreign forces *(ius ad praesentiam)* is subject to approval by the receiving State in accordance with its national laws and practice. In Germany, the right to permanently station allied forces is based on a State treaty, the 1954 Convention on the Presence of Foreign Forces.[8] This right is not restricted to tasks to be accomplished in the context of collective defense pursuant to Article 5 of the North Atlantic Treaty. Instead, the purpose of stationing is defined in more general terms in the Preamble to the 1954 Convention: *"In view of the present international situation and the need to ensure the defense of the free world"*. In the past, this was related to defensive action as provided for in Article 5 of the North Atlantic Treaty (commitment to provide assistance *"if an armed attack against one or more of the Parties in Europe or North America occurs"*) and in Article V of the Brussels Treaty on the Western European Union—(*"If any of the High Contracting Parties should be the object of an armed attack in Europe"*). However, activities of allied armed forces in the context of crisis management and humanitarian assistance, as they form part of the common objectives of multinational units today, are not precluded by the text of the 1954 Convention. In this regard, note that the Convention was explicitly confirmed by an Exchange of Notes dated 25 September 1990,[9] and that the preambular reference to *"the present international situation and the need to ensure the defense of the free world"* was not altered in 1990. Thus, it is subject to continuous political evaluation. In German State practice, such activities have always required special consent of the Federal Government.

Similar conventional provisions apply to the German forces stationed in the Netherlands as part of the German-Netherlands Corps. The new 1997 treaty on the stationing of German armed forces in the Netherlands,[10] which updates a previous German-Netherlands agreement of 1963 and which takes the 1954 Convention into account, covers all possible purposes of stationing, although set purposes are subject to mutual agreement between the two governments.

As far as additional allied armed forces temporarily stationed in Germany within the framework of multinational units for the purpose of combined exercises, the legal situation is rather complex. While there is no doubt that even temporary presence requires special consent of the Federal Government, the question of whether and to what extent such consent has to be based on parliamentary approval has been a matter of discussion. Some experts demanded such approval without clearly defining the scope of the Government's executive powers, which are of special importance with regard to forces of a foreign power on German territory. The German Visiting Forces Act of 1995[11] ended this debate by requiring the conclusion of agreements with sending States. Such agreements may be put into force in Germany by executive order under the Visiting Forces Act; specific parliamentary approval is not required. Note that formal agreements are required on the entry into and temporary stay in the Federal Republic of Germany of foreign armed forces *"for the purpose of exercises, transit by land or training of units"*. Below this threshold, manifold forms of military cooperation are possible and are, indeed, daily routine today, but they do not require the conclusion of formal agreements.

German unification necessitated specific provisions concerning the stationing of foreign troops, for the territorial application of the 1954 Convention is restricted to Western Germany. Specifically, according to Article 11 (in conjunction with Chapter 1 Section I of Annex I) of the Treaty on German Unity,[12] neither the 1954 Convention or the NATO SOFA and Supplementary Agreement apply to Berlin or the former German Democratic Republic. In order to permit allied forces that are permanently stationed in Germany[13] to temporarily visit the Eastern part of the country, it was agreed in a 25 September 1990 Exchange of Notes[14] that any official activity requires consent of the Federal Government in compliance with the provisions of Article 5 paragraph 3 of the Two-plus-Four Treaty.[15]

An agreement regarding temporary visits by other allied forces was concluded by an Exchange of Notes on April 29, 1998.[16] It creates a legal situation with the six permanent sending States comparable to the above-mentioned Exchange of Notes of September 25, 1990. New NATO member States may also be invited to accede to it. It will be submitted for approval to the newly elected 14th German Bundestag. Approval by the other participating States is being pursued according to their national requirements.

Before long, bilateral agreements will be concluded with the Polish and Czech governments covering reciprocal arrangements for the mutual presence of forces of the Bundeswehr and Polish and Czech forces in each of the participating States. They can be put into force in Germany by statutory order in

accordance with the Visiting Forces Act[17] and the Act concerning the Partnership for Peace (PfP) SOFA.[18] Similar visiting forces agreements are proposed for all new partners to the Alliance.

The Status of Personnel

The status (*ius in praesentia*) of military and civilian personnel of multinational units is complex because the provisions of international law apply to the status of foreigners, but not to nationals of the host State. Although the NATO SOFA of 1951 extends to all NATO members, and to the new partners of the Alliance through the PfP SOFA of 1995, it mainly contains rather general regulations. Indeed, the preamble of the NATO SOFA contemplates the possibility of separate arrangements between the Parties concerned "*in so far as such conditions are not laid down by the present Agreement.*" In many cases there is a need to supplement the NATO SOFA provisions; varying interests have led to quite different arrangements during the five decades of close cooperation within the Alliance.

Article IV of the PfP SOFA provides for the possibility of supplementing *or otherwise modifying* it in accordance with international law. For such modification, the rules codified in Article 41 of the Vienna Convention on the Law of Treaties[19] are relevant. By application of that article, Parties to the PfP SOFA may modify it only as between themselves alone and subject to the following conditions: the modification in question must not be prohibited by the PfP SOFA; it must not affect the enjoyment by the other Parties of their rights under the PfP SOFA or the performance of their obligations; it must not relate to a provision, derogation of which is incompatible with the effective execution of the object and purpose of the PfP SOFA as a whole; and the Parties in question shall notify the other Parties of their intention to conclude the agreement and of the modification to the PfP SOFA for which it provides. Thus, the scope of possible modifications is clearly limited. Experience gathered so far in the implementation of the PfP program establishes that modifications of PfP SOFA rules are neither intended nor required under existing supplementing agreements. There is, indeed, a widely shared interest in avoiding modifications altogether.

Cooperation within multinational units may contribute to increased interest in the reciprocity of such separate arrangements. In this context, the Netherlands deserve special credit because, in 1997, they were the first Ally to conclude a Supplementary Agreement with the Federal Republic of Germany,[20] which defines the rights and duties of Bundeswehr personnel stationed in the

Netherlands in provisions which are fully congruent with the Supplementary Agreement regarding the status of forces permanently stationed in Germany.[21] Special tribute is also to be paid to the Czech and Polish negotiators who demanded full reciprocity from the beginning of the negotiations on agreements in accordance with the German Visiting Forces Act. In doing so, they effectively contributed to uniform standards, for as a national law, the German Visiting Forces Act had to be limited to the status of foreign forces in Germany.

In addition to the provisions relating to the status of forces of a sending State, special rules have to be established on the status of multinational headquarters. An exception was the LANDJUT Corps, because it was commanded by an existing NATO headquarters, the status of which ensued from the Paris Protocol of 1952[22] and the 1967 Agreement regarding NATO headquarters in Germany.[23] By contrast, the Danish-German-Polish Convention of 5 September 1998 on the Multinational Corps Northeast[24] provided for specific States rules due to the fact their application of the Paris Protocol, either *mutatis mutandis* or under its Article 14, was excluded for political and legal reasons. By Article 14, the whole or any part of the Paris Protocol may be applied, by decision of the North Atlantic Council, to any international military headquarters or organization established pursuant to the North Atlantic Treaty. The Headquarters of the Multinational Corps Northeast in Szczecin, however, is not part of the NATO command structure. Reference to the Paris Protocol on NATO Headquarters could have resulted in a misunderstanding in this respect which would not have been without political implications. As confirmed in Part IV of the NATO-Russia Founding Act,[25] in the current and foreseeable security environment, the Alliance will carry out its collective defense and other missions by ensuring the necessary interoperability, integration, and capability for reinforcement rather than by additional stationing of permanent substantial combat forces. Even if provisions of the Paris Protocol had been used, major adaptations would have been necessary considering the fact that the Multinational Corps Northeast is subordinated only to the three ministers of defense; therefore, the rights and responsibilities of NATO as defined in the Paris Protocol are inapplicable. Consequently, the Multinational Corps Northeast derives no juridical personality from the North Atlantic Treaty Organization as defined in Article 10 of the Paris Protocol. Its authority is vested exclusively by the three participating States. Property of the Headquarters of the Multinational Corps Northeast is that of the States and only participating States may be committed in legal proceedings. Finally, the North Atlantic Council will not be involved in the settlement of possible disputes, which will remain the

exclusive responsibility of the Parties under the Convention. These adaptations go far beyond what is normally considered as an application *mutatis mutandis*.[26] Hence, no precedent was established by the Paris Protocol. As far as relevant, however, experience and common practice deriving from the application of certain Paris Protocol provisions may be useful for interpretation purposes.

Unlike NATO headquarters that do not act on behalf of specific States but on behalf of the North Atlantic Treaty Organization, the headquarters of multinational units generally do not require a legal personality of their own, for participating States remain the subjects of all rights and duties. The States own all real property and equipment, either individually or jointly. The fact that military and civilian personnel remain under national command does not, however, preclude combined headquarters from concluding certain support services contracts payable from the joint budget. Doing so requires an agreement on contractual competence because the contracts are concluded on behalf of the participating States.

Article 8 of the Convention on the German-Netherlands Corps provides for this solution. According to the German constitution, the authority to conclude contracts and perform other administrative functions is exercised by agencies of the defense administration, not the armed forces.[27] A strict separation of the armed forces and the defense administration may, however, cause friction in multinational units, especially if the partners provide for differing distribution of responsibilities, as might be the case if budget commissioner functions are performed by a division of the Corps headquarters headed by a foreign officer.

It is of particular importance for the Eurocorps that development of a WEU Status of Forces Agreement has been included in the effort to produce a NATO/WEU framework document. The necessity and urgency of such an agreement on the status of troops and personnel placed under WEU command remains unsettled. Among others, the following factors bear on this issue: deepening relations between the WEU and NATO, with priority being given to the implementation of the pertinent resolutions passed during summit conferences and ministerial meetings; increased integration of Associated Partners, specifically in military cooperation within the WEU; and the common aim to strengthen the WEU's capabilities, particularly with regard to the role and efficiency of the WEU's military bodies. To foster uniformity during combined operations, the status of the troops and personnel placed under WEU command should largely be patterned on the provisions of the NATO SOFA. Moreover, the compatibility of new solutions with European Union (EU) law

must be ensured. This applies specifically to EU law dealing with the exemption of foreign armed forces and their members from taxes and other duties.[28]

Command and Control

Given legal constraints as well as policy concerns which for most of the participating States would exclude transfer of full command to an officer of allied forces, it is essential to clearly define command and control issues for multinational units.

Within NATO, rules and procedures for integrated assignment are well established.[29] They denote the relationship between a soldier assigned to a NATO headquarters or agency and the person heading that headquarters or agency. Generally speaking, this relationship involves all matters concerning the soldier, with the exception of personal (in particular disciplinary) matters and personnel service support (which in principle remains a national responsibility).

The established terms of command relationship between NATO commanders and the national units apply both in peacetime and in wartime. NATO commanders exercise authority pursuant to the Resolution Implementing Section IV of the Final Act of the London Conference of 23 October 1954.[30] This authority is amplified in the Terms of Reference of the Major NATO Commanders and further agreements. In these documents, the different levels of command and control—Tactical Control (TACON),[31] Tactical Command (TACOM),[32] Operational Control (OPCON)[33] up to Operational Command (OPCOM)[34]—are well established. As specified for each particular case, they may be exercised either permanently or on an *ad hoc* basis. Although extensive Coordinating Authority[35] is vested in the NATO commander, Full Command,[36] remains under national authority. It follows that the term "command," as used internationally, implies a lesser degree of authority than in a purely national sense. No NATO commander has full command over the forces assigned to him. Instead, nations, when assigning forces to NATO, delegate only operational command or operational control. In multinational operations, each participating nation will normally be represented by a national commander responsible for ensuring that full command can be exercised and that respective national law and policies are observed. Given this situation, an appropriate means for facilitating close cooperation at the international level are common rules of engagement; they are critical for effective command and control of an operation.

Likewise, the relationship between a national unit and the competent NATO commander has to be considered. An elaborate system of NATO Earmarked Forces,[37] NATO Assigned Forces[38] and NATO Command Forces[39] allows for reasonable planning security. It should, however, also be borne in mind that any Transfer of Authority (ToA) remains subject to national decision in accordance with national procedures of the country concerned. Additionally, national forces so earmarked, assigned, or even placed under operational command or control may be withdrawn by national decision.

Of particular import for Germany is the question of the scope of command which the Federal Minister of Defense has over German military personnel in accordance with Article 65a of the German Constitution.[40] Despite the article, German subordinates may be ordered by their national superiors to obey the instructions of a foreign directing authority. Disobedience of the foreign superior's instructions would be a disciplinary offence against the duty to serve loyally.[41] The practical consequence of this legal construction is that German soldiers have to fully comply with directives issued by an allied commander as if these directives were military orders *strictu sensu*. Non-compliance may be sanctioned by the competent national commander under the Military Disciplinary Code.[42] However, penal sanctions are not allowed because, pursuant to the Military Penal Code,[43] disobedience requires a military order *strictu sensu*.

In the case of the guard duties in the German-Netherlands Corps, these considerations led to an express provision in the Corps Convention stating that binationally used facilities may be guarded by binational guards, if sending State guard personnel are vested with the same authority as guard personnel of the receiving State. For the execution of their duties, binational guards are exclusively subordinated to the competent superior guard authorities of the receiving State.[44] The German national guard provisions have been amended accordingly to include allied soldiers in German military guards.[45] For binational guard duties outside the territory of the Contracting Parties, specific arrangements will be necessary.

Unless otherwise provided, the command relationship between NATO commanders and national units also applies to the relationship between commanders of multinational units and their national contingents. In the case of the German-Netherlands Corps, a first step towards deepening command and control integration was the agreement on Integrated Directing and Control Authority under Article 6 of the Corps Convention.[46] As understood by the Contracting Parties, the Commander of the Corps' authority with regard to the execution of tasks given to the Corps goes beyond Operational Command. Pursuant to Article 7 paragraph 4 of the detailed Corps Agreement,[47] Integrated

Directing and Control Authority enables the Corps Commander to take full responsibility for the implementation of all Corps directives. Accordingly, he may issue and prioritize directives to the binational and national elements of the Corps when necessary, with the exception of national territorial tasks. The commander may delegate this authority to the extent required to subordinate commanders. Unanimity of all Parties is essential for this solution; a majority decision will not suffice. Moreover, it must be ensured that national contingents (and single soldiers) are recallable at any time through national orders. National rights and private duties, specifically with regard to disciplinary matters and complaints, are still exempt. Further steps towards full command and control will, thus, remain subject to continued consideration.

A reevaluation of the relevant German legal doctrine[48] has led to an influential academic opinion that, without prejudice to the power of command of the Minister of Defense under Article 65a of the Basic Law, foreign commanders in multinational military units may be included in the chain of command under German military law as long as unanimity exists between all ministers of defense concerned. This opinion is based on the understanding that directives issued at the multinational level in fact represent national directives tied up in joint responsibility. Hence, so long as directives issued by a multinational ministerial committee to the commander of a multinational unit are executed by the latter with respect to the national contingents, these directives represent national directives to the respective national contingent. There are, however, contrary opinions which question the compatibility between the political and military interest in full power of command of the integrated commander and existing German legal requirements.[49] To date, no legislative solution to this controversy has been reached.

Outside the Alliance, NATO terms and definitions do not apply unless specifically agreed. Nevertheless, the legal issues discussed here in the context of multinational military units resurface when national contingents of various States are tasked to cooperate in joint missions. Clear provisions should, therefore, be negotiated and enacted well in advance of such operations.

For peacekeeping operations under United Nations command and control, standardized rules should be possible. Unfortunately, existing UN practice appears to be less than precise in this respect. A general provision was prepared in the 1991 Model Agreement on troop contribution.[50] Yet, the term "command" is not clearly defined in this document. Interpretations of the term "full authority over the deployment, organization, conduct and direction," which, according to this Model Agreement, shall be exercised exclusively by the Secretary-General, may also differ. So far, the Model Agreement has not been

widely used in UN peacekeeping. For the mission in the former Yugoslavia, it was essential to secure NATO's support under the Dayton Accords. Thus, clear terms of command and control could be used and implemented as discussed above.

As illustrated in this study, multinational military units are of unique significance for application of the *ius ad praesentiam* as well as the status of forces (*ius in praesentia*) regime and its further development. In specific cases, the establishment of such units has revealed the need for certain adjustments to promote the principle of reciprocity.

Command and control issues within multinational units and the relationship between foreign, "multinational" commanders and national authorities of the participating States need further consideration. New forms of integrated command and control relations may be required in the process of deepening integration. The degree to which NATO terms of command and control could be used as guidance, or even be made applicable to operations outside the Alliance, merits further investigation.

Proposals to harmonize national military laws in support of daily cooperation in multinational units raise questions regarding possible deviations from existing national laws. Such questions cannot be properly answered in general terms, but instead require specific solutions responsive to the respective context. Changes in national legislation may only be executed step by step and as part of an overall process of development.

Increased integration should not be regarded as an end in itself. It remains equally important to ensure the exchangeability of personnel between various units with regard to their participation in multinational units. This sets certain bounds to military integration between the participating States which must be taken into account in the interest of a common solution.

The question remains open as to what extent the concept of multinational units, which is unique in Europe today, will gain importance beyond present Alliance cooperation. Most current UN peacekeeping operations have long been multinational in nature. It is sometimes surprising to see that certain general rules which have become routine for NATO cooperation, in particular with respect to command and control, are still absent during UN operations. The practice of *ad hoc* arrangements may still be preferable to allow for flexibility in a specific mission, but clarity, consistency and, last but not least, the principle of equality between troop contributing States require a long-term solution based on accepted general terms and procedures.

In all aspects of multinational military units, the need for a continuous review is obvious. It is highlighted by the review process agreed to in the treaties, as well as by the common interest of all negotiating partners in using well-tried procedures and developing tailor-made solutions.

Notes

1. Convention of 6 October 1997 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands on the General Conditions for the 1 (German-Netherlands) Corps and Corps-related units and establishments (Bundesgesetzblatt - BGBl - 1998 II 2438).

2. 17th (B) Brigade, based in Spich, which forms part of the 1st (B) Division; 1st (F) Armored Division, 42nd Signal Regiment and French element of the Franco-German Brigade.

3. Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of their Forces (NATO SOFA) of 19 June 1951 (199 UNTS 67; 4 UST 1792; TIAS 2846).

4. Agreement to Supplement the Agreement between the Parties of the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany (Supplementary Agreement to NATO SOFA) of 3 August 1959, amended by the Agreements of 21 October 1971 and 18 March 1993 (481 UNTS 262; BGBl 1961 II 1218, 73 II 1022, 94 II 2594).

5. Convention of 5 September 1998 between the Government of the Kingdom of Denmark, the Government of the Federal Republic of Germany, and the Government of the Republic of Poland on the Multinational Corps Northeast.

6. International Military Operations (German Participation) Case, Federal Republic of Germany, Federal Constitutional Court (BVerfG) of 12 July 1994, Case Nos. 2 BvE 3/92, 5/93, 7/93 and 8/93 in: INTERNATIONAL LAW REPORTS, Vol. 106, Cambridge, 1997, pp. 319–352. These decisions were given occasion to by the Bundeswehr's participation in operations in the Adriatic Sea, in the air space over Bosnia-Herzegovina, and in Somalia.

7. Bulletin No. 68 (23 June 1992), pp. 649 ff.

8. Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954 (3 UNTS 334; BGBl 1955 II 253).

9. Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the United States concerning the status of their forces during temporary stays in Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, of 25 September 1990, as amended on 12 September 1994 (Exchange of Notes with six permanent sending States, BGBl 1990 II 3716).

10. Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande über die Stationierung von Truppen der Bundesrepublik Deutschland im Königreich der Niederlande vom 6. Oktober 1997 (BT-Drucksache 13/10117, pp. 56–57).

11. Gesetz über die Rechtsstellung ausländischer Streitkräfte bei vorübergehenden Aufenthalten in der Bundesrepublik Deutschland (Streitkräfteaufenthaltsgesetz) vom 20. Juli 1995 (BGBl 1995 II 554).

12. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertrag - (BGBl 1990 II 889).

13. Forces of Belgium, Canada (which were, however, largely withdrawn from Germany in 1994), France, Netherlands, United Kingdom, and United States.

14. *Supra* note 9.

15. Treaty on the Final Settlement with respect to Germany of 12 September 1990 (BGBl 1990 II 1317).

16. Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Denmark, the Hellenic Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Norway, the Portuguese Republic, the Kingdom of Spain, and the Republic of Turkey concerning the status of their forces during temporary stays in the Federal Republic of Germany, of 29 April 1998 (Exchange of Notes concerning temporary stays in Germany).

17. *Supra* note 11.

18. Gesetz zu dem Übereinkommen vom 19. Juni 1995 zwischen den Vertragsstaaten des Nordatlantikvertrags und den anderen an der Partnerschaft für den Frieden teilnehmenden Staaten über die Rechtsstellung ihrer Truppen sowie dem Zusatzprotokoll (Gesetz zum PfP-Truppenstatut) vom 9. Juli 1998 (BGBl 1998 II 1338).

19. Vienna Convention on the Law of Treaties of 23 May 1969 (UNTS 1155, 331).

20. Zusatzabkommen zu dem Abkommen vom 19. Juni 1951 zwischen den Parteien des Nordatlantikvertrags über die Rechtsstellung ihrer Truppen hinsichtlich der im Königreich der Niederlande stationierten deutschen Truppen vom 6. Oktober 1997 (BGBl 1998 II 2407).

21. *Supra* note 4.

22. Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol) of 28 August 1952 (340 UNTS 200).

23. Agreement between the Federal Republic of Germany and the Supreme Headquarters Allied Powers Europe on the special conditions applicable to the establishment and operation of International Military Headquarters in the Federal Republic of Germany (Supplementing Agreement to the Paris Protocol) of 13 March 1967 (BGBl 1969 II 2009).

24. *Supra* note 5.

25. Founding Act on Mutual Relations, Cooperation and Security Between the North Atlantic Treaty Organization and the Russian Federation, signed in Paris on 27 May 1997.

26. *Cf.* the definition of *mutatis mutandis* taken from BLACK'S LAW DICTIONARY: "With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices and the like."

27. Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 as amended. Article 87b, paragraph 1, reads: "(1) The administration of the Federal Defense Forces shall be conducted as a Federal administration with its own administrative substructure. Its function shall be to administer matters pertaining to personnel and to the immediate supply of the material requirements of the Armed Forces. Tasks connected with benefits to invalids or construction work shall not be assigned to the administration of the Federal Defense Forces except by Federal legislation which shall require the consent of the Bundesrat. Such consent shall also be required for any legislative provisions empowering the administration of the Federal Defense Forces to interfere with rights of third Parties: this shall, however, not apply in the case of laws concerning personnel."

28. Article 93 (ex-article 99) of the EC Treaty and Article 15.10 of the Sixth Directive of the European Union regarding the Value Added Tax.

29. *Cf.* MC 57/3 Overall Organization of the Integrated NATO Forces.

30. C-M (54)85(Final), 25 October 1954, Department of State Publication 5659, p. 32.

31. Tactical Control (TACON) is the detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned.

32. Tactical Command (TACOM) is the authority delegated to a commander to assign tasks to forces under his command for the accomplishment of the mission assigned by higher authority.

33. Operational Control (OPCON) is the authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location, to deploy units concerned and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control.

34. Operational Command (OPCOM) is the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational control and/or tactical control. OPCOM does not of itself include responsibility for administration or logistics.

35. Coordinating Authority is the authority granted to a commander or individual assigned responsibility for coordinating specific functions or activities involving forces of two or more countries or commands, or two or more services or two or more forces of the same service. It includes the authority to require consultation between the agencies involved or their representatives, but does not have the authority to compel agreement. In case of disagreement between the agencies involved, the commander should attempt to obtain essential agreement by discussion. In the event he is unable to obtain essential agreement, he shall refer the matter to the appropriate authority.

36. Full Command is the military authority and responsibility of a superior officer to issue orders to subordinates and covers every aspect of military operations and administration. It exists only within national services.

37. NATO Earmarked Forces are forces which nations agree to place under the operational command or operational control of a NATO commander at some future time.

38. NATO Assigned Forces are forces which nations agree to place under the operational command or operational control of a NATO commander at a specified stage, state or measure prescribed in the NATO Alert System or in special agreements.

39. NATO Command Forces are forces which nations have placed under the operational command or operational control of a NATO commander (e.g., NATO Airborne Early Warning and Control Force - NAEW - a NATO Force under the operational command of all three Major NATO Commanders, for whom SACEUR acts as Executive Agent).

40. Article 65a reads: "Power of command in respect of the Armed Forces shall be vested In the Federal Minister of Defense."

41. Duties under § 7 of the Soldatengesetz (Soldiers Act), § 54 of the Bundesbeamtengesetz (Federal Act on Civil Servants).

42. Wehrdisziplinarordnung (Military Disciplinary Code) in der Fassung vom 4. September 1972 (BGBl 1972 I 1665) with later amendments.

43. §§ 19, 20 Wehrstrafgesetz (Military Penal Code) in der Fassung vom 24. Mai 1974 (BGBl 1974 I 1213) with later amendments.

44. *Supra* note 1, Article 10.

45. Article 2 of the law of 11 September 1998 (BGBl 1998 II 2405), by which the Corps Convention (*supra* note 1) and the Supplementary Agreement for German Forces in the Netherlands (*supra* note 20) were enacted.

46. *Supra* note 1. Article 6 reads:

> Integrated Directing and Control Authority (1) The Commander of the Corps shall be vested with integrated directing and control authority with regard to the execution of the tasks given to the Corps. This authority includes the right to give instructions to soldiers and civilian members of the Corps under his integrated command. It encompasses planning, preparation and execution of the Corps' tasks and missions, including training exercises as well as logistic competencies. (2) National rights and obligations of personnel, in particular with regard to disciplinary matters and complaints, do not fall within the scope of the integrated directing and control authority. (3) Details shall be agreed between the Contracting Parties. (4) The responsibilities and powers of the competent NATO/WEU Commander shall remain unaffected.

47. Agreement between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands on the Organization and the Activities of the 1 (German-Netherlands) Corps and the Air Operations Coordination Center of 6 October 1997 (BT-Drucksache 13/10117, p. 79).

48. Ferdinand Kirchhof, *Deutsche Verfasssungsvorgaben zur Befehlsgewalt und Wehrverwaltung* in multinationalen Verbänden, in: NEUE ZEITSCHRIFT FÜR WEHRRECHT 4, 1998, pp. 152–163.

49. Joachim Wieland, *Die Beteiligung der Bundeswehr an gemischtnationalen Einheiten. Rechtsfragen ofener Staatlichkeit auf militärischem Gebiet*, in: Grawert/Schlink/Wahl/Wieland (eds.), OFFENE STAATLICHKEIT. FESTSCHRIFT FÜR ERNST-WOLFGANG BÖCKENFÖRDE ZUM 65. Geburtstag, Berlin 1995, pp. 219–236.

50. Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations UN-Document: A/46/185 (23 May 1991). Part V (Authority) reads as follows:

> (7) During the period of their assignment [to the United Nations peace-keeping operation], the personnel made available [by the Participating State] shall remain in their national service but shall be under the command of the United Nations, vested in the Secretary-General, under the authority of the Security Council. Accordingly, the Secretary-General of the United Nations shall have full authority over the deployment, organization, conduct and direction [of the United Nations peace-keeping operation], including the personnel made available [by the Participating State]. In the field, such authority shall be exercised by the Head of Mission, who shall be responsible to the Secretary-General. The Head of Mission shall regulate the further delegation of authority. (8) The Head of Mission shall have general responsibility for the good order and discipline [of the United Nations peace-keeping operation]. Responsibility for disciplinary action with respect to military personnel made available [by the Participating State] shall rest with the officer designated by the Government [of the Participating State] for that purpose.

VII

International Law and the Conduct of Military Operations

Stocktaking at the Start of a New Millennium

Christopher Greenwood

IT IS ALWAYS A PRIVILEGE to be asked to contribute a chapter to a collection of essays in honour of a colleague, but in this case it is also a great pleasure. The present writer is one of many who have benefited over the years from Leslie Green's writings, teaching, friendship, and encouragement. Leslie's contributions to the literature on the laws of war have always combined rigorous scholarship with a determination that the subject is a practical one to be approached in a practical way. It is in that spirit that he has grappled with every challenge to that body of law, from the Indian National Army trials in which he took part at the end of the Second World War to the Kosovo crisis. It therefore seems fitting to take the opportunity of this collection of essays to examine the impact of the law on military operations and to take stock of where we are going at the start of a new millennium.

The idea of laws of war is not, of course, a new one. Laws on the conduct of hostilities can be traced back several centuries, while rules of international law restricting the right to resort to force have existed for most of the present century. It is one of the paradoxes of international law that it thus has one body of law designed to prevent war, by restricting the circumstances in which it is

lawful for States to resort to force, and another designed to regulate the conduct of war if the first is disregarded. While other areas of international law may have a bearing on government decisions regarding the use of force,[1] it is these two bodies of law on which this paper will accordingly focus.

While the law on resort to force and the laws of war are separate bodies of law with different objectives and very different histories, the relationship between them is obviously a close one. If the use of force by a State in its international relations is to be lawful, it must comply with both bodies of law. While the law on resort to force is more directly the concern of decision makers at government level than of military commanders in the field, the latter are affected, through the medium of rules of engagement, by that law as well as by the law on the conduct of hostilities (the "law of war" or "law of armed conflict," properly so-called).

In the last decade, both bodies of law have assumed a more prominent role in discussion of international affairs, and their impact on government decision making and on the whole military chain of command has become more important. The purpose of this paper is to explore that impact in the context of the changing nature of war and changes in the relevant rules of international law at the start of the new millennium. To that end, Part I of the paper will consider developments in the law on resort to force, such as the increased reliance on United Nations mandates as the justification for resort to force and the question of whether there is a right of humanitarian intervention. Part II will make a similar survey of developments in the law on the conduct of hostilities, particularly in the areas of United Nations operations, internal armed conflicts and the use of new technology in warfare. Finally, Part III will examine the impact of the law upon decision making, both at the governmental level and by military commanders.

Part I

The Legal Basis for Using Force

Prior to 1919, international law recognized a right of States to resort to war in furtherance of national policy. The most important change in international law during the twentieth century has been the replacement of that right by a general rule that prohibits recourse to force in international relations, qualified by a small group of exceptions.[2] Thus, Article 2(4) of the United Nations Charter provides 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, or in any other manner inconsistent with the Purposes of the United Nations.

Since the principal purpose of the United Nations is the maintenance of international peace and security,[3] this provision has generally been interpreted as stating a ban on any threat or use of force in international relations unless that use or threat of force is justified by a specific exception to the general rule. The Charter itself expressly provides for only two exceptions: the right of individual or collective self-defence in the event of an armed attack, which is preserved by Article 51 of the Charter,[4] and the use of force under the authority of the Security Council when the Council takes enforcement action under Chapter VII of the Charter. Although States and writers have from time to time suggested that other justifications for the use of force exist under customary international law and are not affected by Article 2(4) of the Charter—for example, a right of humanitarian intervention, of reprisals, of intervention to promote democracy, and intervention to protect a State's nationals outside its territory—all of these are disputed. Even the right of humanitarian intervention, which has assumed such importance in the last few years, still arouses considerable controversy[5] (although this writer will argue that this right forms part of the corpus of modern international law).

Since enforcement action by the Security Council was virtually unknown before 1990,[6] until that date the law on resort to force was in practice defined by the limits which international law placed on the right of self-defence. Article 51 of the Charter gives only a partial indication of those limits:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus, although self-defence is intended to protect the State, no indication is given of what "the State" means for these purposes. Clearly, an act such as Iraq's invasion of Kuwait was an armed attack upon the State of Kuwait, but the concept of a State includes more than just territory; it also encompasses

population and government. Is an attack upon a State's nationals abroad, or upon ships flying its flag, or upon units of its armed forces (such as the U.S. forces in Berlin who were attacked by the bombing of the La Belle discotheque in 1986) an attack upon the State itself? This is a question of considerable importance to which international law gives only an uncertain answer, but the practice of those States which can do so has been to invoke the right of self-defence to protect their nationals and shipping and certainly to protect their armed forces. This approach is surely correct, for a State consists of its people as much as its territory, and there would be something very strange, to say the least, about a law which permitted the use of force to protect territory, no matter how remote, barren, or uninhabited, but not to protect the lives of a State's people when attacked outside its territory.[7]

Nor does the Charter give a definition of what is meant by "armed attack" (or in the French text "*aggression armée*"). The International Court of Justice has said that the use of force constitutes an armed attack only when it reaches a certain level of intensity, so that a minor border incident would probably not qualify.[8] It is clear, however, that the use of force need not be by regular forces but can include covert operations and terrorist attacks.[9] In addition, while Article 51 is couched in terms which suggest that the right of self-defence may be exercised only once an armed attack has actually commenced, the better view, and one for which there is substantial support in State practice, is that there is a right of anticipatory self-defence when an armed attack is reasonably believed to be imminent.[10]

One further consideration is that, although Article 51 is silent on this point, the International Court of Justice has recognized that the right of self-defence is subject to the limitation that measures taken in self-defence must be proportionate; excessive use of force by a State which has been the victim of an armed attack is unlawful.[11] This requirement is often misunderstood. It does not mean that a State which has been attacked is confined to the degree of force used by the attacker:

> The requirement of the proportionality of the action taken in self-defence . . . concerns the relationship between that action and its purpose, namely . . . that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. [12]

This is an important aspect of the right of self-defence and is indicative of one of the purposes which the international law on resort to force is designed to serve, namely, that if war cannot be prevented, the law should at least seek to contain it. It is this requirement, that the exercise of the right of self-defence should be confined to what is necessary and proportionate, which makes the limits of self-defence important not only in the decision to resort to force but also in decisions about how the subsequent hostilities should be conducted.[13]

While the right of self-defence remains the legal basis for the use of force which is most frequently invoked, it is no longer the only one. Since 1990, decisions to employ force have increasingly had a United Nations element. The point can be illustrated by contrasting the Falklands conflict of 1982 with the Kuwait conflict of 1990–1991. Both conflicts commenced with the invasion by one State of territory of another and thus with a violation of Article 2(4) of the Charter. In the case of the Falklands, the British Government justified its resort to force in response to the Argentine attack entirely on the basis of the right of self-defence—United Kingdom territory had been the subject of an armed attack and the United Kingdom claimed the right to use the degree of force necessary to repel that attack, which meant, in that case, such force as was compatible with the laws of war and was necessary to retake and secure the islands. The Security Council was only peripherally involved. The United Kingdom scored an important victory, in *political* terms, at the outset of the conflict in obtaining Resolution 502 (1982) which called on Argentina to withdraw and uttered a thinly veiled condemnation of the invasion. That resolution was not, however, a necessary part of the United Kingdom's *legal* justification for the military operations on which it then embarked. The legal questions were, first, was the United Kingdom acting within the scope of the right of self-defence—in particular, were its actions within the proportionality requirement—and, secondly, did those actions comply with the laws of war?

By contrast, when Iraq invaded Kuwait in August 1990, the Security Council determined that that action was a breach of international peace and then took enforcement action under Chapter VII of the United Nations Charter.[14] The United Nations could not itself undertake military action, as envisaged in the Charter, but it used its powers under Chapter VII to authorize military action by an *ad hoc* coalition of States. Thus, Security Council Resolution 678 (1990) authorized "States co-operating with the Government of Kuwait" (a formula carefully designed to avoid any suggestion that the Council was approving military action by Israel) to use force in order to ensure Iraqi compliance with the various resolutions on Kuwait and "to restore international peace and security in the area."

The importance of that authorization was evident at both the political and legal levels. At the political level it helped to cement the coalition and to enhance its credibility, especially in the Arab world. At the legal level, Resolution 678 was not essential, in the sense that the coalition States could have justified recourse to force by reference to the right of collective self-defence in the face of what was undoubtedly an armed attack upon Kuwait. However, Resolution 678 had important legal (as well as political) effects, for it provided an entirely new justification for using force, one derived from the Security Council authorization. Moreover, that justification entitled the coalition States, in principle, to go beyond what the same States would have been entitled to do by way of collective self-defence.[15] Self-defence would have justified only what was necessary for the liberation of Kuwait. Resolution 678, on the other hand, justified the use of force to restore peace and security. It is by no means clear, for example, that the right of self-defence would have justified what was in effect a blockade of Aqaba in "neutral" Jordan, or the attacks upon Iraq's longer term military potential. The peace terms imposed upon Iraq in Resolution 687 (1991) also went far beyond anything which could lawfully have been required by States relying upon their own rights of self-defence.

The lesson is clear. By obtaining the backing of the Security Council for their use of force against Iraq, the principal coalition States not only secured a far firmer political base and, in particular, reinforced their support in the Arab world, they also obtained the authority to go beyond what even an expansive interpretation of the right of self-defence would have permitted in that they were authorized to use force to achieve objectives which would not have fallen within the concept of self-defence. The price was the political complication of having to secure the necessary support in the United Nations Security Council. In practice, however, that price was a small one. Having secured enough votes to pass Resolution 678,[16] the coalition was not then subject to any practical control by the Security Council (although it reported to the Council on the actions which it took) because the mandate conferred by Resolution 678 was very broad and could not have been altered without a further resolution which the United States, United Kingdom, and France could have vetoed even if there had otherwise been a majority for its adoption. While the Security Council provided the authority to use force and defined the limits of that authorization, command and control in the ensuing operation rested entirely in the hands of the States which contributed the forces.[17]

The power of the Security Council to authorize States to use force has been particularly important in a number of cases of humanitarian intervention, a ground for the use of force which has emerged into particular prominence in

recent years. In contrast to those cases, such as the Entebbe raid, in which States have intervened by force in the territory of other States in order to protect their own citizens, humanitarian intervention entails intervention in order to protect the nationals of the target State from their own government or, in some cases, from events occurring in the target State which the government of that State (if one still exists) is unwilling or unable to control. The use of force for this purpose cannot be accommodated, even within the elastic limits of the right of self-defence. If humanitarian intervention is to be considered lawful, therefore, it must be because of the existence of a legal basis for using force separate from the right of self-defence.

It now appears to be widely accepted that the Security Council has the power to authorize intervention on humanitarian grounds. Since 1990, the Security Council has done so in relation to Somalia and Haiti, as well as giving subsequent approval to the ECOWAS operation in Liberia, while humanitarian intervention was one of the features of the United Nations operations in the former Yugoslavia between 1991 and 1995. Such actions have required the Security Council to take a broader view of what constitutes a threat to international peace and security,[18] extending it from situations involving the use of force between States to conflicts within a State. That was an easy step to take where the conflict within a State affected a neighbouring country or threatened to spill over an international boundary (as happened in Liberia).

In both the Somalia and Haiti cases, however, the Council acted at a time when the threat to other States was minimal, and it seems that it was the situation within those two States which was considered to be the threat to international peace. In the Somalia case, the Council effectively admitted as much when it determined, in the Preamble to Resolution 794 (1992), that "the magnitude of the human tragedy" within Somalia posed a threat to international peace and security. No mention was made of any effect upon neighbouring States and, in fact, at the time that that resolution was adopted, the effect upon neighbouring States was minimal since the fighting was contained within Somalia and few Somalis were able to flee the country. In the case of Haiti, the flow of refugees to neighbouring States was undeniably a political problem, but it could not be said to have threatened the peace of the region or the security of any other State.

A more difficult question is whether there are any circumstances in which it is lawful for a State, or group of States, to intervene by force on humanitarian grounds without the authorization of the Security Council. This question has, of course, received much attention as a result of the NATO operations over Kosovo which began in March 1999.

Prior to 1990, the legality of humanitarian intervention in the absence of United Nations authorization was widely questioned. Nevertheless, there were occasions when States invoked a right of humanitarian intervention. When India intervened in Bangladesh in 1971, and when Vietnam invaded Cambodia and Tanzania Uganda in 1979, they claimed to be acting in exercise of such a right, although they did so only as a secondary justification and their claims met with considerable resistance.[19]

Since 1990, however, there has been a more substantial body of State practice sustaining a right of intervention in a case of extreme humanitarian need.[20] The Economic Community of West African States (ECOWAS) intervention in Liberia in 1990 could only have been justified as an exercise of a right of humanitarian intervention, yet not only did it meet with no condemnation from the international community, it eventually received the express endorsement of the Security Council some two years later.[21] The interventions by United States, British, and other forces in northern Iraq in 1991 and southern Iraq the following year are an even more striking assertion of the right of humanitarian intervention. Although the intervention was preceded by the adoption of Security Council Resolution 688 (1991), which condemned Iraq's attacks upon its civilian population, that resolution was not adopted under Chapter VII of the Charter and did not authorize military action. The justification for the operation rested, therefore, on the assertion of a right of humanitarian intervention under general international law. While Iraq protested at these incursions into its territory, they again met with almost no opposition in the rest of the international community.

In asserting a right of humanitarian intervention in Yugoslavia, the NATO States were not, therefore, writing on an empty page. As was the case in Iraq, military action was not authorized by the Security Council but the Security Council had condemned the Federal Republic of Yugoslavia's treatment of the population of Kosovo as a threat to international peace and security.[22] Moreover, the Security Council had expressly recognized that there was overwhelming evidence of widespread violations of human rights and consequent loss of life in Kosovo (much of the evidence for which came from the United Nations High Commissioner for Refugees and other impeccable sources) before NATO action commenced. These factors have led a number of writers to conclude that the NATO action was necessary and morally justified, but that it was nevertheless unlawful.[23] If true, that is a damning condemnation of international law. The present writer, however, does not accept that it is true. International law is not static and modern international law can no longer be regarded as giving the protection of State sovereignty absolute primacy over the protection of

life. In this writer's opinion, a right of humanitarian intervention is part of contemporary customary international law, and the rejection in the Security Council—by the substantial majority of twelve votes to three—of a Russian draft resolution which would have condemned the NATO action tends to reinforce that conclusion.

Another change of considerable importance is illustrated by the earlier United Nations involvement in the fighting in the former Yugoslavia. For most of its history, the United Nations has distinguished between enforcement action, where the Security Council either established a United Nations force to fight an aggressor or authorized States to conduct a war against the aggressor on behalf of the United Nations, and peacekeeping operations, in which the United Nations established a force to police a cease-fire or perform other tasks of an essentially neutral character. While a peacekeeping force might become involved in fighting, especially if it were itself attacked, it was not intended that such a force should become a party to a conflict. The distinction between the two types of operation was rightly considered to be of the utmost importance (although, in practice, almost all United Nations operations were of the peacekeeping kind).

The revitalization of the Security Council in the 1990s, however, has led to the United Nations attempting to mount operations which had some of the attributes of both peacekeeping and enforcement action. In Bosnia-Herzegovina, for example, UNPROFOR was originally established with a role which was primarily one of peacekeeping,[24] at least in the sense that UNPROFOR was charged with a humanitarian mandate, to be discharged on an impartial basis, and was neither intended nor equipped to fight a war. Over time, however, this basic mandate changed as the Security Council used its enforcement powers under Chapter VII of the United Nations Charter to give UNPROFOR new tasks, such as monitoring (and, perhaps, protecting) the safe areas established by the Security Council, while NATO air forces, operating outside the United Nations chain of command, were authorized by the Council to use air power in support of specific UNPROFOR objectives.

As the conflict progressed, some States which were major contributors to UNPROFOR became increasingly concerned about the safety of their contingents in Bosnia-Herzegovina and deployed forces, under national not United Nations control, to the region to assist in protecting UNPROFOR and, if necessary, in evacuating their UNPROFOR contingents. Had such an evacuation been attempted in, for example, the winter of 1994 against armed opposition, the legal authority to use force against those attacking UNPROFOR units or attempting to prevent their redeployment would have been derived from a

complex mix of the various United Nations mandates and the right of self-defence of the various contributor States. Given the military and political complexity of such an operation, this additional level of legal complication would have been far from helpful.

Although enthusiasm in the United States for United Nations involvement in armed conflicts has diminished since the Somalia conflict, and the number of United Nations peacekeepers is unlikely to climb back to its peak of 1994–1995 in the near future, it is also unlikely that the United Nations will return to its comparatively passive role of the 1970s and 1980s. The position of the Security Council in the international legal system as a body which can authorize States to use force in circumstances where they could not otherwise lawfully do so makes it too useful for that. The other options—disregarding the law or attempting to develop new customary law rules permitting the use of force—are problematic. The first course entails abandoning the advantages which legitimacy bestows; the second would encounter serious opposition and would be very much a mixed blessing, since rules developed for the benefit of one State or group of States are, of course, equally available to others.

One further development requires comment. A majority of modern conflicts occur within a State, or, at least, have their origins in an internal conflict, even if they subsequently involve other States. The law on resort to force traditionally had nothing to say about internal conflicts. Rebellion did not violate international law but nor was it the exercise of a right under international law, except where force was used to vindicate a right to self-determination, something which until recently was assumed to be confined to colonial and quasi-colonial cases. Similarly, international law left the incumbent government free to employ force against any challenge to its authority. Article 2(4) of the United Nations Charter prohibited the use of force by States only in their *international relations*, not in their dealings with their own peoples. International law did prohibit assistance to rebels and, once the situation in a State reached the level of civil war, to governments. In practice, however, the latter part of that rule was almost entirely disregarded and States continued to provide military assistance to governments even after those governments had lost control of most of the territory and population of their States.

There has been no formal change in the law. There are, however, signs of a change in practice in the way that the law is interpreted and applied. First, the Security Council has been willing to treat the use of force within a State as giving rise to a threat to international peace and security and to take action in respect of it. For example, in the early stages of the conflict in what was then still treated as a single Yugoslavia, the Council imposed an arms embargo in

Resolution 713 (1991); more recently, in Resolutions 1160 (1998), 1199 (1998) and 1244 (1999), it has first imposed sanctions on the Federal Republic of Yugoslavia, because of the latter's military crackdown in Kosovo, and then authorized the deployment there of a multinational and essentially NATO-dominated force in the wake of the NATO air operations against the Federal Republic of Yugoslavia.

Secondly, the speed with which much of the international community recognized the new States which emerged from the former Yugoslavia and the insistence upon non-recognition of boundary changes resulting from the use of force suggest that the concept of self-determination may be acquiring a broader meaning than hitherto.

Thirdly, there are indications that the use of force by an incumbent government may, in certain circumstances, be regarded as unlawful, for example if it involves the use of federal troops against a breakaway province (as in Yugoslavia in 1991) or against an entity which has carved out some kind of *de facto* international status (such as Taiwan). These are tentative steps. The fighting in Chechnya and Sri Lanka, for example, has not attracted the same degree of attention. Nevertheless, it seems unlikely that international law in the next century will continue to ignore the use of force within a State in the way that it has for most of the twentieth century.

Part II

Law and the Conduct of Hostilities

While the law on resort to force seeks to prevent, or at least to contain war, the principal goal of the laws of war today is the preservation of certain humanitarian values in war, particularly by limiting violence against those who do not take a direct part in hostilities. This emphasis on humanitarian values helps to explain one of the apparently paradoxical aspects of the laws of war—the fact that they apply with equal force to both sides in a conflict, irrespective of which is the aggressor and which the victim.[25]

In contrast to the law on resort to force, which consists almost entirely of broad principles with considerable flexibility, the laws of war are detailed—more than thirty treaties, running in total to several hundred pages—and, in most respects, very precise. While the most detailed regimes concern the treatment of persons who are clearly not participating in hostilities—the wounded, sick, shipwrecked, prisoners of war, and civilian detainees

and the civilian population of occupied territory—recent years have seen an increased emphasis on what may be termed "front line law," that law dealing with the actual conduct of combat operations. This law requires, *inter alia*, that the armed forces distinguish at all times between combatants and civilians, direct attacks only against the military and military objectives [26] and not against civilians or civilian objects, and refrain from attacking a military objective when it is likely that to do so would cause collateral civilian loss and damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.[27] It is evident that principles of this kind, if properly observed, have a significant impact on the way in which the military conduct operations, which is quite different from, e.g., the requirement of humane treatment of prisoners of war.

This paper cannot review the whole of the laws of war, and even a brief survey of the treaties and other developments of the last decade would exceed what is possible here.[28] Instead, this part of the paper will examine certain issues likely to prove particularly important in the wars of the future.

The Scope of Application of the Laws of War. One of the most difficult questions raised by the laws of war is when those laws apply. Declarations of war are today almost unknown and the laws of war are no longer confined to the handful of cases—such as the Arab-Israel conflict—in which a formal state of war may be said to exist.[29] It is common ground that the laws of war today apply to any armed conflict between two or more States, whether or not the belligerents recognize that they are at war.[30] Moreover, there has been a tendency to give the concept of armed conflict a very broad definition. The United States, for example, maintained that when Syrian anti-aircraft batteries in the Bekaa Valley shot down a United States Navy plane and captured its pilot, that incident gave rise to an armed conflict and the pilot was accordingly entitled to be treated as a prisoner of war. The U.S. note to Syria added that the conflict had ended after only a few hours and Syria was therefore under a duty to return the pilot.[31] This interpretation of "armed conflict" is, perhaps, somewhat elastic, but the International Criminal Tribunal for the Former Yugoslavia and the International Committee of the Red Cross have both treated the concept as broad enough to cover any fighting between two or more States, even if the scale of the fighting is small and the duration brief.[32] In this respect, the popular use of terms such as "Operations Other Than War" tends to mislead, since military operations by one State against another become subject to the laws of war as soon as they result in the use of force between the

States concerned, irrespective of the term which may have been used to describe such operations.

Thus, there is no doubt that the recent air operations by the NATO States against the Federal Republic of Yugoslavia over the latter's atrocities in Kosovo constituted an international armed conflict between the NATO States and the Federal Republic of Yugoslavia. The fact that the NATO States' motives were humanitarian and the operation was conducted for strictly limited goals does not alter the fact that there was an armed conflict to which the Geneva Conventions and the whole corpus of the laws of armed conflict applied.[33]

Non-International Armed Conflicts. Although the laws of war never wholly ignored conflicts within a State, their rules were primarily designed for international conflicts. Not until 1949 did the international community adopt a treaty provision specifically concerning internal armed conflicts. Common Article 3 of the Geneva Conventions was undeniably a major step, but it did little more than require the parties (government and insurgent) to a conflict to observe a few minimum humanitarian standards in their treatment of the wounded, prisoners, and civilians who took no part in hostilities. In 1977, Additional Protocol II added considerably to the law on this subject but only in the case of conflicts in which the insurgents actually controlled part of the territory of the State. Even then, the provisions of the Protocol were far less extensive, particularly in relation to the actual conduct of military operations, than were the comparable provisions of the law on international conflicts.

In the last few years, however, there has been a dramatic change in the law. Most of the recent treaties on weapons—the Chemical Weapons Convention, 1993, the Land Mines Convention, 1997, and the amended Land Mines and Booby Traps Protocol to the United Nations Conventional Weapons Convention—are applicable to internal as well as international conflicts. Even more important are the developments in customary law. The International Criminal Tribunal for the Former Yugoslavia has held that the customary law applicable to the conduct of armed conflicts within a State is far more extensive than had generally been thought.[34] In relation to such matters as the targeting of civilians and the precautionary measures which should be taken to protect them, it is clear that the Tribunal, whose decisions are likely to have considerable influence, considers that the customary law on internal conflicts is now essentially the same as that for international conflicts. It has also held that violations of the law applicable in internal conflicts constitute war crimes. The Tribunal's ruling on this point has now been partially reflected in the list of war crimes included in Article 8 of the Statute of the International Criminal Court, adopted

in 1998, which confers upon the Court jurisdiction in respect of certain crimes committed in non-international armed conflicts.

Nevertheless, it remains important to determine the borderline between internal and international conflicts and, in particular, to know at what point the involvement of outside forces has the effect of internationalizing a conflict and subjecting it to the full body of the laws of war. Unfortunately, international law gives no clear answer to that question. As a matter of law, the laws of war apply only where the armed forces of one State meet those of another. Accordingly, if outside forces intervene in a civil war to assist the government of a State against rebel forces, the resulting conflict continues to be a civil war and to be subject only to the smaller body of law applicable to such conflicts. This principle has been strictly applied by the International Criminal Tribunal for the Former Yugoslavia.[35] There is something deeply unsatisfactory about this uncertainty. At the very least, where the forces of State A become involved in fighting in State B, they should be subject to the laws of war in their entirety, even if their local allies are not.

United Nations Operations. The growth in the number and variety of United Nations military operations since 1990 has already been discussed in Part I. This development has highlighted the fact that there exists considerable uncertainty regarding the applicability of the laws of war to the operations of United Nations forces.[36] This is not a problem when a United Nations force, or a force authorized by the United Nations, is sent out to fight a war, since it is agreed that the laws of war would apply in full to hostilities between such a force and the forces of a State. Nor should it be a problem where a United Nations force operates in a traditional peacekeeping mode, since such a force would remain impartial and not become a party to an armed conflict of any kind. As shown in Part I, however, some recent United Nations operations have had both peacekeeping and enforcement elements. Moreover, in a number of cases, forces with a pure peacekeeping mandate have been drawn into fighting (usually by attacks upon their personnel which have caused them to exercise their right of self-defence).[37] In such cases, it is far from clear whether the laws of war are applicable to the activities of the United Nations forces concerned.

The United Nations has accepted that, as a minimum, its forces are obliged to comply with the "principles and spirit" of the laws of armed conflict. As a matter of principle, however, in cases where a United Nations force becomes involved in fighting to such an extent that it is a party to an armed conflict, it should comply not merely with the principles and spirit, but with the entirety of

the law. That much appears to be taken for granted in the provisions of the recently adopted Convention on the Safety of United Nations and Associated Personnel, 1994. The Convention makes attacks on United Nations personnel an offence, but Article 2(2) provides that:

> This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and *to which the law of international armed conflict applies*. (Emphasis added.)

The problem is that there is no agreement as to when the line identified in this provision is crossed. The scale of the fighting in which UNPROFOR and supporting forces became involved in Bosnia would unquestionably be sufficient to cross the very low threshold of armed conflict identified earlier in this paper,[38] but it appears that the 1994 Convention was drafted on the assumption that the additional protection which it affords to United Nations personnel would have been applicable in Yugoslavia. This problem is one which is likely to recur and to cause real difficulty in the future, since the threshold for the application of the laws of war has now also become the ceiling for the application of the 1994 Convention.

Moreover, even if a particular United Nations operation is not subject to the laws of war, it does not take place in a legal vacuum. The United Nations, no less than its Member States, is a subject of international law and is bound by customary international law. Concern about the behaviour of what was admittedly a very small minority of United Nations troops in Somalia and certain other operations has led to calls for a clearer identification of the legal standards with which members of United Nations forces must comply. That has led the United Nations, after consultations with the International Committee of the Red Cross, to draw up a set of Draft Directives for the conduct of peacekeepers, drawn from the laws of war. It is arguable that at least some of the provisions of human rights law are also applicable to United Nations peacekeepers, either because of the adherence of Member States to human rights treaties or because those provisions have become part of customary international law.

The problem is that there remains far too great a degree of uncertainty on this subject. To be effective in a military context, the law must be clear and must not be so complex that it is incapable of practical application. The law on United Nations operations does not yet meet those requirements, and its

clarification and, perhaps, reform, ought to be treated as a far more urgent priority than it has been so far.

The Laws of War and New Technology. Much of the law of war can be traced back to the beginning of the twentieth century (even further in the case of the law of naval warfare). Can such law be applied to the very different technology of warfare which exists today and which was so dramatically demonstrated in the Kuwait conflict? Some parts of the law are clearly ill-suited to modern conditions. The law of naval warfare still emphasises the right of visit and search at sea despite the fact that this practice is almost impossible to conduct in an age of comparatively small surface fleets and containerised shipping (which cannot be searched at sea, since it is usually impossible to gain access to the containers). This is an area of the law which would benefit at the very least from clarification of what is a legitimate target—the Iran-Iraq War having demonstrated the very considerable differences of opinion which existed on that subject even between the United States and other NATO countries.[39] At present, however, it seems unlikely that there is sufficient political support for any such move.

In other areas, the picture is better. The Kuwait conflict showed that the principles of customary international law regarding the distinction between civilian objects and military targets and the principle of proportionality—i.e., that even a military target should not be attacked if to do so would cause civilian casualties which would be excessive in relation to the concrete and direct military advantage anticipated—remain capable of application, although the proportionality principle requires a measure of fresh thought, given that the collateral casualties in Iraq tended to come not from the direct effects of the bombing but rather the damage to infrastructure such as the power system which in turn led to a breakdown of sanitation and medical facilities with consequent severe effects on the civilian population.

The principles of the law in relation to the conduct of hostilities can generally be adapted to new methods of waging war, precisely because those principles are so general in character. The International Court of Justice had no difficulty in holding them applicable to the possible use of nuclear weapons in its recent opinion.[40] Suppose that it became possible for a State to cause havoc to an enemy through the application of electronic measures or the selective planting of computer viruses which brought to a standstill whole computer systems and the infrastructure which depended upon them. Such a method of warfare would appear to be wholly outside the scope of the existing law. Yet that is not really so. The application of those measures is still likely to affect the

civilian population and possibly to cause great damage and even loss of life amongst that population. As such, it should be subject to the same principles of distinction and proportionality considered above and there is no compelling reason why its legality cannot be assessed by reference to these principles, notwithstanding that the principles were devised in the context of attacks carried out with weapons of a wholly different kind.

Part III

The Impact of the Law on Decision-Making

What impact, then, do these rules of international law have upon decisions regarding the use of force? To the "realist" school of international relations, the answer is "none." For them, international law is no more than "the advocate's mantle artfully draped across the shoulders of arbitrary power." Theirs, however, is a "realism" far removed from the reality of the way in which most governments conduct international relations. Governments do not, for the most part, employ legal advisers merely to provide an apologia for decisions already taken on policy grounds, but because legal considerations are one of the factors which have to be taken into account in the process of decision, particularly where the question for decision is whether, or how, to use force in order to achieve a particular goal. While it would be naïve to imagine that legal considerations are invariably the controlling factor, it is equally unrealistic to assume that they have no influence at all.

Indeed, even if the cynical view were correct, and the role of the lawyer is no more than to drape a mantle over the projection of power, law would retain a degree of significance. Such a mantle is employed only because most States are concerned at least to *appear* to be acting within the law. It is, therefore, of some importance to States that the mantle is not threadbare—as it was with at least some of the arguments advanced by the United States to justify its 1989 intervention in Panama—still less manifestly illusory, as was the case with the USSR's attempts to justify its intervention in Afghanistan a decade earlier or the British Government's arguments over the Suez intervention in 1956.

That is particularly so when the use of force has any kind of multilateral character and especially where the decision to use, or at least to authorise the use of, force is taken within the United Nations or another international organization. To obtain the authorization of the Security Council for military operations, a State must be able to deploy a plausible case that there is a threat to

international peace and security within the meaning of Article 39 of the United Nations Charter, so that the Security Council has the legal power to act, and that the use of force of the degree and kind proposed is a legitimate method of addressing that threat. Otherwise, it will not be able to secure the support needed to obtain a mandate from the Security Council.

The legal basis for resorting to force has an important impact both at the strategic level of decision making and, through the medium of rules of engagement, at lower levels of command. We have already seen that the existence of a Security Council mandate can affect the purpose for which force may be used and, therefore, the degree of force which may be employed. In the case of the Kuwait conflict, the existence of a Security Council mandate enlarged the scope of the Coalition's right to use force beyond what would have been permitted in self-defence. A mandate which is drawn more narrowly than that in Resolution 678 may, however, have an important limiting effect. In the operations in Bosnia-Herzegovina between 1992 and 1995, the mandate given to UNPROFOR and the secondary mandate conferred upon NATO to use air power in support of UNPROFOR were limited both as to ends and means. To take just a few examples:

- The authorization given by the Security Council to NATO to use air power to enforce the ban on military flights over Bosnia-Herzegovina was for a long time limited to the air space of Bosnia itself, so that, for a considerable time, NATO was not authorized to use force against Serb air bases in the Serb-held parts of Croatia, even though these were being used for air operations over Bosnia.
- It was unclear to what extent the mandate permitted the use of air power to protect the "safe areas" in Bosnia, nominated by the Security Council, although the real problem here lay less in the clarity of the mandate than in the ill-thought-out nature of the "safe areas" and the lack of willingness to defend them in 1995.
- When agreements restricting the use of heavy weapons in certain parts of Bosnia were concluded under the auspices of the UNPROFOR commander in 1994, it is unclear to what extent, if at all, either UNPROFOR or NATO was empowered to use force in response to violations of those agreements.

It is clear that these issues had an effect upon the rules of engagement issued to UNPROFOR and NATO forces and that, in some respects, they were more restrictive of NATO action than would have been the case had NATO relied not upon a Security Council mandate but upon collective self-defence.[41] It should, however, be realized that the proportionality principle in self-defence

(which was discussed in Part II) also has an effect upon the freedom of action of a force affecting for example, such questions as the degree of force which may be used and the area within which it is legitimate to take military action. For example, insofar as there are grounds for questioning the legality of the British action in sinking the *General Belgrano* during the Falklands Conflict in 1982, that is not because the sinking occurred outside the exclusion zone which the United Kingdom had proclaimed around the Islands,[42] but because it can be argued that the sinking of the cruiser was not a necessary step in retaking the Islands.[43]

The laws of war also have a significant impact on command decisions, again through the medium of rules of engagement, if these are properly drawn. While much of the laws of war relates to matters taking place behind the combat zone—e.g., the treatment of prisoners of war—the need to comply with these rules has implications for the conduct of the commander, as the problems in handling the large numbers of prisoners taken in the Falklands and the Kuwait conflict demonstrate. In the case of the rules prohibiting attacks on civilians and requiring commanders to observe the principle of proportionality, the impact is even more apparent. For example, Article 57 of Additional Protocol I requires those who plan or decide upon an attack to take all practicable steps to ensure:

(a) that the target to be attacked is a legitimate military objective;

(b) that it can be attacked without causing collateral civilian losses or damage to civilian objects which is excessive in relation to the concrete and direct military advantage anticipated from the attack;

(c) that the methods and means of attack are selected with a view to minimising the collateral losses and damage; and

(d) that the attack is called off if it becomes clear that these tests will not in fact be met.

Properly drafted rules of engagement will take account of all these legal constraints, although it has to be remembered that they are by no means the only constraints which will feature in ROE, which will also restrict the commander's freedom of action in response to military and political factors. The impact of the law should also be enhanced by its role in military education and training. Moreover, the recent decision to establish an International Criminal Court is likely to increase awareness of the laws of war and to lead to greater press and public scrutiny of military operations.

IF ONE TAKES STOCK OF THE PART which international law has played in military operations and the influence which it has today, the picture which emerges is distinctly mixed. Much of the century which is just ending has been a catalogue of violations with a total disregard for the law. Yet the century has also seen unprecedented development of the law itself, with the adoption of an extensive body of treaty law and the development of important rules of customary law. At least in the democracies, that law is taken a great deal more seriously by governments and the military than were the far less detailed rules which existed at the start of the century.

There is an enormous temptation to assume that where the law is not working today, the answer is that we need more and better law. International law on military operations will, of course, continue to develop; however, the priority should be not to legislate but to ensure greater respect for the law that already exists. In the military context, that means more than the prosecution of offenders—it requires the development of a culture of compliance with the law. That in turn requires that the practical effects of the law on military operations be properly understood. It is for that goal that Leslie Green has worked so tirelessly for more than fifty years and which makes the publication of this volume in his honour so appropriate.

Notes

1. For example, the law which determines disputes about title to territory and the efficacy—or otherwise—of the international machinery for the peaceful settlement of disputes can have a bearing on whether a State decides to resort to force or agree to end a conflict. The boundary case between Cameroun and Nigeria, currently before the International Court of Justice, and the similar dispute between Yemen and Eritrea, currently the subject of international arbitration, have both involved the use of force.

2. Some indication of the extent of what has been achieved in this area of international law can be seen in S. KORMAN, THE RIGHT OF CONQUEST (Oxford, 1996).

3. United Nations Charter, Article 1(1).

4. It is not, however, created by the Charter but by customary international law; see the decision of the International Court of Justice in *Nicaragua* v. *United States of America*, ICJ REPORTS, 1986, p. 3.

5. See, e.g., the submissions of Professor I. Brownlie, QC, to the International Court of Justice in May 1999 in the *Cases concerning the Legality of the Use of Force* brought by the Federal Republic of Yugoslavia against the United Kingdom, the United States, and eight other NATO Member States (CR/99/14, available on the Court's website at http://www.icj-cij.org). The decisions of the Court, rejecting the Federal Republic's requests for provisional measures of protection, given on June 2, 1999, do not rule on this question.

6. The one real instance of enforcement action involving the use of force was the Korean conflict 1950–1953, although United Nations intervention in the Congo is regarded by some as an instance of enforcement action.

7. For a defence of this view, see Sir Derek Bowett, *The Use of Force for the Protection of Nationals Abroad* in A. Cassese (ed.), THE CURRENT LEGAL REGULATION OF THE USE OF FORCE (Dordrecht, 1986), pp. 39–56.

8. *Nicaragua* case, *loc. cit.*, note 4, *supra*.

9. See, e.g., the preamble to Security Council Resolution 748 (1992), imposing sanctions on Libya.

10. See the discussion by SIR DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (Manchester, 1957), pp. 188–192, JUDGE R. HIGGINS, PROBLEMS AND PROCESS (Oxford, 1994), p. 242 and O. Schachter, *In Defense of International Rules on the Use of Force*, 53 UNI. CHI. LAW REV. (1986), p. 113 at pp. 134–136. The defeat in both the United Nations General Assembly (United Nations Doc. A/L 521, defeated by 71–22–27) and the Security Council (United Nations Doc. S/PV 1360) of resolutions which would have condemned Israel's anticipatory attack in 1967 and the discussion in the Security Council of the Israeli attack on Iraq's nuclear reactor (United Nations Doc. S/PV. 2280) all suggest that there is a right of anticipatory self-defence. For the contrary view, see I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (Oxford, 1963), p. 275, and J. de Arechaga, *International Law in the Past Third of a Century*, 159 RC (1978), pp. 96–97.

11. *Nicaragua* case, *loc. cit.*, note 4, *supra*, at p. 94. This matter had been common ground between the parties. See also the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ REPORTS, 1996, p. 225 at paras. 40–41.

12. Judge Ago, *Eighth Report on State Responsibility*, YEAR BOOK OF THE ILC, 1980, vol. II (i), at p. 121. See also the dissenting opinion of Judge Higgins in the *Nuclear Weapons* case, note 11, *supra*, at pp. 583–584.

13. See Part III, below.

14. See C.J. Greenwood, *New Legal Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN LAW REVIEW (1992), p. 153.

15. See Sir Derek Bowett, *Collective Security and Collective Self-Defence: the Errors and Risks in Identification*, in M. Rama-Montaldo (ed.), INTERNATIONAL LAW IN AN EVOLVING WORLD (Montevideo, 1997). For a rather different perspective, see O. Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL (1991), p. 452, and N. Rostow, *ibid.*, p. 506.

16. Under Article 27 of the United Nations Charter, that required the proponents of the Resolution to secure the affirmative votes of nine of the fifteen members of the Council and to ensure that none of the five permanent members voted against. In fact, Resolution 678 obtained eleven affirmative votes. One permanent member—China—abstained. Despite the wording of Article 27(3), it has long been established practice that the abstention of a permanent member does not prevent a resolution from being adopted. See the Advisory Opinion of the International Court of Justice in the *Namibia* case, ICJ REPORTS, 1971, p. 3.

17. This is in marked contrast to the formal position in peace-keeping operations, where command and control is normally held to reside in the United Nations and is exercised by the Force Commander and/or the Special Representative of the Secretary-General.

18. Under Article 39 of the Charter, the existence of such a threat, or of a breach of international peace or an act of aggression, is a prerequisite to Security Council action under Chapter VII of the Charter.

19. See C.J. Greenwood, *Is There a Right of Humanitarian Intervention?* WORLD TODAY, (February 1993), pp. 34–40.

20. For discussion, see S. MURPHY, HUMANITARIAN INTERVENTION (1996); F. TESON, HUMANITARIAN INTERVENTION (2nd ed., 1997); Greenwood, *loc. cit.*, note 19, *supra*.

21. See Security Council Resolution 788 (1992).

22. Security Council Resolutions 1160 (1998), 1199 (1998) and 1203 (1999).

23. See, in particular, B. Simma, *NATO, the United Nations and the Use of Force: Legal Aspects*, 10 EJIL (1999), p. 1. A. Cassese, *Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, loc. cit.*, p. 23, thinks that the law is changing but accepts that the action is unlawful under the present law.

24. There was, in fact, no peace to keep, so the main activities of UNPROFOR differed from those of a classic peacekeeping operation. Moreover, since the force was intended to be impartial and not to become a party to the conflict, at least initially, it was not equipped for a combat role.

25. See, e.g., paragraph 4 of the Preamble to Additional Protocol I, 1977, to the Geneva Conventions.

26. Defined in Article 52(1) of Additional Protocol I as "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."

27. Additional Protocol I, Article 51(5)(b).

28. A few landmarks should, however, be noted. Since 1990, the two 1977 Additional Protocols to the Geneva Conventions have at last attracted a broad measure of acceptance, although the United States has not become a party to either and France has so far declined to become a party to Additional Protocol I. New treaties have been adopted outlawing chemical weapons (the Chemical Weapons Convention, 1993) and anti-personnel land mines (the Land Mines Convention, 1997) and establishing a permanent International Criminal Court (the Statute of the International Criminal Court, 1998). In addition, the Security Council has established tribunals with jurisdiction to try suspected war criminals in the former Yugoslavia and Rwanda.

29. C.J. Greenwood, *The Concept of War in Modern International Law*, 36 ICLQ (1987), p. 283.

30. See, e.g., common Article 2 of the Geneva Conventions, 1949.

31. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, volume III, p. 3456.

32. In its decision in *Prosecutor* v. *Tadic (Jurisdiction)* in 1995, the International Criminal Tribunal held that the laws of war applied "whenever there is a resort to armed force between States," 105 ILR 419 at p. 453, para. 70. The view of the ICRC is stated in J.S. Pictet (ed.), COMMENTARY ON GENEVA CONVENTION III (Geneva, ICRC, 1960), p. 23.

33. That was the view taken from the outset by the ICRC (see Public Statement of April 23, 1999, available at http://www.icrc.org) and accepted by NATO and the relevant governments.

34. *Prosecutor* v. *Tadic (Jurisdiction)*, Decision of the Appeals Chamber 1995, 105 ILR 419 at pp. 504–520; Prosecutor v. Martic (Rule 61), Decision of the Trial Chamber, 1996, 108 ILR 39. For a review of this jurisprudence, see C. J. Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, 2 YEAR BOOK OF UNITED NATIONS LAW (1998), p. 97.

35. See *Tadic, loc. cit.*, note 34, *supra*, and the decision of the Trial Chamber in *Tadic (Merits)*, 112 ILR 1 (1997). At the time of writing, the decision of the Appeals Chamber in Tadic's appeal from the 1997 decision had not yet been delivered.

36. On this subject, see ICRC, SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS (Geneva, ICRC, 1994); L. Condorelli and others, eds., THE

UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW (Paris, Editions Pedone, 1996); U. Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-keeping Forces*, 33 INTERNATIONAL REVIEW OF THE RED CROSS (1993), p. 227; and C. J. Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 YEAR BOOK OF INTERNATIONAL HUMANITARIAN LAW (1998), p. 3. See also Institut de droit international, Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, 54 (II) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1971), p. 465, and the Resolution on the Conditions of Application of Rules other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, *loc. cit.*, vol. 56 (1975), p. 540.

37. In this context, it should be borne in mind that the United Nations has traditionally taken, at least in theory, a very broad view of the right of self-defence of United Nations forces. Thus, in a report on the operations of UNPROFOR in the former Yugoslavia, the Secretary-General stated:

> It is to be noted that, in this context, self-defence is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate. (United Nations Doc. S/24540 (1992), para. 9)

38. Part II (a), *supra*.

39. See DE GUTTRY AND RONZITTI, THE IRAN-IRAQ WAR AND THE LAW OF NAVAL WARFARE (1992). For a recent, unofficial attempt to clarify the law relating to naval warfare, see the INTERNATIONAL INSTITUTE OF INTERNATIONAL HUMANITARIAN LAW, SAN REMO MANUAL OF THE LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1995).

40. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ REPORTS, 1996, p. 225.

41. In addition, throughout the conflict, Resolution 713 (1991) prohibited the supply of weapons to any party in the former Yugoslavia. It was repeatedly claimed by the Government of Bosnia-Herzegovina and others sympathetic to it that this resolution unreasonably (and, in the eyes of some, unlawfully) restricted the exercise by Bosnia-Herzegovina of its right of self-defence. The challenge to the legality of Resolution 713 is, in the view of this writer, wholly untenable, but the restriction on the right of self-defence was real.

42. Any limitations derived from that proclamation were entirely self-imposed and were political, rather than legal, in character. In any event, the proclamation had made clear that it did not affect the right of the United Kingdom to take action in self-defence outside the zone.

43. The present writer, however, considers that the sinking was legitimate since the destruction of the cruiser ensured that the Argentine surface fleet was effectively removed from further participation in the conflict, thus making the task of the British fleet significantly easier.

VIII

Naval Blockade

Wolff Heintschel von Heinegg

THE VARIETY AND QUANTITY of Professor Leslie Green's work on the law of armed conflict make it nearly impossible to choose a subject that has not already been covered by him. This also holds true for the law of naval warfare. Suffice it to mention that Professor Green was one of the most important members of the Round Table of Experts that drafted the San Remo Manual on International Law applicable to Armed Conflicts at Sea.[1] It was on that occasion that the author first met Professor Green and since then he has continuously profited from Professor Green's deep knowledge of the law and of the practical issues involved. The discussions with him, especially on controversial questions, have always been a delight. The present contribution on the law of naval blockade is therefore but a modest expression of the author's gratitude to a practitioner, teacher and academician who will certainly continue to influence strongly the progressive development of the law of armed conflict.

Introduction

According to a widely accepted definition, blockade is "a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation."[2] The purpose of

establishing a blockade is "to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory."[3] If solely aimed against the enemy's economy, the legality of a blockade has to be judged in the light of the law of economic warfare and of the law of neutrality. However, in contrast to the practice of the 19th century and of the two World Wars, in modern State practice such economic blockades have been the exception. Today the establishment of a blockade is very often an integral part of a military operation that is not directed against the enemy's economy but against its armed forces. For example, a blockade may be declared and enforced in preparation of a landing operation. It may also help in surrounding enemy armed forces or in cutting off their lines of supply. But even if an economic blockade in the strict sense were established, there would always be a strategic element: cutting off the enemy's trade links and weakening its economy will also weaken its military power of resistance.[4] No matter which purpose is pursued by the establishment of a blockade, it always involves the use of military force directed against the enemy's coastline or ports. Accordingly, a blockade is a method of naval warfare to which the general principles and rules of the law of naval warfare—the maritime *jus in bello*—also apply.[5]

While naval blockades still have to be distinguished from other, although related, concepts (e.g., operations designed to interdict contraband, unilateral embargoes, defensive measure zones, and exclusion zones),[6] there is no longer any need to deal separately with so-called "pacific blockades."[7] Since the establishment of a "pacific blockade" involves the use of military force by one State against another State, there is an international armed conflict in the sense of common Article 2 of the 1949 Geneva Conventions. The (maritime) *jus in bello* applies to all belligerent measures taken in such conflicts. The existence of a state of war is not a precondition for the legality of certain methods and means of warfare anymore. If they are taken, they have to be in accordance with the applicable *jus in bello*. Hence, the same rules will apply in either case.

Whether and to what extent the *jus ad bellum* also serves as a legal yardstick for naval blockades is a highly disputed issue. Leslie Green has always taken the position that the *jus in bello* and the *jus ad bellum* are distinct from one another[8] and it has always been an ambitious task to take the opposing view. However, this is not the proper place to reenter that discussion and to repeat arguments put forward elsewhere.[9] An interesting issue that is also far from settled, but that does need to be addressed here is the question of whether and to what extent the rules governing naval blockades also apply to blockades established in accordance with Article 42 of the UN Charter.

Before entering into that question the present article will first offer an overview of the development of the law of naval blockade in State practice and in international treaties and drafts. An assessment of the current state of the law of blockade by special reference to the legal literature will follow.

Development of Blockade Law in State Practice and International Instruments

As blockades were originally restricted to coastal fortifications, they differed only slightly from sieges in land warfare.[10] With the increasing importance of sea trade at the end of the 16th century, it became necessary to also cut off the enemy's sea links without taking possession of the respective part of the coastline or port.[11] Presumably, the first naval blockade was declared by the Dutch in 1584. The Flemish ports that then were under Spanish control were declared barred in order to cut off the Spanish troops from supplies.[12] In fact, this blockade, as well as subsequent blockades, was declared for the sole purpose of enabling the Dutch to seize neutral merchant vessels even if they were not carrying enemy or contraband goods.[13] In the early 17th century, Hugo Grotius took the view that regardless of their contraband character all goods destined to a blockaded location were subject to capture and seizure provided their delivery jeopardized the success of the closure of the respective enemy port. That, according to Grotius, was the case if surrender or peace were imminent.[14] State practice at the close of the 16th and during the 17th centuries, however, fails to evidence general acceptance of such a restriction. Hence, one hundred years later, Cornelius van Bynkershoek could easily establish that Grotius' opinion was not in accordance with existing treaties and edicts or even reason.[15]

Although a blockade affected all ships and goods regardless of their enemy or contraband character,[16] in those days belligerents were not obliged to maintain and enforce a blockade by a sufficient number of warships. Regularly, they were "fictitious" or, to use the more popular expression, "paper blockades" (also called "blocus de Cabinet" or "blocus per notificationem")[17] that were not enforced by capture in case of breach. Rather, as laid down in the Dutch decree of June 26, 1630,[18] or in the Anglo-Dutch Treaty of Whitehall (1689),[19] ships could be captured at far distance from the blockaded area if it was established that they clearly intended to breach the blockade ("droit de prévention").[20] Thus, the basis was laid for the doctrine of "continuous voyage," according to which ships destined to a neutral port are subject to capture if their ultimate destination is a blockaded port. According to the "droit de suite," ships were

subject to capture not only during a breach of blockade and subsequent pursuit, but also until they reached their port of destination.

Despite Danish and Swedish resistance that was in part successful in the last decade of the 17th century, England and Holland did not give up their practice of "fictitious blockades."[21] Moreover, England, especially in the 18th century, maintained that the French and Spanish ports were blockaded by the mere geographical situation of the English islands.[22] That practice, as well as the stern application of the law of contraband, resulted in grave restrictions on neutral merchant shipping. Therefore, affected States reacted by means of the first armed neutrality.[23] In her famous declaration of February 28, 1780,[24] the Russian Czarina Katharine II claimed that blockades, in order to be legal, needed to be effective:

> Que pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.

While a considerable number of European States acknowledged the principle of effectiveness in their treaties,[25] England continued its practice of fictitious blockades.[26] After neutral merchant shipping had again been severely affected by Anglo-French hostilities, some European powers reacted by a second armed neutrality.[27] Russia, Denmark, Sweden and Prussia, in their treaties of December 14 and 16, 1800, confirmed the principles of the first armed neutrality, especially the requirement that a blockade needed to be effective.[28] This requires a blockade, in order to be binding, to be maintained by a force sufficient actually to prevent access to the coast of the enemy. The blockading power, according to those treaties, was obliged to inform neutral shipping of the blockade.

The principle of effectiveness was later expressly confirmed in Article III, paragraph 4, of the Anglo-Russian Treaty of June 17, 1801, to which Denmark (October 23, 1801) and Sweden (March 30, 1802) acceded.[29] Still, the blockade of England effected by the Decree of Berlin of November 21, 1806,[30] and by the Decree of Milan of December 17, 1807,[31] as well as the blockade of France and its allies by Orders-in-Council of January 7 and November 11, 1807,[32] were hardly in conformity with that principle, for neutral trade was interfered with by all means at hand. The time of the continental blockade has, therefore, correctly been characterized as a decisive step backwards in the development of international law governing the belligerent rights in naval warfare.[33]

Despite the aspirations of some south-American States,[34] it was not until the Crimean War (1854–1856) that the English and continental European

positions on the law of blockade could be reconciled. In view of the Anglo-French alliance against Russia, it had become imperative to adjust the rules for the respective naval forces. This explains why France, England, Austria, Prussia, Russia, Sardinia and Turkey were able to agree in the Paris Declaration of April 16, 1856,[35] upon the principle, among others, of effectiveness:

> Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

Thus, fictitious or paper blockades had become illegal. It must be stressed, however, that the Paris Declaration fell behind the rules agreed upon during the armed neutralities. In particular, it lacks a clear definition of what is to be understood by "effective." On the other hand, an obligation similar to that of the armed neutralities according to which the blockading warships must be "arrêtés et suffisamment proches," in view of the introduction of torpedo boats and the improvement of coastal artilleries, would not have been feasible anyway.[36] Altogether, the requirement of effectiveness was not interpreted restrictively. It was not necessary for the blockading warships to be stationed at visual range from the coast. There existed no clear rule on the number of warships necessary.[37] Rather, the effectiveness of a blockade was to be judged in the light of the circumstances of each single case.[38] Hence, even blockades whose effectiveness could only be ascertained after a lapse of time were generally accepted as binding.[39] The application of the doctrine of continuous voyage to blockades led to a further erosion of the principle of effectiveness.[40]

The Second Peace Conference at the Hague (1907) did not succeed in reaching agreement upon the international law governing naval blockades. At the beginning of the conference Great Britain had proposed the following article:

> L'emploi de mines sous-marines automatiques de contact pour établir ou maintenir un blocus de commerce est interdit.[41]

In the course of the conference, that proposal was not discussed further in the Third Commission.[42] In its report and draft convention, the Comité d'examen merely included the following paragraph 3 in Article 4:

> Il est interdit de placer des mines automatiques de contact devant les côtes et les ports de l'adversaire dans le seul but d'intercepter la navigation de commerce.[43]

With regard to that rule the Comité d'examen held that

il s'agirait seulement de déterminer, en examinant les mines, comme moyen de nuire à l'ennemi, si l'on peut s'en servir dans le but de barrer la navigation commerciale de l'adversaire—question à laquelle, paraît-il, on devrait répondre négativement. Cela établi, on pourrait confier au Comité le soin de bien faire ressortir cette pensée commune, tout en laissant hors de discussion l'application, au sujet de l'emploi des mines, des principes de la Déclaration de Paris concernant l'effectivité du blocus.[44]

Although the Third Commission did not intend to agree on rules applicable to blockades, some of the participants drew the conclusion that Article 4, paragraph 3, prohibited the establishment of a blockade by the laying of mines only.[45] Be that as it may, the vague formulation in Article 2 of Hague Convention VIII (which is identical with Article 4, paragraph 3, of the draft) gave—and still gives—rise to dispute. But even if the provision applied to an enforcement of a blockade by naval mines, it would be quite difficult to establish whether its sole purpose was, indeed, to intercept commercial navigation.[46]

Hence, it was left to the 1909 London Conference to codify the law applicable to naval blockades. The 21 articles devoted to that subject in the 1909 London Declaration can be summarized as follows:[47] A blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline (Article 2). Whether that precondition is met is, however, a question of fact (Article 3). The delegates to the 1909 Conference were unable to agree upon a more specific rule. They expected that the determination of effectiveness was in any case reserved to the competent (international or national) prize court.[48] According to Article 4, a blockade is not regarded as raised, and thus remains effective, if the blockading force is temporarily withdrawn on account of stress of weather. It must be applied impartially to the ships of all nations (Article 5), and warships (Article 6) and merchant vessels in distress (Article 7) may be allowed to enter and leave a blockaded port or place. The declaration and notification are constitutive for a blockade's legality (Articles 8, 10, and 11).[49] A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name. It must specify (1) the date when the blockade begins, (2) the geographical limits of the coastline under blockade, and (3) the period within which neutral vessels may come out (Article 9). Additionally, it must be notified to both neutral powers and the local authorities (Article 11). The provisions on declaration and notification also apply to cases where the limits of a blockade are extended or where a blockade is re-established after having been raised (Article 12). Notice is similarly required upon the voluntary raising or any restriction in the limits of a blockade (Article 13). If no declaration of blockade has been notified to

the local authorities, or if no period of grace has been provided, neutral vessels must be allowed to leave the blockaded area (Article 16, paragraph 2). Vessels that in actual or presumptive knowledge of the blockade[50] attempt to leave or enter the closed port may be captured as long as they are being pursued by a warship of the blockading force and are subject to condemnation (Articles 14, 17, 20, and 21). The limitation of the right of capture to the area of operation of the warships detailed to render the blockade effective is the result of a compromise between the English and the continental European position. In any event, according to Articles 17, 19, and 20, neither the doctrine of continuous voyage nor the "droit de suite" that had been practiced excessively during the 18th century survived.[51] In case of a vessel approaching a blockaded port, without (actual or presumptive) knowledge of the blockade, notification must be made to the vessel itself (Article 16 paragraph 1). Finally, a blockade must be confined to ports and coasts belonging to or occupied by the enemy (Article 1) and may not bar access to neutral ports or coasts (Article 18).

Although the 1909 London Declaration never entered into force because of resistance by the House of Lords to ratification, its provisions on blockade were observed during the Balkan Wars and were included in a number of national prize regulations.[52] Apart from the applicability of the doctrine of continuous voyage, at the beginning of the First World War they were generally regarded as customary in character.[53] However, in view of the rapid development of weapons technologies (long distance artillery, submarines, military aircraft) and the necessary modification of naval strategies and tactics it soon became impossible to observe Articles 1 ff. of the London Declaration. The traditional blockade was replaced by the long-distance blockade that—by a simultaneous excessive application of the doctrine of continuous voyage—in fact led to the barring of neutral ports and coasts.[54] Neutral trade was subjected to far-reaching control measures, some even taken in their respective home ports. For instance, merchant vessels that did not possess a navicert were either diverted or captured, even if they had not approached blockaded coasts or ports. Moreover, the belligerents established huge minefields and exclusion zones ("Sperrgebiete") within which all vessels, regardless of the flag they were flying, were attacked without prior warning.[55] During the Second World War that practice was repeated and led to even further restrictions of neutral trade.[56] To give but one example of the excessive use of the right of blockade, it suffices to quote the British Order-in-Council of November 27, 1939:

> 1. Every merchant vessel which sailed from any enemy port, including any port in territory under enemy occupation or control, after the 4th day of December,

1939, may be required to discharge in a British or Allied port any goods on board laden in such enemy port.

2. Every merchant vessel which sailed from a port other than an enemy port after the 4th day of December, 1939, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or Allied port.

3. Goods discharged in a British port under either of the preceding Articles shall be placed in the custody of the Marshal of the Prize Court, and, unless the Court orders them to be requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Court. The proceeds of goods so sold shall be paid into the Court.

> On the conclusion of peace such proceeds and any goods detained but not sold shall be dealt with in such manner as the Court may in the circumstances deem just, provided that nothing herein shall prevent the payment out of Court of any such proceeds or the release of any goods at any time (a) if it be shown to the satisfaction of the Court that the goods had become neutral property before the date of this Order, or (b) with the consent of the proper officer of the Crown.

4. The law and practice in Prize shall, so far as applicable, be followed in all cases arising under this Order.

5. Nothing in this Order shall affect the liability of any vessel or goods to seizure or condemnation independently of this Order.

6. For the purposes of this Order the words "goods which are of enemy origin" shall include goods having their origin in any territory under enemy occupation or control, and the words "goods which [. . .] are enemy property" shall include goods belonging to any person in any such territory.

7. Proceeding under this Order may be taken in any Prize Court having jurisdiction to which the Prize Court Rules, 1939, apply.

8. For the purposes of this Order the words "British port" mean any port within the jurisdiction of any Prize Court to which the Prize Court Rules, 1939, apply.[57]

In view of that practice, Frits Kalshoven has concluded that

[. . .] developments in the techniques of naval and aerial warfare have turned the establishment and maintenance of a naval blockade in the traditional sense into

a virtual impossibility. It would seem, therefore, that the rules in the Declaration on blockade in time of war are now mainly of historical interest. [58]

Some consider the British practice a contribution to the progressive development of the international law on blockades.[59] Still others stress the fact that the United Kingdom had justified its practice by reference to reprisals. Hence, they maintain, the London Declaration has not been substantively derogated by that practice. They merely concede that the requirement of effectiveness today has to be interpreted in the light of the development of weapons technologies, such that the blockading forces may be deployed at some distance from enemy coasts and ports.[60]

In fact, the limitations of the traditional blockade law have, to a considerable extent, been observed in the practice of States since 1945. Of course, the principle of effectiveness as well as the requirement of maintaining and enforcing a blockade by solely surface warships have been modified. Moreover, it seems that today aircraft may also be subjected to blockade measures. Still, the law as laid down in the 1909 London Declaration has not become obsolete.

The closure of the areas and ports under the control of communist China declared by the national Chinese government on June 26, 1949, although not justified as blockade, widely conformed with the traditional rules. Both the measures to be taken and the geographical limits were declared and notified in advance. The national Chinese armed forces were able to effectively enforce the closure/blockade because, by deploying reconnaissance aircraft, they were fully and constantly aware of all movements within the Chinese territorial sea.[61]

During the Korean War the U.S./UN naval armed forces, because of their superiority, were able to maintain and enforce the blockade declared on July 4, 1950, in nearly full accordance with the provisions of the London Declaration.[62] Warships—except of the North Korean navy—were excluded, as was the port of Rashin that served as a naval base of the former Soviet navy.[63]

During its 1971 conflict, the Indian navy closed the entire coast of Bangladesh. The superior Indian navy was supported by military aircraft deployed on the carrier *Vikrant*. Thus, all vessels were successfully prevented from entering or leaving the blockaded area. Altogether, six merchant ships and numerous small boats were captured. Those small boats that did not comply with the orders given by the warships' commanders were attacked and sunk.[64]

The blockade of Haiphong in May 1972 also widely corresponded with the requirements of a classical blockade, although, again, the notion "blockade" was not used. Prior to the closure becoming effective, it was publicly

announced and all States presumably affected were informed.[65] However, it was not maintained and enforced by surface units but by mines laid by aircraft. Those mines became automatically armed after a predetermined period of time had elapsed.[66]

The Egyptian blockades of Eilat and of the Gulf of Aqaba in 1967 and of the Bab el-Mandeb in 1973[67] were similar to the British blockades of World War II insofar as the forces entrusted with their enforcement were deployed at a considerable distance from the areas in question. Still, the Egyptian measures were effective because no vessel could enter or leave the areas without running the risk of being attacked.

At the beginning of the Iran-Iraq conflict (1980–1988), Iran, on September 22, 1980, declared the transport of all goods and cargoes to Iraq prohibited.[68] The Iranian naval forces were in a position to enforce that prohibition, as well as the closure of the Shat-al-Arab, which was declared on October 1, 1980,[69] during the course of the entire armed conflict. Altogether 71 neutral merchant ships were affected by the closure of the Shat-al-Arab. Iran offered to allow them to leave the area under the condition that they flew the UN flag. However, Iraq required those ships to fly the Iraqi flag as long as they were within the Shat-al-Arab.[70]

In most of these cases, neutral States, in view of the lack of protests, obviously accepted the blockades.[71] If at all, they merely doubted their legality under the *jus ad bellum* not the *jus in bello*. For example, the British government protested against the blockade of the Shat-al-Arab[72] because, in its view, the right of self-defense did not allow its establishment. However, the British government did not consider the Iranian measures illegal under the maritime *jus in bello*.

The customary character of the principles of the 1909 London Declaration is also widely acknowledged in the military manuals of the U.S. Navy,[73] and of the Canadian[74] and German[75] armed forces. According to those manuals, blockades must be restricted to ports or coastal areas belonging to, occupied by, or under the control of the enemy. They must not bar access to or departure from neutral ports and coasts.[76] The declaration, either by the government or by the commander of the blockading force, must include the details laid down in Article 9 of the London Declaration and must be notified to affected neutral States and to the local authorities.[77] Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade, neutral vessels are always entitled to notification.[78] Moreover, according to the three manuals, a blockade, in order to be valid, must be effective. That means that it must be maintained by a force or other mechanism[79] that is

sufficient to render ingress or egress of the blockaded area dangerous. The temporary absence of the blockading force is without prejudice to the blockade's effectiveness, if such absence is due to stress of weather or to some other reason connected with the blockade.[80] The blockade need not be restricted to vessels; it may also be applied and enforced against aircraft.[81] In any event, a blockade must be applied impartially to the vessels of all States, including merchant ships flying the flag of the blockading power.[82] However, although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit.[83] Neutral vessels in distress should not be prevented from entering and subsequently leaving a blockaded area.[84] According to the U.S. and the German manuals, a further exception applies to neutral vessels (and aircraft) engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded. Those vessels should be authorized to pass through the blockade cordon (safe passage).[85] The German manual and Canadian draft manual contain provisions according to which starvation of the civilian population as a method of warfare is prohibited.[86] Neutral vessels and aircraft that, in knowledge of a notified and effective blockade, breach or attempt to breach a blockade are subject to capture.[87] If they resist an attempt to establish identity, including visit and search, they may be attacked.[88]

The Contemporary Law of Blockade

As already mentioned, some authors consider traditional blockades to have become obsolete because, in their view, developments in weapons technologies have made it impossible for belligerents to comply with the strict requirements of blockade law.[89] The short overview of modern State practice has shown, however, that States will continue to make use of this method of naval warfare at least in cases in which they possess superior naval forces and aerial reconnaissance capabilities. Blockade remains an especially efficient method for subduing the enemy in limited armed conflicts.[90] Moreover, it is the only way by which a belligerent is entitled to prevent the enemy from not only the import but also the export of goods that would otherwise enable it to continue the armed conflict. Neutral commercial sea and air traffic can be subjected to far-reaching restrictions, even if they carry goods that do not qualify as contraband.[91] Hence, as in the beginning of the 20th century, identifying the legal restrictions that apply if a belligerent decides to establish and enforce a naval blockade is indispensable. It may be added that according to the position taken here, a special theoretical justification[92] is no longer necessary because the

maritime *jus in bello* is appropriately considered a legal order of necessity that prescribes the minimum standards that have to be observed by States, even if they are unwilling or unable to refrain from the use of armed force.[93]

Declaration, Notification, Impartiality and Effectiveness. In general, States are willing to accept the customary character of the principles laid down in the 1909 London Declaration. When it comes to the specification of the rights and duties, however, no general agreement exists. Of course, it is undisputed[94] that

- a blockade must be declared and that the declaration must contain the details laid down in Article 9 of the London Declaration;
- it must be notified to those affected; and
- impartial application is required.

According to the prevailing position in legal literature, neutral vessels are to be granted a period of grace to leave the blockaded port or roadstead.[95]

The reason for this wide agreement is that these requirements do not pose any considerable problems. The belligerent establishing a blockade will, of course, be interested in informing all those possibly affected, since it is the object and purpose of a blockade to close certain enemy areas and to cut them off. In addition, today such information will not take long to reach its addressees. Rather, it can be disseminated universally within a couple of hours.[96] Finally, any discrimination, in view of the practical problems of identification, would not be practicable.

Problems and disagreement exist, however, with regard to the principle of effectiveness. The authors only agree that when judging the effectiveness of a blockade the development of modern weapons systems have to be taken into consideration—a stipulation that was first raised prior to World War I and which obviously is generally recognized now.[97] Accordingly, it is no longer necessary for the blockading force to be deployed in close vicinity to the coast, it may also be stationed at some distance seaward as long as ingress or egress continues to be dangerous.[98] Whether that is the case cannot be determined *in abstracto* but, as in Article 3 of the London Declaration, remains a question of fact.[99] There exists, however, an ultimate legal limitation with regard to the area affected. A blockade must be restricted to coastal areas and ports belonging to, occupied by, or under the control of the enemy. It may not be established outside the general area of naval warfare.[100]

For the purpose of maintaining and enforcing a blockade, belligerents are not restricted to the use of surface warships. This means that they may choose a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the other rules and principles of

the maritime *jus in bello*.[101] In view of the overall importance of aerial reconnaissance and of the legitimate incorporation of the airspace into the regime of blockades,[102] a blockade may be maintained by military aircraft, submarines or even by naval mines.[103] However, a blockade may not be maintained and enforced by naval mines alone. This prohibition does not follow from Article 2 of Hague Convention VIII of 1907, for it is nearly impossible to prove that the mines have been laid "for the sole purpose of intercepting commercial navigation."[104] Rather, it has to be observed in this context that certain categories of vessels and aircraft may not be denied ingress or egress. Hence, generally, it is necessary that manned units (or "at least one man-o-war")[105] are present in the vicinity of the blockaded area in order to make sure that such vehicles remain unharmed.[106] The mining of Haiphong is merely a single incident that fails to establish the contrary, even though only the former USSR raised protests against it.[107] Despite the obvious perils submarines and missiles pose to surface warships, in most cases the presence of at least one surface unit, for humanitarian reasons, remains an indispensable requirement for the legality of a naval blockade. And it makes no difference whether the blockade serves strictly military or economic purposes.[108] Only if controlled mines are laid may their sole use for maintaining and enforcing a blockade be legitimate. Of course, apart from naval mines, other obstacles, such as wrecks, can be used to close a port or a part of the enemy's coast.[109]

Consequences of Breach and Attempted Breach of Blockade. It is generally acknowledged that vessels (and aircraft) breaking or attempting to break blockade are liable to capture.[110] If, after prior warning, they clearly resist capture, they may be attacked.[111] However, it remains unclear which behavior may be characterized as attempted (inward[112]) breach of blockade. While the German Manual is silent on this issue, the U.S. Manual[113] defines attempted breach of blockade as follows:

> Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed. [. . .] It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area.

This implies that the doctrine of continuous voyage may be applied to the legal regime of naval blockades. As in the beginning of the 20th century, this

question is a matter of dispute in the legal literature.[114] There are good reasons to maintain that the doctrine of continuous voyage may not be applied to blockades. First, neutrals have only in rare cases been willing to tolerate interference with their merchant shipping in areas distant from blockaded coasts or ports.[115] Second, the doctrine has not played a significant role in the practice of States since 1945. It has only been recognized in the military manuals of some Anglo-American States. Most continental European authors have always rejected the doctrine's applicability to blockade.[116] The arguments put forward do not have to be repeated. If blockade law is perceived as part of an order of necessity that, by its nature, has to be interpreted restrictively and that merely modifies but does not abrogate the peacetime rules of international law applicable between belligerents and neutrals, an obligation of States not participating in an international armed conflict to tolerate belligerent measures can be justified only under strict conditions. In the context of blockade, one of these conditions is the principle of effectiveness. That principle would be rendered meaningless if belligerents were entitled to enforce a blockade at a far distance from the area in question. As long as neutral merchant vessels are situated outside the range of operations of the forces maintaining the blockade, and as long as they do not carry contraband or act in a way that makes them liable to attack, the freedoms of navigation and overflight supersede the belligerents' interest in a comprehensive prohibition of imports to their respective enemies. Of course, the practical consequences of this position are of a solely secondary nature. If a neutral merchant vessel is captured outside the range of operation of the blockade forces because it—in fact or presumably—was destined to a blockaded port, that violation of the law of neutrality results in a duty to return the vessel and its cargo and to compensate any damage.

Relief for the Civilian Population and the Wounded and Sick. A blockade preventing all ingress to or egress from the blockaded area by vessels and aircraft, in general, negatively affects the civilian population's supply of food and other objects essential for survival. For that reason it was—at least to a certain extent—justified to characterize the British long-distance blockades as "hunger blockades."[117] Still, that notion should not be used too easily. In World War II, the United Kingdom maintained that naval blockades did not differ from sieges in land warfare in which the responsible commander was under no duty to allow food and other goods to pass into the town.[118]

Today, according to Article 54, paragraph 1, Additional Protocol I, "starvation of civilians as a method of warfare is prohibited." Contrary to an assertion by the Australian delegation to the Geneva Diplomatic Conference,[119] as well

as some authors,[120] the position of that provision in Part IV of the Additional Protocol I does not prevent its application to naval blockades. Blockade is, in the sense of Article 49, paragraph 3, Additional Protocol I, a method of "sea warfare which may affect the civilian population [. . .] on land." Therefore, States parties to Additional Protocol I may not establish and maintain a blockade that serves the specific purpose of denying them essential foodstuffs, "whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."[121] As part of customary international law, the prohibition of starving the civilian population by the establishment of a naval blockade is also binding on States not party to Additional Protocol I, since it follows from the generally accepted principles of humanity and proportionality.[122] Methods and means of naval warfare are illegal "if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated."[123] In that context, it makes no difference whether the blockade serves genuine military or economic purposes. Moreover, even States not bound by Additional Protocol I recognize that belligerents are under an obligation not to prohibit relief consignments in case of a naval blockade.[124] That obligation, which is also recognized in the literature,[125] would be meaningless absent prohibition of a so-called "hunger blockade." The military and strategic interests involved are met by the fact that relief consignments must be granted free passage subject to

- the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.[126]

Blockades under Chapter VII of the UN Charter

The final question that remains is whether the rules just described also apply if a blockade is ordered by the Security Council pursuant to Article 42 of the UN Charter.[127] In an annotation to paragraph 7.7.2.1, NWP1-14M, the authors hold that "it is not possible to say whether, or to what extent, a UN blockade would be governed by the traditional rules."[128] This statement is certainly correct insofar as the Security Council, when taking action under Chapter VII, has a wide range of discretion and that it—as an organ of the UN—is not directly bound by rules of international law that are primarily designed to regulate the conduct of States in situations of armed conflict. On the other hand, a

blockade ordered by the Security Council will, of course, have to be declared. The respective resolution will at least contain all the elements that are prescribed for a belligerent blockade (geographical limits, duration). The practice of the Security Council also demonstrates that, for humanitarian reasons, certain goods essential for the survival of the civilian population may be transported to a blockaded area.[129] If feasible and if not counterproductive to the aim pursued (restoration of international peace and security), the Security Council will also ensure that access to ports and coasts of third States is not barred. However, an important exception applies. Despite allegations to the contrary,[130] in the case of enforcement measures under Chapter VII, there is no room for neutrality. Therefore, third States may well be affected by a blockade ordered pursuant to Article 42. Affected States, according to Article 50, have the right to "consult the Security Council with regard to a solution of those (= economic) problems." A second exception concerns the applicability of the doctrine of continuous voyage. Situations are conceivable in which the Security Council is forced to order the capture of vessels (and aircraft) at great distance from the blockade area if international peace and security cannot otherwise be restored. Finally, in view of the binding force of the decisions taken under Chapter VII and of the ultimate goal of maintaining international peace and security, a blockade pursuant to Article 42 will not have to fully comply with the principle of effectiveness.[131]

It must, however, be realized that, in view of the lack of UN armed forces proper, a blockade ordered by the Security Council will always be maintained and enforced by the members of the United Nations and their (national) armed forces. Those forces are bound by the rules and principles of the maritime *jus in bello* that, according to the position taken here, has to be considered an "order of necessity." That legal order has to be conceived of as primarily formulating duties which, as a minimum, have to be observed if States resort to the use of armed force.[132] In other words, the restrictions contained in the rules of war are, in principle, the most that international law is ready to accept when States are unwilling or unable to refrain from the use of armed force. This means that, when ordered to maintain and enforce a blockade pursuant to Article 42, they may only deviate from the rules of blockade law described above if there is an express decision by the Security Council to that effect. Whether and to what extent the Security Council is entitled to exempt member States from the restrictions of the maritime *jus in bello* will depend on the circumstances of each case. In that regard, the Security Councils discretion is wide but—especially with regard to the elementary considerations of humanity—not unlimited.

Notes

1. L. Doswald-Beck (ed.), SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, Cambridge 1995.

2. DEPARTMENT OF THE NAVY (Office of the Chief of Naval Operations), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, para. 7.7.1.

3. *Ibid.*

4. For a discussion of the differences and similarities between economic (commercial) and strategic blockades, see C.J. COLOMBOS, INTERNATIONAL LAW OF THE SEA, 6th rev. ed., London 1967, § 818; L. OPPENHEIM, INTERNATIONAL LAW (ed. by H. Lauterpacht), Vol. II, 7th ed., London 1963, p. 769 f.

5. In textbooks, the law of blockade is dealt with in the context of the law of neutrality because a blockade always implies interference with neutral trade. The authors acknowledge, however, that blockade is a "means of warfare against the enemy" (e.g., Oppenheim, *supra* note 4, p. 768). Blockades are not directly aimed against neutral shipping. If neutral shipping is affected by a blockade, this is an indirect consequence resulting from the very nature of this concept. Accordingly, the law of blockade is not an integral part of the law of neutrality. It is being dealt with in that context for practical reasons only. For a characterization of blockades as acts of war, see the references in M.M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, Vol. 10, Washington D.C. 1968, p. 868 ff.

6. For a distinction, see M.N. SCHMITT, BLOCKADE LAW: RESEARCH DESIGN and SOURCES, Legal Research Guides, Vol. 12, Buffalo 1991, p. 3 ff.

7. "Pacific blockades" were established quite often. Still, in view of the lack of a (formal) state of war, their legality was disputed. See W. SCHUMANN, DIE FRIEDENSBLOCKADE, Hamburg 1974, *passim*; A.H. Washburn, *The Legality of the Pacific Blockade*, COLUMBIA LAW REVIEW 1921, pp. 55–69, 227–241, 442–459; Institut de Droit International, *Droit de blocus en temps de paix*, AIDI 9 (1887-88), pp. 275–301. See also the references in M.M. WHITEMAN, DIGEST 10, *supra* note 5, p. 870 f. For early State practice, see the references in H.J.W. VERZIJL/W.P. HEERE/J.P.S. OFFERHAUS, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, Part IX-C, Dordrecht 1992, p. 419 ff.

8. In his commentary on a report presented during the Round Table in Bergen (Norway), Leslie Green stated:

> It should be pointed out at the very beginning that my own view is based on the premise that the Charter is an instrument concerned with peace and only becomes involved in questions relating to armed conflict when the Security Council decides in accordance with Chapter VII to take action directed to the prevention or termination of hostilities. It is essentially an instrument concerned with the preservation of peace and there is no article therein to suggest that its provisions operate once a conflict has commenced, other than as indicated above. L.C. Green, Comment No. 5 on Mr. Greenwood's Report, in: W. Heintschel v. Heinegg (ed.), VISIT, SEARCH, DIVERSION AND CAPTURE/THE EFFECT OF THE UNITED NATIONS CHARTER ON THE LAW OF NAVAL WARFARE, Bochum 1995, p. 191.

9. See, *inter alia*, Ch. Greenwood, *The Effects of the United Nations Charter on the Law of Naval Warfare*, *ibid.*, p. 133 ff.; and the commentaries on that report, *ibid.*, p. 177 ff. (by A.W. Dahl); p. 181 ff. (by L. Doswald-Beck); p. 185 f. (by W.J. Fenrick/K.S. Carter); p. 187 ff. (by D. Fleck); p. 201 ff. (by J.A. Roach); p. 205 f. (by H.B. Robertson, Jr.).

10. See H. Wehberg, *Das Seekriegsrecht*, in: F. Stier-Somlo (ed.), HANDBUCH DES VÖLKERRECHTS V, Berlin 1915, p. 26; R.W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, Washington D.C. 1957, p. 283. According to PH.C. JESSUP/F. DEÁK, NEUTRALITY. ITS HISTORY, ECONOMICS AND LAW, Vol. I: THE ORIGINS, New York 1935, pp. 105, 112 f., 114 ff., naval blockade was distinguished from siege with the Anglo-Swedish Treaty of 1656. For further references see H.J.W. VERZIJL, *supra* note 7, p. 415 ff.

11. See also R. KLEEN, LA NEUTRALITÉ D'APRÈS LE DROIT INTERNATIONAL CONVENTIONNEL ET COUTUMIER DES ÉTATS CIVILISÉS, Tome I: PRINCIPES FONDAMENTAUX - DEVOIRS DES NEUTRES, Paris 1898, p. 542 ff., who explains the emergence of naval blockade with the increase of naval forces.

12. Edict of July 27, 1584. *Cp.* C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI, Liber I, Cap. XI, p. 89; C.J. COLOMBOS, *supra* note 4, § 814.

13. In addition to the proclamations of 1586, 1622 and 1694, the Decree of the General States of June 26, 1630, is especially worth mentioning. See C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI, *supra* note 12, p. 89; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 26 f. For the practice of other States/entities, see PH.C. JESSUP/F. DEÁK, NEUTRALITY, *supra* note 10, p. 111 ff.

14. HUGO GROTIUS, DE JURE BELLI AC PACIS, Liber III, Cap. I, Para. V.

15. C. VAN BYNKERSHOEK, QUAESTIONUM, *supra* note 12, p. 87 ff., with references to the Dutch practice. For the 17th century practice of other States/entities, see PH.C. JESSUP/F. DEÁK, NEUTRALITY, *supra* note 10, p. 107 ff.; H.J.W. VERZIJL, *supra* note 7, p. 424 ff. See also E. DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, Book III, § 117, who maintains that in case of blockade and siege the respective belligerent is entitled to prevent anybody from entering the respective area and to consider that person an enemy if he endeavors to enter the area or to transport something into that area.

16. It should be noted that according to Chapter 276 of the *Consolato del Mare* only enemy goods on board neutral merchant vessels were subject to capture. If, however, the captain refused to transport those goods to an ordered destination, the commander (the "Admiral") of the privateer was entitled to use armed force. According to the consolato del mare, as well as according to the "*Breve curiae maris*" of Pisa (1298) and the Statutes of Genoa (1316), neutral goods, in principle, were exempt from capture. See F. JORDÁ, DAS "CONSULAT DES MEERES" ALS URSPRUNG UND GRUNDLAGE DES NEUTRALITÄTSRECHTS IM SEEKRIEGE BIS ZUM JAHRE 1856, Hamburg 1932, p. 25 f.

17. See H.J.W. VERZIJL, *supra* note 7, p. 421 f.

18. According to the second clause of that decree, all ships and goods were to be confiscated even if encountered at a certain distance from the blockaded area if the ship's documents gave sufficient proof that they were destined to a Flemish port. An exception was provided for the case in which the vessel in question, prior to visit or pursuit, deliberately changed course. See C. VAN BYNKERSHOEK, QUAESTIONUM, *supra* note 12, p. 87 f.

19. C.J. COLOMBOS, *supra* note 4, § 816.

20. H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 26 f., with further references.

21. PH.C. JESSUP/F. DEÁK, NEUTRALITY, *supra* note 10, p. 117 ff., with further references.

22. H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 30.

23. P. FAUCHILLE, LA DIPLOMATIE FRANÇAISE ET LA LIGUE DES NEUTRES DE 1780, Paris 1893, pp. 20, 68 ff.; R. KLEEN, NEUTRALITÉ I, *supra* note 11, p. 576 ff.; U. Scheuner, *Neutralität, bewaffnete*, in: Strupp/Schlochauer (eds.), WÖRTERBUCH DES VÖLKERRECHTS, Vol. II, pp. 596–597.

24. That declaration can be found in: TH. NIEMEYER, URKUNDENBUCH ZUM SEEKRIEGSRECHT, Berlin 1913, p. 1 f.

25. See the references in H. WEHBERG, SEEKRIEGSRECHT, *supra* note 10, p. 33; TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 6 ff.

26. H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 34 ff.

27. R. KLEEN, NEUTRALITÉ I, *supra* note 11, p. 28 ff.; M.C. DE BOECK, LA PROPRIÉTÉ PRIVÉE ENNEMIE SOUS PAVILLION ENNEMI, Paris 1882, p. 70 ff.

28. Those treaties are printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 13 ff.

29. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 17 ff.

30. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 47 f.

31. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 48 f.

32. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 39 ff.

33. H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 40. Still, there are some examples of blockades in the traditional sense; see H.J.W. VERZIJL, *supra* note 7, p. 421 f.

34. See the references in: H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 41 f

35. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 53 ff.; J. HINZ/E. RAUCH, KRIEGSVÖLKERRECHT, 3rd ed., Cologne 1984, no. 1525

36. CH. DUPUIS, LE DROIT DE LA GUERRE MARITIME D'APRÈS LES DOCTRINES ANGLAISES CONTEMPORAINES, Paris 1899, p. 201:

> Les manoeuvres navales de l'Angleterre, en 1888, paraissent avoir démontré la nécessité, pour l'escadre de blocus, de modifier fréquement la position de ses navires, de les éloigner de temps à autre, pour donner aux équipages un repos indispensable. [...] Les attaques de nuit sont les plus périlleuses; il faut, pour les prévenir ou les déjouer, changer souvent de place, tromper par la mobilité du but les calculs de l'aggresseur projeter parfois en un point inattendu la lumière qui permettra de le surprendre, au besoin disparaître et le laisser s'épuiser à son tour des recherches vaines.

See also R. KLEEN, NEUTRALITÉ I, *supra* note 11, p. 572; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 42 ff.

37. Already in the case of the *Nancy* [(1809) Roscoe II, 106 and 108], Lushington had held that "if a blockade was effective, the Court must not appreciate the number and the disposition of the ships of the blockading force," and that "even a single warship might maintain it."

38. During the Crimean War it was sufficient for the effective blockade of Riga to station one warship at a distance of 120 NM because it was indeed able to really prevent access via the only approach. See CH. DUPUIS, LE DROIT DE LA GUERRE MARITIME, *supra* note 36, p. 203.

39. S.V. Mallison/W.T. Mallison Jr., *A Survey of the International Law of Naval Blockade*, U.S. Naval Institute PROCEEDINGS 102 (Feb. 1976), pp. 43–53, 46.

40. See the judgements of the U.S. Supreme Court in the cases of The *Bermuda* [3 Wall. 514 (1865)], The *Springboek* [5 Wall. 1 (1866)] and The *Peterhoff* [5 Wall. 1 (1866)]. See also H.W. Malkin, *Blockade in Modern Conditions*, BRITISH YEARBOOK OF INTERNATIONAL LAW III (1922–23), pp. 87–98, 92 ff.; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 158 ff.; G. SCHRAMM, DAS PRISENRECHT IN SEINER NEUESTEN GESTALT, Berlin 1913, p. 172 ff.

41. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 736.

42. In its report, the Comité d'examen stated that

> on dut se demander, si la discussion de la proposition britannique n'outrepassait pas les limites de la compétence de la Troisième Commission. On fit observer que la question de

savoir quand et comment un blocus peut être établi, est du ressort de la Quartième Commission, qui aurait à s'occuper de la matière du blocus de guerre; c'est notamment à la Quatrième Commission qu'il devrait appartenir de se prononcer sur toute question concernant l'effectivité du blocus.

printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 772.

43. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 772.

44. Printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 773.

45. For example, Rear Admiral Siegel during the fifth session on September 17, 1907.

46. Hence, Rear Admiral Siegel was right when he stated: "C'est là une clause qui laisse au belligérant une échappatoire bien dangereuse"; printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 805.

47. For a more detailed discussion, see N. BENTWICH, THE DECLARATION OF LONDON, London 1911, p. 44 ff.; F. Kalshoven, *Commentary on the 1909 London Declaration*, in: N. Ronzitti (ed.), THE LAW OF NAVAL WARFARE, Dordrecht et al. 1988, pp. 257–275; NAVAL WAR COLLEGE, THE DECLARATION OF LONDON OF FEBRUARY 26, 1909, Washington, D.C. 1910, p. 25 ff.

48. See the Rapport général présenté à la Conférence Navale au nom du Comité de Rédaction; printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 1604 ff., 1608.

49. While, according to the French position, the notification was regarded as constitutive, by the Anglo-American position knowledge of the establishment of a blockade was considered sufficient. See C.J. COLOMBOS, *supra* note 4, §§ 826 ff.; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 164 f.; G. SCHRAMM, PRISENRECHT, *supra* note 40, p. 202 f. See also the different proposals submitted to the 1907 Hague and to the 1909 London Conferences and the Rapport général; printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, pp. 1247 ff. and 1610.

50. According to Article 15, knowledge is presumed, failing proof to the contrary, "if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time."

51. W.E. HALL, INTERNATIONAL LAW, Oxford 1880, p. 846 ff.; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 170. In the Rapport général (printed in: TH. NIEMEYER, URKUNDENBUCH, *supra* note 24, p. 1616) it is made clear that:

> Le rayon d'action d'une force navale bloquante pourra s'étendre assez loin, mais, comme il dépend du nombre des bâtiments concourant à l'effectivité du blocus, et comme il reste toujours limité par la condition d'effectivité, il n'atteindra jamais des mers éloignées sur lesquelles naviguent des navires de commerce, peut-être destinés aux ports bloqués, mais dont la destination est subordonnée aux modifications que les circonstances sont susceptibles d'apporter au blocus au cours du voyage. En résumé, l'idée de rayon d'action liée à celle d'effectivité telle que nous avons essayé de la définir c'est-à-dire, comprenant la zone d'opérations des forces bloquantes, permet au belligérant d'exercer d'une matière efficace le droit de blocus qui lui est reconnu, et, d'un autre côté, elle évite aux neutres d'être exposés à grande distance aux inconvénients du blocus, tout en leur laissant courir les dangers auxquels ils s'exposent, sciemment en s'approchant des points dont l'accès est interdit par le belligérant.

52. See the references in G. SCHRAMM, PRISENRECHT, *supra* note 40, p. 203. Many of those national prize regulations can be found in: H. HECKER/E. TOMSON, VÖLKERRECHT UND PRISENRECHT, Frankfurt a.M./Berlin 1965, p. 29 ff.

53. H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 166; H.W. Malkin, *supra* note 40, BYIL III (1922-23), p. 93; R.W. TUCKER, *supra* note 10, p. 285.

54. The British long-distance blockade, even though the notion "blockade" was not used, was proclaimed by Order-in-Council of March 11, 1915 (printed in: REICHS-MARINE-AMT, SEEKRIEGSRECHT IM WELTKRIEGE, SAMMLUNG DIPLOMATISCHER NOTEN UND ANDERER URKUNDEN, Berlin 1916, No. 150). In its note to the American Ambassador (*ibid.*, No. 155), the British government expressly stated that the blockade had been established "to prevent vessels from carrying goods for or coming from Germany." For the practice of blockade during the First World War, see J.W. GARNER, PRIZE LAW DURING THE WORLD WAR, New York 1927, p. 621 ff.; L. GUICHARD, THE NAVAL BLOCKADE, 1914–1918, New York 1930, *passim*; OPPENHEIM, *supra* note 4, p. 791 ff.; R.W. TUCKER, *supra* note 10, p. 305 ff.; CH. ROUSSEAU, LE DROIT DES CONFLITS ARMÉS, Paris 1983, p. 272 ff.; E. RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE, Berlin 1984, p. 83 ff.

55. Such exclusion zones have to be distinguished from blockades. See W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, CANADIAN YEARBOOK OF INTERNATIONAL LAW XXIV (1986), p. 91 ff. See also the references in M.M. WHITEMAN, DIGEST 10, *supra* note 5, p. 872 ff.; L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in: H.B. Robertson, Jr. (ed.), THE LAW OF NAVAL OPERATIONS, Newport 1991, p. 156 ff.; J. SCHMITT, DIE ZULÄSSIGKEIT VON SPERRGEBIETEN IM SEEKRIEG, Hamburg 1966, *passim*.

56. OPPENHEIM, *supra* note 4, p. 795 ff.; R.W. TUCKER, *supra* note 10, p. 312 ff.; S.W.D. Rowson, *Prize Law During the Second World War*, BRITISH YEARBOOK OF INTERNATIONAL LAW XXIV (1947), pp. 160–215, 193 ff.; E. RAUCH, PROTOCOL ADDITIONAL, *supra* note 54, p. 87 ff. For reflections within the German Navy during World War II, see the references in: W. Heintschel v. Heinegg, *Exclusion Zones, Mines, Abuse of Neutral Flags and Insignia, Booty in Naval Warfare*, in: D. Fleck (ed.), THE GLADISCH COMMITTEE ON THE LAW OF NAVAL WARFARE, Bochum 1990, p. 39 ff.

57. Stat. Rules and Orders 1939, No. 1709; printed in: OBERKOMMANDO DER KRIEGSMARINE, URKUNDEN ZUM SEEKRIEGSRECHT, Berlin 1941, No. 398.

58. F. KALSHOVEN, COMMENTARY, *supra* note 47, p. 274.

59. Especially J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT. A TREATISE ON THE DYNAMICS OF DISPUTES – AND WAR – LAW, New York 1959, p. 508: "The realities of the present century require the British long distance blockade to be viewed as a long term transformation of the traditional law of blockade, rather than as mere reprisals, or mere breach of the traditional law." See also H.W. Malkin, *supra* note 40, BYIL III (1922–23), p. 87 f.; OPPENHEIM, *supra* note 4, p. 796 f.; C.J. COLOMBOS, *supra* note 4, §§ 839 ff.

60. That view is taken by R.W. TUCKER, *supra* note 10, p. 285 f.; and E. CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY, Helsinki 1954, p. 314 ff.

61. L.H. Woolsey, *Closure of Ports by the Chinese Nationalist Government*, AM. J. INT'L L. 44 (1950), pp. 350–356; R. OTTMÜLLER, DIE ANWENDUNG VON SEEKRIEGSRECHT IN MILITÄRISCHEN KONFLIKTEN SEIT 1945, Hamburg 1978, p. 74 f.; E. BECKERT/G. BREUER, ÖFFENTLICHES SEERECHT, Berlin/New York 1991, no. 1126 ff.

62. S.V. Mallison/W.T. Mallison Jr., *supra* note 39, U.S. Naval Institute PROCEEDINGS 102 (Feb. 1976), p. 49; R. OTTMÜLLER, ANWENDUNG VON SEEKRIEGSRECHT, *supra* note 61, p. 106 f.; J.G. Verplaetse, *The Ius in Bello and Military Operations in Korea 1950–1953*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 23 (1963), pp. 679–738, 698 ff.

63. M.W. CAGLE/F.A. MANSON, THE SEA WAR IN KOREA, Annapolis 1957, p. 281 ff. See also M.M. WHITEMAN, DIGEST 10, *supra* note 5, p. 866 f.

64. J. ROHWER, *Naval Warfare Since 1945*, U.S. Naval Institute PROCEEDINGS 104 (May 1978), p. 66 ff.; J. Rohwer, MARINE-RUNDSCHAU 71 (1974), pp. 7–26, 19; R. OTTMÜLLER, ANWENDUNG VON SEEKRIEGSRECHT, *supra* note 61, pp. 274, 285 f.; D.K. PALIT, THE LIGHTNING CAMPAIGN, Salisbury 1972, p. 145.

65. The speech by President Nixon ("Denying Hanoi the Means to Continue Aggression,") was delivered on May 8, 1972, U.S. DEPT. OF STATE BULL., Vol. 66 (May 29, 1972), pp. 747–751. See also D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEAPOWER, Manchester 1975, pp. 64 f., 93 ff.; F.B. Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, JAG JOURNAL XXIX (1977), pp. 143–173.

66. S.V. Mallison/W.T. Mallison Jr., *supra* note 39, U.S. Naval Institute PROCEEDINGS 102 (Feb. 1976), p. 51; R. OTTMÜLLER, ANWENDUNG VON SEEKRIEGSRECHT, *supra* note 61, p. 231 ff.

67. D.P. O'CONNELL, INFLUENCE, *supra* note 65, p. 101 ff.; S.V. Mallison/W.T. Mallison Jr., *supra* note 39, p. 51; R. OTTMÜLLER, ANWENDUNG VON SEEKRIEGSRECHT, *supra* note 61, pp. 293 f., 301; R.R. Baxter, *The Law of War in the Arab-Israeli Conflict: On Water and on Land*, TOWSON STATE JOURNAL OF INTERNATIONAL AFFAIRS 5 (1971), pp. 1–17, 8.

68. Notice to Mariners No. 17/59.

69. Notice to Mariners No. 18/59.

70. See the references in: A. Gioia/N. Ronzitti, *The Law of Neutrality: Third States' Commercial Rights and Duties*, in: I.F. Dekker/H.H.G. Post (eds.), THE GULF WAR OF 1980–1988, Dordrecht *et al.* 1992, p. 234

71. For the reactions of neutral States in the aforementioned conflicts, see the references in: R. OTTMÜLLER, ANWENDUNG VON SEEKRIEGSRECHT, *supra* note 61, pp. 71 f., 96 f., 235 f., 282, 298.

72. Printed in: BYIL LIX (1988), 581.

73. THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1–14M/MCWP 5–2.1/COMDTPUB P5800.1 (hereinafter NWP 1–14M).

74. While NWP 1-14M applies to the Canadian armed forces, there also exists a draft manual that is not yet completed. Since there are some differences, that draft will be cited in the following notes.

75. HUMANITARIAN LAW IN ARMED CONFLICTS Manual, edited by the Federal Ministry of Defence of the Federal Republic of Germany, Bonn, August 1992 (hereinafter GERMAN MANUAL).

76. NWP 1-14M, paras. 7.7.1 and 7.7.2.5; GERMAN MANUAL, para. 1051; Canadian Draft, para. 722 (1)(5).

77. NWP 1-14M, paras. 7.7.2.1 and 7.7.2.2; GERMAN MANUAL, para. 1052; Canadian Draft, para. 722.

78. NWP 1-14M, para. 7.7.2.2; GERMAN MANUAL, para. 1052; Canadian Draft, para. 722 (3).

79. As to the question whether and to what extent a blockade may be maintained only by naval mines, see the section on Declaration, Notification, Impartiality and Effectiveness *infra*.

80. NWP 1-14M, para. 7.7.2.3; GERMAN MANUAL, para. 1053; Canadian Draft, para. 722 (4).

81. NWP 1-14M, para. 7.7.1; GERMAN MANUAL, para. 1051 (1); Canadian Draft, para. 722 (1).

82. NWP 1-14M, para. 7.7.2.4; Canadian Draft, para. 722 (6).

83. NWP 1-14M, para. 7.7.3; Canadian Draft, para. 722 (10).

84. NWP 1-14M, para. 7.7.3; Canadian Draft, para. 722 (11).

85. NWP 1-14M, para. 7.7.3; GERMAN MANUAL, para. 1051 (2).

86. GERMAN MANUAL, para. 1051. However, in an annotation to paragraph 722 (1) of the Canadian Draft, a more cautious approach is taken:

> In so far as the purpose of a blockade is to deprive the enemy population of foodstuffs, so as to starve them in the hope that they would apply pressure to their government to seek peace, it would now appear to be illegal in accordance with AP I Art. 54 (1), which prohibits starvation of civilians as a method of warfare and which, as part of Section II concerning the general protection of the civilian population against the effects of hostilities, applies to all attacks from the sea against objectives on land Art. 49 (3) [...].

87. NWP 1-14M, para. 7.10; Canadian Draft, para. 722 (9).

88. NWP 1-14M, para. 7.5.2, according to which in those cases they acquire the character of an enemy merchant vessel or civil aircraft and may be treated in accordance with paragraph 8.2.2.

89. F. KALSHOVEN, COMMENTARY, *supra* note 47, p. 272; G.J.F. van Hegelsom, *Introductory Report*, in: W. Heintschel v. Heinegg (ed.), METHODS AND MEANS OF COMBAT IN NAVAL WARFARE, Bochum 1992, pp. 1 ff., 46; R.W. TUCKER, *supra* note 10, p. 285; CH. ROUSSEAU, *supra* note 54, p. 272.

90. A similar position is taken in NWP 1-14M, para. 7.7.5: "Notwithstanding this trend in belligerent practices (during general war) away from the establishment of blockades that conform to the traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict."

91. According to the well-established principles of prize law, capture and seizure of neutral goods are allowed only if they qualify as contraband, i.e., if they are destined to the enemy armed forces. Goods being exported from enemy ports may therefore not be considered contraband. The same position is taken by the ILA. According to the Helsinki Principles (5.2.3), "contraband are goods ultimately destined to the enemy of a belligerent which are designed for the use of war fighting and other goods useful for the war effort of the enemy." In the commentary it is made clear that, since the goods in question must be destined to the enemy, "the doctrine of contraband is not applicable to exports from enemy territory."

92. For the different theoretical approaches to blockade, see H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 138 ff.; G. SCHRAMM, PRISENRECHT, *supra* note 40, p. 163 ff.

93. Hence, the applicability of the legal limitations merely depends on the establishment of a blockade. According to Oppenheim (*supra* note 4, p. 774), a special justification is not necessary for the following reasons:

> The fact is that the detrimental consequences of blockade to neutrals stand in the same category as the many other detrimental consequences of war to neutrals. [...] A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce. But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, the freedom of neutral commerce, became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate.

94. R.W. TUCKER, *supra* note 10, pp. 287 f., 291; CH. ROUSSEAU, *supra* note 54, p. 267 f.; OPPENHEIM, *supra* note 4, p. 775 f.; C.J. COLOMBOS, *supra* note 4, §§ 822, 824, 826; E. CASTRÉN, *supra* note 60, p. 296 ff.; Y. Dinstein, *The Laws of War at Sea*, ISR. YBHR 10 (1980), pp. 38 ff., 50 ff., and *Sea Warfare*, in: R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Installment 4, North Holland 1981 ff., pp. 201–212, 205 f.; F. BERBER, LEHRBUCH DES VÖLKERRECHTS, Vol. II, 2nd ed., Munich 1969, p. 189. See also the SAN REMO MANUAL, paras. 93 ff., 99; and Articles 74, 77–79 of the 1939 Harvard Draft. According to the ILA Helsinki Principles (5.2.10), "in order to be valid, the blockade must be declared, notified to belligerent and neutral States, effective and applied impartially to ships of all States."

95. E. CASTRÉN, *supra* note 60, p. 297; C.J. COLOMBOS, *supra* note 4, § 825; OPPENHEIM, *supra* note 4, p. 777; R.W. TUCKER, *supra* note 10, p. 287; Article 78 para. 1 lit. (c) of the 1939 Harvard Draft.

96. For example, the Iranian declaration of October 1, 1980, was made known to international shipping within a few hours.

97. OPPENHEIM, *supra* note 4, p. 778 ff.; C.J. COLOMBOS, *supra* note 4, §§ 819 f.; 840 f.; J. STONE, *supra* note 59, p. 493; CH. ROUSSEAU, *supra* note 54, p. 263 ff.; R.W. TUCKER, *supra* note 10, p. 288 f.; E. CASTRÉN, *supra* note 60, p. 299 ff.; L. Weber, *Blockade*, in: EPIL 3, *supra* note 94, p. 48 ff.; E. RAUCH, PROTOCOL ADDITIONAL, *supra* note 54, p. 81; D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA (ed. by I.A. Shearer), Vol. II, Oxford 1984, p. 1151 ff.; Y. Dinstein, *supra* note 94, ISR. YBHR 10 (1980), p. 49 f.; P.A. MARTINI, BLOCKADE IM WELTKRIEG, Berlin/Bonn 1932, p. 84 ff. According to the commentary on Principle 5.2.10 of the Helsinki Principles "the force maintaining the blockade may be stationed at a distance determined by military requirements." For a position according to which a close cordon remains necessary, see F. BERBER, *supra* note 94, p. 190.

98. In that context, R.W. Tucker (*supra* note 10, p. 289) explains: "The element of danger associated with an effective blockade is therefore to be understood in terms of liability to seizure and eventual condemnation, though not in terms of a liability to destruction upon entrance into the forbidden area." See also the foregoing references and para. 96 of the SAN REMO MANUAL ("The force maintaining the blockade may be stationed at a distance determined by military requirements.).

99. In addition to the foregoing references, see para. 95 of the SAN REMO MANUAL; Article 72 of the 1939 Harvard Draft.

100. For the general area of naval warfare ("regions of operations"), see paras. 10 ff., 14 ff. of the SAN REMO MANUAL. For the legal status of international straits in naval warfare, see W. Heintschel v. Heinegg, *Straits and the Law of Naval Warfare*, in: L.C. Green/M.N. Schmitt (eds.), THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENIUM, U.S. Naval War College, International Law Studies Vol. 71, Newport, 1998, p. 263 ff.

101. The same position is taken in the commentary on Helsinki Principle 5.2.10 and, *inter alia*, in NWP 1-14M, para. 7.7.2.3.

102. For an in-depth analysis of the legality of aerial blockades, see M.N. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, USAFA JOURNAL OF LEGAL STUDIES, Vol. 2 (1991), pp. 21–86. See also OPPENHEIM, *supra* note 4, p. 781; E. CASTRÉN, *supra* note 60, p. 301. R.W. TUCKER, *supra* note 10, p. 283, footnote 1, maintains: "The extension of blockades to include the air space over the high seas remains a development for the future. It is next to impossible to declare with any degree of assurance what procedures may govern blockade by air. Certainly, there are grave difficulties in assuming that the practices of naval blockade can be applied readily, by analogy, to aerial blockade." Still, he does not doubt the principal legality of the incorporation of the airspace. Of course, in view of the dangers involved, belligerents are

obliged to observe certain rules of conduct, as, for example, proposed by the ICAO in its Safety Recommendations, ICAO Doc. C-WP/8803, AM. J. INT'L L.83 (1989), p. 335.

103. OPPENHEIM, *supra* note 4, p. 780 f.; C.J. COLOMBOS, *supra* note 4, § 842; E. CASTRÉN, *supra* note 60, p. 300 f.; R.D. Powers Jr., *International Law and Open-Ocean Mining*, JAG JOURNAL XV (1961), pp. 55–58, 71; M.S. MCDOUGAL/F.P. FELICIANO, MINIMUM WORLD PUBLIC ORDER, New Haven 1961, p. 495; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 152; Art. 73 of the 1939 Harvard Draft. See also SAN REMO MANUAL, para. 97: "A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document."

104. See *infra* notes 45 f.

105. J. STONE, *supra* note 59, p. 496.

106. Obviously, the same position is taken by H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 152; E. CASTRÉN, *supra* note 60, p. 300 f.; OPPENHEIM, *supra* note 4, p. 781; Article 73 of the 1939 Harvard Draft ("For the purpose of establishment and maintenance of a blockade, a belligerent must use surface or submarine vessels or aircraft, and may also used fixed obstacles and anchored automatic contact mines which become harmless on becoming unanchored."). The commentary to paragraph 97 of the San Remo Manual makes clear that "this paragraph ... does, however, prohibit the enforcement solely by weapon systems, such as mines, unless they are employed in such a manner as not to endanger legitimate sea-going commerce." In an annotation to paragraph 7.7.2.3, NWP 1–14M, the authors maintain that "the presence of at least one surface warship is no longer an absolute requirement to make a blockade legally effective, as long as other sufficient means are employed."

107. The former USSR opposed the mining of Haiphong by referring to the freedom of navigation. It did not claim a violation of the maritime *jus in bello*.

108. The position taken by O'Connell, according to which the mining of Haiphong was a "strategic blockade" and could, thus, be maintained and enforced solely by mines, is untenable. The maritime *jus in bello* does not distinguish between "strategic" and "economic" blockades. D.P. O'CONNELL, LAW OF THE SEA II, *supra* note 97, p. 1139.

109. J. STONE, *supra* note 59, p. 496; E. CASTRÉN, *supra* note 60, p. 301; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 152; Article 73 of the 1939 Harvard Draft.

110. NWP 1-14M, para. 7.10; Principle 5.2.10 of the Helsinki Principles ("Neutral vessels believed on reasonable and probable grounds to be breaching a blockade may be stopped and captured"); SAN REMO MANUAL, para. 98; R.W. TUCKER, *supra* note 10, p. 292 ff.; C.J. COLOMBOS, *supra* note 4, § 832; E. CASTRÉN, *supra* note 60, p. 304 ff.; D.P. O'CONNELL, LAW OF THE SEA II, *supra* note 97, p. 1156 f.; OPPENHEIM, *supra* note 4, p. 782 ff.; Articles 81 f. of the 1939 Harvard Draft.

111. Besides the foregoing references, see NWP 1-14M, paras. 7.5.2 and 8.2.2.

112. For the differentiation between inward and outward breach of blockade, see C.J. COLOMBOS, *supra* note 4, §§ 829, 831.

113. NWP 1-14M, para. 7.7.4. See also Canadian Draft, para. 722 (8).

114. In favor: C.J. COLOMBOS, *supra* note 4, § 835; J. STONE, *supra* note 59, p. 498; E. CASTRÉN, *supra* note 60, p. 306 f.

Against: R.W. TUCKER, *supra* note 10, pp. 310, 316, footnote 80; H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 161; P.A. MARTINI, BLOCKADE, *supra* note 97, p. 72 ff.; CH. ROUSSEAU, *supra* note 54, p. 271. See also TH. NIEMEYER, DAS SEEKRIEGSRECHT NACH DER LONDONER DEKLARATION, Berlin 1910, p. 21.

115. See the protests by neutral States printed in: OBERKOMMANDO DER KRIEGSMARINE, *supra* note 57, p. 18 ff., 329 ff.

116. See the references in H. Wehberg, *Seekriegsrecht*, *supra* note 10, p. 156 ff.; F. BERBER, *supra* note 94, p. 190 f.; F.D. v.Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande*, ZEITSCHRIFT FÜR VÖLKERRECHT UND BUNDESSTAATSRECHT, Beiheft zum IV. Bande, Breslau 1910, p. 6 ff.

117. That expression was used in a German bulletin of September 13, 1939, printed in: OBERKOMMANDO DER KRIEGSMARINE, *supra* note 57, No. 40. See also P.A. MARTINI, BLOCKADE, *supra* note 97, p. 94 ff.; A.C. BELL, DIE ENGLISCHE HUNGERBLOCKADE IM WELTKRIEG 1914–15, Essen 1943, *passim*.

118. In his statement of September 26, 1939, the British Prime Minister said:

> There have been many proposals founded in the highest motives that food should be allowed to pass the blockade for the relief of these populations. I regret that we must refuse these requests. Many of these valuable foods are essential to the manufacture of vital war materials. Fats are used to make explosives. Potatoes make the alcohol for motor spirit. The plastic materials now so largely used in the construction of aircraft are made of milk. If the Germans use these commodities to help them to bomb our women and children rather than to feed the populations who produce them, we may be sure imported foods would go the same way, directly or indirectly, or be employed to relieve the enemy of the responsibilities he has so wantonly assumed;

Parl. Deb. House of Commons Bd. 351, 1237, cited in: W.N. MEDLICOTT, THE ECONOMIC BLOCKADE, Vol. I, London 1952, p. 666. See also P.A. MARTINI, BLOCKADE, *supra* note 97, p. 115.

119. The Australian delegate stated that "Article 48 [= Art. 54] does not prevent military operations intended to control and regulate the production and distribution of foodstuffs to the civilian population, and that it does not affect existing legal rules concerning the right of military forces to requisition foodstuffs. Moreover, in the view of my delegation, nothing in Article 48 directly or indirectly affects existing rules concerning naval blockade." CDDH Off. Rec. VI, 220. The same position was taken by the Third Committee in its 1975 Report, CDDH Off. Rec. XV, 279.

120. H. Meyrowitz, *Le protocole additionel I aux conventions de Genève de 1949 et le droit de la guerre maritime*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 89 (1985), pp. 243–298, 270 ff., 276 ff.; G.J.F. van Hegelsom, *Introductory Report*, *supra* note 89, p. 46. It is unclear whether Levie shares that view. H.S. Levie, *Means and Methods of Combat at Sea*, SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 14 (1988), pp. 727 ff., 732. See also C. Pilloud/J. Pictet, in: ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA 1987, no. 2092. These authors, while rejecting the applicability of Article 54 to naval blockades, apply Article 70 on relief actions. There is, however, some contradiction, if these authors also hold (*ibid.*, no. 2095) that "it should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians." Obviously, they were eager to avoid any contradiction to the Report of the Third Committee.

121. M. Bothe, *Commentary on the 1977 Geneva Protocol I*, in: N. Ronzitti, *supra* note 47, p. 764; E. RAUCH, PROTOCOL ADDITIONAL, *supra* note 54, p. 93 f. A more cautious approach is taken by W.A. Solf, in: M. BOTHE/K.J. PARTSCH/W.A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, The Hague *et al.*, 1982, p. 338: "The Committee III report disclaims any intention to change the law of naval blockade, citing the provisions of Art. 49(3), although,

indirectly, it may have had some effect on that law through the provisions dealing with relief actions."

122. W.A. SOLF, *supra* note 121, p. 336. See also SAN REMO MANUAL, para. 102: "The declaration or establishment of a blockade is prohibited if: (a) it has the sole purpose of starving the civilian population or to deny it other objects essential for its survival [. . .]." Article 54 Additional Protocol I is to be considered a "new rule" that, as such, is not yet part of customary international law. In an annotation to NWP 1–14M, para. 8.1.2, the authors state that "Article 54(1) of Additional Protocol I would create a new prohibition on the starvation of civilians as a method of warfare [. . .] which the United States believes should be observed and in due course recognized as customary law [. . .]. Starvation of civilians as a method of warfare has potential implications on the law of blockade [. . .]."

123. SAN REMO MANUAL, para. 102 lit. (b). This is also accepted by those authors who reject an application of Article 54 of Additional Protocol I to naval blockades. See G.J.F. van Hegelsom, *Introductory Report*, *supra* note 89, p. 46: "[. . .] if the sole purpose of the blockade is to starve the civilian population, the blockade should be deemed illegal on the grounds that it is not directed at a military objective [. . .]. Termination of the blockade might be prompted if the collateral damage would be excessive in the light of the military advantage anticipated."

124. According to Article 23, paragraph 1, of the Fourth Geneva Convention (1949), "each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is the adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." Relief consignments for the civilian population are regulated in Article 70, Additional Protocol I. The customary character of that provision is, *inter alia*, recognized in NWP 1–14M, paragraph 7.7.3: "Similarly, neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon."

125. M. Bothe, *Commentary*, *supra* note 121, p. 763 f.; G.J.F. van Hegelsom, *Introductory Report*, *supra* note 89, p. 46 f.; Y. Dinstein, *supra* note 94, 47 ff.; Y. Sandoz, in: ICRC, COMMENTARY, *supra* note 120, no. 2805; SAN REMO MANUAL, paras. 103 and 104. According to Principle 5.3 of the Helsinki Principles, "a blockade may not be used to prevent the passage of relief consignments which has to be free according to the applicable rules of international humanitarian law, in particular those contained in Articles 23, 59 and 61 of the Fourth Geneva Convention or Articles 69 and 70 of Protocol I Additional to the Geneva Conventions." See also the commentary thereon: "The provisions of the Geneva Conventions and the Additional Protocol referred to in this principle constitute an exception to the general rules of blockade. It is also submitted that these rules are part of customary law. Thus, they also bind those States which have not ratified the treaties mentioned in this principle."

126. SAN REMO MANUAL, para. 103. See also Article 23, para. 2, of the Fourth Geneva Convention and Principle 5.3 of the Helsinki Principles. In the commentary to the latter provision, the ILA states: "This obligation is, however, subject to the right to prescribe the technical arrangements, including search, under which such passage is permitted, and the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality."

127. Also covered are embargoes ordered by the Security Council pursuant to Article 41 if the member States are entitled to enforce the respective embargo "by all necessary means", i.e., the use of armed force. For example, by UN Security Council Resolution 217 of November 20, 1965, the United Kingdom was entitled to enforce the oil embargo against Rhodesia. The

economic sanctions imposed on Iraq by UNSC Resolution 661 of August 6, 1990, were, according to UNSC Resolution 665 of August 25, 1990, enforced by the States cooperating with Kuwait. In both cases, the Security Council did not decide according to Article 42, but according to Article 41 UN Charter.

128. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, Newport 1997, para. 7.7.2.1, footnote 131.

129. For example, in UNSC Resolution 661 of August 6, 1990.

130. During the second Gulf War Iran, in particular, tried to assume a neutral status. This position, however, was rejected by the vast majority of States and international lawyers.

131. In its commentary on Principle 5.2.10 on blockade of the Helsinki Principles on the Law of Maritime Neutrality, the ILA maintains that "the Security Council, when acting by virtue of Chapter VII of the Charter, may adopt decisions deviating from this Principle (see Principle 1.2)." Principle 1.2 in part reads as follows:

> Nothing in the present Principles shall be construed as implying any limitation upon the powers of the Security Council under Chapters VII and VIII of the United Nations Charter. In particular, no State may rely upon the Principles stated herein in order to evade obligations laid upon it in pursuance of a binding decision of the Security Council.

In the commentary it is made clear that "the provision serves as a reminder that the principles do not preclude a modification of the rules of neutrality due to the law of the United Nations Charter ...."

132. W. Heintschel v. Heinegg, *The Current State of International Prize Law*, in: H.H.G. Post (ed.), INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT, Dordrecht *et al.* 1994, pp. 5 ff., 27.

IX

Dispute Settlement under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses

Ruth Lapidoth

SINCE 1971, the law on non-navigational uses of international watercourses has been on the agenda of the International Law Commission. It took thirteen reports, five special rapporteurs, and 26 years before the work led to the UN General Assembly's adoption, on May 21, 1997, of the Convention on the Law of Non-Navigational Uses of International Watercourses[1] (1997 Watercourses Convention). It is a "framework convention," intended to "ensure the utilization, development, conservation, management, and protection of international watercourses, and the promotion of the optimal and sustainable utilization thereof for present and future generations."[2]

The convention will enter into force after at least 35 States become parties to it. Since it was adopted by a relatively small majority—103 in favor, 3 against, and 27 abstentions—the prospects for such a number of participants are not certain. The convention is nevertheless of considerable interest, not least because some of its principles may constitute a codification of customary rules.[3]

Provisions on the prevention and settlement of disputes are of particular importance in the sphere of international water agreements for at least two reasons. First, the use of water by several riparian States has to be based on a certain compromise between the interests of the different parties, in particular in areas that suffer from water scarcity. It is a case of distributive justice. In the past, when watercourses served mainly or perhaps exclusively for navigation, the danger of conflict was minimal since the use of the river by one ship did not seriously hamper another vessel from sailing in its wake. Even fishing with traditional techniques failed to hinder fishing activities by another riparian. But today, with the new and expanded non-navigational uses of watercourses on the one hand, and the danger of pollution on the other hand, disputes among neighbors that share an aquifer or a drainage basin system are almost unavoidable.

Second, some conventions and other texts in this field (including the one here under review) prescribe only general, rather flexible, principles, such as "equitable and reasonable utilization and participation."[4] The implementation of these general notions can easily lead to disagreement and conflict of interests—hence the need for conflict prevention, management, and settlement mechanisms. In fact, a great number of conventions and other texts dealing with international streams include provisions for those purposes.[5]

When studying dispute resolution in the context of international water law, one has to bear in mind certain characteristics of this field.[6] The questions and problems are of a rather technical nature. Moreover, there is not only a need to reconcile the interests of different States but also to find the right balance between different categories of uses.[7] In addition, the uses have to be adapted to the requirement of protection of the environment.[8] These characteristics, and the fact that we are dealing with a joint watercourse, imply that every solution has to be based on cooperation between the parties.[9] These features have led a great number of experts to conclude that the management of international river systems should be entrusted to permanent joint international commissions, which would also deal with the settlement of disputes.[10]

Before proceeding to study in detail the relevant provisions in the 1997 Watercourses Convention, it may be helpful to highlight its main rules: conflict prevention by the exchange of information,[11] consultation on equitable utilization,[12] notification concerning planned measures,[13] communication in reply,[14] and consultation.[15] If, nevertheless, a conflict occurs, it should be solved by negotiations upon the request of one of the parties.[16] If negotiations fail, the parties "may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse

institutions that may have been established by them, or agree to submit the dispute to arbitration, or to the International Court of Justice."[17] All these mechanisms, except for negotiations, require the consent of both parties. If the dispute is not solved by one of these methods, there is an obligation, upon one party's request, to submit it to a Fact-finding Commission.[18] The parties have to consider the latter's report "in good faith," but it is not binding. States may also agree in advance to submit disputes to the International Court of Justice or to binding arbitration ("opt-in" procedure). Finally, the text includes a provision on private claims.[19]

Dispute Prevention

The first means of preventing disputes is the exchanging of information. "Watercourse states shall on a regular basis exchange readily available data ..."[20] "If a watercourse state is requested ... to provide data ... that is not readily available, it shall employ its best efforts to comply with the request."[21] It thus seems that supplying readily available data is compulsory, while transmitting information which is not readily available is a relative obligation and may be subject to the payment of reasonable costs.

Moreover, in emergency situations there is an unconditional obligation to notify other potentially affected States without delay.[22] An emergency situation has been defined as "a situation that causes, or poses an imminent threat of causing, serious harm to watercourse states ... and that results suddenly from natural causes ... or from human conduct...."[23] The idea is that early knowledge of an emergency can help potentially affected States to prevent or reduce the damage. For instance, the Chernobyl nuclear disaster amply demonstrated the harm caused by holding back information. However, States are not obligated to provide data or information vital to their national defense and security.[24]

In the search for "equitable and reasonable utilization" of the watercourse, the parties have, "when the need arises," to "enter into consultation."[25] Similarly, if "significant harm" is caused to a State by another watercourse State, the latter has to take all appropriate measures, in consultation with the affected state, to eliminate or mitigate the harm.[26]

The obligation to prevent conflict is even more developed in case of "planned measures" of exploitation or development projects by one State. For such situations, the convention establishes a series of procedures—exchange of information, notification, communication, consultation and, where necessary, negotiations; a State contemplating a new use, a change in an existing use, or

development projects on the watercourse that may have "a significant adverse effect" upon other riparians, shall provide those States with timely notification thereof. The notification has to be accompanied by available technical data, including, most importantly, the results of any environmental impact assessment.[27] The potentially affected States are given six months—a period that may be extended an additional six months if it is difficult to evaluate the possible effects of the planned measures—to respond.[28] If the relevant States do not respond, the State that planned the new measures may go ahead, but still has to comply with the principles laid down by the convention.[29]

On the other hand, if the other watercourse States communicate their objection, the parties "shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation."[30] Another provision deals with the situation in which there is disagreement on whether other riparian States have to be notified of certain plans.[31] Only in cases of "the utmost urgency in order to protect public health, public safety or other equally important interests" may a State proceed with planned measures before the necessary notifications and consultations have taken place.[32]

To conclude, the convention lays down a considerable set of rules on information, notification, communication, consultation and negotiations intended to prevent conflicts. Conflicting interests are to be adjusted by cooperative means. While each State has to take into consideration the needs and interests of the others, no right of veto has been granted to any riparian.

The process of dispute prevention can take twelve months or even longer. If the matter is not resolved to the satisfaction of all the watercourse States, the dispute settlement procedures would have to be employed.

Dispute Settlement

While all the dispute prevention measures are obligatory, in the field of dispute settlement only two mechanisms are compulsory—negotiations and submission to a fact-finding commission. All others are optional.

The relevant provisions were hotly debated at the last sessions prior to adoption of the convention, namely, in the meetings of the plenary ad hoc working group of the whole, which met in October 1996 and in March–April 1997. Some delegations favored compulsory resort to a diplomatic mechanism—impartial fact-finding, or mediation or conciliation. Should that procedure fail, they argued for an obligation to resort to arbitration and adjudication before the International Court of Justice or another competent court.[33] At the other extreme were States that opposed any compulsory procedures.[34] Between these

two poles were various intermediate opinions. For example, one group advocated an "opt-in" procedure, i.e., at the time of depositing the instrument of ratification, each party would state whether it would be bound to compulsory arbitration and/or compulsory adjudication before the International Court of Justice.[35] By contrast, the International Law Commission had recommended compulsory fact-finding,[36] whereas Drafting Group Chairman Professor Lammers had favored compulsory fact-finding plus an "opt-in" procedure.[37] Some supported compulsory fact-finding plus an "opt-in" procedure plus compulsory conciliation.[38] These examples show the extent to which opinions on the subject differed.

The reasoning against compulsory binding third-party involvement is obvious. Binding settlement of disputes is considered inappropriate for a framework convention like the 1997 Watercourses Convention, since such a convention only provides guidelines. In addition, one can argue that international watercourse law is not sufficiently developed and that the existing case law is not rich enough to serve as the basis for adjudication by a judge or an arbitrator. Moreover, States might balk at binding solutions because they feel such procedures undermine their sovereignty.[39] The opinion has also been expressed that States should be free to choose the appropriate means of dispute settlement according to the nature of the dispute and the circumstances.[40]

On the other hand, there are many considerations in favor of an obligatory binding third party mechanism. Although the text is a framework convention, it nevertheless contains specific obligations. If every State had the power to interpret or apply the provisions of the convention as it saw fit, the convention would be of little value. If disputes are not to drag on endlessly, and if might is not to prevail over law, settlement procedures that yield binding solutions must be provided for. Given the ambiguity or general nature of some of the concepts that are included in the convention, such as the terms "equitable," "reasonable," "significant," and the difficulty in determining how much weight should be given to each of the factors to be taken into consideration when establishing the equitable and reasonable utilization, the presence of a neutral third party with power to adopt binding decisions would be particularly valuable.[41] Moreover, the very existence of a compulsory and binding mechanism can induce States to compromise.

With so many different opinions and considerations, it is little wonder that the relevant article—Article 33—was adopted in the Working Group by only a small majority: 33 in favor, 5 against, and 22 abstentions. In the discussion that follows, optional mechanisms whose activation under the 1997 Watercourses

Convention requires the consent of both parties will be addressed first. Discussion will then turn to the compulsory means that can be activated unilaterally.

Optional Mechanisms. The list of optional procedures is quite impressive: good offices, mediation, conciliation, use of any joint watercourse institution, arbitration, submission to the International Court of Justice.[42] This list does not include one of the mechanisms mentioned in Article 33 of the UN Charter, namely, inquiry—probably because fact-finding is a compulsory means under the convention. On the other hand, the convention does include good offices, a procedure absent from the UN text. Instead of resort to regional agencies or arrangements mentioned in the Charter, the convention refers to the use of any joint watercourse institution.

The convention has also adopted the "opt-in" procedure: when becoming a party to the convention or thereafter, a State may declare that in respect of any dispute not resolved by the above optional mechanisms, it accepts the compulsory jurisdiction of the International Court of Justice or of an arbitration panel.[43] For such an arbitration, the convention has also laid down optional rules of procedure.[44] It is interesting that the reference to arbitration and adjudication has not been limited to conflicts of a legal nature.

Under the optional rules on arbitration, a party may unilaterally submit a dispute to arbitration: "If the parties do not agree on the subject matter of the dispute, the arbitral tribunal shall determine the subject matter."[45] The "subject matter" is probably equivalent to the question submitted for arbitration.[46] The tribunal shall consist of three members. Each of the parties shall appoint one member, and the chairman shall be designated by common agreement. He may not be a national or a habitual resident of any of the parties or the other riparians. Vacancies shall be filled in the same manner. If either a national member or the chairman is not appointed within a certain time, the President of the International Court of Justice shall designate him at the request of a party.[47]

The rules to be applied by the arbitrators have been defined as "...[T]he provisions of this convention and international law."[48] Although this provision does not expressly mention equity, the tribunal will have to refer to it, since the convention itself to a large extent provides for "equitable and reasonable utilization and participation."[49]

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.[50] It may also, at the request of one of the parties, recommend essential interim measures of protection.[51] The term "recommend" implies that these measures are optional. The parties have to

facilitate the work of the tribunal.[52] Both the parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings.[53] Usually, the expenses of the tribunal shall be borne by the parties in equal shares.[54]

Other parties to the convention that have an interest of a legal nature in the subject matter may intervene in the proceedings with the consent of the tribunal.[55] This provision is remarkable, since it is usually not possible for a third party to intervene in an arbitration.

When dealing with a case, the tribunal may also hear counterclaims that arise directly out of the subject matter of the dispute.[56] If a party does not participate in the proceedings, the tribunal may nevertheless go ahead with the case.[57]

The tribunal should render its award within five months, but it may extend that period for another five months. The award should include the reasons on which it is based, and members may add separate as well as dissenting opinions. There lies no appeal against the award unless the parties have agreed in advance to an appellate procedure. Either party may apply to the tribunal if a controversy arises with regard to the interpretation or manner of implementation of the award.[58]

The convention leaves the choice among the optional mechanisms to the parties without recommending a particular procedure for certain kinds of disputes. What are, then, the circumstances to be considered when deciding which procedure should be preferred? One should ascertain the nature of the dispute—whether it is a political or a legal one, namely, whether the parties are at odds over their existing rights or over changes to be introduced in those rights. Second, do the parties disagree on questions of fact, or of law, or both? Third, is the dispute mainly of a technical nature? Fourth, the general relations between the parties have to be taken into consideration. Fifth, does the dispute involve vital interests of a State? Indeed, most States would be reluctant to submit such a dispute to binding third party adjudication. Sixth, should one try to solve the dispute by an ad hoc mechanism, or is it preferable to establish a permanent institution that can from time to time adjust the rights of the parties to accord with changing circumstances?[59]

Examining the conflict in accordance with the above criteria will help the parties to choose the best suited mechanism. If, however, the disagreement is not settled by one of the optional methods, the obligatory measures remain: negotiation and a fact-finding commission.

Negotiation is the most natural and commonly used way to settle a dispute. It is a process which allows the parties to fully retain control over the dispute

and its resolution. It would be beyond the scope of this article to analyze various mechanisms of negotiation.[60] One should, however, bear in mind that negotiations can be successful only if all the participants wish to reach an agreement and are ready to compromise. Especially in water-related issues, there is usually a great need for compromise.

Compulsory Means. If the parties cannot solve their dispute by a means of their choice or by negotiations, it shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding.[61] When the exhaustion of negotiations is a prerequisite for resorting to another means of dispute settlement, it is not easy to establish when and whether the possibilities for a negotiated settlement have been exhausted. The 1997 Watercourses Convention has established an objective criterion related to time: "[I]f after six months from the time of the request for negotiations ... the Parties concerned have not been able to settle their dispute through negotiations or any other means ... the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding."[62] I assume the same applies if a party refuses to negotiate, despite its obligation. Interestingly, the six months are counted from the date of the "request for negotiations" and not from the time the negotiations have actually started.

The text lays down a certain number of rules for the fact-finding mechanism: the commission is to be composed of one member appointed by each of the parties to the dispute, and a third person chosen by the two members nominated by the parties. The third member may not have the nationality of either party and he will serve as chairman.[63] In order to prevent frustration of the process by failure to agree on a chairman, the text provides that if within three months of the request for the establishment of the commission the chairman has not been chosen, the Secretary-General of the United Nations will appoint him. Moreover, the convention even foresees the possibility that a party may refuse to appoint its own member—a situation that has happened in the past when a party wished to avoid an arbitration to which it was committed.[64] In that case, under the Watercourses Convention, the Secretary-General of the UN will appoint a person who does not have the nationality of the parties to the dispute nor of any riparian State of the watercourse concerned, and this person will constitute "a single-member commission."[65]

However constituted, the commission shall determine its own procedure.[66] The parties have to provide the commission with information that it may require, and permit it to visit their respective territories to inspect relevant structures and equipment as well as natural features.[67]

The commission shall adopt its report by a majority vote, unless it is a single-member commission, and submit it to the parties. The report should set forth "its findings and the reasons therefore and such recommendations as it deems appropriate for an equitable solution of the dispute."[68] Probably, the "equitable solution" does not necessarily have to be in accordance with the legal situation. The parties do not have to adopt the report and implement it, but they must consider it "in good faith."[69]

In order to better understand and evaluate the procedure established as obligatory by the convention, it may be worthwhile to examine the notion of fact-finding in international law. The forerunner of fact-finding was the institution of inquiry, established by the 1899 and 1907 Convention on the Peaceful Settlement of International Disputes.[70] The great affinity between these two concepts has also been recognized by the International Bureau of the Permanent Court of Arbitration: the revised rules on the subject established by the International Bureau, which entered into force in 1997, are called "Optional Rules for Fact-Finding Commissions of Inquiry." According to the introduction to the text, "the denomination 'Fact-finding Commission of Inquiry' satisfies the need for modernization...."[71]

Most international disputes include, *inter alia*, disagreement over facts. A disinterested third party that tries to solve the dispute, whether it is a conciliation commission, arbitral tribunal, court of justice, or United Nations organ, has to resolve the issue of fact by an inquiry. A commission of inquiry or fact-finding panel, on the other hand, is an institutional arrangement intended to clarify only a specific point of fact. This mechanism is based on the assumption that if the factual disagreement is solved by an authoritative impartial third party, the solution of the dispute is self-evident.

The case of the *Tiger*, a Norwegian ship sunk in 1917 by a German submarine off the coast of Spain, serves as an example. Both Norway and Spain were neutral in that war, but the Norwegian vessel allegedly carried contraband. The crucial question was the vessel's location; Spain claimed that the attack had taken place in her waters (and hence was illegal), while Germany maintained that it had taken place on the high seas (and hence was lawful). The commission of inquiry had difficulties in ascertaining where the attack had actually taken place, but in the end concluded that it had happened in Spanish waters.[72] The obvious conclusion was that the act was unlawful; however, the commission did not have to deal with the issue of legality, but only with the factual question.

The specific procedure established by the Hague Convention has been followed in only very few cases (about six), but other fact-finding mechanisms

have been used on an ad hoc basis by various international organizations. The League of Nations set up its own commissions of inquiry in seven cases, including the Aland Islands dispute between Finland and Sweden in 1921, and the Mosul dispute between Britain and Turkey in 1925. The United Nations has similarly resorted to inquiry. For instance, in 1982 the Security Council established a fact-finding commission to investigate an attempted coup led by foreign mercenaries in the Seychelles, and in 1984 Secretary General Perez de Cuellar sent a commission of neutral experts to investigate whether chemical weapons had been used in the Iran-Iraq war. Moreover, the UN General Assembly has expressly recommended the resort to fact-finding as a means to settle disputes.[73]

Also well known are the International Labor Organization's commissions of fact-finding, which investigate complaints related to labor conventions. Among the commissions established by the International Civil Aviation Organization, the most famous is the one established in 1983 to investigate the KAL 007 incident, which involved the shooting down of a South Korean jumbo jet over Soviet territory.[74]

A *permanent* international fact-finding commission was established by the parties to the 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts.[75] The provision on fact-finding became operative in 1990 after 20 States had expressed consent to the jurisdiction of the commission.[76] The commission is to

> (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
>
> (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.[77]

Although the text of the Protocol does not say so expressly, according to the Commentary prepared by the International Committee of the Red Cross the commission is authorized to enquire only into the facts and not to decide matters of law or pass judgment.[78]

So far we have seen that by definition the mechanism of inquiry or fact-finding is limited to the establishment of the facts. However, under the 1997 Watercourses Convention as quoted above, the commission is also to include in its report "recommendations as it deems appropriate for an equitable solution of the dispute."[79] Is this still in the realm of fact-finding? It seems that

although the commission envisaged by the convention is a fact-finding one, it also has some ingredients of conciliation (a formal impartial commission to investigate a dispute and to suggest possible ways to settle it). Moreover, a study of the various precedents shows that in certain other instances fact-finding commissions have submitted reports that actually included conclusions that went beyond mere fact-finding.[80]

Like all other diplomatic means for the settlement of disputes, fact-finding does not lead to a binding decision. However, under the 1997 Watercourses Convention, the parties have an obligation to consider the report in good faith. That is probably a general obligation which applies even in cases in which it is not expressly mentioned.

The text includes only a few guidelines as to how the commission should proceed, and authorizes it to determine its own procedure. There are certain rules which may be helpful for any fact-finding organ:

> A fact-finding mission should not begin its quest without clearly defined terms of reference that circumscribe the precise area in which it is to operate. These terms of reference should be neutrally stated in the form of questions of fact. The mission should insist that within this area it be free to apply the best available tools of perceptive objectivity, insulated from socio-political passions and assumptions. Ordinarily, the members should be distinguished individuals not beholden to governments—certainly not to governments with a direct stake in the issues. Appointment to a fact-finding panel should be irrevocable until the completion of the mission. Evidence should be taken in such a way as to facilitate informed cross-examination and rebuttal, and at the same time to protect witnesses against reprisal. The panel should have its own staff capable of researching issues as well as preparing agendas and itineraries independently. The fact-finders' on-site freedom of movement and access should be assured ab initio. Draft findings should be circulated to the parties for comment. The final product should accurately reflect the result, whether it is a consensus, a majority, or a wide diversity of views as to the facts. Members should be free to write separate or dissenting reports.[81]

Private Remedies

So far we have dealt with the prevention and solution of inter-state conflicts. The 1997 Watercourses Convention also deals to some extent with private remedies. Under Article 32, entitled, "Non-discrimination," natural as well as juridical persons who have suffered or may suffer significant transboundary harm as a result of activities related to an international watercourse, should be granted equal access to, and non-discriminatory treatment

at, judicial or other (probably administrative) procedures in the State where the harmful activity was carried out. No discrimination on the basis of the nationality or residence of the claimant, nor in view of the place where the injury occurred, is permitted. The watercourse States concerned may, however, agree to provide otherwise for the interests of the relevant persons.

The 1997 Watercourses Convention has provided for conflict prevention and for dispute resolution. States must endeavor to prevent conflicts by the exchange of information, notification, communication, consultation, and, where necessary, negotiations. These means of prevention are obligatory.

On the other hand, in the field of dispute settlement, some mechanisms are optional: good offices, mediation, conciliation, the use of a watercourse institution, arbitration, or the International Court of Justice. Only two procedures are obligatory: negotiation and establishment of a fact-finding commission. Even though resort to the latter two mechanisms is obligatory, the outcome is not binding.

In dealing with water-related issues, the parties to the dispute as well as those helping them to solve it should bear in mind some special features of this area. There may be a conflict not only between the interests of riparians for a similar use of the water, e.g., the allocation of water for irrigation, but there may also be a need to reconcile different uses of the water, e.g., agricultural versus industrial ones.[82] Other matters, not directly related to the distribution of benefits, may have to be envisaged, in particular the protection of the environment and the interests of future generations.[83] Considerations of efficiency may have to be weighed against the need for equitable solutions, as well as the search for "equitable and reasonable utilization and participation" against the "obligation not to cause significant harm."[84] Moreover, one has to remember that with regard to water, there may exist psychological factors, as well as religious sensitivities.[85]

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Notes

1. The Convention is annexed to UNGA Res. 51/229, May 21, 1997. It was also published in 36 INTERNATIONAL LEGAL MATERIALS (1997), p. 700. See also Lucius Caflisch, *Regulation of the Uses of International Watercourses,* in Salman M.A. Salman and Laurence Boisson de Chazournes, eds., INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICT, World Bank Technical Paper No. 414 (1998), pp. 3–16; Stephen McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, ibid.,* pp. 17–28. The Convention was negotiated in a Committee of the Whole of the Sixth (Legal) Committee of the UN General Assembly on the basis of draft articles adopted by the International Law Commission. See Report of the International Law Commission on the Work of its Forty-sixth Session, UNGA OR, 49th Session, Supp. No. 10, p. 197, UN Doc. A/49/10 (1994).

2. Preamble, 5th paragraph.

3. Stephen McCaffrey, *supra* note 1, at p. 26. On the impact the Convention may have on the development of general customary law, see Attila Tanzi, *The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes,* 11 LEIDEN JOURNAL OF INTERNATIONAL LAW (1998), pp. 441–472, at pp. 442–443. The International Court of Justice has already referred to the Convention. See the Gabcikovo-Nagymaros case (Hungary/Slovakia), Judgment of September 25, 1997, 1997 I.C.J. Reports and 37 INTERNATIONAL LEGAL MATERIALS (1998) at p. 162.

4. Article 5.

5. See, e.g., B.R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins,* WASSERRECHT UND WASSERWIRTSCHAFT, vol. 19, Berlin: Erich Schmidt Verlag 1981. See also the overview by Professor Stephen C. McCaffrey, Special Rapporteur, in his Sixth Report to the International Law Commission, UN Doc. A/CN.4/427 and Add. 1, of February 23 and June 7, 1990, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1990 (II), p. 41, at pp. 66–75; Resolutions adopted by the Institute of International Law at its Session at Salzburg September 4–13, 1961, Utilization of Non-maritime International Waters (except for navigation), ANNUAIRE DE l'INSTITUT DE DROIT INTERNATIONAL, 1961, at p. 381, Articles 6–9; The Helsinki Rules, adopted by the International Law Association in 1966, Report of the Fifty-Second Conference, held at Helsinki, August 14–20, 1966, p. 484, Articles XXVI-XXXVII and Annex; Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments,* 25 NATURAL RESOURCES JOURNAL (1985), p. 7.

6. See also Ruth Lapidoth, *Some Reflections on Peaceful Means for the Settlement of Interstate Disputes with Special Reference to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses,* in Robin Sanchez, Jeff Woled, and Darle Tilly, eds., Proceedings of the First Biennial Rosenberg International Forum on Water Policy, Water Resources Report No. 93, University of California Centers for Water and Wildland Resources, 1998, pp. 59–74, at p. 71.

7. Article 10 of the 1997 Watercourses Convention.

8. Articles 20–23. See also Gretta Goldenman, *Adapting to Climate Change: A Study of International Rivers and Their Legal Arrangements,* 17 ECOLOGY LAW QUARTERLY (1990), p. 741.

9. McCaffrey, *supra* note 1, p. 22.

10. McCaffrey, *supra* note 5, pp. 42–48; Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law,* 90 AMERICAN JOURNAL OF INTERNATIONAL LAW (1996), p. 384. See also the reports to the International Law

Commission by Professor Stephen Schwebel, Special Rapporteur, (YEARBOOK OF THE ILC, 1982 (II) (Part One), p. 175), and by Professor Jens Evensen, Special Rapporteur, (YEARBOOK OF THE ILC, 1983 (II) (Part One), p. 178, and 1984 (II) (Part One), p. 116). See also the judgement of the International Court of Justice in Gabcikovo–Nagymaros case, *supra* note 3, at para. 147.

11. Article 9.

12. Article 6(2).

13. Article 12. Notification is also obligatory with respect to emergency situations—Article 28.

14. Article 15.

15. Article 17. The commitment for consultation for various purposes has been included in several articles.

16. Article 33(2).

17. *Ibid.*

18. *Ibid.*

19. Article 33(10).

20. Article 9(1).

21. Article 9(2).

22. Article 28.

23. Article 28(1).

24. Article 31.

25. Article 6(2).

26. Article 6(2).

27. Article 12. On notification, see also J. PRUHACS, THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, Dordrecht, Nijhoff, 1993, p. 172.

28. Article 13.

29. Article 16.

30. Articles 15 and 17. See also J. PRUHACS, *supra* note 27, at p. 176; C.B. Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and Negotiate,* 10 CANADIAN YEARBOOK OF INTERNATIONAL LAW (1972), p. 212.

31. Article 18.

32. Article 19.

33. See, e.g., Proposal for Article 33 by the Syrian Arab Republic and Switzerland, UN Doc. A/C.6/51/NUW/DC/CRP.10, of March 24, 1997; proposal by Hungary, June 25, 1996, in Report of the Secretary-General, UN Doc. A/51/275, of August 6, 1996, p. 68; Greece, *ibid.*, p. 24; Finland, proposal of October 14, 1996, UN Doc. A/C.6/51/NUW/WG/CRP.45.

34. E.g., China, Turkey and Israel. Report of the Secretary General, UN Doc. A/51/275, of August 6, 1996, p. 68 (Turkey); UN Doc. A/C.6/51/NUW/WG/CRP.82, of March 27, 1997 (China); oral statement by Israel on May 14, 1997. See also verbatim record, 99th plenary meeting, UN General Assembly, May 21, 1997, UN Doc. A/51/PV.99, at p. 7 (China), p. 9 (India), p. 8 (France), p. 11 (Israel), p. 12 (Rwanda).

35. E.g., proposal by Finland, Greece, and Italy submitted on October 24, 1996 to the Working Group; Proposals submitted by Guatemala, A/C.6/51/NUW/WG/CRP.62, of October 18 and 22, 1996.

36. *Supra* note 1.

37. A/C.6/51/NUW/WG/CRP.83, of March 27, 1997.

38. E.g., proposal by Finland, Greece, and Italy, *supra* note 35.

39. See, e.g., Note on the need to amend Article 33 of the draft convention on the law of the non-navigational uses of international watercourses, prepared by the Syrian Arab Republic and Switzerland, *supra* note 33, at p. 5; Statement by the Chairman of the Drafting Committee, Professor Lammers, Introducing the Report of the Drafting Committee, March 31, 1997, at p. 6.

40. Professor Lammers, *ibid.*

41. Note by Syria and Switzerland, *supra* note 39, at p. 5; Professor Lammers, *supra* note 39.

42. Article 33(2). See also C.B. Bourne, *Mediation, Conciliation and Adjudication in the Settlement of International Drainage Disputes*, 9 CANADIAN YEARBOOK OF INTERNATIONAL LAW (1971), p. 114.

43. Article 33(10).

44. Annex to the Convention.

45. Annex, Article 2.

46. Thus, in the Beagle Channel Arbitration between Argentina and Chile (1977), when the parties could not reach an agreement on the formulation of the question to be submitted for arbitration, each party formulated its own version, and the tribunal determined the subject matter. 17 INTERNATIONAL LEGAL MATERIALS (1978), p. 634.

47. Annex, Articles 3 and 4.

48. Annex, Article 5.

49. Articles 5–6 of the Convention.

50. Annex, Article 6.

51. Annex, Article 7.

52. Annex, Article 8(1).

53. Annex, Article 8(2).

54. Annex, Article 9.

55. Annex, Article 10.

56. Annex, Article 11.

57. Annex, Article 13.

58. Annex, Article 14.

59. *Supra* note 10.

60. On negotiations, see, e.g., J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, third edition, Cambridge University Press, 1998, p. 3; Daniel Druckman, *Negotiating in the International Context*, in I. William Zartmann and J. Lewis Rasmussen, eds., PEACEKEEPING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES, Washington: United States Institute of Peace Press, 1997, p. 81, and bibliography on p. 115.

61. Article 33(3).

62. *Ibid.*

63. Article 33(4).

64. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, First Phase (1950), International Court of Justice, Reports, 1950, p. 65; Second Phase, *ibid.*, p. 221.

65. Article 33(5).

66. Article 33(6).

67. Article 33(7).

68. Article 33(8).

69. *Ibid.* This obligation does not appear in the draft of the International Law Commission, *supra* note 1.

70. Articles 9–14 of the 1899 Convention and Articles 9–35 of the 1907 Convention; Clive Parry, 205 CONSOLIDATED TREATY SERIES (1907), p. 234; NISSIM BAR-YAACOV, THE

HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY, Oxford University Press, 1974.

71. PERMANENT COURT OF ARBITRATION, BASIC DOCUMENTS: CONVENTIONS, RULES, MODEL CLAUSES AND GUIDELINES, The Hague, 1998, p. 175.

72. N. BAR-YAACOV, *supra* note 70, p. 156; J.G. MERRILLS, *supra* note 60, p. 49.

73. UNGA Resolution 2329 (XXII), December 18, 1967. See also UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, New York, 1992, chapter 2B.

74. For these examples, see J.G. MERRILLS, *supra* note 60 at pp. 59–60 and references.

75. Article 90. See J. Ashley Roach, *The International Fact-Finding Commission*, 31 INTERNATIONAL REVIEW OF THE RED CROSS (1991), p. 167; Francoise Krill, *The International Fact-Finding Commission: The ICRC's Role, ibid.*, p. 190.

76. Article 90(1)(b) of the Protocol I; J.A. Roach, *supra* note 75, at 168.

77. Article 90(2)(c).

78. CLAUDE PILLOUD, JEAN DE PREUX, YVES SANDOZ, BRUNO ZIMMERMANN, PHILIPPE EBERLIN, HANS-PETER GASSER, CLAUDE F. WENGER, COMMENTARY ON THE ADDITIONAL PROTOCOL I OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, Geneva, International Committee of the Red Cross, Martinus Nijhoff, 1987, paragraph 3620.

79. Article 33(8).

80. See J.G. MERRILLS, *supra* note 60, at pp. 47, 49, 54, 58; Thomas M. Franck and H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW (1980), p. 308. N. Bar-Yaacov makes a distinction between what he calls "enlarged inquiry," namely, a commission that is to investigate and report on all aspects of the dispute, and conciliation where the commission is empowered to recommend to the parties a scheme for the settlement of the dispute. *Supra* note 70, p. 109.

81. Thomas M. Franck and H.S. Fairley, *supra* note 80, at pp. 344–345. See also the guidelines included in a Working Paper submitted to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, UN Doc. A/AC.182/L.66, reproduced in the Report of the Special Committee on its 1990 session (UNGA OR, 45th Session, Supplement no. 33; A/45/33); UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, New York, 1992; Permanent Court of Arbitration, Optional Rules for Fact-Finding Commissions of Inquiry, *supra* note 71.

82. See B.R. CHAUHAN, *supra* note 5, at p. 143. David H. Getches, *Sectoral Conflicts over Water: Resolving Tensions among Agricultural, Municipal and Industrial, and Ecological Demands*, in Sanchez, Woled and Tilly, eds., *supra* note 6, pp. 35–48. The 1997 Watercourses Convention has given preference to "the requirements of vital human needs"—Article 10(2).

83. On the protection of the environment, see Articles 20–23 of the Convention. On the protection of the rights of future generations, see Preamble, 5th paragraph, and Edith Brown Weiss, *International Fairness for Fresh Water Resources*, 25 ENVIRONMENTAL POLICY AND LAW (1995), p. 231.

84. Articles 5–6 versus Article 7.

85. E.g., with regard to the Ganges and the Jordan.

X

The History and Status of the International Criminal Court

Howard S. Levie

UNTIL FAIRLY RECENTLY, INTERNATIONAL CRIMINAL COURTS have been established entirely on an *ad hoc* basis. Probably one of the earliest and most famous such court was that which convened to try Peter von Hagenbach in the town of Breisach in 1474. He was acting as governor of the city on behalf of the Duke of Burgundy to whom it had been pledged by the Archduke of Austria as security for a loan. In that capacity, von Hagenbach was personally responsible for innumerable acts of murder, rape, illegal taxation, and illegal confiscation of property. The victims included merchants from Swiss towns passing through the pledged area while travelling to and from Frankfurt. Finally, his German mercenaries revolted and joined the citizens of Breisach in seizing von Hagenbach and putting him on trial. He was tried by a court of twenty-eight judges, eight from Breisach and two from each of the other towns, German and Swiss, with respect to which von Hagenbach had exercised his powers over their inhabitants. Despite his plea that he had only obeyed the orders of his master, the Duke, he was found guilty, deprived of his knighthood, and executed.[1]

International conferences on the law of war were convened in Brussels in 1874, in The Hague in 1899 and 1907, and in Geneva in 1929, 1945 and 1974.

At none of these conferences was there even a suggestion made that an international criminal court be established.

In 1919, the Preliminary Peace Conference of Paris created a Commission on the Responsibilities for the War, a sub-commission of which made a list of thirty-two specific war crimes.[2] However, when ultimately drafted, the provisions of Article 14 of the Treaty of Versailles[3] with respect to the future establishment of a Permanent Court of International Justice did not contemplate that the Court would enjoy any criminal jurisdiction.[4] Paragraph 25 of the Annex to Article 50 of the Treaty of Versailles, dealing with the Saar Basin, provided for the establishment by the Governing Commission of a "civil and criminal court" which was to hear appeals from the decisions of the then existing courts of the Saar Basin. The Governing Commission was responsible "for settling the organisation and jurisdiction of the said court" and "Justice was to be rendered in the name of the Governing Commission."[5] Whether this can be called an "international criminal court" is doubtful.

What is sometimes considered to be the first *ad hoc* international criminal court of modern times was the court created by Article 227 of the Treaty of Versailles.[6] It provided as follows:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

As the Netherlands had earlier granted the ex-Kaiser asylum and refused the demands for his extradition made by France and Great Britain, he was never tried.[7]

Articles 228–230 of the Treaty of Versailles provided for the trial before military tribunals of the Allied and Associated Powers of persons "accused of having committed acts in violation of the laws and customs of war"; for the handing over by the German Government of persons accused of having committed such acts; and for the furnishing by the German Government of all appropriate documents and information. These trials were, of course, to be conducted by national, not international, courts. Because of the political situation in Germany, the Allies agreed that the German Supreme Court of Leipzig would try these cases. This proved to be a fiasco and established beyond doubt that trial by a defeated nation of its own personnel charged with the commission of war crimes against enemy personnel or property during the hostilities was not a viable solution to the problem.

Part I of the Treaty of Versailles constitutes the Covenant of the League of Nations.[8] The Council of the League established a Committee of Jurists which drafted a Statute of the Permanent Court of International Justice.[9] Article 34 of that Statute provided that only "States or Members of the League of Nations can be parties to cases before the Court." Obviously, such a limitation precluded criminal trials.

While it did not provide for the establishment of an international criminal court, it is not possible to omit reference to the Treaty of Paris (also known as the Kellogg-Briand Treaty),[10] which was executed on August 27, 1928. This Treaty provided:

> Article I
>
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II
>
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatsoever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

As we shall see, this Treaty served as the substantive law basis for findings with respect to crimes against peace reached by the post-World War II courts at Nuremberg and Tokyo.[11]

During the course of World War II (1939–1945), the Allied Powers repeatedly stated that at the conclusion of hostilities (which they obviously assumed would be in their favor) there would be retribution for the violations of the law of war being committed by the Nazis in all occupied territories. Thus, in response to a statement of condemnation made by President Roosevelt on October 25, 1941, while the United States was still neutral, Winston Churchill, Prime Minister of Great Britain said: "Retribution for these crimes must henceforward take its place among the major purposes of the war."[12] The Declaration of St. James (January 13, 1942), to which many of the Allied Powers were Parties, provided:

> Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a regime of terror characterised amongst other things by imprisonment, massed expulsions, the execution of hostages and massacres....
>
> ....
>
> (3) place among their principal war aims, the punishment, through the channel of organised justice, of those guilty of or responsible for those crimes, whether they have ordered them, perpetrated them or participated in them,
>
> (4) resolve to see to it in a spirit of international solidarity, that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.[13]

In November 1941, an unofficial body known as the Cambridge Commission on Penal Reconstruction and Development engaged in the task of collecting information on the subject of war crimes. This body was of the opinion that

> wherever possible, municipal law should be the system of law applicable to the trial of war criminals, but where this was not possible, it was suggested that the general principles of international law should be applied . . . It was evident that there would be a residue of cases outside the scope of the municipal courts and to deal with these cases some members recommended the formation of an international criminal court; others, however, did not think the time was ripe for the creation of such a court.[14]

Another unofficial body, the London International Assembly, created to make recommendations to the Allied Commission, established a commission

to study the question of the institution of an international criminal court. After lengthy discussion, the Assembly concluded that

> the jurisdiction of an international court should be defined in the widest possible manner and should cover crimes hitherto unlisted as war crimes, such as the crime of aggression, but there were some categories of crimes which could definitely be considered to be within its jurisdiction, namely:
>
> (1) crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews and stateless persons and possibly against Allied nationals in Germany); this category was meant to include offences subsequently described as "crimes against humanity."
>
> (2) crimes in respect of which a national court of any of the United Nations has jurisdiction, but which the State concerned elects, for political or other reasons, not to try in its own courts.
>
> (3) crimes which have been committed or taken effect in several countries, or against the nationals of different countries.
>
> (4) crimes committed by heads of State.[15]

In June 1945, when the war in Europe had, for all practical purposes, come to an end, the Allied nations drafted the United Nations Charter.[16] The only international court that was established by that Charter was the International Court of Justice. Article 34(1) of the Statute of that Court limits its jurisdiction to States.[17]

As early as January 1945, France, Great Britain, the Soviet Union, and the United States began negotiations which would lead to the trial of those Nazis designated as major war criminals. These negotiations culminated in an Agreement in London on August 8, 1945, to which was attached a Charter of the International Military Tribunal.[18] Of particular interest insofar as this study is concerned is the resolution of the jurisdiction of the Tribunal. Article 6 of the Charter states:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) *War Crimes*: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating 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 person in execution of such plan.

It will be noted that, although this Agreement and Charter established an international criminal court, as with prior efforts it was an *ad hoc* court created for a specific limited purpose and its jurisdiction was restricted to the trial of individuals alleged to have committed major crimes connected with World War II.[19]

The events following upon the breakup of the Soviet Union once again brought to the fore the need for an international criminal court. The United Nations Security Council responded by deciding that

> an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991

and the Secretary-General was directed to submit a specific proposal for the establishment of such a Tribunal.[20] He did so,[21] and his proposal was adopted by the Security Council.[22] Article 1 of the Statute of the International Tribunal for the Former Yugoslavia provides:

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

This Tribunal was given jurisdiction over violations of the grave breaches provisions of the 1949 Geneva Conventions (Article 2), violations of the laws and customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). Unlike the Statute of the International Court of Justice, this Tribunal was specifically given "jurisdiction over natural persons."[23] Although at this point we still do not have a true permanent International Criminal Court, it is apparent that we are moving towards that goal.

While the International Law Commission (ILC) had early decided that to include the law of war on its original agenda would indicate a belief in the weakness of the United Nations, it had no such qualms with respect to drafting a convention establishing an international criminal court which would have jurisdiction, among others, to try war crimes. However, this item was apparently very low on its agenda and for years the ILC did little more than designate rapporteurs or working groups whose products rarely received deep consideration. Finally, the report of its forty-fourth session (1992) included what was designated as a "Draft Code of Crimes against the Peace and Security of Mankind." The General Assembly of the United Nations then adopted a resolution inviting States to submit to the Secretary-General comments on the ILC's draft report on the subject of international criminal jurisdiction, and requested the ILC to elaborate a draft statute for an international criminal court as a matter of priority.[24] In accordance with that mandate of the General Assembly, at its next (forty-fifth) session the ILC reconvened a working group for a draft statute on an international criminal tribunal. The ILC's report on its forty-fifth session (1993) included a "Draft Statute for an International Criminal Tribunal."[25] For the first time, offenses other than war crimes were included within the jurisdiction of an International Criminal Tribunal; and the Tribunal was limited neither in duration, nor by the nationality of the accused, or the location at which the alleged crime occurred.

The ILC's Draft Statute provided for a permanent Tribunal of 18 judges to be elected by the Parties to the Statute (no two of whom could be from the

same State) and to sit in a place to be determined. Its jurisdiction included: genocide and the related crimes set forth in Articles II and III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;[26] grave breaches of the four 1949 Geneva Conventions[27] and the 1977 Protocol I Additional to those Conventions;[28] violations of the 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft;[29] the crimes set forth in Article 1 of the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;[30] apartheid and the related crimes set forth in Article 2 of the 1973 International Convention on the Prevention and Suppression of the Crime of Apartheid;[31] the crimes set forth in Article 2 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents;[32] hostage-taking and related crimes as set forth in the 1979 International Convention Against the Taking of Hostages;[33] and the crimes set forth in Article 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[34] and in Article 3 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.[35] The Tribunal would also have jurisdiction over cases referred to it by the Security Council of the United Nations (Article 25) and in cases where the affected State or the State in which the accused is found agrees to the exercise of such jurisdiction (Article 26).[36]

The ILC draft pursued its way through the agencies of the United Nations, receiving the comments of various States, and concluding with the Report of the Preparatory Committee on the Establishment of an International Criminal Court that became the Working Paper for a Conference of Plenipotentiaries on the Establishment of an International Criminal Court which was to meet in Rome in June 1998.[37] Article 5 of that Report is entitled Crimes within the jurisdiction of the Court. It listed various options for the crimes of genocide, aggression, war crimes, crimes against humanity, and a blank fifth offense.[38] There is an N.B. which states that "once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly." The draftsmen then proceeded to do just that, providing in many cases numerous alternative draft provisions for the listed offenses. A discussion of these lengthy provisions has not been included herein because the provisions selected by the Diplomatic Conference have adopted, rejected, superseded, or replaced the offenses specified in the Preparatory Committee's Report.

The Diplomatic Conference met in Rome from June 15 to July 17, 1998, and after a month of heated arguments, disputes, and disagreements, drafted the Rome Convention for the Establishment of an International Criminal Court.[39] Understandably, the question of the extent of the jurisdiction to be exercised by the Court constituted one of the major problems to confront the Conference.[40] However, there were also other problems which caused considerable controversy and the solution of which will probably mean that a number of States, including the United States, will not become Parties to this Statute. All in all, the Statute of the Court includes 128 articles covering well over 100 pages![41]

Perhaps basic to the entire matter is Article 1, which states:

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 provides that the relationship of the International Criminal Court to the United Nations will be based on an agreement between the Assembly of States Parties to the Statute[42] and the United Nations.[43] Article 3 provides that The Hague shall be the seat of the Court but that it may sit elsewhere as provided in the Statute.[44]

Part 2 (Articles 5–21) is the core of the Statute. It is entitled Jurisdiction, Admissibility and Applicable Law. In successive articles, the Statute enumerates and amplifies the crimes which are within the jurisdiction of the Court. Article 5 lists those crimes as (a) genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.[45] By becoming a Party to the Statute, a State accepts the jurisdiction of the Court with respect to the crimes enumerated. For the Court to exercise jurisdiction, an alleged crime must (a) be referred to the Prosecutor by a State Party, or (b) by the Security Council, or (c) must result from an investigation initiated by the Prosecutor.[46] With respect to (a) and (c), the Court only has jurisdiction if the conduct in question was committed on the territory of a State Party, or on board a vessel or aircraft registered in a State Party; or, the accused is a national of a State Party.[47]

Part Three of the Statute (Articles 22–33) is entitled "General Principles of Criminal Law." It includes such long-standing and non-controversial provisions as *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23),

non-retroactivity *ratione personae* (Article 24); grounds for excluding criminal responsibility (Article 31); etc.

There were two provisions included in the 1945 London Charter[48] which proved to be of major importance during the war crimes trials conducted after World War II: Article 7, providing that the official position of the accused was not a defense; and Article 8, providing that the fact that the accused acted pursuant to the orders of a superior was likewise not a defense.[49] The provisions with respect to the responsibility of the superior were apparently non-controversial and will be found reiterated in Articles 87 and 88 of the 1977 Protocol I Additional to the 1949 Geneva Conventions.[50] Comparable provisions are to be found in Article 27 of the Statute entitled "Irrelevance of Official Capacity" and in Article 28 thereof entitled "Responsibility of Commanders and Other Superiors." However, perhaps because of fear of its effect on discipline, several prior attempts to include a provision denying "superior orders" as a defense were rejected by Diplomatic Conferences.[51] Article 33 of the Statute approaches the subject, but cautiously. After a first paragraph which flatly sets forth the rule, three subparagraphs place what appear to have been intended as limitations on that provision: (a) the accused must have been "under a legal obligation to obey orders of the Government or the superior in question";[52] (b) the accused did not know that the order was unlawful; and (c) the order was not manifestly illegal.[53]

Strange to relate, the very important provisions concerning the composition of the Court do not appear until Part 4 of the Statute in Articles 34–52. There are to be eighteen judges,[54] not more than one from any State, and all having specified qualifications. With a minor exception, the term of office is nine years and judges are not eligible for reelection. The organs of the Court include the Presidency (Article 38); the Chambers (an Appeal Chamber composed of the President and four other judges, a Trial Division composed of not less than six judges, and a Pre-Trial Division also composed of not less than six judges) (Article 39); an Office of the Prosecutor (Article 42); and the Registry (Article 43).

Of major importance to any judicial body are its rules of procedure and its rules of evidence. The Statute does not specify who is to draft these rules, so presumably that will be a task for the Court. However, Article 51 provides that such rules enter into force only after they have been approved by a two-thirds majority of the Assembly of States Parties.[55] It can be anticipated that this will present a major problem.

Part 5 of the Statute (Articles 53–61) is concerned with "Investigation and Prosecution." There is little that is novel in this area. The Prosecutor

investigates; he determines whether there is evidence warranting prosecution; if he determines that there is not such evidence, he notifies the Pre-Trial Chamber and the State which referred the case; the State which referred the case (or the Security Council if it was the complainant) may request a review of the Prosecutor's decision by the Pre-Trial Chamber.[56]

The Statute contains a number of provisions for the protection of individuals. Thus, Article 55 has provisions protecting persons during the investigation of an alleged offense; and Article 66 specifies that "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law."[57] As Article 63 provides that "The accused shall be present during the trial," there are to be no trials *in absentia*.[58]

Part 6 (Articles 62–76) is concerned with the trial proper. It is here that we find provisions concerning the presence of the accused at the trial, the presumption of innocence, the rights of the accused, the protection of victims and witnesses, rules of evidence, etc.

Part 7 (Articles 77–80) deals with penalties. Paragraphs 1(a) and (b) of Article 77 are rather peculiar. Paragraph 1(a) provides that the Court may impose "Imprisonment for a specified number of years, which may not exceed a maximum of 30 years." However, paragraph 1(b) provides that the Court may impose "A term of life imprisonment when justified by the extreme gravity of the crime"! That article also contains provisions for fines and for the "forfeiture of proceeds, property and assets derived from the crime."

Part 8 (Articles (81–85) is concerned with appeals. Article 81(1)(a) empowers the Prosecutor to appeal, apparently even from an acquittal, on the ground of procedural error, of error of fact, or of error of law. Paragraph (1)(b) of that Article authorizes the convicted person "or the Prosecutor on that person's behalf" to appeal not only on those same grounds but also on "Any other ground that affects the fairness or reliability of the proceedings or decision." Article 82 refers to appeals against a number of other types of decisions which may be made during the course of the proceedings.

Part 9 (Articles 86–102) of the Statute is entitled "International Cooperation and Judicial Assistance." It can be anticipated that this is an area where difficulties and controversies will arise. Thus, Article 89 requires States Parties to "comply with requests for arrest and surrender." As this requirement is stated to be subject to the procedure under the requested State's national law, past experience has demonstrated the numerous problems to be encountered in this area even where an extradition treaty is the basis for the request.[59]

Part 10 (Articles 103–111) is concerned with the problem of the enforcement of sentences. These provisions are somewhat similar to the provisions in

this regard contained in the Statute for the Yugoslav Court. Article 103 provides that States may indicate their willingness to accept convicted persons for incarceration and the conditions under which this will be accomplished.

Part 11 (Article 112) establishes the Assembly of States Parties and enumerates the functions of this body. They are, of course, solely administrative in nature as are the provisions of Part 12 (Articles 113–118), which are concerned with financing. However, the Assembly of States Parties is the body which will be responsible for the external matters relating to the Court. It is the body which, pursuant to Article 121, will convene in seven years to consider amendments to the Statute. Only States Parties will have a vote at that conference.

Part 13 (Articles 119–128) are, for the most part, the usual administrative details with respect to international agreements. It is here that we find one of the provisions of the Statute to which the United States takes exception, and one of the several reasons why it will, in all probability, not ratify the Statute. This provision is contained in Article 120, which provides that "No reservations may be made to this Statute." Such a provision has caused the United States to withhold ratification of several other conventions and will undoubtedly play a major role in its failure to ratify the Statute of the International Criminal Court.

It is obvious that there are good provisions and provisions of dubious value in the 1998 Statute of the International Criminal Court. It is the opinion of the present author that the good far outweigh the bad and that the Court should be permitted to function for a period during which improper provisions and necessary but missing provisions will be identified and the Assembly of States Parties will then be in a position to evolve what a two-thirds majority thereof considers to be a more perfect Statute.

Notes

1. II GEORG SCHWARZENBERGER, INTERNATIONAL COURTS, ARMED CONFLICT 462–466 (1968). Although the trial took place before the outbreak of war between the Archduke of Austria and his Allies against the Duke of Burgundy, the case had all the characteristics of an *ad hoc* international war crimes court, with the accused fruitlessly asserting the now famous defense of "superior orders."

2. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 34–35 (1948) (hereinafter cited as War Crimes Commission).

3. Treaty of Versailles, 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949 at 43, 52 (Charles I. Bevans ed., 1969); II MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, at 1265, 1279 (Fred L. Israel ed., 1967).

4. This Article appears in the portion of the Treaty concerned with the Covenant of the League of Nations.

5. 2 Bevans, *supra* note 3, at 73; II Israel, *supra* note 3, at 1306.

6. 2 Bevans, *supra* note 3, at 136–137; II Israel, *supra* note 3, at 1389.

7. JAMES F. WILLIS, PROLOGUE TO NUREMBERG 98–112 (1982).

8. 2 Bevans, *supra* note 3, at 48; IV Israel, *supra* note 3, at 1274.

9. 1 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 530 (1931).

10. 2 Bevans, *supra* note 3, at 732; IV Israel, *supra* note 3, at 2393.

11. Nazi Conspiracy and Aggression: Opinion and Judgment 48 (GPO, 1947); Report of Robert H. Jackson, United States Representative to the International Conference of Military Trials, Doc. LX, at 422, 423 (1949) [hereinafter Jackson]; 1 The Tokyo Judgment 46 (B.V.A. Roling & C.P.Ruter eds., 1977). However, it did not prevent a series of wars such as that between Bolivia and Paraguay (the Chaco War); the Italo-Abyssinian War; etc.

12. WAR CRIMES COMMISSION, *supra* note 2, at 88. See, for example, the Moscow Declaration of 1945, *op. cit.*, at 107.

13. WAR CRIMES COMMISSION, *supra* note 2, at 89–90.

14. WAR CRIMES COMMISSION, *supra* note 2, at 95.

15. WAR CRIMES COMMISSION, *supra* note 2, at 102–103.

16. 3 Bevans, *supra* note 2, at 1153.

17. *Ibid.* at 1179, 1186.

18. 59 Stat. 1544; Jackson, *supra* note 11, at 420 and 422 (1949); 3 Bevans, *supra* note 2, at 1238 and 1240.

19. The Charter of the International Military Tribunal for the Far East, established by proclamation issued on January 19, 1946, by General Douglas MacArthur as Supreme Commander for the Allied Powers (SCAP), while differing in wording, provided for a similar jurisdiction. See Article 5, Charter of the International Military Tribunal for the Far East, Department of State, Publication 2613, Trial of Japanese War Criminals 39, 40 (1946); 4 Bevans, *supra* note 1, at 20.

Once again persons who were charged with having committed ordinary war crimes were to be and were tried by national courts both in Europe and in Asia.

20. S/RES 808 (1993), Feb. 22, 1993.

21. S/25704, May 3, 1993; 32 I.L.M. 1163 (1993).

22. S/RES 827 (1993), May 25,1993; 32 I.L.M. 1203 (1993).

23. 32 I.L.M. 1194, (S/RES 955 (1994), Nov. 8, 1994. S/RES/955, Nov. 8, 1954, 33 I.L.M. 1600 (1994), created a somewhat similar Tribunal for Rwanda.)

24. UNGA/RES 47/33 Nov. 25, 1992. The draft Final Act of the Rome Conference (A/CONF.183/2/Add.1, at 168) contained the following summary of the actions of the General Assembly in this regard:

> 3. Previously, the General Assembly, in its resolution of 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 45/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

It appears obvious that the General Assembly was far more interested in the establishment of an international criminal court than was the International Law Commission!

25. General Assembly, Official Records, Forty-eighth Session, Supplement No. 10 (A/48/10), paragraphs 75 *et seq*; 33 I.L.M. 253 (1994).

26. 78 U.N.T.S. 277; 151 B.F.S.P. 683; THE LAWS OF ARMED CONFLICT 231 (Dietrich Schindler & Jiři Toman, eds., 3rd ed. 1988).

27. 6 U.S.T. 3114–3695; T.I.A.S., 3362–4465; 75 U.N.T.S., 31–468; Schindler and Toman, *supra* note 26, at 373–594.

28. 72 AM. J. INT'L L. 457–509 (1980); Schindler & Toman, *supra* note 26, at 621–718.

29. 860 U.N.T.S. 105; 10 I.L.M. 133 (1971).

30. 974 U.N.T.S., 177; 10 I.L.M., 1151 (1971). For some strange reason, the supplement to this Convention, the 1988 Protocol for the Suppression of Violence at Airports Serving Civil Aviation 27 I.L.M. 627 (1988), was not included.

31. UNGA/RES 3068 (XXVIII); 13 I.L.M., 51–57 (1973).

32. UNGA/RES 3166 (XXVIII); 13 I.L.M., 41–49 (1974).

33. UNGA/RES 34/146 (XXXIV); 18 I.L.M., p. 1456 (1979).

34. 27 I.L.M., 672 (1988);

35. 27 I.L.M., 685 (1988).

36. It will be noted that neither crimes against humanity nor crimes against peace (nor crimes involving the environment or cultural objects) were included within the jurisdiction of the Tribunal. However, Article 27 provided that a person could be tried for an act of aggression if the Security Council "has first determined that the State concerned has committed the act of aggression which is the subject of the charge."

37. A/CONF.183/2/Add. 1, April 14, 1998.

38. Parenthetical provisions indicate the possibility of including: crimes of terrorism; crimes against United Nations and associated personnel; and crimes involving the illicit traffic in narcotic drugs and psychotropic substances.

39. A/CONF.183/9, July 17, 1998. The vote on the final Draft Convention was 120 for and 7 against, the latter including Algeria, China, Iraq, Israel, Libya, Qatar and the United States—a strange grouping!

40. One problem that arises is whether the International Criminal Court will have jurisdiction over all international crimes listed to the exclusion of all other such courts, including those already in existence (such as the courts already established with respect to Yugoslavia and Rwanda) or will *ad hoc* international criminal courts continue to be established for specific matters. See Christopher Staker, *Will There be a Role for Other International Criminal Courts after the Establishment of an ICC?* INTERNATIONAL LAW FORUM 16 (Zero Issue, 1998).

41. The Statute will be found in A/CONF/183/9, July 17, 1998. (It can also be found at: http/www.un.org/icc part 1.htm (through part 13.htm).

42. The composition and activities of the Assembly of States Parties to the Statute are set forth in Article 112 of the Statute.

43. This is a far cry from the conclusions reached at a symposium conducted by the United States Institute of Peace in 1996 and which caused the present author to write a letter to the symposium director that included the following paragraph:

> . . . I heard nothing but proposals which would, in effect, make the International Criminal Court a pawn of the Security Council. The Security Council would determine who should be tried; the Security Council would indict; the Security Council would instruct the International Criminal Court how to proceed; the Security Council would

> review the acts of the Court, etc., etc. In other words there would be a completely politicized criminal court dependent entirely on the will and the whims of the Security Council—which, in effect, means on the will of any single nation exercising the veto power, or even on the negative votes of any nine members of that body. This is not my idea of an *independent International Criminal Court*; and I am sure that States would be reluctant to release any of their criminal jurisdiction to such a court.

I received no answer to that letter.

44. Article 4(2) provides that the Court "may exercise its functions, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."

45. Articles 6 enumerates five acts constituting genocide; Article 7 enumerates eleven acts constituting crimes against humanity; and Article 8 enumerates eight acts constituting violations of the grave breaches provisions of the 1949 Geneva Conventions and an additional twenty-six acts which also constitute war crimes. Extensive attempts to define aggression proved unsuccessful. Concerning this situation, an "Analysis of the Statute of the International Criminal Court," apparently prepared by one of the U.S. representatives at Rome, but not otherwise identified, listing objectives of the United States which were not achieved, states:

> Inclusion of aggression in the statute, with a proviso "activating" the crime once an acceptable definition has been arrived at and included in the Statute as a result of a Review Conference under Article 123 and an amendment to the Statute pursuant to Article 121, is in direct contravention of the consensus clearly demonstrated during the debates—that aggression should not be included if not adequately defined.

(The present author was unable to identify any such "proviso" in the Statute and assumes that it was a separate action of the Conference.)

Article 8(c) to (f) relate to crimes committed during armed conflicts not of an international character.

46. See Articles 12 and 13 of the Statute. Under Article 12(3) a State which is not a Party to the Statute may accept the jurisdiction of the Court. This is one of the areas to which the United States strongly objects as it took the position that the Statute should not apply the jurisdiction of the Court to States not Parties to the Statute on the theory that a treaty does not create either obligations or rights for a non-Party.

The United States also objected strongly to the provisions of Articles 13 and 15 of the Statute which permit the Prosecutor to initiate investigations on his own motion. It fears that he will be subjected to the pressure of human rights organizations to institute proceedings in cases which do not comprise crimes of concern to the international community.

47. Article 12 of the Statute. Because of the fact that American soldiers are stationed in so many different areas, and the fear that they would be subjected to politically motivated charges, the United States sought, unsuccessfully, the right to veto the prosecution of American citizens. While there was merit to its concern, every nation would have sought entitlement to the same right and the entire idea of an International Criminal Court would have been nullified.

48. See note 18, *supra*.

49. These provisions will be found in Principles III and IV, respectively, of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. 44 AM. J. INT'L L. Supp. 146 (1950).

50. See note 28, *supra*.

51. See Howard S. Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 183 (1991); reprinted in LEVIE ON THE LAW OF WAR 269 (Vol. 70, International Law Studies, 1998).

52. It has probably always been held that a person is legally obligated to obey the orders of his government or a superior unless the order was manifestly illegal. See, e.g., The Dover Castle Case in MULLINS, THE LEIPZIG TRIALS 107 (1921).

53. See note 52, *supra*. Paragraph 2 of Article 33 specifically states that "orders to commit genocide or crimes against humanity are manifestly illegal."

54. There is a procedure in Article 36(2) for increasing this number.

55. One rather unusual rule which is included in Article 50 of the Statute itself is that while the official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish, the working languages of the Court are English and French.

56. Under certain circumstances, the Pre-Trial Chamber may review the Prosecutor's decision on its own initiative. See Article 53(3)(b).

57. Article 67 sets forth a number of additional rights of the accused. A rather unusual provision for an international criminal court is to be found in Article 72, "Protection of national security information."

58. However, paragraph 2 of that article does authorize the Court to remove an accused from the courtroom if he disrupts the proceedings. Even then, he must be allowed to view the trial from outside and to communicate with his counsel.

59. It should be noted that Article 101 makes the rule of specialty applicable to cases of the surrender of an individual to the Court for trial.

XI

The Charter of the United Nations as a World Constitution

Ronald St. J. Macdonald

Forty-seven years ago I had the privilege of attending the famous Thursday afternoon seminars on public international law conducted by Georg Schwarzenberger at the Institute of Advanced Legal Studies in London. Mr. L. C. Green, a young university lecturer full of erudition, was one of the animating personalities at those memorable meetings. We became and remained friends and I watched with admiration as he travelled the world garnering a multitude of richly deserved prizes, in England, Singapore, Israel, Canada, and the United States. Now, half a life time later, it is a pleasure to publicly express my respect and good wishes to him and his lovely wife, Lilian, in this splendid book of essays published under the distinguished auspices of the United States Naval War College.

THE PURPOSE OF THIS PAPER IS TO CONSIDER the Charter of the United Nations and its associated provisions, as represented by resolutions and declarations of the organization, from a constitutional point of view. More particularly, I want to reflect on whether the Charter has risen above the status of a mere international treaty to become something of a constitution for the international community as a whole. This question is increasingly important in view

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of the number of States members of the United Nations and the variety of situations that call for more detailed regulation in the management of international affairs. The main object of the essay is to emphasise the extent to which the complex legal structures of the Charter and the law generated by the organization are in fact providing constitutional guidance in the normative evaluation of conflicts over interests and values which global integration is bound to produce and must resolve.

The constitutionalist perspective is about the establishment of important, albeit limited, supranational competencies and the adjustment of national legal orders to guidance and direction from the organized international community. To consider the Charter of the United Nations as the constitution of the international community *tout court* marks a significant step towards centralization at the expense of classical sovereignty in international society. Constitutionalism is also about democratic governance and respect for individual rights. I hope to show that the constitutionalization of the principles of the Charter is fully in line with the inclusionary ideals embodied in democratic constitutions and can thus be understood as complementary features of national constitutional traditions.[1]

What needs to be assessed is the status of the Charter in the system of international law, that is, whether it is a mere treaty, albeit with universal scope and near-universal membership, simply restating principles of customary international law, or whether this "*Charte Octroyée*" is recognized as a constitution increasingly influential in the active creation and consolidation of a universal legal community.[2] The object of my remarks is to encourage discussion of the latter perspective and, importantly, its implications.

In order to identify the major principles that ensure the existence of different States and the compatibility of the objectives of those States with the obligations they have assumed, I will start with a brief overview of the most relevant of the Charter's 111 articles.

The Charter of the United Nations

The Charter is today a combination of different sets of provisions. A number of them state general principles now largely accepted by States and by doctrine as principles valid *erga omnes*, some of which have a *jus cogens* nature. Other provisions have a more "technical" value, their task being to shape the constitutional framework of an international organization empowered with the potential to play a major, sometimes overriding, role in the international community.

Articles Stating Principles Erga Omnes *and of* Jus Cogens. As Zemanek puts it, almost all the fundamental principles of international law can be found in the Charter.[3] The Charter has consolidated previously existing rules and developed new principles of international conduct, giving both categories "a distinct legal status [obtained] by having been formally incorporated into a multilateral treaty of historic importance."[4]

The Preamble summarizes the objectives and the purposes of the United Nations. To some extent, it duplicates the provisions of Articles 1 and 2. However, the first lines of the Preamble seem to give the Charter a forward-looking constitutional flavor. The "Peoples of the United Nations" are said to enjoy rights and obligations under the document. In fact, the Preamble, which reflects the language of the Constitution of the United States, represents the first time the concept of "Peoples" appears in international law as a legal category.[5] Human rights, including, importantly, social and economic rights, are stated at the very beginning of the Preamble (lines 2 and 4). As Cote and Pellet rightly observe, *"il est très remarquable à cet égard que, tout au long de la Charte, comme c'est le cas du préambule, tout disposition qui évoque les droits de l'homme traite aussi des problèmes économiques et sociaux."*[6]

Despite this remarkable beginning, in which the draftsmen courageously sought to reach out to all of humankind, the focus returns to States in the closing sentence of the Preamble and governments are indicated as the subjects in charge of the rights and obligations of the Charter. Peoples are again referred to in Articles 1.2 and 55, in relation to the right of self-determination, but all other preambular provisions refer to States and governments. Perhaps, then, the Charter does begin with an overstatement, because governments remained the authors of the Charter and States the principal actors in the creation and implementation of United Nations law. Nevertheless, the Preamble is a charged text whose time has yet to come: it awaits the interpreter's attention.[7]

Article 1.1, empowering the organization to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression, states the main objective of the United Nations as the maintenance of international peace and security.

Article 1.2 calls for the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. As evidenced by the number of independent States born from colonial regimes under the auspices of the organization, this has been one of the most productive areas of action of the United Nations. With the passage of time, however, and the action of new member States, the general principle of self-determination became a principle of *jus cogens*, stating the right to

independence of people subjected to foreign domination. No provision in the Charter deals extensively with colonial regimes. The document provides only for an international regime of trusteeship in Chapters XII and XIII. The principle of self-determination was recognized as a general principle, intended to protect nationalities from foreign aggression or domination

The purposes and principles stated in Article 1.3, to cooperate to achieve higher standards in the social, economic, and cultural domains and to encourage respect for human rights, have from the outset occupied a prominent place in the Charter, in contrast to the Covenant of the League of Nations, and have been reaffirmed in countless resolutions and declarations. This provision is interpreted as binding on all States. The obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinctions appears to have reached the status of *jus cogens*, and the recent activity *extra vires* of the Security Council in situations where human rights were at stake seems to point in the same direction.

In the economic field, the United Nations has not achieved the success it has realized in the field of human rights. Following the failure of the Havana Convention of 1947, the most impressive results were achieved by international organizations not fully related to the United Nations, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). In Falk's opinion, the "logic [of the international economic organizations] is embedded in the well-being of capital rather than people."[8] For too long, the United Nations was, he believes, "deliberately kept away from this global economic domain to ensure that normative claims about rectifying poverty and unemployment are not given any serious hearing on the global policy stage."[9]

Following on, for example, from the mandate in Article 55(c)—the obligation to promote universal respect for human rights—States developed a distinct branch of international law, international humanitarian law, that is increasingly invoked to require and justify intervention by the United Nations in cases of widespread violations. Actions by the United Nations in the humanitarian field were for long limited by another fundamental principle of the Charter, the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State (Article 2.7). Lately, however, especially after the fall of the Soviet Union and the socialist regimes (among the strongest supporters of the principle of non-intervention), and the rise of public awareness, respect for human rights is increasingly perceived as taking precedence over the protection of domestic jurisdiction in situations of extreme crisis.

In the result, the area covered by Article 39, in which the Security Council can determine the existence of any threat to the peace, breach of the peace or act of aggression and recommend or decide on measures to be taken by member States to maintain or restore international peace and security has been significantly extended by the need for humanitarian protection.[10] This has reduced the reach of Article 2.7, except of course in the case of the involvement of one of the Permanent Members of the Security Council under Article 39, as happened in the 1982 Falkland/Malvinas war. As Ferrari Bravo puts it, if the practice of the Security Council continues along the lines followed in the last few years, humanitarian interventions may come to represent a decisive blow to the international system based on the classical concept of the sovereignty of States.[11]

Article 2.7 was considered at the time of the creation of the United Nations to be a sacred, if not the highest principle of international law. However, the rise of other principles of international law has brought about a shrinkage in the traditional scope of domestic jurisdiction. This is strikingly evident when, for example, the protection of human rights is invoked. By recognizing the superior value of the protection of human rights, some old distinctions between internal and international war have been blurred. The cases of Somalia and Liberia are emblematic of this new development in the practice of the United Nations. In both, the existence of a civil war, which in traditional theory falls within the reach of Article 2.7, was defined by the Security Council as a situation capable of threatening international peace and security and therefore subject to resolutions under Chapter VII.[12] China, which has always considered the principle laid down in Article 2.7 as inviolable, supported the resolutions, considering the situation at hand a "unique situation" not constituting a precedent.[13] Another remarkable example of this trend is Security Council Resolution 688 of April 15, 1991, which served as the basis for the intervention of member States in the domestic affairs of Iraq in order to terminate the violation of human rights perpetrated by the Iraqi government against the Kurdish population.[14]

Almost all the principles listed in Article 2 have achieved the status of *jus cogens*. After restating the sovereign equality of all members (Article 2.1), this article proclaims the duty of member States to fulfill in good faith the Charter's obligations (2.2), requires States to use peaceful means to settle international disputes (2.3), enjoins the threat or use of force against the territorial integrity or political independence of any State (2.4), and imposes on States the duty to give the United Nations every assistance in any action it takes in accordance with the Charter (2.5). Article 2 also imposes on the organization a duty to ensure that States that are not members of the United Nations act in accordance

with the principles laid down in the Charter (Article 2.6). This paragraph, which will be examined more closely below, is particularly relevant for purposes of ascertaining the constitutional value of the Charter.

The principle of the sovereign equality of the member States of the United Nations, affirmed in Article 2.1, is as old as international law. From the time of Grotius to the present day, jurists have declared that all independent States are equal in the eyes of the law. This theory was first developed at the end of the Middle Ages, sanctioned by the Peace of Westphalia, and strongly supported by developing States from 1945 onwards. General Assembly declarations and a number of treaties refer to the principle of sovereign equality as one of the bases for the right to development, the right to freely dispose of natural resources, and for the general condemnation of neo-colonialism in any form.

The fundamental duty to settle international disputes by peaceful means is proclaimed as one of the purposes of the organization in Article 1.1, but is stated as a general principle in Article 2.3. Article 33 provides an illustrative, non-exhaustive list of dispute settlement modes, adding that States may resort to other modalities as long as they are peaceful. The validity of this principle was reinforced by the Manila Declaration on the Peaceful Settlement of International Disputes, and a number of General Assembly resolutions. The fundamental importance of the principle of peaceful settlement is evidenced by the traditional emphasis on it in the great regional arrangements, such as the treaties establishing the Organization of American States and the Organization of African States, the many treaties on the protection of human rights and on arms control, the Disputes Settlement Understanding of the World Trade Organization, and, remarkably, the comprehensive provisions of Part XV of the 1982 Law of the Sea Convention.

Articles Revealing Substantial Constitutional Characteristics. Article 10 defines the functions and powers of the General Assembly as consultative and declaratory. Although the Assembly was not designed as a legislative organ, Article 10 empowers it to discuss any matter within the scope of the Charter. Furthermore, Article 13.1 confers on the General Assembly an unrestricted power to initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. Despite the fact that the United States, the most powerful member of the organization, abandoned its early liberal view of the quasi-legislative value of certain acts of the General Assembly when the United States lost its majority within the General Assembly,[15] the Assembly has increasingly and successfully used the

means at its disposal to foster new developments in international law by convening international conferences and promoting the creation of new law instruments through resolutions.

Article 12 states a division of labour, and indeed a superiority, between the two main organs of the United Nations: while the Security Council is exercising its functions under the Charter in respect of a dispute or situation, the General Assembly must, in most cases, refrain from making any recommendation with regard to that dispute or situation unless the Security Council so requests.

Article 24 sets out the functions and powers of the Security Council. By conferring on the Security Council primary responsibility for the maintenance of international peace and security, the members made the Council the cornerstone of the system of international security established by the Charter.[16] Virtually no limit is placed on the powers of the Security Council as long as, very importantly, the Council acts in accordance with international law including the provisions of the Charter itself. The Council exercises other specific powers with regard to the maintenance of international peace and security. However, as stated by the International Court of Justice in the *Namibia* case, the mention of specific powers does not exclude the general powers the Council enjoys in order to carry out its duties in accordance with the Charter.[17]

Under Article 25, member States agree to accept and carry out decisions of the Security Council, whether its decisions stem from specific or general powers, provided, in my opinion, the decisions of the Security Council in question are "in accordance with the present Charter."[18]As will be referred to later, the extensive powers conferred on the Security Council raised worries on the part of the smaller States at the San Francisco Conference, but the virtual non-functioning of the Council during the Cold War period alleviated those particular concerns.[19] They reappeared, understandably, with the extraordinary reactivation of the Security Council after 1989. The worries regarding the existence of an overpowering Council were well summarized by the statement of the representative of Zimbabwe on the sanctions against Libya: "Any approach that assumes that international law is created by majority vote in the Security Council is bound to have far-reaching ramifications which could cause irreparable harm to the credibility and prestige of the Organization, with dire consequences for a stable and peaceful world order."[20]

Article 25 has even more constitutional relevance than Article 24. We see here that sovereign States have agreed to accept general policy decisions they may not have voted for, considering that only 15 of the 185 members of the United Nations sit on the Council. This problem has lately caused a renewal of demands for an enlargement of the membership of the Security Council and a

general reorganization of the structures of representation within which member States operate.[21]

The famous Chapter VII refers to action with respect to threats to the peace, breaches of the peace, and acts of aggression. This is the chapter where the constitutional nature of the Charter comes clearly into view, as it gives the United Nations, through the Security Council, the lead role in carrying out operations that may involve the use of force. States are deprived of the right to use force unless authorized to do so by the Council itself. The only exception to this rule is contained in Article 51, which allows the use of force in case of individual or collective self-defense.[22]

Article 39 grants the Security Council authority to make the requisite determination about the existence of any threat to the peace and to "decide" what measures shall be taken to maintain or restore international peace and security. Article 41 lists a series of measures not involving the use of armed force that the Council may call on the members to apply in order to give effect to its decisions. Article 42 refers to measures involving the use of force that may be necessary to maintain or restore international peace and security. Until recently, however, no action was ever taken in line with the full procedures of Chapter VII, nor has the Military Staff Committee been able to work according to its mandate under Article 47.[23] When military operations were authorized, the armed forces involved were not placed under the control of the Security Council through an agreement between the State or States concerned and the United Nations under Article 43; such forces were controlled by the States which the Security Council requested to intervene.

The only two occasions in which Chapter VII was invoked to legitimize warfare actions by member States were the wars in Korea (1950–1952) and in Iraq (1990–). On both occasions, Chapter VII was used to "provide cover for geopolitical undertakings led by the United States."[24] While the operation in North Korea was conducted under the United Nations flag, although managed by the United States and its allies, the operations in Iraq, once the authorization was granted, were conducted without space for the United Nations to monitor the intervention.[25] The success of the action in Iraq led to a resurgence of hope for an increase in the legitimate activity of the Security Council, but the circumstances of the Iraqi war were exceptional in comparison to the warfare situations with which the United Nations is usually involved—the Iraqi war was the exact kind of conflict envisioned by the drafters of the Charter. As Evans states, "the United Nations Charter was written retrospectively to avert another World War II, and in Saddam Hussein, the United Nations found a 1930s type aggressor."[26]

The only other significant precedent regarding the authorization of the use of force by one member State against another member State, not including complete warfare operations, was the request to the United Kingdom to enforce a naval blockade outside the port of Beira in Mozambique during the riots in South Rhodesia in 1966.[27] Article 43 obliges members to make available to the Security Council whatever assistance (armed forces, assistance, and facilities) the Council requires for purposes of maintaining international peace and security. This was to have been done by special agreements or agreements negotiated on the initiative of the Security Council. Interestingly, in view of the legal limbo NATO found itself occupying during the Kosovo crisis of 1999, and the present need to redefine NATO, which is a military alliance not a traditional regional arrangement, those agreements can be concluded between the Security Council and "groups of Members."

Some authors find that several articles in Chapter VII give the Security Council a certain law-making capacity. For example, Kirgis affirms that "from the outset, the Security Council has had quasi-legislative authority . . . Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorize the Security Council to take legislative action."[28] This was also the opinion of distinguished participants at the San Francisco Conference, one of whom observed that the "Security Council is not a body that merely enforces law. It is law unto itself."[29]

Under-appreciated and under-utilized, until recently, have been the possibilities, inherent in Chapter VIII, which govern the functioning of regional arrangements or agencies under the Charter. Article 52 states that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional actions. Under Article 53, no enforcement action can be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.[30]

While Chapter VIII is frequently associated with the military activities of the United States in Guatemala in 1954, the Dominican Republic in 1960, and Cuba in 1960 and 1962, Secretary-General Boutros Ghali rightly pointed to wider possibilities when he underlined the "useful flexibility" of the system as a whole. In his 1992 report to the Security Council, *An Agenda for Peace*, he pointed out that "decentralization, delegation and co-operation with UN efforts could not only lighten the burden of the Council, but also contribute to a deeper sense of participation, consensus and democratization in international affairs."[31]

In my opinion, Chapter VIII, although focused on collective security, in no way rules out regional cooperation in the economic, cultural, and social fields.

The recognition of regional arrangements and agencies within the UN system, and the implicit need to work out compromises between universalism and regionalism, is a striking example of the major constitutional features of the Charter of the United Nations, in this case a feature fully familiar to citizens of federal and confederal states.

Chapter XIV deals with the International Court of Justice, the principal judicial organ of the United Nations. Its statute is an integral part of the Charter itself. The precise mandate of the Court, which we should not overlook, is to decide in accordance with international law such cases as are submitted to it.

According to Articles 93 and 94, all member States of the United Nations are *ipso facto* parties to the Statute of the Court and must comply with the Court's decisions in any case to which they are party. However, the constitutional reach of these provisions is limited jurisdictionally; the Court is available only to States. Organs of the United Nations or of any other international organization cannot stand as a party. This leaves little if any room for jurisdictional control over acts of the organization, particularly over those of the Security Council. As Crawford observes, "there is in the Charter, an almost total lack of institutional means for implementing the principle of the rule of law on the part of individual Member States."[32]

Two articles, Article 2.6 and Article 103, have particular relevance for purposes of revealing the constitutional significance of the Charter. Under Article 2.6, the organization "shall ensure that States which are not Members of the United Nations" act in accordance with the principles of the Charter as far as may be necessary for the maintenance of international peace and security. Article 103 provides for the superiority of Charter obligations over the obligations of members under other international agreements.

Article 2.6, together with Article 103, represents the strongest suggestion that the Charter of the United Nations may be seen as a constitutional charter, or at least as proof of the universal vocation of the organization itself. The acts of the organs of the United Nations reinforce this view by addressing "all states," not simply member States. On the other hand, the relevance of the universal vocation of the Charter is now perhaps academic, since almost every State in the world has joined the United Nations. The only relevant exceptions to universal membership are, for obviously different reasons, Switzerland and Taiwan, plus a limited number of microstates, such as the Holy See. Nowadays, the United Nations is virtually a universal organization and its Charter is the basic written rule of the international community.

Some also consider the formulation of Article 2.6 a further indication that other principles of that article are to be considered international customary law

and therefore applicable to all States regardless of their membership in the United Nations. Since the obligations to maintain international peace and security and to prohibit the use of force have achieved *jus cogens* status, the provisions of Article 2.6 themselves would not necessarily be required to impose first-order juridical obligations on third States, but would technically represent supplementary obligations, and, of course, a political objective for the organization.

Article 103, even more forcefully, assigns the Charter a quasi-constitutional relevance by giving it priority over any other treaty obligation that conflicts with the Charter. This article seriously impacts on the centuries-old rule of *pacta sunt servanda,* and affects the *res inter alios* principle as well. The fact is that the consequences of the implementation of this provision reverberate on third States that are also parties to treaties signed by member States. However, the quasi-universal coverage of the United Nations renders the practical effect of Article 103 less striking than previously.

A number of articles, such as Articles 32 and 35, deal with non-member States, whose participation in the work of the General Assembly and the Security Council has been encouraged. In line with legitimate concerns for openness, it was recognized early on that it would be detrimental to the success of the United Nations if significant segments of the world population (non-member States) were to remain excluded from its activities, and if the organization did not provide for participation by non-State actors, which are playing an increasingly important role in international relations.

The status of non-State participants in the work of the United Nations is different for entities with sovereignty and entities, such as NGOs and individuals, without sovereignty. Whereas the first category has traditionally been given a certain recognition by the General Assembly in the form of "observer status," the second has been accorded, as provided in Article 91 of the Charter, "consultative status" with ECOSOC. The question of the extent of NGO participation has not yet been solved.

Access to the Security Council has traditionally been governed by Article 32 of the Charter and Rule 39 of the Provisional Rules of Procedure of the Security Council. While Article 32 limits access in principle to States, Rule 39 allows access to the Council for persons whom it considers competent to supply it with information or otherwise assist in examining matters within its competence. In recent years the Council has been commendably flexible in encouraging contacts and consultations with non-governmental and inter-governmental organizations.

A further feature of the Charter that points in the direction of its constitutional vocation is the absence of any provision regarding the possibility of withdrawal from the organization. Although the question of withdrawal was discussed at San Francisco, where it was tacitly agreed that any State could voluntarily withdraw,[33] the only existing precedent on the subject seems to demonstrate the practical unlikelihood of such an action for any significant period of time.

In 1965, Indonesia declared its intention to withdraw from the United Nations and its delegation accordingly vacated its seat in the General Assembly. However, the following year the Indonesian government sent a note to the Secretary General informing him of its intention to recommence co-operation with the United Nations. In the result, Indonesia was readmitted to the General Assembly without being obliged to pass through the admission procedures. The President of the General Assembly declared in front of the Assembly that, in his understanding, the Indonesian action had been a withdrawal from the cooperative duties of the members but not a withdrawal from the United Nations *tout court*. He concluded that the Indonesian "bond of membership" had been maintained during the period of absence.[34] As no objection to the President's statement was made, the Indonesian delegation simply reoccupied its seat. It seems, therefore, that the General Assembly did not consider a temporary unilateral withdrawal from the organization to be the kind of serious withdrawal contemplated by the Charter.

Acts of the General Assembly

As mentioned above, most basic principles of international law are included in the provisions of the Charter. Many of these principles were of necessity generally defined, with room left for interpretation. The General Assembly, almost from the outset, assumed the task of clarifying and interpreting these principles, sometimes elaborating on principles not yet established as international customary law, in an attempt to develop the law and harmonize State practice in the matter at hand.[35] Resolutions and declarations adopted by the General Assembly are not binding on States. However, the influence of the General Assembly has a long-term effect. Repeated discussion of principles of international law may gradually influence the *opinio juris* and consequently the actions of member States.[36]

General Assembly actions have relevance in developing the formation of principles of general customary law by adding the significant weight of an interpretation shared by the vast majority of States.[37] When a resolution restates

and clarifies existing principles of the Charter or existing principles of international customary law, it means the majority of States consider the resolution's interpretation to be representative of the current *opinio juris* on the subject.[38] Furthermore, through the activity of the General Assembly, developing countries, which represent the majority of the members, have been able to introduce new concepts and create new standards of international law, thereby positively contributing to its expansion from a European-centered system to a more widely-based universalist system.[39]

In the *Nicaragua* case, the International Court of Justice accepted the value of General Assembly resolutions: "This *opinio juris* [regarding principles of international customary law] may, though with all due caution, be deduced from *inter alia* . . . the attitude of the states towards certain General Assembly resolutions. . . . The effect of consent to the text of such resolutions cannot be understood as merely that of 'reiteration and elucidation' of the treaty commitments undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[40]

General Assembly Resolutions Carrying Erga Omnes *Principles.* Among the more important declarations of the General Assembly that have dramatically developed the principles of the Charter and become rules of *jus cogens* or *erga omnes*, the following must be mentioned: (i) Declaration 217A (III) of 1948 proclaiming the Universal Declaration of Human Rights; (ii) Declaration 1514 (XV) of 1960 regarding the granting of independence to peoples under colonial domination; (iii) Resolution 2625 (XXV) of 1970, the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States; (iv) the related Resolution 3314 (XXIX) of 1974 on the Definition of Aggression; (v) Declaration 1803 (XVIII) of 1962 on Permanent Sovereignty over Natural Resources; (vi) Resolution 2749 (XXV) of 1970 on the Principle Applicable to the Seabed and Subsoil of the Oceans beyond National Jurisdiction; and (vii) Resolution 1962 (XVIII) of 1963, the Declaration of Principles Governing the Activities of States in the Exploration and Use of Outer Space.

In order to further illustrate the dramatic unfolding of the provisions of the Charter and the process by which extensive areas of contemporary international law have been developed and endowed with specificity without, however, abandoning their Charter-based foundations, I will comment briefly on the documents and changes referred to.

Resolution 217A (III) of 1948, Universal Declaration of Human Rights. The General Assembly proclaimed the Universal Declaration on Human Rights on December 10, 1948 as the "common standard of achievement for all peoples and all nations." It is now generally regarded as having achieved the status of *jus cogens*. Several other important statements, such as the Declaration on the Rights of the Child (Res. 1386 [XIV] 1959) and the Declaration on Racial Discrimination (Res. 1904 [XVIII] 1963), were issued by the Assembly at an early date.

The International Covenant of Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights were adopted by Assembly Resolution 2200 (XXI) of December 16, 1966, and both entered into force in 1976, ten years later. Together with the Universal Declaration of Human Rights, they represent the most important documents on human rights issued by the United Nations.

The two covenants have been ratified by a large number of countries, not all of them beyond suspicion of neglecting human rights. This, and the weaknesses of the control system established by the covenants, suggests that some States may have ratified the covenants to enhance their public image more than to advance human rights.[41] Nevertheless, regardless of the reasons behind the ratifications or the state of application of the covenants in individual countries, the fact remains they are recognized by the majority of States as delineating the framework of action for the international community. In fact, their binding character, especially the *jus cogens* value of the Universal Declaration of Human Rights, confirmed by its frequent invocation by Security Council resolutions on, for example, interventions under Chapter VII of the Charter, makes them the basic standards of behaviour for the international community in the area of human rights.

The past two decades have witnessed a renewed effort by the General Assembly to advance the protection of human rights. Through a series of resolutions, it has contributed significantly to the promulgation of international treaties aimed at the suppression of apartheid, all forms of racial and sexual discrimination, the elimination of torture and genocide, and related areas. These major developments in the strengthening of international law since 1945 are rooted in and inextricably linked to both the Atlantic Charter of August 14, 1941, and the Charter of the United Nations, which, with its extensions, has established powerful new freedoms for citizens against their national sovereign States, thereby enhancing their individual autonomy.

Resolution 1514 (XV) of 1960, Declaration on Granting Independence to Colonial Countries and Peoples. Resolution 1514 (XV), passed on December 14, 1960, marked the most determined action of the General Assembly on the subject of self-determination. According to Cassese, the Declaration, "in conjunction with the Charter, contributed to the gradual transformation of the 'principle' of self-determination into a legal right for non-self-governing peoples."[42] Several other declarations of the General Assembly, as well as the two covenants on human rights of 1966, consider the right of self-determination to be a basic right of peoples. The International Court of Justice expressed the same opinion in the *Namibia* case when it said that "the subsequent developments of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them."[43] Today this principle is regarded as *jus cogens*.

The activity of the United Nations in the field of self-determination and decolonization has been paramount. Almost all peoples under colonial domination before the establishment of the United Nations have achieved independence. The only major exception is Western Sahara, occupied by Morocco since 1975.[44]

Resolution 2625 (XXV) of 1970, Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States, and Declaration 3201 (S-VI) 1974 on the Definition of Aggression. At the famous Bandung Conference of 1955, the non-aligned countries adopted the concept of peaceful coexistence and listed ten principles derived from it. Following fifteen years of discussion, initiated mainly by the Soviet Union and non-aligned countries, and the adoption of several resolutions regarding peaceful coexistence and friendly relations,[45] on October 24, 1970, the General Assembly finally adopted, by consensus, a Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This Declaration lists seven principles, most of which are now considered *jus cogens*. They are:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other matter inconsistent with the purposes of the United Nations;

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

(d) The duty of States to cooperate with one another in accordance with the Charter;

(e) The principle of equal rights and self-determination of peoples;

(f) The principle of sovereign equality of States; and

(g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community and promote the realization of the purposes of the United Nations.

(a) The first principle is already included in Article 2.4 of the Charter. The main problem posed by the formulation of the principle was the definition of the use of force. The intention of the non-aligned States was to include economic and political coercion in the prohibition of the use of force. This view was opposed by western States and no definition of aggression was included in the Declaration. After much effort, the gap was filled by Resolution 3314 (XXIX) of 1974 on the Definition of Aggression, Article 1 of which defines aggression as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." The Resolution then defines an aggressor as the first State to use armed force. Article 3 lists acts qualifying as aggression. The list is not considered exhaustive, and the Security Council may decide whether other acts constitute an act of aggression.

(b) The principle of peaceful settlement of international disputes is drawn from Article 2.3 of the Charter. The Declaration on Friendly Relations might possibly clarify the principle, but seemingly without adding anything new. As affirmed by Daoudi, it "contains no new statement on this matter [the role and power of the organs of the United Nations in the settlement of international disputes] but it synthesizes the present state of development of the principle in international law." Further refinements of the subject were achieved in the Manila Declaration on Peaceful Settlement of Disputes.[46]

(c) Both the Declaration on Friendly Relations and the Resolution on the

Definition of Aggression condemn all forms of intervention, not just armed aggression, perpetrated directly or indirectly in the internal or external affairs of a State. The use of force in reprisal is also considered as illegal when not conducted by the Security Council or for self-defense.

To the principles outlined in the Charter of the United Nations, the Declaration adds two principles already considered in Resolution 2131 of 1965: the duty to refrain from the use of force to deprive peoples of their national identity, which is seen as a violation of their inalienable rights as well as a violation of the principle of non-intervention; and the duty to refrain from interference of any sort in the inalienable right of States to choose their own political, economic, social, and cultural systems without interference of any form.

(d) The duty to cooperate is again drawn from the Charter. Interestingly, economic cooperation is envisaged as a duty under both the Charter and the Declaration, while in subsequent resolutions, such as Resolution 3281 (XXIX) of 1974, it is seen as a right to economic cooperation.[47]

(e) Self-determination was originally intended by the drafters of the Charter to refer to nationalities, not to peoples under colonial domination.[48] With the passage of time, the beneficiaries of the right to self-determination became peoples subjected to colonial, racist, or other forms of alien domination. Those people, when struggling against alien domination, enjoy the *jus ad bellum* to fight against a subject of international law, and are themselves granted the status of a quasi-subject of international law. They are entitled to seek and receive support in accordance with the purposes and principles of the United Nations Charter.

(f) The principle of sovereign equality restates in a more extensive manner the principle laid down in Article 2.1 of the Charter. It provides that all States are juridically and legally equal regardless of economic, social or political capacity.

(g) The duty of good faith in fulfilling Charter obligations is restated so as to emphasize the more effective application of those obligations within the international community.

As already mentioned, almost all these principles are recognized as part of international law. The General Assembly, as the principal legal forum of the international community, provided the framework within which the principles governing friendly relations among States were codified.[49] Important for present purposes is the inextricable linkage of the principles of peaceful coexistence to the Charter, into whose provisions they may or may not come to be imperceptibly merged. What I wish to underline, however, is that whether

independently or as elements of the Charter, those principles stand as prominent parts of the written constitution of the world.

In that the idea of peaceful coexistence is deeply rooted in the political and legal culture of the Peoples' Republic of China, a major actor on the international stage, one should not be too hasty in thinking that the idea of peaceful coexistence has lost independent validity and been folded into the Charter since the end of the Cold War. Given China's influence on the development of the international legal system, it behooves us to briefly consider the concept of peaceful coexistence in the context of world constitutionalism.

The first point to recall is that the basic constitutional document, the "Common Programme," made public at the time of the founding of the People's Republic of China, mentioned explicitly the principles of equality, mutual benefit, and mutual respect for each other's territorial sovereignty. Then, in 1954, the famous Pancha Shila Treaty between China and India referred to Five Principles essential for peaceful coexistence, including mutual non-aggression, mutual non-interference in each other's internal affairs, and equality and mutual benefits. The following year, at the Bandung Conference of Asian and African Countries, the participants formulated ten principles based on the essence of the Five Principles of Peaceful Coexistence which for China had come to express the basis for mutual friendly relations and peaceful coexistence.

Although the Five Principles of Peaceful Coexistence may not be totally novel if seen separately, in China's view their proposition as a whole set of rules guiding international relations has been unprecedented for the development of international law since the end of the Second World War. For China, they not only summarize concisely the purposes and principles of the Charter of the United Nations but also further develop them; they proclaim the principle of "equality and mutual benefit" as the code of conduct in relationships between States. The Charter speaks of "the promotion of the economic and social advancement of all peoples" without, of course, indicating what principles and methods are to be used to realize that objective. "Equality and mutual benefit" envisage economic and technological cooperation beneficial for both parties carried out among *all* States on the basis of sovereign equality, irrespective of size, power, or national income.

Since the Five Principles represent a basic national policy for handling China's relations with the outside world and a cornerstone of China's foreign policy, they are not regarded as a temporary expedient but, rather, as long-term policy reinforcing and slightly extending the provisions of the Charter of the United Nations. For present purposes, they reaffirm China's recognition of,

and commitment to, one single contemporary international law system applicable to all countries of the world based on the purposes and principles of the Charter as well as the Five Principles themselves. In 1984, Deng Xiaoping declared the Five Principles "the best means for handling relations between nations. Other forms, such as the 'big family,' 'group politics' and 'spheres of influence' would bring about contradictions and increase international tension."

Declaration 1803 (XVIII) of 1962 on Permanent Sovereignty over Natural Resources. Resolutions and declarations are also used by the General Assembly to state principles that are not necessarily included in the Charter, although they may be derived from it, and are not yet established *opinio juris*. In this way, the General Assembly may successfully initiate a process of creating new norms. That was the case with the turbulent debates of the 1960s and 70s on permanent sovereignty over natural resources, which concerned the still-unresolved question of distributive justice in the world community.

Declaration 2749 (XXV) of 1970 on the Principle Applicable to the Seabed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction. This document represents a perfect example of the double effect of a resolution of the General Assembly in the law-creating process. Declaration 2749 declared the ocean seabed the common heritage of mankind and Resolution 2750 convened an international conference to codify a new regime for the ocean seabed. The area of concern for the conference was soon extended to cover virtually all marine related norms. Almost nine years after the conference began, the United Nations Convention on the Law of the Sea was adopted on December 10, 1982. By then, several of the norms laid down in the convention, such as the creation of the exclusive economic zone and the relative economic rights of coastal States, had already become principles of international customary law.

The system created by the Law of the Sea Convention and subsequent instruments is notoriously complex; it includes rules of procedure of a constitutional nature, such as the creation of a High Authority and a tribunal for the settlement of disputes. Further, one of the subsequent instruments, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 28 July 1994, expressly creates precise obligations *erga omnes*, binding also on non-members of the Convention.[50] I will return briefly to this vast topic under the heading "other constitutional orders," below.

Resolution 1962 (XVIII) of 1963, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. An effect similar to the one obtained by Resolution 2549 regarding the law of the sea was realized by Resolution 1962 (XVIII) for the regime of outer space. Indeed, the regime of outer space acquired shape for the most part through the activity of the General Assembly. The 1966 Outer Space Treaty and nearly all subsequent international texts on outer space are based on General Assembly resolutions generated by the Committee on Outer Space.[51] Whatever the particularism or partial autonomy of this field of law, as evidenced by the development of its own set of legislative instruments, it remains closely linked to the Charter of the United Nations which, we need to bear in mind, was made specifically applicable to space and outer space by the General Assembly. On this extended view, the constitutional reach of the Charter extends beyond planet earth to embrace the cosmos itself.

Recent Activities of the Security Council

Almost all recent interventions by the United Nations, and the Security Council in particular, have been justified by humanitarian concerns. Some of these interventions were not only against States but also against individual persons. The main critique of the activity of the Security Council in this particular field is that the acts in question seem to point in the direction of the establishment of new norms of international law despite the fact that nowhere in the Charter is the Council (or any other organ of the United Nations) endowed with law-making capacity. As Zemanek affirms, "The word 'measures' used in Articles 39, 41, and 42 of the Charter does not suggest that the Security Council may generate rules of general international law by decision."[52] Yet this is exactly what the Council has done on several occasions since 1989.[53] The first legally doubtful act of the Council after the end of the Cold War was the delegation of the use of force in the intervention against Iraq.[54] More significant from a law-making point of view was the guarantee of the inviolability of the Kuwait-Iraq boundary[55] and the establishment of a Compensation Commission to solve the Kuwait claims against Iraq. An even more evident deviation from the usual prerogatives of the Security Council, and an action that can hardly find a basis in international law, was the request to Libya to surrender two of its nationals to other States' tribunals and the subsequent economic sanctions imposed under Resolutions 731 (1992) and 748 (1992).

The Council again used the instrument of resolution to establish an International Tribunal for the Prosecution of Persons Responsible for Serious

Violation of International Humanitarian Law Committed in the Territory of the Former Yugoslavia in Resolutions 808 (1993) and 827 (1993), and an International Tribunal for Rwanda in Resolution 955 (1994). The possibility of grounding these actions in Article 29 of the Charter does not seem to be available since it is not possible to consider the tribunals in question as mere subsidiary organs necessary for the performance of the Council's functions. The Council has neither a judicial or law-making function nor competence against individuals. However, no member of the United Nations has so far objected to this extension of the Council's activities. Only Brazil and China expressed concerns for the legality of the Council's action in establishing the tribunals but neither voted against the resolutions. China voted in favour of the establishment of the Tribunal for the Former Yugoslavia and abstained in the case of Rwanda.[56]

The consolidation of this United Nations attitude regarding intervention in cases of human rights breaches is growing, along with another more problematic trend, the delegation of the use of force against a State to an individual State or group of States in the execution of Security Council decisions under Article 42. Since the end of the Cold War, delegations of power to member States have multiplied, and have been used to foster the multi-national intervention in the civil war in Somalia, the use of NATO forces in Bosnia-Herzegovina, and the U.S.-led intervention in Iraq. The legal validity of these actions has been questioned by scholars.[57] For some, the newly established trend seems to signify a shift in the role of the Council from the executive and operational role provided for it in Article 42 to a more directive role.[58]

The lack of explicit dissent, according to the maxim *qui tacet consentire videtur*, seems to embrace the possibility of the formation of a new norm of international customary law, springing from the failure of the Chapter VII norms. However, despite the lack of formal dissent in the actual proceedings, one needs to note increasing concern on the part of less powerful States regarding the expanding sphere of action of the Security Council. As Bedjaoui notes, "The small and medium nations are again gripped by the fear which some of them had already expressed at San Francisco in 1945 when they saw danger in the sweeping powers that the Conference was ready to confer on the Security Council in the Charter then on the brink of adoption."[59]

Bedjaoui goes on to argue that a major weakness in the United Nations system lies in the fact that no instrument to control the legality of the actions of its organs is available to member States. Zemanek underlines the same point as regards recent activities of the Security Council: "Since the Council started working properly after 1989, its permanent members, once they come to an

understanding among themselves, feel not really restrained in their decision-making by provisions of the Charter or by rules of international law if it suits their combined interests, and they are apparently able to persuade other Council members to fall into line."[60]

Other Constitutional Orders

I have already referred to regional arrangements or agencies and the inviting possibilities for decentralization, including the delegation of inter-governmental powers, that are inherent in the overall concept of order envisaged in the Charter of the United Nations. To complete the delineation of the legal landscape it is now necessary to say something about autonomous subsidiary legal orders. In this respect, I am unable at the present time to take even a cursory glance at the World Trade Organization, which is creating an economic constitution for the world. However, I will briefly refer to the United Nations Convention on the Law of the Sea, which represents a Constitution for the Ocean, and the European Union, which constitutes a novel juridical order of international legal character. Both must be taken into account in any portrayal of the nature and scope of the Charter.

Ocean Regimes. The Law of the Sea Convention, a milestone in the history of international relations, clarified or replaced much of the old law of the sea and introduced new concepts in international law.[61]

The Convention was adopted at the Third United Nations Conference on the Law of the Sea (1973–1982)in Montego Bay, Jamaica, on December 10, 1982, after nine years of negotiations. There were 130 votes for and 4 against the Convention, with 17 abstentions. The final act of the Conference was signed by some 150 States and entities, including the European Union. The convention entered into force on November 16, 1994.

Consisting of 17 Parts in 320 Articles, plus 9 Technical Annexes, the Convention is organized into three major divisions. The first, comprising Parts I–X, is territorial in character. It creates three new types of ocean space: the exclusive economic zone, the archipelagic State with its archipelagic water, and the international seabed area. "The Area" lies beyond the limits of national jurisdiction and is governed by "the Authority" on the basis of the principles of the Common Heritage of Mankind.

Part XI defines this regime with its combination of functional and territorial characteristics. It is "territorial" in that the Area is a territoriality to be delineated by boundaries, by the year 2004, ten years after the entry into force of the

Convention. It is "functional" insofar as the Authority exercises limited functions through exclusive rights, controlling and managing the exploration and exploitation of the natural resources of the Area and related activities, that coexist with shared jurisdictions (scientific research) and with the rights of States in the Area (prospecting).

The third major division of the Convention comprises Parts XII through XV. It deals with the marine environment as a whole, with marine scientific research and technology development transfer, and with the peaceful settlement of disputes.

The Convention put an end to the old controversy regarding the width of the territorial sea—the limit of 12 nautical miles was accepted—and introduced a number of new features, such as the exclusive economic zone, the archipelagic zone, and the regime of transit through straits used for international navigation. It provided for the establishment of an International Tribunal for the Law of the Sea and defined the Area of seabed and subsoil beyond national jurisdiction.

The Area, considered under Part XI (Articles 136–191) and Annexes IV–IX of the Convention, is defined as the common heritage of mankind. Article 311.6 further underlines the importance of the Area by declaring that no State can be party to an agreement in derogation of Article 136. This article is not subject to amendment. Article 160 sets up an Assembly, comprising representatives of all members, for the management of the Area. An executive organ, a Council comprising 36 members, 18 coming from special interest States (the coastal States) and 18 chosen according to a geographic criteria, is provided for in Article 162. The Authority has a Secretariat for administrative matters and an Enterprise, its business arm,[62] which deals with States in the granting of exploitation concessions. Jurisdictional authority for disputes among States or between States and the Authority regarding the Area rests with the 11-member Seabed Dispute Chamber of the 21-judge International Tribunal for the Law of the Sea.

As far as dispute settlement is concerned, States have been given the option to select their forum by written declaration. They may choose between the International Tribunal, the International Court of Justice, arbitration or special interpretation, failing which, or in the case of conflicting declarations, arbitration under Annex VII. Between 1984 and 1994 some 15 disputes on the law of the sea were referred to the International Court of Justice, arbitration, or another forum, such as a conciliation commission. As is well known, but bears repeating, the system for the peaceful settlement of disputes designed in Part XV

and the Annexes is the most comprehensive and binding system of its kind ever accepted by the international community.

On August 4, 1995, after three years of negotiation, the representatives of 96 countries at the United Nations conference on straddling fish stocks and highly migratory fish stocks concluded an Agreement for implementing the provisions of the Law of the Sea Convention of 1982 relating to their conservation and management. The reason for this further development of the Convention was that the division of duties between coastal States and flag States in the management of fish stocks moving between exclusive economic zones and the high seas was unclear in that it was subject to conflicting interpretations.

The 1995 Agreement stresses the duty of States to manage and protect fish stocks straddling between the high seas and areas under national jurisdiction in their entirety, not simply according to existing maritime boundaries.[63] The agreement places major emphasis on the utilization of regional organizations to achieve cooperation between coastal States and distant water fishing nations. Article 8.4 states that only States that are party to such organizations and those that agree to submit to the decisions of the organization should be allowed to fish in the area covered by the organization. This represents a significant exception to the regime of high seas fisheries, since it implies that even outside national jurisdictions, distant water-fishing nations are not permitted to operate without the consent of other States.

A further and even more significant breach of classical concepts on high seas fisheries regimes is found in Article 21 of the Agreement. Article 21 strengthens the role of regional organizations by giving States that are members of one of such organizations the right to enforce its rules even on those States not party to the organization but party to the 1995 Agreement.[64] In this case, a distant-water-fishing-nation loses its right to fish in the high seas "because of its commitment at the global level."[65]

In summary, we can see that developments in the law of the sea over the last seventy years have followed the qualitative procedural change evolved in the twentieth century for its codification and progressive development through international consultations, negotiations, and agreements rather than through traditional unilateral means based on discovery, effective occupation, and national claims supported by political strength. Virtually all those developments, encouragingly positive and comprehensive, have taken place under the auspices of the United Nations and in light of the principles of the Charter and the Law of the Sea Convention of 1982. Just as the Charter of the United Nations stands as the mother constitution to the Law of the Sea Convention, the latter now stands as a constitution in its own right to the structure and process of

continuing refinements such as those in the 1995 Agreement on straddling and highly migratory stocks. The 1982 Convention is basically a framework convention: it is to be filled in by literally hundreds of geographically or functionally sectoral agreements already in existence or yet to be created. Further progressive development, adjustment, and crystallisation of all aspects of the law of the sea and sustainable ocean management will continue under the benign guidance of the overarching constitutional provisions referred to.[66]

The European Union. The European Union, the first supranational organization in Europe, presents unique features.[67] Labeled the European Community until 1993, it differs from other international organizations because of the magnitude of its objectives and the effectiveness of its organs in the pursuit of those objectives. Today, the organization consists of three pillars. The first, the "European Community," incorporates the three "communities" established by the founding treaties (the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community) and sets out the institutional requirements for the European Economic and Monetary Union. The other two, the "Common Foreign and Security Policy" and "Justice and Home Affairs," operate by intergovernmental cooperation rather than through community institutions.

The Community, which aims at the gradual integration of the economies of the members, is competent to regulate a wide range of matters relating to economic and social development.[68] The objective of the Founder States was to "promote throughout the Community a harmonious and balanced development of economic activities . . . sustainable and non-inflationary growth respecting the environment . . . a high level of employment and of social protection, [and] the raising of standards of living and quality of life."[69] To realize these objectives, the six Founder States agreed to delegate sovereign powers to the organs of the Community. In doing so, they granted the Community power to legislate, implement and, importantly, enforce, the regulations promulgated according to its competence. In this way, the effectiveness of the European Community in achieving the objectives of the treaty has been more successful than in the case of other international organizations.

After the establishment of the Common Market in 1992, two new treaties extended the range of areas to be covered by the Communities. The Treaty on the European Union, which was signed in Maastricht in 1992 and came into effect the following year, added to the list of objectives the strengthening of the economic and social cohesion and the establishment of an economic and monetary union.[70] The 1997 Treaty of Amsterdam underlined the need for a

consistent external policy and the development of a common foreign and security policy, as well as the further development of the monetary union and the social policy.

The main bodies of the Union involved in the decision-making process are listed in Article 4.1 of the Treaty of Rome: the European Parliament, the Council, the Commission, and the European Court of Justice.

The European Parliament is the only EU institution whose members are directly elected by national constituencies instead of being nominated by national governments; it thus represents European citizens.[71] Its role in the Community decision-making system has developed from mainly advisory and consultative to a more active and effective one. According to Article 149, as amended by the Single European Act of 1987, Parliament exercises pressure on the work of the Council by refusing to accept or by amending provisions set in the Council "Common Position" by absolute majority. Since Maastricht, it has the right of co-decision in various areas of the Union's sphere of action, such as the common market and the protection of the environment.

The Council of Ministers is the EU legislative body. It is the only institution that can issue measures binding on all member States. As Parliament represents the peoples of Europe, the Council represents the governments; it is formed by the ministers of the members in charge of the subject under discussion. As a rule, the Council votes with a qualified majority,[72] except in the case of the vote on a second reading of Parliament, or if the subject is considered of vital importance for one of the member States, in which cases it must decide by unanimity. Only the Council can adopt acts that are immediately enforceable in member countries.

The European Commission is the operative body of the Communities. Comprising 20 commissioners nominated by the member States, it operates independently from them.[73] The Commission is the body responsible for the management of the Community's policies and for the monitoring and enforcement of the implementation of those policies by member States and by their citizens. The main tasks of the Commission, as listed in Article 155 of the Treaty of Rome, are: to ensure that the provisions of the treaties and of European legislation are respected, by States and by individuals or organizations; to initiate the Community's actions by preparing proposals for Regulations to be adopted by the Council; to formulate recommendations or deliver opinions on subjects considered in the Treaty whenever asked or where it feels necessary to do so; to operate the Community's policies and manage the Community's structural funds; and to represent the European Union in its relations with third States and international organizations.

The European Court of Justice, although not directly involved in the decision-making process, is important in the development of Union policy. The Treaty of Rome, in Article 164, mandates the Court to "ensure that in the interpretation and application of [the] Treaty the law is observed." In discharging this responsibility, the Court has been functional in developing the law regarding, for example, the division of powers between the Community and the States in several areas covered by the treaty, both on the external and internal level. The Court has jurisdiction over, and can order punitive measures in relation to, the acts of member States and the Commission with regard to the implementation of Community law. These rulings cannot be challenged, which is in marked contrast to the judicial powers of other international organizations, such as the United Nations, which do not have jurisdiction over the actions of international organs and whose decisions are only compulsory for those States expressly accepting the jurisdiction in question.

The European Council, formally recognized in the 1970s and first acknowledged in Community law in the Single European Act of 1986, comprises the Heads of States and Government of the European Union. It provides the Union with general political guidelines. The Presidency of the Council, assumed by each member for a period of six months, is in the main responsible for coordinating the work of the Council and managing the Common Foreign and Security Policy.[74]

In the application of their competencies, community institutions have been provided with a number of legislative and jurisdictional instruments: regulations, issued only by the Council, which are binding and directly enforceable in the member States; directives, binding but not directly applicable in the member State, which must first be included in the national legislation through an apposite national law before becoming enforceable;[75] and recommendations and resolutions, which are not binding.

Areas in which the European Community can exercise its competencies are listed in the Treaty of Rome, as amended by subsequent treaties. However, this list is not exhaustive. According to Article 235, the Council can legislate in areas not covered by the letter of the treaty if such action should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and Article 100 empowers it to "issue directives for the approximation of such provisions laid down . . . in Member States as directly affect the establishment or functioning of the common market." The principle laid down in these articles is clearly stated in Article 3b of the Treaty of Maastricht, which provides that, "in areas which do not fall within its exclusive competence, the Community shall take actions, in accordance with the

principle of subsidiarity, only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

The 1992 Treaty of Maastricht is the first legislative instrument to refer explicitly to the much talked about "principle of subsidiarity." Until then, the Community did legislate in areas not explicitly covered by the treaty when it deemed it functional to the achievement of the objectives of the Community.[76] The Court of Justice, the supreme interpreter of the rule of law in the Community,[77] ruled on several occasions that the Community had power to legislate stemming from the need to accomplish the objectives of the Treaty.[78] According to Article 3b, member States retain sovereign rights in every area not explicitly covered by the treaties unless it is proved that a certain action can better be carried on at the European level.[79] However, the boundary between the competencies of the States and the Community is not well specified in the treaty and, since 1992, few road blocks have been placed in the way of the Community in areas not covered by the treaty, but "functional" to its objectives. This demonstrates once again that member States are willing to accept a larger role for the Community if that proves to be of advantage for their national interests as well.[80] It is one of the most relevant features of the European Community that the competencies of the organization can be modified by the mere practice of its organ, and legitimized by the ruling of its court, without having to amend the founding treaties.

The treaty of Maastricht also formalizes the doctrine of the *acquis communautaire,* by which the corpus of Community law is considered as established at the Community and national level. The European Communities Treaties and the European Union Treaty have been most appropriately called "a complementary constitution for each of the Member states, which, like their national constitution, structure their legal order."[81] Externally, the major consequence of the existence of an *acquis communautaire* is that any State aspiring to accede to the benefits of the European Union must also agree to yield to the existing rules and change its national legislation in accordance with them. This increases the capacity of the Union to influence the national policies of third States which, in their wish to enter the Community, must accept the political and economic conditions it poses and demonstrate that they have undergone significant changes in several areas in order to qualify for admission.

The European Union is recognized as the representative of member States in international relations in several areas under its internal competence. Its achievements in the economic field have made it a point of reference for

international agreements, such as NAFTA, and an irresistible pole of attraction for other States of Europe and the neighboring regions. Its development as an economic unity is already having effects in the international arena.

The member States and the Union have sought through the years to take a single common position in areas covered by the treaties, presenting the Community, represented by the Commission, as a credible actor in important international economic venues such as GATT and the WTO.[82] The Union's role in other international institutions is often less marked; although it enjoys full membership in the FAO,[83] the Community occupies observer status in the majority of the other UN bodies. Despite the reforms indicated in the Amsterdam Treaty, the Union still lacks a strong common foreign policy; indeed, member States still retain most of their sovereign powers in this area. However, the trend seems to indicate stronger integration in various fields, such as the Single European Currency and the harmonization of national legislation. The impact of the Union both internally and in the international arena is unprecedented, and its supranational character effectively and undoubtedly established.[84]

Concluding Remarks

In light of the foregoing—the structure and architecture of the organization, the fundamental principles of the Charter and their development by the great foundation texts of the last fifty years, the interpretations of the International Court of Justice, the practice of States and international organizations, the opinions of qualified commentators, the attitudes of the publics of the world to the United Nations as part of a flow of policy-making activity, and, not to be underestimated, *the longue durée* of the historical processes at work since the middle of the 19th century—we can now return to the question posed at the outset: is the Charter of the United Nations a world constitution, *de facto* if not *de iure*, or perhaps *in fieri*?

Not surprisingly, the interpretative community of the international legal profession answers this question in different ways.

While most scholars acknowledge the prominence of the Charter above other conventional instruments and recognize that it contains several norms of *jus cogens*, many do not believe that it has more significance than that of a treaty, even though it is more far-reaching than any other treaty. While the United Nations is generally considered "the most important international organization for the maintenance of peace and security which has been established in modern history,"[85] many scholars remain reluctant to recognize the Charter as other than a historic instrument founding a permanent system of

general security. Rao emphasizes a widely held view when he says that, although the tasks of the organizations are far-reaching and of a global nature, "the United Nations has not been conceived as a world government, nor could transform itself into one."[86] The lack of effective capacity of United Nations organs to impose their decisions on the members and the absence of any mechanism to juridically review their acts are almost universally seen as serious problems for the constitutional perspective.[87]

The distinguished Italian jurist Arangio-Ruiz, now a judge of the United States-Iran Claims Tribunal in The Hague, answers the question posed rather negatively. In a recent article, he does not exclude a priori the possibility that sometime in the future the United Nations may develop into something more on the lines of a confederation or a federation. For the time being, however, he sees the United Nations as a mere union of States, subordinate rather than superior to its members.[88] On the same line is Conforti, who sees the Charter as a treaty, not binding on third States, and the United Nations as a voluntary community.[89] James Crawford, Whelwell Professor at Cambridge, although recognizing the existence of several constitutional traits in the Charter which have the potential to make it a constitutive act, also notices the constitutional inadequacies of the Charter itself and suggests that it can be considered a starting point towards the development of a constitution for the international community.[90]

Somewhat in the middle is Picone, who sees the United Nations as having a double nature in the international system. On the one hand, it is a traditional international organization, with forms and modalities defined by the Charter. On the other, it acts, in specific cases, as an organ of the international community, able to guarantee to the States operating *uti universi* in the defense of rules *erga omnes*, a further layer of legitimization.[91]

Other influential commentators have little doubt that the Charter is a world constitution. For Dupuy, the vocation of the Charter is to serve as "*the* text of reference"[92] when international law is analyzed, the Charter being "at the same time the basic covenant of the international community and the world constitution. . . . [it is the] world constitution, already realized and still to come."[93] Others perceive the Charter as a global constitution, *in fieri*. In a similar vein, Mosler quite rightly envisions the "trend of history [as going] towards *relative* sovereignty."[94] An even stronger stand is taken by Tomuschat, who affirms that "the Charter is nothing else than the constitution of the international community . . . not to be compared to any other international instrument."[95]

However perceived, doctrine agrees that the Charter is a treaty establishing the most comprehensive framework of cooperation in the history of international relations. The importance of the organization as a permanent forum for

multilateral diplomacy, and the moral as well as legal strength of the Charter as the only comprehensive covenant common to the universality of States, is undoubted. In my opinion, the Charter is not only the most important document of the twentieth century, it is indeed one of the most important texts in the history of humankind; it stands as a steady light at the apex of the international legal system giving guidance and inspiration to the life of "the great community, the universal commonwealth of the world."[96]

What then are the implications of the constitutional perspective of the Charter of the United Nations and its extensions? The truth is that we have only begun to examine them. While this vast terrain cannot be explored in this paper, it needs to be emphasized, in conclusion, that even a brief overview of the provisions of the Charter and its extensions indicates that the constitutionalization of the principles of the Charter is in line with the inclusionary ideals embodied in democratic constitutions and that legal supranationalism can be understood as a complementary common feature of national constitutional traditions. Supranational constitutionalism is therefore to be understood as a fundamentally democratic concept. It is a partial alternative, an addition, to the model of the constitutional nation-State; which respects the State's constitutional legitimacy, but at the same time clarifies and sanctions the commitments arising from its interdependence.[97]

In this essay I have tried to demonstrate that the constitutionalization of the principles of the Charter of the United Nations is well under way and that the process has important implications for the reconceptualization of our subject. I hope colleagues will react to the challenge presented by the emergence of international constitutionalism in a non-statal world, and contribute to the exploration of this topic in the future.[98]

Notes

1. See especially HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY (The Hague: Sijthoff & Noordhoff, 1980). On the Europeanization of domestic legal systems in Europe, see Christain Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for Constitutional Perspective*, 18 LEGAL STUDIES 146 (1998).

2. Benedetto Conforti rightly observes: "One might say that the Charter was born in a certain sense as a constitution granted *(octroyée)* [by the Great Powers]. The basic outline sketched at Dumbarton Oaks was presented as unchangeable. Although the Conference could decide by majority (two-thirds) on the wording of the individual articles, the participants knew that any substantial change in the Dumbarton Oaks proposals would have resulted in the rejection by the Great Powers, or by some of them, of the new Organization." BENEDETTO

CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS (The Hague: Kluwer Law International, 1996), pp. 4–5.

3. KARL ZEMANEK, THE LEGAL FOUNDATIONS OF THE INTERNATIONAL SYSTEM (The Hague: Martinus Nijhoff, 1997), p. 47. See also MARIO GIULIANO, TULLIO SCOVAZZI, TULLIO TREVES, DIRITTO INTERNAZIONALE (Milano: Giuffrè, 1991), p. 238; R. St. J. Macdonald, *The Charter of the United Nations and the Development of Fundamental Principles of International Law*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS 80TH BIRTHDAY (London: Stevens, 1988), p. 196.

4. Quizhi He, *The Crucial Role of the United Nations in Maintaining International Peace and Security*, in Christian Tomuschat (ed.), THE UNITED NATIONS AT AGE FIFTY, A LEGAL PERSPECTIVE (The Hague: Kluwer Law International, 1995), p. 80.

5. This origin, clearly recalled by the rapporteur of the First Committee of the First Commission on June 13, 1945, is also reported in JEAN-PIERRE COT ET ALAIN PELLET, LA CHARTE DES NATIONS UNIES, COMMENTAIRE ARTICLE PAR ARTICLE (Paris: Economica Bruylant, 1985), p. 18. See also, Raymond Ranjeva, *Peoples and National Liberation Movements*, in Mohammed Bedjaoui (ed.), INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, (Dordrecht: Martinus Nijhoff, 1991), pp. 101–112.

6. Jean-Pierre Cot and Alain Pellet, *Préambule*, in COT ET PELLET, note 5, p. 15.

7. See in particular RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945 (Washington D.C.: The Brookings Institution, 1958), p. 910 (explaining the reasons for the ambiguities in the Preamble); HANS KELSEN, THE LAW OF THE UNITED NATIONS, (London: Stevens, 1950), pp. 3–11; Christof Heyns, *The Preamble of the United Nations Charter: The Contribution of Jan Smuts*, 7 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 329 (1995); BENGT BROMS, THE UNITED NATIONS (Helsinki: Suomalainen Tiedeakamic, 1990), pp. 49–51; Bruno Simma (ed.), THE CHARTER OF THE UNITED NATIONS (Oxford: Oxford University Press, 1994), p. 45. Hans Georg Gadamer reminds us that "Every age has to understand a transmitted text in its own way." The text lacks meaning *until* it is interpreted; and it makes a difference who the interpreter is. HANS GEORG GADAMER, TRUTH AND METHOD (G. Barden and J. Cumming trans., 2nd ed., 1975), p. 263.

8. Richard Falk, *Explaining the UN's Unhappy Fiftieth Anniversary: Towards Reclaiming the Next Half-Century*, in Ron Wheeler and Howard McConnell (eds.), SWORDS AND PLOWSHARES: THE UNITED NATIONS IN TRANSITION (Toronto: Canadian Scholar's Press, 1997), p. 22.

9. *Ibid.*, p. 22.

10. Giuseppe Cataldi, *Il Consiglio di Sicurezza nel nuovo scenario internazionale: prospettive di riforma nella struttura e nelle procedure*, 48 COMUNITÀ INTERNAZIONALE 683–700 (1993).

11. Luigi Ferrari Bravo, *Prospettive del Diritto Internazionale alla fine del secolo XX*, 74 RIVISTA DI DIRITTO INTERNAZIONALE 528 (1991).

12. CONFORTI, note 2, chapter 3, sec. II.

13. See, on the behaviour of China during recent developments in the Security Council, Ron Wheeler, *China, the UN and National Sovereignty. Drawing the Line on Supranationalism?* in Ron Wheeler and Howard McConnell (eds.), note 8, pp. 33–49.

14. Girolamo Strozzi, *I "principi" dell'ordinamento internazionale*, in 47 COMUNITÀ INTERNAZIONALE, p. 184ff (1992); Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL 727 (useful discussion emphasizing that Resolution 688 neither mentioned Chapter VII nor specifically authorized establishment of no-fly zones). These zones "more closely

resemble humanitarian intervention mounted by multinational forces in response to a threat to international stability" (p. 736).

15. See on this subject, among others, Johan Kaufmann, *Developments in Decision-Making in the United Nations*, in Richard A. Falk, Samuel L. Kim, Saul H. Mendlovitz (eds.), THE UNITED NATIONS AND A JUST WORLD ORDER (Boulder: Westview Press, 1991), p. 130ff.

16. Rene Degni-Sagui, *Article 24, paragraphes 1 et 2*, in COT ET PELLET, note 5, p. 451ff.

17. ICJ REPORTS, 1971, p. 54ff.

18. For a discussion of the case itself see, among others, Benedetto Conforti, note 2, p. 4, p. 253ff.; Degni-Segui, note 16, p. 452ff.

19. MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL. TESTING THE LEGALITY OF ITS ACTS (Dordrecht: Martinus Nijhoff, 1994), p. 5.

20. UN Doc. S/PV.3063, at pp. 54–55.

21. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 517ff. (1995).

22. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (Oxford: Clarendon Press, 1994), chapters 14 and 15.

23. Benedetto Conforti, *In tema di azioni del Consiglio di Sicurezza a tutela della pace e della sicurezza*, 48 COMUNITÀ INTERNAZIONALE 701 (1993); Falk, note 8, p. 23.

24. Falk, note 8, p. 23.

25. Pemmaraju Sreenivasa Rao, *The United Nations and International Peace and Security—An Indian Perspective*, in Tomuschat (ed.), note 4, p. 161.

26. In that the aggression was provoked, it trespassed recognized international borders and was carried on by the army of a member State invading another member State, in a region involving vital interests of the main powers. Gareth Evans, *The New World Order and the United Nations*, in Mara R. Bustelo and Philip Alston (eds.) WHOSE NEW WORLD ORDER? WHAT ROLE FOR THE UNITED NATIONS? Centre for International Public Law, (Sidney: Federation Press, 1991), p. 5ff.

27. Conforti, note 23, p. 704.

28. Kirgis, note 21, p. 520. Kirgis considers as legislative actions those being unilateral in form, creating or modifying part of a legal norm of general nature. Actions such as economic sanctions are unilateral because they are adopted by the Security Council instead of the generality of States, are binding, and not directed to a particular State but general in nature.

29. JOHN FOSTER DULLES, WAR OR PEACE (New York: MacMillan, 1950), p. 194.

30. Simma, note 7, p. 679; Joachim Wolf, *Regional Arrangements and the UN Charter*, in Rudolf Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Installment 6 (1983), p. 289; Sergio Gonzalez Galvez, *The Future of Regionalization in an Asymmetrical International Society*, in Ronald St. J. Macdonald and Douglas Johnson (eds.), THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW (The Hague: Martinus Nijhoff, 1986), p. 661; Ronald St. J. Macdonald, *The Developing Relationship between Superior and Subordinate Political Bodies of the United Nations and the Organization of American States*, 2 CANADIAN YEARBOOK OF INTERNATIONAL LAW 21 (1964). This essay ends with the statement (p. 54) that "there is a certain inevitability about the articulation and acceptance of effective standards on review and supervision, and one can't avoid thinking that, had Chapter 8 not appeared in the Charter, the Organization's practice would have created it nevertheless." I believe that as firmly in 2000 as I did in 1964; see also Russel, note 7, p. 693ff.

31. As quoted by Neri Sybesma-Knol, *The Continuing Relevance of the Participation of Observers in the Work of the United Nations*, in Karel Wellens (ed.), INTERNATIONAL LAW:

THEORY AND PRACTICE. ESSAYS IN HONOUR OF ERIC SUY (The Hague: Martinus Nijhoff, 1998), p. 371 at 385 (with full notes).

32. James Crawford, THE CHARTER OF THE UNITED NATIONS AS A CONSTITUTION, in Hazel Fox (ed.), *The Changing Constitution of the United Nations*, (London: British Institute of International and Comparative Law, 1997), p. 12.

33. Felicetta Leanza Lauria, *Il recesso dall'Organizzazione delle Nazioni Unite: il caso dell'Indonesia*, in 20 DIRITTO INTERNAZIONALE 153–174 (1966); Mario Scerni, *Aspetti giuridici del Ritiro delle Nazioni Unite* in 20 COMUNITÀ INTERNAZIONALE, 228 (1965).

34. United Nations Press Release GA/3210 of September 28, 1966.

35. The status of declarations of the General Assembly in the international law system is debatable and has produced a vast literature. See, among others, ZEMANEK, note 3; CONFORTI, note 2; GIULIANI-SCOVAZZI-TREVES, note 3; Richard Falk, *The quasi-legislative Competence of the General Assembly*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 782 (1996).

36. Herny G. Schermers, *International Organizations*, in Bedjaoui, note 5, p. 79ff.

37. This opinion is shared by the majority of scholars. See, among others, CONFORTI, note 2, p. 282ff.

38. ZEMANEK, note 3, p. 49ff.

39. Christopher C. Joyner, *The United Nations as International Law-Giver*, in Oscar Schachter and Christopher C. Joyner (eds.), THE UNITED NATIONS AND INTERNATIONAL LAW (New York: Cambridge University Press, 1997), p. 440ff.

40. International Court of Justice, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs. U.S.), in ICJ REPORTS, 1986, pp. 14–150, para. 188. For further elaboration on the significance of the Court's judgment with regards to General Assembly resolutions, see Ronald St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CANADIAN YEARBOOK OF INTERNATIONAL LAW 130ff. (1987); ZEMANEK, note 3.

41. CONFORTI, note 2, p. 245.

42. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (New York: Cambridge University Press, 1995), p. 70.

43. ICJ REPORTS, 1971, p. 31, para 52.

44. For more extensive discussion of these cases, as well as other disputed areas, such as the Falkland Islands and Gibraltar, see CASSESE, note 42, chapter 9.

45. See, for instance, Resolution 1815 (XVII) of 1962, and Declaration 2132 of 1965.

46. Resolution 37/10 of 1982.

47. Riad Daoudi, *Promotion of Friendly Relations by International Organizations*, in Bedjaoui (ed.), note 5, p. 492.

48. Cassese, *Article 1 paragraphe 2*, in Cot and Pellet, note 5, p. 42.

49. Daoudi, note 47, p. 496.

50. See on this subject Jost Delbrück, *Laws in the Public Interest—Some Observations on the Foundations and Identification of erga omnes Norms in International Law*, in Volkmar Götz, Peter Selmer, Rüdiger Wolfrum (Hrsg.), LIBER AMICORUM GÜNTER JAENICHE - Zum Beispiel Gieburtstag (Max Plank Institut, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 135) (Berlin, Springer, 1998), p. 27.

51. The Treaty on Principles Governing the Activities of Space in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) of December 19, 1966, was adopted by the UN General Assembly in Resolution 2222 (XXI) of December 19, 1966, UN Doc. A/6316. Among the other several international instruments developed through the "legislation by resolution" of the General Assembly, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into

Outer Space (Dec. 19, 1967) in A/RES/2345 (XXII) 1967, the Convention on International Liability for Damage Caused by Space Objects (Nov. 29, 1971) in A/RES/2777 (XXVI), the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Dec. 5, 1979) in A/RES/34/68. Regarding the activity of the General Assembly and the Committee on Outer Space on the subject, see Ralph G. Steinhard, *Outer Space,* in Oscar Schachter and Christopher C. Joyner (eds.), UNITED NATIONS LEGAL ORDER (Cambridge: Grotius Publications, Cambridge University, 1995), vol. 2, pp. 753–787.

52. ZEMANEK, note 3. p. 203.

53. Conforti, note 23, p. 703; Giorgio Gaia, *Reflexions sur le role du Conseil de Securité dans le nouvel ordre mondial. A propos des rapports entre maintin de la paix et crimes internationaux des Etats,* 97 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIQUE 297–320 (1993).

54. Giorgio Burci, *L'azione del Consiglio di Sicurezza delle Nazioni Unite nella crisi del Golfo,* in 46 COMUNITÀ INTERNAZIONALE 278–315 (1991); Kirgis, note 21, p. 520ff.

55. In Council Resolution 687/1991. The representative of United States, which was the main supporter State of the resolution, hastened to declare that "certainly the United States does not seek, nor will it support, a new role for the Security Council as the body that determines international boundaries." Quoted in BEDJAOUI, note 19, p. 42.

56. ZEMANEK, note 3, p. 205 (footnote).

57. Among others, BEDJAOUI, note 19.

58. Conforti, note 23, p. 706.

59. BEDJAUOI, note 19, p. 5.

60. ZEMANEK, note 3, pp. 93–94.

61. Satya N. Nandan, *Introduction to the Law of the Sea,* in Bedjaoui (ed.), note 5, p. 839.

62. ELIZABETH MANN BORGESE, THE OCEANIC CIRCLE: GOVERNING THE SEA AS A GLOBAL RESOURCE (Tokyo: United Nations University Press, 1998); S.P. Jagota, *The Seabed Outside the Limits of National Jurisdiction,* in Bedjaoui (ed.), note 5, p. 931.

63. Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF. 164/33, August 3, 1995, art. 7.2

64. "In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is member of, or participant in, such organization or arrangement, may, through its duly authorised inspectors, board and inspect . . . fishing vessels flying the flag of another State party to this agreement, whether or not such State Party is also a member of, or a participant in, the organization or arrangement for the purpose of ensuring compliance with conservation and management measures for straddling stocks and highly migratory fish stocks established by that organization or arrangement." *Ibid.*, art. 21.1.

65. Moritaka Hayashi, *The 1995 Agreement of the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention,* in 29 OCEAN AND COASTAL MANAGEMENT 61 (1995).

66. S. P. Jagota, *Developments in the Law of the Sea Between 1970 and 1998,* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW (1999), forthcoming; S.P. Jagota, *Asia and the Development of the Law of the Sea: 1983–1992,* in Ronald St. J. Macdonald (ed.), ESSAYS IN HONOUR OF WANG TIEYA (Dordrecht: Martinus Nijhoff, 1994), p. 367.

67. According to Mosler, the term supranational was first used and defined in the negotiations which followed the Shumann Plan for the establishment of a European Coal and Steel Community. MOSLER, note 1, p. 188. The supranationalism of the Coal and Steel Community was more marked than that of the European Economic Community, and the powers given to the High Authority of the Coal and Steel Community were broader than those later granted to its EEC correspondent, the European Commission. In consideration of the wider area

of intervention and the more complex matters included in the Treaty of Rome, encompassing economic and social concerns, States were less ready to renounce their sovereign powers in favour of a supranational authority working too independently from them.

68. The Member States, "anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions ... establish among themselves a European Economic Community ... to promote ... a harmonious development of economic activities." Treaty of Rome, 1957, Preamble and arts. 1–2. The Treaty on the European Union (1992) "marks a new stage in the process of creating an ever closer union among the people of Europe" (art. A).

69. Treaty establishing the European Economic Community (The Treaty of Rome), Rome, March 25, 1957, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AS AMENDED BY SUBSEQUENT TREATIES (London: HMSO, 1988), art. 2.

70. Treaty on the European Union, TREATY OF ROME CONSOLIDATED AND THE TREATY OF MAASTRICHT, (Sweet and Maxwell, 1992), art. B. The European Union is "founded on the European Communities, supplemented by the policies and forms of co-operation established by ... [the] Treaty" (art. A); it is not therefore replacing the European Community, which is maintained as the official denomination for what the common policies and the common market are concerned.

71. "The representatives in the Assembly of the peoples of the States brought together in the Community shall be elected by direct universal suffrage." Council Decision and Act of September 20, 1976, art. 1.

72. See Treaty of Rome, Art. 43 ff. Up to 1994, only 14 percent of the entire body of legislative acts of the Council have been voted by qualified majority, while in the great majority of the cases, the Council prefers to adopt these measures at unanimity, according to the so-called "Luxembourg compromise" of 1966.

73. "The member of the Commission shall, in the general interest of the Communities, be completely independent in the performance of their duties ... In the performance of these duties, they shall neither seek nor take instructions from any government." Single European Act, art. 10.

74. Clive Archer and Fiona Butler (eds.), THE EUROPEAN COMMUNITY: STRUCTURE AND PROCESS (New York: St. Martin's Press, 1996), p. 44ff.

75. The States often do not promptly adopt such laws, thus causing several delays in the implementation of the Community's Policies. Some States have adopted legislative measures to avoid excessive delays in the implementation of European directives. The Italian Parliament, for instance, decided to provide for an annual European Law, which automatically allows all the directives that have not been converted in the previous year, to be made effective at the local level of administration.

76. Paul Taylor, *Prospects for the European Union,* in Stelios Stavridis (ed.), NEW CHALLENGES TO THE EUROPEAN UNION: POLICIES AND POLICY-MAKING (Brookfield: Aldershot, 1997), pp. 13–41.

77. DIARMUID ROASSA PHELAN, REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY, (Dublin: Round Hall Sweet & Maxwell, 1997), p. 27, quoting W.G. van der Meers.

78. The most evident effect of this doctrine is in the recognition of the capacity of the Community to enter into international treaties on behalf of member States. According to the Court, wherever the European Community has internal power to legislate, it also has the corresponding external power to enter into treaties, while the Member States have no longer the

right to do it, even if the Community has yet to exercise its internal powers. See, for instance, Opinion 2/91 *Re* Convention No. 170 of the International Labour Convention.

79. Carolyn Rhodes, *Introduction: The Identity of the European Union in International Affairs*, in Carolyn Rhodes (ed.), THE EUROPEAN UNION IN THE WORLD COMMUNITY (Boulder: Lyenne Rienner Publishers, 1998), pp. 1–17.

80. Moshe Mahor, *Towards Political Union: Assessing Two Strategies of EPU*, in Stavridis (ed.), note 76, pp. 43–66.

81. PHELAN, note 77, p. 145, quoting Bruno de Witte.

82. The European Commission has represented the member States in the GATT since at least the 1960s, as they realized immediately that their relative weight in negotiation would be greatly increased by creating a united front. The European Union also greatly contributed to the formulation of the WTO agenda. Fraser Cameron, *The European Union as a Global Actor: Far from Pushing Its Political Weight Around*, in Rhodes (ed.), note 79, pp. 19–43.

83. The Community has thus been since the early stages mainly responsible for the agricultural policy of its members. The FAO constitution had to be changed to allow the Community to join. Interestingly enough, Article II.4 (revised) now provides for admission of "regional organization constituted by sovereign states . . . to which its Member States have transferred competencies," thus making possible for other regional organizations with similar competencies to be admitted.

84. Koen Lenaerts and Eddy De Smÿter, *The United Nations and the European Union: Living Apart Together*, in Wellens (ed.), note 31, p. 439.

85. Qizhi He, note 4, p. 77.

86. Rao, note 25, p. 182.

87. CONFORTI, note 2, p. 13 ff.; Crawford, note 32, p. 8ff.; Rao, note 25.

88. In the article, Arangio-Ruiz focuses on the recent activities of the UN organs, and the Security Council in particular, in order to defy the analogy between a federal system and the system established by the Charter, an analogy that has been extensively used to justify (under the doctrine of implied powers) the unchecked expansion of the range of activities of the Security Council. Arangio-Ruiz considers this analogy marginally justified with regard to peace-keeping operations, which are "carried out by the organization under the legal cover not so much of the Charter, but of more or less special agreements with the state(s) whose territory or people are to be affected." Otherwise, the federal analogy is, in his opinion, "undemonstrated and implausible." Although he recognizes that the United Nations has had a significant impact on the rules of inter-State relations among members, he finds several pitfalls in the conception of the Charter as a constitution. The United Nations as created by the Charter has no direct power on the peoples of the Member States, and the peoples themselves had no role in the foundation of the United Nations and still have no voice in the procedures of the organization. Moreover, the international system gives no room for a change in the distribution of powers among the States, being the differences of political economic and military powers among members tendencially permanent, and the organs of the United Nations are composed of delegates of States, and are therefore not independent in their decisions. The author looks with alarm at the increasing tendency of certain States to operate *uti universi* on behalf of the United Nations and the entire international community, without control. He considers the application of the doctrine of implied powers to the actions of the Security Council as a dangerous trend that could be used by certain States to use the United Nations as an instrument of their own foreign policy, with the risk of undermining the future of the organization. Gaetano Arangio-Ruiz, *The Federal Analogy and UN Charter Interpretation: A Crucial Issue*, 8 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1–18 (1997).

89. CONFORTI, note 2, p. 10.

90. Crawford, note 32, p. 15. Crawford indicates a number of constitutional characteristics met by the Charter, such as virtual universality, broad scope of activities and success in certain fields, and lack of any rival organization. He, however, also points out the weaknesses of the United Nations, such as the lack of a clear distribution of powers and, most dangerous of all, lack of institutional means for protecting the State from unlawful or unjust acts of UN organs.

91. Paolo Picone, *Nazioni Unite e obblighi 'erga omnes'*, in 48 COMUNITÀ INTERNAZIONALE 717 (1993).

92. Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter Revisited*, in 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 31 (1997).

93. *Ibid.*, p. 33.

94. MOSLER, note 1, p. 5.

95. Christian Tomuschat, in Tomuschat (ed.), note 4, p. ix.

96. C. WILFRID JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS (London: Stevens, 1962), p. 257, citing PHILLIMORE'S COMMENTARIES, vol. 2, 1879.

97. Christian Joerges, note 1.

98. On the whole subject see the remarkable study by PHILIP ALLOT, EUNOMIA: NEW ORDER FOR A NEW WORLD (Oxford: Oxford University Press, 1990), and my review of this book in 70 CANADIAN BAR REVIEW 822 (1991). A modified version of this paper will appear, with acknowledgements, in a forthcoming issue of the Australian Yearbook of International Law.

XII

International Humanitarian Law from Agincourt to Rome

Theodor Meron

OVER THE PAST HALF-MILLENNIUM, the relationship between war and law has been the subject of much change. Two issues have remained central, even in modern international humanitarian law (IHL): the first is "quarter," that is, the obligation to spare the life of a combatant who has laid down his arms and surrendered, and, second, the protection of women from the ravages of war and, especially, rape. Both issues arose during Henry V's Agincourt campaign, a phase of the Hundred Years' War that started in 1415 with the landing of Henry's Army near Harfleur, the siege and capture of Harfleur, and its victory in Agincourt, and ended in 1420 with the conclusion of the Treaty of Troyes, which pronounced Henry the heir to the French throne. At Agincourt, the terrain, the tactics, and the longbow helped the lightly armed and mobile English prevail over the several times larger, heavily armoured mounted French knights. The Treaty marked the ascendancy of England until Joan of Arc's rallying of the French in 1429 sparked a turning point that eventually led to the defeat of England by Charles VII of France.

This article is based on an inaugural lecture delivered on November 7, 1998, at the Graduate Institute of International Studies in Geneva.

This campaign was immortalized in Shakespeare's epic play, on which I shall draw. I draw on Shakespeare because his anatomy of war is a close reflection of the sixteenth century chronicles, Raphael Holinshed and Edward Hall, and thus an excellent vehicle to illustrate the law's evolution. This apt point of departure in assessing the current state of humanitarian law evidences an approach to the issue that may well prove instructive in implementing present day IHL. Therefore, it is at Agincourt that the journey to Rome begins.

Medieval Law of War

I will start by describing briefly the law of war as it existed during the Agincourt campaign. In the Middle Ages, chivalry was the principal normative system providing a code of behaviour for knights, nobility, and the entire warring class in the endemic wars in which they were involved. The humane and noble ideals of chivalry included justice, loyalty, courage, honour, and mercy, obligations of not killing or otherwise taking advantage of a vanquished enemy, and keeping one's word, and duties of protecting the weak, especially women, and helping people in distress. Seldom if ever realized in full, chivalry was a mix of reality, poetry, and legend. Despite humanizing warfare, chivalry also contributed to the legitimization of war and, through ransom and pillage, provided economic incentives for resorting to war.

The rules of chivalry were customary. However, various royal ordinances, including Henry V's famous ordinances of war, codified some of these rules, including those protecting women from rape and persons belonging to the Church from capture and robbery. In addition, writers on chivalry compiled treatises and manuals explaining the rules of chivalry, such as the duties to grant quarter on the battlefield in exchange for ransom and to treat prisoners humanely.

Chivalry's norms were fully applicable, regardless of nationality, between knights and nobility but did not protect commoners and peasants and were not applicable to non-Christians. Gentlemen were careful to avoid surrendering to commoners and commoners to gentlemen. Rules were international but were not class or religion neutral. They were enforced by courts of chivalry and military courts, but—in contrast to our own modern system of detailed Hague and Geneva conventions—honour and shame played a critical role in enforcement; the sanction of dishonour for the knight who violated his knightly duties was quite effective. Although our generation has lost the sense of shame—consider the slaughter and rape in Algeria—at least we have gained in universality:

all men and women, of whatever class, religion or colour, are entitled to the full protection of international humanitarian law.

Let me situate briefly chivalry in the medieval law of nations. Chivalry was the *jus armorum*, or the law of arms, the special law of the knightly class paralleling such special laws as the law merchant or the law of the sea. It was a part of the law of nations, or *jus gentium*, although the law of nations addressed also additional subjects such as the privileges of ambassadors and the law of treaties.

Agincourt

From history, literature, and the films of Laurence Olivier and Kenneth Branagh, most know the story of Agincourt, one of the rare great medieval battles during a period when wars were won or lost mostly by besieging fortresses and cities. The massacre of the French prisoners of war in Agincourt, the flower of French nobility and chivalry, is comprehensible only if we consider how outnumbered the English forces were and how great their fear must have been. As the battle wore on, the outnumbered English appeared to have the upper hand. The fear that another French charge was about to begin, the presence on the battlefield of a very large number of French prisoners who, though disarmed, could have risen against their English captors, and the French attack on the English rear camp possibly involving loss of life among the young boys guarding the camp, all combined to trigger an unexpected order by the King. Shakespeare's Henry cries out:

> But hark, what new alarm is this same?
> The French have reinforced their scattered men.
> Then every soldier kill his prisoners.

But Shakespeare's Gower then responds to Fluellen's comment that it was against the law of arms to kill the boys and explains the King's order as generated by the pillage of his treasures from the rear camp. He sarcastically adds that the King ordered cutting the throat of prisoners, "O'tis a gallant king." Shakespeare thus explains Henry's cruel order on two grounds: necessity, as the French appeared to be regrouping to attack; and reprisal for the unlawful attack on the servants guarding the rear camp and for its plunder.

The defence of reprisal was doubtful even at the time. The rear camp constituted a lawful military objective. It is far from certain that the pages guarding the camp were entitled to the immunity of children. At least some medieval jurists regarded non-combatant servants of an army, even when not involved in

any fighting, as legitimate military objectives. What made the massacre even more reprehensible, was that it was directed against prisoners. Yet some great Renaissance jurists, such as Gentili, still justified reprisals against a collectivity. Grotius dissented, "nature does not sanction retaliation except against those who have done wrong. It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body."

If the massacre of the prisoners was not justified as a reprisal, could it have been justified on grounds of necessity? It may well be that the heavily outnumbered English would have had difficulty repelling another attack while guarding their numerous prisoners. But this explanation is undercut by the fact that the King decided to spare the highest ranking prisoners, whose ransom would belong to him. Indeed, captors who were knights refused to carry out the order and the King had to use 200 of his archers to carry out the gruesome task of throat cutting.

Nevertheless, the eminent medieval jurist Giovanni da Legnano recognized the captor's right to kill prisoners where there was fear of disturbance of the peace; even the Renaissance scholar Vitoria prohibited killing of prisoners only after victory had been won and all danger was over. Gentili, however, harshly criticized the killing. Notwithstanding Gentili's condemnation, it cannot be concluded that Henry clearly violated contemporary standards. Killing prisoners in an emergency was not unprecedented. While quarter was normally granted in Anglo-French wars, the virtual absence of contemporary criticism of Henry's action suggests that cruel as it was, his order did not violate the accepted norms of behaviour.

Even before the treaty of Rome, certainly under the jurisprudence of Nuremberg, killing of prisoners of war, whether in the guise of reprisals or on grounds of military necessity would be an absolute war crime. Yet, as recently as during World War II, reprisal killing of innocent civilians in occupied territories was, in some circumstances, lawful. The Nuremberg tribunals ruled that killing of civilian hostages in reprisal for hostile acts against the occupying power was not a war crime provided that certain conditions were complied with. Today, it would be a war crime under the Geneva Conventions and Protocols, and certainly under the Treaty of Rome with its explicit criminalization of refusal to grant quarter.

But what about the killing of prisoners of war on grounds of necessity in modern humanitarian law? Medieval chivalry, medieval ordinances of war and humanist writings of Renaissance writers were followed by about two lean centuries of humanitarian law. Two major challenges, one military, the other religious, forced a decline of chivalry without providing an effective substitute.

Wars fought by large groups using long-range artillery were not conducive to the pursuit and taking of prisoners or the once customary grant of quarter in exchange for ransom. And the emergence of Protestantism triggered an increasing dehumanization of members of an adversary branch of Christianity, and thus a fertile environment for the destruction of those regarded as subhuman. Remember the massacre of Saint Bartholomew's Day or the outright killing by the English of Spanish Armada sailors shipwrecked in Western Ireland.

By the mid-19th Century, the technology which precipitated the demise of chivalry ultimately generated the need for international rules of war to humanize the conduct of hostilities, limit the killing and maiming, and ensure the humane care of prisoners, the sick and the wounded. The very scale of casualties and of suffering required that this need be recognized. The American Civil War generated the Lieber Code promulgated in 1863. The Lieber Code ultimately spawned that branch of international humanitarian law commonly known as the Hague law, which governs the conduct of hostilities. The Battle of Solferino, along with Henry Dunant's moving portrayal of the suffering and bloodshed at the battle in *A Memory of Solferino* (1862) inspired the conclusion of the First Geneva Convention (1864) as well as Geneva law more generally, the other branch of IHL which emphasizes the protection of victims of war, the sick, the wounded, prisoners, and civilians. Since the mid-19th Century, we have been engaged in a period of intensive multilateral treaty making.

Both prongs of IHL—Hague and Geneva—drew their guiding principles from chivalry. The obligations to use fairness and restraint, mercy and compassion, in both offensive and defensive situations, have their origin in chivalric honour.

In matters pertinent to military necessity, progress was nevertheless slow. Those of us who consider Henry's order in Agincourt to be medieval and barbaric, should note that even the essentially humanitarian Lieber Code allowed the denial of quarter to the enemy, that is, Confederate prisoners, on grounds of necessity: "A commander is permitted to direct his troops to give no quarter . . . when his own salvation makes it impossible to cumber himself with prisoners." This rule, which was law for the United States Army as recently as mid-19th Century, appears almost designed to legitimate the massacre Henry V ordered at Agincourt.

Compare the modern U.S. Army Field Manual of 1956. It unequivocally prohibits killing prisoners on grounds of self-preservation, in whatever circumstances.

However, certain related questions of international humanitarian law are less clear, especially whether in all circumstances there is a duty on a military

unit to accept surrender and thus, in effect, grant quarter. In the abstract and as a general principle, the obligation for a Party to a conflict to accept the surrender of enemy personnel and thereafter to treat them in accordance with the Hague and the Geneva Conventions is categorical. In reality, problems continue to arise. A recent study states that the *opinio juris* of the United States is that quarter may not be refused to an enemy who communicates an offer to surrender under circumstances permitting that offer to be understood and acted upon by U.S. forces. A combatant who appears merely incapable or unwilling to fight because he has lost his weapons or is retreating, but who has not communicated an offer to surrender is still subject to attack. And the 1992 U.S. DOD report to Congress on the Conduct of the Persian Gulf War states:

> There is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon—an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

The problem is thus not so much with the concept itself but with the nitty gritty of the situational ability of the attacking force to accept surrender. Whatever the black letter of the law, soldiers will not want to risk their own lives in granting quarter. Hopefully, the ICRC study of customary rules of humanitarian law will be able to advance the proposition that quarter must be given even when the safety of the captor is endangered by the presence of the captured combatants. But this is an area where a return to a culture of values, and especially honour, is necessary if we want better compliance with the rules. Only when it is realized that killing a surrendering enemy is shameful will we see progress.

Protection of Women

I turn to my second theme, protection of women. License to rape was considered a major incentive for the soldier involved in medieval siege warfare. While urging generals to forbid and prevent rape during the sacking of a city, Vitoria reluctantly admitted the lawfulness of allowing soldiers to sack a city if the "necessities of war" required it or "as a spur to the courage of troops," even when this involved rape. These cruel rules were, however, rejected by Gentili. Anticipating international criminal tribunals, Gentili wrote that if the enemy

who allows rape is not punished by God, he will have to render an account to other sovereigns.

Henry V's ordinances of war prohibited rape and imposed capital punishment on offenders. Enforcing compliance was a major problem, however. In his famous speech at the walls of Harfleur, Shakespeare's Henry enumerates the dreadful abuses—including rape, denying quarter, killing non-combatants, children and women—that his troops will commit in the city if it refuses to surrender. How could these dire threats be reconciled with the existing and emerging norms protecting women from the ravages of war? The distinction in medieval law between the treatment of both combatants and civilians in captured territory or on the battlefield, on the one hand, and their treatment in a besieged city or fortress that was taken by assault, on the other, suggests an explanation. Unmitigated brutality was reserved for the population of a city that refused to surrender.

Henry, the commander, tells Harfleur that he will no longer be able to control his forces if it does not surrender, and that the leaders of Harfleur will bear the responsibility for the resulting brutality. Of course, Shakespeare emphasizes rape and its sheer horror. But in a speech which attracted feminist censure, his Henry clearly places the responsibility on Harfleur should it resist his ultimatum. In terms of *realpolitik*, Henry tells Harfleur: "If you do not deal now with me, your one protector able only for a time to maintain discipline among this terrifying force, the force will run amok according to base human nature and I cannot be responsible for the consequences." But such arguments by their very nature are likely to incite illegal conduct by the troops, and these claims of the inevitable breakdown of discipline are thus both an evasion of the moral responsibility that should continue even into battle, and affirmative encouragement to unrestrained war.

In modern international law, despite the prohibition of rape in the Lieber Code, the protection of women's rights to physical and mental integrity does not appear to have been a priority. The Hague Regulations provide only indirect protection against rape. The 1929 Geneva POW Convention contained a general provision too vague to afford effective protection to women prisoners. During the Second World War, rape was tolerated and even utilized in some instances as an instrument of policy. In occupied Europe and in the occupied Far East, tens of thousands of women were subjected to rape and forced to enter brothels for Nazi and Japanese troops. Rape was not prosecuted in Nuremberg, though it was in the Far East. Only in the Fourth Geneva Convention of 1949 was an unequivocal prohibition of rape established. Even so, violation of this prohibition was not listed among the grave breaches of the

Convention which require prosecution or extradition. Finally, it took the mass rape in the former Yugoslavia, so well publicized by the media, followed by widespread rape in Rwanda, to generate rapid changes.

International humanitarian law does not develop in a rational and gradual way. It develops spasmodically in response to atrocities. It is a pity that calamitous events are needed to shock the public conscience into focusing on neglected areas of the law. The more offensive the occurrence, the greater the pressure for rapid adjustment. Nazi atrocities, for example, led to the establishment of the Nuremberg tribunals, the evolution of the concepts of crimes against peace, crimes against humanity and the crime of genocide, the shaping of the Fourth Geneva Convention, and the birth of the human rights movement. The starvation of Somali children prompted the Security Council to apply Chapter VII of the Charter to an essentially internal situation, bringing about a revolutionary change in our conception of the role of the Security Council to enforce peace in such situations.

The Hague and Rwanda Tribunals

Instant reporting from the field has resulted in rapid sensitization of public opinion, greatly reducing the time lapse between the perpetration of such tragedies and responses to them. It took the repeated and massive atrocities in the former Yugoslavia and then in Rwanda to persuade the Security Council to establish the two ad hoc criminal tribunals and to start the momentum towards the establishment of a standing international criminal court. The statutes of the ad hoc tribunals criminalized rape as a crime against humanity. At the same time, both the ICRC and the United States started interpreting the grave breaches provisions of the Geneva Conventions as encompassing rape.

The Hague Tribunal has issued several important decisions that clarify and give judicial imprimatur to some rules of international humanitarian law. It has made a real contribution to the elucidation of crimes against humanity and to establishing that customary law war crimes apply also to non-international armed conflicts. Let us remember that as recently as 1949, the Geneva Conventions contained only one article—common Article 3—which addressed non-international armed conflicts. Until the mid-90's, its violation was considered not to involve individual criminal responsibility.

The Rwanda tribunal has issued important decisions on its competence and on genocide. The work of both tribunals demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible. These developments have created a

positive environment for the establishment of the standing international criminal court.

Rome

One is struck by three aspects of the scope of crimes under international humanitarian law as it has emerged from the work of the diplomatic conference in Rome. First, most governments appeared ready to accept an expansive conception of customary international law without much supporting practice. Second is an increasing readiness to recognize that some rules of IHL once considered to involve only the responsibility of States may also be a basis for individual criminal responsibility. There are lessons to be learned here about the impact of public opinion on the formation of *opinio juris* and customary law. The ICRC study of customary rules of IHL, now in progress, will further reinforce these developments. Third, the inclusion in the ICC Statute of common Article 3 and crimes against humanity, the latter divorced from a war nexus, connotes a certain blurring of IHL with human rights law and thus an incremental criminalization of serious violations of human rights. It goes without saying that the type of offenses encompassed by common Article 3 and crimes against humanity are virtually indistinguishable from ordinary human rights violations. I note that we have witnessed a rapid transition of many principles and rules of IHL from the rhetorical to the normative, and from the merely normative to the effectively criminalized.

These developments could not have taken place without a powerful new coalition driving the criminalization of offenses against the IHL. Much like the earlier coalition that stimulated the development of both a corpus of international human rights law and the mechanisms involved in its enforcement, this new coalition includes scholars who promote and develop legal concepts and give them theoretical credibility, NGO's that provide public and political support and means of pressure, and various governments that spearhead law-making efforts in the United Nations.

The adoption of the Rome Statute of the ICC on July 17, 1998, is an event of major historical importance. Although it is still too early to assess the prospects of the effectiveness of the Court and many aspects of its Statute, this is not the case with regard to the definition of crimes against international humanitarian law contained in Articles 6–8. These articles, now part of treaty law, not only constitute the principal offenses that the ICC will try, but they will take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law. As such, they may become a model for

national laws to be enforced under the principle of universality of jurisdiction. They will thus have great influence on practice and doctrine even before the Statute enters into effect.

Regarding the crime of genocide, the Statute tracks the 1948 Convention. The article defining crimes against humanity is the first multilateral treaty definition of crimes against humanity. It is independent of any nexus with war.

There are many additions to the Nuremberg list of crimes against humanity. Crimes added or developed include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity. Rape and other sexual offences against women have been included in all of the sections of war crimes.

For non-international armed conflicts, the Statute declares criminal serious violations of common Article 3 and also contains a significant list of Hague-type war crimes. This recognition of war crimes under customary law as pertinent to non-international armed conflicts represents a significant advance.

The definitions of crimes are now in place. It is up to the States to make them effective, to punish violators and to deter future crimes. Recent atrocities in Kosovo should make us realize that adoption of treaties and statutes is not enough; without effective enforcement, prospects of deterrence will continue to be poor.

Let me conclude with a broad reflection. We now have a system of Geneva Conventions that have obtained the formal assent of virtually all States. The Conventions give us exact language, and clarity, at least for the initiated. We have created a complicated and technical system of humanitarian law that only experts can master. It is true that this system has not prevented the continuing growth of customary rules, to add, to modify, and to fill in the interstices of conventions. The jurisprudence of the Hague tribunal for the former Yugoslavia provides a salutary example of this process. Although the teleological aspects of humanitarian law facilitate the continuing creation of customary law through emphasis on *opinio juris*, nonetheless, international humanitarian law is primarily conventional.

A normative system, like chivalry, based largely on custom and a few rules of relative generality, would not suffice in the face of the frequent disintegration of States, the multiplicity of powerful actors on the domestic and international scene, and the modern weapons and technology. However, through this process of treaty-making, of codification, vital and necessary as it is, we may have lost the sense that rules arise naturally out of societies. We may have lost the flexibility that came from rules of essentially customary character. And finally,

we may have forgotten the value attaching to honour, chivalry and mercy. In conflicts around the world, people not only kill and rape, they are proud of their deeds.

We must revive our ability to feel shame and guilt. We have to create a culture of individual responsibility. Utopian attempts to revive chivalry would have little effect. But, to make international humanitarian law truly effective, we need to reinvigorate chivalry's culture of values, especially the notion of individual honour and dishonour as motivating factors for the conduct of both warriors and citizens. Treaties alone will not ensure respect for fundamental norms.

XIII

Legal Implications of NATO's Armed Intervention in Kosovo

Ved P. Nanda

THE MILITARY INTERVENTION by the nineteen-member North Atlantic Treaty Organization (NATO) in Kosovo, a province of Serbia in the Federal Republic of Yugoslavia, was the first of its kind undertaken by the alliance. Under the 1949 North Atlantic Treaty,[1] NATO was formed as a regional security organization. With its mission to act in a defensive capacity to protect its members from external aggression, under the treaty the parties specifically agreed that

> an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently . . . if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[2]

Thus, the intervention was arguably beyond NATO's intended mission. Equally important, by unilaterally intervening in Kosovo, NATO bypassed the United Nations. Its use of force clearly failed the test of strict compliance with

the constraints of the UN Charter,[3] for it did not seek prior authorization of the Security Council to use force. Although the UN eventually assumed an important role in shaping the future of Kosovo, it was invited to perform that task only after the end of the conflict.[4]

I concede that it is too early to write a definitive commentary on the legal implications of this intervention. Some tentative conclusions can, however, be reached even at this time, which is a couple of months after Slobodan Milosevic's acceptance of NATO's terms to end its air operations against Yugoslavia. These conclusions form the subject of this paper. In the next section, I relate pertinent aspects of the armed conflict in Kosovo to provide the context for the discussion that follows on the role of the United Nations in the conflict.

It is undoubtedly a laudable goal that the world community should effectively respond to heinous crimes such as genocide in Rwanda and ethnic cleansing, forced expulsions, and egregious violations of human rights in Bosnia and Kosovo. But after NATO's intervention in Kosovo, the nature of the response to such deprivations and the kind of precedent it sets are valid questions because of their implications.

Air Operations by NATO and the Kosovo Peace Accord

Context. Arguably, the roots of the ethnic conflict in Kosovo go back hundreds of years.[5] Although as a province of the Ottoman Empire Kosovo was ceded to Serbia after Turkey's defeat in the Balkan Wars of 1912–1913, the area is regarded by Serbs as the cradle of their civilization, their cultural birthplace. It was at the Battle of Kosovo in 1389 that the Serbs were defeated and ever since they have painfully remembered the date. Also, many of their monasteries, churches, and sacred places are in Kosovo.

The discussion here will, however, be confined to more recent events. A decade ago, in 1988–1989, Yugoslavia and Serbia made constitutional changes under which the special autonomy enjoyed by the Autonomous Province of Kosovo under the 1974 constitution was revoked. That was the beginning of Milosevic's repressive policies in Kosovo which eventually led to the current crisis.

During 1998, violence spread with intensified attacks by ethnic Albanian rebels on Serbian military and police forces and a crackdown by these forces, "result[ing] in the deaths of over 1,500 Kosovar Albanians and forc[ing] 400,000 people from their homes."[6] Consequently, the concern grew that the violence might spread into neighboring Macedonia and also draw Albania into the conflict, destabilizing the region. In May–June 1998, the North Atlantic Council

held meetings on the Kosovo crisis at foreign and defense ministerial levels and began considering a large number of possible military options.[7]

Earlier, the so-called "contact group," composed of France, Germany, Italy, Russia, the United Kingdom, and the United States, had begun attempts to find a diplomatic solution to the conflict. In March 1998 the group proposed a comprehensive arms embargo on the Federal Republic of Yugoslavia, including Kosovo.[8] Also in March 1998, the Organization for Security and Cooperation in Europe (OSCE) convened a special session of its Permanent Council to assess the deteriorating situation.[9]

After considering the reports of the contact group and the OSCE, the UN Security Council, acting under Chapter VII of the Charter, resolved on March 31 to impose an arms embargo on the Federal Republic of Yugoslavia, including Kosovo.[10] The Council also expressed "its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration," and accepted the contact group's proposal that the Kosovo problem should be solved on the principle of the territorial integrity of Yugoslavia.[11]

Furthermore, the Council condemned "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training,"[12] and threatened additional measures in case of the "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo."[13] Yugoslavia, however, was insistent that under the UN Charter the Kosovo situation was a matter solely within its domestic jurisdiction.[14]

Subsequently, on September 23, 1998, the Security Council, again acting under Chapter VII, adopted another resolution in light of the deteriorating humanitarian situation.[15] It called upon the parties to cease hostilities and "enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo."[16] It demanded that Yugoslavia "enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the [State]"[17] and facilitate "the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo."[18]

On October 13, the NATO Council authorized Activation Orders for air strikes[19] to be undertaken by NATO military forces within 96 hours as part of a

phased air campaign in Yugoslavia[20] unless the parties agreed to implement the terms of Security Council Resolution 1199 of September 23. However, within the next three days successful diplomatic efforts resulted in Yugoslavia's agreement with the OSCE for the establishment of a verification mission in Kosovo[21] and another agreement between Yugoslavia and NATO providing for the establishment of an air verification mission over Kosovo to complement the OSCE verification mission.[22] The United States also succeeded in diplomatic negotiations under which Yugoslavia agreed on a framework for a political settlement of the conflict.[23]

Because of these developments and visits to Belgrade by NATO Secretary General Javier Solana, U.S. envoys Richard Holbrooke and Christopher Hill, and NATO Generals Claus Naumann and Wesley Clark, NATO called off the air strikes.[24] Yugoslavia also agreed on limits on the number of Serbian forces in Kosovo and on the scope of their operations.[25]

Acting again under Chapter VII, on October 24 the Security Council adopted another resolution[26] reiterating the terms of the two earlier resolutions, endorsing and supporting the verification agreements signed between Yugoslavia and the OSCE and NATO, respectively, and demanding, *inter alia*, that both the government of Yugoslavia and the Kosovo Albanians "comply fully and swiftly" with the terms of those resolutions and "cooperate fully" with the OSCE and NATO verification missions.[27] A special NATO military task force was established to assist with emergency evacuation of Kosovo forces if they were put at risk by renewed conflict; it was situated in Macedonia.

Subsequently, on November 12, the Secretary General reported to the Security Council that the October agreements had "contributed towards defusing the immediate crisis situation in Kosovo and [had] created more favourable conditions for a political settlement."[28] In his report, the Secretary General addressed the military, security, humanitarian and human rights situation in Kosovo, and envisaged that the UN's role in Kosovo, "will focus on humanitarian and human rights issues."[29]

Also through the Secretary General, the OSCE reported that its verification mission would be composed of up to 2,000 unarmed verifiers and among the mission's tasks would be "to supervise elections in Kosovo in order to ensure their openness and fairness."[30] Similarly, the Secretary General of NATO noted in his October 27 letter to the UN Secretary General that the North Atlantic Council had

> decided to maintain the activation order for the limited air response on the understanding that execution would be subject to a further Council decision and

> assessment that the Federal Republic of Yugoslavia was not in substantial compliance with Security Council Resolution 1199 (1998) . . . [and had] also decided to continue the present air activities as part of the phased air campaign.[31]

The relatively optimistic picture presented by the UN Secretary General, however, did not live up to its promise. As a result of mutual provocations and increasingly excessive force being used by the Serbian military and Special Police against the Kosovar Albanians at the beginning of 1999, the situation was worsening. Hence, the contact group met on January 29 and agreed that the parties must come together for negotiations under international mediation.[32] The urgency of the mandate was underlined by NATO's commitment to strike if required.[33] The result was the first round of negotiations in Rambouillet, outside Paris, from February 6 to 23, and a second round in Paris from March 15 to 18.

Under the proposed Rambouillet Accords,[34] the basic principles of the framework were the maintenance of territorial integrity of the Federal Republic of Yugoslavia and political autonomy for Kosovo.[35] However, the term which Yugoslav President Milosevic was unwilling to accept was the implementation plan contemplating the establishment of a multinational military implementation force with NATO at its core.[36] Another major difficulty was the provision that after three years the mechanism for a final settlement for Kosovo would be determined by the convening of an international meeting primarily "on the basis of the will of the people"[37] of Kosovo. This meant that ethnic Albanians, constituting a 90 percent majority, would hold the key to Kosovo's future status. Ultimately, the Kosovar Albanian delegation signed the proposed peace agreement but the Serbs did not.[38]

The Serbian offensive against the ethnic Albanian Kosovars was immediately intensified with the Serbs defying their October agreement by moving greater force into Kosovo. On March 20, its effectiveness having been blocked by the Serbs, the OSCE verification mission withdrew, a last minute effort by U.S. envoy Richard Holbrooke to persuade Milosevic to sign the accords failed, and on March 23 NATO's air campaign—"Operation Allied Force"—was launched.[39]

Air Strikes Continue for Eleven Weeks. NATO Secretary General Javier Solana stated the reason for ordering the strikes:

> All efforts to achieve a negotiated political solution to the Kosovo crisis have failed and no alternative is open but to take action. We are taking action following the Federal Republic of Yugoslavia government's refusal of international community demands: the acceptance of the interim political settlement, which

> has been negotiated at Rambouillet; full observance of limits on the Serb Army and the special police forces, agreed on 25 October; an end to the excessive and disproportionate use of force in Kosovo.[40]

In Solana's words, the objective of the air strikes was "to prevent more human suffering, more repression, more violence against the civilian population of Kosovo . . . [and] to prevent instability spreading in the region."[41]

NATO bombed Yugoslavia for eleven weeks. From the beginning, the attacks consisted of missiles and smart bombs. Satellite-guided cruise missiles were launched from ships and B-52s to knock out Yugoslavia's air defense systems, and smart bombs were dropped from aircraft, including F-15s, F-16s and the B-2 Stealth bomber.[42]

As the strikes began, President Bill Clinton justified the action in the following terms:

> Today we and our 18 NATO allies agreed to do what we said we would do, what we must do to restore the peace. Our mission is clear: to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war.[43]

UN Secretary General Kofi Annan was concerned that NATO had acted without Security Council authorization. However, he blamed Yugoslavia's intransigence in repeatedly rejecting a diplomatic resolution of the conflict for the air strikes. In his words,

> I deeply regret that, in spite of all the efforts made by the international community, the Yugoslav authorities have persisted in their rejection of a political settlement, which would have halted the bloodshed in Kosovo and secured an equitable peace for the population there. It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.[44]

Three weeks into the air campaign, on April 13, General Clark summed up the campaign's intent: "attack, disrupt, degrade, deter further Serb actions and keep it going and further degrade Serb military potential. . . ."[45] He elaborated:

> We are operating on what I would call two axes of attack, or two lines of operations: we are going after the forces inside Kosovo and around Kosovo to

> destroy these forces, to isolate them, to interdict them and to prevent a continuation of their campaign or its intensification; and at the same time we are going after an array of more strategic target sets that have to do with forces that are possible to be used to reinforce bases of supply, the integrated air defense system which protects the entire array of targets around the country, and also higher level command and control, petroleum and many other factors here that feed this military and security juggernaut that was assembled.[46]

In order to prevent hurting innocent civilians, causing so-called "collateral damage," Clark added, "this campaign has the highest proportion of precision weaponry that has ever been used in any air operation anywhere. We are going after militarily significant targets and we are . . . taking all possible measures to avoid civilian damage."[47]

Civilian casualties continued to occur, however, because of errors as these smart bombs would miss their targets.[48] To illustrate, General Clark went on to explain how, because of bad weather, a NATO pilot engaged in mounting a remotely directed attack on a bridge struck a passing train, killing many passengers.[49]

Calling the human cost of the war in Kosovo "unacceptably high," UN Secretary General Kofi Annan issued a press statement on April 28 on the "deteriorating humanitarian situation" in Yugoslavia.[50] He said,

> The civilian death toll is rising, as is the number of displaced. There is increasing devastation to the country's infrastructure, and huge damage to [Yugoslavia's] economy. For example, Mr. Sommaruga [the President of the International Committee of the Red Cross who recently visited there] told me that the destruction of the three bridges in Novi Sad also cut off the fresh water supply to half of that city's population of 90,000 people.[51]

According to an independent Serb study reported in the *Sunday Times* (London) after the bombing had been halted, the air campaign had resulted in severe damage to the Yugoslav economy—an estimated loss of $29 billion.[52] This figure included $4.1 billion to the country's infrastructure, $2.77 billion in damage to factories, oil refineries, and other industrial facilities, $270 million to power plants, $355 million to the transportation system, and $2.3 billion in "the human toll caused by deaths, injuries and unemployment."[53] The bulk of the cost, $23.2 billion, is the estimated loss to Yugoslavia's gross domestic product over the next decade.[54]

The cost of the war according to NATO, the United Nations, and other sources, as reported by the Associated Press at the end of the conflict, was:

35,219 sorties flown, resulting in the destruction of many targets, including 102 aircraft, over 400 artillery pieces, over 200 armored personnel carriers, over 100 tanks and 283 other military vehicles, and 16 command posts.[55] Estimates of civilian casualties ranged from 2,000 to 5,000, and the number of refugees was 855,000, according to the UN High Commissioner for Refugees, while several hundred thousand were displaced.[56]

Later reports, based on investigations of the physical evidence of the results of the bombing, showed that NATO's damage estimates to the Yugoslav army were exaggerated, for the pilots had hit several clever decoys—dummy and deception targets.[57] A UN team, the Inter-Agency Needs Assessment Mission, sent in May to Yugoslavia by Secretary General Kofi Annan, reported to the Security Council on June 9 that the air strikes had a "devastating impact" on the environment, industry, employment, essential service and agriculture.[58] The mission team reported:

> Damage to oil refineries, fuel dumps and chemical and fertilizer factories, as well as the toxic smoke from huge fires and the leakage of harmful chemicals into the soil and the water table have contributed to as yet unassessed environmental pollution in some urban areas, which may in turn have a negative impact on health and ecological systems.[59]

According to subsequent reports, however, the earlier estimates of the massive pollution caused by the military campaign may have been overstated.[60] Also, a World Bank team assessing reconstruction needs in Kosovo reported, on July 13, "significantly less damage to homes, power plants and roads than thought"—at the lower end of the estimates that have ranged from $3 billion to $5 billion over a three year period.[61]

The Kosovo Peace Accords. The failure of the Rambouillet Conference, and thus of diplomacy, led to NATO's bombing in Yugoslavia, and despite an intensified bombing campaign, the war dragged on. Efforts at finding a political solution, however, continued.[62] On May 6, the foreign ministers of the Group of Eight, at their meeting in Bonn, Germany, agreed on a set of principles to move toward a resolution of the Kosovo crisis.[63]

These principles included an immediate and verifiable end to the violence and repression in Kosovo; withdrawal from Kosovo of military police, police, and paramilitary forces; effective international civil and security presences to be deployed in Kosovo as endorsed and adopted by the United Nations; establishment of an interim administration for Kosovo to be decided by the UN

Security Council; the safe and free return of all refugees and displaced persons and unimpeded access by humanitarian aid organizations to Kosovo; a political process toward the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo based on the principles of sovereignty and territorial integrity of Yugoslavia, and the demilitarization of the Kosovo Liberation Army; and a comprehensive approach to the economic development and stabilization of the region.[64] Left vague were terms covering the composition and the command of the peacekeeping force envisaged by the Group of Eight.

Eventually, after protracted diplomatic negotiations, led primarily by Russian envoy and former Prime Minister, Victor Chernomyrdin (who traveled to Belgrade five times to talk with Milosevic) and NATO envoy President Martti Ahtisaari of Finland, with the assistance of U.S. Deputy Secretary of State Strobe Talbott,[65] a deal was struck between President Milosevic and NATO to end the bombing. The Yugoslav Parliament accepted the peace document.[66]

The prior principles announced by the Group of Eight formed the core of the international proposal to end the Kosovo conflict, which was accepted by Milosevic on June 3.[67] The major difference from the prior set of principles was that now the international security presence to be deployed was to be "with substantial NATO participation . . . under unified command and control."[68] A military-technical agreement was to be "rapidly concluded that would, among other things, specify additional modalities including the roles and function of Yugoslav/Serb personnel in Kosovo."[69] Subsequently, after the foreign ministers of the Group of Eight agreed on a draft Security Council resolution to end the conflict, the Security Council resolved that the political solution to the Kosovo crisis would be based on the General Principles earlier adopted by the Group of Eight foreign ministers.[70]

NATO's Bypassing the United Nations and the UN Role after the Bombing is Halted

The reason that the United States and NATO bypassed the United Nations by not seeking authorization from the UN Security Council to use force was obviously their fear and the near certainty that Russia and China would use their veto power in the Council to block the action; both these permanent members of the Security Council had strongly opposed the use of air strikes against Yugoslavia.

As NATO's strikes began, the Security Council held an urgent meeting. Calling the strikes a blatant violation of the United Nations Charter, some

States condemned them as a unilateral use of force, while others justified them on the ground that the action would prevent a humanitarian catastrophe in Kosovo likely to result from Serbian attacks on Kosovar Albanians.[71] The Russian representative said that the Security Council "alone should decide the means to maintain or restore international security," and that NATO's action would set a dangerous precedent.[72] He further warned that "the virus of a unilateral approach could spread," and that those who had initiated the military venture "bore complete responsibility for its consequences."[73]

China's representative said that the NATO action "amounted to a blatant violation of the United Nations Charter as well as the accepted norms in international law," and that the Chinese government strongly opposed the NATO action.[74] He added that the Kosovo question should be solved by the people in Kosovo, as it was an internal matter of the Federal Republic of Yugoslavia, that China "was opposed to the use of or the threat of use of force in international affairs, or power politics of the 'strong bullying the weak,' " and that only the Security Council could take such action, for it alone shouldered the primary responsibility for maintaining peace and security.[75]

The NATO action was strongly supported by the representatives of the United States,[76] United Kingdom,[77] and Canada,[78] among others. On March 26, the Security Council rejected a demand for the immediate cessation of the use of force against Yugoslavia and the urgent resumption of negotiations, as proposed in a draft resolution submitted by Belarus, Russian Federation, and India. Only three countries—China, Namibia, and Russia—voted in favor, while twelve voted against, with no abstentions.[79]

Subsequently, on May 14, 1999, the Security Council adopted a resolution inviting the United Nations High Commissioner for Refugees (UNHCR) and other international humanitarian relief organizations to extend relief assistance to the internally displaced persons in all parts of Yugoslavia, as well as to other civilians being affected by the continuing crisis.[80] The Council also emphasized that the humanitarian situation would "continue to deteriorate in the absence of a political solution to the crisis consistent with the principles" adopted by the Foreign Ministers of the Group of Eight on May 6, and urged all concerned to work towards that aim.[81]

The vote to adopt the resolution was 13 in favor, with China and Russia abstaining. In explaining his country's abstention, the Chinese representative expressed his concern that the U.S.-led NATO had launched military attacks without the Security Council's authorization and, by bypassing the United Nations, had created "the largest humanitarian disaster since the Second World War."[82] He also said that

> NATO had brazenly attacked the Chinese Embassy in Belgrade with five missiles. Three people in the Embassy had been killed and more than 20 injured. The Embassy building had been severely damaged. Such a criminal act was a flagrant encroachment on China's sovereignty and a serious violation of international law and the norms governing international relations. As a victim, China had every reason, on both moral and legal grounds, to demand that NATO stop bombing the Federal Republic of Yugoslavia immediately and unconditionally.[83]

In explaining why his country could not support the text of the resolution, the Russian representative said that "Russia had repeatedly warned against the dire consequences created by NATO's illegal military actions. It was continued bombing that could lead to an escalation of the humanitarian tragedy—a fact that was not reflected in the resolution. Narrow national interests had prevailed over Charter obligations in the case of some Member States."[84]

Earlier, on May 8, the Security Council had met at the request of the government of China, after the Chinese Embassy in Belgrade was accidentally bombed by NATO the preceding day.[85] The Chinese representative read a statement from his government that said:

> Flagrant bombing by NATO, led by the United States, had already caused enormous casualties and now it had gone so far as to bomb the Chinese Embassy. That was a violation of the sovereignty of China, and of the basic norms of international relations. China expressed the utmost indignation and severe condemnation of this barbaric activity. It made the strongest protest. NATO, headed by the United States, must assume the responsibility. China reserved the right to take further measures.[86]

He added: "The frenzied bombardment by NATO, led by the United States, of Yugoslavia over the last 45 days had resulted in civilian casualties. It had now violated a mission. This was shocking. NATO should stop the air strikes immediately and unconditionally."[87] He was joined by the representative of Russia expressing outrage "over the barbaric action," and calling for an immediate halt to the strikes.[88] The United States representative expressed his government's regrets and offered condolences to the Chinese Ambassador,[89] and was joined by several other representatives expressing their sympathy to China and condolences to families of victims.[90]

Finally, after lengthy negotiations, the UN Security Council adopted a resolution on June 10, 1999,[91] under which the United Nations was called upon to provide "international civil and security presences" in Kosovo.[92] The Council decided that the General Principles adopted by the G-8 Foreign Ministers on

May 6, as further elaborated in the international proposal accepted by Milosevic and the Yugoslav Parliament on June 3, would form the basis of a political solution to the Kosovo crisis.[93]

The Council demanded a "complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized."[94] It also requested the Secretary General to appoint "a Special Representative to control the implementation of the international civil presence," and for the Special Representative to "coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner."[95]

The Council enumerated the responsibilities of the international security presence which would include demilitarization of the Kosovo Liberation Army and establishment of a secure environment in Kosovo, "in which refugees and displaced persons [could] return home in safety, the international civil presence [could] operate, a transitional administration [could] be established, and humanitarian aid [could] be delivered."[96]

The Council authorized the Secretary General

> to establish an international civil presence in Kosovo in order to provide an interim administration [there] under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia and which [would] provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.[97]

This, indeed, was a tall order, and the Council detailed the main responsibilities of the international civil presence. These would include the promotion of the establishment of substantial autonomy and self-government in Kosovo, performance of the basic civilian administrative functions for as long as required, the organization and overseeing of the development of provisional institutions for democratic and autonomous self-government and facilitation of a political process designed to determine Kosovo's future status. Also included were the support of the reconstruction of key infrastructure and other economic reconstruction, protection and promotion of human rights, and maintenance of civil law and order, including establishing police forces.[98]

After a slow start, the functions contemplated in the Council resolution are being performed by the various actors. For example, the civilian and security presences are in place, refugees have returned, and, although belatedly, the KLA demilitarization is finally taking place.[99] However, the dreams of establishing

democratic institutions in Kosovo and building a multiethnic, multicultural society there are far from realization.

Yugoslavia's Request to the International Court of Justice for Provisional Measures

On April 29, 1999, Yugoslavia instituted proceedings before the International Court of Justice against Belgium "for violation of the obligation not to use force."[100] Similar claims were brought against nine other main NATO countries: Canada,[101] France,[102] Germany,[103] Italy,[104] the Netherlands,[105] Portugal,[106] Spain,[107] the United Kingdom,[108] and the United States.[109] Yugoslavia based its claim on the UN Charter and several international legal conventions, including the 1949 Geneva Convention and 1977 Additional Protocol I, and the Genocide Convention.[110] It requested the Court to indicate the following provisional measure: "The Kingdom of Belgium shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia."[111]

After holding public hearings between May 10 and 12, 1999, at which the parties made oral presentations,[112] the Court issued an Opinion on June 2 in which it reflected, in its preambular paragraphs, on the use of force in Kosovo:

> . . . Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;
>
> . . . Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;
>
> . . . Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court; [and]
>
> . . . Whereas the Court deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law. . . .[113]

The Court indicated that, while it does not have to "finally satisfy itself that it has jurisdiction on the merits of the case," it must ensure that "the provisions invoked by the applicant appear, prima facie, to afford a basis on which the

jurisdiction of the Court might be established."[114] The Court noted that Yugoslavia's Declaration recognizing the compulsory jurisdiction of the Court "in all disputes arising or which may arise" after the signing date,[115] was deposited with the Secretary General on April 26. Yugoslavia's contention was that, under its Declaration, the Court should consider all disputes effectively arising after April 25. Specifically, it referred to bombing attacks that NATO had waged on April 28, May 1, May 7, and May 8.

The Court, however, determined that, since the bombings in question had begun on March 24 and had continued beyond April 25, the legal dispute between Yugoslavia and NATO member States arose "well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole."[116] It added, "The fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose," and that "each individual air attack could not have given rise to a separate subsequent dispute. . ., [and] at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium."[117] Thus, the Court concluded that it could not base its jurisdiction upon Yugoslavia's Declaration and, by a vote of 12 to 4, rejected Yugoslavia's request for the indication of provisional measures.[118]

Also, the Court did not consider the provisions of the Genocide Convention to be applicable since, under the Convention's definition of genocide at Article II, the essential characteristic of the crime is the intended destruction of a national, ethnic, racial, or religious group, and, in the Court's opinion, NATO bombings did not entail the element of intent towards a group as such.[119]

With minor variations, the Court also rejected Yugoslavia's claims against other NATO members.[120] The determination was made on technical grounds in some cases, such as that the United States had made reservations to Article IX of the Genocide Convention, under which any dispute pertaining to the Convention could be brought before the Court,[121] and declarations of Spain[122] and the United Kingdom,[123] under which no State accepting the ICJ's compulsory jurisdiction could institute proceedings within twelve months after the filing of the Declaration.

Although the Court did not indicate any provisional measures requested by Yugoslavia, it did state that its findings "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves."[124] The Court also asked the parties to "take care not to aggravate or

extend the dispute," for it had not passed judgment on the question of "the compatibility of particular acts with international law," a question that could be reached only when the Court addressed the merits after having established its jurisdiction and heard legal arguments by all parties.[125] The Court added that, whether States accept or reject its jurisdiction, "they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law," and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which . . . is left to the parties."[126]

Thus, although the Court refused to pass judgment on the legality of NATO's offensive in the absence of an authorizing UN Security Council resolution, it unequivocally expressed its concern about the use of force and the human suffering and loss of life in Kosovo.

Analysis

NATO's Flawed Operation. NATO's operation was flawed from the outset.[127] Costly miscalculations had led the alliance to begin air strikes.[128] The assumption that NATO's threat of bombing would force Milosevic to back down, and that, in any event, he would not be able to withstand more than two to four days of air strikes, was subsequently proven false. After the failure of Rambouillet, NATO perceived its credibility to be at stake, especially as its fiftieth anniversary was so close at hand. And as the war dragged on, NATO intensified its attacks, severely damaging Serbia's infrastructure, ruining its economy, and causing numerous civilian casualties.

Also from the outset, the United States and NATO had sent a clear signal to Milosevic that they would not use ground forces. Without the use of ground forces against Serbia, Milosevic appropriately reasoned that he could withstand NATO's attacks. Given the importance of Kosovo to the Serbs, it was foolhardy for NATO to assume that Milosevic would quit Kosovo without much resistance, as he had earlier done in Krajina when the Croats cleansed the area of Serbs, apparently with western complicity.

To go back to the Rambouillet Conference, it was again flawed thinking on the part of NATO that Milosevic could accept the take-it-or-leave-it proposition, an integral part of Rambouillet, that the agreement on Kosovo's constitution was simply an interim measure, allowing the final status to be determined in three years when the people of Kosovo would finally decide their future. It was easy for any observer to understand what the provision meant—independence for Kosovo in three years, which Milosevic could not accept. Similarly, for

Rambouillet to impose an international force, more or less as an occupying force in Yugoslavia, to keep the peace in Kosovo was surely unacceptable to the Serbs.

And finally, the NATO operation miserably failed to accomplish its twin missions—one, to protect Kosovar Albanians from the excessive use of force by Serbs, and two, to prevent destabilization of the Balkan region. Instead, Milosevic intensified the ethnic cleansing being waged against the Kosovars. The outcome was that villages were burned, homes destroyed, and thousands of Kosovar Albanians murdered. Over 800,000 ethnic Albanians fled Kosovo into Albania, Macedonia, Montenegro, and abroad, and hundreds of thousands were displaced within Kosovo. And the region was troubled—Macedonia and Albania bursting with refugees and other neighboring countries feeling the economic pain caused by the devastation of Yugoslavia. Thus, political and economic stability was a further casualty of the operation.

NATO's Actions in Kosovo Required UN Authorization. Article 2, paragraph 4 of the UN Charter explicitly prohibits the use of force in international relations.[129] The only exceptions are: action taken by the Security Council under Chapter VII,[130] regional actions under Chapter VIII,[131] and unilateral or collective self-defense measures under Article 51.[132] A regional body may legitimately use force only pursuant to prior authorization by the Security Council.[133] Even if NATO, a regional security organization, could have justified its offensive on moral grounds, that is, in response to the gross violation of Kosovar Albanians' human rights, it did not seek prior authorization because of the certainty of the Russian and Chinese vetoes, for these two permanent members of the Council had openly opposed NATO bombings of Yugoslavia.

The bypassing of the United Nations has not set a healthy precedent. As Secretary General Kofi Annan, in his address to the General Assembly on September 20, 1999, said, "While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community."[134]

Annan presented the dilemma faced by the international community in the Kosovo situation, that is, its inability to reconcile the question of legitimacy of intervention by a regional organization without the Council's authorization on the one hand, and the effective halting of gross and systematic violations of human rights—a universally accepted imperative—on the other.[135] This, he said,

can only be viewed as a tragedy and is likely to present a "core challenge" to the Security Council in the next century: how to forge unity behind the principle that massive, systematic violations of human rights should not be allowed to happen anywhere.[136]

The Secretary General provocatively asked those who hailed the NATO military action in Kosovo as the heralding of a new era when States and groups of States can take military action without prior Council authorization, that is, "outside the established mechanisms for enforcing international law": "Is there not a danger of such interventions undermining the imperfect, yet resilient security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?"[137]

In his address to the General Assembly the day following the Secretary General's, President Clinton defended NATO's action in Kosovo, saying it "had followed a clear consensus expressed in several Security Council resolutions: that the atrocities committed by Serb forces were unacceptable, that the international community had a compelling interest in seeing them end."[138] He said that had NATO chosen to do nothing in the face of this brutality in Kosovo, it would not have strengthened the United Nations, but instead, "we would have risked discrediting everything the United Nations stands for."[139] He added:

> By acting as we did, we helped to vindicate the principles and purposes of the UN Charter, to give the UN the opportunity it now has to play the central role in shaping Kosovo's future. In the real world, principles often collide and tough choices must be made. The outcome in Kosovo is hopeful.[140]

The norms stated in Article 39 of the UN Charter authorizing the use of force only when the Security Council determines that there has been a threat to or breach of the peace or act of aggression[141] were fashioned at the end of the Second World War and in the era of interstate conflicts. Since most contemporary conflicts leading to violence are likely to be intrastate and not interstate, have these norms become too restrictive and hence outdated? Professor Michael Glennon has recently suggested that the old UN rules on peacekeeping and peacemaking, premised on Article 2, paragraph 7's prohibition against intervention in "domestic" matters, are dead and that their death "should not be mourned."[142] Although he decries ad hoc approaches, he says that in Kosovo, justice and the UN Charter seemed to collide, and that new international rules are emerging.

Is it a collision of principles that we are witnessing, and are the UN norms being replaced with newly emerging norms to meet the needs of the time? Principles do often collide, and, as Professor Glennon reflects, the imperative to halt gross violations of human rights and the doctrines of sovereign equality and non-interference in internal affairs are seemingly irreconcilable. But that does not mean that the existing Charter norms are unworkable and are being replaced by new norms.

As I have earlier argued, by interpreting Article 2(4) broadly and giving due consideration to the human rights provisions in the Charter and to the impressive array of human rights norms developed in the last half-century, one can make a strong case that the UN Charter does leave room for armed humanitarian intervention.[143] Thus, my contention has been that when the UN is unwilling or unable to act, as happened in Rwanda, a regional organization or even a group of States could have validly intervened to halt the tragedy of genocide that occurred there. This contention, however, does not signify the demise of the "antiquated" rules of the United Nations Charter, nor the emergence of new rules. Nor does it endorse unconstrained regional action on the model of NATO's bombings in Yugoslavia.

It should, however, be noted that at the end of the bombing campaign, NATO did appropriately turn to the United Nations, and, as mentioned earlier, Security Council Resolution 1244 explicitly stated that the deployment of international civil and security presences in Kosovo is to be under UN auspices.[144] To reiterate President Clinton's words, NATO acted "to give the UN the opportunity it now has to play the central role in shaping Kosovo's future."[145]

In his General Assembly address, Secretary General Annan reminded the Assembly of the Preamble of the UN Charter, which states that "armed force shall not be used, save in the common interest."[146] He emphasized that under the Charter the Security Council is required to be the defender of the "common interest,"[147] and that UN member States should find a way to find common ground in upholding the Charter principles and acting in defense of that common interest. He said that the choice must not be between Council unity and inaction in the face of genocide, as happened in Rwanda, and Council division and regional action, as happened in Kosovo.[148]

It is indeed lamentable that the Security Council could not find a way through preventive diplomacy or preventive action, such as sending several thousand more OSCE monitors into Kosovo, to avert the NATO military action. The Rambouillet Accord, as a special example, was so greatly tilted

against the Serbs that they could not have been expected to accept its terms, and there was no opportunity accorded to them for revision of the document.

It would have been preferable for the UN to have undertaken armed intervention when it became necessary in Kosovo. However, as NATO began the air campaign, its action was ill-conceived and poorly planned. On legal grounds, though, it still did not meet the criteria outlined earlier for unilateral or regional humanitarian intervention actions.[149] These criteria, as applicable here, are necessity, proportionality, and maximization of the best outcome.

One can argue that the necessity criterion was met. As to the other factors, there remains a valid question whether the intense bombing of Serbia, especially that of the infrastructure and civilian targets, was proportional; it was perhaps excessive. The most questionable aspect, however, is that the probable humanitarian impact of the air campaign was never adequately considered. To reiterate, the use of ground forces was rejected at the outset; Milosevic's determination was grossly underestimated; and the likely intensification of ethnic cleansing by the Serbs after the air strikes would begin was practically ignored. And with the ethnic cleansing having also occurred in reverse after the end of the bombing and the withdrawal of Serb forces from Kosovo,[150] as most Serbs have left Kosovo under pressure from the Kosovars, the outcome has not been the establishment of a multiethnic society in Kosovo, an express objective of the campaign. Under any objective criteria, the NATO action is hard to justify.

Notes

1. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

2. *Id.*, art. 5.

3. U.N. CHARTER arts. 2(4), 24, 103; chs. VII, VIII.

4. See S.C. Res. 1244, U.N. SCOR., 54th Sess., 4011th meeting, U.N. Doc. S/RES/1244 (1999), discussed *infra*.

5. For a historical perspective, see generally JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999); GREG CAMPBELL, THE ROAD TO KOSOVO: A BALKAN DIARY (1999); DAVID FROMKIN, KOSOVO CROSSING: AMERICAN IDEALS MEET REALITY ON THE BALKAN BATTLEFIELDS (1999).

6. NATO's Role in Relation to the Conflict in Kosovo at 2, <http://www.nato.int/kosovo/history.htm>. (updated 15 July 1999) [hereinafter NATO's Role].

7. See *id.*

8. U.N. Doc. S/1998/223, Mar. 9, 1998; S/1998/272, Mar. 25, 1998.

9. See U.N. Doc. S/1998/246, Mar. 11, 1998.

10. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998), para. 8.

11. *Id.*, para. 5.

12. *Id.*, Preamble.

13. *Id.*, para. 19.

14. Pursuant to art. 2, para. 7, of the U.N. Charter.

15. S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

16. *Id.*, para. 3.

17. *Id.*, para. 4(b).

18. *Id.*, para. 4(c).

19. NATO's Role, *supra* note 6.

20. See the NATO Secretary-General's Press Statement of October 13, 1998, <http://www.nato.int/docu/speech/1998/s981013a.htm>.

21. See U.N. Doc. S/1998/978, Oct. 16, 1998.

22. See U.N. Doc. S/1998/991, annex, Oct. 15, 1998.

23. See U.N. Doc. S/1998/953, annex, Oct. 13, 1998.

24. See *id.*

25. *Id.*, at 3.

26. S.C. Res. 1203.

27. *Id.*, paras. 3,4.

28. Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, U.N. Doc. S/1998/1068, Nov. 12, 1998, at 2 [hereinafter Nov. 1998 SG Rep].

29. *Id.*, para. 45.

30. *Id.*, annex I, para. 30. See *id.*, paras. 30–31.

31. *Id.*, annex II.

32. See NATO's Role, *supra* note 6, at 3.

33. *Id.*

34. Interim Agreement for Peace and Self-Government in Kosovo, February 23, 1999, <http://www.suc.org.kosovo-crisis/documents/kia 0223.html>.

35. *Id.*, Framework and ch. 1, Constitution.

36. *Id.*, ch. 7.

37. *Id.*, ch. 8, art. 1(3).

38. See NATO's Role, *supra* note 6, at 3.

39. *Id.*; *The Rationale for Air Strikes*, Editorial, N.Y. TIMES, March 24, 1999, at A26, col. 1; Jane Perlez, *NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit*, March 24, 1999, N.Y. TIMES, at A1, col. 6.

40. Javier Solana, Statement by NATO Secretary-General on Air Strikes, March 23, 1999, <http://more.abcnews.go.com/sections/world/ DailyNews/solana transcript.html>.

41. *Id.*

42. Steven Lee Myers, *Early Attacks Focus on Web of Air Defense*, N.Y. TIMES, March 25, 1999, at A1, col. 1.

43. N.Y. TIMES, March 25, 1999, at A15, col. 2. In the President's words: "We act to prevent a wider war." *Id.*

44. Quoted in Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, March 25, 1999, at A13, col. 1.

45. NATO HQ, Brussels, Press Conference by Jamie Shea and General Wesley Clark, April 13, 1999, at 4, <http://www.nato.int/docu/speech/1999-/s990413a. htm>.

46. *Id.*

47. *Id.* at 5.

48. See Steven Lee Myers, *NATO Raid Hits China Embassy; Beijing Cries "Barbarian Act"; Allies Admit Striking Hospital*, N.Y. TIMES, May 7, 1999, at A1, col. 6 (includes a chart entitled "As War Continues, Errors Mount," showing that, from March 24 until May 7 when NATO accidentally hit the Chinese Embassy, eight errors had occurred, targeting residential areas, a bus, a train, a hospital, and refugees).

49. *Id.*

50. Statement by Secretary-General Kofi Annan on Kosovo Crisis, Press Release SG/SM/6972, April 28, 1999, <http://www.globalpolicy.org/security/issues/kosovo34.htm>.

51. *Id.*

52. Eve-Ann Prentice, *Cost of NATO Damage Estimated at $29 Billion*, LONDON SUNDAY TIMES, Overseas News Section, July 23, 1999. The article describes the Serbian group conducting the study as being seen by many western diplomats in Belgrade to be a "reliable source of economic information." *Id.*

53. *Id.*

54. *Id.*

55. *Destruction, Casualties, Costs and Other Facts in the War Over Kosovo*, AP, June 10, 1999, at 1, <http://www.globalpolicy.org/security/issues/kosovo76.htm>.

56. *Id.* at 1–2.

57. See, e.g., Steven Lee Myers, *The Toll—Damage to Serb Military Less than Expected*, N.Y. TIMES, June 28, 1999, at A1, col. 2; Richard J. Newman, *The Bombs That Failed in Kosovo*, U.S. NEWS & WORLD REPORT, Sept. 20, 1999, at 28 (noting that, while NATO reported that Allied pilots had hit 110 tanks, 210 armored personnel carriers, and 449 towed artillery mortars, NATO teams subsequently found only 26 tanks, 12 armored personnel carriers, and 8 pieces of artillery mortars destroyed in Kosovo).

58. Damage to Yugoslav Environment "Immense," UN Team Reports, 1, <http://ens.lycos.com/ens/jun99/1999L-06-29-02.html>.

59. *Id.* at 2.

60. See Fred Pearce, *Atrocity Stories*, NEW SCIENTIST, Sept. 11, 1999, at 46.

61. *Damage in Kosovo Less than Thought*, World Bank Says, AP, July 13, 1999, at 1–2 <http://www.2.star tribune.com/cgi-bin/stONLINE/article?this Slug=KOSO0713>.

62. See Ved Nanda, *It's Time for a Diplomatic Solution*, DENVER POST, May 6, 1999, at B7 (calling for an end to the bombing in favor of a diplomatic solution).

63. U.N. Doc. S/1999/516, May 6, 1999. For an excerpt from the statement by the Foreign Ministers of the Group of Eight, see also AP, *Group of Eight's Kosovo Statement*, May 6, 1999, at A14, col. 1.

64. *Id.*

65. For an insightful account of the long process, see Blaine Harden, *Crisis in the Balkans: Doing the Deal—A Special Report; A Long Struggle That Led Serb Leader to Back Down*, N.Y. TIMES, June 6, 1999, sec. 1, at 1, col. 4.

66. See *NATO Envoy on Talks with Milosevic*, N.Y. TIMES, June 4, 1999, at A23, col. 4.

67. For the text of the proposal, see *Kosovo Peace Accord: 10 Steps to a Verifiable End of Violence*, N.Y. TIMES, June 4, 1999, at A20, col. 2 [hereinafter *Kosovo Peace Accord*]. See also Steven Erlanger, *Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo*, N.Y. TIMES, June 4, 1999, at A1, col. 5; Tim Judah, *What Do We Do With Serbia Now? id.* at 29A, col. 2; Editorial, *The Kosovo Peace Plan*, *id.* at 28A, col. 1; Michael Wines, *Reception in Moscow for*

Accord is Scalding, N.Y. TIMES, June 5, 1999, at A7, col. 6; Edmund L. Andrews, *Russians and NATO Negotiating Pact Details*, *id.* at A6, col. 1.

68. *Kosovo Peace Accord*, *supra* note 67, principle 4.

69. *Id.*, principle 10.

70. S.C. Res. 1244, U.N. SCOR, 54th Session, 4011th meeting, U.N. Doc. A/Res/1244 (1999).

71. See *NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo*, U.N. Press Release SC/6657, March 24, 1999, at 1.

72. *Id.*

73. *Id.*

74. *Id.* at 9.

75. *Id.* at 9–10.

76. *Id.* at 3–4.

77. *Id.* at 8–9.

78. *Id.* at 4.

79. *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, U.N. Press Release SC/6659, March 26, 1999, at 1. The Council had met pursuant to a 24 March letter from Russia to the Council President. The letter asked that an urgent meeting of the Council be convened to consider "an extremely dangerous situation caused by the unilateral military action of the North Atlantic Treaty Organization (NATO) against the Federal Republic of Yugoslavia." *Id.* at 2. The text of the draft resolution (U.N. Doc. S/1999/328) follows:

> The Security Council,
> Recalling its primary responsibility under the United Nations Charter for the maintenance of international peace and security,
> Deeply concerned that the North Atlantic Treaty Organization (NATO) used military force against the Federal Republic of Yugoslavia without the authorization by the Council,
> Affirming that such unilateral use of force constitutes a flagrant violation of the United Nations Charter, in particular Articles 2(4), 24 and 53,
> Recognizing that the ban by NATO of civil flights in the airspace of a number of countries in the region constitutes a flagrant violation of the principle of complete and exclusive sovereignty of every State over the airspace above its territory in accordance with article 1 of the Chicago Convention on International Civil Aviation,
> . . . ,
> Reaffirming its commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,
> Determining that the use of force by NATO against the Federal Republic of Yugoslavia constitutes a threat to international peace and security,
> Acting under Chapters VII and VIII of the Charter,
> 1. Demands an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations;
> 2. Decides to remain actively seized of the matter.

80. S.C. Res. 1239, U.N. SCOR., 55th Sess., 4003rd meeting, U.N. Doc. S/Res/1239 (1999), operative para. 2.

81. *Id.*, para. 5.
82. *Security Council Calls for Access for UN and Other Humanitarian Personnel Operating in Kosovo and Other Parts of Federal Republic of Yugoslavia*, U.N. Press Release SC/6677, May 14, 1999, at 5.
83. *Id.*
84. *Id.* at 6.
85. See U.N. Doc. S/1999/523, May 7, 1999, for the text of the letter.
86. *China, at Security Council Meeting, Registers Strongest Possible Protest Over Attack Against Its Embassy in Belgrade*, U.N. Press Release SC/6674, May 8, 1999, at 2.
87. *Id.* at 3.
88. *Id.*
89. See *id.*
90. See *id.* at 3–8.
91. *Supra* note 4.
92. *Id.*, para. 5.
93. *Id.*, para. 1 & annexes 1, 2. See also *supra* notes 63, 64, 66, 67.
94. *Id.*, para. 3.
95. *Id.*, para. 6.
96. *Id.*, para. 9.
97. *Id.*, para. 10.
98. *Id.*, para. 11.
99. See, e.g., Carlotta Gall, *Kosovo Rebel Leader Basking in Warmth of Deal's Reception*, N.Y. TIMES, Sept. 22, 1999, at A8, col. 1; Carlotta Gall, *Kosovo Liberation Army Yields, Agreeing to Civilian Role*, N.Y. TIMES, Sept. 21, 1999, at A8, col. 3; *KLA Signs Weapons Pact*, Online Network, BBC News, Sept. 20, 1999, <http://news2.thls.bbc.co.uk/hi/english/world/europe/newsid 452000/452915.stm>.
100. ICJ, Case Concerning Legality of Use of Force (Yugoslavia v. Belgium); Request for the Indication of Provisional Measures, General List No. 105, June 2, 1999, reprinted at 38 I.L.M. 950, 950 (1999) [hereinafter Yugoslavia v. Belgium].
101. ICJ, Legality of Use of Force (Yugoslavia v. Canada), reprinted at *id.* at 1037 (1999).
102. ICJ, Legality of Use of Force (Yugoslavia v. France), reprinted at *id.* at 1059.
103. ICJ, Legality of Use of Force (Yugoslavia v. Germany), reprinted at *id.* at 1075.
104. ICJ, Legality of Use of Force (Yugoslavia v. Italy), reprinted at *id.* at 1088.
105. ICJ, Legality of Use of Force (Yugoslavia v. Netherlands), reprinted at *id.* at 1101.
106. ICJ, Legality of Use of Force (Yugoslavia v. Portugal), reprinted at *id.* at 1126.
107. ICJ, Legality of Use of Force (Yugoslavia v. Spain), reprinted at *id.* at 1149.
108. ICJ, Legality of Use of Force (Yugoslavia v. United Kingdom), reprinted at *id.* at 1167.
109. ICJ, Legality of Use of Force (Yugoslavia v. United States), reprinted at *id.* at 1188.
110. See *id.* at 951, para. 3.
111. *Id.* at 953, para. 7.
112. See *id.* at 954.
113. *Id.* at 955–956, paras. 16–19.
114. *Id.* at 956, para. 21.
115. ICJ Statute, art. 36, para. 2.
116. Yugoslavia v. Belgium, *supra* note 100, at 957, para. 28. See also *id.*, paras. 24–27.
117. *Id.* at 957–958, para. 29.
118. *Id.* at 961–962, para. 51(1).
119. *Id.* at 958–960, paras. 34–41.

120. *Supra* notes 101–109.
121. *Supra* note 109, at 38 I.L.M. 1193–1194, paras. 21–25.
122. *Supra* note 107, at 38 I.L.M. 1157, paras. 23–33.
123. *Supra* note 108, at 38 I.L.M. 1175, paras. 23–25.
124. Yugoslavia v. Belgium, *supra* note 101, at 961, para. 46.
125. *Id.*, paras. 47, 49.
126. *Id.*, para. 48.
127. For a report suggesting that President Clinton was too distracted by impeachment hearings to pay adequate attention to the Kosovo crisis, see Elaine Sciolino & Ethan Bronner, *How a President, Distracted by Scandals, Entered Balkan War*, N.Y. TIMES, April 18, 1999, sec. 1, at 1, col. 2.
128. See, e.g., Ved Nanda, *supra* note 62; Steven Erlanger, *Fruit of Miscalculation*, N.Y. TIMES, June 4, 1999, at A1, col. 3.
129. Article 2, paragraph 4, enumerates as one of the Charter principles: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
130. U.N. CHARTER arts. 39–51.
131. U.N. CHARTER arts. 52–54.
132. Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

133. Article 53(1) reads in part: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ."
134. *Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General in Address to General Assembly*, U.N. Press Release GA/9595, Sept. 20, 1999, at 3 [hereinafter Secretary-General's Address].
135. *Id.*
136. *Id.*
137. Secretary General Kofi Annan, Address to the General Assembly, Sept. 20, 1999, quoted in Barbara Crossette, *U.N. Chief Wants Faster Action to Avoid Slaughter in Civil Wars*, N.Y. TIMES, Sept. 21, 1999, at A1, col. 3.
138. *Bulletin Broadfaxing Network, Inc., Clinton Outlines International Vision in Major Address, Calls for Large UN Role in World Affairs*, White House Bulletin, Sept. 21, 1999.
139. *Id.*
140. *Id.*
141. See notes 129–133 and accompanying text for other exceptions on the legitimate use of force.

142. Michael F. Glennon, *The New Interventionism—The Search for a Just International Law*, FOREIGN AFFAIRS, May/June 1999, at 2.

143. See generally Ved Nanda, et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law*—Pt. II, 26 DENV. J. INT'L L. & POL'Y 827 (1998).

144. See *supra* notes 91–98 and accompanying text.

145. *Supra* note 134.

146. Secretary General's Address, *supra* note 134, at 4.

147. *Id.*

148. *Id.*

149. See Ved Nanda, et al., *supra* note 143, at 827.

150. See *Exodus From Kosovo Underway—U.N. Reports 195,000 Serbs Have Fled the Province (According to a UNHCR Report)*, ABCNews.com, Aug. 25, 1999, <http://abcnews.go.com/sections/world/DailyNews/Kosovo Serbs Flee 990825.html>.

XIV

Making Law of War Treaties

Lessons from Submarine Warfare Regulation

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THE PAST QUARTER CENTURY has seen an outpouring of treaties regulating or prohibiting battlefield conduct. In the early to mid-1970s, separate multilateral negotiations produced the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques[1] and Protocols I[2] and II[3]Additional to the Geneva Conventions of August 12, 1949. A subsequent conference produced the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (UNCCW[4]) of October 10, 1980, and its three protocols.[5] Negotiation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction[6] was completed in 1992, and the treaty was opened for signature on January 13, 1993. In 1994 the United Nations began preparatory sessions for the first review conference of the UNCCW, which concluded on May 6, 1996, with an amended land mines protocol and a new protocol prohibiting blinding laser weapons.[7] Dissatisfied with the amended land mines protocol's regulation

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and partial prohibition (rather than total prohibition) of antipersonnel land mines, nongovernment organizations (NGOs) and the Government of Canada rushed through a conference that resulted in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of September 18, 1997.[8] On July 17, 1998, the United Nations Diplomatic Conference on the Establishment of an International Criminal Court produced the Rome Statute of the International Criminal Court.[9] A diplomatic conference was held in The Hague from March 15 to 26, 1999 to promulgate a second protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.[10] Planning already is underway for the second UNCCW review conference, to be held not later than 2001, to consider the possibility of regulating or prohibiting other conventional weapons.[11]

The list of recent and possible future law of war legislation reflects a prodigious effort on the part of the international community. Equally impressive on its face is the number of States Parties to these and other law of war treaties. Whereas there are only thirty-four States Parties to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of October 18, 1907,[12] and the Annex Thereto,[13] there are 188 States Parties to the Geneva Conventions for the Protections of War Victims of August 12, 1949,[14] and 156 States Parties to the 1977 Additional Protocol I.

But the value of the law of war depends less on codification and ratification or accession of treaties than on effective implementation and observance. The urgency to create the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,[15] the International Criminal Tribunal for Rwanda,[16] and, subsequently, the International Criminal Court, is clear evidence that codification and ratification or accession mean little without effective implementation. Evidence of any implementation, much less effective implementation, by States Parties to Additional Protocols I and II, or the 1980 Conventional Weapons Convention and its protocols, or even the older 1949 Geneva Conventions, is lacking and, for many States Parties, nonexistent. Although the Diplomatic Conference that promulgated Additional Protocol I concluded its work twenty-two years ago, there is little evidence of implementation of its obligations by States Parties,[17] and the treaty has yet to be tested by the harsh realities of combat.[18]

In 1999, some governments and the International Committee of the Red Cross (ICRC) were engaged in a futile headlong rush to create more law of war legislation in celebration of the centennial of the First Hague Peace Conference,

or the fiftieth anniversary of the 1949 Geneva Conventions. The ICRC and other NGOs as well as some governments, flushed with their perceived successes in Ottawa and Rome, also are casting about to find other areas to legislate in their effort to regulate or limit, if not entirely prohibit, the taking up of arms.[19]

The real success of recent efforts in Ottawa and Rome remains to be seen. As is true with cooking, the proof is in the eating rather than the making. The lessons of history offer some evidence of the probability of success. Governments and NGOs would be well advised to examine those lessons heralding recent legislative "successes" or advocating new legislative ventures.

Clear lessons are available from the between-the-wars endeavor by nations to prohibit or regulate submarine warfare. The product of nearly two decades' effort involving numerous conferences was a spectacular failure when confronted by the crucible of war. The legal history of the law of submarine warfare was reported in the late Professor W. T. Mallison's 1966 volume in the Naval War College's International Law Studies.[20] Subsequent scholarship and examination of the military, political, economic and diplomatic environment in which these negotiations occurred provides a more complete picture of that history.

Regulating Submarine Warfare: A Preface

Near-continuous negotiations between 1919 and 1936 produced a single document regulating submarine warfare. The 1936 *Procés-Verbal* Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930[21] declares:

> The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

At the outset of World War II, forty-nine nations were States Parties.[22] Yet the rules quickly proved a failure in that conflict. Each of the major naval powers—Germany, Italy, Japan, United Kingdom, and the United States—willingly and systematically violated its provisions. While Germany, Italy, and the United Kingdom moved steadily away from compliance, the departure of Japan and the United States from compliance was instant and unhesitating. As will be shown, recent scholarship revealed that the U.S. decision was premeditated.

Upon conclusion of that conflict, Germany's naval leadership[23] was charged by the International Military Tribunal at Nuremberg with waging unrestricted submarine warfare contrary to the London Naval Protocol. That tribunal acquitted each accused of the charge for Germany's attack of British armed merchant ships, but found each guilty of violation of the protocol with respect to the attack of neutral merchant vessels by German U-boats and its rescue provisions. However, in light of evidence offered of similar conduct by British and U.S. submarines, the court awarded no punishment for these infractions.[24]

This summary provides the framework for the analysis that follows: the rejection by all principal State Parties of a treaty devised in the years immediately preceding the conflict, by (at least in theory) persons fully seized with the issue and the experience of a previous conflict to assist them in their negotiation efforts.

Initial Regulation Efforts, 1899–1914

Consideration of the possibility of regulation or prohibition of submarines began at the turn of the century. On August 24, 1898, acting on behalf of Tsar Nicholas II, Russian Foreign Minister Mikhail Muraviev proposed the convening of an international disarmament conference to address issues relating to disarmament, the proscription or regulation of certain modern weapons of war, and establishment of a mechanism for arbitration of international disputes.[25] Although other governments were suspicious of Russian motives, none felt that they could afford not to attend, and the First Peace Conference was convened in The Hague on May 18, 1899. Among its proposals, the Russian government offered to abstain from submarine construction provided all other governments agreed.[26] As was true of its rationale for calling the conference, Russia's motivation for its proposal was primarily economic; with a dreadnought construction race on, abolishing the new, unknown submarine would reduce naval acquisition costs.[27] Great Britain, Germany, Italy, Japan, and Romania expressed a willingness to accept the Russian proposal if it were adopted by consensus. Other nations—Belgium, Greece, Persia, Siam, and

Bulgaria—favored a prohibition, but with reservations. Ten nations, including the United States, France, Austro-Hungary, Denmark, Spain, Sweden, Norway, the Netherlands, and Turkey, strongly resisted the proposal, while Serbia, Switzerland and, ironically, Russia, abstained. Lacking unanimity, it failed.[28] Of note is the fact that the proposal was introduced as an arms control rather than a law of war issue. Although "humanitarian" arguments were made in subsequent conferences, the issue of controlling submarines remained primarily one of arms limitation, not the law of war. By 1907, more nations—including Russia and Germany—had acquired submarines.[29] As a consequence, neither the original Russian proposal nor any new proposal to regulate or prohibit submarines was offered at the Second Hague Peace Conference in 1907. Nor was the submarine the subject of special consideration in the subsequent London conference of major naval powers that produced the Declaration Concerning the Laws of Naval War.[30]

This should not be surprising. In the pre-World War I era, the submarine was a relatively unknown but emerging capability. Nations were unwilling to surrender it unilaterally or prohibit it without universal agreement; most undoubtedly preferred to take a wait-and-see attitude. By 1912, the world's major navies were building a substantial number of submarines.[31] Its anticipated role was seen primarily as scouting and support for the battle fleet.[32] Limitations on employment of submarines in a visit and search role were recognized by then-First Lord of the Admiralty Winston Churchill who, in June 1913, acknowledged that the submarine "cannot capture the merchant ship; she has no spare hands to put a prize crew on board . . . she cannot convoy her into harbor. . . . There is nothing else the submarine can do except sink her capture. . . ."[33] The potential for use of submarines for attacks on commerce had been forecast. Six months prior to the beginning of World War I, Admiral of the Fleet Sir John Fisher advised the Prime Minister that Germany would likely employ her submarines for that purpose. As his biographer notes:

> The [Royal] Navy recognized the danger; and the only doubt was whether Germany, owing to the impossibility of differentiating between belligerent and neutral, would risk bringing neutrals into the war. Germany did what Fisher had forecasted; and in consequence, what others had foreseen also happened, namely, that the United States was drawn into the war.[34]

British anticipation of probable German use of submarines was not met with a commensurate degree of preparation for antisubmarine warfare. Subsequent British conduct makes it probable, however, that having recognized the likely

outcome if a merchant ship carrying contraband was stopped by a German submarine, the decision was taken that British merchant ships would actively resist visit and search if attempted by a German submarine.

German use of submarines in World War I would change naval warfare, but changes already were occurring in warfare that led to Germany's actions. The nation-State system had produced an environment in which a nation went to war with an enemy nation as a whole, rather than merely waging war against the enemy's military forces.[35] Attacking a nation's ability to wage war included denying it seaborne commerce. The advent of the naval mine, submarine, and shore-based aircraft made close blockade difficult.[36] Distant blockade became an alternative, and the submarine a viable force option notwithstanding recognized limitations on its use in that role.

The story of Germany's use of its submarines in World War I is well known.[37] Its employment of its submarines as commerce raiders virtually brought Great Britain to its knees. But its resort to unrestricted submarine warfare, which resulted in the sinking of the British passenger ship *Lusitania* by *U-20* on May 7, 1915, with the loss of 1,198 passengers (twenty-eight Americans), and neutral vessels, was a major step in bringing the United States into the war on the side of the British and its allies.[38] The end of World War I began an effort to prohibit or regulate submarine warfare that would continue for almost two decades.

International Regulation Efforts, 1919–1936

The conclusion of World War I raised two initial issues with respect to submarine warfare: prosecution of German U-boat personnel for engagement in unrestricted submarine warfare, and disposition of the German U-boat fleet. With respect to the former, whether unrestricted submarine warfare was a crime for which U-boat commanders and crews could be held criminally responsible was debated during the war.[39] Allied demands at the end of the war for prosecution of Germans accused of war crimes, including U-boat personnel, proved only marginally successful.[40]

The conduct of nations in World War I raised a legal issue in clear terms. Although enemy and neutral merchant vessels historically have been regarded as noncombatants,[41] the status of the former had been challenged by the new theory of nation-State wars, and further complicated by distinctions made in diplomatic correspondence during that conflict between public and private vessels of a belligerent, and the status of either when armed:[42] in some cases manning their guns with military personnel; commissioning their captains as members of the Royal Naval Voluntary Reserve; directing them to report any sighting of a

U-boat; and ordering them not to subject their ships to visit and search, but instead to ram and sink the challenging U-boat.[43] Some belligerent merchant vessels were converted into heavily armed decoy ships, displaying false flags, known as "Q-ships." The decoy ship posed as a neutral merchant vessel until the unsuspecting U-boat approached, having ordered the merchant ship to stop to be searched. At the submarine's most vulnerable time, the Q-ship crew, members of the Royal Navy dressed in civilian clothing to disguise their true identity, would open fire with heavy guns from previously concealed positions.[44] The issues had been identified, viz., (a) when does an enemy merchant ship forfeit its noncombatant status, and (b) what rules should apply to submarines in light of the changes brought about by (a)?[45] Failure to address these critical issues in the post-World War I series of multilateral negotiations was a primary cause for the subsequent failure of the 1936 *Procés-Verbal* regulating submarine warfare.

The second issue was U-boat disposition. Germany surrendered its High Seas Fleet, including 176 U-boats. Another seven foundered en route to Great Britain. Ten older, unseaworthy U-boats and 149 boats under construction were broken up, and German submarine salvage vessels and docks were turned over to the Allied and Associated Powers.[46] Their disposition could decide the future of submarine warfare.

Paris Peace Conference. In anticipation of the Paris Peace negotiations, the American Naval Planning Section London considered the potential use of submarines. In a memorandum completed only days before the end of the war, its authors reached several conclusions with regard to the issues at hand and future use of submarines. The submarine, the authors asserted, "has an undoubted right to attack without warning an enemy man-of-war *or any vessel engaged in military operations* and not entitled to immunity as a hospital ship, cartel ship, etc."[47] After recognizing the limitations of submarines in visit and search, and the "inherent right" of merchant ships to be armed, the authors stated that "Submarine operations in the present war may be considered to be typical of what may be expected in future wars, when success is dependent on the result of commerce. . . . It is interesting to note the several phases of submarine operations in the present war as illustrating the tendency to develop maximum efficiency regardless of legal restrictions."[48]

Continuing, the memorandum noted the success of German U-boat operations against Great Britain, "the greatest naval power as well as the greatest mercantile power in the world." It considered the value of submarines in a future conflict to other naval powers, noting Japan's potential submarine threat

to U.S. lines of communications. The U.S. counter was that "our submarine bases on the Philippines and Guam would be within striking distance of her coasts and would be a great threat *to the commerce on which her existence depends*...."[49]Having recognized the military potential of the submarine as an effective commerce raider, the memorandum took an ironic twist, recommending the abolition of the submarine not for humanitarian reasons but because "our public opinion would never permit their use in the same manner as that of our adversaries."[50]

The memorandum was forwarded to Washington with an unfavorable endorsement by Admiral William S. Sims, Force Commander of American Naval Forces operating in European Waters, who stated that "The Force Commander does not consider that the arguments put forward by the Planning Section in this paper are logical, nor that they support the conclusions reached. The paper is therefore forwarded without approval for consideration by the Department [of the Navy]."[51] Although the memorandum's recommendations were for naught, its value lies in its recognition of the potential and likely employment of the submarine in future conflicts.

The issue would not be resolved at the Paris Peace Conference, as it was regarded as beyond the scope of that conference and more in the purview of the League of Nations. The conferees ultimately distributed former German U-boats to France (ten), Japan (seven), and the United States (six). The remaining U-boats were broken up.[52]

The Paris Peace Conference exacerbated a growing naval rivalry between Japan, Great Britain, and the United States. Although allies during World War I, Japan and the United States previously had identified each other as potential foes in any future Pacific naval war; Great Britain joined in the assumption of war with Japan following World War I.[53] Japan's receipt of the former German Pacific mandates (Marianas, Caroline, and Marshall groups, without providing a verification mechanism to ensure it kept its pledge not to fortify the islands) in the Paris Peace settlement, in part as a reward for its alliance against Germany, increased the concern of British-American naval leaders.[54] It also was to be a factor in the American decision to resort to unrestricted submarine warfare more than two decades later.

In 1919, however, nations were engaged in the inevitable postwar retrenchment of military forces. Great Britain's national debt had soared during the five years of World War I. Major cuts in government spending were paramount, and no costs were more apparent than naval shipbuilding. The issue was framed all the more by the belief by many that the pre-World War I naval arms race was a major cause of that war. Against these beliefs was the genuine desire

by Great Britain that she retain her naval and mercantile supremacy upon the high seas, and the recognition that much of its pre-war fleet was reaching block obsolescence. The Royal Navy's dilemma was heightened by the changes in naval construction made necessary by the submarine threat: hull blisters to protect against torpedoes, more extensive internal subdivision within the ship into watertight compartments, higher speeds, and an increased need for antisubmarine vessels.[55] A call by U.S. Secretary of State Charles Evans Hughes on July 8, 1921, for a conference on the limitation of armament to be held in Washington, therefore, came as welcome news to Great Britain. A ban on submarines would eliminate a threat to its naval and mercantile supremacy while reducing its naval shipbuilding costs. The Washington Naval Conference, convened four months later, would provide Great Britain its first and best opportunity to prohibit the submarine as an instrument of war.[56] With Germany theoretically (or at least temporarily) eliminated as a threat, Great Britain's budgetary and naval defense planning problems could be eased substantially by prohibition of one of the greatest threats to its naval and commercial shipping superiority.

The three major naval powers (U.K., U.S. and Japan) shared a belief in the Mahanian doctrine of *guerre d' excadre*, which emphasized command of the seas through fleet engagements, rejecting the doctrine of *guerre de course*, or attacks on commerce.[57] This philosophy drove the debate in negotiations between the wars and, in particular, British efforts to abolish the submarine. Those efforts failed in part because the belief in *guerre d' excadre* erroneously assumed that each future opponent would play to the opposite's strong suit, that is, the three major powers assumed that future enemies would choose to attack their opponent where he was strongest rather than weakest.

Washington Naval Conference. Submarines were an important issue at the Washington Conference on the Limitation of Armaments, but not the most important.[58] The meeting's primary purpose was to stop the capital ships arms race between the three major naval powers. The host nation opted to meet the issue head-on. In the opening plenary session on November 12, 1921, U.S. Secretary of State Charles Evan Hughes proposed a tonnage ratio for capital ships for the three major naval powers that would require the scrapping of a large number of commissioned vessels and a stop-and-scrap program for new capital ships under construction. Hughes' ratio of 5:5:3 (U.S., Great Britain, and Japan, respectively) met with considerable resistance from Japan, which favored a 10:10:7 ratio, but ultimately accepted it with conditions.[59] In return for Japan's agreement to this ratio, the United States and Great Britain could not fortify any of their respective territories within striking distance of Japan.[60]

While the original U.S. proposal (5:5:3) considered only the naval armament of the three principal naval powers, an effort to extend the formula to France and Italy in the course of the conference had an effect on the submarine issue. France balked at the formula proposed of 5:5:3:1.67:1.67,[61] eventually accepting a 5:5:3:1.75:1.75 tonnage ratio provided it did not extend to auxiliary vessels, such as cruisers, destroyers and submarines. This was the first of several ploys by the participating powers, and served to enable the submarine to evade prohibition—which France vehemently opposed—while introducing the alternative of use regulation.

The British attempt to abolish the submarine, opposed by France, Japan, Italy, and the United States, and offered against the advice of the American delegation, had an overly optimistic goal and an ulterior motive. If Great Britain could achieve the abolition of the submarine, the threat would be removed. If it could not, it would use that fact to insist that the tonnage ratio not extend to cruisers, which it used not only in antisubmarine operations but also for most of its peacetime naval missions.[62] Failing attainment of a submarine prohibition, a submarine tonnage ratio was proposed by the U.S. delegation. The British resisted, arguing that if a total prohibition could not be achieved, tonnage ratios should be substantially lower than those proposed by the United States, and there should be an express prohibition on ocean-going (as opposed to coastal) submarines whose primary use would be commerce destruction. This argument played well in the media and with the American public, which the British fully exploited. Over the next month the American delegation received over 400,000 letters and telegrams urging abolition or drastic limitation of submarines, with only 4,000 supporting submarine retention. Notwithstanding assurances by the British that its proposals had neither unworthy nor selfish motives, but that it was acting solely "on the highest of humanitarian principles," and domestic pressure on the U.S. delegation to support the British proposals, agreement as to abolition or to tonnage limitations was not possible. Japan viewed its ability to build submarines in parity with the United States and Great Britain as one of its few successes at the Washington Conference.[63]

It was at this moment that Elihu Root, former United States Senator, former Secretary of War and Secretary of State, and a member of the U.S. delegation, introduced the idea of regulating submarines as commerce destroyers. The Root resolution not only proposed new rules relating to visit and search, but also stipulated that the members of a submarine crew violating its provisions would be subject to international prosecution as pirates.

The proposal met with almost as much opposition as the British argument for total abolition, not the least initially from the British delegation, which

feared its piracy provision would place its own submarine commanders and crews at risk.[64] The French, Italian, and Japanese delegations, while agreeing with the resolution's aim, raised doubts as to its clarity and legal correctness. They suggested its referral to a committee of jurists for further study. This effort received an acid rejoinder from Root, declaring that neither he nor his resolution would be "buried under a committee of lawyers."[65] Continuing, he argued that the while the resolution might be ineffective "if made between diplomats or foreign offices or governments," he believed that if its rules "were adopted by the conference and met with the approval (as would surely be the case) of the great mass of the people, the power of the public opinion would enforce them."[66] Efforts to clarify basic terms, such as "merchant ship," were firmly refused by the United States and Great Britain. After considerable debate, with slight modifications, the Root Resolution was adopted as the Submarine Treaty, as follows:[67]

Resolutions proposed by Mr. Root	*The Submarine Treaty, Articles I-IV*
	Article I
I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:	The signatory powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law:
1. A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured.	(1)A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.
A merchant vessel must not be attacked unless it refuses to stop for visit and search after warning.	A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.
A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.	A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.
2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires that it desist from attack and from capture and to permit the merchant vessel to proceed unmolested.	(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the the merchant vessel to proceed unmolested.

The signatory powers invite the adherence of all other civilized powers to the foregoing statement of established law to the end that there may be clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.	Article II The signatory powers invite all other civilized powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the world public opinion is to pass judgment upon future belligerents.
II. The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations, they declare their assent to such prohibition and invite all other nations to adhere thereto.	Article IV The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-18, the requirements universally accepted by civilized nations for the the protection of the lives of neutrals and noncombatants, and to that end the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.
III. The signatory powers, desiring to insure the enforcement of the humane rules declared by them with respect to the prohibition of the use of submarines in warfare, further declare that any person in the service of any of the powers adopting these rules who shall violate any of the rules thus adopted, whether or not such person is under orders of a government superior, shall be liable to trial and punishment as if for an act of piracy, and may be brought to trial before the civil or military authorities of any such powers within the jurisdiction of which he may be found.	Article III The signatory powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any power who shall violate any of those rules, whether or not such person is under the orders of a government superior, shall be deemed to have violated the laws of war and shall be liable to trial before the civil or military authorities of any power within the jurisdiction of which he may be found.

In its re-worded form, the Root Resolution was adopted by the conference with an express stipulation demanded by Root that a forthcoming commission of jurists would *not* have authority to examine it.[68] Its survival was at risk from the outset.[69] Its intent was to accomplish through ambiguous regulation what could not be achieved through express prohibition.[70] It did not resolve issues raised in the recent war. The well-established legal distinction between commerce raiding and blockade, blurred by both sides during that conflict, was not

addressed. Efforts to clarify the term "merchant ship" with respect to the distinction between unarmed neutral and armed belligerent merchant ships were blocked by Senator Root and vehemently opposed by the British delegation. Despite efforts to clarify this critical question by Italy and Japan—with France discreetly supporting but hiding behind each—the conferees, "in order to secure an outward appearance of agreement, studiedly evaded the real crux of the submarine problem; namely, the denial of merchant-ship privileges and immunities to armed merchant vessels."[71]

Ultimately, the 1922 Submarine Treaty would fail entry into force owing to France's refusal to ratify it.[72] Its problems had deeper roots: ambiguities in its most important terms and provisions, an imbalance between attacker and defender, a refusal to address the fundamental issue of the armed merchantmen, and a rush to reach agreement in response to the hysteria of popular demand rather than being based upon sound thinking.[73] An analysis by a U.S. naval submarine officer writing before World War II offered these criticisms:

> It is difficult to escape the conviction that the delegates were still influenced by the "spirit of Versailles." No attempt was made to consider the submarine problem calmly and realistically. . . . Questions concerning the legality or practicability of the rules were . . . swept aside. . . . [I]t represents a solution of the submarine problem which is chiefly emotional and far too simple in view of the complexity of the considerations involved.[74]

Of the treaties drafted at the Washington Conference, only the Submarine Treaty failed to gain the necessary support for entry into force.

Another mistake of the Washington Naval Conference was the exclusion of Germany as a participant. For the moment an international pariah and not a naval power, Germany's participation nonetheless may have provided an opportunity for a fuller, fairer consideration of the submarine issue.

The view of Germany and the German people with regard to the U-boat was substantially different from that of the British and others who favored abolition of the submarine. As was the case with the airplane,[75] the U-boat enjoyed popular support in Germany throughout the years between World Wars I and II[76] notwithstanding the provisions of the Treaty of Versailles prohibiting Germany from building or possessing either.[77] Germany saw the value of the submarine,[78] and was prepared to take the necessary steps to maintain its expertise in submarine design, development and construction. As was the case with military aircraft,[79] Germany wasted no time following Versailles in commencing work to maintain and enhance its submarine expertise.[80]

Geneva Naval Conference. Submarines remained a secondary issue in the years following the Washington Naval Conference. The major topic of international debate was cruiser strength, which was not resolved at Washington. Upon conclusion of that conference, Japan, Great Britain and the United States embarked on new cruiser construction programs.[81] Britain and the United States, experiencing tension in naval matters with one another that began following World War I, did not keep apace with Japanese auxiliary construction.[82] Under congressional pressure to stave off an arms race in auxiliaries (cruisers, destroyers, and submarines), on February 10, 1927, President Calvin Coolidge invited the leading naval powers to a new conference to seek resolution of that which could not be attained in Washington five years earlier.[83] France and Italy declined, sending observers only, but Great Britain and Japan agreed to meet with the United States in Geneva. As early as 1923 the Japanese had anticipated that the United States would call for a second naval conference, and that its purpose would be to bring auxiliary vessels under the Washington treaty ratio. It viewed this with great disfavor and opposed it tenaciously.[84]

Subsequently described as "one of the most dramatically unsuccessful international gatherings of the twentieth century,"[85] the conference was in trouble from the start. The United States believed that Great Britain sought superiority rather than parity with respect to auxiliary vessels. Agreement among the parties could not be reached for formulas as to numbers of cruisers, tonnage, or gun caliber (six-inch or eight-inch) due to fundamental differences with respect to national requirements. The Japanese refused to extend the 5:5:3 capital ship ratio to auxiliary vessels, reverting to insisting upon the 10:10:7 ratio it unsuccessfully sought for capital ships at Washington.[86]

While the conference ultimately faltered over cruiser strength issues, submarine disarmament was considered. In preparation for the Geneva Conference, a U.S. Navy study reported that while submarines would be of an advantage in the event of war with Japan, the U.S. Navy was at a point of numerical inferiority in submarines *vis-à-vis* Japan. The report concluded that submarines were "a vital element in any well-balanced fleet," and recommended that the United States oppose the abolition of the submarine unless there was universal agreement. Agreement on means for controlling the submarine race, such as displacement, maximum deck gun caliber,[87] or total submarine tonnage, could not be gained.[88] No consideration was given to improvement of the unadopted 1922 Submarine Treaty or to other possible regulation of submarine use, perhaps due in part to France's refusal to participate fully in the conference.[89]

As was the case at the Washington Naval Conference, Germany was not invited to participate in the Geneva Naval Conference. It remained busily engaged in clandestine rearmament, including submarine development.[90]

London Naval Conference. Several events occurred between the 1927 Geneva Disarmament Conference and the 1930 London Naval Conference that would color the approach to the latter. On March 4, 1929, Herbert Hoover succeeded Calvin Coolidge as President. A Quaker, Hoover vowed to stop the naval arms race. Three months later the Labor Party took office in Great Britain. There followed informal discussions between the two new governments. On June 24, 1929, British Prime Minister Ramsay MacDonald announced acceptance of naval parity with the United States, canceling work on two 10,000-ton cruisers and three submarines. In subsequent Anglo-American talks, the United States agreed to parity with the British with regard to submarines, provided agreement could be reached with regard to cruisers. On October 7, 1929, the British extended invitations to France, Italy, Japan and the United States to participate in a conference on naval disarmament in London to address categories of ships not covered by the Washington Treaty. The invitation was accepted, though not entirely as the British had hoped, and the conference convened on January 21, 1930.[91]

In many respects the parties were back to square one. The Washington Treaty's ten-year capital ship building holiday would expire at the end of 1931, and Great Britain, Japan, and the United States each were considering new battleship construction. The period was one of intense naval rivalry between France and Italy, while the former also was taking a number of steps to secure itself against the threat posed by the resurrection of Germany.[92] The Americans and British, having begun the process of settling the differences that were the hallmark of their naval rivalry during the 1920s, proceeded with a mutual interest in continuing the provisions of the Washington Naval Treaty for a period of five years, and extending its tonnage ratio to cruisers. As was true in Washington, delegation debates were heated, with Great Britain and the United States siding against Japan.[93]

On February 11, 1930, the First Lord of the Admiralty offered British arguments for abolition of the submarine, which included "the general interests of humanity"; the fact that the submarine was primarily an offensive rather than defensive weapon (to counter a long-standing French argument to the contrary);[94] the contribution such a move would make towards disarmament and world peace; the financial relief that would be possible through its prohibition; and the arduous conditions under which submarine crews had to serve.[95] He

suggested that if the assembled governments could not agree to abolish the submarine, efforts should be made to limit its size and numbers and to reconsider the rules set forth in the failed 1922 Submarine Treaty. In a reversal of its previous, long-standing position, the United States supported the British proposal for abolition.[96] France, Italy, and Japan remained opposed to submarine abolition.

Progress was made with respect to defining *standard displacement*, setting a limit on individual submarine displacement (a maximum of 2,000 tons, with an allowance for existing submarines above that displacement),[97] total tonnage (52,700 tons each for Great Britain, Japan, and the United States), and maximum gun caliber (5.1 inch). Japan was successful in its insistence upon parity in submarines.[98]

Failing a total submarine prohibition, which the British Admiralty did not believe possible, it offered for reconsideration in revised form the unadopted rules of the 1922 Submarine Treaty. One of the most contentious issues, however, that of belligerent rights at sea in time of war—the British opposite to the long-standing American principle of freedom of the seas—was kept off the agenda at the insistence of the British political leadership, even though critical to resolution of the submarine regulation issue.[99] Separate meetings of a committee of jurists produced abbreviated but complementary rules to those contained in the 1922 Submarine Treaty. Article 22 of the 1930 London Naval Treaty stated:

> The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.
>
> The High Contracting Parties invite all other Powers to express their assent to the above rules.

Gone were the piracy provisions. But in avoiding the differing British and American views, which in turn failed to consider issues such as the definition of *merchant ship*, the status of armed merchant ships,[100] and the flying of false flags, the participants had not resolved the overall problem. The rules had been revised with the hope that French objections to ratification of the 1922 Submarine Treaty could be overcome. But concern was expressed by British First Sea Lord Sir Charles E. Madden who, upon reading the revised rules, commented that "I am strongly in favor of supporting the French view [opposing the rules]. We will *certainly* wish one day to use submarines in a legitimate way against commerce."[101] The official British naval historian was less charitable, concluding that "As it was plainly impossible for submarines and aircraft to conform to the Hague Conventions applicable to surface warships this now appears to be an example of legalistic considerations obscuring practical realities."[102]

The London Conference concluded on April 22, 1930, with a treaty of limited parties (only Great Britain, Japan and the United States) and of limited duration (it expired December 31, 1936, except for its rules regulating submarine warfare, which were without time restriction). The repetition in its submarine warfare rules of the failure of the Washington submarine treaty to clarify the ambiguities with respect to "merchant ship" doomed any chance of their success.[103] Agreement as to many of the London Naval Treaty's key provisions came at what ultimately proved a very high price. Although Japan gained many of its demands, the agreement was roundly condemned by the Command Faction of the Imperial Navy, and was a factor in Japan's movement down the slippery slope to World War II.[104]

Germany, uninvited to the London Naval Conference, continued its progress in clandestine U-boat development.[105]

World Disarmament Conference. On February 2, 1932, after many years of preparatory sessions, the World Disarmament Conference convened in Geneva. The war clouds of World War II already were forming on the distant horizon. On September 18, 1931, Japanese and Chinese troops engaged in combat at Mukden. On January 28, 1932, only days before the Geneva disarmament conference, Japanese atrocities in its attack on Shanghai received worldwide media coverage.[106] Its many issues are beyond the scope of this paper. It adjourned *sine die* on June 11, 1934, without alteration of the status quo with regard to submarines.[107]

The failure of the World Disarmament Conference coincided with, or was immediately followed by, a number of events that reduced the likelihood of

further agreement with respect to submarines. On November 15, 1932, German authorities approved a plan for rebuilding the German Navy, to include construction of sixteen U-boats. Franklin Delano Roosevelt's assumption of the White House in January 1933 was followed almost immediately by the National Socialists assuming power in Germany. On January 16, 1933, the U.S. Congress passed the National Industrial Recovery Act, authorizing the President to use its funds to bring the Navy up to London Naval Treaty limits. Funds were appropriated for thirty-two ships, including four submarines. On October 13, 1933, the German leadership approved a new naval construction plan, authorizing larger U-boats while increasing construction of small U-boats to six per month. The following day, having been allowed to return to the community of nations, it withdrew from the World Disarmament Conference in Geneva. Japan's 1933 withdrawal from the League of Nations was followed by its formal notice in December 29, 1934, of its intention to withdraw from the 1922 Washington and 1930 London naval treaties, effective December 31, 1936. On March 27, 1934, Congress passed the Vinson-Trammel Act, authorizing the President to construct auxiliary naval tonnage adequate to bring the U.S. Navy, by 1942, up to the limits established by the Washington and London naval treaties. The twenty-eight submarines authorized were to be of the "maximum effective tonnage . . . that accords with Treaty provisions."[108] On March 16, 1935, German Führer Adolph Hitler renounced the disarmament clauses of the Treaty of Versailles. In April 1935 Germany publicly disclosed its intention to begin construction of submarines. Two months later Great Britain and Germany signed a naval agreement permitting Germany to possess a total tonnage in combatant vessels, equal to thirty-five percent of the aggregate tonnage of the British Commonwealth. Germany also was entitled to construct for its use submarine tonnage equal to the total tonnage of the British Commonwealth, with the agreement that it would not exceed 45 percent of the Royal Navy's submarine tonnage. Noting British acquiescence to Germany's demands in the Anglo-German Naval Agreement, on October 3, 1935, Italian dictator Benito Mussolini invaded Abyssinia in open defiance of the League of Nations.[109] This was the environment in which the second London Naval Conference convened on November 9, 1935.

Second London Naval Conference. Preparation for the anticipated follow-on London Naval Conference began one week after the end of the failed Geneva disarmament conference. The United States and Great Britain began meetings on June 18, 1934, that continued intermittently through December. Meetings in London with Japan began on October 16, 1934. On October 24, Japan

proposed abandonment of the Washington Treaty's ratio, and defended submarines as a defensive weapon. An impasse between the Japanese and Anglo-American positions was clear and, as previously noted, on January 29, 1934—even before the London Naval Conference convened—Japan announced its intention to rescind its obligations under the Washington and London naval treaties, effective December 31, 1936.[110]

Japan's announcement made the actual conference an anticlimax. Japan insisted upon full parity with Great Britain and the United States, which each refused on January 16, 1936. In reaction, Japan announced its withdrawal from the London Naval Conference, leaving the conferees with nothing more than an Article 22 of the 1930 naval treaty once that treaty's other arms control provisions expired on December 31, 1936.[111] Article 22 was adopted as the *Procés-Verbal* Relating to the Rules of Submarine Warfare Set Forth in Part IV of the London Naval Treaty of 1930.[112]

Post-London, 1936–1939

The downward slide to World War II continued. The Sino-Japanese War began on July 7, 1937, with combat between Chinese and Japanese forces in North China. Two months later, the Imperial Japanese Navy commenced a total blockade of China. Japanese attack on December 18, 1937, of the gunboat USS *Panay* on the Yangtze River prompted President Roosevelt to expand the Navy's strength. On March 31, 1938, in light of reports of Japanese naval construction beyond treaty limits, the United States, Great Britain, and France agreed to employ the escalator clauses of the 1936 London agreement. On December 12, 1938, Germany announced that it intended to increase its submarine tonnage to parity with Great Britain. Four months later, it abrogated the entire Anglo-German Naval Agreement.[113]

There would be one more effort at regulating submarines. The Spanish Civil War began in July 1936. On August 13, 1937, Italian submarines supporting the Nationalist forces of Spanish dictator Francisco Franco began unrestricted submarine attacks of merchant shipping, prompting British antisubmarine responses and a call for a conference to establish rules for submarine employment. At the request of Great Britain and France, nations with Mediterranean frontiers, less Spain, along with Germany, Russia, and Great Britain, met in Nyon, Switzerland, between September 6th and 13th. Their meeting produced an agreement of the same name that refers to the rules contained in the 1936 London *Procés-Verbal*, without any substantive modification or improvement. Their efforts were for naught, however, as the British were aware from their

interception of Italian signals that its submarine operations had been suspended two days before the conference began.[114]

The state of play on the eve of World War II was less than perfect. The vague, unadopted submarine rules of the 1922 Washington Conference formed the basis for the improved but equally vague Article 22 of the 1930 London Naval Treaty and the 1936 *Procés-Verbal.* Although the latter ultimately was adopted by all of the major users of submarines in World War II, its ambiguity did not lend itself to a likelihood of success. It failed to distinguish between public and private belligerent vessels, or armed belligerent ships and neutral merchant ships. Other issues needed to be addressed, clarified and resolved, either through a multilateral, bilateral or unilateral process. U.S. Navy officers, writing in the pages of the prestigious *Naval Institute Proceedings*, dissected the 1922 Washington submarine treaty, Article 22 of the 1930 London Naval Agreement, and the 1936 London *Procés-Verbal*, and highlighted their shortcomings.[115] The parties to the negotiations between the wars chose purposeful ambiguity to reach agreement, however flawed; they drafted ambiguous rules as an alternative for a prohibition they sought but could not achieve.

World War II: The Bloom Comes Off the Rose

World War II began on September 1, 1939, with Germany's invasion of Poland. Two days later, Great Britain and France declared war on Germany.[116] Each major submarine user took different roads at a different pace to abandonment of the rules contained in the 1936 London *Procés-Verbal.*

Germany. Initial orders to German U-boats were that they were to strictly observe the 1936 *Procés-Verbal*'s rules for visit and search, with three exceptions: enemy troopships, that is, vessels known from intelligence or actually observed to be carrying troops or war materiel; vessels in convoy, or any vessel escorted by warships or aircraft; or vessels taking a direct part in enemy actions, or acting in direct support of enemy operations, including intelligence gathering. Although France had declared war on Germany, U-boat commanders were ordered to take no hostile action against French ships, including combatants, other than in self defense.[117]

History repeated itself early. Germany stumbled badly in World War I with the sinking of the *Lusitania* on May 7, 1915, the ocean liner *Arabic* on August 19, and the liner *Hesperian* on September 9. As previously indicated, the sinking of the *Lusitania* and neutral vessels was a key factor in the U.S. decision to enter into the war against Germany.[118] Aware of this risk, Hitler for political

reasons insisted upon strict compliance with the rules for submarine visit and search. But on September 3, 1939, the first U-boat sinking of World War II occurred when *U-30* attacked and sank the British ocean liner *Athenia* (with a loss of 118 lives, including 28 Americans) when it was misidentified as a British auxiliary cruiser. Errors occur in war, but this error was compounded by the German decision to deny responsibility.[119]

The leading U-boat historian concludes that through the first seven months of the war, German U-boat commanders carried out their duties "in a fair—and at times even chivalrous—manner."[120] Hitler's decision to comply strictly with the 1936 London submarine rules added significantly to the risk for U-boat commanders, while reducing their effectiveness. Within days the ambiguities in the language of the 1936 *Procés-Verbal* became apparent, as U-boat commanders and the U-boat command sought clarifications or relaxation of Hitler's directive. The authority to attack belligerent merchant shipping was complicated by the knowledge that a ship might be using a false flag to conceal its identity, thereby forcing the U-boat to endeavor to visit and search, or might be a decoy ship.[121] On September 23, Admiral Karl Dönitz sought a relaxation of the directive to permit attack of neutral vessels carrying contraband in the North Sea. Hitler approved changes and clarifications that permitted the attack or capture of any merchant ship that made use of its radio to send the "SSS" (submarine alarm) on being stopped by a U-boat for visit and search; authorized the attack of French shipping; and British or French passenger ships carrying 120 passengers or less. Hoping to avoid a repetition of the *Athenia* sinking, large passenger vessels were not to be attacked. The following day he authorized the attack of French warships; one week later the requirement to comply with the *Procés-Verbal* in the North Sea was withdrawn. But objections from Norway, Sweden and Denmark prompted Hitler to rescind that portion of his September 23rd order to the extent that it authorized the attack of neutral shipping. Two days later Hitler authorized the attack on sight and without warning of darkened ships (including neutral ships) encountered off the British and French coasts.[122] On October 4, the requirements for visit and search were extended to 15° west longitude; on October 17, U-boats were authorized to attack without warning any belligerent merchant ship; on October 19, the authority to attack blacked-out ships was extended to 20° west; and on November 12, Hitler authorized the attack on sight of any passenger vessel known or seen to be armed, and any tanker which was "beyond doubt" proceeding to or from Great Britain or France.[123] By mid–1940, Germany's movement toward unrestricted submarine warfare was well underway.[124]

Italy. On July 11, 1940, Italy entered the war as an ally of Germany, adding its 105 submarines to Germany's strength. Italian Atlantic submarine operations commenced the following month. When operating in the Atlantic under the operational control of the German U-boat command, Italian submarines followed German rules of engagement.[125]

Great Britain. British progression toward abandonment of the submarine rules it worked so hard to achieve was slow but steady. Always the Cinderella of the Royal Navy, British thinking with respect to submarine employment suffered. Royal Navy submarines were so hindered by legal, moral and political restrictions, and bureaucratic impediments, especially poor training, that their first and only success in 1939 was not realized until December 12, 1939, when HMS *Salmon* sank *U-36.*[126] This was to change with the German invasion of Norway on April 9, 1940. Forced by the enemy aircraft threat to attempt to identify vessels through the submarine's periscope, many German troopships made their way to their destinations unscathed. The very neat rules of the 1936 *Procés-Verbal* had run head on into the realities of war, and been found wanting. On April 9, 1940, the British Cabinet authorized the sinking on sight of all German ships, combatant vessel or merchant ship, in the Heligoland Bight, the Skagerrat and the Kattegat. The zone for executing such attacks was extended up the coast of Norway as far as Bergen three days later.[127] On February 5, 1941, British submarines were authorized to attack on sight, without warning, all ships met south of 35° 46' north on the assumption that they were German.[128] In the Mediterranean, on July 15, 1940, British submarines were authorized to attack all vessels operating within thirty miles of the Italian coast. Two days later, this authority was extended to any vessel operating between Italy and Libya or within thirty miles of the Libyan coast. Subsequently, the Mediterranean "sink at sight" operational areas were extended as required.[129] While the Royal Navy continued to place priority on attack of German Navy combatants, and British operational zones for unrestricted submarine warfare may not have been as extensive as Germany's, British practice was a renunciation of the 1936 *Procés-Verbal* requirements.[130] The British decision was taken for operational reasons rather than in response to German U-boat operations.

Japan. Japanese abrogation of the 1936 *Procés-Verbal* was immediate, coinciding with its December 7, 1941, attack on Pearl Harbor. The *I-26* sank the merchant ship *Cynthia Olsen* several hundred miles west of Honolulu at 0800, as the Japanese attack on Pearl Harbor was underway.[131] This was

followed by other attacks on merchant ships in the western Pacific, and a brief campaign along the U.S. west coast.[132] While other merchant ship attacks followed, including extended campaigns in the Indian Ocean, the Imperial Japanese Navy's deployment of its submarines for the balance of the war did not serve it well. Former Japanese submarine officers and historians have been unanimous in their criticism of the failure of Japan to give priority to the attack of merchant shipping.[133] The evidence is clear, however, that prioritization of missions was an operational rather than a legal decision, and that Japan did not adhere to the rules set forth in the 1936 *Procés-Verbal* in its submarine operations.

United States. On December 7, 1941, upon notification of the Japanese attack on Pearl Harbor, Admiral Harold R. Stark, U.S. Chief of Naval Operations, issued the following order: "Execute against Japan unrestricted air and submarine warfare."[134]

Historians and international lawyers long held that the United States' action was a reprisal for the Japanese attack on Pearl Harbor,[135] apparently based upon the statement by Admiral Chester A. Nimitz, USN, in response to interrogatories from the International Military Tribunal on behalf of Admiral Karl Dönitz. After acknowledging that the Chief of Naval Operations had ordered unrestricted submarine warfare against Japan on December 7, 1941, Admiral Nimitz was asked if that decision was based upon reprisal. Admiral Nimitz responded:

> The unrestricted submarine and air warfare ordered on 7 December 1941 resulted from recognition of Japanese tactics revealed on that date. No further U.S. orders to submarines concerning tactics toward Japanese merchantmen throughout the war were based on reprisal . . . .
>
> The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war.[136]

These responses are postwar legal justifications for operational and political decisions taken before the Japanese attack on Pearl Harbor. They also are legally inaccurate as a basis for reprisal.[137]

The decision of the United States to abandon its obligations under the 1936 *Procés-Verbal* was premeditated, and not based upon reprisal. The historian who discovered the actual basis for the decision is quite specific:

> The motives which impelled the United States ... to resort to unrestricted submarine warfare ... were the same which had activated Germany to the same tactic. They were coolly, studiously strategic: to cut off the enemy's vital overseas trade and thereby weaken his capacity to fight and win a long war. Submarines were the only American naval instrument which could reach across the Pacific at the beginning of the conflict, and they were promptly put to this prearranged task.[138]

Revelation of the basis for the U.S. decision was protracted. Samuel Flagg Bemis, professor emeritus of diplomatic history at Yale University, pieced together the story and offered a classified presentation to the faculty of the Naval War College on November 1, 1961. He returned to offer the presentation to Naval War College faculty and students on December 15 and discuss his paper further in a seminar the following day. Each was classified.[139] Declassified in 1978, the story emerged in 1984.[140] Other pieces of the story were added by other historians.[141]

The pre-World War II change in U.S. policy emerged rapidly. Following the 1930 London Naval Conference, a new draft of the U.S. Navy's Instructions for the Navy of the United States Governing Maritime Warfare was received by the General Board of the Navy[142] on June 30, 1933. Incorporating the rules contained in Article 22 of the 1930 London treaty, it was shelved by the General Board without adoption.[143] When war began in 1939, the Navy's War Plans Division prepared a revision. It was referred to the Judge Advocate General of the Navy in April 1940 for comment and concurrence. The newest draft repeated the provisions of Article 22—now the 1936 *Procés-Verbal*—without elaboration as to what constituted a "merchant ship," or possible bases (other than resistance to visit and search) for loss of protection. The questions raised publicly by U.S. Navy submarine officers[144] went unanswered. This document subsequently was adopted, published, and distributed to the fleet, but with the proviso that "In the event of emergency these instructions may be supplemented by additional instructions made necessary by circumstances then existing."[145]

The U.S. plan for war against Japan, War Plan Orange, long had recognized that Japan could be defeated through blockade.[146]As war clouds approached, the role of the submarine in accomplishing this mission received fresh attention. In October 1940, Admiral J. O. Richardson, Commander of the U.S. Fleet, proposed long-range interdiction of Japanese commerce, recommending that were war to begin, U.S. submarines should "make an initial sweep of Japanese merchantmen . . . in the Pacific.[147]On January 18, 1941, the commander of the U.S. Asiatic Fleet, Admiral Thomas Hart, advised that "the possibilities

in raids on Japan sea communications—meaning shipping other than naval forces—would be great if our submarines were free to wage 'unrestricted' war."[148]

Others entered the deliberation process. On March 20, 1941, Admiral E. C. Kalbfus, President of the Naval War College, advised the Chief of Naval Operations of the solution by its faculty and students to its annual international law problem, which assumed war with Japan. The solution acknowledged the law of war principle of distinction between combatants and noncombatants, but argued that "new weapons may well call for changes in the technique of applying fundamental procedures in altering some of the traditional procedures which no longer fit current needs." Noting the use of war zones in the European conflict, it proposed similar zones—proclaimed as "strategic areas"—for the purpose of attacking Japanese merchant shipping, inasmuch as "visit and search by plane, submarine, or surface vessel cannot be readily or safely accomplished."[149]

Admiral Kalbfus' letter was referred to the Navy General Board. Responding on May 15, 1941, the Chairman of the General Board rejected the Naval War College's recommendations, declaring "These [war] zones have no justification in international law, and the United States and other nations have vigorously protested the establishment of such zones." The response went on to conclude that "No change in this policy is considered at this time."[150] However, a memorandum one week later advised that the issue was being addressed "in another manner."[151]

The "other manner" involved steps being taken by the Chief of Naval Operations (CNO). On May 26, 1941, the CNO approved Rainbow 5, the U.S. strategic war plan. Ten days earlier, the CNO had advised Admiral Ernest J. King, Commander in Chief, Atlantic Fleet, of his intention to transfer all long-range submarines to the Pacific.[152] By November 14, 1941, the CNO had drafted directions to the Commander, U.S. Asiatic Fleet for unrestricted submarine warfare against Japan that matched the Naval War College's recommendations. Professor Bemis reported that he could find no evidence that the CNO consulted with the Judge Advocate General of the Navy in the preparation of these instructions. The new instructions were released on November 26, 1941, two weeks before the Japanese attack on Pearl Harbor, apparently after their discussion between the CNO and President Franklin Delano Roosevelt. The CNO's action coincides with the rejection by Secretary of State Cordell Hull of the most recent Japanese demands, following which he declared that he "left the matter to the Army and the Navy."[153] The CNO's instructions declared:

> If formal war eventuates between the United States and Japan, "Instructions for the Navy of the United States Governing Maritime and Aerial Warfare, May 1941," will be placed in effect but will be supplemented by additional instructions, including authority to . . . [Commander-in-Chef, Asiatic Fleet] to conduct unrestricted submarine and aerial warfare against Axis shipping within that part of the Far East area lying south and west of a line joining Latitude 30 North Longitude 122 East, and Latitude 7 North 140 East, which you will declare a strategical area. . . .[154]

The following day, a general war alert was sent to all naval commanders. When Japan attacked Pearl Harbor on December 7, Admiral Stark spoke by telephone with President Roosevelt at 2:28 p.m. Washington time. Roosevelt directed Admiral Stark to execute the "agreed orders" to the Army and Navy for the event of an outbreak of war in the Pacific. Stark issued his order at 5:52 p.m., Washington time, on December 7.[155] The order to conduct unrestricted submarine warfare against Japan was not amended to include German and Italian naval shipping when Germany and Italy declared war against the United States four days later.[156] The first Japanese loss—merchant ship or combatant—to a U.S. submarine was the 8,663-ton *Atsutusan Maru*, sunk by USS *Swordfish* (SS–193), on December 16, 1941.[157] Japan merchant ship losses to U.S. submarines in the following years would reach 1,150.5 ships for a total of 4,859,634 tons, more than were sunk by naval aviation, U.S. and Allied air forces, mines, and surface ship actions combined.[158]

There were various reasons for the U.S. decision. By the end of the 1930s, the United States was constructing and deploying fleet submarines with the range to reach Japan. This capability did not exist at the time of the Washington Naval Conference or London Naval Conference.[159] As indicated, attack of Japanese lines of communications was a long-standing part of U.S. war plans. To paraphrase an adage, the prospect of war wonderfully concentrates the mind. Issues raised by U.S. submarine officers in open source, professional military journals during the 1920s and 1930s about the ambiguities of the 1922 Root Resolution and Article 22 of the 1930 London Naval Treaty had to be faced by naval planners. As the semi-official U.S. submarine history concluded:

> [R]ealistic thinking demanded recognition . . . that a nation's economic forces and its fighting forces bear the inseparable relationship of Siamese twins. Any reduction of a nation's economic resources weakens its war potential. Sever the commercial arteries of a maritime nation and its industrial heart must fail, while the war effort expires with it. . . . Armed or not . . . merchantmen were in effect combatant ships. . . .[160]

Other factors contributed to the U.S. decision. The practical arguments against submarine visit and search expressed by Winston Churchill twenty-eight years earlier undoubtedly were weighed, along with questions as to whether Japanese merchant ships would comply with a demand for visit and search by an enemy submarine. In his directives to his U-boat forces, Hitler's desire for compliance with the rules contained in the 1936 *Procés-Verbal* was not altruistic. He was concerned about damage to neutral shipping, including that of the United States, that might widen the war. The political risk for the United States was not as great as it had been for Germany. U.S. submarine forces would operate in an area virtually devoid of neutral shipping, and neutral entry into the war on the side of the Axis was unlikely.[161] The U.S. decision was not based on reprisal or retaliation, but was a conscious, deliberate decision made at the highest levels of the government to abandon flawed rules the government had a hand in drafting eleven years earlier.

In a war that saw each and every major submarine power consciously abandon the rules in the 1936 *Procés-Verbal*, it is an understatement to say that the treaty did not measure up to the harsh reality of war. Its postwar status has been debated,[162] as has the legality of exclusion zones by whatever euphemism they may be called.[163] Even the most ardent defenders of the *Procés-Verbal* provide numerous clarifications and conditions identified by submarine officers before World War II but persistently ignored or dismissed by diplomats, negotiators, naval leaders and international lawyers of that era.

History offers lessons. While the negotiation experience of one era may not transfer entirely to another, the reader is invited to consider analogies between the lessons from events described in these pages and recent negotiation efforts.

1. *Law of war treaties stringently regulating the use of a weapon system cannot be used as a substitute for an arms control agreement.* Efforts to rigorously regulate submarine use as a substitute for its outright abolition, something which Great Britain sought but could not obtain, immediately jeopardized the future of the rules in Article 22 of the 1930 London Naval Treaty (repeated in the 1936 *Procés-Verbal*), while undermining the purposes of the law of war.

2. *The law of war may not be used to "cancel out" a threat to another nation's strengths, or for other purposes.* The submarine presented a clear threat to British maritime superiority and, by the time of the 1930 London Naval Conference, to the United States in the Pacific. A law of war treaty was not an appropriate

basis for attempting to offset the threat. Nor was it a suitable way to balance the national budget.

3. *The likelihood that an effective, lawful weapon can be banned is limited.* The history of the law of war is replete with unsuccessful efforts to ban weapons that have legitimate military value. The attempt to ban the submarine is one example. A respected expert of that era observed that no effective weapon has ever been banned.[164] The failure of the negotiators to acknowledge this did not augur well for their efforts.

4. *If it is to succeed, a law of war provision must be balanced. It cannot favor the operational capabilities of a party to the conflict over another.* The 1922 Submarine Treaty and its successors placed the submarine at an unreasonable disadvantage, assuring failure of the rules, once conflict occurred.

5. *Beware those who proffer "humanitarian" arguments.* No one party in law of war negotiations generally has a monopoly on humanitarian concerns. The "humanitarian card" was played against the submarine, because other arguments against its use were unpersuasive. Concern for human life includes the lives of military personnel, not just civilians.

6. *The likelihood of success for a law of war treaty is in direct proportion to who participated in the negotiations and became a party to it, and why.* The nation with the greatest experience with submarines, Germany, was excluded from each conference that considered prohibiting or regulating submarines. It is possible that more realistic rules might have been produced had Germany been included. However, participation by every nation in law of war negotiations, in today's practice, does not necessarily increase the likelihood for success. The ability to understand an issue generally is in direct proportion to the time that has elapsed since a nation's military forces have been in combat. A nation may be willing to accept unrealistic rules if they are perceived as irrelevant to the nation's interests or to foreseeable threats to its security. Similarly, the recent practice of adopting new rules by majority vote, rather than consensus, militates against the likelihood of their long-term success. Likewise, the fact that there are a certain number of States Party to treaty *x* is of little relevance. A nation may agree to the most benevolent rules in peacetime. The test is whether that nation is likely to follow those rules when it is involved in conflict, when its national security is directly threatened and its men and women are dying on the battlefield.

7. *Treaties based primarily upon emotional appeal may offer short-term political gain, but have less chance of long-term respect.* The 1922 Submarine Treaty and its 1930 and 1936 successors were constructed in part in response to emotional rhetoric rather through dispassionate deliberation. Singling a weapon out for

description of its effects in horrific terms may play well with the media and cause some to succumb to emotional calls to ban that weapon. But war remains a violent confrontation between nations, and people suffer from the lawful use of lawful weapons. As evidenced by the efforts to prohibit the submarine, seeking a political solution in response to emotional rhetoric often results in a fatally flawed product.

8. *A difficult issue seldom becomes easier to resolve with time.* The refusal of the United States and Great Britain to address the distinctions with regard to "merchant ships" merely postponed the inevitable. Using ambiguities to gain consensus did not resolve issues raised early in World War I that re-surfaced in World War II, prompting each submarine power to abrogate its obligations.

Notes

1. May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 152, T.I.A.S. 9614. Republished in D. Schindler and J. Toman eds., DROIT DES CONFLICTS ARMÉS (4th ed., 1996), at 173. Iraqi intentional release of oil into the Persian Gulf and destruction of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait during its 1990–1991 occupation of Kuwait prompted calls for further international legislation to protect the environment. See R. Grunawalt, J. King and R. McClain, eds., U.S. Naval War College International Law Studies, Vol. 69, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (1997); and J. Austin and C. Bruch, *The Greening of Warfare*, THE ENVIRONMENTAL FORUM 15, 6 (November/December 1998), at 32.

2. 26 I.L.M. 561, Schindler & Toman, *supra* note 1, at 755. The United States signed Additional Protocol I on December 12, 1977, with declarations. On January 28, 1987, President Ronald Reagan informed the United States Senate that Additional Protocol I would not be submitted for Senate advice and consent to ratification. Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 100th Congress, 1st Session (1987). However, the United States has agreed that certain of its provisions constitute a codification of customary international law; see U.S. DEPARTMENT OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981–1988, at 3434–3435.

3. Schindler & Toman, *supra* note 1, at 829. Signed by the United States on December 12, 1977. Forwarded by President Ronald Reagan to the United States Senate for its advice and consent to ratification on January 29, 1987, where it awaits action; see Message of the President,. *supra* note 2.

4. The popular name is United Nations Conventional Weapons Convention. It is referred to by the acronym UNCCW (for United Nations Convention on Certain Conventional Weapons) to avoid confusing it with the 1993 Chemical Weapons Convention, whose acronym is CWC.

5. 1342 U.N.T.S. 137, U.S. Treaty Doc. No. 103-25, 19 I.L.M. 1523; Schindler & Toman, *supra* note 1, at 195. Protocol I prohibits weapons the primary effect of which is to injure by fragments which in the human body escape detection by x-ray; Protocol II regulates the use of land mines, booby traps and other devices; Protocol III regulates the use of incendiary weapons.

The United States ratified the Treaty and Protocols I and II on March 24, 1995, with reservations and understandings. Protocol III was forwarded to the Senate for its advice and consent to ratification by President William J. Clinton on January 7, 1997. Message from the President of the United States Transmitting Protocols to the 1980 Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II or the Amended Mines Protocol); the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and the Protocol IV on Blinding Laser Weapons (Protocol IV), Treaty Doc. 105–1, 105th Congress, 1st Session (January 7, 1997). Senate action remains pending.

6. 32 I.L.M. 800, Treaty Doc. 103–21.

7. 35 I.L.M. 1206, Treaty Doc. 105–1. The amended Mines Protocol (Protocol II) and Blinding Laser Protocol (Protocol IV) were forwarded to the Senate for its advice and consent to ratification by President Clinton on January 7, 1997. See Message from the President, *supra* note 3. As indicated therein, Senate action remains pending.

8. 36 I.L.M. 1507. The Ottawa treaty was a project of the Canadian Ministry of Foreign Affairs in which the Canadian military was not consulted. Canadian military skepticism with regard to the Ottawa treaty is expressed in A. Brown, *Mines: Soldiers' Concerns*, VANGUARD 3, 4 (1998), at 14. U.S. antipersonnel land mine policy since Ottawa is summarized in R. Barfield, *Antipersonnel Land Mines Policy Law and Policy*, THE ARMY LAWYER (December 1998), at 22.

9. A/Conf.183/9 (July 17, 1998).

10. 249 UNTS 240, Schindler & Toman, *supra* note 1, at 1047. The 1954 Hague Convention was submitted by President William J. Clinton to the United States Senate for its advice and consent to ratification on January 6, 1999; Message from the President of the United States Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Convention) and, for Accession, the Hague Protocol, Concluded on May 14, 1954, and Entered into Force on August 7, 1956, with Accompanying Report from the Department of State on the Convention and the Hague Protocol, 100th Congress, 1st Session, Treaty Doc. 106–1. Senate action is pending. The history of the delayed route to U.S. ratification is contained in the author's *Protection of Cultural Property from the Effects of War* in M. Phelan, ed., THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE (1998), chapter 3.

11. First Review Conference Final Declaration, CCW/CONF.I/14 (Part I), May 6, 1996, at 33. The Final Declaration (p. 38) states that "The Conference decides ... to convene a further Conference five years following the entry into force of the amendments adopted at the First Review Conference, but in any case not later than 2001, with preparatory expert meetings starting as early as 2000, if necessary." The Final Declaration notes two potential areas for consideration at the Second Review Conference: naval mines and small-caliber weapons and ammunition. The small-caliber weapons and ammunition issue was fully considered during the original conference that promulgated the UNCCW and its first three protocols (1978–1980), without resolution. A Swiss proposal during the 1994–1996 First Review Conference was withdrawn in the face of a general lack of support, and strong opposition by a number of delegations, including the United States. A Swedish proposal on naval mines was deferred to the Second Review Conference due to lack of time. Personal knowledge of the author, who was a member of the U.S. delegation to the original UNCCW conference (1978–1980) and the First Review Conference (1994–1996), and the U.S. negotiator for small arms issues at each.

12. 36 Stat. 2277, T.S. 539, Schindler & Toman, *supra* note 1, at 65. Post-World War II war crimes tribunals concluded that the treaty had reached the level of being customary international law. United States et al. v. Hermann Wilhelm Göring et al., I.M.T. (1948), at 253–254; U.S. v. Krupp et al., IX T.W.C. (1948), at 1340; U.S. v. Wilhelm von Leeb et al. ("The High Command Case"), XI I.M.T. (1948), at 532–533; and judgment, I.M.T.F.E. (1948), at 28.

13. Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295, TS 539); Schindler & Toman, *supra* note 1, at 75.

14. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31, Schindler & Toman, *id.* at 463; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85, Schindler & Toman, at 491; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3216, T.I.A.S. 3364, 75 U.N.T.S. 135, Schindler & Toman, at 515; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287, Schindler & Toman, at 587. The numbers are potentially misleading, as there were fewer States in 1907. Nonetheless a greater percentage of States are parties to the 1949 Geneva Conventions, etc., than were parties to the 1907 Hague Convention IV during either World War I or II.

15. United Nations Security Council Res. S/RES/827 (May 25, 1993), Schindler & Toman, *id.* at 1335.

16. United Nations Security Council Res. S/RES/955 (November 8, 1994).

17. For example, in 1974 the United States promulgated a Department of Defense directive requiring a legal review of all new weapons and munitions to ensure their compliance with its law of war and arms control obligations; the current directive is DoD Dir. 5000.1 (March 15, 1996), Subj: Defense Acquisition, para. D.2.j. The author performs these legal reviews for weapons and munitions developed or acquired by the U.S. Army or U.S. Special Operations Command. Article 36 of Additional Protocol I obligates a State Party to conduct similar reviews of any new weapon, means or method of warfare in its development, acquisition or adoption of that weapon. Informal polling by the author of representatives of States Parties indicates that fewer than ten States Parties have taken any steps to implement this obligation. Similarly, some nations, Party throughout this century to the Hague Convention II with Respect to the Laws and Customs of War on Land of July 29, 1899, and its 1907 successor, Hague Convention IV, are just beginning to prepare a law of war manual for their respective military, despite the obligation to do so contained in Article 1 of each treaty. Most States Parties to that treaty have not even taken this basic step.

18. A U.S. analysis following the successful 1991 Coalition effort to liberate Kuwait raised questions as to the practicality of key provisions in Additional Protocol I. See DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), Appendix O. For a critical analysis of Additional Protocol I, see the author's *Air War and the Law of War*, A.F.L. REV. 32,1 (1990), at 1.

19. A senior official of the ICRC proclaimed, "If we cannot stop war, we will take the toys away from the boys," that is, prohibit as many weapons as possible and in particular new weapons. The United States recognizes the responsibility and expertise of the ICRC with respect to the 1949 Geneva Conventions, but, as an NGO of Swiss citizens—a neutral nation without combat experience in this century—regards the ICRC as possessed of limited expertise with regard to weapons or warfighting.

20. W. THOMAS MALLISON, International Law Studies, VOLUME LVIII, STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS (1966). See also R. TUCKER, International Law Studies, Volume XLX, THE LAW OF WAR AND NEUTRALITY AT SEA (1955), at 55–73. The distinction between a legal treatise and a military/diplomatic history is: the former usually explains *what* the law is, with minimal reference to history (for example, "Participants in the *x* conference decided that *a* was prohibited, but could not agree on a course of action with regard to *b*"). The latter explains *why*, in the circumstances ruling at the time, participating nations agreed to restrictions on *a* but could not agree to a course of action with regard to *b*. The international lawyer must know the former, but is a better adviser and negotiator if he understands the latter.

21. L.N.T.S. 173, pp. 353–357; 3 Bevans 298–299; Schindler & Toman, *supra* note 1, at 1203.

22. Schindler & Toman, *id.* at 884–885.

23. Grand Admiral Erich Raeder, Commander-in-Chief of the German Navy from 1929 to January 30, 1943, and Grand Admiral Karl Dönitz, Commander-in-Chief of the German Navy's U-boats until he succeeded Raeder. On May 1, 1945, Dönitz was designated Adolph Hitler's successor as Führer, the position he held at the time of Germany's unconditional surrender on May 8, 1945. See F. RUGE, DER SEEKREIG; THE GERMAN NAVY'S STORY, 1939–1945 (1957), at 31, 57, 58, 277–279; K. DÖNITZ, MEMOIRS: TEN YEARS AND TWENTY DAYS (1959), at 21, 48–50, 299, 441–460; and P. PADFIELD, DÖNITZ: THE LAST FÜHRER (1984), at 156, 266, 411.

24. Judgment, I.M.T., at 138–140 (Karl Dönitz) and 143 (Erich Raeder). That portion of the judgment was written by former U.S. Attorney General and I.M.T. judge Francis Biddle, who favored acquittal of Dönitz and Raeder in light of U.S. and British practice. T. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992), at 592–594.

25. J. Scott, ed., INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS (1916), at 1–2.

26. J. SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899 (1920), at 365–367.

27. Muraviev's call expressly tied to the need to exchange "ideas in furtherance of national economy and ... the interests of humanity;" SCOTT, *supra* note 26. See also A. MARDER, THE ANATOMY OF BRITISH SEA POWER (1964), at 342; B. TUCHMAN, THE PROUD TOWER (1966), at 251–267; W. Hawkins, *Captain Mahan, Admiral Fisher and Arms Control at the Hague, 1899*, 39 NAV. WAR COLL. REV. (January-February 1986), at 77, 78; R. MASSIE, DREADNOUGHT (1991), at 429–432; and, generally, T. ROPP, THE DEVELOPMENT OF A MODERN NAVY: FRENCH NAVAL POLICY, 1871–1904 (1987), at 347–352.

28. R. CHAPUT, DISARMAMENT IN BRITISH FOREIGN POLICY (1935), at 50; C. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962), at 120, reports that "The ... [Russian proposal] promised extensive debate. In fact, it was disposed of with little discussion. The result was entirely negative." See also MARDER, *supra* note 27, at 341–352, who notes that the naval representatives on the United States and British delegations—the equally-legendary Alfred Thayer Mahan and Admiral of the Fleet Sir John Fisher, respectively—were "frankly out of sympathy with the main purposes for which the conference was called" (p. 347). Fisher was an early enthusiast for the submarine; see R. HOUGH, ADMIRAL OF THE FLEET: THE LIFE OF JOHN FISHER (1969), at 168–172. The various Russian arms limitations proposals at the First Hague Peace Conference, which included limiting army force levels and military budgets for five years, and freezing naval budgets for three years, are noteworthy in their total rejection by the other participants in the subcommittee that considered

them. Other Russian proposals to limit fleets, naval gun sizes, and naval armor plate met a similar fate. SCOTT, *supra* note 26, at 320–322, 371–373.

29. Initial acquisition of submarines in France and Great Britain began in 1899; the United States followed in 1900. Russia's first submarines were German-built, and Germany ordered its first in 1904. J. ALDEN, THE FLEET SUBMARINE IN THE U.S. NAVY (1979), at 2; H. HERWIG, 'LUXURY' FLEET: THE IMPERIAL GERMAN NAVY 1888–1918 (1980), at 86–87; ROPP, *supra* note 27, at 347–352; E. RÖSSLER, THE U-BOAT: THE EVOLUTION AND TECHNICAL HISTORY OF GERMAN SUBMARINES, (1989), at 15–19; G. WEIR, BUILDING THE KAISER'S NAVY (1992), at 51–52.

30. J. Scott, ed., THE DECLARATION OF LONDON (1919); Schindler & Toman, *supra* note 1, at 843. The conference, attended by representatives of Austria-Hungary, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, Spain and the United States, met from December 4, 1908, to February 26, 1909. Although the declaration was signed by each delegation, it was ratified by none.

31. ALDEN, *supra* note 29, at 3.

32. C. Nimitz, *Military Value and Tactics of Modern Submarines*, U.S. NAV. INST. PROC. 38,4 (December 1912), at 1193; MASSIE, *supra* note 27, at 453. The ability of the submarine to attack combatant surface vessels was not viewed seriously; see MARDER, *supra* note 27, at 339.

33. J. TERRAINE, THE U-BOAT WARS, 1916–1945 (1989), at 4–5, 7–8. Churchill adopted the words of Sir John Fisher, who so advised Churchill in a memorandum. A. MARDER, FROM THE DREADNOUGHT TO SCAPA FLOW, Vol. I, THE ROAD TO WAR 1904–1914 (1961), at 363.

34. R. BACON, THE LIFE OF LORD FISHER OF KILVERSTONE (1929), Vol. I, at 123.

35. For example, Article 20 of U.S. Army General Orders No. 100 of April 24, 1863, declares that "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war." Schindler & Toman, *supra* note 1, at 6. The effect of this approach is described in E. HAGERMAN, THE AMERICAN CIVIL WAR AND THE ORIGINS OF MODERN WARFARE (1988), 282, 283, 285, and, generally, J. MCDONOUGH AND J. JONES, WAR SO TERRIBLE: SHERMAN AND ATLANTA (1987). A U.S. State Department proposal at the First Hague Peace Conference that the U.S. support the traditional American view of neutral rights was strongly opposed by Mahan. He argued that the traditional view benefited the neutral to the loss of the stronger belligerent. With U.S. ascendancy as a naval power during the previous decade, approaching parity with the Royal Navy, Mahan believed an international agreement in support of its traditional position would be inconsistent with America's new strategic interest in command of the seas. Hawkins, *supra* note 27, at 84–85.

36. MARDER, *supra* note 33, at 328–339; MASSIE, *supra* note 27, at 453.

37. See A. MARDER, FROM THE DREADNOUGHT TO SCAPA FLOW, Vol. II, THE WAR YEARS: TO THE EVE OF JUTLAND, 1914–1916 (1965), at 342–348; R. HOUGH, THE GREAT WAR AT SEA, 1914–1918 (1983), at 169–177; V. TARRANT, THE U-BOAT OFFENSIVE 1914–1945 (1989), at 7–76; TERRAINE, *supra* note 33, at 3–150, and, for an overall history, R. GIBSON AND M. PRENDERGAST, THE GERMAN SUBMARINE WAR 1914–1918 (1931).

38. G. DAVIS, A NAVY SECOND TO NONE (1940), at 233; and see generally P. RYAN, THE *LUSITANIA* DISASTER (1975), for an account of the sinking and its consequences. See also C. BLAIR, HITLER'S U-BOAT WAR, vol. I, THE HUNTERS, 1939–1942 (1996), at 11.

39. J. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982), at 17–21. First Lord of the Admiralty Winston Churchill, believing unrestricted submarine warfare illegal, ordered the captured crews

of *U-8* and *U-12* treated as war criminals. While charged with no offense, the thirty-nine men were detained as common criminals rather than as prisoners of war. In reprisal, Germany incarcerated a matching number of British prisoners of war from distinguished British families under like conditions until the British relented. *Id.*, at 17–21.

40. Under articles 228, 229 and 230 (Part VII, Penalties) of the Versailles Treaty (225 C.T.S., 2 Bevans 43, at 137), Germany was obligated to turn over to the Allies and Associated Powers all persons accused by them of war crimes for trial before military tribunals. Rather than acquiesce to surrender of the accused, Germany convened war crimes trials at Leipzig in May 1921. The British demand for the prosecution of Lieutenant Karl Neumann, commander of *U-67*, for the May 26, 1917, intentional sinking of the British hospital ship *Dover Castle*, was *nol-prossed* on June 4. With the cooperation of the British, evidence was collected by Germany against Captain Wilhelm Werner who, as commander of the *U-55*, allegedly sank the hospital ship *Torrington* on April 8, 1917, and murdered thirty-four survivors. But Werner "escaped" and was not brought to trial. The Germans prosecuted Lieutenants Ludwig Dithmar and John Boldt of *U-86* for the June 27, 1918, intentional sinking of the British hospital ship *Llandovery Castle*, and the murder of survivors. (*U-86*'s commander was beyond the Leipzig court's jurisdiction.) Acquitted of any crimes in the attack on the hospital ship (the defense argued successfully that the *Llandovery Castle* was carrying Allied combatants, and was a lawful target), the court convicted the accused of manslaughter for the murder of the survivors. Each was sentenced to four years imprisonment. With strong domestic sympathy and outside assistance, both escaped after brief incarceration. In 1928 the Reichsgericht annulled the sentences of each and declared the men innocent. WILLIS, *supra* note 39, at 126, 131, 137–141, 146; J. PLUMRIDGE, HOSPITAL SHIPS AND AMBULANCE TRAINS (1975), at 45, 46.

41. H. Robertson, *Submarine Warfare*, THE JAG JOURNAL (November 1956), at 3.

42. Arming merchant vessels for *defensive purposes* was historic practice. But the controversy of doing so was raised before and throughout World War I. See G. Hackworth, ed., DIGEST OF INTERNATIONAL LAW (1943), Vol. VI, at 449–453, 489–503. In the aftermath of the *Lusitania* sinking, U.S. Secretary of State Robert Lansing, writing to the British Ambassador on January 18, 1916, noted that historic visit and search procedures were premised on an armed merchant ship's acquiescence to the demand by a surface man of war with superior armament. The arming of merchant ships with a gun superior to that carried by a submarine, and its use for *offensive purposes* against the submarine, was inconsistent with the historic rule. He urged the disarmament of belligerent merchant ships. *Lansing's New Code of Warfare for Sea*, N.Y. TIMES (February 12, 1916), at 1; C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES (1951), Vol. III, at 1994–1995.

43. One British merchant captain, captured by the Germans, was known to have endeavored to ram a U-boat the year before his capture. Charged with being a *franc-tireur*, he was court-martialed, convicted, and executed; WILLIS, *supra* note 39, at 30.

44. E. CHATTERTON, Q-SHIPS AND THEIR STORY (1972); R. Smith, *The Q-Ship – Cause and Effect*, U.S. NAV. INST. PROC. (May 1953), at 533. British decoy ships were named "Q-ships" as they were based in a British port known as Queenstown during World War I. K. BEYER, Q-SHIPS VERSUS U-BOATS (1999), at xix. The author is indebted to Colin Babb of the U.S. Naval Institute Press and Mr. Beyer for permitting the author to see the page proofs of this book prior to its publication for preparation of this article.

45. Flying false flags, that is, flying the national insignia of a nation other than one's true identity, is an ancient naval tradition, as is arming a merchant ship for its self-defense. By the twentieth century, however, the distinction between warship and merchant ship was clear. Had the distinction between the noncombatant merchant vessel and the combatant warship been

maintained, the history of submarine warfare might have taken a different turn, no matter how difficult it might have been for the submarine to engage in visit-and-search activities. Certainly the moral and legal arguments for agreed rules would have been stronger.

46. TARRANT, *supra* note 37, at 77; Versailles Treaty, Part V, Military, Naval and Air Clauses, Section II, Naval Clauses, Articles 181, 188, 189, 191.

47. Dept. of the Navy, THE AMERICAN NAVAL PLANNING SECTION LONDON (1923), Paper No. 68, *Submarine Warfare*, at 466, 467 [emphasis supplied].

48. *Id.* at 470.

49. *Id.* at 472.

50. *Id.* at 472–473.

51. *Id.* at 475.

52. Great Britain and Italy received no U-boats. The U-boats received by Japan and the United States were to be retained temporarily for experimental reasons before being broken up. L. Douglas, Submarine Disarmament, 1919–1936, Ph.D. diss., Syracuse (1970), at 86–87, 90. Japan retained its U-boats for an extended period of time and employed former U-boat design and construction engineers in the development of its submarine fleet even before the issue of U-boat distribution had been resolved at Versailles. On October 9, 1919, almost two months before the Versailles participants reached a decision, the U.S. naval attaché in Tokyo reported that Japanese officials were in Berlin "for the purpose of studying submarine construction from German naval designers. . . . Captain Godo expects to obtain German patents and designs for submarines, and also expects to bring German naval mechanics back to Japan." A subsequent U.S. Navy intelligence report advised that by 1920 over 800 German U-boat specialists were working in Japan. C. BOYD AND AKIHIKO YOSHIDA, THE JAPANESE SUBMARINE FORCE AND WORLD WAR II (1995), at 13–14.

53. E. MILLER, WAR PLAN ORANGE: THE U.S. STRATEGY TO DEFEAT JAPAN, 1897–1945 (1991), at 19–30, 313–314; M. BARNHART, JAPAN PREPARES FOR TOTAL WAR (1987), at 50; S. ROSKILL, NAVAL POLICY BETWEEN THE WARS, Vol. I, THE PERIOD OF ANGLO-AMERICAN ANTAGONISM (1968), at 278–279; A. MARDER, OLD FRIENDS, NEW ENEMIES: THE ROYAL NAVY AND THE IMPERIAL JAPANESE NAVY (1981), at 6; TERRAINE, *supra* note 33, at 156–157; Sadao Asada, *The Revolt Against the Washington Treaty: The Imperial Japanese Navy and Naval Limitation, 1921-1927*, NAV. WAR COLL. REV. XLVI, 3 (Summer 1993), at 83.

54. ROSKILL, *supra* note 53, at 87; R. KAUFMAN, ARMS CONTROL DURING THE PRE-NUCLEAR ERA: THE UNITED STATES AND NAVAL LIMITATION BETWEEN THE TWO WARS (1990), at 14; H. SPROUT AND M. SPROUT, TOWARD A NEW ORDER OF SEA POWER (1940), at 88–90. Japan also received the former mandates as a *quid pro quo* for termination of the 1902 Anglo-Japanese Alliance, which was due for renewal but opposed by the United States; ROSKILL, *supra* note 53, at 315–317.

55. TERRAINE, *supra* note 33, at 154–155; Douglas, *supra* note 52, at 72; SPROUT AND SPROUT, *supra* note 54, at 190; and A. CLAYTON, THE BRITISH EMPIRE AS A SUPERPOWER 1919–1939 (1986), at 17–18, 20–21.

56. K. Hagan and C. Campbell, in H. SPROUT AND M. SPROUT, THE RISE OF AMERICAN NAVAL POWER 1776–1918 (1966 ed.), at ix.

57. S. PELZ, RACE TO PEARL HARBOR (1974), at 27, 88, 89; SPROUT AND SPROUT, *supra* note 56, at vii, xiii–xiv, xxii, xxvii; BLAIR, *supra* note 38, at 16; E. LACROIX AND L. WELLS, JAPANESE CRUISERS OF THE PACIFIC WAR (1997), at 114–116. It should be noted that neither Great Britain, the United States nor Japan asserted that *guerre de course* was illegal, but merely that it was not the first course of action. For example, a February 25, 1925, U.S. Navy report of the Special Board to Consider the Upkeep of the Navy and Its Various Branches (consisting of

the Chief of Naval Operations, Commandant of the Marine Corps, President of the Naval War College, and other senior Navy officials) to the House of Representatives stated in part that "The board is of the opinion that submarines are an essential part of our national defense...." It defined the object of the Navy to be "first, to destroy or blockade the enemy fleet in order; second, to protect our commerce; third, to destroy the enemy's commerce in order; fourth, to bring economic pressure on him...." W. Anderson, *Submarines and the Disarmament Conference*, U.S. NAV. INST. PROC. (January 1927), at 54.

58. Its purposes can be summarized in the principal treaties concluded: (I) Treaty for the Limitation of Armament (2 Bevans 351), a five-power (U.S., France, Great Britain, Italy, Japan) treaty of ten-year duration which addressed capital ship (battleships and aircraft carriers) strength; (II) Treaty Relating to the Use of Submarines and Noxious Gases in Warfare ("Submarine Treaty," III Malloy 3116, Schindler & Toman, *supra* note 1, at 1195), which (as summarized in this article) endeavored to regulate submarines while prohibiting the use of chemical weapons; (III) Treaty Relating to Insular Possessions and Insular Dominions in the Pacific Ocean (2 Bevans 332), a treaty of ten-year duration between the British Empire, France, Japan and the United States for amicable relations with respect to their respective Pacific territories; (IV) Treaty Relating to Principles and Policies to be Followed in Matters Concerning China (2 Bevans 375), a treaty between the United States, Belgium, British Empire, China, France, Italy, Japan, the Netherlands and Portugal, relating to the "Open Door" permitting trade with China; and (V) Treaty Between the Nine Powers Relating to Chinese Customs Tariff (2 Bevans 381). The only treaty that failed to enter into force was the Submarine Treaty.

59. The precise tonnage ratio for capital ships was 525,000 tons each for the United States and Great Britain and 315,000 tons for Japan, with the Japanese authorized to substitute the older battleship *Settsu*, commissioned in 1912 as one of Japan's first dreadnoughts, for the newer *Mutsu*, completed nine days after the opening of the Washington Naval Conference; Douglas, *supra* note 52, at 115; H. JENTSCHURA, D. JUNG AND P. MICKEL, WARSHIPS OF THE IMPERIAL JAPANESE NAVY, 1869–1945 (1977), at 24–25, 28. An ironic but fortuitous result of the Washington Conference was that the agreement to scrap capital ships permitted conversion from battle cruiser to aircraft carrier of USS *Lexington* (CV-2) and USS *Saratoga* (CV-3), providing a significant boost to U.S. naval aviation, which, with the submarine, was a primary force in the subsequent victory over Japan in the Pacific. A. TURNBULL AND C. LORD, HISTORY OF UNITED STATES NAVAL AVIATION (1949), at 209-211; R. STERN, THE LEXINGTON CLASS CARRIERS (1993), at 27. C. MELHORN, TWO-BLOCK FOX: THE RISE OF THE AIRCRAFT CARRIER, 1911–1929 (1974), concludes (p. 85) that "In terms of attitudes and concessions on the part of the Contracting Powers, naval aviation emerged from the [Washington] conference with something close to a blank check." The United States was not the only beneficiary. For the same reason, the Japanese battleship *Kaga* and battle cruiser *Akagi* were completed as aircraft carriers; JENTSCHURA, et al., *supra*, at 42–45, while Great Britain converted the cruisers *Courageous* and *Glorious* into carriers; R. CHESNEAU, AIRCRAFT CARRIERS OF THE WORLD (1984), at 98.

60. G. WHEELER, ADMIRAL WILLIAM VEAZIE PRATT, U.S. NAVY (1974), at 177, 179, 181; Douglas, *supra* note 52, at 92–93, 113–115; DAVIS, *supra* note 38, at 292–293; PELZ, *supra* note 57, at 1; SPROUT AND SPROUT, *supra* note 56, at xi–xii.

61. U.S., Great Britain, Japan, France, and Italy, respectively. Italy's only demand was parity with France. Douglas, *supra* note 52, at 115–117.

62. ROSKILL, *supra* note 53, at 324; Douglas, *supra* note 52, at 108–109, 130, 194–195; L. Douglas, *The Submarine at the Washington Conference of 1921*, NAV. WAR COLL. REV. XXVI, 5 (March–April 1974), at 86, 87. "In an assumed war against the world," wrote Assistant Secretary

of the Navy Theodore Roosevelt, Jr., "the submarine would be of most value ... against the two island empires—Great Britain and Japan." He regarded it as imperative that the United States Navy not "permit our hands to be tied as regards submarines."

63. A. WATTS AND B. GORDON, THE IMPERIAL JAPANESE NAVY (1971), at xii; Douglas, *supra* note 52, at 192–195; Douglas, *supra*. note 62, at 90–94; Asada, *supra* note 53, at 82.

64. SPROUT AND SPROUT, *supra* note 54, at 199; ROSKILL, *supra* note 53, at 328. Roskill (p. 328) notes that the Root Resolution prompted the British Admiralty to raise with its law officers the risk of individual criminal liability of its own submarine officers, but could not obtain a definite ruling. Continuing, "This discussion continued for some years, and in 1926 the Admiralty took note of the fact that 'if in a naval war we were forced to sink merchant ships as a reprisal we might have to suspend or abrogate this provision....'"

65. Douglas, *supra* note 62, at 95.

66. H. Rickover, *International Law and the Submarine*, U.S. NAV. INST. PROC. (September 1935), at 1220. The author, Lieutenant Hyman G. Rickover, USN, would continue his naval career to become the father of the U.S. nuclear navy, retiring forty-seven years later as an admiral; T. ROCKWELL, THE RICKOVER EFFECT (1982), at 363.

67. Anderson, *supra* note 57, at 51.

68. Resolution on Commission of Jurists to Consider Laws of War (2 Bevans 346), February 4, 1922. The subsequent Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, which met in The Hague from December 11, 1922, to February 19, 1923, was expressly guided by this resolution, which read in part: "That it is not the intention of the powers agreeing to the appointment of a commission to consider and report upon the rules of international law respecting new agencies of warfare that the commission shall review or report upon the rules or declarations relating to submarine . . . adopted by the powers in this conference." COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE REVISION OF THE RULES OF WARFARE (1922), at 7. This conference of jurists proceeded to an equally unsuccessful effort to regulate aircraft use in war in Articles 22 through 24 of the Hague Rules of Air Warfare, contained in Schindler and Toman, *supra* note 1, at 283, 285. The rules were never adopted. L. Brune, *An Effort to Regulate Aerial Bombing: The Hague Commission of Jurists, 1922-1923*, AEROSPACE HIST. (September 1982), at 183–185; R. Wyman, *The First Air Rules of Warfare*, AIR U. REV. (March–April 1984), at 94–102; and Parks, *supra* note 18, at 25–36.

69. Although a U.S. proposal, the U.S. Navy opposed the Root Resolution because it placed "inequitable restrictions upon the use of submarines" and "introduced ambiguities in the rules governing their use." The naval architect of the 5:5:3 formula, then-Captain William Veazie Pratt, was an Anglophile and intensely anti-Japanese. In particular, he believed that in a future war with Japan, that nation would be vulnerable to attack on its merchant commerce. ROSKILL, *supra* note 53, at 328; SPROUT AND SPROUT, *supra* note 56, at x, xiv, xvii; WHEELER, *supra* note 60, at 203–204, 248–250, 296.

70. The British delegation turned initial skepticism into a tactical gain. As one analysis noted, "Once more Great Britain showed the quality of its diplomacy. It had proposed the abolition of the submarine. In that it was thwarted. Then by a flank movement, but an open and fair one, it obtained a great deal that its frontal attack had failed to accomplish. It obtained abolition of the use of submarines in all operations, against merchant ships. . . . This abolition includes not only illegitimate operations, but those that until the making of the treaty were admitted by all to be legitimate." Anderson, *supra* note 57, at 69.

71. SPROUT AND SPROUT, *supra* note 54, at 200, 201, 202–204. The Advisory Committee assisting the U.S. delegation at the Washington conference argued that a merchant ship's defensive armament would almost surely be used offensively against a submarine, leading to a

"sink at sight" result. It proposed rules to prohibit the arming of merchant ships and their use of false flags, in vain. The delegates of Italy and Japan expressed doubts as to whether an armed belligerent merchantman could continue to be regarded as a "noncombatant."

72. Senator Root made it clear that the Submarine Treaty was not regarded as a codification of customary international law, that is, the application of customary law for surface vessels to submarines, but as a proposal to change the law. Anderson, *supra*. n. 57, at 59. By its terms (article VI), it was binding only upon ratification by each of the parties to the negotiations – the U.S., the British Empire, France, Italy and Japan.

73. Rickover, *supra* note 66, at 1213, 1220.

74. *Id.* at 1220.

75. P. FRITZSCHE, A NATION OF FLIERS: GERMAN AVIATION AND THE POPULAR IMAGINATION (1992), at 103–219.

76. M. HADLEY, COUNT NOT THE DEAD: THE POPULAR IMAGE OF THE GERMAN SUBMARINE (1995), at 48–78.

77. Germany was permitted aircraft for civil aviation; Treaty of Versailles, *supra* note 40, Part V, Military, Naval and Air Clauses, Section III, Air Clauses, Articles 198, 202. Submarines were prohibited for any purpose, including commercial. Treaty of Versailles, Article 191.

78. See, e.g., RADM Spindler, *The Value of the Submarine in Naval Warfare: Based on the German Experience in the War*, U.S. NAV. INST. PROC. (May 1926), at 835, who commented (at 837) that "the present state of treaties does not preclude the unrestricted employment of the submarine in the future. So long as the situation remains as it is, this method of the employment of submarines cannot be dismissed from military consideration."

79. E. HOMZE, ARMING THE LUFTWAFFE: THE REICH AIR MINISTRY AND THE GERMAN AIRCRAFT INDUSTRY, 1919–1939 (1976) 3; and B. WHALEY, COVERT GERMAN REARMAMENT, 1919–1939 (1984).

80. As previously indicated (note 52), trade in submarine technology and expertise between Germany and Japan commenced even before conclusion of the Versailles Treaty. In addition to its transfer of six U-boats, Germany sold U-boat blueprints to Japan in 1920. The following year the Argentine Navy invited the former head of the Flanders U-boat flotilla and two former German naval architects to assist in the establishment of an Argentine submarine capability. Similar work by German submarine engineers was undertaken in Sweden and Italy. Over the 1921/1922 winter Germany conducted research on the question of "Which of our U-boat types that we used in the war are most appropriate for future development?" In April 1922, German shipbuilding yards, with the approval of the German Navy, established in The Hague a German Submarine Construction Office under the cover of the Dutch firm NV Ingenieurskaantor voor Scheepsbuow (IvS). A dummy Berlin company, "Mentor Bilanz," provided the conduit between the German Admiralty and IvS. RÖSSLER, *supra* note 29, at 88–90; TARRANT, *supra* note 37, at 77.

81. WATTS AND GORDON *supra* note 63, at xii; LACROIX AND WELLS, *supra* note 57, at 155–157; DAVIS, *supra* note 38, at 315–317; 322–324, 330–331, 335; ROSKILL, *supra* note 53, at 508-516; N. FRIEDMAN, U.S. CRUISERS (1984), at 163–164. A Japanese defense policy approved on February 23, 1923, listed its potential enemies, in order of probability, as (1) the United States, (2) Great Britain, (3) Russia, and (4) China. Its naval construction program was designed to meet those threats. LACROIX AND WELLS, *supra*, at 51.

82. DAVIS, *supra* note 38, at 314, citing Representative Carl Vinson, Congressional Record, 69th Cong., 2nd Sess., pp. 1095–1096, January 4, 1927, offered the following contrast in naval shipbuilding between the Washington Naval Conference and President Coolidge's call for a new naval disarmament conference:

Ships Built and Building 1922–1927

	United States	Great Britian	Japan
Battleships		2	
Aircraft carriers*	2	2	2
Cruisers	2	11	12
Destroyers		2	35
Submarines	3**	4	30

*As noted (note 59), aircraft carrier construction was a direct result of conversion rather than scrapping of existing battleships/battle cruisers under the terms of the Washington Treaty.

France built eight Washington Treaty cruisers and four smaller cruisers, and *fifty* submarines—more than Great Britain, Japan and the United States possessed—combined—in the 1920s. S. ROSKILL, NAVAL POLICY BETWEEN THE WARS (1976), Vol. II, THE PERIOD OF RELUCTANT REARMAMENT, 1930–1939, at 27.

** U.S. submarine construction had been inhibited in part by a Navy General Board decision in May 1921 giving priority to aviation development over submarines. ALDEN, *supra* note 29, at 14.

83. DAVIS, *supra* note 38, at 316–319.

84. Asada, *supra* note 53, at 91–92; Sadao, *From Washington to London: The Imperial Japanese Navy and the Politics of Naval Limitation, 1921–1930*, in E. Goldstein and J. Maurer, eds., THE WASHINGTON CONFERENCE, 1921–22 (1994), at 147, 159.

85. D. Carlton, *Great Britain and the Coolidge Disarmament Conference of 1927*, POL. SC. QTLY. LXXXIII (December 1968), at 573.

86. ROSKILL, *supra* note 53, at 505, 514–515; Douglas, *supra* note 52, at 168–169. Conference failure produced one of the ironies of history. Resolving to achieve parity with Great Britain, the Coolidge Administration on April 5, 1927, authorized the construction of the six remaining cruisers of the *Northhampton* class and in December 1927 introduced legislation calling for a major increase in U.S. naval shipbuilding. The cruiser construction bill, the largest naval construction bill since 1916, became law on February 13, 1929. It authorized and instructed the President to undertake the construction of fifteen 10,000-ton cruisers, five in FY 1929, 1930, and 1931, and one aircraft carrier in FY 1930. On August 6, 1928, a Japanese report responded by (a) identifying its potential enemies as (in order of priority) the United States and Great Britain, and (b) recommending an increase in cruiser construction and parity between Japan, the United States and Great Britain in battleships and cruisers. Douglas, *supra*, at 173, 179; DAVIS, *supra* note 38, at 330–331; LACROIX AND WELLS, *supra* note 57, at 155–157; KAUFMAN, *supra* note 54, at 108–111.

87. In the post-Washington Naval Conference period, the United States, Great Britain, France, and Japan embarked on construction programs for exploiting the potential of the submarine. These included the possibility of long-range cruiser submarines, carrying heavy deck guns for commerce raiding, patterned along the lines of the World War I *U–139*. The most celebrated was the French *Surcouf*, displacing 4,318 tons submerged, with 8-inch guns. Other examples are the British *X–1*, displacing 3,600 tons submerged, with 5.25-inch guns in twin turrets, and the U.S. *V–4* design (4,135 tons submerged, 6-inch guns). ALDEN, *supra* note 29, at 13–14; RÖSSLER, *supra* note 29, at 71–75; and A. MARS, BRITISH SUBMARINES AT WAR 1939–1945 (1971), at 17–18; J. RUSBRIDGER, WHO SANK *SURCOUF*? (1991), at 16–19.

88. For example, a British-American proposal to extend the Washington Conference 5:5:3 capital ship tonnage ratio to submarines was not acceptable to Japan. Douglas, *supra* note 52, at 154–156, 159; DAVIS, *supra* note 38, at 159, 162, 167, 168.

89. The following year, on February 20, 1928, the Sixth International Conference of American States, meeting in La Habana, Cuba, adopted the Convention on Maritime Neutrality (4 Malloy 4743, 2 Bevans 721; Schindler & Toman, *supra* note 1, at 1379). Article 1, paragraph 2 of that treaty is similar to Article 1, paragraph 2 of the Washington Submarine Treaty. Although signed by the twenty-one participants, only Brazil, Colombia, Dominican Republic, Ecuador, Haiti, Nicaragua, Paraguay and the United States ratified it. It entered into force on January 12, 1931, but appears to have had limited, if any, effect.

90. On September 1, 1925, a clandestine U-boat department was established in the German Naval Command Office. The following year IvS began building two submarines for Turkey based upon its *UB–111* design, with the stipulation that IvS had the right to select the crews and attend all trials of the boats. That same year IvS contracted with Finland to construct a mine-laying submarine at Abo (now Turku). Its keel was laid in September 1926, and the boat was completed in 1930. In 1927, the German Admiralty's secret U-boat technical section was established in Mentor Bilanz. On October 27, a German Navy memorandum declared that "In evading the Treaty of Versailles by maintaining submarine development and, if possible, training a limited number of personnel, it is essential that . . . IvS be given all possible support." In that same year agreement was reached with Spain for Mentor Bilanz's technical section to build a 750-ton U-boat at Cadiz. Subsequently Mentor Bilanz was liquidated and a new dummy company "Igewit" (*Ingenieurbüro für Wirtschaft und Tecknik*) was established to hasten clandestine re-establishment of the German U-boat service. RÖSSLER, *supra* note 29, at 88, 90, 91–92, and 93–97; TARRANT, *supra* note 37, at 77–78; and PADFIELD, *supra* note 23, at 111, where it is noted that "The determination to thwart the drastic provisions of Versailles ran powerfully through the whole German Officer Corps—Army, airmen, surface Navy and submariners."

91. DAVIS, *supra* note 38, at 333, 334; Douglas, *supra* note 52, at 184, 187; ROSKILL, *supra* note 82, at 38–43. The conference undoubtedly gained greater urgency with the crash of the U.S. stock market on October 29, 1929, bringing on the Great Depression. President Hoover responded to the economic crisis by cutting funds for naval construction in 1931 and eliminating them entirely in 1932. The conference was preceded by talks between representatives of the United States and Japan. The Japanese repeated their long-standing preference for a 10:10:7 ratio in auxiliary vessels. It was opposed to abolition of the submarine, and wished to retain its current tonnage (78,000 tons) rather than reduce its submarine fleet. Douglas, *supra,* at 188–189. The British and the United States were disappointed that Italy and Japan named admirals to their respective delegations. Prime Minister MacDonald and President Hoover had intended to keep the negotiations out of the hands of "naval experts," an idea that undoubtedly would have ensured conference success but ultimate treaty failure. Breakdown of the Treaty ultimately occurred in part because the naval leadership of each participant, including the United States and Great Britain, was repeatedly cut out of the negotiations by their respective political leaders and delegations. ROSKILL, *supra,* at 52, 53; KAUFMAN, *supra* note 54, at 129.

92. Germany launched the pocket battleship *Deutschland* in May 1931, signaling its revived navalism. RUGE, *supra* note 23, at 26, 28; ROSKILL, *supra* note 82, at 27.

93. D. CARPENTER AND N. POLMAR, SUBMARINES AND THE IMPERIAL JAPANESE NAVY (1986), at 3.

94. The French argument is offered in R. Castex, *The Weapon of the Weak*, J.R.U.S.I. LXXVII (November 1932), at 739–743, in response to an article by British Admiral Sir Herbert W. Richmond of the same title, J.R.U.S.I. LXXVII (August 1932), at 497–503.

95. Douglas, *supra* note 52, at 191–192.

96. *Id.* The position reversal was based in large measure upon the Hoover Administration's fiscal and disarmament policies, not on any change of heart by the U.S. Navy with respect to the value of the submarine. It also was based upon the belief that the American public would not tolerate U.S. resort to unrestricted submarine warfare and that the Japanese Navy stood to gain more by their retention than did the United States. As shown in footnote 82, Japan had vastly out-built the United States in submarines in the period prior to the Hoover administration. That administration authorized only two submarines for construction—*V–7* (USS *Dolphin*) in FY 1930 and *V–8* (USS *Cuttlefish*) in FY 1932. ALDEN, *supra* note 29, at 36–39; DAVIS, *supra* note 38, at 354–355; WHEELER, *supra* note 60, at 294–295; KAUFMAN, *supra* note 54, at 124, 126, 138, 139.

97. In deference to the French *Surcouf* (note 87), which as defined in the London Treaty displaced 2,880 tons.

98. Douglas, *supra* note 52, at 198–200. By late 1930, Japan's large submarine construction program provided it with twenty-two first-class submarines (34,788 tons total) and forty-five second-class submarines (36,185 tons total). The program was adjusted downward briefly following the London Naval Conference to comply with the tonnage limitations of that treaty. CARPENTER AND POLMAR, *supra* note 93, at 2–4.

99. ROSKILL, *supra* note 82, at 44, 47, 60.

100. One historian states that Article 14 of the 1930 London Naval Treaty prohibited the arming of merchant ships; S. PELZ, *supra* note 57, at 146. Article 14 provides that "The naval combatant vessels of the United States, the British Commonwealth of Nations and Japan, other than capital ships, aircraft carriers and all vessels exempt from limitation under Article 8, shall be limited during the term of the present Treaty as provided in this Part III, and, in the case of special vessels, as provided in Article 12." Reading Articles 8 and 12 indicates that while these provisions may have had an effect on the number of vessels that could be armed commissioned vessels in the navy, or that would be counted for the purposes of the arms control provisions of the Treaty, Article 14 does not prohibit the arming of private merchant vessels for the historic purpose of self defense. This distinction is set forth in D. Knox, *The London Naval Treaty and American Naval Policy*, U.S. NAV. INST. PROC. (August 1931), at 1079, 1084. He notes "the size and characteristics of the British merchant marine, representing an auxiliary to purely naval strength," as being of immense importance. The unresolved issue was the arming of merchant vessels for defensive purposes, with a directive that a belligerent's merchant ships would (a) report all enemy submarine sightings, (b) resist visit and search, (c) endeavor to ram surfaced submarines attempting to carry out visit and search in accordance with Article 22, and (d) use its weapons for offensive purposes. Knox (p. 1985) acknowledges the advantage Great Britain gained in preventing full consideration of the issue, stating that "The value of armed merchant ships as a substitute for cruisers in blockade and trade protection operations was amply demonstrated during the World War. While a single merchant ship may not be a match for one regular cruiser carrying the same armament, it is necessary to consider the question from the viewpoint of multiple numbers. Then it becomes evident that to equal the fighting power of a given force of merchant auxiliaries at least 50 per cent of their total number is required in regular cruisers."

101. ROSKILL, *supra* note 82, at 60 [emphasis in original]. That day would come sooner than anticipated. One British submariner commented that "Successive British governments persisted

in their efforts to hamstring the submarine and, in the London Naval Treaty of 1930, achieved success. By 1940, they wished they hadn't!" MARS, *supra* note 87, at 20. Despite its opening language ("The following are accepted as *established* rules of International Law"), the concluding sentence ("The High Contracting Parties invite all other Powers to express their assent to the above rules") indicates that the delegations regarded Article 22 to be contractual rather than a codification of customary international law.

102. *Id.* at 44, 49; and KAUFMAN, *supra* note 54, at 137–138.

103. LNTS, Vol. 112, at 65–69; 2 Bevans, at 1055–1075. The ambiguities of the Treaty's submarine warfare regulations regarding merchant ships were immediately identified in the Naval War College's INTERNATIONAL LAW SITUATIONS 1930 (1931), at 1–56.

104. In the period preceding the London conference, Japan had taken advantage of the 1922 Washington Treaty's lack of cruiser regulation to build a new fleet of heavy cruisers and submarines that provided it superiority over the U.S. fleet in the Western Pacific. The London agreement would sacrifice that superiority. The Japanese Cabinet, led by Prime Minister Hamaguchi Osachi, overrode the Navy's objections, precipitating a constitutional crisis. In November 1930, Prime Minister Hamaguchi was shot by a right-wing fanatic; he died the following summer. KAUFMAN, *supra* note 54, at 141; PELZ, *supra* note 57, at 14; LACROIX AND WELLS, *supra* note 57, at 51, 53,

105. RÖSSLER, *supra* note 29, at 93–97; TARRANT, *supra* note 37, at 78.

106. CHAPUT, *supra* note 28, at 211; WATTS AND GORDON, *supra* note 63, at xii; BARNHART, *supra* note 53, at 56. The first session of the League of Nations Preparatory Commission for the 1932 World Disarmament Conference took place in May 1926. ROSKILL, *supra* note 53, at 498.

107. J. Thompson, Great Britain and the World Disarmament Conference, 1932–1934, Ph.D. diss., U. N.C. (1961), at 350.

108. Douglas, *supra* note 52, at 233–234.

109. RÖSSLER, *supra* note 29, at 97–99; TARRANT, *supra* note 37, at 78; KAUFMAN, *supra* note 54, at 175; PELZ, *supra* note 57, at 41, 75; S. ROSKILL, THE WAR AT SEA, Vol. I (1954), at 52; W. SHIRER, THE RISE AND FALL OF THE THIRD REICH (1960), at 187, 210, 289; Douglas, *supra* note 52, at 233, 234; MARDER, *supra* note 53, at 9.

110. Douglas, *supra* note 52, at 237, 241; ROSKILL, *supra* note 82, at 284–299; MARDER, *supra* note 53, at 9; PELZ, *supra* note 57, at 134–151; and HIROYUKI AGAWA, THE RELUCTANT ADMIRAL: YAMAMOTO AND THE IMPERIAL NAVY, J. Bestor, tr. (1979), at 46–48.

111. Douglas, *id.*, at 248; MARDER, *supra* note 53, at 11; PELZ, *supra* note 57, at 164.

112. See note 21. The Treaty was signed on November 6, 1936, by Australia, Canada, France, United Kingdom, India, Ireland, Italy, Japan, New Zealand, South Africa, and the United States. As the signatory States were parties to the 1930 London Naval Treaty, ratification of the *Procés-Verbal* was unnecessary. Thirty-nine other nations, including Germany (November 23, 1936), subsequently became States Parties.

113. TARRANT, *supra* note 37, at 79; Douglas, *supra* note 52, at 235, 251; PELZ, *supra* note 57, at 193, 203; WATTS AND GORDON, *supra* note 63, at xii, xiiii; ROSKILL, *supra* note 109, at 52; SHIRER, *supra* note 109, at 471. As part of the 1936 London meeting, France, Great Britain and the United States agreed to restrictions on the individual size of the different types of combatants and the gun caliber on each vessel type, with escalator clauses if the provisions were exceeded by a nonsignatory, with Germany and Japan clearly in mind. Douglas, *supra* note 52, at 250–251.

114. H. THOMAS, THE SPANISH CIVIL WAR (Rev. ed., 1977), at 739–742; ROSKILL, *supra* note 82, at 370, 383, 385. The complete text of the Nyon Agreement is in Schindler & Toman,

supra note 1, at 1207. The agreement was signed by Bulgaria, Egypt, France, Great Britain, Greece, Romania, Turkey, the Soviet Union and Yugoslavia.

115. Anderson, *supra* note 57; Rickover, *supra* note 66; Knox, *supra* note 100. In his lengthy and well-reasoned 1927 article, Captain Walter S. Anderson, USN (at 66) asked the key question indicated in the main text, listing conditions that might cause a belligerent ship to lose its noncombatant status, *viz.*:

(a) Carrying a few soldiers?
(b) Using the radio to help the enemy?
(c) Under the enemy's orders?
(d) Chartered by the enemy?
(e) Owned by the enemy but doing strictly merchantman service?
(f) Attempting to avoid visit and search?
(g) Carrying irregular papers or no papers?
(h) Carrying contraband?
(i) Breaking blockade?
(j) Under enemy convoy?
(k) Armed?
(l) A privateer?

The conundrum therefore is, when is a merchant ship not a merchant ship?

In a lecture at the U.S. Naval War College on December 22, 1938, Professor Payson S. Wild, Jr., Professor of International Law at Harvard and Associate Professor for International Law at the Naval War College, raised similar questions. Noting the degree to which governments, particularly in totalitarian States, had "obliterated" the distinction between private and public functions, the traditional law of war distinction between "combatant" and "non-combatant" also would merit re-examination. "Recent Trends in International Law," 3810/3210 (4/3/39) Naval War College Archives, RG 15, Box 8. The author is indebted to Professor John B. Hattendorf of the Naval War College for this document.

116. SHIRER, *supra* note 109, at 597; G. WEINBERG, A WORLD AT ARMS (1994), at 48, 65.

117. BLAIR, *supra* note 38, at 64–66; ROSKILL, *supra* note 109, at 103. The British began convoying in October 1939. Blair, *supra*, at 39. Attack of French warships was authorized on September 24, 1939; Roskill, *supra*, at 103.

118. BLAIR, *supra* note 38, at 11; TARRANT, *supra* note 37, at 20–22.

119. BLAIR, *supra* note 38, at 66–69; TERRAINE, *supra* note 33, at 215–217; SHIRER, *supra* note 109, at 622, 636–638. Mistakes did, indeed, occur in submarine attacks during World War II. In addition to the *Athenia*, *U-453* attacked by mistake, the British hospital ship *Somersetshire* on April 7, 1942. Despite being struck by three torpedoes, *Somersetshire* survived to limp into Alexandria, Egypt; Blair, *supra*, at 645–646. On September 10, 1939, the British submarine HMS *Triton* sank the submarine HMS *Oxley*; MARS, *supra* note 87, at 30. On October 11, 1942, the Japanese submarine *I-25* sank the Russian submarine *L-16* (at the time a neutral in the Pacific war) by mistake; BOYD AND AKIHIKO, *supra* note 52, at 111, and CARPENTER AND POLMAR, *supra* note 93, at 21. During the evening of April 1–2, 1945, the USS *Queenfish* (SS–393) sank the Japanese *Awa Maru*, a ship guaranteed safe passage by the United States. In contrast to the German and Japanese examples, the United States acknowledged its error, and the commander of the *Queenfish*, an experienced and highly decorated officer, was charged, tried, and convicted by general court-martial. R. Voge, *Too Much Accuracy*, U.S. NAV. INST.

PROC. (March 1950), at 257; R. Speer, *Let Pass Safely the Awa Maru*, U.S. NAV. INST. PROC. (April 1974), at 69; R. DINGMAN, GHOST OF WAR: THE SINKING OF THE AWA MARU AND JAPANESE-AMERICAN RELATIONS, 1945–1995 (1997).

120. BLAIR, *supra* note 38, at 144.

121. The British returned to their World War I practice of decoy ships quickly. Between October 1939 and March 1940, eight decoy ships were constructed in "utmost secrecy," according to the official history; ROSKILL, *supra* note 109, at 136. On the evening of May 31/June 1, 1941, *U–107* attacked the British freighter *Alfred Jones*. Surfacing to aid its "survivors," who were "abandoning ship," the *U–107* was attacked by the vessel, which was a decoy ship. BLAIR, *supra* note 38, at 297; K. WYNN, U-BOAT OPERATIONS OF THE SECOND WORLD WAR, Vol. I (1997), at 89; J. ROHWER, AXIS SUBMARINE SUCCESSES OF WORLD WAR TWO (Rev. ed., 1999), at 54. The latter argues that *Alfred Jones* was not a Q-ship, but an armed merchantman. From the perspective of the U-boat commander endeavoring to comply with the visit and search requirements of the 1936 *Procés-Verbal*, whether or not *Alfred Jones* was a decoy ship or an armed merchantmen is moot. Less successful than they had been in World War I, the British Q-ships were withdrawn from service. Roskill, *supra*, at 137; Rohwer, *supra*, at 54. The U.S. Navy's Q-ship effort was equally brief; BEYER, *supra* note 44.

122. BLAIR, *supra* note 38, at 66, 68–69, 95–96, 111; ROSKILL, *supra* note 109 at 103, 104.

123. BLAIR, *supra* note 38, at 115, 117–118. British steps complicated the legal questions. On August 26, 1939, before war began, the British Admiralty had assumed control of all British merchant shipping; pre-war plans for utilizing decoy ships (Q-ships) brought the first deployment in December 1939 (see note 121). Merchant ship guns were manned by trained seamen or marines from the Admiralty's Defensively Equipped Merchant Ship organization; TERRAINE, *supra* note 33, at 244; ROSKILL, *supra* note 109, at 136–137, 363. In somewhat of an irony, a British submarine officer, writing of the British submarine efforts of World War II, concluded that the submarine "cannot observe international law when waging war against an enemy who disregards it." N. Gilbert, *British Submarine Operations in World War II*, U.S. NAV. INST. PROC. (March 1963), at 74, 81.

124. Listing of further steps in the evolution must be limited due to space limitations. Commencing May 24, 1940, U-boats were authorized to attack any ship, belligerent or neutral, in British or French waters; Hitler extended the authority for unrestricted attack to 20° west longitude on August 17, 1940; other steps came throughout the war. Restrictions on attack of neutral combatant vessels in announced zones of operations, and merchant vessels outside zones of operations, continued through much of the war. BLAIR, *supra* note 38, at 104, 115, 117–118, 161, 179, 308–309. A collateral issue is the requirement in the 1936 *Procés-Verbal* with regard to rescue and safeguard of crew and passengers of vessels sunk. Regrettably, space limitations also preclude discussion in this article. For the same reason, neither is it possible to discuss the ancillary issue of murder of shipwreck survivors by submarine crews, as occurred during some Japanese and German submarine operations during World War II.

125. TERRAINE, *supra* note 33, at 278; A. COCCHIA, THE HUNTERS AND THE HUNTED (1958), at 3, 5, 7, 9, 13, 24.

126. MARS, *supra* note 87, at 28, 30, 33–34; WYNN, *supra* note 121, at 25.

127. MARS, *supra* note 87, at 70, 71, 73; Gilbert, *supra* note 123, at 74. This authorization was cited by the International Military Tribunal in its acquittal of Admirals Raeder and Dönitz; see text at note 24.

128. ROSKILL, *supra* note 109, at 439.

129. Gilbert, *supra* note 123, at 77; MARS, *supra* note 87, at 124.

130. British submarine officers were critical of the decision to place priority on attack of combatants; Gilbert, *supra* note 123, at 75, 77.

131. BOYD AND AKIHIKO, *supra* note 52, at 59; ROHWER, *supra* note 121, at 278.

132. *I–10* sank the 4,473-ton Panamanian *Donerail* on December 10; *I–4* sank the 4,858-ton Norwegian *Heögh Merchant* on December 15. The campaign off the U.S. west coast began on December 21, when *I–17* sank the U.S. *Emidio*. BOYD AND AKIHIKO, *supra* note 52, at 59, 65–67; CARPENTER AND POLMAR, *supra* note 93, at 17; ROHWER, *supra* note 121, at 278.

133. C. Goldingham, *Japanese Submarines in the Second World War*, J.R.U.S.I. (February 1951), at 93–94, 95; MOCHITSURA HASHIMOTO, SUNK: THE STORY OF THE JAPANESE SUBMARINE FLEET 1942–1945 (1954), at 33, 179; M. ITO, THE END OF THE IMPERIAL JAPANESE NAVY (1956), at 22–23, 25, 82–83, 108, 183, 198; Kennosuke Torisu, *Japanese Submarine Tactics and the Kaiten*, in D. Evans, ed., THE JAPANESE NAVY IN WORLD WAR II (2nd ed., 1986), at 440–441; BOYD AND AKIHIKO, *supra* note 52, at xi, 49–50, 116.

134. C. BLAIR, SILENT VICTORY (1975), at 106; MALLISON, *supra* note 20, at 87.

135. For example, the late Professor D. P. O'Connell stated that "The [U.S.] policy of unrestricted warfare against Japan . . . [was] justified as a reprisal for Japanese breach of the law." THE INFLUENCE OF LAW ON SEA POWER (1975), at 44. Similarly, see S. MORISON, HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, vol. IV, CORAL SEA, MIDWAY AND SUBMARINE OPERATIONS (1949), at 190. Clay Blair, *supra* note 38, at 106, refers to the U.S. action as a renunciation. In his Naval War College treatise, Professor Mallison is more circumspect, suggesting possible operational reasons in support of Admiral Nimitz's statement (MALLISON, *supra* note 20, at 89, 90) apparently in agreement with the semi-official U.S. submarine history, which states that the decision "was not reprisal so much as military imperative that caused Washington to reverse its opinion on the already abrogated naval laws." T. ROSCOE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II (1949), at 19. Professor Leslie C. Green, whom this essay and volume honors, is more cynical: ". . .[M]ilitary necessity prevailed over respect for human rights." L. Green, *Human Rights and the Law of Armed Conflict*, in ESSAYS ON THE MODERN LAW OF WAR (1985), at 91.

136. 40 I.M.T. 111; MALLISON, *supra* note 20.

137. At the time of the attack on Pearl Harbor, the U.S. Navy was operating under its TENTATIVE INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME AND AERIAL WARFARE (May 1941). That document does not use or define *reprisal*. However, the U.S. Army Field Manual 27–10, RULES OF LAND WARFARE (1 October 1940), which was in effect at the time, defines and discusses *reprisal* in the following terms (pp. 89–90):

> a. Definition.—Reprisals are acts of retaliation resorted to by one belligerent against the enemy ... for illegal acts of warfare committed by the other belligerent, *for the purpose of enforcing future compliance with the recognized rules of civilized warfare.*
>
> b. When and how employed.—*Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. . . .*
>
> c. Form of reprisal.—The acts resorted to by way of reprisal need not conform to those complained of by the injured party, *but should not be excessive or exceed the degree of violence committed by the enemy. . . .* [Emphasis supplied]

As the attack on Pearl Harbor had concluded and would not be repeated, the U.S. decision to resort to unrestricted submarine warfare against Japan could not have been taken to induce Japan to "desist from its illegitimate practices." Had the United States government intended this to be a reprisal for that purpose, it would have been necessary to communicate this to the Japanese government, either through diplomatic communication or public announcement. It did neither. Indeed, the December 7, 1941, order by the Chief of Naval Operations to commence

unrestricted air and submarine warfare against Japan remained classified until March 29, 1961; MALLISON, *supra* note 20, at 89, fn. 152. It would be difficult to conclude that engagement in unrestricted submarine warfare for the duration of the Pacific war was proportionate to the Japanese attack on Pearl Harbor. Finally, operational rationale such as those offered by Professor Mallison (*id.* at 138) would not be necessary if the action taken was a reprisal.

138. S. Bemis, Submarine Warfare in the Strategy of American Defense and Diplomacy, 1915–1945, unpublished manuscript of lecture by Professor Samuel Flagg Bemis at the U.S. Naval War College, December 15, 1961, at 36.

139. *Id.*, and Bemis, Submarine Warfare, unpublished seminar and panel discussion, Naval War College, December 16, 1961.

140. J. Talbott, *Weapons Development, War Planning and Policy: The US Navy and the Submarine, 1917–1941*, NAV. WAR COLL. REV. 37 (May–June 1984), at 53.

141. R. SPECTOR, EAGLE AGAINST THE SUN: THE AMERICAN WAR WITH JAPAN (1985), at 478–480; J. MANSON, DIPLOMATIC RAMIFICATIONS OF UNRESTRICTED SUBMARINE WARFARE, 1939–1941 (1990), at 127–160.

142. The General Board was created by the Secretary of the Navy on March 13, 1900, for advisory purposes only. E. Potter, ed., SEA POWER: A NAVAL HISTORY (2nd ed., 1981); K. HAGAN, THIS PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER (1991), p. 232; MILLER, *supra* note 53, at 15–18. By 1921, "its functions were clearly delineated. By executive order, the Board concerned itself with war plans, naval policy, fleet organization and reorganization, naval construction planning, and ship (also aircraft) design characteristics." WHEELER, *supra* note 60, at 174.

143. Bemis, *supra* note 138, at 18–19.

144. See sources at note 115.

145. *Id.* at 19–21; TENTATIVE INSTRUCTIONS, *supra* note 137, at iii, 14, 17, 20–21.

146. MILLER, *supra* note 53, at 319.

147. Talbott, *supra* note 140, at 62.

148. MANSON, *supra* note 141, at 150.

149. Bemis, *supra* note 138, at 22–26.

150. *Id.* at 26.

151. Director, War Plans Division to Director, Central Division (May 21, 1941), Records of the Secretary of the Navy, File A16–3(26), as cited in Bemis, *supra* note 138, at 27.

152. Talbott, *supra* note 140, at 62, 63.

153. Bemis, *supra* note 138, citing H. STIMSON AND M. BUNDY, ON ACTIVE SERVICE IN WAR AND PEACE (1947), at 389, and C. HULL, MEMOIRS OF CORDELL HULL (1948), at 1068–1082. Japanese ambassador to the United States, Kichisaburo Nomura, Secretary of State Hull, and Japanese special envoy Saburo Kurusu previously met at the White House on November 17 for a "final attempt at peace." G. PRANGE, AT DAWN WE SLEPT (1981), at 358. The Japanese presented their latest plan to Secretary of State Hull on November 20, who viewed it as only the latest in a series of Japanese duplicity; BARNHART, *supra* note 53, at 259, 260–261.

154. Bemis, *supra* note 138, at 31.

155. *Id.*, at 32–34, citing R. SHERWOOD, ROOSEVELT AND HOPKINS (1948), at 431. Bemis (at 33) confirmed Admiral Stark's conversation with President Roosevelt in a lunch meeting at the Army-Navy Club in Washington on May 31, 1961, where Stark confirmed that President Roosevelt knew clearly that the "agreed orders" included unrestricted submarine warfare. The semi-official U.S. history indicates that, among other things, the order was one for which the U.S. submarine community was totally unprepared, having devoted all pre-war training and planning to compliance with the rules contained in Article 22 of the 1930 London Naval Treaty

and, subsequently, the 1936 *Procés-Verbal*; ROSCOE, *supra* note 135, at 18. Other reasons are provided in SPECTOR, *supra* note 141, at 482–483. Fortunately, the Imperial Japanese Navy's antisubmarine capabilities were equally unprepared for the change in U.S. submarine tactics. *Id.* at 485–486.

156. Bemis, *supra* note 138, at 36, 41.

157. *Id.* at 38; ROSCOE, *supra* note 135, at 34.

158. ROSCOE, *supra* note 135, at 524; BLAIR, *supra* note 134, claims 1,314 vessels—combatants and merchant ships—for 5.3 million tons, or 55 percent of all Japanese ships sunk. In contrast, Germany sank 5,078 merchant ships for about 11 million tons during World War I, and 2,882 Allied merchant vessels, for 14.4 million tons, plus 175 Allied combatant vessels in World War II. *Id.*, at 878. He revised these figures subsequently to 5,000 ships (combatant or merchant ship) for about 12 million tons in World War I, and approximately 3,000 ships and 4 million tons in World War II. *Id.*, at 18, 20, and 771; and BLAIR, HITLER'S U-BOAT WAR, VOL. II, THE HUNTED, 1942–1945 (1998), at xii, 820, citing TARRANT, *supra* note 37, at 148, 149.

159. Construction of what was to become the U.S. fleet submarine began with the *Perch* class, commenced in 1936. These were followed by the *Salmon* (1936), *Sargo* (1937), *Tambor* (1939–40) and *Gato* (1941) classes; ALDEN, *supra* note 29, at 60–103.

160. ROSCOE, *supra* note 135, at 19.

161. In this regard this author respectfully disagrees with the cynicism expressed by Professor Leslie Green (note 137). "Human rights" is not limited to protection of civilian lives. Nothing in the law of war places greater value on civilian lives than military, particularly where the "civilians" in question are traveling on a combatant vessel in a war zone, or otherwise taking an active part in hostilities. As this essay shows, abrogation of the rules stated in the 1936 *Procés-Verbal* by all submarine powers in the main lay in their ambiguity and impracticality.

162. C. Eichelberger, *The Law and the Submarine*, U.S. NAV. INST. PROC. (July 1951), at 691; H. Robertson, *supra* note 41, at 3; and W. Miller, *A New International Law for the Submarine?* U.S. NAV. INST. PROC. (October 1966), at 97.

163. J. Gilliland, *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, GEORGETOWN L. J. 73, 3 (February 1985), at 975; W. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, CAN. Y.B. INTL. LAW XXIV (1986), at 91.

164. M. Royse, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE (1928), at 141; and *Consultation de M. W. Royse*, in International Committee of the Red Cross, ed., LA PROTECTION DES POPULATION CIVILES CONTRA LES BOMBARDMENTS (1930), at 77.

XV

Antecedents of the Rome Statute of the International Criminal Court Revisited

Shabtai Rosenne

ON JULY 17, 1998 the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (hereafter Rome Statute or Statute).[1] This was the culmination of the hopes and dreams of many generations of international lawyers and others who aimed at seeing international law placed on a sounder basis than the voluntarist conceptions so characteristic of it.

One hundred and sixty States took part in the Conference, held in Rome between June 15 and July 17, 1998. Thirty-one official organizations and other entities were represented at the Conference by observers. In addition, observers from 134 non-governmental organizations participated. The Rome Statute was adopted on a non-recorded vote of 120 in favor, seven against, and 21 abstentions, the remaining States not taking part in the vote. The purpose of this article is to retrace briefly the developments that led to the Rome Statute, together with some afterthoughts.

It is a pleasure to dedicate this article to my friend of about fifty years standing, Leslie Green. The author wishes to acknowledge the assistance of Hans-Peter Gasser, Editor-in-Chief of the International Review of the Red Cross, in preparing this article.

In the Beginning (1872–1914)

It is common knowledge that in the Middle Ages knights could be "tried" by their peers of another people or another fiefdom for violation of the accepted canons of knightly behavior or for allowing particularly vicious acts to be performed by soldiers under their authority. A well-known example of this is the so-called Breisach trial of 1447.[2] These, however, were hardly war crimes trials as we understand them today. Rather they were knightly courts of honor deciding on violations, direct or indirect, of knightly codes.

Another attempt at quasi-criminal international proceedings encountered during the mid-nineteenth century should be noted. As part of its campaign against the slave trade, Great Britain concluded a series of bilateral agreements. These allowed duly commissioned ships of the Royal Navy to visit and search on the high seas flag vessels of the other State, and bring vessels suspected of engaging in illegal slave trade operations into port. Here they would be brought before a mixed commission for adjudication. The mixed commission would decide, without appeal, whether or not a vessel brought before it was a slave ship trading illicitly and legally captured, and would accordingly either condemn it as lawful prize and liberate the slaves it carried, or acquit it and restore both the vessels and the slaves to their owners. These mixed commissions had no jurisdiction over the owners, masters or crews of the condemned vessels. Individuals were to be handed over to their own authorities for trial and punishment in their own courts and according to their own laws. Mixed commissions of this kind sat to the east along the coast from the Cape of Good Hope to the Cape Verde Islands, and in the west from Rio de Janeiro to New York, with the court at Freetown, Sierra Leone, being the most important. It is estimated that over 600 slave vessels were condemned by these commissions and that some 80,000 slaves were liberated by them. They functioned between 1819 and 1871.[3]

Credit for the first attempt in modern times to develop a system of an international criminal tribunal goes to Gustave Moynier of Switzerland. Moynier, together with Henry Dunant, was one of the founders of the International Red Cross, through the Geneva Red Cross Conference of 1863,[4] followed by the first Geneva Conference of 1864. That Conference adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.[5] Dismayed at the failure of the belligerents in the Franco-Prussian War of 1870–1871 to observe faithfully the provisions of the Geneva Convention in its first real test, Moynier conceived the idea of an established standing international machinery to make it possible to try

individuals who allegedly violated the provisions of the Convention.[6] He was able to persuade his colleagues of what became known as the International Committee of the Red Cross to circulate his proposal to the national committees, for consideration at a future Red Cross Conference.[7]

The gist of Moynier's proposal was that as soon as war had been declared, the President of the Swiss Confederation was to choose by lot three Powers party to the Geneva Convention, excluding belligerents. The three governments, together with those of the belligerents, were to be invited to nominate an "adjudicator" [*arbitre*]. Those five persons would constitute a tribunal. That tribunal, however, would deal only with breaches of the Convention that had been the subject of complaints addressed to it by interested governments. The tribunal was to subject the facts to an adversarial inquiry and then present its decision, for each individual case, as a verdict of guilty or not guilty. If guilt was established, the tribunal was to pronounce a penalty, in accordance with provisions of international law. The latter were to be the "subject of a treaty which is complementary" to the proposed convention on the international judicial body. The tribunal was to notify its judgments to interested governments. These, for their part, were to impose on those found guilty the penalties that had been pronounced against them. Another interesting provision was to the effect that where a complaint was accompanied by a request for damages and interest, the tribunal would be competent to rule on that claim and to fix the amount of the compensation. "The government of the offender will be responsible for implementing the decision." In this scheme, what was permanent was not the tribunal itself but the mechanism for the establishment of a tribunal in time of war.

This proposal did not receive a warm welcome. A longish note by Moynier's friend and colleague, the Belgian jurist G. Rolin-Jaequemyns, gives the text of replies received from several eminent internationalists of that epoch. These included F. Lieber of the United States of America,[8] A. Morin of France, F. de Holtzendorff of Germany, John Westlake of Great Britain, and the Asamblea española de la Asociacion internacional para el secorso de los heridos en campaña of Madrid—apparently the only national society to reply to the circular.[9]

Moynier's proposal attacked several of the central problems that the idea of a permanent international criminal court raises. Among these are the selection of the judges, the law to be applied, jurisdiction both *ratione personae* and *ratione materiae* and its scope *ratione temporis*, the enforcement of the decision, and the relation between the criminal responsibility of an individual even though the agent of the State and the international responsibility of the State

itself (an aspect now regulated by Article 3 of the Hague Convention No. IV of 1907 with respect to the laws and customs of war on land).[10] The proposal bears traces showing that it could have been inspired by a combination of factors. These include the general attack on international law as "law" without regular enforcement machinery through standing courts; the influence of the *Alabama* arbitration taking place in Moynier's hometown and the seat of the Red Cross, Geneva; dismay in Red Cross circles at the relative weakness of the Geneva Convention brought out during the Franco-Prussian war; and perhaps to some extent the experience of the Central Commission of the Rhine that was exercising some civil and criminal jurisdiction, even if of limited and localized scope.

However, the proposal was ahead of its time. No international experience had been acquired of any permanent international judicial instance of universal competence. The absence of an agreed international code on the law of war and on the conduct of warfare, and setting forth what acts, when committed by an individual, could be considered criminal, detracted from the feasibility of any kind of international criminal tribunal at that period. Furthermore, the concept of extradition formalized in national legislation and in international treaties was relatively undeveloped and there was—and still is—well-marked reticence on the part of many influential States to allow the extradition of their nationals, save perhaps in the most exceptional circumstances. The existence of factors such as these was not propitious for the fundamental innovation in international law and practice that the creation of an international judicial instance exercising jurisdiction over an individual acting as agent of the State would entail, even on so limited a scale as Moynier envisaged.

In this connection, it is interesting to observe that after the failure of Moynier's initiative in 1872, the International Committee of the Red Cross did not return to the idea of establishing an international criminal court to try individuals accused of violations of the Geneva Conventions. Instead, it focused its attention more on securing national legislation criminalizing individuals for such violations. The issue of an international penal jurisdiction does not seem to have been raised in the Geneva Red Cross Conferences of 1929, 1949, and 1974–1977. The most that occurred was in connection with the 1949 conference, where the International Committee suggested including in all the Conventions to be adopted at that Conference a provision regarding grave breaches. According to that suggestion, grave breaches were to be punished as crimes against the law of nations by the tribunals of any of the parties to the Convention "*or by any international jurisdiction.*" This proposal, however, was not pursued.[11]

Nevertheless, Moynier's initiative was not without practical consequences. His reference to international law that was to be made was followed by a rapid spurt in the development of the *jus in bello*, the law governing the conduct of warfare. That was prompted, of course, by a combination of many diverse attributes. These included, alongside the intellectual and humanitarian activism, rapid technological advances in that period, both generally and in the weapons of war. This development ran on two-parallel and interactive lines. One was a series of intergovernmental treaty-making conferences—at Brussels (1874), The Hague (1899, 1907) and London (1908–1909). The second was activity *de lege ferenda* on a grand scale by the Institute of International Law (of which Moynier was one of the founders), leading to a series of resolutions on different aspects. The most important was the Oxford Manual on the laws of war on land of 1880 and a parallel manual on the laws of naval war governing the relations between belligerents, also adopted at Oxford (1913).[12] Many prominent international lawyers and diplomats were active on both those tracks. At the same time, individual scholars were beginning to look into the question.[13]

The law embodied in the Geneva Conventions, from 1864 up to and including the Additional Protocols of 1977, used to be termed "Geneva law," and the succession of treaties, declarations, and other instruments governing the conduct of warfare was designated as "Hague law." Geneva law was concerned with individuals—victims of war (military and civilian) and the perpetrators of violations of the laws and customs established for their protection, whether military or civilian personnel. Hague law dealt with the rights and duties of States in their conduct of warfare. Breach of the applicable treaties could lead to a case of State responsibility. The black-letter texts were at this stage couched in the language of rights and duties of States as the subjects of international law. They paid little attention to the actions of individuals, whether in a position of command and authority, or subordinates. They show little signs of recognition of the importance and relevance of military hierarchy. Both sets of treaties and the law that they enunciate have become heavily encrusted with rules and practices of customary international law generated by the black-letter texts. These largely place responsibility for the application of the rules of law on individuals (especially members of the armed forces) as the instrumentalities through which States act or even when an individual is acting *sua sponte* and not under orders.

In addition, the development of the concept of human rights on a universal scale embodied in the Charter of the UN and amplified in the Universal Declaration of Human Rights and other instruments has had a direct impact on this branch of the law. One consequence has been that the distinction between

Geneva law and Hague law has become increasingly artificial, especially when the law envisages individual criminal responsibility for violations. The two branches of the law are now plaited together as international humanitarian law, which nonetheless maintains the distinction between the international responsibility of the State and the criminal responsibility of an individual. It is not clear when the term "international humanitarian law" was first used. The International Court of Justice has endorsed it.[14] Established competence "in relevant areas of international law such as international humanitarian law" is one of the qualifications required for judges of the new Court by Article 36, paragraph 3(*b*)(ii), of the Rome Statute.

Intermezzo: The Peace Treaties and the League of Nations (1919–1939)

A major step forward was taken in the Treaty of Versailles of 1919.[15] Article 227 envisaged the trial of the Kaiser Wilhelm II by a special tribunal "for a supreme offence against international morality and the sanctity of treaties." The special tribunal was to be composed of five judges, one appointed by each of the Principal Allied and Associated Powers, and to be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It was to fix the punishment which it thought should be imposed. The Allied and Associated Powers "will address a request to the Government of the Netherlands [to which the Kaiser had fled on his abdication as Emperor of Germany] for the surrender [not "extradition"] to them of the ex-Emperor in order that he may be put on trial." As is well known, the Dutch Government refused to "surrender" the Kaiser, and the matter of his trial was quietly dropped. The significance of this provision is its recognition—probably the first instance in modern times—that the Head of State can be criminally liable for violations of international law, not limited to international humanitarian law or what we would today call "war crimes."[16] In addition, Article 228 provided that the Allied and Associated Powers could bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Article 229 provided for the trial of persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers before the military tribunals of that power. All those provisions, however, came up against the obstacle that German law did not permit the extradition of German nationals, and apparently viewed "surrender" as another word for "extradition." Some Germans accused of war crimes were tried by German Courts. However, on the whole, in practice

those provisions of the Treaty of Versailles were not satisfactory.[17] Their importance is more conceptual.

Thus, the modern process had begun.

The next step was taken a year later, in 1920. The Committee of Jurists appointed under Article 14 of the Covenant of the League of Nations to prepare the statute of the Permanent Court of International Justice adopted a resolution for the establishment of a High Court of International Justice, to try crimes constituting a breach of international public order or against the universal law of nations referred to it by the League Assembly or Council. This Court would have the power to define the nature of the crime, fix the penalty, and decide the appropriate means of carrying out the sentence. The resolution came before the first session of the League Assembly (1920) which, however, did not adopt it, and the matter was accordingly dropped.[18]

At this point, nongovernmental organizations began to show interest in the matter. Drafts were prepared by the Inter-Parliamentary Union, the International Law Association, the International Congress of Penal Law and the International Association of Penal Law (this latter adopting a proposal by V.V. Pella, who was to play an important role after the Second World War).[19] At that stage there was a widespread feeling—not shared in political circles—that in one way or another appropriate competence should be conferred on the Permanent Court of International Justice, then a new and untried international institution.

On the diplomatic front, the Special International Conference on Repression of Terrorism was in session from 1 to 16 November 1937. It adopted a Convention for the Prevention and Punishment of Terrorism and a Convention for the Creation of an International Criminal Court, neither of which, however, entered into force.[20] That Court's jurisdiction was limited to the offenses set out in the Convention for the Prevention and Punishment of Terrorism. The judges were to be nominated by States parties, and chosen by the Permanent Court of International Justice. The Convention was quite detailed, with 56 articles in all (including the final clauses). Considering the general deterioration of the international situation by 1937, it is quite remarkable that this Conference, attended by 31 States—including the Soviet Union, but not Germany, Italy or Japan—could reach agreement on such complex texts, something that really was to elude the United Nations until 1998.

Restart in the United Nations (1945–1967)

The Declaration on the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, signed at Berlin on June 5, 1945, was the

next major advance.[21] Article 11 of that instrument required the German authorities to apprehend and surrender to the Allies all persons from time to time named or designated by rank, office or employment by the Allies as having been suspected of having committed, ordered or abetted war crimes or analogous offenses. This was followed by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, signed at London on August 8, 1945.[22] The precedent of the Treaty of Versailles was not being followed, and the prohibition of German law on the extradition or surrender of German nationals leading to their trial in a foreign court was made inoperative. The unconditional surrender of Germany made this possible.

It is unnecessary here to go over the story of the London Agreement and the Charter of the International Military Tribunal for the Far East, Tokyo, January 19, 1946,[23] and of the Nürnberg and Tokyo Tribunals. They set in motion powerful trends for the establishment of a permanent international criminal tribunal to avoid the creation of *ad hoc* tribunals in the future. The first major move in that direction accompanied the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.[24] Article VI of that Convention provides:

> Persons charged with genocide or any of the other acts enumerated in article III [conspiracy, incitement, attempt or complicity regarding genocide] shall be tried by a competent tribunal in the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[25]

When the General Assembly adopted that Convention and opened it for signature, it also adopted Resolution 230 (II) B. Here it invited the newly formed International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by other international agreements. It requested the International Law Commission to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That resolution must be regarded as the starting point of the process that led to the Rome Statute of 1998. Its point of departure was the work accomplished during the period of the League of Nations and the 1945 activities of the victorious Allies, but future developments were unrestricted.[26]

At its first session in 1949, the International Law Commission held a preliminary discussion. It rejected proposals to postpone the matter to the following

session and decided to appoint a rapporteur to report to that next session. At its 33rd meeting it appointed two rapporteurs, R.J. Alfaro (Panama) and Judge A.E.F. Sandström (Sweden), to prepare working papers on the topic.[27] The two working papers were duly presented. Each examined the two aspects mentioned specifically in the General Assembly's resolution, namely the general question, and the particular aspect of the employing of the International Court of Justice for this purpose.

Alfaro[28] dealt mainly with the evolution of the idea of an international criminal jurisdiction, without adding much to the Secretariat's Historical Survey. He was unhesitatingly of the opinion that instituting an international criminal jurisdiction was both desirable and feasible "for the prevention and punishment of international crimes."

> If the rule of law is to govern the community of States and protect it against the violations of the International public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction (para. 136).

Regarding the International Court of Justice, he pointed out that an amendment to Article 34 of the Statute would be required to establish a chamber of the Court with power to try States and individuals. With that proviso, he would answer the question in the affirmative (para. 134).

Sandström[29] concentrated more on the possibility of establishing an international criminal judicial organ, carefully weighing the pros and cons. His conclusions were negative:

> 39. In my opinion the cons outweigh by far the pros. A permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good. The time cannot as yet be considered ripe for the establishment of such an organ.
>
> 40. If such a judicial organ is to be established, it is submitted that, in view of the defects with which it would be impaired, it would be preferable to provide for the possibility of establishing a Criminal Chamber of the International Court of Justice in case of need. The defects would then be less noticeable, and such a possibility could perhaps in a given case meet the criticism voiced against the Nürnberg trial.

The Commission dealt with the matter at its 41st to 44th meetings during its second session (1950). After votes, the Commission decided that the

establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon it by international convention was desirable. It went on to decide that the establishment of such an international judicial organ was possible. Finally, it reported that it had paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it was possible to do so by amendment of the Court's Statute, the Commission did not recommend it.[30]

The General Assembly discussed this at its fifth session in 1950. The Cold War was dominating all activities in the United Nations then, not a promising moment for dispassionate consideration of so delicate a matter as the establishment of an international criminal court. In Resolution 489 (V), December 12, 1950, the General Assembly showed that a final decision regarding the setting up of an international penal tribunal could not be taken except on the basis of concrete proposals. It accordingly established a Committee composed of 17 Member States "to prepare one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court."[31]

The Committee was in session from August 1 to 31, 1951.[32] It produced a draft statute for an international criminal court in 55 articles (excluding the preamble and the final clauses). It also adopted a *vœu* in which, referring to the Genocide Convention, it expressed the wish that along with the instrument establishing the International Criminal Court, a provision should be drawn up conferring jurisdiction on that Court in respect of the crime of genocide. The report is important. It set out the first general outline of the structure of the proposed tribunal. The draft statute was divided into several chapters, on general principles (Articles 1–3), the organization of the Court (Articles 4–24), the competence of the Court (Articles 25–32), the committing authority and prosecuting authority, not an organ of the court, the Committee drawing the attention of the General Assembly to the need to establish special investigatory and prosecuting machinery (Articles 33–34), procedure (Articles 35–53), clemency (Article 54) and final provisions (Article 55). That has remained the basic structure for the international criminal court. Among the deficiencies of the draft was Article 2, on the law to be applied, except that the Rome Statute has included the prosecution among the organs of the new Court, a curious abandonment of any idea of the separation of powers. It was partly similar to Moynier's 1872 suggestion, and partly reflected the ICRC's change of direction, aiming at incorporating the relevant provisions in national criminal law: "The Court shall apply international law, including international criminal law, and where appropriate, national law." There were other deficiencies. The draft was subjected to a series of critical written observations by several

governments, including some that had been represented on the Committee, and even more serious criticism in the Sixth Committee's debate that year.[33]

The General Assembly then adopted Resolution 687 (VII), December 5, 1952.[34] Here it decided to appoint another committee of 17 Member States to be designated by the President of the General Assembly (Lester Pearson of Canada). Its mandate was more complicated. The new Committee was, in the light of the comments and suggestions of governments, (i) to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done; (ii) to study the relationship between such a court and the United Nations and its organs; and (iii) to reexamine the draft statute. This resolution brought out the more general complexities of the subject, something that before had not been clear.

The 1953 Committee was in session between July 27 and August 20, 1953. In its report, it in effect followed what the earlier Committee had reported, suggesting only some minor changes in the Statute as previously drafted. On the central issue of the law to be applied, Article 2 merely repeated unchanged Article 2 of the earlier draft.[35] In Resolution 898 (IX), December 4, 1954, the General Assembly did not really accept this. It noted the connection between the question of defining aggression, the draft Code of Offenses against the Peace and Security of Mankind, and the question of an international criminal jurisdiction. It decided to postpone consideration of the international criminal court until the General Assembly had taken up again the questions of the definition of aggression and the draft Code of Offenses. This well brings out that at that time the question of the applicable law continued to be the central issue of interest on the political level. Simultaneously, in Resolution 895 (IX) of the same date, the General Assembly established a new special committee to submit in 1956 a detailed report with a draft definition of aggression. At the same time the International Law Commission submitted a report on the draft Code of Offenses Against the Peace and Security of Mankind.[36] In Resolution 897 (IX), also of December 4, 1954, the General Assembly, referring to its decision regarding the definition of aggression, decided to postpone further consideration of the Code until the Committee on the definition of aggression had submitted its report. The three items in that way became bound together, a triad. The decision to postpone these items *sine die* was a direct consequence of the Cold War.

The Special Committee on the Definition of Aggression submitted its report in 1956.[37] Meanwhile, the early crisis of the United Nations on the admission of new members had been resolved and the beginnings of the decolonization process were taking place. Those two processes produced profound changes in the composition and institutional character of the United Nations, especially

the General Assembly. In Resolution 1181 (XII), November 29, 1957, the General Assembly noted that 22 additional States had recently joined the United Nations. It requested the Secretary-General to take the view of the new Member States and to place the question of defining aggression on the provisional agenda of the General Assembly not earlier than its 14th session (1959), after another special committee had advised him that it considered the time appropriate. That resolution was adopted on a roll-call vote, something rare on draft resolutions coming from the Sixth Committee, of 42:24:15 with one State absent. The negative votes were cast by the Soviet Bloc together with some Latin American, Arab, and other States, and the abstentions were similarly scattered. That vote shows the impact of the Cold War and the changing composition of the General Assembly on what was nothing more than a procedural decision, in effect deferring consideration of the matter for another two years at least. However, no recommendation to renew discussion of the definition of aggression was ever made.

Meanwhile, as the Cold War continued, the decolonization process produced an enormous increase in the membership of the United Nations, completely changing all voting patterns in the General Assembly and in diplomatic conferences and enhancing the role of "consensus" in decision making as opposed to a majority vote. On top of that, the Six Days War (1967) led to a major international crisis. That was to generate a new phase in the development of each of these three interlocked items. To widespread surprise, the Soviet Union took the initiative. Before the exercise was completed, the Soviet Union, and with it the Soviet Bloc in the United Nations, had also collapsed, leading to further profound changes in the composition and character of the United Nations overall, and the General Assembly in particular.

This first United Nations phase had brought out two aspects in particular: (i) the close connection that exists between the establishment of an International Criminal Court and the law to be applied, quite apart from any question arising out of the Genocide Convention; and (ii) the question of the relationship to exist between the criminal court and the United Nations, and in particular the Security Council. It also showed that on the political level the question of the law to be applied contained at least two separate elements, namely the definition of aggression and the code of offenses against the peace and security of mankind, that item itself being more directly the offshoot of the Nürnberg Judgment. Further developments regarding the court would therefore depend on the progress in those two other matters.

The Definition of Aggression, the Code of Crimes and the Geneva Red Cross Conference (1967–1991)

On September 22, 1967, the USSR requested the inclusion in the agenda of the 22nd session of the General Assembly of a tendentiously worded additional item entitled: "Need to expedite the drafting of a definition of aggression in the light of the present international situation." The item was taken on the agenda after a bitter procedural debate. In an unusual procedure it was allocated to plenary meetings for a general debate, and then, in light of that debate and the results achieved, to the Sixth Committee. The General Assembly decided in Resolution 2330 (XXII), December 18, 1967, to establish a Special Committee on the Question of Defining Aggression to consider all aspects of the question and to report back to the General Assembly. Retracing the subsequent developments is not necessary here. It is sufficient to say that in Resolution 3314 (XXIX), December 14, 1974, the General Assembly, without a vote, adopted a definition of aggression.[38] That definition does not, however, deal with "the crime of aggression" as a matter of the criminal responsibility of an individual. Article 5 of the Rome Statute includes "the crime of aggression" among the crimes over which the new International Criminal Court will have jurisdiction. As it is, it does not explain what that means for individual criminal responsibility. In Resolution F annexed to its Final Act, the Conference requested the Preparatory Commission established by that resolution *inter alia* to prepare proposals for a provision on aggression for submission to the Assembly of States Parties at a Review Conference.[39] Although the Nürnberg and Tokyo Tribunals had little difficulty in dealing with charges of crimes against peace by the planning, preparation, initiation, and waging of wars of aggression against the accused before them—all senior officers of the State—the problem today is complicated because of the existence of the Security Council with primary responsibility for the maintenance of international peace and security. The issue to be faced is whether the International Criminal Court can have jurisdiction over a case of aggression regardless of whether the Security Council has formally determined that an act of aggression has taken place (Charter, Article 39).

In 1968 the Special Committee on the Definition of Aggression drew the General Assembly's attention to the question of the Draft Code of Offenses against the Peace and Security of Mankind, but no action was taken then. When the General Assembly adopted the definition of aggression, it again took note of observations by the Secretary-General regarding the Draft Code and the international criminal court, without adopting then any operative

decision.[40] In 1977 the International Law Commission raised the question of renewing consideration of the Draft Code. In Resolution 33/97, December 16, 1978, the General Assembly requested the Secretary-General to ascertain views of Member States and relevant intergovernmental organizations, a request that was reiterated in Resolution 35/97, December 4, 1980. In Resolution 36/106, December 10, 1981, the General Assembly invited the International Law Commission to resume its work on that topic. The International Law Commission recommenced its work in 1982. In 1996 it adopted what is now named the Draft Code of Crimes against the Peace and Security of Mankind, and submitted it to the General Assembly.[41]

In Resolution 44/39, December 4, 1989, dealing with trafficking in narcotics across national frontiers, the General Assembly invited the International Law Commission, when considering the Draft Code, to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes that may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers. This showed that political thinking was beginning to envisage a wider role for the proposed international criminal jurisdiction than for the Genocide or Apartheid Conventions or to enforce the law applicable in times of armed conflict. In 1992 the Commission included a detailed survey of the question in its examination of the Draft Code.[42]

One other major event of this period, formally outside the United Nations, was the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. That Conference, in session from 1974 to 1977, was, as is traditional for the Geneva Conventions, convened and organized by the Swiss Government to examine and adopt texts based on preparatory work undertaken by the International Committee of the Red Cross. That Conference completed its work with the adoption of two instruments, formally entitled Protocols Additional to the Geneva Conventions of 12 August, 1949. One related to the Protection of Victims of International Armed Conflicts (Protocol I) and the second to the Protection of Victims of Non-international Armed Conflicts (Protocol II). Those two instruments are important additions to and updates of the 1949 Geneva Conventions. They include very carefully drafted and reasonably comprehensive listings of what those instruments classify as breaches or grave breaches, although some of them are controversial and not universally accepted. Together with the Geneva Conventions of 1949 on the protection of war victims, they completed the process of establishing the rules of international humanitarian

law as a self-standing branch of the law, not dependent on the existence of a formal state of war. In that way they bring the Geneva law into line with the fundamental rule of Article 2, paragraph 4, of the UN Charter, prohibiting the use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the Purposes of the United Nations. It is to be noted that the detailing of war crimes in Article 8 of the Rome Statute does not always follow exactly the language of the Geneva Conventions and the Additional Protocols as regards breaches and grave beaches. This is a possible cause of difficulty for the new court. The Rome Conference may have exceeded its formal mandate when it made those changes.[43]

To Rome (1992–1998)

In Resolution 47/33, November 25, 1992, the General Assembly requested the Secretary-General to seek written comments of States on that section of the report of the International Law Commission in which the Commission, as requested, addressed the issue of the proposed criminal court. At the same time, in a marked change from its attitude in the 1950s, it invited the Commission to continue its work on the question by undertaking to prepare a draft statute for the proposed court as a matter of priority. Accordingly, in 1993 the Commission reconvened the Working Group, which prepared what it termed a preliminary version of the draft statute for an international criminal tribunal and commentaries thereto.[44] In Resolution 48/31, December 4, 1993, the General Assembly requested the Commission to continue its work as a matter of priority, and if possible to submit a draft statute in 1994. This the Commission did. It reestablished a new Working Group and went on to draw up a complete Statute in 60 articles with commentaries, together with an Annex and three Appendices. The Commission recommended to the General Assembly to convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.[45]

In that condition the question reverted to the political organs for the final decisions to be taken. The discussion in the General Assembly soon showed that the International Law Commission's draft was not widely accepted and could not, as it stood, form the basic text for an international plenipotentiary conference. Accordingly, the first step of the General Assembly was to establish an *Ad hoc* Committee open to all States members of the United Nations or of specialized agencies. In Resolution 49/53, December 9, 1994, the General Assembly set out the function of this new Committee requiring it to review the

major substantive and administrative issues arising out of the draft prepared by the International Law Commission. The report of that *Ad hoc* Committee came before the next session of the General Assembly.[46] In Resolution 50/46, December 11, 1995, the General Assembly decided to establish a Preparatory Committee to continue preparing a widely acceptable consolidated text of a convention on an international criminal court as a next step towards consideration by a conference of plenipotentiaries. It also decided to include the item in the provisional agenda of the 52nd session in order to study the report of the Preparatory Committee "and, in the light of that report, to decide on the convening of a conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and duration of the Conference." Composition of the Committee was slightly adjusted and included States members of the International Atomic Energy Agency, a technical modification. Some 90 States took part in the work of the Preparatory Committee at one stage or another. Comprising approximately one-half of the total membership of the organized international community, the Preparatory Committee was broadly representative of all trends that had to be taken into consideration.

That Preparatory Committee was in session throughout 1996 and 1997. It reported to the 51st session of the General Assembly. In Resolution 51/207, December 17, 1996, the General Assembly noted that major substantive and administrative issues remained to be resolved. These included, apart from the definition of different crimes, such issues as the relationship between the international court and national jurisdictions (the problem of complementarity), the so-called trigger mechanism, and the relationship of the court to the United Nations, to mention but a few. At the same time it noted that despite this, the Preparatory Committee considered that it was realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible. The General Assembly accordingly decided that the Preparatory Committee should continue its work, that the diplomatic conference should be held in 1998, and postponed to the next session decisions on "the necessary arrangements made for the diplomatic conference . . . to be held in 1998, unless the General Assembly decides otherwise in view of relevant circumstances."[47] In Resolution 52/160, December 15, 1997, the General Assembly again authorized the Preparatory Committee to continue its work early in 1998 and to transmit the text of its final report directly to the Conference.[48] It also decided to hold the Conference in Rome between June 15 and July 17, 1998, and adopted relevant ancillary decisions.

Three other major events occurred in this period of the prehistory of the establishment of the International Criminal Court. On February 22, 1993, the Security Council adopted Resolution 808 (1993). In that resolution it decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It requested the Secretary-General to submit for consideration by the Council, at the earliest possible date, and if possible no later than 60 days after the adoption of the resolution, a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision, taking into account suggestions put forward by Member States.

On May 3, the Secretary-General submitted his report.[49] It is a lengthy document, and it draws on the 1953 Report on International Criminal Jurisdiction (see note 35 above) as one of the sources consulted. On May 23 the Security Council adopted Resolution 827 (1993). In that resolution, acting under Chapter VII of the Charter, it approved the Secretary-General's report and decided to establish an international tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report." The Tribunal (ICTY) was formed in November 1993 and is still in operation.

This was followed in 1994 by the adoption of Resolution 955 (1994) on November 8, 1994. Here, again acting under Chapter VII of the Charter, the Security Council adopted the Statute for the International Tribunal for Rwanda (ICTR). The Government of Rwanda asked for this tribunal to be established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between January 1, 1994 and December 31, 1994. Subject to that major difference over jurisdiction, the Statute of the ICTR follows closely the Statute of the ICTY, and a single Appeals Chamber acts for both tribunals. Unfortunately, little is known about the activities of ICTR. Nevertheless, it is the first international tribunal to have convicted and sentenced persons accused of the crime of genocide.[50]

The third major event was the completion in 1996 by the International Law Commission of the Draft Code of Crimes against the Peace and Security of

Mankind.[51] The General Assembly, in Resolution 51/160, December 15, 1996, drew the attention of States participating in the preparatory committee on the establishment of the International Criminal Court to the relevance of the Code to their work. However, although the Preparatory Committee had the draft Code before it, it made no relevant recommendation and there is no reference to the Code as such in the Rome Statute.[52]

That is the background against which the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court worked.

Some Afterthoughts

This historical recital of the complicated events leading up to the Rome Conference goes a long way in explaining the difficulties encountered by that Conference, its unfinished business, and the defects, both of form (lack of concordance in the language versions and many presumed typographical errors in the "authentic" text) and of substance.

In the 1950s, the General Assembly, correctly, requested the International Law Commission for its opinion on the feasibility and advisability of establishing a permanent international criminal court. Equally correctly, it entrusted the work of preparing the statute of such a court to *ad hoc* intersessional committees composed of the representatives of States. The work of those *ad hoc* committees formed the basis for the report of the Secretary-General leading to the establishment by the Security Council of the Yugoslav Tribunal, and indirectly also to that of the Rwanda Tribunal. Preparing the constituent instrument of an international organization is neither progressive development of the law nor its progressive codification. It is a highly political act, requiring, of course, both political and legal inputs. In the case of an international criminal court, at least three branches of law are relevant—international law, criminal law, and military law, this latter both from the aspect of the internal discipline of the armed forces (chain of command) and from the point of view of military criminal law as such. The application of a rule of criminal law by a court-martial can be very different from the application of that same rule by a civil criminal court.

In 1948 the General Assembly also correctly linked the Convention on the Prevention and Punishment of the Crime of Genocide with the eventual establishment of an international criminal court, without prejudice to the general international responsibility of a State in the event of breach by the State of its obligations under that Convention, and without prejudice to the obligation

imposed by Article V on all parties to enact appropriate legislation to give effect to the provisions of the Convention and in particular to provide effective penalties for persons guilty of genocide.[53] At the same time it placed States under the obligation to enact the necessary legislation to give effect to the provisions of the Convention, and in particular to provide effective penalties for persons guilty of genocide or other offenses enumerated in the Convention (Article V). The International Law Commission continued along those lines by linking its proposed court to the Draft Code of Crimes. Again, in the 1980s, the General Assembly seems to have invited the International Law Commission to "address" the question of establishing an international criminal court, answered by the Commission in its report of 1992 (note 41 above). In 1992 the General Assembly, in a complete reversal of its earlier position, and possibly without fully considering the implications, requested the Commission to prepare the draft statute, which the Commission did in 1994 (note 45 above). It is to be observed that the International Law Commission, hurried by the General Assembly, did not follow its customary practice of giving its text two readings, the second taking place after an interval of two years on the basis of the observations, written and oral, of governments on the first draft. The result was that the Commission's final text did not take sufficient account of the political attitudes of the different governments and comment on them in its final report on the topic. The General Assembly accordingly had to establish two intersessional committees to study the text in light of political considerations, and yet the final report of the Preparatory Committee (note 48 above), which became the basic proposal for consideration by the Conference,[54] contained a large number of square brackets, footnotes and options, pinpointing the absence of agreement on major issues. It was not a true basic text as that term is commonly understood in conference practice.[55] What is more, it was completed and circulated to States only a short while before the opening of the Conference, allowing Governments little time or opportunity to give it the full consideration that it deserved and required, or to undertake the usual diplomatic consultations with other participants in the Conference. If the Rome Statute has defects, without doubt one explanation lies in the haste with which the Conference was convened, without adequate or completed preparatory work.

Given this slow progress in the preparatory work and its incompleteness, it is difficult to understand how in Resolution 52/160, December 15, 1997, the General Assembly decided to convene a diplomatic conference of plenipotentiaries a bare six months later to complete and adopt the convention, and allowed only for five working weeks in all, that is thirty working days for that

Conference to complete its work. This final rush contrasts strangely with the slow and careful work that had been undertaken before 1992.

It also seems that the organization of the Conference itself was atypical. Rule 48 of the Rules of Procedure required the Conference to establish a Committee of the Whole. Normal conference practice is for the committee of the whole to examine the basic text, article by article, and to submit its conclusions to the plenary conference. It is not clear that this was done in all cases. From some of the statements made at the concluding session on July 17, 1998, it appears that delegations had not been given a proper opportunity to express their views on portions of the text before it was put to the final vote in the Conference. In addition, the long list of corrigenda submitted by the Secretariat, itself incomplete as mentioned, confirms that the arrangements for verification of the concordance of the six authentic language versions of the Convention were unsatisfactory. The extraordinarily large number of typographical corrigenda suggested by the Secretariat shows that the Drafting Committee (Rules of Procedure, Article 49) and the Secretariat were not given sufficient time to complete their work properly. This adds up to a sorry story.

* * *

In 1996 the International Law Commission completed the first reading of its draft articles on the topic of State responsibility. Article 24, paragraph 5, of the Rome Statute lays down that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.[56] Likewise, Article 4 of the draft Code of Crimes against the Peace and Security of Mankind also states that the fact that the Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law. The Commentary to that article suggests that it is possible, indeed likely, that an individual may commit a crime against the peace and security of mankind as an "agent of the State," "on behalf of the State," "in the name of the State," or even in a de facto relationship with the State, without being invested with legal power. The State may remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.[57] This is pointing the way to a complicated set of legal relationships between States, and perhaps also between courts and tribunals.

Article 19 of the draft articles on State responsibility as adopted on first reading has a direct bearing on this. Article 19 in that form is headed "International

crimes and international delicts." It is, however, a confused article, not differentiating clearly between acts of State of particular gravity and acts of the individual that are themselves violations of rules of international law to which an individual is subjected, such as genocide.[58]

It is interesting to note that throughout the prehistory of the Rome Statute, in which the applicable law was a central issue, little thought appears to have been given to the relationship of the general law of State responsibility and the international criminal law to be applied by the International Criminal Court. So far, the International Law Commission does not appear to have faced the matter until 1998, when it was raised for the first time.[59] This issue was apparent during the drafting of the Genocide Convention, as appears from the combination of Articles VI and IX of that Convention, discussed earlier. Article 19 was introduced into the draft articles on State responsibility in 1976, and therefore has been present throughout the greater part of the renewed discussions on the establishment of an international criminal court. This interrelationship is a matter to which further thought should be given, especially in connection with the provisions in the articles on State responsibility regarding the discharge of the international responsibility, and in regard to the settlement of disputes. Trial and punishment of the individual responsible for the crime coming within the jurisdiction of the International Criminal Court, and that in fact includes all the crimes listed in Article 19 as it now stands that can be committed by an individual, may well be included as an element of satisfaction for the directly injured State. For this reason, the question arises whether the completed codification of the law of State responsibility should not contain a parallel provision, to the effect that nothing in that codification affects any question of criminal responsibility coming within the jurisdiction of the International Criminal Court.

* * *

When the Rome Statute enters into force, the international community will have three standing international tribunals at its disposal—the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the International Criminal Court (ICC). There is very little overlap between them as to jurisdiction, and the risk of the fragmentation of the law is slight. The case law of the two *ad hoc* criminal tribunals. ICTY and ICTR, established by the Security Council, shows a marked tendency to seek guidance from the jurisprudence of the International Court. The limited experience to date of ITLOS shows a similar inclination, and one must presume that

the new International Criminal Court will act similarly if it is to gain general confidence. However, the existence of the ICJ and ITLOS alongside the ICC is likely to give rise to an unsuspected conflict, not of jurisdiction but of propriety, of whether one or other of these "civil" tribunals, the ICJ and ITLOS, can determine a case before it without causing detriment to the criminal tribunal. The difference has been pithily explained by the Trial Chamber of ICTY in the *Celebici* case: "The International Tribunal [ICTY] is a criminal judicial body, established to prosecute and punish crimes for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention."[60]

The potential conflict is demonstrated by the *Application of the Genocide Convention* case in the International Court of Justice between Bosnia and Herzegovina on the one side, and Yugoslavia on the other. In that case the applicant's claims have been met by the respondent's counterclaims.[61] Both parties are alleging violations of the Genocide Convention by the other. The crime of genocide, when committed by an individual, comes within the jurisdiction of ICTY, and in due course of that of the International Criminal Court also (but that aspect can be ignored for present purposes). The Rwanda Tribunal has, as mentioned, already tried two cases of individuals accused of the crime of genocide (see note 50 above). The dispute between States over the interpretation, application or fulfillment of the Genocide Convention comes within the exclusive jurisdiction of the International Court of Justice. Although it is clear that the International Court itself is dealing with the "civil" responsibility of the parties, in the pleadings, the allegations and the defenses rest upon the actions of individuals. Should those individuals be called to testify in the International Court, they may be forced either not to reply to questions or to incriminate themselves. In that way the question arises how to reconcile the claims of States parties to reparation for alleged violations of the Genocide Convention as a matter of State responsibility, with the claims of the international community for criminal trials before a competent international tribunal of those individuals accused of committing acts of genocide. The matter can be put the other way round. How, in such circumstances, can the right of an individual, accused of genocide, to a fair trial, required by Article 14 of the International Covenant on Civil and Political Rights of December 16, 1966,[62] with the possibility of an acquittal, be reconciled with the right of the States parties to the litigation in the International Court to have their claims decided by the principal judicial organ of the United Nations?

In such circumstances, the human rights law, many elements of which are regarded as possessing the quality of *jus cogens*, should have priority over the law of State responsibility.

* * *

It has been seen how in the intermediate stage of this history, the General Assembly found a close connection to exist between three separate topics on a shared agenda with the International Law Commission: the definition of aggression, the Draft Code of Crimes, and the international criminal court. For a certain period the General Assembly attempted to keep them in step. To that triad there has also to be added the codification of the law of State responsibility, which the International Law Commission is planning to complete by the year 2001. Events, however, have unraveled the initial triad, which never, until now, has considered the law of State responsibility to belong to this complex.

Under a series of resolutions annexed to the Final Act of the Rome Conference (note 42 above), unfinished business of the Conference to be considered in due course by the Review Conference envisaged in Article 123 of the Statute includes an acceptable definition of terrorism and drug trafficking and their inclusion in the list of crimes within the Court's jurisdiction. In addition, the Preparatory Commission is required to prepare draft texts for what is termed "Elements of Crimes" addressed in Articles 9 and 21 of the Statute, this to be done before the year 2000. It is also to prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to that crime.

This wide remit to the Preparatory Commission, far beyond what is usual for a preparatory commission, coinciding in time with the second reading of the draft articles on State responsibility in the International Law Commission, and during the process of the final decision on the draft Code of Crimes, provides the opportunity to put together a complete and properly co-ordinated set of black letter texts embracing the whole law of international responsibility, including the "civil responsibility" of States, international organizations, and other actors on the international scene capable of sustaining a claim of international responsibility, and the international criminal responsibility of individuals charged with breaching the basic rules of international humanitarian law and other rules of international law laying down international crimes.

Appendix

French Translation of Letter of F. Lieber to General G. H. Dufour, New York, April 10, 1872 (See note 8)

Monsieur,

J'ai reçu il y a quelques jours votre honorée lettre du 1 février . . . Je m'empresse de vous donner mon opinion, malgré la divergence qui peut exister entre nos vues concernant l'application des principes sur lesquels nous sommes complètement d'accord.

Je suis un des juristes qui se sont déclarés, de la manière la plus claire et la plus expresse, en faveur de l'expansion et de la multiplication constante de l'arbitrage et de la conciliation entre nations.

J'ai même fortement recommandé de retourner à la coutume de moyen-âge, et de prendre pour arbitres internationaux les facultés de droit des universités en renom; mais je me suis prononcé déjà dans mes *Political Ethics* contre l'idée d'une Haute-Cour internationale, par laquelle tous les différends entre nations seraient décidés. J'ai cru que la réalisation de cette idée, quand même elle serait possible, ne serait ni souhaitable ni efficace. Je n'ai pas changé d'opinion.

Qui serait le *sheriff* (l'exécuteur des décisions) d'une haute Cour des nations? Et quel est même le tribunal ordinaire dont les jugements feraient quelque impression, si l'on ne savait que ses arrêts seront appliqués par le pouvoir public? Il est vrai que Hugo Grotius fut cité comme autorité au Congrès des nations Européennes à Vienne. Mais s'il fut cité ainsi au-dessus des monarques, des ministres et des nations, c'est précisément *parce qu'il* n'était qu'un simple particulier, absent de la lutte et ayant écrit son ouvrage sur la paix et la guerre, sous la dictée de la raison et de la justice, sans se préoccuper aucunement des cas en question, qui appelaient les lumières de la raison et de la justice.

Des nations libres seraient toujours dans une position désavantageuse devant un pareil tribunal: car les gouvernements plus ou moins despotiques sont toujours mieux placés que les nations libres pour cabaler et intriguer, et les nations libres ont spécialement besoin d'autonomie. Ce besoin, sans équivaloir à l'isolement, croîtra avec les progrès de la liberté et le développement du *self-government*. Je suis parfaitement certain que peu des citoyens américains consentiraient à confier une affaire litigieuse dans laquelle leur république serait intéressée, à une Haute-Cour internationale permanente, quelque favorable qu'il puisse être à des tribunaux d'arbitrage

établis par des traités spéciaux. Le pouvoir de ces derniers tribunaux et l'autorité de leurs décisions sont dûs précisément à la raison qu'ils sont constitués par consentement mutuel, et pour l'occasion spéciale dont il s'agit. Ce n'est-pas une jalousie puérile, mais le besoin de l'autonomie qui empêcherait une nation libre de quelqu'importance de se rallier à une Haute-Cour internationale permanente.

Toutes ces raisons s'appliquent avec beaucoup plus grande force au tribunal international que vous proposez pour juger les infractions à la convention de Genève en cas de guerre. Vous dites, art. 6 ; *les jugements du tribunal seront notifiés par lui aux gouvernements intéressés et ceux ci seront tenus d'infliger aux coupables les peines prononcées contre eux.*

Tenus? Par qui les gouvernements respectifs seront-ils *tenus* de punir ceux qui ont violé les règles de la Convention de Genève, si les belligérants ne le font par leur propre volonté? Les temps récents nous ont fourni deux exemples de peuples,—l'un en Europe, l'autre en Amérique,—succombant l'un et l'autre parce qu'ils étaient énervés par la vanité. Les infractions aux principes protecteurs de la Convention de Genève ont été fréquentes; peut-on imaginer la soumission aux jugements du tribunal international de la part de ceux qui fréquemment ont méconnu les lois les plus élémentaires de la guerre? Et quand je parle de la Convention de Genève ne vous méprenez pas, je vous prie, sur mes sentiments à son égard. Rien n'est plus sacré à mes yeux que ce spectacle de la charité se mettant au pas du tambour et marchant en avant, non pour se battre, mais pour relever les blessés or pour succomber elle-même dans l'accomplissement de cette tâche. Mais je m'occupe seulement ici de ce qu'il y a de praticable ou de désirable dans l'exécution de votre plan.

Si la Confédération suisse doit être à perpétuité la gardienne de ce tribunal international, qu'arrivera-t-il au cas où la Suisse elle-même serait enveloppée dans une guerre? Elle l'a été, pourquoi ne le serait-elle pas de nouveau? Il ya des moments où les nations ne peuvent s'empêcher de faire ce que Solon exigeait de chaque citoyen en temps de discorde civile.

Vous voyez par ce que j'ai dit que, quant à moi, je ne suis pas partisan de l'établissement permanent de tribunaux chargés de statuer entre belligérants. Cependant j'applaudis à tout ce qui, à quelque degré que ce soit, tend à faire planner la raison, la justice et la charité, comme une nuée bienfaisante, sur la plus ardente chaleur du combat. C'est ce que savent tous ceux qui ont connaissance du Code des lois de la guerre sur terre, que j'ai conçu et écrit, et que le Président Lincoln a publié comme ordre général pour la conduite des armées américaines, en 1863. Je ne voudrais

donc pas vous conseiller d'arrêter brusquement tous vos efforts pour donner une efficacité de plus en plus grande à la Convention de Genève. Poursuivez-les avec zèle et ne regardez les contrariétés que comme au stimulant à des nouvelles tentatives. Car votre cause est sacrée.

Comme remarque générale, je me permets de répéter à cette occasion qu'une des choses les plus efficaces et les plus utiles que l'on puisse faire, en cette matière, pour améliorer les rapports entre nations dans la paix ou dans la guerre (et il y a des *rapports mutuels [intercourse]* dans la guerre, attendu que l'homme ne peut se rencontrer avec l'homme sans qu'il en résulte un échange de rapports),—une des choses dont il y aurait le plus à attendre dans l'intérêt de l'internationalisme, serait la réunion des plus éminents jurisconsultes du droit des gens que possède notre race cis-caucasienne,—un de chaque pays,—en leur capacité individuelle et non en vertu de quelque mandat public, pour régler entre eux certaines grandes questions du droit des nations, qui sont encore indécises,—telles que la neutralité, l'emploi de troupes barbares comme auxiliaires, la durée des droits ou des obligations fondées sur la qualité de citoyen. J'entends *régler* comme Grotius réglait ce dont il s'occupait, par le grand argument de la justice. Ce qui émanerait d'un pareil corps, code ou proclamation, serait *certain* d'acquérir bientôt une autorité supérieure au livre du plus grand juriste isolé. J'espère qu'une pareille réunion pourra avoir lieu en 1873 ou 1874.

Avec la plus haute considération, etc.

Notes

1. Originally issued as doc. A/CONF.183/9*. That contained many errors in each one of its authentic texts and has been replaced by PCNICC/199/INF.3, August 17, 1999, in the documentation of the Preparatory Commission for the International Criminal Court. Further corrections to one or the other of the authentic texts are still being circulated by the United Nations Secretariat, as depositary of the Rome Statute. For an account of the Rome Conference through the eyes of participants, see Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS (1999).

2. *Cf.* L.C. Green, *Law of War in Historical Perspective*, International Law Studies Volume 72, THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM PROFESSOR JACK GRUNAWALT, pp. 39, 48 (M. Schmitt, ed., 1998); Howard S. Levie, *War Crimes, ibid.*, p. 95. And see G. SCHWARZENBERGER, INTERNATIONAL LAW (THE LAW OF ARMED CONFLICT), p. 462 (1968); J.H.W. VERZIJL, I INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, p. 407 (1968); TH. MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVE ON THE LAW OF WAR IN THE LATER MIDDLE AGES, pp. 12, 167 (1993).

3. I am grateful to Mr. Ch. Keith Hall for bringing this to my attention. And see L. Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, JOURNAL OF AFRICAN HISTORY, vol. VII (1960), p. 79. For an example of this type of treaty and the detailed regulations for a mixed commission, see H. LA FONTAINE, PASICRISIE INTERNATIONALE 1794–1900, HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX, p. 84 (reprint, 1997, with preface by Pierre Michel Eisemann).

4. See COMPTE RENDU DE LA CONFÉRENCE INTERNATIONALE RÉUNIE À GENÈVE LES, 26, 27, 28 ET 29 OCTOBRE 1863 POUR ÉTUDIER LES MOYENS DE POURVOIR À L'INSUFFISANCE DU SERVICE SANITAIRE DANS LES ARMÉES EN CAMPAGNE (deuxième édition 1904).

5. 1 Bevans 7; 129 CONSOLIDATED TREATY SERIES (hereafter: CTS) 361; reproduced in D. Schindler and J. Toman, THE LAWS OF ARMED CONFLICTS; A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (hereafter: Schindler and Toman), p. 279 (1988), supplemented by the Additional Articles extending the Provisions of the Convention of August 22, 1864, to Naval Warfare, of October 20, 1868, 138 CTS 189; Schindler and Toman, p. 285 (never in force), replaced by Hague Convention III of 1899, 187 CTS 443; Schindler and Toman 289.

6. On this see P. BOISSIER, HISTOIRE DU COMITÉ INTERNATIONAL DE LA CROIX-ROUGE, DE SOLFÉRINO À TSOUSHIMA, p. 395 (1978); Ch. Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 38 INTERNATIONAL REVIEW OF THE RED CROSS, p. 57 (1998). An English translation of Moynier's proposal appears at p. 72. Curiously, this initiative is not mentioned in the Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted [to the International Law Commission] by the Secretary-General (hereafter: Historical Survey), doc. A/CN.4/7/Rev.1 (Sales No. 1948.V.8) (1949).

7. Circular of January 28, 1872, reproduced in BULLETIN INTERNATIONAL DES SOCIETÉS DE SECOURS AUX MILITAIRES BLESSÉS PUBLIÉ PAR LE COMITÉ INTERNATIONAL DE LA CROIX ROUGE, No. 11, p. 121 (1872). This circular was signed by General Dufour in Moynier's absence. The ICRC took that initiative very seriously. A note in the ICRC Archives shows that, with regard to another idea of Moynier's, the Committee approved it but decided not to insert a reference to it in the upcoming issue of the Bulletin, for fear it would divert attention from the proposal for the establishment of an international criminal jurisdiction. E-mail, Hans-Peter Gasser to the author, January 11, 1999.

8. Letter of April 10, 1872. The English original of this letter has not been found. The French translation given in the article by Rolin-Jaecquemyns (see next note) is reproduced in the Appendix to this article. Many of Lieber's remarks presage the position adopted by the American delegation regarding the Rome Statute in 1998. For the American position on the Rome Statute, see the statement of Ambassador D. Scheffer at the 9th meeting of the Sixth Committee in the 53rd session of the General Assembly on October 21, 1998; and his *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

9. G. Rolin-Jaecquemyns, *Note sur le projet de M. Moynier, relatif à l'établissement d'une institution judiciaire internationale, protectrice de la Convention [de Genève]*, 4 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, p. 325 (1872).

10. 1 Bevans 631; 203 CTS 227; Schindler and Toman, p. 63.

11. ICRC, Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals submitted by the International Committee of the Red Cross, Article 40 (1949). H-P. Gasser to the author, November 16, 1998. Common Article 49/50/129/148, dealing with penal sanctions in general, obliges a party to bring persons accused of grave breaches before its own courts or, if it prefers, and in accordance with the provisions of its own legislation, to hand such persons over for trial to another party concerned. As far as is known, there has been no experience of that provision in practice. At the Rome Conference, the ICRC changed its position and strongly supported the establishment of the International Criminal Court. See the statements of the President of the ICRC, C. Sommaruga, and of its chief Legal Adviser, Y. Sandoz, at the commencement of the Conference. It also submitted important comments on the jurisdiction of the Court. See docs in A/CONF. 183/SR. 4, para. 68, and SR. 9, para. 113. A check of the records of the Hague Conferences of 1899 and 1907 likewise discloses that the idea of an international criminal jurisdiction was not raised on either occasion when those Conferences were discussing rules for the conduct of warfare. The position of the Institute of International Law was similar. *Cf.* its resolution of 1895 on penal sanction for breaches of the Geneva Convention, *op. cit.* in the next note at p. 69.

12. INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉSOLUTIONS (1873–1956), pp. 180, 231 (H. Wehberg ed., 1957); Schindler and Toman, pp. 35 and 57.

13. See B. FERENCZ, I AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE, p. 5 (1980) (hereafter: FERENCZ).

14. Legality of the Threat or Use of Nuclear Weapons, advisory opinion, International Court of Justice Reports, 1996, pp. 226, 259 (para. 86). A partial explanation of the term is given in that advisory opinion at p. 257 (para. 78). According to the Court, there are two cardinal principles in humanitarian law: "The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants . . . According to the second principle, it is prohibited to cause unnecessary suffering to combatants." The term probably originated in the International Committee of the Red Cross through the works of Jean Pictet. See G. Abi-Saab, *The Specifities of Humanitarian Law*, STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET, p. 265 (Ch. Swinarski ed., 1984). For a recent assertion of the close tie between the Universal Declaration of Human Rights and the international criminal court, see the letter of the President of the International Tribunal for the former Yugoslavia, Judge Gabrielle McDonald, to the personnel of ICTY distributed on the 50th anniversary of the Universal Declaration, obtained from the ICTY website visited January 18, 1999, <www.un.org/icty/news/Humanrights/unidechu.htm>.

15. 225 CTS 188. And see Department of State, The Treaty of Versailles and After: Annotations of the Text of the Treaty (Publication 2724, Conference Series 92, 1947).

16. The treaties which put an end to the Napoleonic Wars contained no provision regarding Napoleon's fate. Article XVI of the Treaty of Paris of May 30, 1814, provided that no individual of whatever rank or condition should be prosecuted, disturbed, or molested, in his person or property, under any pretext whatsoever, either on account of his conduct or political opinions, his attachment either to any of the Contracting Parties, or to any Government which has ceased to exist, or for any other reason except for debts contracted towards individuals, or acts posterior to the date of the treaty. I MAJOR PEACE TREATIES OF MODERN HISTORY 1648–1967, pp. 501, 509 (F.I. Israel, ed., 1967); 63 CTS 171. With regard to Napoleon himself, on March 13, 1815, (before the Battle of Waterloo) the Allies issued the Declaration of Vienna to the effect that he had placed himself beyond the protection of the law. 63 CTS 495. On his later surrender to and custody by the British authorities, see LORD MCNAIR, INTERNATIONAL LAW OPINIONS, vol. I, p. 104 (1956). This was unconditional surrender of an individual, not of the State.

17. See the State Department's annotations in the publication cited in note 15 above. More in J.H.W. VERZIJL, *op. cit.* in note 2 above, vol. IX, p. 381 (1978). In addition, note Article 226 of the Treaty of Sèvres, the Treaty of Peace with Turkey, apparently intended to enable the perpetrators of the genocide of the Armenians in World War I to be brought to trial and punished. That treaty never entered into force. For that Treaty see 15 AM. J. INT'L L. SUPPLEMENT, p. 179 (1920).

18. Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 18th–July 24th, 1920, with Annexes, p. 748 (1920). Reproduced in I FERENCZ, pp. 193, 225, 239. Summarized in Historical Survey at p. 10. See also M.O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942, p. 85 (1943).

19. FERENCZ, pp. 244, 252; Historical Survey, pp. 12, 14, 15, 61, 70, 74, 75.

20. League of Nations, Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 16th, 1937, League of Nations doc. C.94.M.47.1938.V (Sales No. 1938.V.3). Reproduced in I FERENCZ, p. 355 and Historical Survey, p. 88. This Conference was prompted by the terrorist murder of King Alexander of Yugoslavia together with the French Foreign Minister at Marseilles on September 9, 1934.

21. 3 Bevans 1140; 68 UNTS 189.

22. 3 Bevans 1238; 82 UNTS 279.Twenty-four States became parties to that Agreement. On this see Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945 (State Department Publication 3080, 1949).

23. 4 Bevans 20; Department of State, TIAS No. 1589.

24. 78 UNTS 277.

25. For an authoritative account of the drafting of that provision, see N. ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY, p. 80 (1960); and see Historical Survey, p. 30. A similar provision was later included in Article 5 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, annexed to General Assembly Resolution 3068 (XXVIII), November 30, 1973, 1015 UNTS 243. By Articles 5, 6 and 7, paragraph 1(j) of the Rome Statute respectively, genocide and the crime of apartheid are within the jurisdiction of the International Criminal Court.

26. For the sake of completeness it is recalled that in the Committee on the Question of the Progressive Development and Codification of International Law (the Committee of Seventeen), which proposed the establishment of the International Law Commission, the French representative, Donnedieu de Vabres (who had been the French member of the Nürnberg Tribunal) raised the question of an international criminal court. In its report on plans for the formulation of the principles of the Nuremberg Charter and Judgment, the Committee included

a paragraph drawing the attention of the General Assembly to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes. United Nations, General Assembly, Official Records (hereafter: GAOR), second session, Sixth Committee (doc. A/332). And see Historical Survey, p.15. It is unusual, to say the least, that the Final Act of the Rome Conference ignores completely this earlier action of the General Assembly and its Committees, and that of the International Law Commission. Doc. A/CONF.183/10, July 17, 1998.

27. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1949, pp. 219, 238 (hereafter: YBILC). And see its Report to the General Assembly, GAOR, fourth session, Supplement 10 (A/925), paras. 32–34, *ibid.*, p. 283. At the same time, and indeed somewhat inconsequentially, the Commission noted that the punishment of war crimes would necessitate a clear statement of those crimes and consequently the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission was opposed to the study of the problem at that stage. "It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace." *Ibid.*, para. 18.

28. Question of International Criminal Jurisdiction, Report by Ricardo J. Alfaro, special rapporteur (A/CN.4/13), YBILC, 1950-II, p. 1. Reproduced in II FERENCZ, p. 241. Article 34 of the Statute of the International Court of Justice provides that only States may be parties in cases before the Court.

29. Report, doc. A/CN.4/20, YBILC, *ibid.*, p. 131. Reproduced in II FERENCZ, p. 259.

30. Report of the commission on the work of its second session, GAOR, fifth session, Supplement 12 (A/1316), YBILC, 1950-II, at p. 378. Reproduced in II FERENCZ, p. 265. The formal reference is to Article 34 of the Statute of the International Court of Justice. But in fact more is required than that. Compare the qualifications required of a member of the International Court of Justice as set out in Articles 2 and 9 of its Statute with those required of a member of the International Criminal Court as set out in Article 36, paragraph 3, of the Rome Statute.

31. That resolution is reproduced in II FERENCZ, p. 312. The 17 Members of that Committee were Australia, Brazil, China (ROC), Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, United Kingdom, United States of America and Uruguay.

32. Committee on International Criminal Jurisdiction, Report to the General Assembly, GAOR, seventh session, Supplement 11 (A/2136). Reproduced in II FERENCZ, p. 337.

33. For the comments of governments, see doc. A/2186 and Add.1, GAOR, seventh session, Annexes, Agenda item 52. Reproduced in II FERENCZ, p. 365. For the debate in the Sixth Committee, see GAOR, seventh session, Sixth Committee, 321st to 328th meetings. Reproduced in II FERENCZ, p. 382. That debate is summarized in the report of the Sixth Committee on that agenda item (A/2275).

34. This resolution is reproduced in para. 3 of the report of the 1953 Committee. See next note.

35. Report of the 1953 Committee on International Criminal Jurisdiction, GAOR, ninth session, Supplement 12 (A/2645) (1954). Reproduced in II FERENCZ, p. 429. This Committee was composed of Australia, Brazil, China (ROC), Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, United Kingdom, United States and Uruguay—the same States that had participated in the previous Committee.

36. Report of the Commission on the work of its sixth session, GAOR, tenth session, Supplement 9 (doc. A/2693), YBILC, 1954-II, pp. 140, 149. Reproduced in II FERENCZ, p. 460.

37. Report of the Committee on the Definition of Aggression, GAOR 12th session, Supplement 16 (A/3574). Reproduced in B. FERENCZ, I DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS, p. 215 (1975).

38. All the documentation relative to this phase is contained in B. FERENCZ, *op. cit.* in previous note, from page 272. The International Court of Justice seems to have regarded that definition as addressing the "civil" responsibility of a State. Military and Paramilitary Activities in and against Nicaragua (Merits) case (Nicar. v. U.S., June 27, 1986), INTERNATIONAL COURT OF JUSTICE REPORTS, 1986, pp. 14, 103 (para. 195).

39. Article 112 of the Statute regulates the Assembly of States Parties. Article 123 deals with the Review Conference, which the Secretary-General is obliged to convene seven years after the entry into force of the Statute. By Article 126, the Statute will enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. In Resolution 53/105, December 8, 1998, the General Assembly authorized the Secretary-General to convene the Preparatory Commission in 1999 and to provide it with the necessary services. For a consolidated report on the activities of the Preparatory Commission in 1999, see doc. PCNICC/1999/L.5/Rev.1 and Adds. 1, 2, December 22, 1999.

40. FERENCZ, *op. cit.* in note 37, p. 599.

41. For that final text, see Report of the International Law Commission on the work of its 48th session, GAOR, 51st session, Supplement 10 (A/51/10), Chapter II. At the same time, the Commission adopted on first reading its draft articles on State Responsibility. *Ibid.*, Chapter III. The change in the title of this item from Draft Code of Offenses to Draft Code of Crimes was suggested by the Commission and accepted by the General Assembly in Resolution 42/151, December 7, 1987. We shall return to that topic later in this article. See text to note 52 below. Outside the framework of the Sixth Committee, in 1981 a working group submitted to the Commission on Human Rights a draft convention on the establishment of an international criminal panel for the suppression and punishment of the crime of apartheid and other international crimes. See Study on the ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid including the establishment of an international jurisdiction envisaged in the Convention. Doc. E/CN.4/1926 (1981). For the Convention of 30 November 1973, see 1015 UNTS 243.

42. Report of the International Law Commission on the work of its 42nd session, GAOR, 45th session, Supplement 10 (A/45/10), YBILC, 1992-II/2, Chapter II, paras. 93–157. This was prepared by a Working Group composed of Doudou Thiam as chairman (he was special rapporteur for the topic of the Draft Code), H. Al-Baharna, J.A. Beesley, M. Benouna, L.D. González, B. Graefrath, J. Illueca, A.G. Koroma, S. Pawlak, P.S. Rao and E. Racounas, with G. Eiriksson, Rapporteur of the Commission, *ex officio*. See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 45th session, prepared by the Secretariat (A/CN.4/L.456, mimeographed, 1991); D. Thiam, Tenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, YBILC, 1992-II/1 (A/CN.4/442). Given this historical background, it is ironic that the Rome Statute does not include drug trafficking amongst the crimes over which the new International Criminal Court at present has jurisdiction. The Rome Conference annexed to the Final Act Resolution E which, *inter alia*, recognized that international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the

political and social and economic order in States. The Conference regretted that no generally acceptable definition of drug crimes could be agreed upon for inclusion within the jurisdiction of the Court and recommended that a Review Conference (see note 39 above) consider drug crimes with a view to arriving at an acceptable definition and its inclusion in the list of crimes within the jurisdiction of the Court. This may well put the question off *ad calendas Graecas*. For that Final Act, see note 26 above.

43. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977, 17 volumes (1978). The major commentaries on those instruments are: INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949 (Y. Sandoz et al. eds., 1987); M. BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982). For the text of Protocol I, see 1125 UNTS 3, and for that of Protocol II, see *ibid.*, p. 609. They are reproduced in Schindler and Toman, pp. 621, 689. In 1999 the International Committee of the Red Cross submitted to the Preparatory Commission of the International Criminal Court a detailed analysis of the war crimes as set out in Article 8 of the Rome Statute. This consists of an exhaustive research of the relevant case law, a review of cases from the Leipzig Trials, from post-Second World War trials, as well as national case law and decisions from the ICTY and ICTR. See docs. PCNICC/1999/WGEC/INF.1, February 19, 1999, PCNICC/1999/WGEC/INF.2 plus Adds 1-4, July 14, July 30, August 4, November 24 and December 15, 1999. This analysis was submitted under covering letter from Belgium, Finland, Hungary, the Republic of Korea, and the Permanent Observer Mission of Switzerland.

44. Report of the International Law Commission on the work of its 44th session, GAOR, 47th session, Supplement 10 (A/48/10), YBILC, 1993-II/2, Annex. For the written comments of governments, see YBILC, 1993-II/1 (A/CN.4/452 and Add.1). See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 47th session, prepared by the Secretariat (A/CN.4/446, mimeographed, 1993), paras. 17–134.

45. Report of the International Law Commission on the work of its 46th session, GAOR, 49th session, Supplement 10 (A/49/10), Chapter II, paras. 30–91, YBILC, 1994-II/2, p. 19. The Working Group was composed of J. Crawford (Chairman), H. Al-Baharna, A. Al-Khasawneh, G. Arangio-Ruiz, M. Bennouna, D. Bowett, C. Rodriguez, J. de Saram, G. Eiriksson, S. Fomba, M. Güney, Q. He, K. Idris, P.S. Rao, E. Razafindralambo, P.L. Robinson, R. Rosenstock, Ch. Tomuschat, V. Vereschchetin, F.V. Kramer, and A. Yankov. In addition, Doudou Thiam as special rapporteur on the Draft Code and P. Kabatsi as rapporteur of the Commission took part in the work of the Group, which was open to every member of the Commission who wished to participate. And see Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its 48th session, prepared by the Secretariat (A/CN.4/457, mimeographed, 1994), paras. 8–206; Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its 49th session, prepared by the Secretariat (A/CN.4/464/Add.1, mimeographed, 1995), paras. 1–188. And see the statement of Professor Crawford at the Conference, representing the International Law Commission, in A/CONF.183/SR.2, para. 102.

46. Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court, GAOR, 50th session, Supplement 22 (A/50/22) (1995). The Chairman of this Committee was Adriaan Bos (the Netherlands).

47. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vols. I and II, GAOR, 51st session, Supplements 22 and 22A (A/51/22) (1996). The Chairman of this Committee was Adriaan Bos. Sickness prevented him from being Chairman of

the Committee of the Whole at the Rome Conference, where his place was taken by Philippe Kirsch (Canada).

48. For the Preparatory Committee's final report, see doc. A/CONF.183/2 and Add. 1 (1998), the latter constituting the basic proposal before the Conference. Available on the UN Internet site http://www.un.org/icc. For accounts of its progress, see C. Hall, *On the Successive Sessions of the Committee*, in AM. J. INT'L L., vol. 91 (1997), p.177, vol. 92 (1998), pp. 124, 391, 548.

49. S/25704. Reproduced in INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 (hereafter: ICTY), BASIC DOCUMENTS, p.155 (1995). See also on Internet site http://www.un.org/icty. For the Statute of ICTY and other relevant constituent documents, see that publication and Internet site. The question of the legality of the Security Council's action in establishing that tribunal was raised by the defence in the Tadic case, and upheld in the Appeals Chamber. 105 INTERNATIONAL LAW REPORTS, p. 427 (Trial Chamber, 1995), p. 453 (Appeals Chamber).

50. Prosecutor v. Akayesu, Judgment of September 2, 1998 (http://www.un. org/ictr/english/judgments/akayesu.html, visited September 15, 1998) (the accused pleaded not guilty); Prosecutor v. Kambanda, judgment of September 4, 1998, (http://www.un.org.ictr/english/judgments/kambanda.html, visited September 15, 1998) (the accused pleaded guilty). Relevant materials are available on Internet site http://www.ictr.org or http://www.un.org/ictr. Those judgements are excerpted in 37 ILM 1399 and 1411 (1998).

51. See note 41 above.

52. In the discussion in the International Law Commission on the law to be applied in the proposed court, some members considered that the problem could be resolved by completing the draft Code of Crimes. The other view was that the Court should apply existing law, but that the Statute should be drafted in such a way as not to foreclose the future application of the Code. Report for 1994, note 45 above, para. 56. To some extent Article 10 of the Rome Statute, to the effect that nothing in Part 2 should be interpreted as limiting or prejudicing existing or developing rules of international law for purposes other than the Statute, may reflect that point of view. When the International Law Commission adopted the Draft Code of Crimes, one of its recommendations was that the Code could be incorporated in the Statute of the International Criminal Court. The General Assembly took no direct action on that recommendation. See the Commission's Report for 1996 (note 41 above). The Report of the *Ad hoc* Committee (note 46 above) at para. 57 indicates reservations at using the Draft Code as a basis for defining the crimes, and the Report of the Preparatory Committee (note 47 above) confirms that there was little support for using the Draft Code, the general preference being to define each crime separately, as is done in Articles 6 to 8 of the Statute. In *Prosecutor v. Furundzija*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) considered the Draft Code as an authoritative international instrument which, depending on the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in process of formation, or, at the very least, (iii) be indicative of legal views of eminently qualified publicists representing the major legal systems of the world. Judgement of December 10, 1998, para. 227. The Trial Chamber also made use of the Commission's commentary on the Draft Code. Later the Trial Chamber used the Draft Code in examining the accused's *mens rea* (para. 242). Case No. IT-95-17/1-T 10, Judgement of December 10, 1998 excerpted in 38 ILM 317 (1999). In using the work of the International Law Commission in this way the Trial Chamber has followed the usage of the International Court of Justice in *the Gabcíkovo-Nagymaros Project* case (Hung./Slovak.), INTERNATIONAL COURT OF JUSTICE REPORTS 1997, 7.54 (para. 79).

53. Article IX of the Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III (see text to note 25 above), shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. Interpreting that provision in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (preliminary objections) case, the International Court said that the reference in Article IX to the responsibility of a State for genocide or for the other acts enumerated in Article III does not exclude any form of State responsibility. INTERNATIONAL COURT OF JUSTICE REPORTS, 1996, pp. 595, 616 (para. 32). The drafting history of that provision, and indeed its own terms, indicates that this refers to what is sometimes loosely called "civil responsibility" as opposed to criminal responsibility. For my account and interpretation of the drafting history of that provision, see Sh. Rosenne, *War Crimes and State Responsibility*, in WAR CRIMES IN INTERNATIONAL LAW pp. 65, 74 (Tel Aviv University, Y. Dinstein and M. Tabory eds., 1996).

54. Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, doc. A/CONF.183/6, June 23, 1998, Rule 29.

55. *Cf.* R. Sabel, PROCEDURE AT INTERNATIONAL CONFERENCES: A STUDY OF THE RULES OF PROCEDURE OF CONFERENCES AND ASSEMBLIES OF INTERNATIONAL INTER-GOVERNMENTAL ORGANIZATIONS p.149 (1997).

56. That provision did not appear in the original draft statute prepared by the International Law Commission (see note 45 above). The Preparatory Committee reported that an essential question which should be addressed was whether some kind of safeguard provision was needed to ensure that individual criminal responsibility did not absolve the State of any of its responsibility in a given case, and it suggested texts to meet this problem (A/51/22, para. 192, and vol. II, Part 3 *bis*, article B, Proposal 1, paragraph 3; Proposal 2, paragraph 3; A/CONF.183/2/Add.1, Article 23, paragraph 4).

57. Report of the International Law Commission on the Work of its 48th session, note 41 above at p. 30.

58. For my criticism of Article 19, see Sh. Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS p. 145 (1998). In 1998 the new special rapporteur of the International Law Commission, Professor James Crawford, recommended deleting Article 19 as such and related provisions. J. Crawford, First Report on the Law of State Responsibility (A/CN.4/490/Add.3), para. 100. This gave rise to a difficult but inconclusive discussion at the Commission's 50th session. See Report of the International Law Commission on the work of its 50th Session, GAOR, 53rd session, Supplement 10 (A/53/10), Chapter VII, paras. 241–331. And see Topical Summary of the Debate held in the Sixth Committee of the General Assembly during its 53rd session, prepared by the Secretariat paras. 110-115 (A/CN.4/496 mimeographed 1999).

59. Report cited in previous note, paras. 275–277. Issues of the relationship between the law of State responsibility and international criminal law have arisen in ICTY in the opinion and judgment of the Trial Chamber in *Prosecutor v. Duško Tadic* case. Case No. IT–94–1–T 112 ILR 1; and on appeal, judgement of July 15, 1999 and judgement in sentencing appeals of January 26, 2000.

60. The Celebici case, Prosecutor v. Delalic, Mucic, Delic and Landzo, judgment of November 16, 1998, Case No. IT–96–21–T, para. 230.

61. International Court of Justice, Application of the Convention for the Prevention and Punishment of the Crime of Genocide case, Counter-claims (Bosn. & Herz. v. Yugo.) International Court of Justice Reports 1997, 243.

62. 999 UNTS 171; 1057 *ibid.* 407; 1137 *ibid.* 396 (rectification).

XVI

The International Criminal Court

A Skeptical Analysis

Alfred P. Rubin

PROFESSOR LESLIE C. GREEN HAS BEEN KNOWN AS AN ACTIVE SKEPTIC since we first met, too many years ago to count. And nobody now living dares question his knowledge of international law. We have disagreed from time to time, and probably disagree about the utility of an International Criminal Court (ICC). But argument in the philosophical sense, constructive debate and discussion, has been our style for too many years to abandon now. So here is my tribute to Leslie's skeptical knowledge.

Very little has excited the international legal and human rights community as much in recent years as the prospect of establishing an international criminal court. After much political and legal labor, a Statute of such a court was adopted in Rome on July 17, 1998, by an overwhelming vote.[1] In my opinion, the ICC, as outlined in the Statute, cannot possibly work as envisaged. This is not because technical problems have been carelessly handled, although there do seem to be some questions, as must be expected in such a work. It is because the ICC is based on assumptions about the relationship of authority to substantive law and a model of the international legal order that seem unrealistic.

First, a few indications that surfaced in the Statute as what appear to be merely technical flaws but in fact seem to reflect assumptions that raise the most serious questions. In the Preamble, paragraph three, there is reference to

"grave crimes"; in paragraph five to "such crimes"; in paragraph six to "international crimes." While the reference to "the most serious crimes of concern to the international community as a whole" in paragraphs four and nine might relate to municipal law crimes (i.e., "crimes" so designated by a municipal legal order, the suppression of which might be of concern to the entire international community),[2] paragraph ten speaks of an International Criminal Court to be "complementary to national criminal jurisdiction," thus implying the existence of "crimes" not defined by municipal law but by international law directly.

Yet the international community has no organ capable of legislating criminal law to its members other than the ICC as newly minted. For example, references in conventional wisdom to "piracy" as an "international crime" simply cannot stand scholarly examination. Despite much dicta referring to piracy "*jure gentium*,"[3] there are no actual cases to support the notion that "piracy" is anything other than a municipal law "crime" in many countries.[4] All attempts internationally to codify the essential elements of the supposed "crime," including the "piracy" provisions of the 1982 United Nations Convention on the Law of the Sea, turn out to be meaningless when read carefully.[5]

The notion that there is "universal jurisdiction" over the supposed "universal offense" of "piracy" also fails when the concept of "jurisdiction" is examined non-polemically. There might be a universal jurisdiction to prescribe (i.e., States might tailor their municipal legislation to make criminal, by their respective municipal laws, the acts of foreign "pirates" against foreigners in foreign territory or the high seas). But nobody has ever acknowledged a foreign country's "universal jurisdiction," without the permission of the territorial or flag State, to enforce its municipal prescriptions in foreign territory or on board vessels properly flying a foreign flag, even in an "enforcing" State's own port. And even where there has been a permitted arrest of a foreigner on board a foreign vessel, the arresting authorities usually seem to lack the "jurisdiction to adjudicate" necessary for a successful prosecution unless there has been some real link between the offense or the offender and the State attempting to apply its municipal law to him or her.[6]

Similarly, the notion that "war crimes" involve universal jurisdiction not only to prescribe but also to enforce and to adjudicate is far more than the evidence will bear. At best there have been "victors' tribunals" as at Nuremberg, or tribunals to which the States concerned have been construed, rightly or wrongly, to have agreed, such as the tribunals at The Hague and Arusha applicable to events in the Former Yugoslavia and Rwanda.[7]

The reasons why jurisdiction to adjudicate is limited even in the case of so-called "universal crimes" are deeply rooted in the structure of the

international legal order. It takes time, effort, and somebody's taxpayers' money to prosecute anybody for anything. The difficulties are regarded as minor when a municipal society, a State, is the beneficiary of its own expenses. But whose children are to be sent to die to perform the arrest or evidence-gathering when a foreigner is to be investigated or arraigned for an act against other foreigners outside the territory of the State purporting to be concerned? Whose legislators determine the procedures to be followed and the exceptions to those procedures when circumstances get complicated? Whose legal order governs when it appears that the enforcers have themselves violated the law of the State in whose territory they are acting, or commit atrocities in the course of acting?

Let us look closely at a particular problem: To whom does a person wrongly arrested appeal, and who pays his expenses? Article 85 of the Statute of the ICC actually foresees this last situation and provides that in the case of a "miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law." But it does not say whose law or what law, implying that there is an international legal standard for such compensation (which is probably not the case except in the minds of advocates wishing to raise some precedents, but not others, to the level of customary law) and that the new Court will elaborate on it. That presumably means leaving both determinations to the very tribunal that was involved in the miscarriage to begin with. And out of whose pocket is the compensation to come? Presumably, the tribunal pays it out of the regular budget of the tribunal which draws from the fund established under Article 115 of the ICC Statute and voluntary contributions. Whether the parties will long consent to have their taxpayers amerced for errors committed by a tribunal they do not control, a tribunal that defines and administers its own law and does not itself respond to legislators for its errors, is a question better answered by faith than by experience.

But perhaps these problems are too theoretical. Perhaps the notion is that the tribunal can resolve these problems and that States parties to the Statute of the ICC will have such an interest in the success of the tribunal that they will be content to have their taxpayers pay for it in its formative years. Let us turn instead to some more immediate problems.

First, consider an apparently obscure problem with large implications: Article 90 of the ICC Statute deals with extradition of an accused to a requesting State under an extradition treaty, or surrender to the Court under the ICC Statute. I could find no mention in the Statute of the "hand over" obligation of the 1949 Geneva Conventions on the laws of war.[8] The phrase "hand over" was deliberately chosen in that context to avoid the complications of municipal

"extradition" law and procedures, while "surrender" was apparently chosen as a word of art in the ICC Statute for the same reason by people who were certainly familiar with the 1949 Geneva Conventions and their use of that different phrase, "hand over." Since Article 8(2)(a) of the ICC Statute, defining "war crimes," and Article 8(2)(c), defining various acts as criminal if performed in an armed conflict not of international character, both specifically refer to the 1949 Geneva Conventions, and the first provision mentions "grave breaches" of the Conventions to which the "hand over" provisions apply, this omission is incomprehensible. It appears as if the parties to the ICC Statute are not obliged to arrest and transfer to the custody of the ICC persons accused of the very "grave breaches" to which this article says it applies, leaving their trials and punishment to the never-used procedures already set out in the 1949 Conventions. But if that is so, it is hard to understand just what the scope of the ICC's authority is intended to be. Perhaps there were intended to be two inconsistent obligations—to "hand over" the accused to another Party to the 1949 Geneva Convention and to "surrender" the same person to the ICC—and disputes were to be resolved by the lawyers after the event actually arose. Since the 1949 Geneva Conventions lie at the root of international obligations on each State party to search out those who are suspected of having committed a "grave breach" and to try them or hand them over for trial to another party concerned, it is difficult to understand what the legal obligation of States now is with regard to persons accused of the most abominable breaches of the supposed international laws of war. It cannot have been to supplement the provisions of the 1949 Geneva Conventions because it creates a clash of obligations, not alternatives; or, if construed to create alternative obligations, does not specify how or by whom the inconsistencies should be resolved. It seems as if the function of these provisions of the ICC Statute is to supersede the 1949 Conventions, but not to provide for the cooperation of States parties that are intended to give real effect to those provisions. I cannot believe that that is what was intended, but the actual intent then seems hidden in inconsistent provisions now accepted as binding by parties to the 1949 Geneva Conventions who are also to be parties to the ICC Statute.

There are many questions of similar technical character in the new draft. But the intelligence and competence of those involved in the drafting is so far beyond dispute that one is left merely to wonder at their intentions and suppose that serious disagreements will surface as real problems begin to arise in practice. Apparently, the tribunal itself and its associated organs are expected to resolve those disputes.

This raises problems of an even deeper and more serious type: Exactly what is the scope of authority given to the institutions created by the ICC Statute? Is the world really willing to give that authority to those bodies?

First is the Prosecutor. His authority is to initiate investigations when there is "a reasonable basis to believe that a crime [sic] within the jurisdiction of the Court has been or is being committed; . . . [unless] (c) there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[9] The word "justice" is used in other provisions of the Statute. But nowhere does it appear that the word "justice" is conceived in its normal sense as essentially a word in the moral order, in which it has many different meanings. Aristotle addresses the concept of "justice" in his *Nicomachean Ethics*[10] and isolates several different meanings, such as "commutative justice," "distributive justice" and "rectificatory justice." Each overlaps the others in part but not completely. To Aristotle, "law" was not necessarily related to "justice." "Natural law" was not related to morality and was self-enforcing, like the law of gravity.[11] As to the positive legal order, it seemed obvious to Aristotle and seems obvious today that various tribunals have different conceptions of "justice" and apply them differently with no clear uniformity.[12] And each party before any of these tribunals seeks "justice" defined in ways different from the "justice" sought by other parties under their own definitions. For example, if a child is killed by some "national liberation" group, there will be parents who insist that "justice" is not done unless all those involved in the group are, to do "distributive justice," condemned to death; others will be satisfied that "commutative" justice has been done if only the direct perpetrator(s) be condemned. Still others will argue that "commutative justice" can be done only if a child of the perpetrator is killed by the State; others that "death" is a commutative remedy that is "unjust" because it cannot serve to rectify the injury, which is not rectifiable but perhaps compensable, which is as close as reality can come to "rectificatory justice" in the circumstances. Aristotle himself proposes mathematical ratios to measure rectificatory and commutative "justice" (which at least one of his translators calls "reciprocity justice"). The examples can be multiplied *ad infinitum*. What this all means is that the Prosecutor is given the authority to determine very important things, like "justice," that are not capable of determination to universal satisfaction. It explains in part why Thomas Jefferson once commented, "I tremble for my country when I reflect that God is just."[13]

The argument that lawyers are trained to grapple with such dilemmas and are more trustworthy than politicians to come to generally acceptable answers has many flaws. First, lawyers are people like everybody else and disagree over

major moral issues like everybody else. They are not trained in morals as much as they are trained in rhetoric, and it is not clear that even appeals to morality will resolve problems that have baffled thinkers of the power of Aristotle for over 2,000 years.

Second, the notion that lawyers or judges form an elite to which we can refer the most complex social dilemmas is deeply inconsistent with fundamental rules of democratic governance. It is a throwback to Plato's notion of rule by "guardians" who are by nature superior to those of us who must live by their rules. The inconsistency of this approach with the notion of an "Open Society"[14] does not necessarily mean it is a foolish notion, but it is not a framework for governance that should be adopted without much thought. For example, it is frequently forgotten that to Plato nobody was fit to be a guardian who would want the role.[15] But I know of no supporter of the ICC who does not think that s/he would do well as the Prosecutor or a judge in it. The point is too deep for mockery; we are dealing with a real statute setting up what its supporters expect to be a real tribunal with real authority.[16] This is not to say that Plato was right, but neither was he clearly wrong. He raised an argument based on insight and character worth considering deeply. In a sense, he was posing a "natural law" argument based on the inborn "nature" of people—a "natural law" like the law of gravity or the laws of economics that has nothing to do with the "moral law" frequently referred to as if "natural" in disregard of several thousand years of unmistakable evidence.

Third, there seems to be a fundamental notion that armed conflict, whether international or not, is governed by rules that can be overseen by an umpire or referee. But when people are willing to die for a cause, or see their own children killed, the matter is too serious for a games approach.

Fourth, the idea that judges or lawyers can "fill in the gaps" of an incompletely expressed bit of legislation might serve well in areas, such as economic regulation, where a mistake can be digested within the system as long as the rules are made clear—or even during an interim period when the rules are not yet clear and some bankruptcies occur which a later appreciation of the rules within the system grappling with the problem would have avoided. But where life or death is involved, or personal freedom, the return to "common law crimes," i.e., "crimes" defined by judges after the event, is deeply disturbing. In the United States, "common law crimes" dropped out of consideration in 1816 when the Executive Branch of the American government refused to bring a prosecution against an individual whom some judges (particularly Joseph Story) thought might be convicted on the basis of non-legislated rules adopted by judges, with knowledge of those rules attributed by judges to all members of

society.[17] It is very distressing to many Americans to see the "common law crimes" approach resurrected under other names and rationales by those who fancy themselves the governors, or at least the political beneficiaries, of the "new" system.

There is a much deeper problem that seems to have received only polemical attention: Is the object of the ICC to do "justice" or to help attain and preserve "peace"? To many, "justice" as they perceive it is a prerequisite to "peace." To others, "peace" as they conceive it is a prerequisite to "justice." I would suggest that assertions on both sides are simplistic and distort the complex relationships they hint at.

"Peace" is not the result of "justice," it is the result of implied consent to a social structure (possibly, in some cases, analogizeable to a "social contract") under which the alternatives to peace are believed worse than the "injustice" that might be unavoidable under any current conception of a human social order. No doubt, in both municipal and international legal orders "peace" can be attained by a draconian criminal law system, "just" or "unjust," depending on the value judgment of each evaluator, under which dissent is immediately punished. Such a peace is unacceptable politically to Americans and many others whose value systems include a great weight to be given open political speech, true or not, disruptive of stability or not.

The international legal order, as currently conceived, considers attempts to alter municipal legal orders by force to be beyond the legal control of international society as long as international peace and security are not threatened;[18] civil wars are not illegal as a matter of international law; they are always, possibly by definition, illegal under the municipal law of the society whose authority-structure is under attack.[19] While the variations in reality might be limitless, it is clear that such "revolutions" as have recently occurred in the former Soviet Union are now occurring in many States[20] and are considered to lie beyond the authority of the international community.

The Statute of the ICC would seek to make criminal, as a matter of international law, violations of the limits of a soldier's privilege in armed conflicts not of an international character agreed by Common Article 3 of the 1949 Geneva Conventions. Under the Geneva Conventions, no State had the "standing" necessary to support diplomatic correspondence or intervention in any such cases; the provisions were acceptable to existing States' authority-holders because they could not, as a matter of law, be applied except polemically by outsiders or as "moral" imperatives now agreed by the apparently defaulting States and brought to their attention by non-governmental organizations, like Amnesty International or the International Committee of the Red Cross and their

agents. But the polemics and moral arguments have always been available to outsiders. And bolstering those arguments by embodying the moral rules in positive documents in the form of "legal" commitments was accomplished in 1949. The great change now has been the creation of an organ empowered to oversee the internal affairs of States parties and limit the application of force used either in revolution or to suppress that revolution.

The ideal commends itself. But it is very difficult to see how this arrangement can work in the current legal and political order. Who should arrest the generals in command of the forces defending an authority structure, whether established or revolutionary, already in place—Ariel Sharon, Saddam Hussein, Yasser Arafat, a Russian general involved in the Chechnya campaign, the Chechen leaders? And surely the evidence of recent experience in Somalia and elsewhere makes it clear that even foreign troops sent in as world-police occasionally commit acts which amount to indictable war crimes. In most cases, these last can be governed well by their own municipal military organizations. But not in the former cases and not in all of the latter. Can a Prosecutor under Article 53 of the Statute be placed in position as the referee of revolutions? It seems to me that even if the positive law placed him or her in that position, the States agreeing to the Statute would refuse to carry out the obligations that a diligent and objective Prosecutor would need carried out if s/he were to perform his or her statutory functions. Indeed, in Article 54 of the Statute, the authority of the Prosecutor seems to be restricted. S/He is authorized to "request the presence" of witnesses but not compel it; to "seek the cooperation of any State" but not to demand it and not to act within a State's territory without its permission. I doubt that these provisions can be strengthened to give the Prosecutor the necessary authority at the expense of States parties to the Statute. It is even more doubtful that s/he could assert the necessary authority over revolutionary groups that are not even parties to the Statute, and thus not subject to its obligations, unless there is a serious move to world governance and to abolish the legal and political effects of even a successful revolution.

With regard to international armed conflicts, the situation is also untenable. Suppose, in an international armed conflict like the Gulf War of 1991, a military leader in the position of General Norman Schwarzkopf were to be arraigned for ordering the bombing of what later turned out to be a civilian bomb shelter. Would a State in the position of the United States not argue that its own legal order was operating and capable of handling the situation? But would that assertion be believed by the relatives of those civilians who had been killed? Or anybody else? And if somebody in the position of General Schwarzkopf were to be surrendered to the ICC for trial, how could s/he defend

him/herself without revealing information that the United States would feel should not be revealed on the ground of national security,[21] such as information received through covert sources or radio intercepts that the civilian bomb shelter overlay a military installation.

And if the Prosecutor waits until the battle or war is finished, the situation would be just as bad. Could a victorious general be surrendered for international judgment when s/he is a national hero? It is frequently forgotten that Admiral Karl Dönitz, the Nazi successor to Hitler, was convicted of declaring unrestricted submarine warfare in the teeth of a submission by America's own Admiral Chester Nimitz that he had done the same thing in the Pacific war on December 7th, 1941.[22] The point is not that Dönitz should have been acquitted of the charge or that Nimitz should have been tried; it is that without a world government it would have been politically impossible to arraign Nimitz, a national hero of the victor State, before any tribunal for the very act for which Dönitz was convicted. It is not difficult to see the equivalent political impossibility of an international trial in analogous situations to arise in the future.

On a more theoretical level, the impossibility of producing "legal" results when States ignore their apparent obligations under the ICC Statute, and the demonstrable lack of State action under the 1949 Geneva Conventions' "grave breaches" provisions, with a lack of "legal" results flowing from that inaction, implicates Occam's Razor, the "law of parsimony." Under that principle of philosophic and legal construction, the simplest rule with the fewest exceptions must always be taken as the primary rule to account for reality.[23] Under that rule, a commitment without results in the legal order but with results in the moral or political orders is better categorized as a moral or political rule than a legal rule. The supposed and much ignored obligation to search out foreigners committing a "grave breach" of the 1949 Geneva Conventions and to "hand such persons over for trial to another High Contracting Party concerned" seems to be obviously a rule of morality and politics, not a rule of law. Failure to carry out the obligation may result in political tensions and opprobrium on the part of those concerned with the morality of giving asylum to persons who have committed atrocities in armed conflict. It has not produced results in the international legal order.

While this skims the surface of why the ICC Statute is unlikely to help achieve the results that its advocates expect from it, it ignores alternatives that have also been ignored by the legal and human rights communities that have pushed so hard to have their value systems institutionalized in the international legal order by means of the positive law. While the ICC does not foreclose parallel possibilities that might be more successful in actually enforcing

that value system, it undercuts those parallel possibilities by making them seem poor alternatives that withhold "justice" from the aggrieved by making "justice" a legal instead of a moral term.

Every normative order has its own enforcement techniques. If the default be regarded as a matter of positive law, then the enforcement techniques of the positive law must be used to "right the wrong." But if the default is viewed as a moral default, then a "Truth and Reconciliation" Commission might be the best way to achieve the closure that peace requires, with moral opprobrium and social ostracism the "sanction." And if the requisite level of opprobrium does not flow, if the wicked find haven among their like-thinking fellows, then it is hard to see how peace and security would flow from the application of positive law sanctions to the wicked. There are two obvious problems. First, the wicked constituents might want to defend "their" wicked leader, and military activity with its attendant atrocities on all sides is the most likely result of attempts to "arrest" him or her. Second, if "legal justice" in the normal municipal criminal law sense is to be done in some cases, only chaos would be the likely result. For example, to do what some demand as "justice" in Rwanda, surely every Hutu who killed an innocent Tutsi, and every Tutsi who killed an innocent Hutu should face trial and punishment. Failing that, the hordes of unhappy survivors would threaten to make peace and reconciliation impossible. How many hundred thousand trials and how many prisons should there be? Or will the "world" apply its sanctions only to a select few? Who selects the "few"? A prosecutor applying objective standards? What standards? What is "objective" in these circumstances that would permit the murderer of a child to go free while the inciter or political leader who killed nobody goes to prison? And who is the "world"? Slightly more than one fifth of the population of the world is Chinese and seems more or less content to live under a government whose conception of "human rights" seems very different from that of the framers of the ICC Statute. The same may be said of the slightly less than one-fifth of the world's population that is Hindu; and the same may also be said of about one-fifth of the world's population who participate in revealed religious traditions, organizations, or sects—whose "divine law" perceptions forgive or even encourage the killing of non-members of their clan or society. Three-fifths is a majority. And while it might be argued that not all Chinese, Hindus, and adherents to absolutist religions would agree with their elected, born, or appointed spokespeople in matters relating to "human rights," it can equally well be argued that not all Americans and other participants in the European enlightenment agree with their political leaders about such questions.[24] So let us abandon majority rule

and move to rule by the enlightened few—us. But that was Plato's answer, and it is inconsistent with open society ideals we also purport to have.

I conclude that openness leading to moral examination of value systems is probably the closest we can come to "justice" if "peace" is really our aim in this imperfect world.

Until now, the accommodation of the international legal order to the quest for enforceable moral standards has been to encourage States in the international legal order to agree to general rules, usually masquerading as legal principles but actually moral principles, and enforce them through their own interpretation of them in their own municipal legal orders. That is why the 1949 Geneva Conventions contain their uniformly incomplete "hand over" provisions quoted above. It is also why, in the Genocide Convention of 1948, the enforcement provision provides that: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated. . ."[25] And "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[26] Until now, i.e., for about 50 years, no State has accepted the jurisdiction of any international tribunal for such acts although, under severe political pressure, the Serbian part of the Bosnian State is argued to have authorized the spokesperson of the Republic of Yugoslavia (Slobodan Milosevic) to accept such an obligation for it. How the other parties to the pertinent international accords construe themselves into making definitive interpretations of a document of delegation to which they are not parties is a bit mysterious as a matter of law, however simple it might seem as a matter of politics.[27] Whether any State accepting the ICC Statute conceives it applying to its own leaders acting in its own territory remains to be seen. Whether other States parties will send their young people to be killed and spend their own taxpayers' money to enforce the mandate of an international tribunal applied in the territory of a second State and affecting only the people of that State, also remains to be seen.

The overarching problem confronting the statesmen and lawyers of the world is probably not that of creating a tribunal to reduce "war" or political violence to the point that atrocities can be punished by some outside umpire. War itself is atrocious; it kills innocent people, hurts others, destroys property, and in many cases is temporary in its political results. The "civilized" world

celebrated with joy the Kellogg-Briand Pact that was supposed to end recourse to war as an instrument of national policy in 1928. It was followed by two decades of bloodshed and misery. The current United Nations Charter requires international disputes to be settled by peaceful means and forbids the threat or use of force in international relations.[28] It is only when these provisions of the positive law are violated or evaded[29] that atrocities can occur that cross international boundaries. But today, the greater number and extent of atrocities, like genocide, occur wholly within the boundaries of a single State, like Bosnia or Rwanda. The real question is whether international law as such is capable of addressing these situations.

The traditional answer would be "No." The situation of internal atrocities is analogous to the situation of child abuse within a municipal legal order—everybody condemns it and would like to do something about it, but the conflicting social values involved in some institutional oversight over family life, and the difficulties of finding people whom society could trust to make decisions in the best interest of society, make the resolution of child abuse issues too difficult to be satisfactorily resolved in Western society. Now, it appears as if the magic solution would be to have the international equivalent of child abuse, genocide, policed by the very system that has failed so obviously in municipal societies: the Courts.

Let me make a radical suggestion. Some problems are not capable of being resolved by the application of positive law. Some social problems are moral problems and better resolved through the application of remedies provided in the moral order, not the legal order. The obvious remedy in the moral order for genocide is exposure and opening borders to grant at least temporary haven to the victims. In some cases, the moral remedy might indeed involve revolution or even an international armed conflict. That appears to have been the case when Idi Amin was accused of presiding over the butchering of a significant part of the population of Uganda. In that case, the moral imperatives appear to have overcome the legal imperatives forbidding recourse to force in international affairs. And nobody but Idi Amin and his supporters would complain. Similarly, the complaints about North Viet Nam's occupation of Cambodia to end the unspeakable regime of Pol Pot were muted by the thought that nothing and nobody else would do the job. Morality turns out to be a counter-weight to the positive law, and the dominant system in some cases. Perhaps it is what Cicero had in mind when he wrote of the "true law [*vera lex*]" that should be obeyed even if inconsistent with the positive law, the decrees of the Roman Senate.[30]

How can the enforcement tools of morality be brought into play in cases of military atrocity? Exposure is the obvious first step. Criminal trials might be a State's response in its own interest; not trials of foreigners for committing atrocities on other foreigners abroad, but trials of people subject to its own jurisdiction for committing atrocities against anybody whom that jurisdiction, allowing reciprocal authority to other municipal orders under current conceptions of the equality of all sovereigns before the law, considers within the range of its protection. That solution does not involve international tribunals; it involves the same national tribunals that the normal laws of war prescribe—national tribunals, possibly military courts-martial but not necessarily so. The application of municipal law in those circumstances is undertaken not because international law compels it, but because national interest makes it the best solution. An example is the United States Civil War of 1861–1865, during which the Union never declared or acknowledged the legal capacity of the Confederacy to engage in "war," but nonetheless issued the first great modern codification of the laws of war, the Lieber Code.[31] The United States Supreme Court in 1877 gave its opinion that those laws were applied as a "concession . . . made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations."[32] There are many other reasons that could be added to those, but this is not the place for further elaboration.

Yet another response, although hardly a "solution," might be the most difficult of all: do nothing. That is the Waldheim response. Kurt Waldheim was Secretary-General of the United Nations for two full terms and then President of Austria. He is now believed to have known about atrocities committed by the Nazi army in the Balkans during the Second World War and to have denied involvement or even knowledge of them. He has never been brought to trial and it is now highly unlikely that he ever will be. But he cannot easily leave Austria. Nor is he likely to get the prizes and adulation that his record at the United Nations and in Austria would otherwise seem to have earned him. "Successful" leaders who cannot explain the inconsistencies that political leaders always have thrown at them by their political opponents and journalists risk ostracism. Those who lead their countries into positions that outsiders find morally abhorrent, like the apartheid leaders of South Africa before Nelson Mandela's rise to power, find the foreigners reacting to them in ways they did not expect. Nobody in the current world wants to deal with a bigot, so the United States enforced its "Sullivan Rules"; it limited American investment in South Africa to that which could stand moral scrutiny.

Steps like these, isolation of morally dubious individuals and adjustment of legal relations with morally dubious legal orders, do not "fix" the perceived

injustices or apply foreign "law" to them. They indicate the abhorrence of other States and ordered trading partners, thus putting political as well as moral pressure on the persons and legal orders whose actions seem questionable. The persons or legal orders that feel victimized by those steps of ostracism or restrictive trade rules can respond, if they like. It might be that the outsiders are wrong, or fail to understand the complexities of the actions or system they condemn. In that case, explanation and openness might result in a relaxation of the condemnations. But it might not; politics frequently acts on the basis of misperceptions more than facts. And it is also possible that the Waldheims or masters of a racist South Africa feel themselves morally justifiable even though the facts seem to others to indicate morally dubious behavior or outright bigotry. But what is the alternative? Invasion that kills people and destroys property? Criminal charges in a tribunal that has no positive law to rely on but finds "law" in the moral indignation of a Prosecutor and a majority of judges who, as human beings, are also fallible?

I should conclude by wishing that objective "justice" were clear and available via a tribunal of scholars of the integrity and perception of Leslie Green. But until cloning becomes the norm, or society in general is prepared to accept the infallibility of its lawyers, such solutions seem beyond our reach. The conclusion is not pessimistic, but realistic. Much can be done, but it is better to do nothing in the legal order than to confuse it with the moral order and attempt to enforce our view of morality as if binding on others in a universal criminal law.

Notes

A partial version of this analysis has been published as *Challenging the Conventional Wisdom: Another View of the International Criminal Court*, in 52(2)COLUMBIA JOURNAL OF INTERNATIONAL AFFAIRS 7837–94 (1999), and another partial version as *A Critical View of the Proposed International Criminal Court*, 23(2)THE FLETCHER FORUM OF WORLD AFFAIRS 139–150 (1999).

1. A/CONF.183/9, July 17, 1998; http://www.un.org/icc. The vote is reported in www.un.org/icc as 120 in favor, 7 opposed, with 21 abstentions. Apparently the vote of each participant was not directly recorded, so the identities of the voting participants must be derived from their statements in explanation of vote or other sources. For present purposes the totals are enough.

2. An example might be drug trafficking or aerial hijacking; there are treaties dealing with them and many other municipally defined "crimes" of international concern.

3. The phrase "*jure gentium*" itself historically relates to a conception of the international legal order under which States are bound by "comity" or "right reason" or some such to enact criminal and other laws in their municipal legal orders that duplicate the equivalent laws of other States. It rests on a notion of universal human morality that seems self-evident to some but has

been disputed by others at least since the days of Aristotle. This entire topic is the subject of ALFRED RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW (1997).

4. Aside from the American struggle to construe a statute of 1819 that made criminal by United States municipal law "the crime of piracy, as defined by the law of nations" (the statute was originally upheld, then dropped out of use), the closest to a case in point is probably In *re* Tivnan and Others, 5 BEST & SMITH's Q.B. REP. 645 (1864), in which a British tribunal refused to extradite to the Federal Union a Confederate raider during the Civil War on the ground that Article X of the Webster-Ashburton Treaty of 1842 requiring the mutual extradition of "pirates" did not apply to "piracy *jure gentium*" but only to "piracy" as determined by the municipal law of the requesting State. There is much that is difficult to follow in the three opinions for the majority, and the British tribunal was itself split, with Chief Justice Cockburn dissenting. It is likely that the judges involved, the two States parties to the Webster-Ashburton Treaty, and the legal community in general were deeply split in their conceptions of the structure of the legal order and the role of extradition in it. It seems likely that the British court believed the defendants to be "pirates" only under an American polemical definition popular in the Union during the Civil War of 1861–1865 and in some cases applied to Confederate raiders, but did not want to insult the United States federal authorities by saying so. See ALFRED RUBIN, THE LAW OF PIRACY pp. 158–171, 206–208 (2d rev'd ed. 1998).

5. An examination of the uses of the term from earliest records to the present is RUBIN, THE LAW OF PIRACY, *supra* note 4. The dissection of the current purported codification is at pages 348–372. All of the normally cited cases and scholarly writings are discussed in the text.

6. There have been several cases of this sort, but to disentangle them seems more than is necessary in this place. See AMERICAN LAW INSTITUTE, RESTATEMENT 3d OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, secs. 421–423 (1987). The interested reader is referred to RUBIN, ETHICS & AUTHORITY IN INTERNATIONAL LAW, *supra* note 3, and RUBIN, THE LAW OF PIRACY, *supra* note 4, at 388–389.

7. These have involved many legal and practical problems and cannot be used as precedents for anything more than *ad hoc* tribunals of doubtful effectiveness. See Alfred Rubin, *An International Criminal Tribunal for Former Yugoslavia?* 6 PACE INTERNATIONAL LAW REVIEW 7 (1994), and Alfred Rubin, *Dayton and the Limits of Law*, 46 THE NATIONAL INTEREST 41 (1997), for a sampling of the problems that seem not to be considered by advocates of the tribunals and their use as "precedents."

8. The "hand over" provision is identical in all four of the 1949 Geneva Conventions. The texts of those Conventions are usefully collected in THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiří Toman eds., 3d rev'd and completed ed., 1988) 373 sq. (Sick and Wounded in the Field), 401 sq. (Wounded, Sick and Shipwrecked), 423 sq. (Prisoners of War), and 495 sq. (Civilians). The parties to those conventions are obliged:

> to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, *hand* such persons *over* [emphasis added] for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

This language appears in Article 49 of the Wounded and Sick Convention, Article 50 of the Wounded, Sick and Shipwrecked Convention, Article 129 of the Prisoners of War Convention, and Article 146 of the Civilians Convention.

There is no provision in any of the Conventions for dealing with persons accused of a grave breach with regard to whom the detaining State has no way of holding a fair trial (subpoenaing foreign witnesses or documents, for example) and no High Contracting Party concerned has bothered to make out a *prima facie* case. There have been no known actions under these provisions for about fifty years now and it is not clear that they bear any relationship to reality. The apparent failure of the ICC to step into the gap, if there is a gap, seems unaccountable and I hope I misread the Statute.

9. ICC Statute, art. 53(1)(a) and (c). See also art. 53(2)(c).

10. ARISTOTLE, NICOMACHEAN ETHICS, *in* INTRODUCTION TO ARISTOTLE pp. 402–411 (1131–1134a) (Richard McKeon ed., Modern Library, 1947). There are, of course, other definitions of parts of what some analysts consider "justice."

11. ARISTOTLE, NICOMACHEAN ETHICS 295(H. Rackham trans., Loeb Classical Library, 1939). The point is rather obscurely made and it is necessary to read much more of Aristotle's ETHICS and POLITICS to understand it. See RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW, *supra* note 3, at 6–8, for a start, with footnotes.

12. "Some hold that the whole of justice is of this [natural] character. What exists by nature (they feel) is immutable, and has everywere the same force: fire burns both in Greece and in Persia; but conceptions of justice shift and change." ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 11, at 294 (Greek)/295(English). Aristotle goes on to imply that perhaps to the gods there is an identity between natural law and justice, but human conceptions of justice, being mutable, and human (positive) law being uttered at the will of the legislator, who is human and therefore fallible, is not capable of such precision. The subject is worth deeper study than this essay will allow.

13. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1781–1785), Query 18, as quoted in BARTLETT'S FAMILIAR QUOTATIONS (14th ed. 1968), at 471a.

14. See KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1950). The major theme of this magisterial work is that Plato's ideal "Republic" rests on a fixed social and political hierarchy run by guardians, while the non-fascist ideals of our time dictate a "republic" responsive to its ever-changing constituencies and their value systems. Stability is not the highest value in our time. Plato's ideal notion was obviously inconsistent with the legal orders of the "States" of his own time, where legal power was, as it is today, frequently the result of the interplay of many other normative orders than positive law and morality. In PLUTARCH, LIFE OF DION, and PLATO, LETTER VII, it is possible to see the clash between Plato's notion of a government based on the "natural law" of inborn talent and education on the one side, and the realities of government based on "divine law" theories of inheritance and the "positive law" of amoral constitutions and "comity"-based divisions of authority. Dionysius II purported to apply Plato's theories of governance to his own realm in Sicily, and failed as the realities of court intrigue ("comity"?), divine law, his very human yearning for absolute control ("natural law"?), and other normative orders imposed themselves on his decisions.

15. PLATO, THE REPUBLIC, Book I, 346e–347, in PLATO, THE REPUBLIC 88–89 (Desmond Lee trans., 2nd rev'd ed., Penguin, 1974).

16. I say this harshly because of the notable application of political polemics to the discussions by some advocates of the ICC. See, for example, the comments by Jerome Shestack and David Stoelting, respectively President of the American Bar Association and Chairman of its Coordinating Committee on the ICC, dismissing as "myth" the bases for various objections to the ICC. 1 ON THE RECORD 21, July 16, 1998. In my opinion, Shestack and Stoelting misrepresent for polemical purposes the objections they mention and dismiss even those few as if they were all and without serious examination.

17. See United States v. Coolidge, 14 U.S. (1 Wheaton) 415 (1816); in the United Kingdom, common law crimes still exist in theory, but scholarly lawyers normally cite MATTHEW HALE, PLEAS OF THE CROWN (1678), for the definitions of crimes not defined by Parliament in legislation. In civil law countries, the issue does not exist any longer. In the ICC Statute, Articles 22 and 23, the well-known aphorisms are cited as if beyond dispute and without attribution: *Nullum crimen sine lege* and *nulla poena sine lege*. There is no discussion as to precisely what is meant by "*lege*"—whether it includes common law or is confined to statutory law. If it is intended to reduce the "crimes" to those already defined by judges, these articles seem inconsistent with the authority given to the tribunal elsewhere, notably Article 21(1)(b) of the Statute, which authorizes the tribunal to find its law in otherwise undefined "principles and rules of international law," among other sources.

18. See U.N. CHARTER arts. 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members") and 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . ."). Many, if not most, if not all, the Members of the United Nations owe their current authority-structure to a violent revolutionary change somewhere in their history.

19. I suppose it is possible to conceive of a society that includes revolutionary struggle against its authority-structure as a lawful part of its authority-structure, but I know of no such society in reality.

20. For example, in Russia, where the status of Chechnya has been the subject of horrible fighting, and in the Democratic Republic of the Congo, where a civil war seems to have broken out in the Eastern areas and has reached the point at which it is acknowledged by the central government. There are, distressingly, many such situations.

21. See ICC Statute, art. 72(6): "Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself result in such prejudice to the State's national security interests." There are several other pertinent provisions of the ICC Statute, none of which would help the Court significantly in the situation posed. And if the ICC could legally demand the information, it would nonetheless be refused because its exposure would be at the expense of the national security of the State involved as that State sees matters. It is difficult to imagine any State submitting itself to an outside evaluation of its own national security interests, certainly not exposing the information to outsiders before an internally binding internal evaluation.

22. W.T. MALLISON, SUBMARINES IN GENERAL AND LIMITED WARS, esp. app. B at 192–195 (Interrogation of Fleet Admiral Chester W. Nimitz on May 11, 1946, taken from 40 INTERNATIONAL MILITARY TRIBUNAL 109–111). Mallison's book is Volume 58 (1966) of the Naval War College "Blue Book" series of International Law Studies.

23. The rule, reputedly first formulated by William of Occam in the first half of the fourteenth century, says, "*Essentia non sunt multiplicanda praeter necessitatem* [assumptions should not be made unless necessary]." The language involves the neo-Platonic notion of "essences," which is now usually considered unnecessary by application of the rule itself. See the article by T.M. Lindsay at 19 ENCYCLOPEDIA BRITANNICA 965 (11th ed. 1911).

24. The morality and political utility of abortion and the death penalty are only two of many examples of such disagreement in "enlightened" countries concerning matters that many would regard as aspects of "human rights."

25. Convention on the Prevention and Punishment of the Crime of Genocide, art. V, 78 U.N.T.S. 277.

26. *Id.*, art. VI.

27. For a fuller analysis of this and many other oddities of the arrangements under which a tribunal was established at The Hague to try people involved in atrocities in the former Yugoslavia, see Rubin, *Dayton and the Limits of Law, supra* note 7. The weaknesses of the tribunal's system were apparent from the moment of its creation. See Rubin, *An International Criminal Tribunal for Former Yugoslavia, supra* note 7.

28. U.N. CHARTER arts. 2(3) and 2(4). The Charter is a treaty, and these provisions are normally considered binding as a matter of international customary law. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, 425, (para. 76); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 1986 I.C.J. 14.38; and decisions 3, 4, 5, 6, and 8 in the latter case, holding American violations of "customary international law" to exist in various acts which also violated Articles 2(3) and 2(4) of the U.N. Charter.

29. A common evasion is when authority over territory is involved and both sides regard the dispute as internal to themselves. An example is the Falklands/Malvinas war between Argentina and the United Kingdom. See Rubin, *Historical and Legal Background of the Falkland/Malvinas Dispute,* in THE FALKLANDS WAR 9-12 (Alberto Coll & Anthony Arend eds., 1985). That is probably the reason why Iraq categorized Kuwait as legally part of Iraq before the invasion of 1990 that led to the Gulf War of 1991.

30. CICERO, *DE RE PUBLICA AND DE LEGIBUS* (C.W. Keyes, trans., Loeb Classical Library, 1928, 1977), at 210 (Latin)/211 (English).

31. General Orders No. 100 promulgating the Instructions for the Government of Armies of the United States in the Field, in Schindler & Toman, *supra* note 8, at 3.

32. Williams v. Bruffy, 96 U.S. 176, 186, 24 L.Ed. 716, 718 (1877). To those reasons can be added the importance of maintaining a sense of moral superiority among the fighters' constituents and the constituents of allies, maintaining discipline among the troops themselves, together with many other advantages.

XVII

Chivalry in the Air?

Article 42 of the 1977 Protocol I to the Geneva Conventions

Robbie Sabel

THE DECISIVE TEST FOR ANY RULE OF HUMANITARIAN LAW is whether, to the soldier in an active combat situation, it would appear to be an instinctively apparent and reasonable rule. In my experience as a teacher and lecturer, I have found that any initial skepticism soldiers may have as to the laws of war is quickly dispelled when one enumerates the basic norms of humanitarian law.[1] No soldier, in my experience, has ever seriously questioned Common Article 3[2] norms such as respect for civilians, persons *hors de combat,* and prisoners of war. From that initial premise, a teacher finds it easier to proceed to the more involved rules that often require legal training for their effective implementation.

If a rule of humanitarian law fails the instinctive morality test of the combat soldier, that rule will most probably not be applied in actual combat. Although the rule may be applied in a forensic *post mortem* as part of a military disciplinary court, we will not have achieved our objective, namely that it be applied by soldiers in the heat of battle.

Does the rule as to protection of airmen[3] in distress pass the decisive test? Would it seem to ground troops to be instinctively wrong and immoral to fire on a crew parachuting from a military aircraft in distress? There seems to be near unanimity in the manuals and legal textbooks that, in principle, airmen

parachuting from an aircraft in distress are to be considered *hors de combat* during their descent and should be treated as such.[4]

The first attempt to draft the rule in codified form was in the 1923 Hague Rules of Air Warfare, which stated:

Article 20

> When an aircraft has been disabled, the occupants, when endeavouring to escape by means of parachute, must not be attacked in the course of their descent.[5]

The Commission of Jurists who drew up this rule did not claim at the time that they were codifying customary law but only that it "seemed desirable to prohibit" such forms of "injuring the enemy."[6] The rule, however, appears to have been viewed as uncontroversial and was accepted without debate.[7] State practice and judicial opinion since then point to the development of the rule into international custom. The International Committee of the Red Cross (ICRC) referred to it in 1971 as "a common-law rule,"[8] and Bothe, Partsch, and Solf write, "withholding attack against airmen descending from a disabled aircraft had certainly hardened into customary international law."[9] DeSaussure states that "while descending air crewmen were occasionally attacked in World War II in areas where their capture was not probable, the practice in Korea, Indochina, and the Mideast *points to a developing custom* which unconditionally exempts any occupant leaving a disabled aircraft from being attacked either from the air or from the ground."[10]

The issue of protection of airmen in distress was extensively debated during the Humanitarian Law Conference.[11] The rule, as finally adopted in Article 42 of Protocol I,[12] states:

Article 42

> 1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
>
> 2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before made the object of attack, unless it is apparent that he is engaging in a hostile act.
>
> 3. Airborne troops are not protected by this Article.

Four of the issues of principle concerning airmen in distress that were raised during the Conference were:

What is the justification for granting special protection to airmen?

Does the rule apply to airmen in distress parachuting onto friendly territory?

What behaviour by the airmen during descent, if any, negates the protection?

What protection is to be granted to airmen in distress once they have landed?

Justification for the Protection Granted to Airmen in Distress

The practice of not shooting at an airman in distress appears to have been part of the mutual chivalry of airmen in the 1st World War. Spaight, the leading authority on this issue, wrote, some fifty years ago, that "the effect of the use of aircraft in war was at first to restore to warfare something of the spirit which went out with the Middle Ages. After 600 years, chivalry re-emerged in strange company."[13] Spaight also adds a very practical argument that there is a military advantage to encouraging enemy airmen to abandon their aircraft since "if airmen know that, if they escape by parachute, they will become an easy target during their descent, it will incline them to harden their hearts and to remain at their post."[14]

As part of preparations for reviewing the laws of war,[15] in 1969 the ICRC convened a conference of experts. Among the issues raised was that of airmen in distress, with the Report of the Conference focusing on the comparison between airmen in distress and "a shipwrecked individual."[16] However, the Conference did not propose specific language. The ICRC position paper presented to the subsequent 1971 Conference of Experts did propose a specific provision on airmen in distress, explaining it in terms of "presumption of harmlessness" and "giving the individual the benefit of the doubt."[17] The Israeli delegation, which submitted a proposal of its own at the Conference,[18] explained that an airman "having parachuted from his aircraft, is in a state of helplessness and military ineffectiveness, and (should) be considered *hors de combat.*"[19] At the second session of the Conference, in 1972, the ICRC presented a revised text.[20] The commentary thereto submitted by the ICRC again referred to the "shipwrecked" analogy.[21] The report of the second session of the Conference did not include a discussion of the justification of the need for such an article.[22]

The issue of the justification, if any, for granting special protection to airmen beyond that granted to other combatants was debated during the

Humanitarian Law Conference. One of the justifications raised was the idea of chivalry. The delegate from Belgium declared that "there was a tradition among fighter pilots that a pilot who had been shot down should be considered to be in a similar situation to that of a rider unhorsed in battle" and that it was a "rule of chivalry."[23] The Canadian representative categorically stated that shooting at an airman in distress "would run counter to the entire tradition of chivalry, for the very idea of shooting in cold blood at a human being descending by parachute in distress and probably already wounded, was monstrous."[24] The delegate of the Netherlands limited himself in this respect to hoping that "all States would carry chivalry beyond the limits imposed by the legal rule as now adopted."[25] By contrast, Egypt's delegate, although accepting the rule in principle, objected to the introduction of the justification of chivalry and pointed out that

> one could look at the situation from the standpoint of chivalry but that would be rather strained and exaggerated. Because chivalry presupposed equality of opportunity in fighting, it implied giving the adversary the opportunity to fight for his life, to kill or be killed. To adopt that concern for chivalry in the situation under discussion would be pushing it too far, because infantrymen were by no means equal in armament to a pilot. If they were ordered to let him go, he would return and fight them, not with a simple rifle—the same weapon that they had—but with a fighter aircraft equipped with all the means of destruction which the human mind had been able to devise and put into use . . . considerable military interests must not be sacrificed to mere considerations of chivalry.[26]

Mr. de Preux, of the ICRC, referred to the fact that although airmen in distress are covered by the general rule as to *hors de combat*, "the importance of aviation in modern conflicts warranted the adoption of a special provision to ensure the normal functioning of air operations and the protection of airmen."[27] During the plenary discussions of the Conference, Mr. Pictet, on behalf of the ICRC, explained that "the serviceman who, to save his life, parachuted from an aircraft in distress was a victim, shipwrecked as it were in the air and that was the idea which should have precedence."[28] The representative of Israel stressed that such an airman was *hors de combat* and should not be attacked for that reason,[29] while the delegate from the Federal Republic of Germany forcefully declared that "a person parachuting from an aircraft in distress was reduced to helplessness in the true sense of the word during his descent and an attack on him would be tantamount to an execution."[30] Possibly summarising the essence of the justification for the rule, the Portugese delegate stated that in such circumstances the airman "could neither defend himself nor attack

nor escape."[31] De Preux, in the ICRC Commentary on Article 42, refers to past "cameraderie" between airmen but observes, I believe correctly, that as regards the delegates at the Humanitarian Law Conference, "the majority considered that airmen in distress are comparable to the shipwrecked persons protected by the Second Convention."[32]

It may be regrettable that chivalry is no longer with us, but I believe it is healthier for the development of humanitarian law to base the norm on the accepted definition of a combatant who is *hors de combat* rather than dwell on analogies to battling knights.

Does the Rule Apply to Aircrews About to Land in Their Own Territory or in Friendly Territory?

The 1923 Hague Air Rules do not distinguish between an airman parachuting over hostile territory and one parachuting over friendly territory. Spaight appears, however, to leave the rule as to protection of airmen parachuting over their own territory open to question. He writes that "when the descent is over ground held by the forces hostile to those to which the parachutist belongs, to shoot him is at once inhumane and a waste of ammunition. He must be captured in any case, if he succeeds in landing."[33] If the justification for protection is, as Spaight seems to suggest, only the certainty of capture, then there is no justification for granting protection if the airmen parachute over friendly territory. If, however, the justification is, as I believe it is, humanitarian and analogous to the protection of those shipwrecked at sea, then the question of where an airman is about to land is irrelevant.

The 1969 ICRC Report enumerates "the nationality of the territory on which they are to land" as one of the factors some experts thought should be considered.[34] In its report to the 1971 Experts Conference, the ICRC commented that "such a view is incompatible with humanitarian principles" and set out the rule without any mention as to territory.[35] The draft rule proposed by Israel in 1971,[36] and by the ICRC in 1972,[37] contained no reference to whether aircrews in distress were about to land in friendly territory or in territory controlled by the enemy. The proposed rule was unequivocal as to the protection to be granted while the airmen were descending by parachute.[38] The 1971 Israeli proposal stated that "airmen in distress shall not be attacked in the course of their descent,"[39] and the 1972 ICRC text proposed that the occupants of aircraft in distress "shall not be attacked during their descent."[40] The commentary by the ICRC to the 1972 Conference did not refer to the issue of

where the airmen might land.[41] The question, however, was raised during the 1972 Conference by one expert who

> stressed that a flyer in distress could sometimes guide his parachute so as to reach the territory controlled by his own forces and that, in this case, by virtue of international law, he could be attacked like an enemy who was not really *hors de combat* and who attempted to elude capture.[42]

The text proposed by the ICRC in 1973 to the Humanitarian Law Conference reaffirmed the principle of protection of occupants of an aircraft in distress "when they are obviously *hors de combat,*" but omitted any explicit reference to protection during descent.[43] However, basing itself on military manuals, the ICRC Commentary to the 1973 Draft stated that it was irrelevant whether the aircraft occupants were due to land on territory controlled by friendly or hostile forces.[44] At the first session of the Humanitarian Law Conference, the Israeli delegation proposed an amendment to the basic ICRC text, which included the phrase that an airman in distress "would be considered *hors de combat* during the course of his descent."[45]

At the third session of the Humanitarian Law Conference, the Third Committee formed a working group to discuss the article dealing with airmen in distress. The Rapporteur, George Aldrich, reported that

> A number of delegations stated that immunity from attack during descent would be unrealistic in a case where it were clear that the airman would return to his armed forces by landing in territory controlled by them or by an ally. Many other delegations argued, on the contrary, that an airman descending by parachute should be considered temporarily *hors de combat* for humanitarian reasons until he reaches the ground.[46]

He consequently submitted the following proposal, with the disputed phrase in square brackets:

> 1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent [unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party.]

The Egyptian delegation, which had proposed the phrase in square brackets, decided to withdraw its proposal. Notwithstanding the Egyptian withdrawal, it was put to vote at the insistence of Iraq and adopted by the Third Committee.[47] A number of delegations, including those of the United Kingdom, Federal Republic of Germany, Canada, Israel, and Belgium, consequently found

themselves voting against the Article as a whole. Stating that the amendment adopted was such "as to change existing law," the UK delegation found it "hard to accept."[48] The delegate of the Federal Republic of Germany explained that his delegation had objected to the amendment because "the mere possibility that he might resume combat activities did not deprive a person of the protection to which he was entitled,"[49] and the Canadian delegate expressed hope that those delegations that had supported the amendment "would withdraw their proposal."[50] The Israeli delegation labeled the amendment "in contradiction with existing law,"[51] while the U.S. delegate declared that the amendment

> would be incompatible with the other provisions of humanitarian law . . . which provided that persons that had fallen into the power of an adverse Party under unusual conditions of combat, which prevented their evacuation, must be released. Those prisoners, too, could resume combat, but it was inadmissible that they should all be shot. By the same token, it was inadmissible that a parachutist *hors de combat* could be shot down, on the pretext that he might resume his military activities.[52]

At the final session of the Conference, the Working Group decided to reopen the issue, its Rapporteur reporting:

> The Working Group proposes amending the text of this paragraph to prohibit attacks against airmen descending by parachute, regardless of which Party controls the territory into which they are descending. It was felt that an airman in this situation is temporarily *hors de combat* as effectively as if he were unconscious and that it would be inappropriate for a Protocol designed to expand humanitarian protections to authorize making him a legitimate object of attack while in that helpless position.[53]

In an unusual move, Committee III decided to reconsider the Article and to adopt it without the phrase in square brackets.[54]

A proposal by Sixteen Arab and other States proposing reintroduction of the qualification as to the territory where the airman would land was later submitted to the Plenary of the Conference.[55] In introducing the Sixteen State proposal, the Syrian delegate explained that there was no cause to give privileged treatment to "a person descending by parachute who was obviously trying to escape to a territory controlled by his country, or by a friendly country."[56] Iraq's representative stated that it "was not possible to remain a mere spectator in the midst of ruins and see the dead, and to watch the descent of airmen ready to start again at the first opportunity."[57] Similarly, Libya's delegate argued that it was not "human to give a chance to pilots ordered to destroy countries,"[58]

and the Sudanese delegate asserted that "a pilot forced to bail out from a doomed aircraft should not be considered to be *hors de combat* if he attempts to land on territory controlled by his own side or its allies, for his attempt indicates his intention to land in a safe place and to continue fighting immediately after he has landed.[59] Mr. Pictet, on behalf of the ICRC, vociferously objected to the Sixteen State proposal, stating that it would

> introduce into the Conventions an element that was outside their framework and contrary to their spirit . . . whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations. A shipwrecked person was a victim of the conflict and should be protected in all circumstances. The ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy, who was not himself in a position to kill, introduced into law which had hitherto been purely humanitarian. It would set a dangerous precedent.[60, 61]

The Sixteen State amendment was put to the vote and defeated.[62]

The text, as finally adopted, makes no distinction as regards the territory where the parachutist is likely to land. The clear rule is that one does not shoot at a person parachuting from an aircraft in distress. It is, I believe, a reflection of a rule of customary international law.

Hostile Attitude during Descent?

If an aircraft carrying paratroopers or other airborne troops is in distress, clearly the troops who parachute from such an aircraft are not necessarily *hors de combat.* Theoretically, even an airman parachuting from an aircraft in distress who attempts to use a weapon during his descent is not at the time *hors de combat.*

The various drafters of the provision providing protection to airmen in distress attempted to find a way to exclude these two categories from the protection of persons *hors de combat.* Participants at the 1969 Experts Conference, "generally admitted that an airmen in distress, cut off and *not employing any weapon,* should be respected."[63] (Emphasis added.) The 1971 Israeli proposal contained no reference to hostile behaviour by an airman; however, the text presented by the ICRC in 1972 conditioned the protection of airmen in distress by the phrase "unless their attitude is hostile."[64] At the 1972 Conference, a question was raised as to the definition of the phrase "hostile attitude,"[65] but no expert appears to have objected to the principle of such a restriction. Proposals submitted by the U.S. and GDR repeated the reference to "hostile attitude"

used in the ICRC text.[66] The text presented by the ICRC to the 1973 Humanitarian Law Conference did not contain any reference to "hostile attitude," presumably since the ICRC had widened the scope of the protection to include occupants of an aircraft even prior to their abandoning the aircraft.

Israel submitted a proposal to the first session of the Humanitarian Law Conference which added the following to the ICRC text:

> 2. A person parachuting from an aircraft in distress and whose attitude in the course of his descent is not manifestly hostile shall be considered *hors de combat* during the course of his descent.[67]

The Israeli proposal thus combined an explicit reference to persons parachuting in distress with a restriction as to hostile attitude. At the second session of the Conference, Egypt and other Arab States proposed replacing the general protection for the occupants of an aircraft in distress proposed by the ICRC with a reference to "persons parachuting from aircraft in distress . . . provided they are obviously *hors de combat.*"[68]

During the discussion in Committee III, and in the Working Group on the subject, there was general support for the idea of restricting the protection to persons who had abandoned the aircraft. Occupants of an aircraft in distress would thus not be entitled to protection until they had actually parachuted from the aircraft.[69] As to "hostile attitude" during descent, there was general agreement on "explicitly excepting airborne troops from the protection of the article, even if they were forced to leave their aircraft."[70] The Working Group proposed adding the phrase "Airborne troops are not protected by this Article," a proposal adopted by Committee III and the Conference as a whole. With the addition of specific language relating to airborne troops, the Working Group and, subsequently, Committee III and the Conference as a whole decided that any other reference to "hostile attitude" during descent was superfluous. During the final session of the Conference, the Philippine delegation proposed adding the phrase "unless he commits a hostile act during such descent."[71] France's delegate objected, stating "he knew from personal experience that it was impossible for a person parachuting from an aircraft to use his weapon during the descent, for at that time his sole concern was to prepare for landing."[72] Along the same lines, Switzerland's delegate commented that "he failed to see its practical bearing."[73] The delegate of the Federal Republic of Germany thought "it involved some risk, because it might be very widely interpreted,"[74] and Iran's delegate pointed out that "such a provision might lead to abuse, for once a parachutist had been fired on, it would be easy to find reasons to justify that action."[75] Syrian, Jordanian, and Libyan delegates, among others,

supported the Philippines' amendment, stating that there could be cases where a parachutist might use his weapon. The proposal failed to obtain the required two-thirds majority and was consequently not adopted.[76]

What Protection is to be Granted to Airmen in Distress after They Have Parachuted to the Ground?

An airman parachuting in distress who, on landing, is rendered *hors de combat* on account of wounds he incurred or by virtue of being unconscious is clearly entitled to the same protection as any other combatant in that situation. A question arises, however, of whether the airman should be entitled to any special protection beyond that granted to all combatants. The justification for such extra protection is set out by de Preux, who writes that "The intent to surrender is assumed to exist in an airman whose aircraft has been brought down, and any attack should be suspended until the person concerned has had an opportunity of making this intention known."[77]

The 1969 Conference of Experts did not specifically address this issue, but at the subsequent 1971 Conference of Experts, the Israeli expert proposed a rule stating:

> Airmen in distress shall be given, upon reaching the ground, a reasonable opportunity to lay down their arms and surrender.[78]

He explained his proposal by stating that "the situation of an airman on the ground, after having bailed out involuntarily from his aircraft is similar to persons in distress at sea."[79] The text proposed by the ICRC for the 1972 Conference of Experts refrained from adopting the proposal. However, the U.S. experts proposed a similar rule:

> They (airmen parachuting in distress) shall, if they have landed in territory controlled by their enemy, and are not in a hostile attitude, be afforded a reasonable opportunity to surrender.[80]

The ICRC again refrained from incorporating such a rule in the text that it proposed in 1973 to the Humanitarian Law Conference. In introducing the text in the second session of the Conference, the ICRC representative stated that "once they had reached the ground, all airmen should be afforded the same safeguards as during their descent by parachute."[81] This would seem to have been an excessively far-reaching protection, as during their descent the rule is an absolute prohibition of attack. No delegation appears to have raised

this issue. In the same second session of the Conference, Israel again proposed the rule that:

> Upon reaching the ground, such person shall be given a reasonable opportunity to surrender.[82]

The issue was transferred to a Working Group, which suggested the following text:

> Upon reaching the ground in territory controlled by an adverse party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaged in a hostile act.[83]

The Rapporteur's comment on the text was that

> The Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act. On the other hand, merely moving in the direction of his own lines would not, by itself, mean that that he should not be given an opportunity to surrender, for he might not know in which direction he was going or that he was visible to enemy armed forces.[84]

This text, which was similar to the 1972 U.S. proposal, was subsequently adopted by Committee III and the Plenary without any further substantial debate. It would be a reasonable surmise that the relative lack of controversy over this rule was due to its less than absolute nature. Introducing phrases such as the reference to who controls the territory of the landing and not committing "a hostile act" presumably made the rule more acceptable to some States. This contrasts with the controversy over the rule as to protection during descent, one which was made absolute and not subject to such limitations.

Conclusion

The atmosphere at the Humanitarian Law Conference, which took place between 1973 and 1977, was strongly affected by anti-American and anti-Western sentiment resulting from the war in Vietnam. There was vocal Third World support for National Liberation Movements and Arab and Third World support for the Palestinian cause. These elements combined to tilt the

balance against classical law of war. I believe that Protocol I has done a disservice to international law by weakening the all-important distinction between combatants and non-combatants and by indirectly introducing ideas of just and unjust wars into *jus in bellum.*

Concerning protection of airmen in distress, Protocol I has, however, clearly enunciated and elucidated an important principle of customary international law. The reason for the surprising clear headedness of the Conference on this subject may well be the conservative nature of military legal advisers. While fighting wars of "National Liberation" may seem to military men an esoteric manifestation of UN political jargon, protection of aircrews is real life. Attending the Conference one felt that, on the issue of aircrews, it was lawyers from JAG departments and military officers who set the tone. It is interesting in this context to note that Egypt, at the later stages of the Conference, departed ranks from the other Arab States and participated in the drafting of the provision. The close contact between the U.S. delegation and the Egyptian delegation at the Conference may well have been a herald of the future Egyptian association with the United States and the subsequent Egyptian-Israeli Peace Treaty.

Notes

1. For example, the *Basic Rules of International Humanitarian Law in Armed Conflict* in BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 7, International Committee of the Red Cross (1983), (Reprint 1987).

2. Article 3 common to the four 1949 Geneva Conventions.

3. The term "airmen" is used to include "airwomen." A term "airperson" is not in current usage.

4. See, for example, BRITISH MANUAL OF MILITARY LAW, Part III 44, art. 119 ["It is lawful to fire on airborne troops . . . It is, on the other hand, unlawful to fire at other persons descending by parachute from disabled aircraft."]; INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, (US) DEPARTMENT OF THE AIR FORCE, para. 4-2 (e), (1976) ["When an aircraft is disabled and the occupants escape by parachutes, they should not be attacked in their descent."]; The LAW OF LAND WARFARE 17, (US) DEPARTMENT OF THE ARMY FIELD MANUAL FM 27–10 (1956); ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 9 (REV.A)/FMFM 1–10 (1989); HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL 442, at 44; (Federal Ministry of Defence of the Federal Republic of Germany VR II 3 ed., 1992); OPERATIONS LAW FOR ROYAL AUSTRALIAN AIR FORCE COMMANDERS 8–26, DI (AF) AAP 1003 (1994); LAW OF WAR WORKSHOP 7–12, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE-ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY (1998); OPPENHEIM'S INTERNATIONAL LAW 521, VOL. II, 7TH ed., (H. Lauterpacht ed., 1952); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 318 (1959); HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, VOL. I, 222 (1986); INGRID DETTER DE LUPIS, THE LAW

OF WAR 244 (1987); FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 113, International Committee of the Red Cross Geneva (1987); FRIEDRICH AUGUST FREIHERR VON DER HEYDTE, AIR WARFARE, ENCYCLOPEDIA OF INTERNATIONAL LAW, Vol. I, 82 Rudolf Bernhardt ed., (1992); L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 143 (1993); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 295 Dieter Fleck ed., (1995).

5. Rules of Air Warfare drafted by a Commission of Jurists at the Hague, December 1922–February 1923. Text taken from 32 AJIL (Part I) (Official Documents) 21 (1938). The text was never officially adopted as a treaty.

6. *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, General Report*, 32 AJIL (Part I) 1, 21 (1938).

7. See report of debate in LA GUERRE AERIENNE, REVISION DES LOIS DE LA GUERRE, LA HAYE 1922–1923, PARIS, LA DOCUMENTATIONS INTERNATIONALE 193 (1930); William L. Rodgers, *The Laws of War Concerning Aviation and Radio*, 17 AJIL (Part II) 629 (1923).

8. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, IV, Rules Relative to Behaviour of Combatants, Submitted by the International Committee of the Red Cross, 8 (1971).

9. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 230, Michael Bothe, Karl Josef Partsch, Waldemar A. Solf eds., (1982).

10. Hamilton DeSaussure, *Recent Developments in the Laws of Air Warfare*, ANNALS OF AIR AND SPACE LAW, Vol. I–1976, at 33, 43. (Emphasis added).

11. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–1977).

12. 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949.

13. J.M.SPAIGHT, C.B., C.B.E., AIR POWER AND WAR RIGHTS 110 (3d ed., 1947).

14. *Id.* at 163. The 1976 US Air Force Manual states the same justification. See note 4 *supra*, footnote 14.

15. Alternatively, the more politically correct term "International Humanitarian Law Applicable in Armed Conflict."

16. Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict, Report Submitted by the International Committee of the Red Cross to the XXIst International Conference of the Red Cross, 77 (1969).

17. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, IV, Rules Relative to Behaviour of Combatants, Submitted by the International Committee of the Red Cross, 9 (1971).

18. CE/Com.III/C.3 appears in Annexes to Part Four of the Report of Commission III, at 105, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report on the Work of the Conference (1971).

19. Col. Z. Hadar, Main Statements of the Delegation of Israel, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, Israel Ministry of Justice, 25 (1971).

20. Article 36, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable

in Armed Conflicts, Vol. I, Basic Texts, Documentary Material submitted by the International Committee of the Red Cross (1972).

21. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972, (second session) II Commentary, part 1, Documentary Material submitted by the International Committee of the Red Cross, 70, (1972).

22. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, second session, 3 May–3 June 1972, Report on the Work of the Conference, Vol. I, Report of Commission III, at 132, (1972).

23. Official Records of the Diplomatic Conference on the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH/III/SR.47, para. 52).

24. *Id.*, para. 69.

25. *Id.*, para. 68.

26. CDDH/III/SR.48, para. 15.

27. CDDH/III/SR.30, para. 1.

28. CDDH/SR.39, para. 89.

29. The present author, CDDH/III/SR.30, para. 4.

30. CDDH/III/SR.47, para. 51.

31. CDDH/III/SR.48, para. 1.

32. Jean De Preux, *Article 42–Occupants of aircraft*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 494 (Yvez Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987).

33. Spaight, *supra* note 13, at 155.

34. Report of the ICRC to the 1969 Conference, *supra* note16.

35. Rules submitted by the ICRC to the 1971 Conference, *supra* note 17, at 8.

36. Israel proposal, *supra* note 18.

37. Article 36, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972, (second session) II, Basic Texts, Documentary material submitted by the International Committee of the Red Cross, 14 (1972).

38. The question of hostile intent is dealt with later in this paper.

39. Israel proposal, *supra* note 18.

40. ICRC Text, *supra* note 17.

41. ICRC Commentary, *supra* note 22.

42. Report of the 1972 Conference, *supra* note 22.

43. Article 39, International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, at 13 (1973).

44. Commentary on Article 39, International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary (1973).

45. CDDH/III/69.

46. CDDH/III/338, Report to Committee III on the work of the Working Group, Submitted by the Rapporteur.

47. 28 votes to 21, with 21 abstentions. CDDH/III/SR.47, para. 25.

48. CDDH/III/SR.47, para. 49.

49. *Id.*, para. 51.

50. *Id.*, para. 69.

51. *Id.*, para. 71.
52. *Id.*, para. 79.
53. CDDH/III/391 Report to Committee III on the work of the Working Group, Submitted by the Rapporteur.
54. 52 votes to 12 with 14 abstentions. CDDH/III/SR.59, para 8.
55. CDDH/414. Egypt was not among the co-sponsoring States.
56. CDDH/SR.39, para. 72.
57. *Id.*, para. 96.
58. *Id.*, para. 103
59. *Id.*, annexed written explanations of vote, at 117.
60. *Id.*, paras. 88–90.
61. The representative of Canada, Mr. Green "endorsed on all points" the statement of the ICRC representative. CDDH/SR.39, para.102.
62. Forty-seven votes to 23, with 26 abstentions. CDDH/SR.39, para. 110.
63. ICRC Report to 1969 Conference, *supra* note 16.
64. Article 36, ICRC Basic Texts submitted to the 1972 Conference, *supra* note 20.
65. CE/COM III/C 31, Proposal submitted by the experts of the Philippines, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972 (second session) II, Report of the Work of the Conference, Vol. II (Annexes) (1972).
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XVIII

The Law of Armed Conflict as Soft Power

Optimizing Strategic Choice

Michael N. Schmitt

AMONG THE MAJOR WESTERN MILITARY POWERS, the United States is distinguished by non-participation in various core legal regimes governing armed conflict. Perhaps most significant is its continued refusal to ratify the 1977 Additional Protocol I to the four Geneva Conventions of 1949, an instrument that most States consider the linchpin of this body of law.[1] Today, the United States is one of only three NATO countries which is not Party to the Protocol, and of the remaining two, France and Turkey, the former is expected to ratify the agreement in the near future. The United States also rejected the 1997 Ottawa Treaty, which prohibits the use, stockpiling, production, or transfer of anti-personnel mines.[2] By March 1999, over 135 States had signed or acceded to the treaty, including every NATO ally except Turkey. More recently still, in 1998, the United States refused to sign the Statute of the International Criminal Court (ICC),[3] a constitutive instrument for the first permanent international tribunal to handle genocide, crimes against humanity, war crimes, and crimes of aggression. Of the countries represented at the Rome Conference, where the final drafting of the Statute occurred, only seven voted against the treaty. Joining the United States in opposition were China, Iraq, Israel, Libya, Qatar, and Yemen, hardly an admirable grouping of bedfellows.[4] Such examples are illustrative, not exhaustive. Over the past half decade, the United

States has opposed or only incrementally moved towards ratification of any number of additional treaties governing the conduct of warfare.[5]

Despite the oft visceral condemnation of the U.S. position on these and other issues involving the international law of armed conflict—criticism which great powers with great power interests inevitably attract—in the vast majority of cases the United States has articulated sound objections to the legal regime concerned. For instance, it objects, *inter alia*, to provisions in Protocol I that might act to legitimize malevolent national liberation movements[6] and believes that the Ottawa Treaty as drafted would frustrate defense of the Korean Peninsula.[7] As to the ICC Statute, the United States fears an expansive jurisdiction that could theoretically extend to members of the U.S. armed forces over the objections of the United States government.[8] One may question the degree of risk posed by each of these possibilities, or even their relative likelihood, but the fact of risk is difficult to dispute.

The dilemma is that sound objections do not necessarily render rejectionist policy decisions wise. A State choosing not to participate in any partially objectionable treaty regime would quickly find itself isolated in the global community, for few legal instruments are innocuous in their entirety, and those that are tend to lack substance. Instead, a "flaw" in a treaty may or may not merit refusal to opt into a particular regime.

In arriving at sound decisions regarding what course to pursue, the key lies in the *process* of decision making. Of course, in some situations a matter is so clear-cut that process is peripheral. For instance, a treaty proposing to outlaw aerial warfare would hardly merit serious attention; there is little risk that faulty decision making processes would lead to a bad decision on whether to ratify such an instrument. As this extreme example exemplifies, the simpler the issue, the more the decision-maker can rely on "informed intuition," the art of drawing conclusions in the absence of absolutely dispositive data. Experience and training allow him to intuitively perform those analytical steps necessary to come to the right conclusion. However, as issues become more complex, it is increasingly valuable to consciously and deliberately work through the decision making process, one that may not be intuitively grasped. Lest such process-orientation be deemed form over substance, it is important to grasp that the motivation for such endeavors is substance through form.

In the field of national security there is no shortage of approaches to decision making.[9] This essay proffers one methodology for making national security decisions in the legal arena. It is an approach that is likely pursued, either intuitively or consciously, in many of the world's capitals. Indeed, it risks restating the obvious. Nevertheless, much as there is value in process itself, there is

corresponding value in regularly contemplating process so as to perfect and internalize it. Hopefully, the approach suggested here will help refocus attention on the art and science of process, thereby allowing decision-makers to exercise choice regarding the law of armed conflict in a way that optimizes congruency with national interests. This will foster enhanced control over, and an ability to shape, the international environment.

Before commencing, one caveat is in order. While discussion will include comment on changes in the international environment that affect the dynamics of the law of armed conflict, this essay is not meant to criticize or support any particular policy decision that has been, or is likely to be, made. Rather, the intent is to explore in a general way the *how*, not the *what*, of decision making in the field. Additionally, although the essay is somewhat U.S.-centric in terms of illustration and analysis, no criticism of specific decision making is intended—the process described should be applicable to normative decision making by any State.

The Nature of the Law of Armed Conflict

To understand process, it is first necessary to comprehend the medium in which it will operate, in this case, the law of armed conflict. For many, law and war are opposing constructs. War is the breakdown of law. Indeed, Carl von Clausewitz dispenses with international law quickly in the opening paragraphs of his classic, *On War:*

> War therefore is . . . an act of violence intended to compel our opponent to fulfill our will. . . . Self imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power. . . .[10]

Clausewitz's skepticism, writing as he was in the nineteenth century, is perhaps understandable, for, by his time, advances in weaponry and the advent of conflict involving whole societies, which really began with Napoleon's use of citizen soldiers in the French Army of the 1790s, had caused war to become a particularly brutal activity. It remained largely unregulated by any comprehensive or systematic normative framework throughout the century. Only with Henri Dunant's publication of *A Memory of Solferino* in 1862 did the notion of limiting the scale and scope of violence during armed conflict begin to gain momentum.[11]

Today, by contrast, the role of the law of armed conflict clearly controverts Clausewitz's characterization as "imperceptible" and "hardly worth mentioning." Aside from a very extensive collection of treaties, the law has proven quite effective (although not infallible) in a number of twentieth century conflicts.[12] It limits targeting decisions, restricts the use of various weapons, mandates treatment of prisoners of war and other detainees, protects non-combatants, and sets forth the nature of occupation. The law of armed conflict also articulates standards for the resort to force as an instrument of national policy, safeguards the rights of neutrals, and increasingly extends into conflicts that are purely internal. Related bodies of law address such issues as arms and weapons technology transfers, disarmament, emplacement of weapons, and mechanisms for enforcement. The extensive debate over both the NATO decision to bomb Serbia and the legality of striking the targets selected during Operation Allied Force illustrates the degree to which legal issues have come to pervade assessments of war and warfare. By the end of the twentieth century, little doubt remains that law has the ability to shape conflict—that it is a very potent form of soft power available to States and other international actors.

Given its capacity to influence the actions of States, the law of armed conflict is essentially national policy expressed. After all, States are generally bound only by those prescriptive norms to which they consent. Consent can be signaled either by becoming a Party to a treaty or by participating in a practice that eventually matures into customary law. Customary norms, like the prohibition on directly targeting civilians or civilian objects, are those evidenced by both consistent and widespread State practice and *opinio juris*, a conviction that the practice is legally obligatory.[13] Although there is some debate over its effect on either States that do not participate in the practice or newly emergent ones,[14] for all other States the requisite practice represents a form of policy choice.

Characterization of law as policy choice is not meant to deny its moral component; much law is clearly underpinned by rectitude. Yet to the extent a State embraces the law of armed conflict out of adherence to moral principles, it has implicitly made a policy choice based on what it deems to be in its national interests. Many States view a moralistic quality to their national policy as beneficial, either tangibly or intangibly, directly or indirectly. That does not detract from the fact that the exercise of choice as to whether to participate in a legal regime is nothing less than a policy decision driven by a State's desire to shape armed conflict consistent with its particular national interests. Such States

simply define their national interests in a way that incorporates a moral dimension.

The concept of shaping is a seminal one. Warfare and the law of armed conflict enjoy a close symbiotic relationship. Since evolution in the conduct of warfare affects the individuals and objects which law seeks to shelter, it is not surprising that progress in the law of armed conflict has tended to track major conflicts and major technological advances with great regularity.[15] When it does, it shapes future conflict. This dynamic is becoming increasingly consequential. As an example, the direct targeting of civilian population centers, a tragically regular occurrence during the Second World War, was unusual in late twentieth century aerial attacks. When it does occur, as in Iraqi SCUD missile attacks against Israeli cities during the 1990–1991 Gulf War, the global reaction is one of outrage. The outrage is not only the product of moral condemnation, but also results from a sense that the rules of the game—the laws of armed conflict—have been breached.

Law can even shape war for those not party to a particular normative standard. For instance, Additional Protocol I, which the United States has not ratified, prohibits most attacks on dams, dikes, and nuclear electrical generating stations.[16] Despite U.S. opposition to this particular provision, there have been no U.S. attacks on any of these target sets since the Vietnam War; should it conduct such an attack it would be condemned, for many will miss the fine distinction between a customary norm of international law, which binds all States, and a treaty norm, which obligates only parties to comply.[17] Apprehension over condemnation certainly influences the policy choice of whether to engage in such strikes. This *de facto* effect of law on non-Party State actions can only expand as military operations become increasingly multilateral in composition, thereby frequently allying States with disparate legal obligations. In most such cases, the greatest common normative denominator will apply. For instance, it would be hard to imagine, e.g., U.S. forces in a coalition intentionally conducting an operation that would violate Protocol I, but no other legal regime, if any significant coalition partners were parties to the treaty. The realties of coalition-building and maintenance would simply not allow it.

So law and policy are closely related, in many cases overlapping, concepts. Law is a form of soft power that can profoundly shape conflict in ways that may or may not advance a particular State's interests. That being so, it is only logical that States approach policy decisions concerning legal regimes in ways that track processes of strategic choice regarding security affairs, the global economy, the environment, and so forth. Of course, the process of choice must be

customized to the unique nature of law, but normative decisions are nonetheless classic examples of strategic choice.

The Process of Strategic Choice

The term "strategic choice" in the legal context implies decision making at either the highest levels of government (as in the decision of whether to opt into a treaty regime), or at a subordinate level when the decision results in national level fallout (as in determining whether to strike targets that may raise questions of legality during a sensitive, and visible, conflict like Operation Allied Force). Because law shapes, it is a strategic tool of national policy which, as with any other tool, must be vectored. Strategic choice is the process by which that vectoring occurs. It may take the form of opposing, supporting, or suggesting changes to a draft treaty, deciding to employ force or use the military in other coercive ways (or refraining therefrom), or conducting operations in a way that raises law of armed conflict issues. Ultimately, the objective is to determine how best to shape the international environment, including armed conflict, to one's own advantage.

Step 1: Identify the Interests. Determining one's advantage begins by identifying "national interests," a term of art used to refer to a State's highest tier goals and concerns.[18] In the vast majority of cases, they may be grouped into one of three categories—security, well-being or value. Security interests are those involving physical security, territorial integrity, sovereignty, and the maintenance of a society's core values, such as those expressed in the Constitution. These interests are certainly implicated in the law of armed conflict context, for to the extent law can shape war, it affects a State's ability to defend itself and its allies. The use of anti-personnel mines on the Korean peninsula serves as apt illustration. North Korean numerical superiority poses a quandary for those planning defense of South Korea. Mines, particularly in light of the Korean geography and topography, can be used to channelize invading forces such that the defenders can concentrate firepower upon them. To agree to remove anti-personnel mines from the U.S.-South Korean inventory altogether, as mandated by the Ottawa Treaty, would bé to deny this option to those responsible for the defense of the country.

National interests based in well-being enhance quality of life. They often are economic in nature (jobs, income, availability of goods, and so forth), but may also extend to health care, educational opportunity, environmental quality, leisure activities, convenience, and the like. Again, certain aspects of the law of

armed conflict respond to such interests. For instance, the laws of neutrality balance the "interests" of belligerents in effectively prosecuting a conflict with those that neutrals have in continuing to engage in commerce.

Value interests are much more pervasive in the laws of armed conflict. They comprise those externally focused interests that lie beyond our borders—democracy, justice, human rights, human dignity, and so forth.[19] Obviously, the bulk of the law of armed conflict addressing how armed conflict may be conducted, the *jus in bello,* falls within this category; in fact, increasing use of the term "humanitarian law" in lieu of either the "law of armed conflict" or the "law of war" is indicative of a growing commitment to the value aspects of this *corpus* of law. So too is the recent involvement of U.S. and other forces in humanitarian operations involving the use of force (e.g., Northern Iraq, Somalia, Kosovo), operations which must be justified by that component of international law governing the resort by States to force, the *jus ad bellum.* To the extent international law permits intervention for humanitarian purposes, value interests are at play.

In fact, the two foundational objectives of the *jus in bello*—separating out those who are involved in the fight from those who are not and limiting the scope and nature of the violence that occurs during combat—are both grounded in value interests. They acknowledge armed conflict as a fact of international (and increasingly internal) activity, but seek to limit its impact on the human condition. Thus, for example, civilians may not be directly targeted,[20] medical facilities[21] and cultural objects receive special protection,[22] and weapons that would needlessly exacerbate human suffering are forbidden.[23] Such strictures represent a recognition that the destruction and hardship war creates are, as a general matter, contrary to human values. To the extent States embrace these values, they represent a national interest that may be fostered through strategic policy choices resulting in international law.

Step 2: Value the Interests. In assessing whether a particular strategic choice regarding matters of law advances national interests, it is important to understand that all national interests do not enjoy equal valence. Thus, they must be valued. This is so because, as noted earlier, realization of most interests comes at the expense of certain other ones. Avoiding civilian damage or injury (a value interest), as an example, may require a mission to be executed in a less than optimal way (a security interest). Additionally, the process is not a level one, for a very rough hierarchy of interests exists. As a general matter, security, well-being and value interests are ranked from high to low respectively. This *a priori* ordering reflects the fact that a State will ordinarily seek to survive before

it attempts international self-actualization and will usually attribute preeminence to its own interests over those of others. Obviously, in any individual case, the intensity of interests may vary from this scheme, the avoidance of civilian casualties just cited being one illustration. Nevertheless, and regardless of whether one personally agrees with the "ranking," the reality is that States do tend to broadly order interests along these lines.

The U.S. case serves as an example of the process. In *A National Security Strategy for a New Century*, the White House has articulated U.S. national security interests. Three are core: enhancing security (obviously, a security interest), bolstering America's economic prosperity (a well-being interest), and promoting democracy abroad (a value interest).[24] Of course, each is interrelated. Enhancing security safeguards economic wherewithal; economic prosperity makes security expenditures possible; democracy abroad diminishes potential security threats and fosters trade, and so forth. Other States may harbor differing interests, or at least harbor them to a differing degree. For instance, Luxembourg is probably less concerned about security interests than a superpower such as the United States, whereas States such as North Korea, Iraq, or Libya may well see the expansion of the democratic community as a negative trend.

The United States values its interests by grouping them into three categories: "vital," "important," and "humanitarian and other." Vital interests include "physical security of our territory and that of our allies, the safety of our citizens, our economic well-being and the protection of our critical infrastructures."[25] Important national interests do not affect national survival, but do affect U.S. national well-being and the character of the world. An example of efforts to support important interests includes NATO operations in Bosnia-Hercegovina. Finally, humanitarian and other interests are those which the U.S. must safeguard because its "values demand it."[26] Responding to disasters or violations of human rights, supporting democratization and civil control of the military, and fostering sustainable development are all examples. Irrespective of the national interests themselves, the point is that strategic choice, including normative strategic choice, should be exercised so as to advance the overriding national interests, and that cannot be accomplished until the interests have been valued.

Step 3: Develop Objectives Advancing the Interests. The process of identifying advantage continues with the development of objectives for the national interests. Conceptually, national interests imbue strategic choice with direction, but they are too broad to be of practical utility themselves.

Objectives, by contrast, are states of being that realize a national interest; they are much narrower than interests. For example, whereas the defense of vital U.S. allies is a U.S. national interest, the defense of South Korea from North Korean attack is an objective. Care must also be taken not to confuse objectives with strategies; an objective is "what" needs to be accomplished, strategy the "how." Strategies are the methods by which objectives that advance national interests are achieved.

Thinking in terms of opportunities and threats facilitates identifying objectives.[27] The process relies on the fact that all States seek both to exploit opportunities that advance national interests and counter threats to them. Thus, objectives are always responsive to threats and opportunities (and aspirations). The U.S. case exemplifies this approach. It has explicitly identified a number of threats to its national interest in security at home and abroad—regional or State centered threats (e.g., Iran, Iraq, North Korea), transnational threats (terrorism, international crime, drug trafficking, illicit arms trafficking, uncontrolled refugee migration, and environmental damage), the spread of dangerous technologies (especially weapons of mass destruction), foreign intelligence collection, and failed States.[28] This being so, its strategic objectives necessarily include countering these threats. Similarly, U.S. superpower status, including financial and military predominance, allows for greater influence (opportunities) in international security matters than any other State. The U.S. has leveraged this power, e.g., to assist in the emergence of democratic institutions throughout Eastern and Central Europe and, albeit somewhat controversially, (and working through NATO) to arrest Serbian suppression of the Kosovars. Other representative opportunities include such varied advantages as technological dependence on the United States by other countries and the excellence of U.S. higher education. It should come as little surprise that U.S. strategic objectives include exploiting these opportunities.

For the law of armed conflict to have any meaning, it must either act to forestall threat-based objectives or exploit opportunity-based ones. Most often, the objective of law is to respond to a threat to a national interest. Examples include ensuring the broad security of the State (the *jus ad bellum*), protecting civilians, maintaining the civilian infrastructure, and continuing civil society during occupation. However, the law of armed conflict also contains elements of opportunity-based objectives. The principle of proportionality, for instance, allows a commander to prosecute an operation despite collateral damage and incidental injury so long as the quantum and quality of military advantage that ensues is sufficient to outweigh the civilian consequences.[29] Similarly, when justified by security concerns, civilians may be interned during an

occupation.[30] In both cases, the law acts to permit military forces to operate without undue constraints.

Thus, strategic choice, even for matters involving the law of armed conflict, requires clarity of goals. It is only after this has been achieved that support for or opposition to a particular normative regime can possibly make sense, for it is insensible to ignore threats to interests or oppose those proposals which advance one's ultimate interests.

Step 4: Value the Objectives. Once objectives that support the respective national interests are identified, they must be valued. In most genres of strategic choice, this process takes the form of ordering, that is, developing a hierarchy of need as to a State's various objectives. At the risk of gross oversimplification, such ordering is often mandated because the resources available to pursue objectives are finite; the issue, then, is the allocation of scarce resources.[31] A State may be forced, for instance, to choose between buying fighter (*re* firepower) or transport (*re* mobility) aircraft. Mobility and firepower are not inherently contradictory (arguably they are complementary), but given limited resources, strategic choice must occur to determine which option best effectuates the State's individualized national interests. Ordering facilitates identifying the "best buy."

In the law of armed conflict context, however, ordering is necessitated by the fact that the objectives often operate at cross-purposes. Resource allocation may surface as an issue (if weapon A is illegal, what must the State obtain to compensate for the loss of capability?), but it generally is not heavily implicated in the process of choice. This is because normative regimes do not directly consume resources; their cost is political and human, not fiscal. Instead, objectives relevant to law, as noted earlier, may well clash. For instance, nuclear weapons pose enormous risk to the global community, but their use in certain circumstances might actually deter acts of greater harm by malevolent international actors. Indeed, the principle of reprisal (which is the subject of much controversy) implicitly recognizes this conflict by allowing the resort to proportional illegal acts to convince an opponent to desist from its own illegal course of action. Because the dynamic is one of contradiction vice competition, assessment of objectives is best thought of in terms of net valuation instead of vertical ordering. The process will often compel strategic choice involving balancing designed to identify net gain, rather than simply plotting "value" along a continuum.

In any event, many variables affect the value attributed to an objective. Further, the importance ascribed to each will be determined in part by one's

experience, education, ideological bent, and cognitive approach—in other words by "informed intuition." Despite the complexity (and imprecision) of valuation, several variables pervade the process.

Intensity: Among the most influential is the intensity with which the actor holds the national interest in question. For instance, the United States views the security of U.S. territory and that of its allies as a vital interest, whereas humanitarian concerns such as human rights are tertiary. This is consistent with the general propensity for security to outweigh value interests. Intensity measurements render it theoretically reasonable to reject a proposed legal norm that poses a moderate threat to security interests even though it might greatly advance a value interest such as human rights.

The dispute over the nature of the legal regime that should be applied to information operations during armed conflict exemplifies the phenomenon. Some argue that targeting instruments of communication which spread propaganda should be forbidden, emphasizing the contention that ideas must be defeated by the force of competing ideas, not the force of arms. Others counter that such felicity to the idea of free speech (value interest) is naïve, for propaganda can endanger the security of their forces and hinder mission accomplishment. They would, resultantly, oppose any limits on striking communications targets, even though in the vast majority of scenarios the military benefits (security interest) of doing so are moderate at best.[32] The point is that while the interest being advanced is seldom dispositive, it certainly matters.

Likelihood: Objectives should also be valued in terms of likelihood. This variable recognizes that the intensity of an interest must be qualified by the likelihood that the opportunity in question will present itself or the threat will become a reality. The Korean case is an excellent example. It is not enough to say that the intensity of the security interest in defending South Korea outweighs the U.S. value-based interest in alleviating civilian suffering—in this case that caused by anti-personnel mines. Rather, it is necessary to weigh the very certain human suffering that anti-personnel mines will cause against the likelihood of a North Korean invasion. Similarly, consider U.S. concerns over the International Criminal Court Statute. There, the competing interests are human rights and well-being versus security (for U.S. forces). The objective which advances the former is punishment/deterrence of war criminals (in the sense understood by laymen), while that which fosters the latter is avoidance of placing U.S. forces at risk of politicized prosecution. Clearly, the prospect of U.S. personnel facing prosecution by a politicized court merits attribution of significant intensity value. That said, the multiple safeguards built into the ICC

system, in great part in response to U.S. concerns, should serve to render the *likelihood* of such an occurrence very low.[33]

Immediacy: A third recurring variable is immediacy, the extent to which opportunity or threat objectives are near or long term.[34] Near-term threat and opportunity objectives should be accorded somewhat greater weight than long-term ones. Of course, it could be argued that an immediacy criterion obfuscates the process by sacrificing long-term objectives for immediate gratification. However, it must be remembered that immediacy is but one of any number of variables used to calculate value. More to the point, immediacy is relevant because the further one projects into the future, the more speculative that projection and the less certain any attempt to fashion the future as one desires. The risk lies in forgoing an immediate opportunity only to find that future opportunity is foreclosed for reasons that could not possibly have been foreseen. Along the same lines, deferring reaction to an immediate threat and thereby suffering the consequences thereof in order to avoid a future threat, may in retrospect prove ill-advised.

Again, consider anti-personnel mines. The U.S. desire to continue using them in South Korea is a sensible military decision. However, this opportunity objective must be viewed in light of the threat objective of precluding their use against U.S. forces. In the last decade, U.S. forces and their allies have increasingly been involved in peace operations, either Chapter VI or Chapter VII in nature,[35] where mines pose a particularly nasty threat. As this essay is being written, they are currently hindering operations in Kosovo and the only casualties KFOR forces have suffered have resulted from mines. Complicating matters is the fact that the likelihood of U.S. forces using mines themselves during a peace operation is *de minimus* because most such operations are combined[36] in nature, and most forces operating with the U.S. will be prohibited from using them. Their use by U.S. forces would create such a row in coalition partner countries that for reasons of political expediency they are generally inutile. The bottom line is that in the types of conflicts the U.S. is currently engaged in (and the type it is likely to be engaged in any time in the near future), anti-personnel mines are causing immediate dreadful civilian suffering and are an immediate threat to U.S. forces. By contrast, their use in conventional large scale conflict, such as that envisaged for the Korean peninsula, is, regardless of likelihood (a different question altogether), temporally more remote.

Degree of Advancement/Harm: A fourth variable is the extent to which exploitation of opportunity objectives may advance, or ignoring threat objectives may harm, the interest in question. This differs from intensity, which simply asks how strongly held the interest is; here the query is the extent to which

the objective advances the interest. It also differs from strategy, which is designed to advance *objectives*. Recall that one U.S. national interest is security at home, and that drug trafficking, illicit arms trafficking, environmental damage, certain rogue States, failed States, and so forth are defined as threats thereto. Countering each is a differing objective fostering the same interest. As between these objectives, intensity is a constant. Yet, the degree to which successfully achieving them advances the interest in security varies widely. Winning the war on drugs is a very much different thing in terms of advancing national security than winning the war against environmental degradation.

A similar phenomenon applies in the legal setting. For instance, operations conducted in response to the failure of a State will not have the same valence in terms of advancing national security interests as those executed in a State-on-State context. This bears directly on the normative environment that a State might seek because the shaping effect of law depends on the milieu in which it operates. Resolution of issues such as detention of civilians, combatant status, "occupation" activities, use of force, and neutrality may well depend on whether the operations are conducted as part of an internal disturbance, internal armed conflict, international armed conflict, or some variant of peace operation.

Finally, it must be grasped that valuation is not a mathematical calculation. On the contrary, it is merely a process for helping decision-makers think through what it is they should accomplish.

Step 5: Choose a Normative Strategy. To this point, no strategy decision has been made, i.e., no actions have been proposed or refrained from. As noted, strategies are game plans for *how* to accomplish the objective (the *what*) that was identified and evaluated during the previous step. The process of strategic choice writ large now turns to the identification and development of strategies designed to effectuate the objectives just valued. This process, which has been described in greater depth elsewhere,[37] involves determining which of one's objectives are "obligatory" (e.g., nuclear deterrence), and then appraising others to determine how best to fashion an overall strategic plan that maximizes opportunity and minimizes risk given finite resources.

Legal strategies must be assessed somewhat uniquely, if only because they are less directly resource dependent than are most other national security strategies. Of course, all strategic choice poses costs and benefits and requires trade-offs. However, as alluded to earlier, non-legal choice is more often an either-or proposition than is the case with legal choice. Strategies for the former frequently come only at the expense of one another. Law, however, often

imposes a pluralistic predicament—for the proposed regime will often contain *both* positive and negative elements—and does so as to myriad objectives. The question is not so much the cost of the strategy as it is the harm its adoption will generate. This being so, strategic choice may be depicted as follows:

> (value of objective advanced) x (degree to which proposed legal strategy advances that objective) minus (value of objective harmed) x (degree to which proposed legal strategy harms that objective).

It must be emphasized that the "formula" is not intended to be objectively quantifiable, but is only a way to order thoughts when making strategic choice.

The Korean scenario and its implications for anti-personnel mines may be used, in a somewhat artificially simplistic and one-dimensional way, to demonstrate the process. A properly sequential decision making calculation would first determine how important the defense of South Korea (and other uses for mines such as perimeter defense) is by considering, *inter alia*, the factors outlined above. It would also consider the degree to which availability of anti-personnel mines contributes to that objective. Next, an assessment of the importance of the objectives anti-personnel mines harm, like the well-being of non-combatants and the safety of one's own forces from mines, and an estimate of the extent to which the failure to adopt a ban sets them back, would be required. The alternative strategies involved are opposing and supporting a ban respectively. Harm would then be subtracted from the benefit to suggest the desirability of the strategy. Thus, in this process, net value is calculated by considering normative strategy holistically. Of course, the process, albeit easily explained, is extremely complicated. Multiple objectives may be involved, intangible factors must be identified and valued, and dissimilar phenomenon must be balanced against each other. Nevertheless, the process does help order analysis.

The last step, then, is to evaluate strategies. As with each of the steps, a measure of "informed intuition" is necessary; ultimately, the determination is subjective. That said, it should be cognitively robust. Robustness demands, at a minimum, considering four variables—opportunity costs, reverberating effects, strategic multipliers/constraints, and hierarchical consequentiality.

Opportunity Costs: An opportunity cost is a measurement of those options which are foreclosed should a particular strategy be chosen. For instance, in an effort to scale down the nature and scope of violence on the battlefield (an objective), a protocol to the Conventional Weapons Convention (a normative strategy) prohibits use of air-delivered incendiaries against valid military

objectives within concentrations of civilians.[38] Such a strategy comes at significant cost, for incendiaries are particularly useful against certain targets, such as bunkered, biological, or chemical facilities.[39] Thus, adoption of the prohibition costs the military commander a useful tool to achieve other valid objectives in pursuit of national interests. Or consider nuclear weapons. There is little question but that such weapons are extraordinarily destructive, so much so that the International Court of Justice has opined that their use in situations other than self-defense where the survival of the State is at stake (and perhaps even then) violates the law of armed conflict.[40] Yet, as illustrated during the Gulf War, nuclear weapons may well be valuable in deterring the use of other weapons of mass destruction, particularly those unavailable to the nuclear power as a result of other normative strictures, such as the prohibitions on chemical and biological weapons.[41] Their unavailability to deter (or respond and compel an opponent to desist from further use) is an opportunity cost that must be considered in appraising whether the State in question should support a normative strategy opposing their possession or use.

Reverberating Effects: Related to opportunity costs is the reverberating effects variable. Whereas opportunity cost calculations are characterized by direct tradeoffs among the objectives pursued, reverberating effect is the indirect fallout from a particular strategy choice. Opportunity costs deny a warfighter the opportunity to pursue a course of action that would advance an objective; reverberating effects are the incidental costs associated with a particular strategy choice.

Return to the incendiary example. A reverberating effect of the prohibition thereon would be that warfighters might have to resort to weapons that would actually cause greater collateral damage or incidental injury than would be the case with incendiaries. Thus, while the opportunity cost is an inability or diminished capability to attack a target, the reverberating effect is unintended harm to civilians and civilian property. As this case illustrates, a reverberating effect may paradoxically bear on the very objective (protection of civilians and civilian objects) that the prescriptive norm seeks to advance in the first place. The prohibition on permanently blinding lasers found in the Conventional Weapons Convention presents a similar example.[42] As a result of the prohibition, commanders who would have otherwise employed blinding lasers to foil an attack on their perimeter will be forced to resort to traditional weapons such as mortars, mines (barring an Ottawa Treaty prohibition), and machine guns. This is an opportunity cost. The reverberating cost is the increased collateral damage and incidental injury that might result in certain circumstances from the use of kinetic means of defense.

Multipliers and Constraints: A third variable against which to measure proposed normative strategies is the effect of multipliers and constraints. Strategic multipliers are factors, often contextual in nature, that further a strategy's advancement of an objective. Conversely, strategic constraints limit fulfillment. To illustrate, multipliers in a security strategy context might include burden sharing, alliance operations, or even economic interdependency. The key is to ask what conditions in the existing or future environment might render success or failure of the strategy (whether it be supporting/opposing a proposed legal regime or implementing one) likelier. With regard to normative strategies, relevant multipliers or constraints could include such factors as public support or opposition; intragovernmental dynamics; the attitude of intergovernmental or nongovernmental organizations towards the strategy; the scope, degree and sources of support it receives from other governments; recent experiences that might auger for acceptance of the strategy; media attention; the relative success of analogous legal regimes; and so forth.

Take several recent opportunities for normative strategic choice. As an example, some have asserted that the tragic death of the late Princess Diana, a strident supporter of a ban on anti-personnel land mines, added much needed impetus to the campaign to outlaw them, and contributed significantly to adoption of the Ottawa Treaty. Thus, by this line of reasoning, her untimely death represented a multiplier for mine opponents. Similarly, it should not be surprising that the ICC Statute was adopted within a decade of the establishment of the Hague and Arusha Tribunals, the first such international bodies since the Nuremburg and Tokyo trials.[43] By the same token, and perhaps somewhat cynically, one may argue that the Hague Tribunal is the partial result of warfare (and the ensuing war crimes and crimes against humanity) touching the face of Europe for the first time since 1945.

The point is not to provide a catalogue of potential multipliers and constraints. Rather, it is simply to demonstrate that the strategic environment matters, and that, therefore, strategic choice is inevitably situational. For example, imagine the difficulty of executing U.S. strategy vis-à-vis the Kosovo crisis had NATO support not been secured. In light of strategic choice's situationality, what is a constraint today may be a multiplier tomorrow and vice versa; some may be neither except in certain circumstances. Despite the uncertainty, the net result of a multiplier/constraint analysis should be a better understanding of the proposed strategy's viability and the suggestion or exclusion of alternatives.

Hierarchical Consequentiality and its Subtlety: Finally, what is often missed in assessing strategies is an appreciation of their hierarchical nature and

the oft subtle nature of their consequences. The consequences of normative strategic choice lie at multiple levels of analysis. Such choices clearly affect the tactical (battle) and operational (theatre) levels, for it is there that the armed conflict is actually conducted. To the extent the overall course of the conflict shifts, an impact is also felt at the strategic (national) level. What is perhaps counterintuitive, however, is that strategies may not operate in parallel at the various levels of analysis; strategies may have disparate hierarchical impact, that is, they may generate benefits at one level and harm at another.

Usually, States are fairly adept at identifying immediate tactical and operational level consequences of normative proposals, for warfighters who would be deprived of weapons, targets, or tactics by the laws of armed conflict can rather reliably estimate how a particular stricture will affect them. States are also skilled at identifying strategic level impact on the war effort. After all, legal prescriptions allow or disallow a course of action that one wishes to take or that another is threatening. The very fact of the desire to act or apprehension of an opponent's action suggests that some rational calculation of advantage or harm has occurred.

Not surprisingly, the subtler consequences of normative strategy are often overlooked. Several examples may help illustrate. During the Falklands/Malvinas conflict, both the United Kingdom and Argentina made a strategic decision to carefully comply with the law of armed conflict. As a result, both war termination and the return to normalcy of relations between the two States were facilitated, thereby advancing national interests other than those directly implicated in the decision to employ force to settle their differences. A sense that Coalition forces would abide by the laws of armed conflict regarding the treatment of prisoners likewise contributed in no small measure to the unprecedented willingness of many thousands of Iraqi soldiers to surrender as early as possible during the Gulf War. Contrast those experiences with the Iraqi decision to generally disregard the law of armed conflict during the war and in the months immediately following the cease-fire. Repeated violations led to near universal distrust of the Iraqi regime, which in turn contributed to the longevity of the post-conflict monitoring, sanctions, and enforcement regimes. Regardless of any tactical or operational objectives Saddam Hussein may have hoped to advance by violating the law of armed conflict,[44] he badly miscalculated the strategic consequences of his malfeasance. Similar disregard for the laws of armed conflict (as well as human rights law) has severely complicated efforts to return the Balkans to stability.

In each of these cases, decisions as to whether or not to comply with the laws of armed conflict had implications beyond what might have been immediately

apparent. Analogous subtlety exists when considering prospective normative regimes. The ICC Statute brouhaha offers multiple examples. Unconsented to jurisdiction over U.S. personnel, an obvious consequence, is central to U.S. hostility. But there are other somewhat more abstruse consequences. For instance, by refusing to participate in the regime (as it now exists), and by aligning itself, however intentionally, with the global miscreants that populate the opposition camp, the United States sets itself apart from virtually all of its key partners. In doing so, it risks forfeiting some degree of normative stewardship that it would otherwise exercise as the sole superpower. Indeed, opting out of a regime as normatively axial as the Court could potentially tarnish the general perception of the United States as committed to the rule of law (might criticism of NATO—aka U.S.—bombing during Operation Allied Force portend future skepticism towards U.S. compliance with the law of armed conflict?). Opting out also forgoes an opportunity to aggressively lead the Court in directions that advance U.S. interests.

On the other hand, by the terms of the Statute the Court is empowered to exercise jurisdiction even over nationals of States that are not Party to it.[45] Of course, many of the crimes enumerated admit of universal jurisdiction, but arguably the Statute goes beyond the present scope of such jurisdiction. That being so, it bears on the nature of the international law-making process, particularly its consent-based predilection, and on the normative valence of widely ascribed-to agreements. Thus, opposition to the jurisdictional provisions may be justified by far broader concerns than the unlikely prospect that a U.S. soldier may one day be unjustly hauled before the Court; the subtler consequences are perhaps the more insidious.

As should be apparent, it is absolutely essential that decision-makers appraise strategies at every level of contact. What may seem appealing at one level might prove disastrous at another. Further, the subtlety of consequentiality is profound in the legal arena. Any urge to focus on the immediately apparent consequences must be resisted lest a far more determinative one be missed. The goal is not simply a strategy that fosters objectives (and thereby interests) or deters threats thereto, but rather one that represents a net advance of interests. To accurately calculate such advances requires robust analysis.

The U.S. Environment

Although this essay is about the process of choice, not any particular U.S. policy decision regarding the law of armed conflict, it may be useful to

comment briefly on the strategic environment in which the U.S. will practice normative choice, and to offer several thoughts on its ramifications. After all, context is key, as has been repeatedly asserted.[46]

The pivotal event influencing the exercise of normative strategic choice is the demise of Cold War bipolarity and the emergence of the United States as the sole economic and military superpower. During the Cold War, the normative context was characterized by competition between two peer competitors. Significantly, the competition was generally viewed as zero-sum. Both States were powerful militarily and boasted a stable of client States with which they maintained mutual defense pacts and which comprised a distinct economic bloc. Although the United States would become involved in a number of "lesser" conflicts, Vietnam being the most noteworthy, most were seen in terms of their relationship to superpower rivalry. Moreover, in the national security context, the conflict that mattered most was the one that never occurred, the cold war turned hot. Reduced to basics, and somewhat oversimplified, issues and events were viewed through the prism of U.S.-USSR competition. Since the Soviets, particularly its military, were "equals," great vigilance was necessary to ensure they did not slip ahead. For example, recall the anxiety that was generated when Sputnik was launched in October 1957 (particularly over its implications for the delivery of nuclear weapons against the U.S. homeland) and the intense U.S. effort to "catch back up."

By the 1960s, a relative strategic stalemate had emerged, thereby exacerbating fear of any Soviet advantage. Because neither side dared let the other achieve an edge, even small advances by an opponent loomed large. This attitude, justified or not, inevitably led to difficulties in fashioning improvements to the law of armed conflict and caused those that were proffered to be evaluated microscopically. Given the strategic stalemate, minor issues took on great significance.

In fact, the Cold War produced very little in the way of laws of armed conflict. In 1954, the Cultural Property Convention was completed under the auspices of the United Nations Educational, Scientific and Cultural Organization, but it is only very recently that the prospect of U.S. ratification appears likely.[47] The two Additional Protocols to the Geneva Conventions were adopted in 1977, but the U.S. opposes the most significant of them, that governing international armed conflict, and has not yet ratified the other. Although the United States objected strongly to certain of the Protocol's provisions at the time, in retrospect one might query whether two decades of opposition to Additional Protocol I have safeguarded U.S. interests in any discernable way. After all, when have U.S. forces engaged in activities since 1977 that they would

not otherwise have been allowed to had the U.S. been party to the instrument? Nevertheless, in the context of the Cold War, concerns about both political issues (e.g., implied recognition of national liberation movements) and warfighting limits (e.g., certain restrictions on striking dams, dikes, and nuclear electrical generating stations) took on added importance. Other examples include U.S. hostility to Protocol III of the Conventional Weapons Convention (incendiaries) and the U.S. refusal to ratify the 1925 Gas Protocol until 1975 out of fear that the agreement might reach the use of riot control agents and herbicides or limit the response to a chemical attack to non-chemical means.[48]

What the United States understood very clearly was that law does have a shaping effect on the conduct of hostilities; it is an element of strategic control. With a hostile, heavily armed peer competitor at hand, the U.S. sought to avoid having law shape the battlefield in any way disadvantageous to it or advantageous to its adversary.

However, the strategic paradigm has changed.[49] Law still shapes, and clearly can be used to the U.S. disadvantage, but the dynamic involved is very different. With no peer competitor on the immediate horizon, particularly in the military realm, the calculations of strategic choice shift. For instance, the wide U.S. technological advantage over potential adversaries, and the far greater redundancy of U.S. weapon systems, means that an inability to employ a single type of weapon will often be less consequential to the U.S. than other States, which may have neither alternatives available nor the technological wherewithal to timely develop one. Similarly, assume a proposed international agreement heightens the requirement for discrimination. The new "brilliant" weapons being fielded by U.S. forces would allow it to comply more easily with heightened standards than any other military. Even if the U.S. were to be precluded from striking a particular target that it would previously have been permitted to attack, its advantage in information systems will enable its forces to find and destroy alternative targets capable of yielding analogous benefits far more easily than its opponents.

Most importantly, the issue is no longer whether the unavailability of particular weapons or tactics will hurt the U.S. *sans plus*. Instead, the overwhelming military superiority of its forces gives the U.S. the luxury of risking potential "negative" security consequences in order to pursue alternative objectives and interests. With an antagonistic peer competitor just over the horizon, security loomed so large as an interest that it dwarfed all others. That is no longer the case. On the contrary, U.S. dominance logically bestows on the United States greater capacity to shape the international legal environment than it has ever enjoyed. If the United States is to take advantage of this unique period, it must

remember that objectives are both threat and opportunity-based. The balance between the two has arguably shifted for the United States. While threat-based objectives remain critical, they no longer need be all encompassing; it would only seem logical that the United States should aggressively exploit the occasion to "shape" the prescriptive landscape to its advantage.[50]

Doing so requires a migration in strategic perspective not dissimilar from that which has taken place in other arenas of national security strategy. During the Cold War, Containment served U.S. national security interests well; some maintain that it won the Cold War. However, Containment was ill-suited to the strategic post-Cold War environment. The new context required a strategy that exploited U.S. dominance, one that recognized the opportunities it presented—hence, the new U.S. national security strategy of "Engagement."[51]

A strategy of normative engagement could serve to leverage U.S. power in much the same way. Such an approach would require the U.S. to proactively lead the international community. A failure to exercise leadership allows potential opponents, who well recognize the shaping import of law, to use it to compensate for their own weaknesses. Indeed, from their perspective law can be viewed as an instrument of asymmetrical warfare, for it is equally accessible to everyone and, therefore, unlike technology (for instance) more widely exploitable. As an example, and regardless of how one views the substantive merits of the case, there is little question but that the United States would have suffered a serious strategic blow had the International Court of Justice declared the use of nuclear weapons contrary to international law in all circumstances. Of course, the opinion was only advisory, but the persuasive import of such a holding would have been measurable nevertheless and certainly a factor to be considered in any strategic calculations. It would seem apparent, then, that involvement in the process is the key, for international law is, by definition, a multilateral process. The decision, for example, of the United States to participate in the post-Conference Preparatory Committee charged with drafting rules of procedure, rules of evidence, and elements of the offenses for the ICC, despite the U.S. vote against the Statute, is an extraordinarily sage one. The alternative is to sit idly by while the rest of the global community crafts a legal regime that will unquestionably affect U.S. military operations and personnel. Given that there are more U.S. personnel deployed outside its borders than any other State, to have refused to participate would approach irresponsibility.

Of course, in light of its sole superpower status, it would be tempting for the United States to simply opt out of those proposed legal regimes that did not completely meet U.S. desires. Any such approach would be shortsighted, particularly in ignoring the intangible, but very real, benefits that come with global

participation and leadership. Anecdotal evidence suggests that the U.S. is increasingly viewed as the boy who took his marbles and went home in the game of international law. It does what it wants because it can, fashioning *ex post facto* legal justifications therefore. Regardless of the accuracy of any such criticism, the mere perception does violence to an overarching national security strategy based on engagement.

Thus, the current international context offers the United States unprecedented, and very welcome, opportunities for normative engagement. In great part, this is because the end of the Cold War moderated the normative threat environment. Of course, to properly exploit this opportunity requires the exercise of sagacious strategic choice. Unfortunately, although the new strategic paradigm expands the scope of choice for the United States, choice has become far more enigmatic. While the two-dimensionalism of the Cold War tempered law's pluralistic character, the current global environment complicates it.

Final Thoughts

This essay has suggested that the law of armed conflict is a powerful form of soft power capable of shaping the battlefield in consequential ways. As such, decisions regarding proposed legal regimes or activities with normative import are in fact serious strategic policy decisions. Unfortunately, informed intuition is all too often relied upon to make the complex decisions necessary for optimizing normative strategic choice. In response to this reality, the essay proffers a skeletal decision process to facilitate choice, one designed to identify and assess possible strategies in the context of the various objectives they advance or harm. Since objectives, and the national interests they foster, do not equally advance the welfare of a State (or may even operate at cross purposes), they must be valued before strategic choice is possible. This allows for informed choice regarding normative schemes that may advance or harm any number of objectives and interests simultaneously in ways that are dependent on the context in which they operate.

Lest this process be misinterpreted, it is perhaps best to conclude by reemphasizing what has not been asserted. First, the process suggested is neither all-encompassing nor mathematical in nature. It simply represents a way to think about normative regimes and activities with normative elements. The goal is orderly thought processes as an alternative to resorting to informed intuition alone in complex situations. There are certainly variables not mentioned that might affect the process, and it is a subjective process that in the end relies on the quality of human cognition.

Second, it deserves mention that normative decisional processes do not operate in strategic vacuums. Nor is international law a strategic panacea. A State has multiple tools at its disposal to achieve objectives and foster its interests; law is but one. Therefore, even if law is an appropriate and sensible way to advance an objective, it may not be the best one. The classic debate regarding how best to effect human rights is illustrative. How should States respond to abuses thereto? Normatively? Militarily? Economically? Through engagement or isolation? A combination thereof? This essay only addressed normative analysis; further examination, particularly of alternatives to normative strategies, remains to be accomplished before wise strategic choices can be made.

Third, the essay recommends no policy choices. While it does advocate normative engagement, engagement alone is a void which is meaningless without substantive goals.

Fourth, there has been no argument for decision making based only on a State's individual selfish interests. Instead, the process suggested merely recognizes that the reality of State-centrism dictates, at least for the foreseeable future, how States make strategic choices. Ultimately, it is their auto-interpretation of national interests that matters when they decide how the global normative architecture should best be constructed. Some States will end up making moral choices, others immoral ones. Hopefully, most will conclude that the former comports most closely with their national interests.

Finally, and most important, the essay begs the question of the precise normative strategies the United States should pursue to advance its national interests. Whatever the right answer may be, U.S. strategy must be infused with a recognition that U.S. national interests have always been, and must remain, heavily value laden. Indeed, superpower status involves both rights *and* duties. As the next millennium approaches, those duties clearly include benevolent custodianship of global human dignity and well-being.

Notes

1. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 (hereinafter Additional Protocol I). Although Additional Protocol I was not ratified by certain States, many of its provisions (but not the environmental provisions) are considered declaratory of customary international law. For a non-official, but generally considered authoritative, delineation of those considered declaratory, see Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987). See also INTERNATIONAL & OPERATIONAL LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF THE AIR FORCE, OPERATIONS LAW DEPLOYMENT

DESKBOOK, tab 12, and comments by the then State Department Legal Advisor Abraham D. Sofaer in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 784 (1988).

2. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, reprinted in INTERNATIONAL REVIEW OF THE RED CROSS, Sept.–Oct. 1997, at 563. On the convention generally, see Stuart Maslen and Peter Herby, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottawa Treaty,"* INTERNATIONAL REVIEW OF THE RED CROSS, Dec. 1998, at 693. A survey of the land-mine issue, with emphasis on operational concerns, is contained in Andrew C.S. Efaw, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MILITARY LAW REVIEW 87 (1999).

3. Rome Statute for the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998, at Annex II, reprinted in 37 INTERNATIONAL LEGAL MATERIALS 999 (1998) and M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL COURT: A DOCUMENTARY HISTORY 39 (1999), and available on-line at http://www.un.org/law/icc/texts/romefra.htm. For a discussion of the Statute, see Michael N. Schmitt and Peter J. Richards, *Into Uncharted Waters: The International Criminal Court*, NAVAL WAR COLLEGE REVIEW (Winter 2000), at 93 and the series of articles collected in Volume 93:1 of the AMERICAN JOURNAL OF INTERNATIONAL LAW (1999).

4. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHT, Aug. 1999, available on-line at http://www.asil.org/insight23.htm. Note that there are differing lists as to which countries voted against the Statute, since the vote was taken without polling. This article adopts that list published by the American Society of International Law. Other countries mentioned as possible no-votes (which would replace one of those above) include Algeria, India, and Sri Lanka.

5. E.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 14 INTERNATIONAL LEGAL MATERIALS 49 (1975); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216, reprinted in THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiri Toman eds., 1988), at 745; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex II (1977), 16 INTERNATIONAL LEGAL MATERIALS 1442 (1977); Additional Protocol [to the Conventional Weapons Convention] on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, reprinted in THE LAWS OF ARMED CONFLICTS, *supra*, at 190.

6. Broad U.S. objections are outlined in Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess. III (1987), reprinted in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 910 (1987).

7. For the U.S. perspective, see The White House, Office of the Press Secretary, Fact Sheet: U.S. Efforts to Address the Problem of Anti-Personnel Landmines, http://www.pub.whitehouse.gov/white-house-publications/1997/09/1997-09-17-landmine-fact-sheets.text.

8. For a description of the U.S. position by the Ambassador that represented the United States at Rome, see David J. Scheffer, *The United States and the International Criminal Court*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 12 (1999).

9. For a description of several, see Michael N. Schmitt, *Identifying National Objectives and Developing Strategy: A Process Oriented Approach*, STRATEGIC REVIEW, Winter 1997, at 24, 24–26.

10. CARL VON CLAUSEWITZ, ON WAR, ch. I, para. 2 (1832) (Anatol Rapoport ed., 1968). Or consider the view of General von Molke, the Prussian Chief of Staff, in an 1880 letter protesting the Declaration of St. Petersburg (one of the earliest formal law of war efforts): "The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable, with that view, to employ all means save those that are absolutely objectionable." The letter was to J.C. Bluntschli, an international legal scholar. MOLKE IN SEINEN BRIEFEN (Berlin, 1902), at 253, cited in MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (2d ed., 1992), at 47.

11. HENRI DUNANT, SOUVENIR DE SOLFERINO (1862). The International Committee of the Red Cross was established not long after Dunant's account of the bloody Battle of Solferino during the Italian War of Unification was published in the book.

12. For instance, the 1990–1991 Gulf War. The legal aspects of the war are described in DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992), at appendix O.

13. The Statute of the International Court of Justice defines custom as "a general practice accepted by law." Statute of the International Court of Justice, June 26, 1977, art. 38(1)(b), 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153, 1976 YEARBOOK OF THE UNITED NATIONS 1052. The Restatement notes that custom "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987). See also North Sea Continental Shelf Cases, 1969 ICJ 3, 44 ("Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it."); The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed 320 (1900); The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10(1927); Asylum Case (Col. v. Peru), 1950 I.C.J. 266; Case Concerning Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6.

14. The view that customary law applies only to States that have participated in the custom is illustrated in the classic case of S.S. Lotus (Fr. V. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 21. For a contrary view, see the RESTATEMENT, *supra* note 13, at § 201.

15. Therefore, progress may be either reactive or proactive. The Geneva Convention of 1906 and the Hague Conventions of 1907 followed closely on the heels of the 1905 Russo-Japanese War. World War I, in great part, served as the impetus for the 1925 Gas Protocol and the 1929 Geneva Convention. The enormous devastation of the Second World War led to the 1949 Geneva Conventions and 1954 Cultural Property Convention. In the aftermath of World War II, bipolarity and wars of national liberation dominated inter-State conflict, while new technologies and sensibilities led to heightened concerns over the methods and means of warfare. The Additional Protocols to the Geneva Conventions, Environmental Modification Convention, Biological Weapons Convention, Conventional Weapons Convention, and Landmines Convention resulted. So too did numerous arms control treaties designed to limit the testing, possession, and spread of nuclear weapons, the unprecedented power of which had been so dramatically illustrated at Nagasaki and Hiroshima. Proactive efforts seek to head off negative consequences before they occur. For instance, Protocol IV of the Conventional Weapons Convention prohibited the use of permanently blinding lasers before they were fielded by any armed force.

16. Additional Protocol I, *supra* note 1, art. 56.

17. It *might* also be asserted that the Protocol I prohibition has by now matured into customary international law, thereby binding the United States regardless of its non-Party status vis-à-vis the Protocol.

18. For discussions on the process of defining national interests, see Carrol J. Doherty, *Defining the National Interest: A Process of Trial and Error,* CONGRESSIONAL QUARTERLY WEEKLY REPORT, March 26, 1994, at 750; Kim R. Holmes, *Defining National Security and American Interests,* in A SAFE AND PROSPEROUS AMERICA (2d ed., 1994), at 5; DONALD E. NUECHTERLEIN, AMERICA RECOMMITTED: UNITED STATES NATIONAL INTERESTS IN A RESTRUCTURED WORLD (1991).

19. Some have argued against any substantive force for value interests. For example, Hans Morgenthau has noted that "The invocation of abstract moral principles was in part hardly more than an innocuous pastime; embracing everything, it came to grips with nothing. . . . The intoxication with moral abstractions . . . is indeed one of the great sources of weakness and failure in American foreign policy." HANS MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST (1952), at 4.

20. E.g., Additional Protocol I, *supra* note 1, art. 51.

21. E.g., *id.*, art. 12.

22. E.g., *id.*, art. 53.

23. E.g., *id.*, art. 35.2.

24. THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (Oct. 1998), at iii, available on-line at http://www.whitehouse.gov/WH/EOP/NSC/html/ documents /nssrpref.html [hereinafter NSS]. The NSS is complemented by the National Military Strategy. JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES (1997), available on-line at http://www.dtic.mil/jcs/core/nms.html. An additional key document in identifying U.S. national interests and the objectives/strategies that may foster them is the QDR Report. SECRETARY OF DEFENSE, REPORT OF THE QUADRENNIAL DEFENSE REVIEW (May 1997), especially Sections II–IV, available on-line at http://www.defenselink.mil/pubs/qdr/.

25. NSS, *supra* note 24, at 5.

26. *Id.*

27. A RAND study has also identified the importance of threat and opportunity, though it employs the concepts primarily as descriptors in discussing four alternative "strategies"—realism, multilateral security, democratic internationalism, and independence. See generally Norman D. Levin, ed., PRISMS AND POLICY: U.S. SECURITY AFTER THE COLD WAR (RAND, 1994).

28. NSS, *supra* note 24, at 7.

29. The principle is reflective of both conventional and customary international law. It forbids, "an attack 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." Additional Protocol I, *supra* note 1, art. 51.5(a). See also art. 57.2(a)(iii).

30. E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 78, 6 UST 3516, 75 U.N.T.S. 287 (Internment that is "necessary, for imperative reasons of security.")

31. But certainly not always. For example, consider President Nixon's "playing of the China card" or the expansion of NATO.

32. See, e.g., William M. Arkin, *Changing the Channel in Belgrade,* Special to washingtonpost.com, May 24, 1999, available on-line at http://www.washingtonpost.com/ wp-srv/national/dotmil/arkin052499.htm.

33. In particular, a potent Pre-trial Chamber has significant power to preclude the possibility of politically motivated prosecutions.

34. An interesting approach is a multi-dimensional hierarchy of foreign policy objectives in which time (immediacy) and priority are related. The resultant scheme is a division into core objectives (middle and high priority), middle-range goals and long-range goals (distant and low-priority). Objectives in each of the categories are placed along a continuum ranging from concrete to abstract values. T.J. HOLSTI, INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS (1988), at 118–130.

35. The terms "Chapter VI" and "Chapter VII" refer to chapters of the UN Charter. The former, often know as peacekeeping operations, is a response to any dispute which is "likely to endanger the maintenance of international peace and security." It generally does not involve the use of force except in self-defense and occurs with the consent of the States in which the peacekeepers are stationed. Chapter VII operations, also known as peace enforcement, may be non-consensual. They are responses by the UN Security Council, including the use of force (e.g., Desert Storm), that respond to "threats to the peace, breaches of the peace, and acts of aggression."

36. "Joint" operations include forces of more than one service. "Combined" operations include forces of more than one State.

37. See Schmitt, *Identifying National Objectives*, *supra* note 9, at 29–31.

38. Conventional Weapons Convention, Protocol III, *supra* note 5.

39. The United States has not ratified Protocol III, although it is considering doing so with a reservation that incendiaries can be used in areas with concentrations of civilians when doing so will result in fewer incidental injuries than would be the case with other types of weapons. The Army's Operational Law Handbook cites the example of a chemical munitions factory in a city. The use of conventional weapons might well disperse the chemical, whereas an incendiary weapon would destroy them through burning. THE JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK (2000), at 5–13.

40. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (Advisory Opinion), (General List 95), *dispositif*, 35 INTERNATIONAL LEGAL MATERIALS 809 & 1343. On the case, see VED P. NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT (1998); Peter H.F. Bekker, *Legality of the Threat or Use of Nuclear Weapons*, 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 126 (1997); Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 64 (1997); John H. McNeill and Ronald D. Neubauer, *The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases* (8 July 1996): *A First Appraisal*, INTERNATIONAL REVIEW OF THE RED CROSS, No. 316, Jan.–Feb. 1997, at 103; Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, NAVAL WAR COLLEGE REVIEW, Spring 1998, at 91.

41. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, 11 INTERNATIONAL LEGAL MATERIALS 310 ; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 INTERNATIONAL LEGAL MATERIALS 800.

42. Additional Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 12, 1995, U.N. Doc. CCW/CONF.I/7 (1995), 35 INTERNATIONAL LEGAL MATERIALS 1218.

43. The Hague Tribunal is handling violations of the law of armed conflict and other offenses occurring in the former Yugoslavia, whereas the Arusha Tribunal is doing the same for events in Rwanda. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, annex (1993), reprinted in 32 INTERNATIONAL LEGAL MATERIALS 1192 (1993); International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens, S.C. Res 955, annex, reprinted in 33 INTERNATIONAL LEGAL MATERIALS 1602 (1994).

44. For example, by releasing oil into the Persian Gulf and setting over 500 oil wells ablaze. While the actual motivation remains a mystery, it is theoretically possible that he took the former action to foil any amphibious landing and the latter to complicate Coalition aerial operations.

45. This is because, by Article 12, jurisdiction extends to nationals of States that are Party to the Statute or to crimes committed on the territory of a Party. Interestingly, in certain circumstances jurisdiction does not extend to nationals of States which are Party to the Statute. For instance, Article 11 provides that it does not have jurisdiction over offenses committed by nationals of a Party State when the offenses were committed before ratification, and jurisdiction is based on Party status.

46. For speculation on how warfare in the future might affect the normative (and moral) architecture intended to govern it, see Charles J. Dunlap, Jr., Technology and the 21st Century Battlefield: Recomplicating Moral Life for the Statesman and Soldier (Strategic Studies Institute Monograph, Army War College, Jan. 15, 1999); Michael Schmitt, *Bellum Americanum: The U.S. View of Twenty-first Century War and Its Possible Implications for the Law of Armed Conflict,* 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1051 (1998); Michael N. Schmitt, *Future War and the Principle of Discrimination,* 28 ISRAEL YEARBOOK ON HUMAN RIGHTS 51 (1999).

47. Cultural Property Convention, *supra* note 5.

48. When it ratified the Protocol in 1975, the U.S. reserved the right to use chemical weapons if the other side did so first. The U.S. also maintained the position that the agreement did not extend to riot control agents or herbicides, but by an executive order established a policy requiring Presidential approval in most cases of first use. Executive Order 11850, 40 Fed. Reg. 16187 (1975). To a more limited extent, this has remained an issue with the 1993 Chemical Weapons Convention, which was ratified by the United States and came into force in April 1997. For a discussion of the topic, see OPERATIONAL LAW HANDBOOK, *supra* note 39, at 5-13 - 5-14.

49. Advantage was taken of the change as early as the Gulf War. Recall the President's decision on November 8, 1990, to reinforce deployed Desert Shield forces by approximately 200,000 personnel. To fulfill this requirement, the Army turned to VII Corps, based in Europe. Among the reasons cited for selection of VII Corps was the fact that "the military threat was significantly lower in Europe and would safely permit removal of one Corps." CONDUCT OF THE PERSIAN GULF WAR, *supra* note 12, at E-27.

50. The United States was an early supporter of the International Criminal Court, and, thus, was arguably doing so.

51. On Engagement, see NSS, *supra* note 24, at 1–3.

XIX

Jus Pacis ac Belli?

Prolegomena to a Sociology of International Law

Georg Schwarzenberger

THE TRADITIONAL SYSTEM OF INTERNATIONAL LAW is based on the distinction between the law of peace and the law of war. In the formative period of international law, thinkers were fully aware of the problem hidden behind this classification. Positivist writers took over these conceptions, framed against the background of a philosophical vista of society. Yet in their hands these terms lost their original significance. It is the purpose of this investigation to throw light on this process and to consider the relevance of this dichotomy into peace and war for the positivist and sociological approaches to international law.

The Naturalist Basis of the Dichotomy

Conceptions such as peace and war are intimately linked up with ideas on the structure of the international society and the motive powers behind it. Naturalist writers indicate their attitude towards these problems in their abstractions from political reality, and, as in our own time, the *is* and *ought* are not always neatly separated from each other. Reality and utopia often are

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amalgamated in the picture of the state of nature drawn by these thinkers. Whether the "natural condition of mankind" is depicted in darker or brighter colors depends on the pessimistic or optimistic, or, if preferred, on the "realistic" or "idealistic" outlook of each individual philosopher. Correspondingly, the emphasis changes from war as the natural state of relations between States to peace as "a state most highly agreeable to human nature."[1]

Hobbes and Pufendorf are typical representatives of the two schools of thought. In Hobbes' *Elements of Law* is a passage which gives the quintessence of his view:

> Seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men in this natural liberty is the estate of war. For war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared; and the time which is not war, is peace.[2]

The opposite thesis finds equally firm upholders and may be illustrated by a quotation from Pufendorf's *De Jure Naturae et Gentium Libri Octo:*

> Now it is one of the first principles of natural law that no one unjustly do another hurt or damage, as well as that men should perform for each other the duties of humanity, and show especial zeal to fulfil the matters upon which they have entered into particular agreements. When men observe these duties in their relations one with another, it is called peace, which is a state most highly agreeable to human nature and fitted to preserve it, the creation and preservation of which constitutes one of the chief reasons for the law of nature being placed in the hearts of men.[3]

It does not seem accidental that the earlier naturalists were more impressed by the reality of the *bellum omnium contra omnes* than by the utopia of the *civitas maxima*. In the early period of absolutism, the Leviathans found themselves involved in a continuous struggle for survival both on the internal and external fronts. The absolutist States were not yet strong enough for the grand strategy which required the compact units of greater Powers, backed by a mercantilist system of economics and taxation as well as by standing armies of considerable size. They were not yet too weak to rely on big and decisive strokes. The undefined medley of war in peace provided the congenial atmosphere for the young absolutist State in its fight for survival and preponderance.[4] It, therefore, was only logical that Grotius entitled his main work *De Jure Belli ac Pacis Libri Tres;*

for war appeared to him as the all-inclusive and over-riding phenomenon: "There is no controversy which may not give rise to war."[5]

Thus, war occupies the central position in the systems of the early naturalists. This statement, however, is open to the challenge that it unduly minimizes the intentions of these writers. As it is commonly held, their aim was to limit the horrors of war and, as seems to follow from their doctrines on the *bellum justum*, to limit the resort to war. The requirement of a *causa justa* appears to suggest that the normal state of affairs between States is one of peace, departure from which is merely permissible in clearly defined cases. Insofar as the intentions of any writer are concerned, it is hard to furnish convincing proof for any thesis. It might, however, be relevant to bear in mind that most international lawyers of that period did not have a merely academic interest in international law nor were they the equivalent of modern pacifists. They were "men of the world," and a good many of them were actively engaged in diplomacy or held honorable and honored posts as legal advisors to the very princes whom they were supposed to subject to the rule of law. Furthermore, all of them alike were only too anxious to see their legal propositions accepted by State practice. It, therefore, would presuppose a childlike naïveté or a saintly character on their part to assume that they either were completely unaware of the power reality surrounding them or of the concessions which had to be made to make their systems acceptable to the powers that be. Yet such considerations can and should not do more than to neutralize the current story-book version of the early history of international law. Quite apart from the laudable or deplorable intentions of their creators, doctrines must be judged on their own merits and by the functions which they fulfil in the reality of society. Once they have been propounded, they live a life of their own, and the uses to which they are put depend on social forces beyond the control of their authors.

The Ideology of the *Bellum Justum*

The two main problems around which naturalist thinking on war centers are well brought out in Gentili's definition of war as *publicorum armorum justa contentio*.[6]

The conception of war as a *public* contest merely put into legal form the object of absolutist policy to achieve and to hold the monopoly of legitimate physical force. The memory of the Middle Ages when vassals waged their private wars against their overlords, and the central authority merely attempted to limit these feuds, was still fresh in the early days of the absolute State. It, therefore, could not be asserted too often that any form of civil war was essentially

different from the wars waged between sovereign princes and was, in Bacon's words, "like the heat of a fever."[7] The intellectual support thus rendered to the cause of absolutism could only recommend the doctrine of the *bellum publicum* to the rulers of absolutist States. In this light, the insistence of naturalist writers on the need for a declaration of war receives a new meaning. Sovereigns did not so much consider this prerequisite of a just war as a burdensome limitation of their freedom of action, but as a golden opportunity of transforming their *de facto* monopoly of physical force into a *de jure* monopoly. The duty of the prince to guard the community against the danger of illegal war was bound to strengthen his claim to undisputed and exclusive authority in matters of peace and war. Duty implies competence, and competence has a tendency towards exclusiveness. This aspect of the matter is strongly stressed by Victoria: "Such a State, then, or the prince thereof, has authority to declare war, and no one else."[8] Once the absolute State was firmly established, other considerations induced sovereigns to forget only too soon this solemn obligation for a declaration of war and the requirement fell into general disuse.[9] Thus, State practice could accept without reservation the plea of the naturalist for the outlawry of private war. They were, however, supposed to consult "the good and the wise"[10] on the prerequisites of *bellum justum*. What advice had the fathers of international law to offer? It is proposed to limit this examination to Gentili, for, with insignificant exceptions, his catalogue of *causae justae* is typical of the naturalist approach to this problem.[11] It seems only fair to select this distinguished Oxford professor of Italian extraction as modern jurists claim for him that he was the first to place the subject of war on a non-theological basis[12] and that his grasp of the doctrine of the *bellum justum* was even firmer than that of Grotius.[13]

According to Gentili, the first group of just wars is provided by defensive wars. They include what he charitably terms wars waged for reasons of expedient defence: "A defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible."[14] It seems as if this all-embracing formula were enough to satisfy the most extreme adherent of the reason of State. Yet, obligingly, Gentili does not stop at this point. He proceeds to elaborate the grounds which justify even offensive wars, and he classifies them under the headings of honor, necessity and expediency.[15] In the case of an alliance, a prince is justified in coming to the assistance of his ally as long as he is convinced of the justice of his ally's cause. If treaty obligations should prove to be incompatible with each other and both cases happened to be equally just, "preference should be given to the one who has priority."[16] Should his disciples still feel any qualms of conscience as to the "justice" of their contemplated war, Gentili provides further

arguments which even the most scrupulous or least gifted adept of power politics could hardly fail to perceive. These considerations are derived from the conceptions of subjective and relative justice. A sovereign may be engaged in an unjust war, but he may be wrongly under the impression that his cause is just. This, Gentili considers enough to exonerate a prince, though the unfortunate consequence of such liberalism may be that "in nearly every kind of dispute neither of the two disputants is unjust."[17] Finally, a State may have a cause which, relatively, is less just than that of its opponent. But in this case it must be remembered that "one man does not cease to be in the right because his opponent has a juster cause."[18] Thus, "invincible ignorance," as Victoria has called this state of mind,[19] is the best keeper of a king's conscience, if he wishes to rule in accordance with the precepts so ably set out by Machiavelli but equally feels bound to engage exclusively in "just" wars of a "defensive" or "offensive" character.

In these circumstances, a naturalist may be forgiven for not always bearing in mind his own subtle distinctions and for bluntly stating that "by the consent of nations a rule has been introduced that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars."[20]

It accordingly seems that there is little substance in the time-honored assertion that the naturalists have subjected war to law, and that rather cynical disregard of these norms by State practice merely amounts to regrettable violations of clearly defined standards. It very much looks like special pleading to retort that sovereigns paid their respect at least in form to these rules when they attempted to justify their wars of interest in terms of doctrine of the *bellum justum*. In effect, this did not mean that war was subordinated to natural law, but that natural law was made subservient to the reason of State. In an international society in which the rulers of States are only responsible to their own conscience, an elastic theory with as many loopholes as the doctrine of the *bellum justum* was bound to degenerate into a mere ideology serving the interests which it was supposed to control. Had the naturalists insisted on more rigid standards, their teachings would have been ignored or interpreted out of existence. As, in accordance with their "realistic" outlook, they were prepared to come to terms with the powers that be, their theories could be turned to useful purposes. As Machiavelli reflects, "the people will complain of a war made without reason."[21] Consequently, rulers are well advised not to ignore their home front, and this is the more necessary the wider awake public opinion and conscience happen to be. It is equally necessary to break the spirit of the enemy

and to mobilize opinion in neutral countries. What could better serve this purpose than a foolproof case regarding the justice of one's own cause? In the field of intellectual warfare, which is not a twentieth century invention, the authority of a Victoria, Gentili or Grotius is worth a good many cannons and battalions, and, as has been shown, it was futile to attempt to apply their doctrines in accordance with the requirements of power politics. The implications of these theories, however, were still more far-reaching. The naturalists conveniently lent their authority to the thesis that some rather disconcerting passages in the Gospel on war were not to be taken too literally, and that war, provided that it was just, was authorized both by divine and natural law.[22] Thus, seemingly, the naturalists consider war as an exceptional remedy. They do so, however, in a manner which does not actually hamper the actual supremacy of force in the international society, and they provide Statesmen with an ideological cover, highly appreciated in ages characterized by glaring gaps between the religious and ethical standards of individual morality and the requirements of power politics.[23]

The conclusions reached so far may be summarized as follows: The naturalists derive their conceptions of peace and war from their vistas of the structure of international society either by abstractions from reality or by wishful speculations on human nature. For the "realistic" school of naturalists, war is the over-riding phenomenon, and peace can be defined only negatively by reference to war. The object of the "idealistic" school of naturalists to limit war to an exceptional remedy is frustrated by their own casuistry. It deprives the doctrine of the *bellum justum* of objective criteria between just and unjust wars and invites subjectivism and abuse by State practice. Thus, their doctrine degenerates into a mere ideology of power politics. The insistence of naturalist writers on the element of *bellum publicum* in their definitions of war corresponds to the interests of rising absolutism, as does their postulation for a declaration of war. Therefore, during the period of early absolutism this part of their doctrine meets with the full approval of State practice.

Peace and War in the Modern Doctrine and Practice of International Law

The modern approach to the problem of peace and war is a medley of doctrines and assumptions. They may be discussed under three headings: The doctrine of the normality of peace, the doctrine of the alternative character of peace and war, and the doctrine of war as a status and objective phenomenon.

The doctrine of the normality of peace and the functions of war. In the leading treatises on international law, the order of things, as it appeared to the naturalists, is reversed. *Jus Belli ac Pacis* is boldly transformed into *Jus Pacis ac Belli.* It is mostly taken for granted that peace is the normal state in international relations. Only exceptionally a writer condescends to state in so many words this "self-evident" assumption. Phillimore, in his *Commentaries upon International Law*, does so with commendable clarity: "We have hitherto considered States in their normal, that is, their pacific relations to each . . . other.We have now to consider the abnormal state of things which ensues upon a disturbance of these normal relations, when these rights have been invaded and these obligations not fulfilled."[24]

Actually, such an assertion implies views and judgments on the nature and functions of war which are far from being self-explanatory. As has been shown before, the naturalists found their solutions of these problems by means of abstractions from reality or deductions from human nature. Modern writers who enjoyed the deceptive security of a stable balance of power system as it existed between 1815 and 1914, might have held with some justice that they, too, had drawn the obvious conclusions from their era of peace. For a generation which has witnessed two World Wars in its lifetime, the assumption of peace as the normal state of international relations is much more problematical. In a system of power politics, war is not an unhappy incident or an incalculable catastrophe, but the culminating point in a rising scale of pressure, the last resort of power politics when diplomacy fails to achieve its objects by the threat of force or the application of less drastic forms of pressure.[25] Thus, this doctrine is founded on a complete misinterpretation of the functions of war in modern international society.

A good many writers have tried to avoid the real issue by remarkable feats of escapism. Over and over its has been repeated that war is an event,[26] a question of fact,[27] or "an international fact in the first degree."[28] If this meant that war is legally irrelevant, it would prove rather too much; for it would imply that international law is not capable of dealing with legal problems arising out of war. Rightly, this conclusion is not drawn by international lawyers. This classification of war may mean, too, that war entails legal consequences, but is not capable of legal control.[29] To prove this is the avowed or implied object of those who interpret war as akin to revolution or as an emergency agency of change. How could a legal system attempt to control revolution or effect far-reaching changes without elaborate legislative organs in which clearly international law is so utterly lacking? As, however, the need for revolution or sweeping changes is only apparent in exceptional circumstances, peace may still be considered to

be the state of normality in the inter-State system. By the opposite procedure, others arrive at the same result. They assert that war is not at all incompatible with international law, but comparable to legal institutions such as self-help, the right of action, something like the sanction or law of procedure by means of which the law of peace is realized.[30]

It should not be denied that, in certain circumstances, war is an agency of self-help and of the violent adaptation of international society to fundamentally changed conditions. Yet it would be highly unrealistic to maintain that these are the only or even the main functions of international law. The functions of war are as manifold as the objects of power politics.

Thus, it appears that neither the self-denying classification of war as a fact nor the *ad hoc* sociology of international lawyers can furnish proof for the thesis that peace is the normal state in international law and relations. In the idealistic variety of naturalist doctrine, the primacy of peace was logically assured by the concept of the *bellum*. If modern doctrine were consistent, it would have to derive its assertions regarding the normal or exceptional character of peace and war from the detached observation of the reality of international relations. The actual fluctuations between periods of peace and war do not seem to justify a doctrine of the normality of peace.[31] This assumption, therefore, is nothing more than a lingering relic of naturalist philosophy on the nature of man.

The doctrine of the alternative character of peace and war and the reality of State practice. In the systems of naturalist writers, this doctrine is perfectly understandable. As they keep reprisals within very narrow limits, and jural war depends on a *causa justa*, "War and peace are correlatively opposite, and what is said affirmatively of the one is said negatively of the other."[32] Thus, Grotius can quote Cicero with approval: "*Inter bellum et pacem nihil est medium.*"[33] It should not, however, be forgotten that even amongst naturalists this doctrine was not upheld with unanimity. In the words of Pufendorf,[34] "some states more expressly denote a relation toward other men than do others, since they signify distinctly the mode in which men mutually transact their business. The most outstanding of these are peace and war."

In view of the fact that modern doctrine does not and can not insist on a just cause as a condition of legal war, and State practice has made extensive use of military reprisals, pacific blockades, and similar devices, the proposition of the alternative character of peace and war as part of modern international law[35] requires to be proved to be believed. It may claim to be in accordance with the practice of English courts.[36] Their view may be summarized in the words of Lord Macnaghten in Janson *v.* Driefontein Consolidated Mines, Ltd.: "The law

recognizes a state of peace and a state of war, but . . . it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace or war."[37] This statement, however, must be read in its context which indicates the reason for the rigid adherence of English courts to the doctrine of the complementary character of peace and war. It follows from the general attitude taken by English courts regarding vital issues of foreign affairs affecting this country. These matters are within the prerogative of the Crown, and "it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. . . . If and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects."[38] This practice is not derived from the scrutiny of positive international law, but is based on a division of functions between the judiciary and the executive, considered desirable from the point of view of English law, and it gives expression to the legitimate concern of courts for the certainty of their municipal law. It is, therefore, impossible to derive from this practice any conclusions regarding the validity of the doctrine of the alternative character of peace and war as a doctrine of international law.

As in the case of the doctrine of the normality of peace, this doctrine could derive its only justification from State practice. The foreign relations of all great Powers contain frequent instances of resort to armed force short of war or, as they are sometimes called, of "pre-belligerent acts."[39] Military interventions and reprisals, material guarantees and pacific blockades have become such household terms of power diplomacy and modern treatises on international law[40] that it suffices merely to refer to them in order to indicate the problematic character of the alternative between peace and war. It cannot be doubted that these measures are "tinged with a hostile character"; it is admitted that they are "often but the train which awaits only a spark to be kindled into the full blaze of open war." Yet it is still asserted that they are "not in themselves inconsistent with the maintenance of peace."[41] Arguments to the effect that such measures merely constitute an abuse of force and amount to war in disguise may be successful in some instances.[42] They do not, however, offer a satisfactory explanation of all or even the greater majority of these cases. It is hard to see how the limited application of force can amount to war if not only third States but also the State against which these measures are taken insists on the continuation of peaceful relations with the State resorting to a limited use of armed force. The current explanation that, by customary international law, these measures have been incorporated into the law of peace, is correct if it means that resort to armed force short of war may be lawful in certain circumstances. Yet how can

writers who take this line square with their contention the attitude of third States in those cases in which they insist on the application of the laws of neutrality to their own relations with the contending States, while the latter insist on the continuance of a state of peace between themselves?[43] This view leads to the paradoxical conception of neutrality in time of peace, not a very pleasant constellation for the followers of the doctrine of the alternative character of peace and war. This doctrine and the reality of measures short of war can be reconciled only at the price of depriving the state of peace of all positive criteria and of reducing it to a merely negative status.[44] To see peace and war in their proper perspective, it is necessary to analyze these states against the background of the reality of power politics which is the over-riding phenomenon in international affairs.[45]

Powers are in a state of peace with each other when they are prepared to apply to their mutual relations the extensive system of legal rules which is characterized, *e.g.*, by respect for territorial sovereignty, the freedom of the high seas and the exclusion of the use of armed force. In effect, this means that States are willing to exercise in their relations merely political and economic, but not military power.[46]

Powers are in a state of war with each other and of neutrality towards third States, if, subject to customary and treaty limitations, they choose to apply against each other Power to the utmost, *i.e.*, military as well as political and economic power.

Modern States in their practice have merely drawn their own conclusions from the complete breakdown of the doctrine of the *bellum justum* when they consider themselves free not only to change over at will from a state of peace to a state of war, but also entitled to the liberal use of limited force.[47] It is characteristic of this state that it does not necessarily lead to the comprehensive use of power, as in case of war. Whether the state of peace continues with the State against which limited force is applied or not, depends on the latter's decision. Similarly, it is left to third States to decide for themselves whether, in their relations with the contending States, they prefer the laws of peace or neutrality. Even if all States directly and indirectly concerned acquiesced in the limited use of force, it appears to be a misnomer to call such a *pax bellicosa* by the name of peace. It is equally unwarranted to call war a state in which both contending States insist on the continuation of their peaceful relations, merely because third States wish to apply the law of neutrality during such a *bellum pacificum*. These constellations are incompatible with the states of peace and war; they constitute a state of their own, a *status mixtus*.

Equally scant respect was shown by State practice to the conception of the *bellum publicum*. Since the beginning of the 19th century,[48] States have insisted on their right at their discretion to recognize revolutionaries as belligerents, and, on less firm ground,[49] as insurgents if the insurrection amounted to a civil war. Thus, again, State practice found it necessary to build a half-way house, this time between the unreserved application of the principle of non-intervention in the domestic affairs of other States and the recognition of the insurgent government as the government of a sovereign State, a measure considered to be illegal during a civil war. If the government against which the revolutionary movement is directed itself recognizes the belligerency of the insurgents, third States are usually inclined to accept the position of neutrals in the contest.[50] If, however, that government is unwilling to do so, it is left to third States to decide for themselves whether they wish to ignore the civil war or elevate it into war proper by the recognition of the insurgents as belligerents. Thus, we are confronted with another typical instance of the *status mixtus*; at their discretion, States may consider one and the same phenomenon as a domestic affair, compatible with a state of peace, or as war.

The conclusion seems unavoidable that, as in the case of the doctrine of the normality of peace, the doctrine of the alternative character of peace and war cannot stand the test when confronted with State practice. It should be discarded as an uncritically accepted remnant of a now merely historically relevant naturalist approach to the problem of peace and war.

The doctrine of war as a status and objective phenomenon. Attempts at defining war in modern doctrine are dominated by Grotius' definition of war as a status or condition: "War is the condition of those contending by force, viewed simply as such."[51] The emphasis on the status of war as the alternative to that of peace is congenial to medieval thinking and there finds its legal expression in the *diffidatio*, the message of defiance which severs the tie of faith between him who sends it and him who receives it.[52] This conception of war as a status equally fits into the naturalist scheme, as naturalist writers consider peace incompatible with the use of armed force between States. Apart from special treaty obligations, modern doctrine, however, cannot rely on the certainty of a declaration of war as an equivalent to the old *diffidatio*, and, in the face of contrary State practice,[53] cannot assert a customary rule requiring a declaration of war. Whether, in these circumstances, insistence on war as a status means anything depends on the capability of modern doctrine to find an objective criterion defining war as distinct from peace and the *status mixtus*.

If modern writers were consistent, they would have to remember in their definitions of war their own assumptions of peace as the normal state and of the alternative character of peace and war. Such consideration for their own doctrines would necessarily lead them to a definition of war by reference to peace. Yet this would be too much to expect. The best of which modern doctrine seems capable in relating war to peace is contained, albeit only on the index, in a leading textbook: "Peace: see Termination of War."[54]

Commonly, war is defined as a contention of States through their armed forces for the purpose of overpowering each other.[55] At first sight, the element of the definition, *contention of States through their armed forces*, appears to offer an objective criterion of distinction between the states of peace and war. Even if this could be granted, this definition could not be regarded as adequate, as it does not cover two types of war. States, geographically widely separated, may declare war against each other and apply the laws of warfare (confiscation of property belonging to the enemy State, internment of enemy aliens, etc.) in their mutual relations without being able to bring about a contention between their armed forces. Or, a State which is at war may deem it prudent to withdraw its armed forces in such a way that, again, there is no opportunity for the required contention between the armed forces to occur. Instances of the first class are provided by the relations between South and Central American States and the Central Powers in the First World War and by corresponding situations in the present world war. An example of the second type is offered by the Bulgarian withdrawal before the Rumanian troops in the Second Balkan War.

Yet a still more serious flaw of this definition consists in its inability objectively to indicate the borderline between war and the *status mixtus*. States may contend through their armed forces, but, as in the case of the extensive battles between Russian and Japanese troops on the frontier between the U.S.S.R. and Manchukuo, may be unwilling to consider such acts as a state of war. Thus, this definition either amounts to the assertion that States are at war with each other against their own will, or these cases have to be distinguished from war by the introduction into the definition of a subjective element, the *animus belligerendi*.[56] Modern doctrine usually chooses this latter alternative as the minor evil. This, however, means that not much is left of the so highly coveted assumption of the alternative character of peace and war and of the apparently objective criterion of the contention of States through their armed forces. The acceptance of the *animus belligerendi* reduces the current definition of war to the truism that States contending with each other through their armed forces are at war with each other if they want to be at war with each other. If one of the contending States unmistakably expresses its will, the status of war is

created. If, however, the belligerents fail to do so, third States are free to interpret at their own discretion the legal significance of "a contention of States through their armed forces."

This failure of modern doctrine is not the fault of individual writers. It is due to the impossibility of achieving what modern theorists attempt to do. In a system of international law which admits the limited use of force to its law of peace, or in which there are more than two states of legal relationships as pointed out in this article, it is impossible to find an objective criterion which distinguishes the status of war both from the status of peace and from the *status mixtus*.

In these circumstances, all that can be said is this:

Declared war creates the status of war between the States directly concerned and with regard to third States.

Measures taken within the purview of the *status mixtus* and of undeclared war automatically create a state of war between the States directly concerned, and of neutrality with regard to third States, only if the State against which these measures are taken, or undeclared war is waged, chooses to consider such action as amounting to war. In the absence of an unequivocal declaration to this effect, third States are free to decide for themselves whether they wish to regulate their relations with the contending States in accordance with the law of peace or the law of war.

Thus it appears that, when faced with the concrete task of defining war, modern doctrine has to disregard its own assumptions of peace as the normal state and of the alternative character of peace and war. The current definition of war is incomplete and only seemingly objective. The express or implied inclusion in this definition of the *animus belligerendi* either amounts to the implicit admission of the *status mixtus* which is determined by intentions rather than acts, or to the unavoidable acceptance of a *continuum* between peace and war which reduces peace to a merely negative status. If the laws of neutrality are applied in a state which the "belligerents" consider to be peace, or those of warfare in a state which third States regard as peace, this means that there is no intrinsic difference between the states of peace and war. The application of the laws of peace and war becomes a question of consensus amongst the States directly and indirectly concerned.[57] Doctrine based on State practice does not and cannot provide objective tests regarding the circumstances in which the different sets of rules are to be applied, and the practice of power diplomacy is not a promising field in which to look for the initiative in the precise separation of measures where the choice is mainly a question of expediency.

It appears, therefore, that none of the assertions of the modern doctrine on peace and war can be upheld.

The doctrine of the normality of peace is merely a survival of naturalist thought, but is incompatible with the real functions of war in modern international society.

The doctrine of the alternative character of peace and war, of the same naturalist origin, minimizes or ignores the reality of State practice which has created rules pertaining neither to those of peace or war, but constituting a *status mixtus*.

The doctrine of war as a status and objective phenomenon breaks down over the reality of the *status mixtus*. This status is not separated from those of peace and war by any objective tests. States contend by power in peace and war. In the state of peace, they are limited to the use of economic and political power. In the *status mixtus*, they supplement these forms of power by the use of military power. In the state of war, they use all available forms of power. It betrays an over-estimation of the difference between political and economic power as compared with military power, to imagine that, within a system of power politics, there is any qualitative difference between the states of peace and war.

The traditional division of international law into the law of peace and the law of war may be expedient for didactic purposes. The necessary subjectivity, however, of the available criteria of distinction between the two, or better three, states of typical legal relations between States deprives this classification of any claim to scientific sacrosanctity.

The Distinction between Peace and War in International Conventions

To round out the picture, it seems worthwhile to examine whether the conclusions reached so far are affected by relevant international conventions. If States had desired to create a clear borderline between peace and war, they could have achieved this object only at the price of renouncing their claim to the use of force in time of "peace." Then war and the use of armed force would have become identical, and a clearly discernible criterion of war would have become available. This truly objective test was used in the Second Hague Convention of 1907 regarding the Limitation of the Employment of Force for the Recovery of Contract Debts. Nevertheless, the Powers represented at the Second Hague Peace Conference were not prepared to abolish the *status mixtus* as such. This became embarrassingly evident in the discussions of the second sub-committee of the Second Commission when the Chinese military delegate analyzed the proposed Convention on Compulsory Declaration of War in the

light of the then recent Boxer expedition, and suggested a clear definition of war.[58] In the words of a contemporary writer, "no one replied to these embarrassing questions. Governments are not loath to have the definition of what constitutes war shrouded in mystery; for in the greater number of States possessing a parliamentary form of government, the decision to make war is hedged about with formalities and special constitutional requirements, and governments have in the past and are likely in the future to find it convenient for reasons of domestic and foreign policy to resort to measures of war while maintaining that no war exists.[59] Thus, again, the term "hostilities," which is used in this convention, really means acts of armed force carried out with the intent of war, and the door is kept wide open for undeclared war developing out of measures taken within the purview or under the cover of the *status mixtus*.[60]

Equally instructive are the attempts made in the post-1919 period to distinguish between legal and illegal wars. In the Covenant of the League of Nations, terms such as war, threat of war, resort to war and acts of war are freely used. This question has received so much attention[61] that it only seems necessary to emphasize the aspects particularly relevant to our discussion.

President Wilson's drafts make it obvious that he was fully aware of the dangers threatening his scheme if the *status mixtus* should be allowed to survive. Article VII of his various drafts runs as follows:

> If any Power shall declare war or begin hostilities, or take any hostile step short of war, against another Power before submitting the dispute involved to arbitrators as herein provided, or shall declare war or begin hostilities, or take any hostile step short of war, in regard to any dispute which has been decided adversely to it by arbitrators chosen and empowered as herein provided, the contracting parties hereby bind themselves not only to cease all commerce and intercourse with that Power but also to unite in blockading and closing the frontiers of that Power to commerce or intercourse with any part of the world and to use any force that may be necessary to accomplish that object.

Yet, in the course of the drafting, Wilson's attempt seriously to curb power politics was quietly undone and his formulations were replaced in a matter-of-course way by the traditional terminology—"minor changes . . . of an entirely trivial character."[62]

Further support to the view that war in the meaning of the Covenant was limited to war in the technical sense, was given by the equivocal treatment of the Corfu incident in League quarters and, particularly, by the sibylline report of the Committee of Jurists on this matter.[63]

The evasive attitude taken by the members of the League towards the war between Bolivia and Paraguay,[64] and still more so towards the "war in disguise"[65] in Manchukuo, led to a situation in which illegal war under the Covenant was limited to cases in which the members of the League were prepared to say so.[66]

Similarly, the use of the term "war" in the Kellogg Pact enables States to exercise their full discretion in deciding whether the use of armed force by a State or even contentions of States through their armed forces are to be considered as wars within the meaning of the pact.[67] Furthermore, the United States Secretary of State himself thought it necessary to affirm in the correspondence preceding the conclusion of the pact that each signatory alone would be "competent to decide whether circumstances require recourse to war in self-defense."[68] Thus, again, illegal war was limited to armed contentions between States which the signatories cared to consider as such.

State practice went still further in its obliteration of the few distinguishing marks that were left between peace, the *status mixtus* and war. If, in the case of a measure taken within the *status mixtus*, a State is free to consider such a step as an act of war, it can in advance sign away its discretion to exchange the *status mixtus* for that of war. Thus, it is *stipulated* in the Treaty of Versailles[69] that measures which may include military reprisals[70] should not be regarded by Germany as acts of war. A similar clause is contained in the Hague Agreements of 1930.[71] In the declarations exchanged January 20, 1930, Germany acknowledges that, in case of an intentional default, "it is legitimate that, in order to ensure the fulfillment of the obligations of the debtor Power resulting from the New Plan, the creditor Power or Powers should resume their full liberty of action."

Yet even this use of the freedom of contract was surpassed by the self-contradictions of the appeasement period. On the one hand, the Powers assembled at Nyon upheld the fiction that the Spanish War was not an international war and most of those States refused to grant recognition as belligerents to the insurgents. On the other hand, they did not base the Nyon Agreement on the obvious inadmissibility of sinking foreign merchantmen in time of peace. In order to enable the totalitarian aggressors to save their faces, they assimilated these acts of illegal intervention to piratical acts by submarines and aircraft of unknown Powers and arraigned the "pirates" for their violations of Part IV of the Treaty of London of 1930, *i.e.*, rules applicable in time of war between sovereign States.[72]

It cannot, therefore, be maintained that the multilateral agreements concluded in pre-1914 days and during the era of "power politics in disguise" have

contributed to the establishment of more solid criteria of distinction between peace and war. If anything, they have increased the tendency towards subjectivism and an unscrupulous abuse of terms. This was the unavoidable result of a "statesmanship" which, while insisting on unlimited sovereignty, felt bound to make paper concessions to popular demands incompatible with any system of power politics.

Programme for a Sociology of International Law

It would by far overstep the limits of this article adequately to develop the tests by which a scientific analysis of international law would have to proceed. In order, however, not entirely to limit these observations to criticism which, of necessity, must be destructive, it may be permitted at least to outline the constructive task.

The starting point must be the fundamental sociological distinction between society and community and a realization of the essentially different functions fulfilled by society and community laws.[73] It depends on the degree to which a society has integrated into a community, whether and to what extent: (1) law can develop its typical function of providing rational rules for the conduct of the members of the group, or this purpose is frustrated by the overriding power of "over-mighty subjects" within a group; (2) it can and must be authoritatively determined by persons appointed for this purpose and can be enforced against recalcitrant members.

A comparison between typical social laws, such as the laws imposed by conquerors or colonial Powers in the early stages of imperialism, with the rules governing relations such as marriage, blood brotherhood or religious communities, indicates the two extreme poles. Ultimately, the one is a law of power and the other a law of coordination. In the one, power, and, in the other, the common task,[74] is the decisive factor. Yet actual life seeks compromises between such extremes and "pure" types of law. Power must be limited even in the interest of those who wield it. Men obey better if they obey the rule of law and not the rule of men. They have an innate vision of justice. What kind of justice will be meted out to them depends on the character of the group in which they live and on the scope of the value consciousness of their own time. The constant trend, however, in any legal system which aims at an approximation to justice inevitably appears to be toward reciprocity. If a certain minimum of reciprocity is realized, the power behind the law has a tendency to become invisible. This situation seems to correspond to the typical make-up of human nature. Man is not predominately altruistic, but is prepared to act on the basis of the principle

Do ut des, to consider the application of this principle to his own affairs as fair and just, and to come to an understanding with his fellowmen on the standards by which the *quid pro quo* is to be determined. In exceptional circumstances, man is prepared to give more than he takes. This may be due to inferiority of power or to mistake and fraud. Then, reciprocity is achieved merely in a formal sense. In the first case, the lacking equivalent is made up by the awareness of the hypothetical situation in case agreement had not been achieved or the law of power had not been obeyed. In the second case, reciprocity is assumed but does not exist in reality. These two examples represent typical social constellations. The willingness to forego actual reciprocity may, however, also be due to a voluntary self-limitation and self-denial, when reciprocity in a spiritual sense is achieved by the consciousness of such sacrifice and its acknowledgment by the community. Thus, power, reciprocity and coordination seem to be the three constant elements of law, and the preponderance of one or the other appears to depend on the type of the group in which law fulfills its specific functions.

International law is a typical social law and a type of social law which does not condition, but is conditioned, by the rule of force.[75] Therefore, it is hard to conceive a more unrealistic assumption than the one which is the basis of the modern doctrine of international law: the normality of peace. The state of peace, as it exists between major wars, is nothing but the interval between the dynamic periods in which previous systems of power politics undergo a process of confirmation or transformation. The peace treaties of Westphalia, Vienna and Paris are the *Magnae Cartae* in which the hierarchy of power achieved during the wars preceding them has been continuously redefined. As peace is the result of force, it requires force to uphold the statics of any peace interval. This means that the same Power which has won the war must maintain the peace after the war. Therefore, within a system of power politics, there cannot exist any intrinsic difference between peace and war.

This explains why the law of peace contains so many rules directly related to the maintenance and justification of power politics in general and of specific systems of power politics established as the result of major wars. The functions of such rules are primarily those of an ideology. Norms such as title by conquest for the acquisition of territory, or the exclusion of duress as a ground for invalidating a peace treaty, are in a different category, as compared with those on the three-mile limit or on diplomatic immunity. They are still more different from those which govern the work of the International Commission for Air Navigation or the organization for the International Anti-Drug Campaign. The first category is representative of the law of power, congenial to an international

society which is founded on the arbitrament of force. The second stands for the law of reciprocity which governs the relations of States in spheres irrelevant from the point of view of power politics and in circumstances when threat of force is no longer effective because States have already resorted to the ultimate means of pressure. The third gives a timid expression to that law of coordination which can only find its realization in an international community proper.

It is suggested that the analytical and descriptive work of past generations must be supplemented by a sociological analysis of international law as a law of power, reciprocity and coördination, and correspondingly as an ideology, reality and utopia.

Notes

1. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1688), Bk. VIII, Ch. VI, 2. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1934.)

2. Pt. I, Ch. 14, II; similarly in his *LEVIATHAN*, Ch. 13. See also PLATO, THE LAWS, Bk. I, 2; PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1563), Pt. I, Ch. I, I; SPINOZA, *TRACTATUS POLITICUS* (1677), Ch. 2, § 14 and Ch. 3, § 13. This conception lies at the bottom of the distinction in Muslim law between the "Abode of Islam" and the "Abode of War." *Cf.* M. KHADDURI, THE LAW OF WAR and PEACE IN ISLAM (London, 1940), pp. 20 and 46.

3. *Loc. cit.*; see also *ibid.*, Bk. II, Ch. II, 7 or his *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO* (1673), Bk. II, Ch. XVI, I (Carnegie Endowment translation, New York, 1927), and the dictum in Miller *v.* The Resolution, U.S. Court of Appeals (1781), 2 Dallas 1: "As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society."

4. *Cf.* F. Meinecke's masterly description of the political background of this period in *DIE IDEE DER STAATSRAISON IN DER NEUEREN GESCHICHTE* (Munich, 1929), p. 514 *et seq.*

5. Bk. I, Ch. I, I. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1925.)

6. *DE JURE BELLI LIBRI TRES* (1589), Bk. I, Ch. II (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933.)

7. In his essay, Of the Greatnesse of Kingdomes and Estates (1597), XXIX.

8. *DE INDIS ET DE JURE BELLI RELECTIONES* (1541), *Relectio Secunda*, No. 7 (Carnegie Institution translation, Washington, 1917). See also GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, Bk. III, Ch. 3, II.

9. *Cf.* SIR TRAVERS TWISS, THE LAW OF NATIONS (Oxford, 1875), Vol. II, p. 65.

10. VICTORIA, quoting from Terence, *loc. cit.*, No. 21.

11. Useful surveys of this doctrine are contained in R. REGOUT, *LA DOCTRINE DE LA GUERRE JUSTE* (Paris, 1935), and W. BALLIS, THE LEGAL POSITION OF WAR (The Hague, 1937). See also J. von Elbe, *The Evolution of the Concept of the Just War in International Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 33 (1939), p. 665 *et seq.*

12. T. E. HOLLAND, STUDIES IN INTERNATIONAL LAW (Oxford, 1898), p. 58.

13. C. Phillipson, introduction to GENTILI'S *DE JURE BELLI LIBRI TRES* (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933), Vol. II, p. 33a.

14. GENTILI, *ibid.*, Bk. I, Ch. XIV.
15. *Ibid.*, Chs. XV, XVII, and XVIII.
16. *Ibid.*, Bk. III, Ch. XVIII.
17. *Ibid.*, Bk. I, Ch. VI.
18. *Ibid.*
19. *Loc. cit.*, No. 32.
20. GROTIUS, *loc. cit.*, Bk. II, Ch. 17, S. 19.
21. THOUGHTS OF A STATESMAN, Ch. II.
22. *E.g.*, VICTORIA, *loc. cit.*, introd. Compare with this approach Erasmus' *QUERELA PACIS* (1517).
23. For a more detailed analysis, see the present writer's POWER POLITICS (London, 1941), p. 153 *et seq.*
24. Vol. III (London, 1885), p. I. See also C. PHILLIPSON, THE EFFECT OF WAR ON CONTRACTS (London, 1909), p. 25; Anonymous, *The League of Nations and the Laws of War*, B.Y.I.L., 1920–1921, p. 109 *et seq.*; A. P. Higgins, *The Law of Peace*, *ibid.*, 1923–1924, p. 153 *et seq.*; SIR JOHN FISCHER WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS (London, 1929), p. 73 *et seq.*
25. For a more detailed discussion of the functions of war in modern international society, see the writer's POWER POLITICS, *supra*, p. 132 *et seq.*
26. *Cf.* Q. Wright, *Changes in the Conception of War*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 18 (1924), p. 756.
27. See G. J. WEBBER, EFFECT OF WAR ON CONTRACT (London, 1940), p. I.
28. The Permanent Court of Arbitration in the case of the Russian Indemnities, XI, p. 82.
29. Wright, *loc. cit.*
30. For a more detailed examination of these and other theories on war, see the writer's POWER POLITICS, *supra*, p. 129 *et seq.*
31. *Cf.* Q. WRIGHT, THE CAUSES OF WAR AND THE CONDITIONS OF PEACE (London, 1935), p. 21 *et seq.*
32. GENTILI, *loc. cit.*, Bk. III, Ch. XXIV.
33. *Op. cit.*, Bk. III, Ch. XXI, I, I, and CICERO, *PHILIPPICA*, VII.
34. *Op. cit.*, Bk. I, Ch. I, 8.
35. *Cf.* A. D. McNair, *The Legal Meaning of War*, GROTIUS SOCIETY, XI, p. 33, and J. L. Brierly, *International Law and Resort to Armed Force*, CAMBRIDGE LAW JOURNAL, 1932, p. 314.
36. On the attitude of American courts which have a similar tendency to leave such "political" decisions in the hands of the Executive, see Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (New York, 1922), p. 172 *et seq.*, and W. J. Ronan, *English and American Courts and the Definition of War*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 31 (1937), p. 650.
37. A. C. (1902) 484, at p. 497.
38. *Ibid.*, pp. 497–498.
39. F. E. SMITH, INTERNATIONAL LAW (London, 1903), p. 90.
40. *Cf.* T. E. HOLLAND, *op. cit.*, p. 130 *et seq.*; A. E. HOGAN, PACIFIC BLOCKADE (Oxford, 1908); J. WESTLAKE, COLLECTED PAPERS (Cambridge, 1914), p. 572 *et seq.*; E. C. STOWELL, INTERVENTION IN INTERNATIONAL LAW (Washington, 1921); C. C. HYDE, INTERNATIONAL LAW (Boston, 1922), Vol. II, p. 192; P. H. Winfield, *The History of Intervention in International Law*, B.Y.I.L., 1922–1923, p. 130 *et seq.*; *The Grounds of Intervention in International Law*, *ibid.*, 1924, p. 149 *et seq.*; S. Maccoby, *Reprisals as a Measure of Redress Short of War*, CAMBRIDGE LAW JOURNAL, 1926, p. 60 *et seq.*; A. E. HINDMARSH, FORCE IN PEACE, Cambridge (Mass.), 1933;

H. Rumpf, *Is a Definition of War Necessary?* BOSTON UNIVERSITY LAW REVIEW, 1938, p. 705 *et seq.*

41. Sir Robert Phillimore, *op cit.*, Vol. III, p. 16.

42. A. G. HEFFTER, *LE DROIT INTERNATIONAL DE L'EUROPE* (edited by F. H. Geffken), Paris, 1883, p. 246; TH. BATY, THE CANONS OF INTERNATIONAL LAW (London, 1930), p. 110; C. Parry, *Some Nineteenth Century Pacific Blockades, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT*, 1938, p. 672 *et seq.*

43. See on the blockade by France of Formosa (1884), HALL-HIGGINS, A TREATISE ON INTERNATIONAL LAW (London, 1924), pp. 439–440; on the British-German-Italian blockade of Venezuela, J. Basdevant, *L'Action Coercitive Anglo-Germano-Italienne contre le Venezuela*, R.G.D.I.P., 1904, p. 422 *et seq.*, and WESTLAKE, *op. cit.*, p. 585.

44. The inability of modern doctrine, based on the assumption of the alternative of peace and war, adequately to deal with the use of force in "peace," may be illustrated by a few examples: H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA (New York, 1845), p. 759: "It remains . . . an undefined and undefinable exception to the mutual independence of nations"; Hall-Higgins, *op. cit.*, p. 434: *Reprisals are acts of war in fact, though not in intention*; E. M. Borchard, *"War" and "Peace,"* AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 27 (1933), pp. 115–116: "It must be conceded that *de facto* war, with or without a full state of war, is one of the commonest of phenomena, and . . . it cannot be reconciled with a state of peace"; OPPENHEIM'S INTERNATIONAL LAW (edited by H. Lauterpacht, London, 1940), Vol. II, p. 107: "Compulsive means are in theory and practice considered peaceable, although not amicable means of settling international differences"; H. Lauterpacht, *"Règles Générales du Droit de la Paix,"* HAGUE RECUEIL, T. 62 (1937), p. 191: *"Le droit international conçu comme un ensemble de règles réglant la paix* (ou, ce qui revient au même, interdisant la violence)." See, however, G. W. Keeton, *Legal Guarantees of Peace*, CZECHOSLOVAK Y.B.I.L., London, 1942, p. 41.

45. *Cf.* the writer's POWER POLITICS, supra, Pt. I.

46. See, on the different forms of power, B. RUSSELL, POWER (London, 1938).

47. See on the unlimited right to war in modern international law, HALL-HIGGINS, *op. cit.*, p. 82, and on the attitude of British practice, the note of Mr. Christie to the Marquis of Abrantes (Dec. 30, 1862) and the dispatch of Earl Russell to Mr. Lettsom (Dec. 24, 1864), *Fontes Juris Gentium*, Series B., Sec. I, Tomus I, Part II (1856–71), Nos. 2398 and 2375. The measures applied by France and Great Britain against Holland in order to achieve the separation of Belgium in 1832–33 (HOGAN, *op. cit.*, p. 80 *et seq.*) and similar measures of "international police" (HALL-HIGGINS, *op. cit.*, p. 441) show that State practice interprets liberally the conditions assumed by doctrine to limit the use of force in "peace." As Brierly observes, "all these writers seem conscious of a certain unreality in the profession of the law to regulate reprisals" (*loc. cit.*, p. 309). See also C. Eagleton, *The Form and Function of the Declaration of War*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 32 (1938), p. 19 *et seq.*

48. A. ROUGIER, *LES GUERRES CIVILES ET LE DROIT DES GENS* (Paris, 1903); resolution adopted by the *Institut de Droit International*, 1900, in CARNEGIE ENDOWMENT, RESOLUTIONS OF THE INSTITUTE of INTERNATIONAL LAW (New York, 1916), pp. 157–159; H. A. SMITH, GREAT BRITAIN AND THE LAW OF NATIONS (London, 1932), Vol. I, p. 261 *et seq.*, particularly also the opinion quoted there of Dr. Lushington (May 29, 1823, p. 293): "To apply the strict principles of the Law of Nations to a state of things so anomalous, would, I apprehend, tend only to mislead the parties interested, for these questions are always mixed up with political considerations, and the practise will in some degree differ from the theory. Of this we have many instances in regard to Spanish South America, the British Government having endeavoured to carry on its intercourse on equitable and beneficial principles, rather than adhere to the letter of

the Law of Nations." See also Earl Russell's dispatch to Lord Lyons (Washington), Oct. 3, 1861, *Fontes Juris Gentium, loc. cit.*, No. 2431. As Smith himself holds, "the true doctrine is that the recognition of the insurgent government is the necessary and logical consequence of recognizing the fact of war." (*Some Problems of the Spanish Civil War*, B.Y.I.L., 1937, p. 18.)

49. See G. G. Wilson, *Insurgency and International Maritime Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 1 (1907), p. 46 *et seq.*; HALL-HIGGINS, *op. cit.*, pp. 46–47; A. D. McNair, *The Law relating to the Civil War in Spain*, L.Q.R., 1937, p. 484 *et seq.* (particularly on the quasi-blockades established by insurgents); H. Lauterpacht, *Recognition of Insurgents as a de facto Government*, M.L.R., 1939, p. 4.

50. *Cf.* HALL-HIGGINS, *op. cit.*, pp. 36–37.

51. *Op. cit.*, Bk. I, Ch. I, S. 2, I: "*Status per vim certantium qua tales sunt.*" See J. WESTLAKE, INTERNATIONAL LAW, Vol. II (Cambridge, 1913), p. I, and A. D. McNair, *loc. cit.*, p. 33.

52. WESTLAKE, *ibid.*, p. 8. This form of declaration of war was used for the last time in 1657 when Sweden declared war against Denmark by a herald-at-arms sent to Copenhagen (SIR TRAVERS TWISS, *op. cit.*, p. 62).

53. T. J. LAWRENCE, WAR AND NEUTRALITY IN THE FAR EAST (London, 1904), p. 26 *et seq.*

54. HALL-HIGGINS, *op. cit.*, p. 941.

55. *Cf.* WESTLAKE, *op. cit.*, p. 1; OPPENHEIM'S INTERNATIONAL LAW, *ibid.*, p. 168; and C. Eagleton, *The Attempt to Define War*, INTERNATIONAL CONCILIATION, 1933, p. 259 *et seq.*

56. *Cf.* WESTLAKE, *ibid.*, pp. 1–2; McNair, *loc. cit.*, p. 45; OPPENHEIM, *ibid.*, p. 241. See also the pertinent comment of Sir Wilfrid Greene, M.R., in Kawasaki Kisen Kabushiki of Kobe *v.* Bantham S. S. Co., Ltd.: "What *animus belligerendi* meant was again a matter of obscurity, and to define war by relation to it came near to define war by itself" (A.C. 55, T.L.R. 503, at p. 505) and the observations of Sir John Fischer Williams, *The Covenant of the League of Nations and War*, CAMBRIDGE LAW JOURNAL, 1933, p. 8 *et seq.*

57. Thus, States may slip as informally from war into peace as from peace into war. *Cf.* HYDE, *op. cit.*, pp. 820–821; C. C. Transill, *Termination of War by Mere Cessation of Hostilities*, L.Q.R., 1922, p. 26 *et seq.*; W. E. Beckett, *The Right to Trade and the Right to Sue, ibid.*, 1923, p. 89 *et seq.*

58. CARNEGIE ENDOWMENT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES (New York, 1921), Vol. III, p. 169. In the view of the German Supreme Court, "although the Chinese expedition of 1900–1901 did not conduct a war in the sense of international law, and no declaration of war was made on China, it found itself nevertheless in a situation similar to that of war" (R.G.Z. 58, p. 328).

59. E. C. Stowell, *Convention Relative to the Opening of Hostilities*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 2 (1908), p. 55.

60. See WESTLAKE, COLLECTED PAPERS, supra, pp. 591–592.

61. *Cf.* Eagleton, *Attempt to Define War, loc. cit.*, pp. 250, 259 *et seq.*

62. D. H. MILLER, THE DRAFTING OF THE COVENANT (New York, 1928), Vol. I, pp. 59, 213, 214 and 222, and Vol. II, pp. 12, 81–84, 101, 138 and 149.

63. See McNair, *loc. cit.*, pp. 226–227, and the writer's POWER POLITICS, *supra.*

64. *Cf.* R. M. COOPER, AMERICAN CONSULTATION IN WORLD AFFAIRS, New York, 1934, p. 114 *et seq.*

65. Lytton Report, p. 138.

66. *Cf.* J. L. Brierly, *Sanctions*, GROTIUS SOCIETY, XVII, p. 79: "It seems clear that the action of Japan has not constituted a 'resort to war' in breach of her obligations under the Covenant"; Q. Wright, *When Does War Exist?* AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 26 (1932), p. 367; H. Lauterpacht, *"Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute, ibid.*, Vol. 28 (1934), pp. 48 and 52. See, however, Eagleton, *ibid.*, p. 250.

67. *Cf.* Borchard, *loc. cit.*, p. 116, and Eagleton, *ibid.*, p. 284 *et seq.*

68. Text of the note of June 23, 1928, in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 22 (1928), p. 109.

69. Part VIII, Sec. I, Annex II, § 18, AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 13 (1919), p. 264.

70. *Cf.* A. D. McNair, B.Y.I.L., 1924, p. 182, and on *The Legality of the Occupation of the Ruhr, ibid.*, p. 17 *et seq.*

71. Exchange of declarations between the Government of Germany and the Belgian, British, French, Italian, and Japanese Governments of Jan. 20, 1930 (British and Foreign State Papers, 1930, Pt. I, p. 42); AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 24 (1930), p. 271.

72. Preamble of the Nyon Agreement regarding submarines, par. 2: "Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity which should justly be treated as acts of piracy." (B.Y.I.L., 1938, p. 205). See also the additional agreement concerning surface vessels and aircraft (*ibid.*, p. 206). The agreements also are printed in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 31 (1937), pp. 179, 182.

73. For a more detailed discussion, see the writer's POWER POLITICS, *supra*, p. 33 *et seq.*, and *The Three Types of Law*, ETHICS, 1943, p. 89 *et seq.*

74. This latter type of law has been well described by G. NIEMEYER, LAW WITHOUT FORCE (Princeton, 1941).

75. For a more detailed discussion, see the writer's POWER POLITICS, *supra*, p. 138 *et seq.*

XX

UN Forces and International Humanitarian Law

Paul C. Szasz

AT LONG LAST, the United Nations has promulgated a set of principles and rules concerning the applicability of International Humanitarian Law (IHL) to military forces under its command and control.[1]

From the time that the first United Nations force was put into the field—that is, into the Sinai[2]—and especially the first one that was required to engage in active military operations—in the Congo[3]—the question has been raised to what extent are or should such operations be subjected to IHL. This question became more urgent as the number and extent of UN military operations suddenly increased in the 1990s—following the uniquely successful operation in Namibia.[4] As described below, the answer to what would seem to be a relatively simple question with an obvious answer (they should be!) has not been easy to arrive at. The present study is not intended as a contribution to the academic debate,[5] but rather catalogues the practical arrangements that have been made, or neglected, in this regard. Meanwhile, other essentially negative developments such as the increasingly frequent assaults on UN forces and the brutality of many recent conflicts, have raised some related problems. The protection of UN forces, their responsibilities when faced with major violations of IHL, and their interaction with the international criminal tribunals established in the past several years will also be discussed briefly herein.

Background

Blue Helmet[6] operations come in many different shapes, sizes, and complexities, and in particular have various and sometimes varying or evolving mandates. Although a few have been established by the UN General Assembly,[7] the great bulk were created by the Security Council. In doing so, the Council acted under two different sources of authority located somewhere in the UN Charter. The larger number, the so-called peace-keeping operations, are authorized under what Secretary-General Hammarskjold characterized as Chapter VI½, thus indicating that there was no specific Charter authority that could be cited.[8] The remaining operations are authorized, or sometimes continued,[9] under Chapter VII, which in its Article 42 does foresee the Council deploying air, sea or land forces.[10]

There are yet other types of UN-authorized deployments of military forces, which are sometimes confused with the Blue Helmet operations mentioned above. The exemplars of the first of these types are the coalition forces that fought the Korean War in the 1950's and the Gulf War in 1991. Though both were specifically authorized by the Security Council under Chapter VII, and therefore considered by the public to be UN operations,[11] they in effect consisted of alliances, both of which were organized and led by the United States. Their status under the Charter was somewhat unclear; on the one hand, they could be considered as forces the Security Council "deployed" under Article 42, though the Council retained almost no power over the organization of the forces and their actual operations; they could also be considered as merely collective self-defense operations authorized by the Council under Article 51; finally, they could be considered as simply falling under Chapter VII in general—as is the case, for example, with the establishment of the two War Crimes Tribunals[12] under that Chapter without any specific article to rely on.[13] The other type of non-UN operations are those that the Security Council "utilizes" under Article 53.1 of Chapter VIII ("Regional Arrangements").[14] Both types can be characterized as examples of the Security Council "franchising" military operations to an *ad hoc* coalition or a regional organization. In any event, in view of the minimal influence the Security Council has so far exercised over the actual conduct of these types of operations[15]—which is not to say that the Council could not, and perhaps should actually, exercise much stricter direction and supervision, as these operations could not legally take place without the Council's authorization—they will only be considered *en passant* in this study.

Reverting now to UN Blue Helmet operations, what are their main characteristics? The execution of each of these operations or forces is delegated by the

establishing organ, normally the Security Council but sometimes the General Assembly, to the Secretary-General, who thus acts, in a sense (though the term is never used), as Commander-in-Chief. To the extent that any aspect of such operations is not specified by the establishing organ—and typically this is true of most aspects except for the basic mandate and the force strength—these determinations must be made by the Secretary-General or under his authority. He himself delegates this authority in several ways: (i) to the Under-Secretary-General of the Department of Peacekeeping Operations (DPKO); (ii) for some operations also to a Personal or Special Representative, who is a high-ranking staff member; (iii) and, for each operation, to a Force Commander. The latter is a military officer seconded by a member State to the United Nations and thus employed by the latter as a staff member; he is therefore fully under the authority of the Secretary-General, and not under that of his government.[16] The force, itself, is made up of military personnel supplied (made available) by member States to the United Nations, normally in the form of a distinct unit (e.g., a platoon, company, battalion) with its own cadre of commissioned and non-commissioned officers. They perform their functions as ordered by the Force Commander, but their internal discipline is maintained according to their national regulations. In particular, the punishment of any violations takes place under national authority and not that of the United Nations.[17] These troops keep their national uniforms, but typically wear a blue helmet (hence their name) or beret and some shoulder insignia indicating that they constitute part of a UN force. They are also remunerated by and according to the rules of their country, though the UN provides them with a per diem and reimburses their governments for its outlays according to a uniform scale established by the General Assembly.

Thus, except for the Force Commander, the military component of a UN force (there may also be police and civilian components) consists of national contingents (military units or, rarely, individuals) voluntarily provided by member States,[18] operating under general UN command as to their operations but still under national authority as to their behavior. This also means that to the extent such units and persons are required by international and/or national law to abide by IHL, in whole or in part, these troops continue to operate under such constraints even while under UN command.[19] Whether these constraints could be loosened by the competent UN organs should they so direct is explored briefly below.

Though this has so far been the invariable practice in composing UN forces,[20] it should be noted that this is not the sole possible model. In principle, the United Nations could recruit military personnel directly (or by

secondment—as is the situation of the Force Commanders) and employ them as UN staff[21] to constitute a standing UN force. Currently, this is precluded by political and financial considerations, and therefore will not be further considered in this study. It should, however, be noted that Article 3A of the Institute of International Law's Zagreb Resolution[22] specifically foresees and deals with this possibility.

Finally, it should be noted that various UN forces have many different mandates. One can distinguish between peace-keeping (the maintenance of a "peace" or at least an agreed cease-fire), peace-making (the imposition by force of a cease-fire on warring entities, whether these be those of different countries or of governmental and irregular forces within a country), peace-building (the reconstruction of a peaceful society in place of a previous war-torn one)[23] and, perhaps, solely humanitarian tasks (those merely assisting other UN operations, such as UNHCR or UNICEF, or humanitarian NGOs in delivering and distributing food, medicine, and other humanitarian aid). A force may be created with a particular mandate and later have others imposed on it by the establishing organ. Though normally one distinguishes between Chapter VI½ and Chapter VII mandates, in practice this distinction may turn out to be rather artificial,[24] the important factor being the amount of force that is actually required by and available to the components of the operation to carry out their assignment.[25]

Thus, it is problematic to try to distinguish the status under IHL of a particular UN military operation, whether based on its name, its initial or even its current mandate, or its establishment under different provisions of the UN Charter. Similarly, in light of how the conflict in Yugoslavia changed from an internal one within the SFRY to an international one as various constituent Republics gained *de facto* and later recognized *de jure* independence, and to some extent the similar developments within Bosnia itself, any conclusions as to the status or responsibilities of a UN force under IHL depending on whether a conflict is a civil or an international one is likely to lead to confusion and uncertainty.[26] Probably the only useful criterion is whether or not a force is actually engaged in combat.[27]

Application of IHL to UN Forces

Multilateral Treaties

The United Nations is not a party to any of the multilateral treaties in which the principles and rules of IHL are expressed. Although for some time the

ICRC pressed the organization to become a party to the 1949 Geneva Conventions, especially to Convention IV Relative to the Protection of Civilian Persons in Time of War,[28] the United Nations raised two basic objections:[29] (i) although intergovernmental organizations can become parties to treaties with States,[30] including multilateral ones, the 1949 Geneva Conventions were only designed, as appears from their final clauses, for participation by States; and (ii) numerous provisions, especially of Convention IV, could only apply to States, which can exercise full governmental functions, such as the arrest, prosecution, trial and imprisonment of offenders against the Convention—which the United Nations is not equipped to do.[31] Moreover, it was considered somewhat unseemly to suggest that the United Nations might be "a party" to a military conflict. Finally, the United Nations has pointed out that all the States that contribute military units to a UN operation are in any event bound by the principal IHL treaties, as well as by customary IHL, and the obligations of these units thereunder are not diminished by the fact that they are in UN service.

Using similar arguments, the United Nations also resisted making any general declaration of acceptance of any or all such treaties. When it was suggested that the organization might in such a declaration indicate that its acceptance does not apply to parts of the treaties that are inapplicable to anyone except a sovereign State, the UN objected that such a selective acceptance might actually endanger or weaken the integrity of the instruments in question. Instead, it had (as recalled below) in many instances undertaken to observe the "principles and spirit," or more lately the "principles and rules," of these conventions.[32] Outside observers considered this formulation inadequate, preferring instead an undertaking to apply the instruments *"mutatis mutandis."* The organization was unwilling to go that far.[33]

There have been a few instances in which the United Nations has, in effect, acted as at least a temporary territorial sovereign, but fortunately in these instances no combat of any sort took place that would have raised obligations under IHL. The first of these situations arose when the organization facilitated the transfer of West New Guinea from The Netherlands to Indonesia (October 1962 to April 1963), for which purpose it established the United Nations Security Force in West New Guinea (West Irian) (UNSF).[34] In the case of Namibia, although the General Assembly had invalidated South Africa's League of Nations mandate over South-West Africa (Namibia), the actual arrangements by the Security Council for the establishment of the United Nations Transition Assistance Group (UNTAG)[35] were such that the Council accepted the continuation of *de facto* South African control over the territory, to be exercised under UNTAG supervision until the attainment of independence—thus no

question of the UN exercising sovereign authority arose. Although the establishment of the United Nations Operation in Somalia (UNOSOM I & II)[36] was on the basis that no effective government existed for the country, the mandates assigned to UNOSOM did not contemplate it exercising genuine governmental authority. As part of the resolution of the Croatia/Serbia conflict, the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) administered the indicated areas in Croatia (formerly the Eastern Slavonia UNPA) from 1996 to 1998.[37] In 1999 the United Nations established "an international civil presence in Kosovo," in effect in a condominium with NATO, which is charged with establishing an "international security presence" there,[38] as well as the United Nations Transitional Administration in East Timor (UNTAET), which is "empowered to exercise all legislative and executive authority, including the administration of justice."[39]

In spite of the UN's resistance to accepting the Geneva and other IHL treaties by participation or a general declaration, the organization has, as discussed below, recognized their binding nature in respect of particular operations, both by means of the regulations issued for them and by the bilateral agreements concluded with host States and with troop-contributing States.

International Customary Law

The United Nations has never denied that its military operations are subject to customary IHL or that the substance of most of the significant IHL treaties has passed into customary law. Although questions might surface about the customary law character of those parts of the Protocols I and II to the 1949 Geneva Conventions that had not already had that character before their adoption, such doubts do not appear to have been raised by the United Nations itself.

In the mid-1960s (evidently in wake of the Congo operation)[39] a number of semi-official suggestions were made for the United Nations to accept explicitly the applicability of IHL to its forces. These included resolutions adopted at the 20th International Conference of the Red Cross[40] and at the 52nd Conference of the International Law Association (ILA).[41] After studying this question from 1965, the private but highly respected Institute of International Law at its 55th session, held in Zagreb in 1971, adopted a resolution on "Conditions of the Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged,"[42] of which Article 2 reads as follows:

The humanitarian rules of law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

(a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;

(b) the rules contained in the Geneva Conventions of August 12, 1949;

(c) the rules which aim at protecting civilian personnel and property.

It might also be noted that the 1994 Convention on the Safety of United Nations and Associated Personnel, which was adopted by the General Assembly, explicitly excludes from its coverage "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations . . . to which the law of international armed conflict applies."[43] This implies that the Assembly appeared to consider that IHL applies to at least some Chapter VII operations.

Powers of the Security Council

The question might be asked whether the General Assembly or the Security Council could exempt the United Nations and its forces from any of the provisions of IHL.

As to the General Assembly, the answer would appear to be negative, for all it may do under Charter Articles 10 and 11 is make recommendations to member States. The Security Council can, of course, make decisions that are binding on members by Charter Article 25 and, for decisions made by the Council under Chapter VII, also by Article 48.1. This, then, brings Charter Article 103 into play, under which in case of conflict between the obligations of a member under the Charter and their obligations under any other international agreement, the former—and these certainly include binding decisions of the Council—prevail. Thus, it would seem that the Council could supersede merely treaty-based IHL obligations.

Whether and to what extent Article 103 also applies to international customary law is not clear from the wording of that provision, though in general it

would seem that it should apply at least by analogy. This, however, would probably not be true of any principles of IHL that are *jus cogens*,[44] as many commentators have asserted in general or with reference to particular rules. The difficulty is that, in the absence of any authoritative determination of what, if any, IHL principles have attained that unassailable status,[45] any limits on the powers of the Security Council in this regard are vague.

It should be noted that this discussion is entirely theoretical, for, so far, the Security Council has in no instance given any instruction to a UN operation, or authorization to a franchised one, that explicitly or implicitly contravened any IHL principle.[46]

The Practice of the United Nations Relating to the Applicability of IHL to Its Military Forces

Past and Recent Practice

Particular Regulations. The Regulations issued by the Secretary-General for the conduct of the early peace-keeping operations of the United Nations, i.e., UNEF I,[47] ONUC,[48] and UNFICYP,[49] contained the following provision:

> The Force shall observe *the principles and spirit* of the general international Conventions applicable to the conduct of military personnel. (Emphasis added.)

In a February 21, 1966, exchange of letters between the Secretary-General and the Canadian Permanent Representative to the United Nations, the former clarified this provision of the UNFICYP Regulations as follows:

> 11. The international Conventions referred to in this Regulation include, *inter alia*, the Geneva (Red Cross) Conventions of 12 August 1949 [United Nations, *Treaty Series*, Vol. 75, pp. 31, 85, 135, and 287][50] to which your Government is a party and the UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict, signed at the Hague on 14 May 1954 [United Nations, *Treaty Series*, Vol. 249, p. 215].[51] In this connexion, and particularly with respect to the humanitarian provisions of these Conventions, it is requested that the Governments of the participating States ensure that the members of their contingents serving with the Force be fully acquainted with the obligations arising under these Conventions and that appropriate steps be taken to ensure their enforcement."[52] (The original footnotes are reproduced within the brackets.)

However, such regulations have not been issued for later UN forces or operations, and thus, until the just-issued Secretary-General's Bulletin,[53] there were no explicit instructions to them in respect of IHL. However, as discussed below, for some time now pertinent provisions have been included in both SOFAs and the agreements with troop-contributing countries.

Status-of-Forces Agreements. Normally, whenever possible, the Secretary-General concludes a Status-of-Forces Agreement (SOFA) with each country in which a UN force is to operate, specifying in considerable detail the respective rights and obligations of the parties, particularly those regarding privileges and immunities. *Inter alia,* SOFAs exempt the members of the force from the criminal jurisdiction of the host State, leaving it for their national States to impose any disciplinary or criminal penalties in respect of at least the military members of the force, while providing for the possibility of the Secretary-General waiving the immunity of civilian members (e.g., UN staff).

Although no provision relating to IHL appeared in the Model SOFA communicated by the Secretary-General to the General Assembly in 1990,[54] in recent years the following provision has been included in these instruments:

> Without prejudice to the mandate of [acronym for the force—hereafter UNX] and its international status:
>
> (a) the United Nations shall ensure that UNX shall conduct its operations in [host State] with full respect for the principles and spirit of the general conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict.
>
> (b) the Government undertakes to treat at all times the military personnel of UNX with full respect for the principles and spirit of the general international conventions applicable to the treatment of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977.
>
> UNX and the Government shall therefore ensure that members of their respective military personnel are fully acquainted with the principles and spirit of the above-mentioned international instruments.[55]

Section 3 of the Secretary-General's Bulletin provides that in SOFAs the United Nations will ensure that its forces fully respect "the general conventions applicable to the conduct of military personnel" and that its forces be fully

acquainted with these principles and rules. It is further stated that the same obligations are to apply even in the absence of a SOFA.

Agreements with Troop-Contributing States. The Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations contains the following standard clause:

APPLICABILITY OF INTERNATIONAL CONVENTIONS

> 28. [The United Nations peace-keeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with the [United Nations peace-keeping operation] be fully acquainted with the principles and spirit of these Conventions."[56]

In practice, however, formal agreements along these lines are only rarely concluded with troop-contributing States.[57] Presumably, were the Organization to insist on the conclusion of such agreements, it might find it even more difficult to secure sufficient contingents for its several operations.

On October 29, 1998, Bernard Miyet, Under-Secretary-General for Peacekeeping, announced to the Fourth Committee of the General Assembly that troop-contributing States would be asked not to send civilian police or military observers younger than 25, and that troops in national contingents should preferably be 21 but no less than 18.[58] Aside from promoting thereby the principle that children under 18 should not participate in military forces, the minimum ages specified should help ensure that UN forces are constituted of persons mature enough to observe IHL.

On August 25, 1999, the Security Council adopted a resolution on children in armed conflict, which *inter alia* requests the Secretary-General to ensure that the personnel involved in UN peacemaking, peacekeeping and peace-building activities "have appropriate training on the protection, rights and welfare of children."[59]

General Regulation

Development. Already many years ago it was suggested, in particular by the ICRC, that the United Nations should issue a general regulation (or

incorporate a section in a general directive concerning the governance of UN military forces) setting out somewhat more detailed provisions concerning the observance of IHL, which would supplement the rather anodyne clauses recited above. The General Assembly's Special Committee on Peacekeeping Operations in April 1995 called on the Secretary-General "to complete the elaboration of a code of conduct for United Nations peace-keeping personnel, consistent with applicable international humanitarian law, so as to ensure the highest standards of performance and conduct."[60]

In June 1994 the ICRC arranged a Symposium on Humanitarian Action and Peace-keeping Operations, and as a follow-up it convened in March and October 1995 brief meetings of experts "to draw up a list of rules of international humanitarian law which were applicable to peace-keeping and peace-enforcement operations and which should be taught in training programmes for all troops supplied to the United Nations."[61] The ICRC's experts designed a relatively short list of rules excerpted from the basic instruments of IHL, going back as far as the 1868 St. Petersburg Declaration[62] but relying most heavily on the 1977 Protocol I to the 1949 Geneva Conventions.

This draft was conveyed to the Secretary-General and was considered within the Secretariat for a number of years. This lengthy dwell time resulted from several factors, including the diminished urgency due to the recent reduction in the number of UN operations in which military personnel are used for any except rather modest protective functions. In this context, the extensive references to combat operations and their consequences, such as the taking of prisoners and the custody of enemy wounded, and the need to protect civilians both in combat and in occupied territory, seemed to give a misleading impression of the scope and nature of UN military operations, especially the current ones. One can also imagine that at least some of the troop-contributing States would have expressed unease concerning the use of extracts from carefully negotiated treaties, in which particular rules are separated from the precisely worded restrictions and limitations in which they were originally embedded, and the heavy reliance on Protocol I, which has not yet gained the adherence of many of the principal troop contributors (though the particular provisions relied on are presumably not the ones these States find objectionable in the Protocol). Thus, it could not have been easy to find a middle ground between, on the one hand, the former general references to the principal conventions and, on the other, an unconditional acceptance of these instruments, by picking and choosing as especially binding only the most significant provisions.

Although the General Assembly's Special Committee on Peacekeeping Operations, while continuing to urge the completion of this project, also expressed

the view that it itself be consulted thereon,[63] the Secretary-General ultimately held no formal consultations with the Committee or with any other intergovernmental body, but rather informally circulated a draft of the Bulletin to members of the Committee and took into account certain of their suggestions. The Bulletin,[64] whose substantive provisions apparently depart only slightly from the 1995 ICRC experts' draft, was promulgated by the Secretary-General on August 6, 1999, on his own authority.

Provisions. The Secretary-General's Bulletin consists of an introductory paragraph followed by ten Sections, many divided into several paragraphs. Sections 1–4 and 10 deal with essentially formal matters, while Sections 5–9 set out the substantive provisions.

Section 1, on "Field of application," specifies in paragraph 1.1 that the Bulletin applies to those situations when UN forces are engaged in armed conflict, whether in enforcement actions or as peace-keepers authorized to use force in self-defence; paragraph 1.2 states that the promulgation of the Bulletin does not affect the protection afforded to members of UN peacekeeping operations by the 1994 Convention.[65] Section 2, "Application of national law," merely states that the provisions of the Bulletin are not intended to constitute an exhaustive catalogue of IHL and that they are not intended to prejudice the full application of IHL, as well as of applicable national laws, to national contingents. The provisions of Section 3, "Status-of-forces agreement," were discussed above.[66] Section 4, "Violations of international humanitarian law," reaffirms that such violations are to be prosecuted in national courts[67]—though, presumably, this would not exclude the jurisdiction of the nascent International Criminal Court or of either of the existing War Crimes Tribunals (ICTY and ICTR) in applicable cases. Section 10, "Entry into force," establishes that date as August 12, 1999, the 50th anniversary of the Geneva Conventions.

The provisions of Section 5, "Protection of the civilian population," Section 6, "Means and methods of combat," Section 7, "Treatment of civilians and persons *hors de combat*," Section 8, "Treatment of detained persons," and Section 9, "Protection of the wounded, the sick, and medical and relief personnel," are evidently adapted largely from the 1907 Hague Conventions, the 1949 Geneva Conventions, and especially from the 1977 Protocol I thereto. As the specific sources are not indicated in the Bulletin, an attempt to do so has been made in Appendix II, which indicates what the apparent principal source of each provision of the Bulletin is and what other parts of the codified IHL, and even some other provisions of international law, appear relevant. From that table it appears that for the most part the paragraphs of Sections 5, 6 and 7 are precise

paraphrases of the indicated provisions of Protocol I, and those in Section 9 of Geneva Convention I, generally merely substituting "The United Nations force" for "The Parties to the conflict" or for the impersonal passive mode. On the other hand, the sub-paragraphs in Section 8 rely more indirectly on Geneva Convention III.

Potential Questions. The Secretary-General issued his Bulletin on his own authority, deriving from his positions as "chief administrative officer" of the United Nations[68]and *de facto* Commander-in-Chief of UN Blue Helmet operations. In doing so, he was also responding to the 1995 call of the General Assembly's Special Committee on Peacekeeping Operations[69]—though not to its recent request that it be consulted in the process.[70]

Incidentally, even though the Special Committee in this pronouncement referred to "guidelines," which suggests a non-binding set of norms, its 1995 report had referred to a "code of conduct" and the actual Bulletin is drafted in that sense. It should be noted that the operative verbs in Sections 5–9 are all "shall," "shall not," "is prohibited," and similar expressions, thereby indicating binding obligations or prohibitions. There is no doubt that as Commander-in-Chief, the Secretary-General is authorized to express such commands and that if any troop-contributing State should object to such rules, it may not cause its troops to defy or disregard the Bulletin but can only withdraw them from UN operations.

Although the Secretary-General had implicit authority to promulgate the Bulletin, this is not the only way in which it could have been issued and given legal force. Either the General Assembly or the Security Council could have promulgated such a code and, indeed, if either should now do so, such code would, at least as far as it specified, supersede that of the Secretary-General. Equally, it would be possible for either the Assembly or the Council to nullify the new Bulletin,[71] but the Secretary-General must have calculated both that this is most unlikely to happen and that the likelihood of either of those bodies reaching an early agreement on any code of their own as also being minimal.

It is also clear that by its terms the Bulletin only applies to "United Nations forces conducting operations under United Nations command and control."[72] It thus does not purport to apply to operations merely authorized by the Security Council (such as those described earlier). Nor could the Secretary-General have issued any code or even guidelines in respect of such operations, which are not under his command; at most he can suggest to the Council that some such rules be issued.[73] Only the Security Council could, as a condition for authorizing any military operation to be carried out by States or by regional organizations, whether under Charter Article 42, 51, or 53, make it a condition that

these be carried out in compliance with general or specific provisions of IHL, such as those set out in the Bulletin, applied *mutatis mutandis*.

It should be noted that even though paragraph 1.2 of the Bulletin refers to the 1994 "Safety" Convention, and that treaty refers to the applicability of IHL to certain UN operations,[74] these two instruments do not fit together seamlessly. The Convention excludes from its coverage Chapter VII operations "in which any of the personnel are engaged as combatants against organized armed forces," while the Bulletin applies to all situations (that is, not only Chapter VII operations or those in which the opponents are organized armed forces) of armed conflict when UN forces are engaged therein as active combatants. Thus, there may be situations in which both the Bulletin and the Convention would seem to apply (e.g., self-defensive combat in Chapter VI½ operations, or Chapter VII ones against unorganized militias)—but there is no reason to fear that this would lead to any practical difficulties.

As to the substantive provisions of the Bulletin, it might be remarked that in a few respects these do not reflect the most recent developments—presumably because they were based on a draft prepared by ICRC experts in 1995. One of these is the failure to refer, in the recitation in the last sentence of paragraph 6.2, which is evidently based on the original three protocols to the 1980 Inhumane Weapons Convention,[75] to the blinding laser weapons prohibited by the 1995 Protocol IV to the Convention.[76] Of course, it should not be difficult to correct any oversights or to make other desired changes in the Bulletin, as the Secretary-General can issue addenda, amendments or revisions at any time.

Special Protection of UN Forces

In considering the applicability of IHL to UN forces, account should also be taken of several recent treaties by which the States parties are to accord special protection to these forces, as well as to other related UN operations and personnel and to those of other intergovernmental and even non-governmental organizations. In this connection, it should be noted that the principal IHL treaties, in particular 1949 Geneva Convention IV and 1977 Protocol I, do contain provisions protecting humanitarian activities carried out by organizations of a non-military character,[77] which might apply to UN operations such as those of UNHCR, UNICEF and the World Food Programme, but not to any Blue Helmet force.

The first protective provision referring directly to UN forces appeared in the 1980 Mines Protocol[78] to the 1980 Inhumane Weapons Convention,[79] in which Article 8, "Protection of United Nations forces and missions from the

effects of minefields, mines and booby-traps," deals in paragraph 1 with "a United Nations force or mission [that] performs functions of a peacekeeping, observation or similar function" and in paragraph 2 with "a United Nations fact-finding mission." This Protocol was considerably expanded and strengthened, also in respect of the above-mentioned provisions, by an amendment adopted on May 3, 1996, at a Review Conference for the Convention.[80]

On December 9, 1994, the General Assembly, in response to ever more frequent attacks on United Nations peace-keeping and similar forces and operations and the significant toll these were taking in deaths and injuries, adopted the Convention on the Safety of United Nations and Auxiliary Personnel.[81] As already pointed out, Article 2 of the Convention excludes its application to Chapter VII operations. Paragraph 1.2 of the new Bulletin explicitly provides that its promulgation does not "affect the protected status of members of peacekeeping operations" under the Convention, "as long as they are entitled to the protection given to civilians under the international law of armed conflict."

Finally, the Rome Statute of the International Criminal Court[82] includes in the definition of "war crimes" that are to fall within the jurisdiction of the Court:

> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

whether these take place in an "international armed conflict" or in an "armed conflict not of an international character."[83] Here again, UN forces engaged in actual combat operations would seem to be excluded—though it is not clear to what extent this depends on their establishment under Charter Chapter VI½ or VII.

Positive Obligations of UN Forces

In connection with some UN operations, especially those with very limited mandates, the question has arisen to what extent their personnel are required or even allowed to intervene in violations of IHL that they can actually observe or of which they are otherwise reliably informed.

UN forces are generally restricted to operating within their mandates; this is especially true when these mandates, as in all Chapter VI½ situations, depend on the consent of all parties to a conflict. Furthermore, the forces are in

practical terms restricted by their small size and feeble armaments, which are usually quite limited in Chapter VI½ and even in Chapter VII operations. The conditions under which a given force may be allowed to use force in situations other than strict self-defense, that is, in defense of other persons, may be covered in its rules of engagement; currently, consideration is being given to drafting a set of model rules of engagement for UN peace-keeping operations in which instructions on this point might be included. The sentiment has been expressed that UN forces should be given mandates, and presumably appropriate arms, to prevent violations of IHL of which they become aware.[84]

Finally it should be noted that whenever the United Nations is in *de facto,* and especially if in *de jure,* control of any territory, then it may have a legal as well as a moral obligation to prevent, as far as it is able, violations of IHL in such territory.

Cooperation with International Tribunals

With the establishment by the Security Council of the two *ad hoc* War Crimes Tribunals, the International Criminal Tribunal for the Former Yugoslavia[85] and the International Criminal Tribunal for Rwanda,[86] and the possible creation of additional ones at least before the entry into force of the Statute of the International Criminal Court, another set of problems has arisen for certain UN forces and for related UN civilian operations—to what extent are these forces and operations obliged to cooperate with tribunals, in particular by making available knowledgeable persons as witnesses, as well as relevant documentation?

Liminally, it is possible to take two conceptually different approaches to these questions. When a question arises as to cooperation between a Security Council-established UN force and a Council-established tribunal, it could be held that it is one that ultimately the Council must determine. Thus, if the Secretary-General, in his capacity as the Commander-in-Chief of a UN force, determines that certain cooperation demanded by a tribunal would be inimical to some aspect of the operation of the force, he or the tribunal would refer this conflict to the Council and secure its determination whether in a given instance (or a class of instances) one or the other of these subsidiary organs of the Council should prevail.

Alternatively—and this is the approach that has actually been adopted—the Secretary-General can, in light of the complete judicial independence of the tribunals, treat them essentially at arms length and apply by analogy the relevant provisions of the Convention on the Privileges and

Immunities of the United Nations, which in respect of the courts and other authorities of States parties (but not of international tribunals) provides that:

> Privileges and immunities are granted to [officials] [experts] in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any [official] [expert] in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.[87]

Applying this principle to the military members of UN forces and to civilian members of these and other UN operations, such persons are to be made available to a UN tribunal when this can be done without prejudice to the interests of these forces and operations. In addition, the Secretary-General has decided that it is also his duty to act equitably as between the tribunals' prosecutor and the defendants, so that assistance rendered to one side (e.g., in interviewing potential witnesses) must equally be rendered to the other. That is, the Secretary-General will, in appropriate cases, waive any conceptual immunity, and both authorize and direct cooperation. Presumably, should a tribunal not be satisfied with the Secretary-General's cooperation, it could complain to the Security Council.

In the case of a military member of a force contingent provided by a UN member State, the latter must evidently give its consent, whether or not the soldier is one still in active service with the United Nations or has returned to his home country. These States are under an obligation to cooperate with the tribunals pursuant to their respective Statutes, which are binding on member States under Charter Articles 25 and 48.1.[88] Nevertheless, to the extent that a UN tribunal requires information or testimony from such personnel that was acquired while in UN service, the Secretary-General's authorization is also required.

Possible objections to full cooperation with a tribunal's demands can derive from several considerations: safety of the potential witness (e.g., if s/he continues to serve in an area controlled by associates of an accused); security and effectiveness of the mission; and the confidentiality of the internal affairs of the United Nations (e.g., the process by which an operational decision was reached).

In practice, the United Nations has allowed military and civilian personnel to be interviewed by the prosecutor and/or by defense counsel and to testify before the tribunals. For example, General Dallaire, Commander of the UN Observer Mission Uganda-Rwanda (UNOMUR), who was a Canadian officer seconded to the United Nations and thus served as a UN staff member, was first permitted to be interviewed by representatives of both the prosecutor and

of defense counsel for Jean-Paul Akayesu. Later, the Secretary-General authorized him to testify before the Rwanda Tribunal on matters relevant to the charges against Akayesu, but not on matters internal to the United Nations or UNOMUR. In giving his testimony, the General was accompanied by a member of the UN Office of Legal Affairs, who advised the Tribunal as to the meaning of the restriction in the waiver.

Similar considerations apply to making available documents and files to the tribunals, their prosecutor, and defense counsel. An additional consideration in respect of requests for documents is that these must be reasonable in terms of the quantity of files involved, especially if a request evidently amounts to a "fishing expedition."

As to the arrest of persons indicted by a UN tribunal, any obligation of a UN force to do so would depend in the first instance on its mandate (established by the Security Council) and in practice on the realistic possibility of accomplishing the task in light of, *inter alia*, the actual military resources available.

In due course, arrangements will have to be made with the International Criminal Court for the provision of information and documents and for dealing with requests for the release of information made available in confidence by the United Nations to a State and then requested from the latter by the Court.[89] Presumably such arrangements will reflect the UN's experience in respect of its own tribunals.

Reflections and Proposals

The promulgation by the Secretary-General of his Bulletin on the observance by United Nations forces of international humanitarian law would seem to lay to rest any possible doubts as to both the obligation and the readiness of these forces to comply with IHL in all appropriate situations, that is, when such forces are actually engaged in combat.

The long reluctance of the organization to state so generally and unequivocally, and any lingering national objections now that it has done so, probably reflect the still prevailing ambivalence about the deployment of such forces. This ambivalence, in turn, reflects several considerations: concern for State sovereignty threatened by ever-increasing encroachments of international organizations; an essentially pacifist inclination that even in the face of major provocations and great evils, the United Nations should perform its tasks through diplomacy rather than military force; the somewhat mixed record of the many operations hastily mounted in the early 1990s after the end of the Cold War and the resulting doubts about the ability of international organizations to

conduct military operations effectively; and finally, the mixed reactions some States may have about any given operation, arising from historical alliances and prejudices or genuinely different interests. In spite of this ambivalence, it should be recognized that as the world community is at present constituted, there will be occasions, whether many or few, when the use of collective military force will be necessary—just as was foreseen half a century ago by the founders of the United Nations. What is important is that such use of force always reflect the collective will of the world community, and at present such collective will can be expressed only through the competent organs of the United Nations.

What is equally important is that when military force is used by the world community, it should invariably be subject to the civilizing restraints of international humanitarian law, as expressed in relevant customary international law and especially as set out in numerous universal treaty instruments—including those that were negotiated and adopted only recently by great majorities in international fora, even if these have not yet been formally ratified by all States. In other words, if and when the United Nations—always reluctantly—sallies forth to do battle, it should only do so subject to all restraints that reflect the most advanced humanitarian principles on which a large measure of—but not necessarily universal—agreement has been reached. The Secretary-General's Bulletin is well designed to help to ensure that this be so.

Although there can be no doubt that the Secretary-General had the authority to promulgate the Bulletin, it would certainly acquire greater gravitas and receive more respect from States and even from unofficial armed forces if it were explicitly endorsed by the competent political organs, ideally by the General Assembly acting on a recommendation of the Security Council. Furthermore, the Council could and should provide that the fundamental principles and rules set out in the Bulletin—or at least a general statement about the need to observe IHL—should also apply to all military operations authorized by the Council, whether as a delegated or franchised military operation under Charter Article 42, or in self-defense under Article 51, or carried out by a regional organization under Article 53.1

Now that the extensive spadework to articulate a set of IHL principles and rules has been accomplished, it is important to see to their full implementation. In particular, the undertaking set out in Section 3 of the Bulletin, that the members of all UN forces will be made fully acquainted with the principles and rules of the general conventions applicable to the conduct of military personnel, should be carried out—which will evidently require the cooperation of actual and potential troop-contributing States. The result should be to raise the standards by which these forces operate so as to leave no doubt that in all

instances not only the letter but the spirit of international humanitarian law is being scrupulously observed. Even in the sorry business of war, the United Nations should establish the highest legal standard and set the best example.

Notes

1. Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law" (ST/SGB/1999/13 of 6 August 1999) [hereinafter Secretary-General's Bulletin or SGB], 38 ILM 1656 (1999). The text is set out in Appendix I hereto.

2. The (First) United Nations Emergency Force (UNEF I) (1956–1967). This was not, however, the first of what is now known as the "Blue-Helmet" operations, as it was preceded by two observation groups: the UN Truce Supervision Organization (UNTSO), established in 1948 and still operating in the Middle East, and the UN Military Observer Group in India and Pakistan (UNMOGIP), established in 1949 and also still in operation. For a description of all the 41 operations established before June 1996, see THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING (UN/DPI, Third Edition, 1996): for UNEF I, Chapter 3; for UNTSO, Chapter 2; for UNMOGIP, Chapter 8.

3. United Nations Operation in the Congo (ONUC) (1960–1964), see *id.* Chapter 10.

4. United Nations Transition Assistance Group (UNTAG) (1989–1990), see *id.* Chapter 11.

5. This question has been extensively explored in the literature. See, in particular: FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR (1966); Rudolf Bindschedler, *Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies*, in 54:II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1971); Yves Sandoz, *L'application du droit humanitaire par les forces armées de l'organisation des Nations Unies*, in 60 REVUE INTERNATIONAL DE LA CROIX-ROUGE 274 (1978); Dietrich Schindler, *United Nations Forces and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET (Ed. Christopher Swinarski, ICRC, 1984); HORST RISSE, DER EINSATZ MILITÄRISCHER KRÄFTE DURCH DIE VEREINTEN NATIONEN UND DAS KRIEGSVÖLKERRECHT (1988); Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 39 (Ed. Umesh Palwankar, 1994); Luigi Condorelli, *Le statut des forces de l'ONU et le droit international humanitaire*, 1995 RIVISTA DE DIRITTO INTERNAZIONALE 881; Hilaire McCoubrey & Nigel D. White, *The Laws of Armed Conflict and UN Forces*, Chapter 8 of their THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS (Dartmouth, 1996); Daphna Shraga, *The United Nations as an Actor Bound by International Humanitarian Law*, in 5:2 INTERNATIONAL PEACEKEEPING 64 (summer 1998) (which constitutes a revision of a paper with the same title included in the Condorelli Colloque (next sentence *infra*)). An especially important set of discussions on *The United Nations involvement in armed conflicts and international humanitarian law* by, *inter alia*, Zacklin, Sandoz, Shraga, Jean de Courton, Claude Emanuelli, Françoise Hampton, Theodor Meron and Condorelli, is included in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW (Actes du Colloque International a l'occasion du cinquantième anniversaire de l'ONU, sous la direction de Luigi Condorelli (Geneva 19–21 October 1995, Editions Pedone) [herein "Condorelli Colloque"]. See also the brief discussion in which this author participated during the ASIL panel "From Keeping the Peace to Making It: The Changing Role of UN Security Forces," in 88 ASIL PROCEEDINGS 328, at 349–350 (1994). The

subject is also mentioned in many studies of UN peace-keeping operations, of which a very complete bibliography was compiled by Michael Bothe, *Peace-Keeping*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 565–72 (Ed. Bruno Simma, 1994), as well as in other sources cited in that study.

6. As explained below, this name derives from the blue headgear that is added to the uniforms of members of national contingents when these become parts of a UN military force.

7. Notably UNEF I, by A/RES/998 (ES-I) of 4 November 1956, and the continuation of ONUC after the Security Council became deadlocked, by A/RES/1474 (ES-IV) of 20 September 1960. When the legality of these General Assembly actions was challenged by certain member States, which as a consequence refused to pay their corresponding assessments (thus throwing the organization into its first financial crisis), the Assembly queried the World Court, which responded in the *Certain Expenses* Advisory Opinion (1962 I.C.J. REPORTS 151) that the Assembly had the requisite authority.

8. Chapter VI of the Charter is titled "Pacific Settlement of Disputes," and although peace-keeping operations would seem to fall under that rubric, none of the specific articles in that chapter (Articles 33–38) contain any provision that can plainly be held to authorize the despatch of UN forces. On the other hand, Chapter VII, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," whose Article 42 does foresee such forces (but see *infra* note 9) requires an explicit finding by the Security Council of such a threat, breach or act, and findings of this nature are usually not made in connection with peace-keeping operations. Thus, the absolutely binding nature of Council actions under Article 48.1 of the Charter does not come into play (though the Article 25 undertaking of all UN members to accept and carry out decisions of the Council does apply), and peace-keeping operations are traditionally based on the consent of all parties to the dispute for the deployment of the force—as a consequence of which no fighting is expected and these forces are normally only lightly armed; their normal function is to interpose themselves between hostile forces that are bound by a cease-fire, armistice or truce to refrain from fighting, so that they can observe and report, or sometimes carry out or assist in carrying out humanitarian operations.

9. Thus, UNPROFOR in former Yugoslavia was originally established as a Chapter VI½ peace-keeping operation, but was a year later explicitly converted into a Chapter VII operation after a number of French peace-keepers were killed in a Croatian attack on Serb-occupied areas in the Kraina. See *infra* note 24.

10. It has, however, been argued that UN peace-making forces are not really established under Article 42, because in the absence of any Article 43 agreements under which UN members are to make available forces that can be called upon by the Council, all operations so far have had to rely on the entirely voluntary contribution of military units by a limited number of members. This can be countered by pointing out that under Article 48.1 all member States are obliged to comply with Chapter VII decisions of the Council, presumably including orders to provide military forces; in this view, Article 43 agreements would only be a convenience in implementing, but not a prerequisite for Article 42 operations.

11. This was particularly true of the Korean operation, which was authorized to use the UN flag; Security Council Resolution 84 (1950) of 7 July 1950, para. 5.

12. See *infra* notes 85 and 86.

13. See this author's somewhat lengthier analysis of this question in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM OF THE KIEL INSTITUTE OF INTERNATIONAL LAW, March 23 to 25, 1994, 17, at 28–30 (Ed. Jost Delbrück, 1995).

14. It is possible to characterize the ECOWAS/ECOMOG operations in Liberia [indirectly endorsed by SC Presidential Statements of 22 July 1991 (S/22133) and 7 May 1992 (S/23886), *et seq.*] and later in Sierra Leone [indirectly endorsed by SC Presidential Statements of 11 July and 6 August 1997 (S/PRST/1997/36 and 42), *et seq.*] as falling under this rubric.

15. In effect, all it has required are occasional reports; see for Korea, Security Council Resolution 84 (1950) of 7 July 1950, para. 6; and, for Iraq, Security Council Resolution 678 (1990) of 29 November 1990, para. 4. See also paragraph 18 of SC Resolution 794 (1992) in connection with the Somalia operation referred to *infra* note 36.

16. By virtue of Charter Article 100.1–2. However, Force Commanders seconded from major powers have perhaps not always maintained the required distance from their national authorities.

17. This principle is reaffirmed, in respect of violations of IHL, by Section 4 of the SGB, *supra* note 1.

18. As mentioned above, Charter Articles 43 and 45, under which member States are to hold available and in case of need provide to the United Nations specially designated military units, have never yet been implemented. Consequently, each national unit supplied to a UN force is provided on an *ad hoc* basis, usually under a standard agreement between the UN and the government concerned, and can be withdrawn by the government at any time (though normally this is done only at the end of a prescribed rotation period, usually six months).

19. This is in effect reaffirmed by Section 2 of the SGB, *supra* note 1.

20. Actually, there is one minor exception: The force that protects the distribution of food to civilians (mostly Kurds) in northern Iraq consists, for complex political reasons, of UN "Guards," i.e., of persons who normally either serve as UN-employed guards at some UN headquarters or other office, but for the most part of persons specially and directly recruited by the UN for this assignment; these are therefore UN staff.

21. Charter Article 101, which deals with the employment and organization of UN staff, is not necessarily limited to civilians, though most likely only such type of staff was foreseen by the drafters of the Charter. See also *supra* note 20.

22. See *infra* note 42 and the related text.

23. These distinctions and terms were largely established by Secretary-General Boutros Boutros-Ghali's report on *An Agenda for Peace*, UN Doc. A/47/277-S/24111 (1992), paras. 20 *et seq.*, *reproduced* in AN AGENDA FOR PEACE 1995, UN Publication Sales No.E.95.I.15 (2nd edition, 1995), at 45 *et seq.*

24. Thus, for example, the UN Protection Force (UNPROFOR) in the former Yugoslavia, was initially established as a Chapter VI½ peace-keeping force, principally to demilitarize and protect the Serb-occupied areas of Croatia (thus creating the UN Protected Areas, or UNPAs); soon thereafter it was directed to demilitarize and operate the Sarajevo airport in Bosnia-Herzegovina and later also to escort humanitarian convoys (principally those of UNHCR) in Bosnia, to occupy the Prevlaka peninsula in Croatia opposite the FRY naval base of Kotor, and to deploy a small preventive force in Macedonia. Early in 1992, after Croatian attacks against an UNPA, the Security Council, in extending the period of the UNPROFOR mandate, did so under Chapter VII for the entire operation (though it later withdrew that designation from the preventive force in Macedonia); other resolutions mandating expansions in respect of Bosnia followed (such as the establishment of "safe areas"), and early in 1995 UNPROFOR was, at the demand of Croatia, divided into three separate operations for the three countries in which it had been functioning. See Chapter 24 of THE BLUE HELMETS, *supra* note 2.

25. See, however, the distinction as to Chapter VII operations referred to below.

26. It should be noted that in some of its judgements the International Criminal Tribunal for the former Yugoslavia (ICTY), after hearing months of testimony, was unable to come to a unanimous verdict as to whether various phases of the conflict in Bosnia and Herzegovina were civil or international. See Prosecutor v. Duško Tadić a/k/a "Dule" (ICTY case No. IT-94-1-A), Part. VI.B of the 7 May 1997 Judgment of the ICTY Trial Chamber dismissing those counts of the indictment that related to war crimes on the ground that the Bosnian conflict was not an international one, and the Dissent on that point by the Presiding Judge (later President) Gabrielle Kirk McDonald [36 ILM 908 (1997), respectively at 924 and at 970]; reversed by the 15 July 1999 Judgment of the Appeals Chamber [38 ILM 1518 (1999)], paras. 146–162).

27. This, in effect, is the criterion that had been specified by Article 2 of the Institute for International Law's Zagreb Resolution, quoted *infra*, text by note 42, and, more importantly, is the criterion now set out in para. 1.1 of the SGB, *supra* note 1.

28. 75 UNTS 287, 6 UST 3516, TIAS 3365, 50 AJIL 724 (1956).

29. See Legal Opinion issued by the UN Office of Legal Affairs to the Under-Secretary- General for Special Political Affairs on 15 June 1972, 1972 UN JURIDICAL YEARBOOK 153. That opinion cites the position taken by the United Nations at the second (1972) session of the ICRC-convened Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (a survey of the Conference appears in UN Doc. A/8781, and para. 218 refers to this issue)—a precursor to the 1974–1977 Diplomatic Conference at which the two 1977 Protocols were negotiated.

30. See in particular the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, UN Doc. A/CONF.129/15 (not yet in force), which not only codifies the law concerning the participation of IGOs in international treaties but also foresees, in its final clauses, the participation of the United Nations and of certain other organizations in that Convention.

31. It might be pointed out that with the establishment of its two war crimes tribunals and the provisions therein for the imprisonment, in the custody of volunteer member States, of those convicted by these courts, the United Nations has recently in effect demonstrated that it has ways of overcoming some of these obstacles.

32. See *infra* text by notes 49, 55 and 56.

33. See, in particular, the discussions by Shraga, Meron and Condorelli in the Condorelli Colloque, *supra* note 5.

34. See Chapter 29 of THE BLUE HELMETS, *supra* note 2.

35. *Id.*, Chapter 11.

36. *Id.*, Chapter 14.

37. *Id.*, Chapter 25.B.

38. S/RES/1244 (1999) of 10 June 1999, especially paras. 9 and 10.

39. S/RES/1272 (1999) of 25 October 1999, para. 1.

40. Resolution adopted in Vienna in 1965 and reproduced in HANDBOOK OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT (13th ed., 1994) 748.

41. See Report of the Fifty-Second [ILA] Conference held at Helsinki (14–20 August 1966), Resolution IV (ii) on "International Medical Law: Application of the Geneva and certain other Conventions, etc.," at xiv–xv.

42. 54:II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 449 (authentic French), 465 (English translation); 66 AJIL 465 (1972); with commentary, in DOCUMENTS ON THE LAWS OF WAR 371 (Eds. Adam Roberts & Richard Guelff, 1982) (a volume that contains the texts of almost all the IHL texts cited in this study; this text has, however, been omitted from the Third Edition (2000).).

43. See *infra* note 81, Article 2.2.

44. See the brief discussion of this point by Thiébaut Flory, in section III of his study of Charter Article 103 in LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 1387–1388 (Eds. Pierre Cot & Alain Pellet, 1985). This question is examined with special reference to IHL by Christian Dominice in the Condorelli Colloque (*supra* note 5) at 175, who concludes that even the Security Council could not overrule *jus cogens* principles of IHL.

45. Under Article 66(a) of the 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331), such a determination should normally be made by the International Court of Justice; the Court has never yet had occasion to do so, with respect to IHL or any other provision of international law.

46. The question has, however, been raised in connection with economic sanctions imposed by the Security Council under Charter Article 41, especially in respect of Iraq. See this author's discussion of this question in *The Law of Economic Sanctions*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM, 71 International Law Studies 473–474 (Eds. Michael Schmitt & Leslie Green, Naval War College, 1998). This point was also briefly mentioned by Dominice at the end of the study referred to in note 44 *supra*.

47. UN Doc. ST/SGB/UNEF/1 of 20 February 1957, Article 44.

48. UN Doc. ST/SGB/ONUC/1 of 15 July 1963, Article 43.

49. UN Doc. ST/SGB/UNFICYP/1 of 25 April 1964, Article 40, reproduced in 492 UNTS 57, at 148.

50. It should be noted that neither here, nor in any of the other regulations and agreements referred to in this section of the present study, does the UN explicitly refer to any of the 1907 Hague Conventions, such as Convention IV respecting the Laws and Customs of War on Land [205 CTS 227, 1 Bevans 631, TS 539, 2 AJIL 90 (1908)], even though the ICRC appears to consider that the 1949 Geneva Convention IV is merely supplementary to the earlier treaties; see both the Preface and the Foreword to INDEX OF INTERNATIONAL HUMANITARIAN LAW (Eds. Waldemar A. Solf & J. Ashley Roach, ICRC, 1987). On the other hand, as appears from Appendix II hereto, the Regulations annexed to Hague Convention IV appear to be sources for at least some of the provisions of the SGB, *supra* note 1.

51. The reference to the 1954 UNESCO Convention presumably responds to a resolution adopted by the 1954 Hague Intergovernmental Conference recommending that the UN ensure the application of the Convention by UN forces involved in military actions; see DOCUMENTS ON THE LAWS OF WAR, *supra* note 42, at 722 (Third Edition). Although no reference is made to the contemporaneously adopted [First] Protocol to the Convention, it might be considered as included in the UN's undertakings, as the citation to the UN TREATY SERIES is to the cover page that refers to the Final Act of the Hague Conference, as well as to both the Convention and the Protocol; evidently, no thought could then be given to the Second Protocol, adopted on 26 March 1999 [38 ILM 769 (1999)].

52. 555 UNTS 119, at 126, para. 11.

53. See *supra* note 1.

54. UN Doc. A/45/594 of 9 October 1990.

55. See, e.g., the Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR) of 5 November 1993 (1748 UNTS, Reg. No. I–30482), and the Agreement between the United Nations and the Government of the Republic of Croatia on the Status of the United Nations Confidence Restoration Operation in Croatia (UNCRO—the successor, in Croatia, of UNPROFOR) of 15 May 1995 (1864 UNTS, Reg. No. I-31771).

56. UN Doc. A/46/185 of 23 May 1991, para 28. It should be noted that in recent agreements the word "spirit" in the second and last lines of the quoted text has been replaced by "rules."

57. These agreements are to be distinguished from the Contribution Agreements between the United Nations and States Contributing Resources to United Nations Peace-keeping Operations—a model of which is set out in UN Doc. A/50/995 (1996), Annex—which are routinely concluded.

58. A/C.4/53/SR. 13, para. 21, and Press Release SG/SM/6777 - PKO/79 of 29 October 1998. The General Assembly's Special Committee on Peacekeeping Operations later complained that it had not been consulted as to this new policy (A/54/87 of 23 June 1999, para. 56).

59. S/RES/1261 (1999) of 25 August, 1999, para. 19. This requirement for training echoes the undertaking in Section 3 of the SGB (*supra* note 1) that the UN is to "ensure that members of the military personnel of [UN forces] are fully acquainted with the principles and rules of the [general conventions applicable to the conduct of military personnel]."

60. UN Doc. A/50/230 of 22 June 1995, para. 73.

61. Report by the ICRC on the first Meeting of Experts on the Applicability of International Humanitarian Law to United Nations Forces, Geneva, 6–8 March 1995 (July 1995).

62. 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight, 138 CTS 297 (Fr.); 1 AJIL Supplement 95 (1907), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 42, at 53 (Third Edition).

63. Most recently the Committee did so in its report on its meetings during 1999, A/54/87 of 23 June 1999, para. 82.

64. See *supra* note 1.

65. See *infra* note 81.

66. See *supra*, text following note 55.

67. See *supra*, text by note 17.

68. UN CHARTER, Article 97.

69. See *supra* note 60.

70. See *supra* note 63. The lack of consultations was deplored by numerous delegations in the debate on peacekeeping operations in the Fourth Committee at the 54th session of the General Assembly during October 1999 (A/C.4/54/SR.10-13), though only the Canadian representative faulted the Bulletin substantively, as containing "an unacceptable level of imprecision and ambiguity" (*id.*,/SR.11, para 2). It should be noted that the resolution that the General Assembly adopted consequent on this debate (A/RES/54/181 of 6 December 1999) does not refer to the Bulletin at all, thus neither criticizing the insufficient consultations nor endorsing the substance. The Special Committee is likely to add its own complaint on this score at its spring 2000 sessions—see *supra* note 58.

71. This would appear to follow from Article 98 of the UN Charter, and from the fact that, even if the Secretary-General's position as *de facto* Commander-in-Chief is not specified in the Charter, it follows from the circumstance that in establishing each military operation, the Council or the Assembly has specifically designated him as the one to implement it.

72. Introductory paragraph of the SGB, *supra* note 1.

73. Indeed, in a letter that the Secretary-General addressed to the President of the Security Council on 29 November 1992, in connection with a proposal to authorize an enforcement operation in Somalia to be undertaken by a group of member States, he suggested that one way by which the Council might exercise control over such a force would be to stipulate in the authorizing resolution that the "operation be conducted with full respect for the applicable rules of humanitarian law" (UN Doc. S/24868, at 5). However, the Council in authorizing the

operation [by Resolution 794 (1992) of 3 December 1992] did not include such a provision. See Chapter 14.B-C of THE BLUE HELMETS, *supra* note 2.

74. Article 20(a) of the Convention, *infra* note 81; see also Article 2.2 relating to the scope of coverage of the Convention.

75. See *infra* note 79.

76. UN Doc. CCW/CONF.I/16 (Part I), 35 ILM 1218 (1996).

77. See, e.g., Article 63 of Geneva Convention IV, *supra* note 28.

78. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) to the Inhumane Weapons Convention, *infra* note 79, 1342 UNTS 168, 19 ILM 1529 (1980).

79. Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1342 UNTS 137, 19 ILM 1523 (1980). It should be noted that the denunciation clause of the Convention (Article 9.2) contains a provision preventing the denunciation of a protocol from taking effect while a UN force protected by that protocol is continuing to perform its functions in the denouncing State.

80. UN Doc. CCW/CONF.I/16 (Part I), 35 ILM 1206 (1996).

81. General Assembly Resolution 49/59 of 9 December 1994, Annex, UNTS Reg. No. I-35457, 34 ILM 482 (1995). The Convention entered into force on 15 January 1999.

82. UN Doc. A/CONF.183/9 (1998), 37 ILM 998 (1998); a version of the Statute including the numerous corrections that had been circulated by the depositary on a non-objection basis has been issued by the ICC Preparatory Commission as document PCNICC/1999/INF.3. The Statute is not yet in force.

83. *Id.*, respectively Articles 8.2(b)(iii) and 8.2(e)(iii).

84. See, e.g., Meron in the Condorelli Colloque (*supra* note 5) at 444.

85. UN Doc. S/25704 of 3 May 1993, Annex, 32 ILM 1163 (1993), approved by Security Council Resolution 827 (1993) of 25 May 1993, 32 ILM 1203 (1993).

86. Security Council Resolution 955 (1994) of 8 November 1994, Annex, 33 ILM 1600 (1994).

87. 1 UNTS 15, 21 UST 1418, TIAS 6900, Section 20 in respect of "officials" and Section 23 in respect of "experts on mission for the United Nations."

88. See Article 29 of the Statute of the Yugoslav Tribunal (ICTY) (*supra* note 85) and Article 28 of the Statute of the Rwanda Tribunal (ICTR) (*supra* note 86).

89. See respectively Articles 87.6 and 73 of the ICC Statute, *supra* note 82.

Appendix I

United Nations
Secretariat

ST/SGB/1999/13

6 August 1999

Secretary-General's Bulletin

Observance by United Nations forces of international humanitarian law

The Secretary-General, for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control, promulgates the following:

Section 1

Field of application

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

Section 2

Application of national law

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.

Section 3

Status-of-forces agreement

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

Section 4

Violations of international humanitarian law

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.

Section 5

Protection of the civilian population

5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

5.2 Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

5.3 The United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.

5.4 In its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations. Military installations and equipment of

peacekeeping operations, as such, shall not be considered military objectives.

5.5 The United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

5.6 The United Nations force shall not engage in reprisals against civilians or civilian objects.

Section 6

Means and methods of combat

6.1 The right of the United Nations force to choose methods and means of combat is not unlimited.

6.2 The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is prohibited.

6.3 The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

6.4 The United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.

6.5 It is forbidden to order that there shall be no survivors

6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.

6.7 The United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies.

6.8 The United Nations force shall not make installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section.

Section 7

Treatment of civilians and persons *hors de combat*

7.1 Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground. They shall be accorded full respect for their person, honour and religious and other convictions.

7.2 The following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; reprisals; the taking of hostages; rape; enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement; and pillage.

7.3 Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.

7.4 Children shall be the object of special respect and shall be protected against any form of indecent assault.

Section 8

Treatment of detained persons

The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:

(a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;

(b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;

(c) They shall be entitled to receive food and clothing, hygiene and medical attention;

(d) They shall under no circumstances be subjected to any form of torture or ill-treatment;

(e) Women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women;

(f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;

(g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

Section 9

Protection of the wounded, the sick, and medical and relief personnel

9.1 Members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

9.2 Whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for and identification of the wounded, the sick and the dead left on the battlefield and allow for their collection, removal, exchange and transport.

9.3 The United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected, unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force.

9.4 The United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

9.5 The United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.

9.6 The United Nations force shall not engage in reprisals against the wounded, the sick or the personnel, establishments and equipment protected under this section.

9.7 The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited.

9.8 The United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. To this end, the force shall facilitate the work of the ICRC Central Tracing Agency.

9.9 The United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.

Section 10

Entry into force

The present bulletin shall enter into force on 12 August 1999.

(Signed) Kofi A. **Annan**
Secretary-General

Appendix II

SOURCES OF THE PROVISIONS OF THE SECRETARY-GENERAL'S BULLETIN IN IHL CONVENTIONS

Bulletin Paragraph	IHL Convention Provisions
5.1	P–I: A 48, (51)
5.2	P–I: A 51.3
5.3	P–I: A 57.2 (a) (ii)
5.4	P–I: A 58(b), (c)
5.5	P–I: A 51.4 (end), .5(b), 57.2 (iii)
5.6	P–I: A 51.6, 52.1
6.1	P–I: A 35.1; (H-IVR: A 22)
6.2	(1868 St. Petersb. Decl.; 1899 Hague Decls. 2, 3; 1925 Geneva Protocol; Inhumane Weapons Conv., Protocols I–III; Chemical Weapons Conv.; Oslo/Ottawa Landmines Conv.)
6.3	P–I: A 35.2, .3 (55)
6.4	P–I: A 35.2; (1968 St. Petersb. Decl.; H–IVR:A 23 (e))
6.5	P–I: A 40; P–II: A 4.1 (H–IVR: A 23 (d))
6.6	(H–IVR: A 27; H–IX A. 5; 1954 Hague Conv. Cult. Prop. P–I: A 53 (a); P–II: A 16)
6.7	P–I: A 54.2
6.8	P–I: A 56.1
6.9	P–I: A 53 (c), 54.4, 56.4
7.1	G–I/IV: A 3(1); P–I: A 75.1; (P–II: A 4.1)
7.2	G–I/IV: A 3(1); P–I: A 75.2; (P–II: A 4.2)
7.3	P–I: A 76.1; G–IV: A 27
7.4	P–I: A 77.1
8 (a)	(G–III: A 69, 70)
8 (b)	(G–III: A 22, 19)

8 (c)	(G–III: A 26–30)
8 (d)	(G–III: A 13, 17 (4), 87(3); ICCPR: A 7; Torture Conv.: A 2)
8 (e)	(G–III: A 25 (4), 108 (2); G–IV: 76(4), 85(4), 124(3))
8 (f)	(G–IV: A 76 (5); P–I: A 77.3–4)
8 (g)	(G–III: A 126(4))
9.1	G–I: A 12 (1)–(3)
9.2	G–I: A 15 (3)
9.3	G–I: A 19 (1): P–I: A 12.1
9.4	G–I: A 24
9.5	G–I: A 35
9.6	G–I: A 46
9.7	P–I: A 38.1
9.8	P–I: A 32, 33.3 (G–I: A 16(3); G–III: A 122 (2); G–IV: A 140 (2))
9.9	(P–I: A 81.1–4)

Notations

A	Article
G–I/IV	1949 Geneva Conventions I, II, III or IV.
H–IVR	Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land
H–IX	1907 Hague Convention IX Concerning Naval Bombardment in Time of War
ICCPR	International Covenant on Civil and Political Rights
P–I/II	1977 Protocol I or II to the 1949 Geneva Conventions

Items in the second column of the table that are not enclosed in parentheses are ones that are fully or in part paraphrased in at least part of the indicated paragraph of the Bulletin; items enclosed within parentheses are not directly paraphrased, and may have merely been sources of inspiration of the indicated paragraph of the Bulletin.

The texts of the IHL instruments referred to in the above table can be found, *inter alia*, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 42.

XXI

The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal

Sharon A. Williams

THE 1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,[1] is a massive document containing one hundred and twenty-eight Articles. The International Criminal Court (ICC) will have under its mandate some of the most serious international crimes known to humankind. It is intended to serve the triple function of deterrence, prosecution of alleged perpetrators, and justice for victims. By individualizing guilt, the ICC will have the potential effect of searching for truth and assisting in peace and reconciliation. It is hoped that the providing of accountability will end the cycle of impunity, protect the fundamentals of human dignity, and work for peace. Deciding where my focus should be for this contribution to honour my colleague, friend, and mentor in many ways in the international criminal law field, Professor L.C. Green, was a difficult choice. I decided to pick what turned out to be one of the most, if not the most, controversial Article at the end of the Conference—Article 12.

Article 12 of the 1998 Statute of the International Criminal Court, dealing with the preconditions for the actual exercise of criminal jurisdiction, is fundamental to an effective International Criminal Court. The views of States on this issue were wide-ranging. Until the proverbial eleventh hour on July 17, 1998, in Rome, where, under the Rules of Procedure of the Conference, the text had to be adopted by midnight, Article 12 was still a make or break provision. Even subsequent to the adoption of the Statute, it retains its notoriety.[2]

Article 12 is intimately related to Article 5 on crimes within the jurisdiction of the ICC, Article 13 on exercise of jurisdiction, Article 17 on complementarity, and Article 124 on the transitional provision. In effect, these provisions dealing with the intertwined aspects of jurisdiction "were the most complex and most sensitive, and for that reason remained subject to many options as long as possible."[3] They were, beyond doubt, indicative of the necessity to adopt a package-deal. The approach taken is firstly that the offence *ratione materiae* is found in the list of core crimes contained in Article 5 and defined in Articles 6, 7 and 8. Secondly, the preconditions for the ICC exercising jurisdiction in the specific case must be met. Thirdly, the case must be initiated in accordance with the provisions of Article 13.

From the Draft Statute of the International Law Commission (ILC)[4], to the Draft Statute prepared by the Preparatory Committee[5] (PrepCom), and finally to the negotiations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from June 15–July 17, 1998,[6] a fundamental issue during all stages of the debate was whether in cases other than where the situation was referred to the Prosecutor by the United Nations Security Council, acting under Chapter VII of the United Nations Charter,[7] the ICC would have vested in it inherent jurisdiction to prosecute the core crimes of genocide, war crimes, crimes against humanity and aggression, listed in Article 5, on account of ratification or acceptance of the Statute. Alternatively, would State consent be a precondition, and, if so, for which crimes, on what basis, and by which State or States?

The aim of this short Article is to analyse Article 12, which sets forth preconditions to the exercise of jurisdiction by the ICC, by considering the various options that were put on the table, beginning with the work of the International Law Commission, followed by the *Ad Hoc* Committee and the Preparatory Committee (PrepCom) set up by the United Nations General Assembly, and culminating in the negotiations during the Rome Diplomatic Conference. It is only through this chronological progression that one can see the divergent perspectives of States and the ultimate compromise that was struck to save the Statute in the final stages of the Rome Conference.

The Route to Rome

The Early Years. The establishment of an international criminal court has been on the agenda of the international community since at least the time of the League of Nations. Although there are examples of war crimes and crimes against peace prosecutions stemming from the thirteenth century in Europe,[8] the contemporary impetus to establish an international criminal court may be said to have originated from the century old 1899 first Hague Convention for the Pacific Settlement of International Disputes.[9] However, it was the 1919 Treaty of Versailles[10] that saw for the first time an attempt at the prosecution of war crimes. Attempt is the operative word, as Kaiser Wilhelm II remained in the Netherlands where he had sought asylum, and the other prosecutions were eventually with the agreement of the allies brought before the German Supreme Court in Leipzig.[11]

In 1937 the League of Nations attempted to bring into operation a multilateral Convention for the Prevention and Punishment of Terrorism and an annexed Protocol on the Establishment of an International Criminal Court to deal with such offences.[12] Neither came into force.[13] However, in 1945, the allied powers adopted the London Charter[14] and set up the International Military Tribunal which sat at Nuremberg. It provided a forum for the trials of the major axis war criminals whose crimes had no precise geographical location. A tribunal was set up on similar lines in Tokyo for the far east theatre of war.[15] These two tribunals were *ad hoc* with a determined time frame—the war period that had just ended. They were not truly "international" in character, with the judges and prosecutors being drawn only from France, the United Kingdom, the United States, and the former U.S.S.R. Nevertheless, the Nuremberg Charter, Judgment and the Principles extrapolated therefrom by the International Law Commission and accepted by the United Nations General Assembly[16] are an extremely pertinent precedent. This was the first task given the ILC, which had been created by the General Assembly in 1947. It was also mandated to formulate a Draft Code of Offences Against the Peace and Security of Mankind and "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes."[17]

The conclusion of the ILC was that such a body was desirable and possible. In 1950 the General Assembly established a Committee on International Criminal Jurisdiction to prepare a concrete proposal. A draft statute was submitted in 1951, and amended in 1953, but was not accepted, ostensibly because of a failure to agree on an acceptable definition of the crime of aggression.[18]

Even though this was done by the General Assembly in 1974,[19] still the matter of the ICC remained dormant.

The ILC Draft. The 1994 Draft Statute[20] for an international criminal court produced by the International Law Commission was complicated and geared towards producing a court that would operate on a restrictive consent basis and with strict Security Council control under Article 23. Article 21 (1) (a) provided for inherent jurisdiction in a case of genocide, with no additional requirement of acceptance.[21] However, Article 21 (1) (b) stipulated that the Court could exercise its jurisdiction for the other crimes referred to in Article 20—namely aggression, war crimes, crimes against humanity, and certain treaty crimes—where the complaint was brought in accordance with Article 25 (2) and the jurisdiction of the Court over the particular crime was accepted under Article 22 by the custodial State and by the State on the territory of which the act or omission in question occurred, a type of "ceded jurisdiction."[22] The term "custodial State" was intended to cover not only the situation where a State has detained a person or has the person in its control, but also would extend to a State the armed forces of which are visiting another State. In the latter case, where a member of the visiting force is suspected of a crime the State to which the force belongs would be classified as the "custodial State." The inclusion of treaty crimes based on the various international terrorism conventions[23] and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[24] rendered it broader than Article 5 of the Rome Statute as adopted. In a case where the custodial State had received a request[25] under an international agreement from another State to surrender a person for the purposes of prosecution, unless the request was rejected, acceptance by the requesting State of the Court's jurisdiction was required. Article 22 of the ILC Draft detailed the modalities of acceptance by States Parties. It can be classified as an "opting in" system with States specifying the crimes for which jurisdiction was accepted.[26] The Court did not have inherent jurisdiction, therefore, based on a State ratifying or acceding but, instead, needed a special declaration issued either at the time of becoming a Party or later. The ILC was of the view that this best reflected its general approach to the Court's jurisdiction,[27] that it is based on State consent with the "Court intervening upon the will of the States concerned, rather than whenever required for protecting the interests of the international community."[28] Article 23 (1) provided for referral to the Court by the United Nations Security Council acting under Chapter VII of the UN Charter for crimes referred to in Article 20. With respect to aggression, Article 23 (2)

detailed the prerequisite that the Security Council first determine that a State had committed aggression before a complaint of, or directly related to, an act of aggression could be brought. In conclusion, the consent regime in the ILC Draft was criticized as being "complicated and cumbersome at best [and likely] to cripple the proposed Court at worst."[29] This being said, it must be realized that the ILC, based on the past views of States' expressed in the Sixth Committee of the General Assembly on its annual Reports, was cognizant of the fact that the "instrument providing for an international criminal jurisdiction must take into account current international realities . . . that the establishment and effectiveness of the court required the broad acceptance of the statute by States."[30]

The PrepCom Draft. In both the *Ad Hoc* Committee[31] set up by the UN General Assembly to review the ILC 1994 Draft Statute and in the PrepCom established in 1996,[32] the same fundamental questions were raised. In the PrepCom there was widespread, albeit not uniform, agreement that there should be inherent jurisdiction over genocide.[33] However, as in the *Ad Hoc* Committee, there were different views on whether war crimes and crimes against humanity should be so treated.[34] States supporting inherent jurisdiction for all core crimes underscored the need for it because of the gravity of the crimes. On the other hand, those States who were opposed stressed the consensual nature of the Court and the necessity of such to obtain maximum State support. The maintenance of State sovereignty was key to this position. In fact, some States argued that the preconditions of State consent set out in Article 21 (1) (b) of the 1994 ILC Draft should have been more expansive, including also the mandatory consent of the States of nationality of the accused and the victim.

In the Draft Report of the Intersessional Meeting in Zuphten,[35] which was produced to facilitate the last PrepCom session, the options on jurisdictional preconditions were contained in Articles 6 [21] and 7 [21 *bis*] as produced by the Working Groups of the PrepCom.[36] The Articles had square brackets indicating again various alternatives and the diverse views of States.

Rome 1998—The Options

The several options contained in the Draft Statute[37] finalized at the last session of the PrepCom on April 3, 1998, were put before delegations in the Committee of the Whole (CW). Broadly speaking, these can be categorized as "the German Proposal," "the Korean Proposal," "the United Kingdom Proposal,"

"the United States Proposal," and the "opt-in" and "case-by case" consent regimes.[38] These proposals ranged from universal jurisdiction for the ICC proposed by Germany and automatic jurisdiction using broad bases of jurisdiction by South Korea at one end of the spectrum to the restrictive mandatory consent of all interested States preferred by certain other delegations. The Bureau discussion paper tried to narrow the options, as did its subsequent proposal, while still retaining alternatives.[39] The final package struck a compromise. Nevertheless, the then entrenched positions of some delegations proved to be irreconcilable. The result was that the consensus approach to adoption was thwarted and an unrecorded vote in plenary was called for late on July 17, 1998. The Statute was adopted by 120 in favour to 7 against with 21 abstentions. Article 12 as adopted is not as restrictive as it could have been. Yet it still requires, where the prosecutor acts *proprio motu* or where States, rather than the UN Security Council acting under Chapter VII of the Charter, refer a situation, that either the territorial State where the crime was committed or the State of nationality of the accused be Parties. If non-State Parties are involved, they may accept the exercise of jurisdiction by the ICC for the crime in question.

The German Proposal. The German proposal was based on the rationale that States individually have a legitimate basis at international law to prosecute the core crimes listed in Article 5 on account of universal jurisdiction. It was submitted that the ICC should have the same capacity as contracting States. This would have been appropriate for a permanent International Criminal Court being founded for the good of the international community of States as a whole. The proposal was contained in Article 9 (1), further option, of the Draft Statute before the CW.

It is a well-established rule of customary[40] and conventional[41] international law that certain criminal conduct is against the universal interest, offends universal conceptions of public policy, and is universally condemned. Thus, the perpetrators are *hostis humanis generis*, enemies of humankind. Any State obtaining custody over them has a legitimate ground to prosecute in the interest of all States on account of the universal basis of jurisdiction over the offence. States have "the legal competence and jurisdictional competence to define and punish particular offences, regardless of whether that State had any direct connection with the specific offences at issue."[42] It appears to merge jurisdiction over the person with jurisdiction over the offence.[43] In this way, such serious and heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement that any other State or States involved in some way through territorial location of the crime or nationality of the accused or

victims must consent. The origins of the principle of universal jurisdiction can arguably be traced to international piracy,[44] the slave trade[45] and more latterly to war crimes,[46] crimes against humanity,[47] and genocide.[48] Most recently, the prosecutions before the *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia (ICTFY) and Rwanda (ICTR) illustrate this fundamental principle. For example, as explained in the *amicus curiae* brief presented by the United States in the *Tadic* case, "The relevant law and precedents for the offences in question here—genocide, war crimes and crimes against humanity—clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals."[49]

More recently, in *Prosecutor* v. *Furundzija,* the ICTFY stated that the prohibition against torture has "evolved into a peremptory norm or *jus cogens*. . . Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[50] As well, Lord Browne Wilkinson, speaking with the majority in the House of Lords in *Regina* v. *Bartle et al., ex parte Pinochet,* held that "the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed."[51]

The German proposal attracted strong support from some delegations[52] and from many of the NGOs.[53] The view central to this proposal was that to limit the potential of the ICC by requiring some form of State consent beyond ratification would detract from the effectiveness of the Court and even its rationale and philosophical underpinnings. Thus, the impact of the German proposal would have been to give the ICC universal jurisdiction[54] over the listed crimes with no need for a separate consent of interested States. As Germany indicated in Rome,[55] the universal principle's application would have eliminated loopholes. For example, if consent of at least the territorial State was necessary and if genocide was committed in State X against nationals of State X, and X is not a Party to the Statute and the United Nations Security Council does not refer the matter to the ICC acting under Chapter VII of the United Nations Charter,[56] the crime would not be cognizable by the Court. Similarly, it is true that in the case of internal armed conflicts, the territorial State and State of nationality will often be one and the same. The ICC would only have jurisdiction if that State had become a State Party before the conflict, agreed *ad hoc* due to domestic political procedures, or if the Security Council acted under Chapter VII.[57] As well, the restrictions of State consent would mean that even where

the custodial State was a Party to the Rome Statute and wanted to surrender the accused to the ICC, the Court would not be able to exercise jurisdiction without the consent of the other involved States.

If the German proposal had been marketable in Rome, the end result would have been the deletion of Article 12 [Article 7 in the Draft Statute] on preconditions. Related to this issue, it must be emphasized, is the safeguard contained in Article 17 on complementarity. The ICC would have only exercised such universal jurisdiction where a national system was unwilling or unable to investigate and/or prosecute effectively. Therefore, the universal principle would not have divested national criminal courts of their primary role in prosecutions of listed crimes.

Clearly, the universal principle would have given jurisdiction to the ICC if the core crimes were committed in the territory of any State, Party or non-Party to the Statute. However, non-States Parties would have been under no international legal obligation to cooperate with the Court. Therefore, the second prong of the German proposal contained in Article 9 (2) further option was that non-States Parties may accept the obligation to cooperate on an *ad hoc* basis with respect to any listed crime.[58]

The Korean Proposal. Sensing opposition to the German concept of universal jurisdiction, the Republic of Korea's proposal[59] appeared two days into the Conference on June 17, 1998. It provided for so-called automatic jurisdiction. The Korean view was that by becoming a Party a State would be considered to have accepted the jurisdiction of the ICC. The jurisdictional nexus was that any one or more of four involved States Parties have consented to the Court exercising jurisdiction over a case: either the territorial State, State of nationality of the accused, State of nationality of the victim, or custodial State. This proposal differed from those that follow in that it allowed for the selective consent by ratification of one of the four States, including the custodial State. In real terms, there was no difference in philosophy between the German and Korean proposals, as the universal principle is based solely upon the alleged perpetrator being in the custody of the prosecuting State. The Korean proposal enjoyed wide support,[60] but was not acceptable to many States who wanted a second layer of State consent.[61]

The United Kingdom Proposal. The United Kingdom,[62] in further option for Article 7 (1), provided for jurisdiction by States Parties of the ICC for crimes listed in Article 5, with necessarily the same built-in safeguard of complementarity discussed above. However, in Article 7 (2), a further requirement

where the situation was referred by a State Party to the Court or where the Prosecutor initiated a prosecution *proprio motu* was that both the custodial State and the State where the crime occurred consented to the jurisdiction of the ICC by being States Parties. Concern had been expressed that to get the cumulative consents would be difficult.[63] On June 19, 1998, the proposal was amended to delete the custodial State.

The United States Proposal. In cases where a situation had been referred to the ICC by a State Party or where the Prosecutor had initiated an investigation, the United States supported[64] as fundamental the consent of the territorial State *and* the State of nationality of the accused person, or at a minimum only the consent of the State of nationality.[65] The United States insisted that the ICC have no jurisdiction over the nationals of States that had not become a Party to the Statute. It was argued that to do so would violate Article 34 of the 1969 Vienna Convention on the Law of Treaties,[66] as treaties cannot be binding on non-Party third States. The position was that it would not be acceptable for United States citizens to be accountable in a court not accepted by the United States. The United States made it clear that it could not adhere to a text that allowed for United States forces operating abroad to be brought even conceivably before the ICC, where the United States had not become a Party to the Statute. The United States position was that this would derogate from the ability of the United States to act as a major player in multinational humanitarian and peacekeeping operations. Protection against frivolous and arbitrary charges and other forms of inappropriate investigations and prosecution was called for. It is worth observing, however, that the passive personality basis of jurisdiction included in the Korean proposal would have been a protective deterrent for such forces in giving jurisdictional acceptance to the State of nationality of victims.

Of course, the United States position still left open referral of a situation by the UN Security Council acting under Chapter VII of the Charter as provided for in Article 13(b) of the Statute, subject of course to the veto of one of the P5. This, in the United States' view, was the only way "to impose the court's jurisdiction on a non-Party State."[67] The proposal would have resulted in an ICC controlled by the Security Council, a type of permanent *ad hoc* criminal tribunal.[68]

The United States position on the indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States as it was seen as causing a probable paralysis of the ICC. The U.S. concerns were not assuaged by the provisions on complementarity

contained in Article 17 of the Statute or on judicial cooperation in Article 98(2), which requires consent of the sending State as a precondition for the surrender to the ICC by the "host" State of persons present in that State pursuant to international agreements. This would have meant that U.S. forces on, for example, peace-keeping or other missions abroad under Status of Forces Agreements would not have been susceptible to prosecution before the ICC unless the United States consented.

State "opt-in" and Case-by-Case Proposals. The State "opt-in" proposal in Article 6(2), Article 7, option 1, and Article 9, option 1, of the Draft Statute was markedly different from the previous proposals as it required an actual second consent other than being a Party to the Statute. This declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage. The thrust of the proposal was that before the ICC could assume jurisdiction, as many as five States potentially would have had to have consented to the exercise of jurisdiction by the Court over the crime in question: the custodial State; the territorial State; the State that had requested extradition of the person from the custodial State, unless the request was rejected; the State of nationality of the accused; and the State of nationality of the victim. The ICC would have been less competent under this proposal than States currently are under conventional and customary international law to prosecute domestically, where the consent of other involved States is not necessary.[69]

The case-by-case approach contained in Article 7, option 2 of the Draft Statute would have needed the specific consent of the States outlined above in the "opt-in" proposal. Ratification would, therefore, have had little meaning in practical reality and States would have been able to make any individual immune from consideration of the Court when it seemed politically desirable. This proposal would have rendered the ICC ineffective in many cases.

In effect, both the "opt-in" and case-by-case proposals based on a second State consent would have been jurisdiction "à la carte." They would have resulted in practical terms in a significantly weakened Court, with the ICC most often only having jurisdiction when the UN Security Council referred a situation to it, with the built-in Charter problem of the veto power of the P5. This would have been particularly so should both proposals have been adopted and States had preferred to follow the case-by-case approach. States, as a result, could have ratified with no intention of ever allowing cases to go before the Court. This would have resulted in an ineffectual Court and as well have "foment[ed] selectivity and arbitrariness."[70]

The Bureau Compromise

The Bureau discussion paper[71] "had narrowed the range of options but had deliberately taken a cautious approach."[72] The Proposal[73] had likewise retained several options. Both of these had dropped the German Proposal.[74] The Bureau Proposal in Article 7(1) adopted the Korean Proposal for genocide alone. For war crimes and crimes against humanity, three options were presented in Article 7(2): (1) the Korean Proposal, (2) the acceptance by the territorial and custodial States, and (3) the acceptance by the State of nationality of the accused alone. Some States voiced strong objections against the Korean Proposal stating that it was quasi-universal jurisdiction. It gave the ability to four States, including the custodial State as a State Party, to give the Court jurisdiction standing alone. However, other States pointed out that it would have been in keeping with the ability at international law of the custodial State to prosecute itself for international crimes, *stricto sensu*. They viewed the other options as too restrictive, in particular option 3 based on the State of nationality of the accused. As well, Article 7 *bis* on acceptance of jurisdiction, in both the discussion paper for treaty crimes, and possibly for one or more of the core crimes, and in option 2 of the Proposal for crimes against humanity and war crimes, was controversial as it replicated the "opt-in" regime. Article 7 *bis* option 1 reproduced the automatic jurisdiction over all core crimes by States Parties. Thus, as late as July 10, 1998, with only one week left, there was no consensus. The United States and other States emphasized that "universal jurisdiction or any variant of it" was unacceptable.[75]

The result was the introduction on July 17, 1998, into the final package by the Bureau of a new Article on preconditions, the present Article 12 in the Statute. It provides:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.

2. In the case of Article 13, paragraph (a) or (c), [referral of a situation to the ICC by a State Party or an investigation by the Prosecutor *proprio motu*] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

This Article combines State acceptance of jurisdiction with preconditions for the exercise of jurisdiction by the ICC. It disjunctively allows for the acceptance by being States Parties of one or more of the territorial State *or* the State of nationality of the accused. The transitional provision contained in Article 124 was also part of the compromise to gain the agreement of France to the Statute.[76] It provides that States Parties may opt out of the ICC's war crimes jurisdiction for a period of seven years when the alleged crimes were committed on its territory or by its nationals. States that had lobbied for the "opt-in" acceptance and the preconditional conjunctive approach or solely the State of nationality of the accused remained opposed. From the outset, issues of jurisdiction had been a key concern for the United States.[77] For the United States it was the four words "one or more of" in Article 12(2) that caused the ultimate dissent. It was on this issue that the United States proposed an amendment during the last hours of the Conference in the CW.[78] It read:

> With respect to States not party to the Statute the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if the State has accepted jurisdiction in accordance with this Article.

The amendment was resoundingly defeated by a no-action motion,[79] adopted by 113 in favour to 17 against, with 25 abstentions. In the plenary that followed, the United States requested an unrecorded vote. The result was 120 in favour with 7 against and 21 abstentions. Those voting against included China, Israel and the United States.

Article 12—An Interpretation

By becoming parties to the Statute, States accept the jurisdiction of the ICC for the crimes of genocide, crimes against humanity, war crimes and aggression, when the latter has been defined and adopted in accordance with Article 5 (2).[80]

Article 12(1) follows option 1 of the Bureau Proposal in Article 7 *bis*. It, therefore, assumes the position of automatic jurisdiction over the listed crimes.

In cases where, pursuant to Article 13 (a) or (c), a situation is referred to the Prosecutor by a State Party[81] or where the Prosecutor has initiated an investigation *proprio motu*,[82] State acceptance is necessary. As discussed above, this complex and controversial issue resulted at the end of the day in a compromise put to the CW in the final package. It was an attempt by the Bureau to find a middle ground between the opposite positions of States—between, on the one hand, those who had for the most part a preference for universal jurisdiction or a list of alternative States (territorial State, State of nationality of the accused or the victim, and custodial State), where it was sufficient that one had accepted the Court's jurisdiction by ratifying, and, on the other, those who insisted on either State Party acceptance of the State of nationality of the accused or even the stricter requirement that there be acceptance conjunctively from a list of States as had been proposed in the ILC Draft.[83] Article 12 as adopted by the Conference is the accommodation that was struck. It reduced the preconditions. The jurisdictional nexus is that either the territorial State or the State of nationality of the accused are States Parties. These are the two primary bases of jurisdiction over the offence accepted by States in international criminal law and are universally accepted.[84]

State with territorial jurisdiction. Territorial jurisdiction is a manifestation of State sovereignty.[85] A State has plenary jurisdiction over persons, property, and conduct occurring in its territory, subject only to obligations or limitations imposed by international law.[86] This is the universally accepted working rule in international criminal law and is found in bilateral extradition treaties and multilateral conventions.[87] The territory of a State includes its land mass, internal waters, twelve-nautical-mile maximum territorial sea, and the airspace above all of the former. Jurisdiction is recognized in customary and conventional international law as also extending to conduct committed on board maritime vessels and aircraft registered in a State.[88] Thus, if a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction. This is so regardless of whether the alleged offender is present in State A or in another custodial State Party.[89]

The ICC is not, as has been argued by the United States, therefore potentially taking jurisdiction over non-States Parties. It is not violating Article 34 of the Vienna Convention on the Law of Treaties,[90] which provides that treaties cannot bind third parties without their consent. When an alien commits a

crime, whether a domestic common crime or an international crime, on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality of the accused being a Party to the pertinent treaty or otherwise consenting.[91] It is not a case of a non-State Party being bound, but rather of the individual being amenable to the jurisdiction of the ICC because of alleged crimes committed in the territory of a State Party. There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute, by becoming a State Party of the Statute.[92]

State of nationality of the accused. The active nationality basis of jurisdiction over the offence is well-entrenched in the domestic law of the majority of States. By virtue of such State practice and *opinio juris*, it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction.[93] Civil law jurisdictions provide for its use extensively and relate it to common crimes of a domestic nature, as well as to international crimes against the common interests of States. It is a corollary to the rule concerning the non-extradition of nationals applied by these States. Common law States, on the other hand, use the nationality basis for the most part only with regard to international crimes, *stricto sensu*, such as are prescribed by international law as envisaged in Article 5 of the Rome Statute and international treaty crimes, like those contained in the international terrorism conventions.[94] In this context it is universally accepted.

Non-States Parties. In the case of non-State Parties, Article 12(3) follows the ILC Draft, the PrepCom Draft Statute,[95] and the Bureau Discussion Paper,[96] and Proposal.[97] It provides that if such a State's acceptance is required under the preceding paragraph, it may declare *ad hoc* its acceptance with respect to the crime in question. Such a State is then obligated to cooperate with the ICC in accordance with Part 9 of the Statute. Thus, the Statute does not infringe upon the sovereignty of non-Party States. It is in compliance with the customary and conventional rules on the law of treaties. It is, therefore, a misconception that the Statute binds non-Parties. They are not obligated to cooperate with the ICC.

Article 12 is a product of compromise supported by the overwhelming majority of States. It endeavours to satisfy the many interests that were in evidence at the Rome Conference and before. Although far from perfect, it was all that was possible at the time. That the acceptance of the Statute

by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC is a serious gap.[98] It is this provision that would have ensured that atrocities will not go unpunished if the territorial State or State of nationality are not Parties or do not consent *ad hoc* and there is no UN Security Council referral. In all probability it may be assumed that the States likely to be the *locus delicti* of such crimes or whose nationals are suspect will not be among the first to ratify or otherwise agree to be bound by the Statute, if ever. Initially, at least once the ICC is operative after the 60 ratifications have been deposited, reliance will have to be placed on the Security Council in such cases. It is ironic to hear the argument following the adoption of the Statute that Article 12 as it stands, in effect without universal jurisdiction (the German Proposal) or automatic jurisdiction including the acceptance as a State Party by the custodial State (the Korean Proposal), "effectively lets off future Saddam Husseins or Pol Pots, who kill their own people on their own territory,"[99] from States that promoted in the Conference even stricter criteria for preconditions to the exercise of jurisdiction and were adamantly against universal jurisdiction or any variant thereof. As a result of not adopting the German or Korean Proposals, the ICC does, indeed, have less jurisdiction than domestic courts of any State would have.

It is safe to say that the ICC will come into operation within the next two years or so. As of May 2000 there are ninety-eight States that have signed and ten that have ratified.[100] Once the Rules of Evidence and Procedure and Elements of Crimes have been completed by June 30, 2000, it seems certain that many more States will ratify. As well, apart from awaiting the conclusion of the Preparatory Commission established since Rome on these issues, many States are in the process of enacting domestic legislation, or as a preliminary step debating what is in substance involved in order to be able to fulfill their obligations to cooperate with the ICC in good faith. This process necessarily takes time. In some States it requires not ordinary domestic legislation but constitutional change. Among the contentious issues are the surrender to the ICC of nationals by those States that ordinarily do not extradite such persons, the negation of immunity of Heads of State, other high ranking government officials and even members of parliament, and the acceptance of life imprisonment as a penalty.

During the PrepCom sessions during 1999 and March 2000, the United States, together with other participating States, has been working actively and constructively. Suggestions made after Rome that the preconditions to jurisdiction could be changed by the States Parties in a "binding interpretative statement"[101] have not been pressed. This has been the case also with the

suggestion that a declarative statement could be made whereby third party jurisdiction would be suspended in the case where the State of nationality of the alleged offender is both able and willing to assume responsibility for criminal conduct which amounted to an official act.[102] This would, it has been argued, simply "move the problem from the level of individual responsibility to that of exclusive state responsibility" and consequently involve "a total change of the parameters of responsibility"[103] that were envisaged in Rome. The United States would appear to have realized that to seek an amendment of the Rome Statute to abrogate the perceived problem that it has with Article 12 is unrealistic and would not meet with support. However, most recently before the March 2000 PrepCom, the United States made a *démarche* to other States in their capitals in which it recalled that it had identified in its mind a number of flaws in the Statute, but it was of the view that they could be dealt with in the Rules of Evidence and Procedure and Elements of Crimes. It reiterated its fundamental difficulty with Article 12 and how it would make it nearly impossible for the United States to give the ICC any measure of support if the Statute remains as it is. It focussed its concerns again on the official decisions of a sovereign non-State Party being subjected to the jurisdiction of the Court in cases where States that oppose United States' actions abroad make unfounded accusations. However, it was also the position of the United States that it shared the concern of other States that any provision dealing with the consent of such a non-State Party should not act as a vehicle for the alleged perpetrators of grave atrocities to escape justice before the new Court. This concern is indeed valid, but it is difficult to envisage how distinctions can be drawn between non-State Parties, so-called "rogue" States or otherwise. All non-Party States could utilize the United States perspective. It would seem that what the United States is promoting is a clarification of the preconditions issue in a supplemental document to the Rome Statute and in a Rule of Procedure. It seems that the supplemental document envisaged is the Relationship Agreement Between the United Nations and the ICC. This Relationship Agreement does not have to be completed by June 30, 2000. However, the Rule of Procedure would have to be. To date nothing has formally been put on the table. The proposal for the procedural rule relates to Article 98(2) of the Statute dealing with cooperation and consent to surrender to the ICC. Article 98(2) reads:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

> surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States proposal would require a footnote to the Rule of Procedure to Article 98. The currently informal proposal reads:

> The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international instrument.

This would then relate to a future proposal by the United States for the supplemental document to be included in the Relationship Agreement Between the United Nations and the ICC which would utilize the possibility presented in the above proposed footnote to the Rule of Procedure. This proposal reads:

> The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the sovereign direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

This is acutely controversial. Obviously, the best case scenario is for the United States to become a State Party. Nevertheless, although many States want to keep the United States positively engaged in the process of bringing the ICC into operation, among the Like Minded States and others there are definite concerns, notably not wanting the delicate balance achieved in Rome to be circumvented by the back door through an oblique Rule of Procedure to be followed at some later stage by the Relationship Agreement Article. The end result in reality would be that the ICC would only have jurisdiction with the consent of the State of nationality of the accused or the United Nations Security Council. The United States proposal appears to remove or at least restrict the jurisdictional provision concerning the State where the offence was committed. As was discussed earlier, Article 12 is in fact much narrower than what most States wanted in Rome and this new "informal" proposal to produce a "procedural fix" to enable the United States to cooperate with the ICC, at a minimum as a "good neighbour"[104] creates more concerns about further restrictions.

Furthermore, there are indeed very serious implications that the premise that war crimes and crimes against humanity committed "within the sovereign direction of a U.N. Member State" would not be in accord with the principle of international law as encapsulated in the Nuremberg Principles, that the "Act of State" plea is no defence.

The mandate of the PrepCom (1998-2000) is not to revise the Rome Statute but to elaborate on it and thereby to encourage general support by States. The Rules of Procedure and Evidence must be consistent with the Statute. Actual amendments to the Statute can only be done by a Review Conference of the Assembly of States Parties after the expiry of seven years from the entry into force of the Statute.[105] Another major fear is that the United States proposal would encourage certain States not to ratify as it would give them the power to block the ICC's jurisdiction. It would also negate a key compromise in Rome concerning the role of the Security Council in that the ICC would be subject to the veto of the P5 over prosecutions of non-State Party nationals, which would undermine the legitimacy of the Court as an impartial and independent judicial body.

Thus, the major and as yet unresolved problem is how to accommodate the concerns of the United States without undermining the integrity, credibility and effectiveness of the ICC. With such a "procedural fix," the United States has indicated in recent weeks that its "good neighbour policy" towards the ICC could "mature over the years into the real possibility of signature and ratification."[106] By June 30, 2000 we shall see, at least, the outcome of this new proposal concerning the Rules of Evidence and Procedure following debate if it is formally tabled. If this happens it is difficult to know whether States will accept the proposal to keep the United States on side, knowing that the Relationship Agreement connection can be negotiated later—or just refuse to agree to this procedural rule as a matter of principle.

The momentum is building and efforts worldwide are being made to ensure ratification and thus secure accountability and justice by an independent, impartial and effective Court. It would be an affront to humanity, the rule of law and to the modern struggle since 1947 to have established a permanent International Criminal Court, if it was to be rendered in real operational terms a nullity by procedural manoeuvres.

Notes

1. U.N. Doc. A/CONF.183/9, July 17, 1998.

2. D. Scheffer, *The United States and the International Criminal Court* (1999), 93 AMERICAN JOURNAL OF INTERNATIONAL LAW, 12, 17–18; *International Criminal Court: The Challenge of*

Jurisdiction, PROC. ANN. MTG. A.S.I.L. (1999) (forthcoming). See also, S.A Williams, "Article 12" in O. Triffter (ed.) COMMENTARY ON THE ROME STATUTE (1999), 329.

3. P. Kirsch & J.T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process* (1999), 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 2.

4. Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, 29, U.N. Doc. A/49/10 (1994).

5. U.N. Doc. A/Conf. 183/2/ Add. 1, April 3, 1998.

6. See Bureau Discussion Paper, U.N. Doc. A/Conf. 183/C.1/L.53, July 6, 1998, 11–12 [then Article 7] and Bureau Proposal, U.N. Doc. A/Conf. 183/C.1/L. 59, July 10, 1998, 10–12 [then Articles 7 *bis* and 7 *ter*.]

7. See Article 13 (b).

8. Note the trial and execution of Conradin von Hohenstaufen in Naples in 1262 for initiating an unjust war, and the trial of Peter of Hagenbach at Breisach for "tramp[ling] under foot the laws of God and man." See G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1968), 23–59; M. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965); M.C. Bassiouni & C. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1992), 25 VAND. J. TRANS. L. 151; and L.C. Green, *Group Rights, War Crimes and Crimes Against Humanity* (1993), 1 INT'L GROUP RIGHTS 107.

9. July 19, 1899, 26 MARTENS NOUVEAU RECUEIL (2d) 720.

10. June 28, 1919, 11 MARTENS NOUVEAU RECUEIL (3d) 323. See Articles 227–229. It should be observed that in 1919 a Special Commission was set up by the allied powers to address, *inter alia*, crimes against humanity. This was of special significance due to the alleged annihilation of 1,000,000 Armenians by Turkey. Interestingly, the opposition of the United States to the inclusion of crimes against humanity resulted in their omission from a list of offences that an international tribunal would be given to prosecute. Interestingly, although the Treaty of Sèvres, between the Allied Powers and Turkey, August 10, 1920, (1921), 15 A.J.I.L. SUPP. 179, provided for the surrender of such persons, the subsequent Treaty of Lausanne between the same parties on July 24, 1923, 28 L.N.T.S. 11, gave them amnesty.

11. C. MULLINS, THE LEIPZIG TRIALS (1921), and M.C. Bassiouni, *Draft Statute International Tribunal* (1993), NOUVELLES ETUDES PENALES 7.

12. HUDSON, 7 INTERNATIONAL LEGISLATION 862.

13. The only State to ratify was India.

14. 82 U.N.T.S. 279. See also the earlier 1943 Moscow Declaration, 1943 DEPT. OF STATE BULL. 311.

15. 1948 15 ANN. DIG. 356.

16. U.N. GAOR V Supp. (A/1316), 11–14.

17. U.N.G.A. Res. 174(II), U.N. GAOR, 2nd Sess., U.N. A/519, 105 – 110 (1947).

18. M. Scharf, "The Politics Behind U.S. Opposition to the International Criminal Court," a paper presented at a conference on La Conference de Rome et la Creation de la Cour Pénale Internationale, Mission Interministerielle pour les Droit de l'Homme, Strasbourg, November 20–21, 1998, at 1, suggests that the 1953 Draft Statute was "extremely ambitious in the powers it conferred on the court." It "had the paradoxical effect of setting back the effort to create such a court," in that "the debate shifted from whether to establish an international criminal court to whether to adopt the 1953 Statute."

19. U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. 31, at 142; U.N. Doc. A/9631 (1974).

20. Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute of an International Criminal Court, May 2–July 22, 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10. Hereinafter "ILC Draft."

21. The complaint was to be brought under Article 25 (1), *ibid.*, by a State Party which was also a contracting Party to the Genocide Convention, 78 U.N.T.S. 277, as envisaged by Article VI.

22. It must, however, be recognized that the ILC Draft reduced the conditions for the exercise of jurisdiction set out in its earlier 1993 Draft. See Report of the International Law Commission on the Work of its Forty-fifth Session, May 3–July 23, 1993, U.N. GAOR, 48th Sess., Supp. No. 10 (A/48/10). See J. Crawford, *The ILC's Draft Statute for an International Criminal Court* (1994), 88 AMERICAN JOURNAL OF INTERNATIONAL LAW, 140; C. Warbrick, *International Criminal Courts* (1995), 44 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 466; and C.L. Blakesley, *Jurisdiction, Definition of Crimes and Triggering Mechanism* (1997), 13 NOUVELLES ÉTUDES PÉNALES 177, 204.

23. The unlawful seizure of aircraft as defined by Article 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1972 Can. T.S. No 23; the crimes defined by Article 1 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Can. T.S. No. 23; the crimes defined in Article 2 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1977 Can. T.S. No. 43; hostage-taking and related crimes as defined by the 1979 International Convention against the Taking of Hostages, reprinted in (1979), 18 I.L.M. 1456; the crimes defined in Article 3 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by Article 2 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, reprinted in (1988), 27 I.L.M. 672.

24. E/CONF. 82/15, December 19, 1988, reprinted in (1989), 28 I.L.M. 497.

25. Article 21 (2).

26. See ILC Draft, Commentary to Article 22, 82. Note that in its 1993 Draft, the ILC Working Group had proposed two alternatives to this Article, which were based on "opting out." *Ibid.*, 83. Under the "opting out" approach, the Court's jurisdiction would have been accepted by all States Parties except for those crimes expressly designated.

27. *Ibid.*, 83.

28. M. Politi, *The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee* (1997), 13 NOUVELLES ÉTUDES PÉNALES 115, 149. See Report of the *Ad Hoc* Committee, U.N. GAOR, 50th Sess., Supp., No. 22 (A/50/22).

29. L.S. Wexler, *First Committee Report on Jurisdiction, Definition of Crimes and Complementarity* (1997), 13 NOUVELLES ÉTUDES PÉNALES 163, 173.

30. Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, UNGAOR 49th Sess. Supp. No. 10 (A/49/10), 31, para. 48.

31. U.N. Doc. A/RES/49/53, December 9, 1994.

32. U.N. Doc. A/RES/50/46.

33. Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22 (A/51/22), vol. 1, 29.

34. See Politi, *supra* note 28, 149–150.

35. U.N. Doc. A/AC. 249/1998/L. 13, February 4,1998.

36. U.N. Doc. A/AC. 249/1997/L.8/Rev. 1, 3, August 4–15, 1997.

37. U.N. Doc. A/Conf. 183/2/Add. 1, Articles 6 (b), 7, 9 (further option), and further option for Article 7.

38. For a useful background paper, see International Commission of Jurists, *Exercise of Jurisdiction and Complementarity*, I.C.J. BRIEF No. 2, June 1998.

39. P. Kirsch and J.T. Holmes, *supra* note 3, 9.

40. Customary international law is based on consistent State practice coupled with *opinio juris*, meaning that States view the matter as a legal obligation. See Article 38 (1) (b), Statute of the International Court of Justice, and the I.C.J.'s judgments in the *North Sea Continental Shelf* cases, [1969] I.C.J. Rep. 3; *The Asylum Case*, [1950] I.C.J. Rep. 266. Note also A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

41. The term "convention" is synonymous with "treaty."

42. C.C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability* (1996), 59 LAW AND CONTEMPORARY PROBLEMS 153, 167; K.C. Randall, *Universal Jurisdiction Under International Law* (1988), TEXAS LAW REV. 785 AND AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), sec. 404.

43. See H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes* (1944), 21 BRITISH YEARBOOK OF INTERNATIONAL LAW 58, 61.

44. But note that these piratical acts were committed on the high seas beyond the territorial jurisdiction of any State. Piracy *jure gentium* is to be distinguished from piracy at domestic law. As to the right of every State to seize a pirate ship or aircraft on the high seas or otherwise outside the jurisdiction of any State and arrest the persons on board, see Article 19, United Nations Convention on the Law of the Sea, 1982, U.N. GAOR, vol. XVII, 139, (1982), 21 I.L.M. 1245; The *SS Lotus* case (1927), P.C.I.J. Series A, No. 10, 70, per Justice Moore; and *In re Piracy Jure Gentium*, [1924] A.C. 586 (Sp. Ref. J.C.P.C.). Universality was necessary to fill the jurisdictional gap left by the other bases. But see Cowles, *Universality of Jurisdiction over War Crimes*, (1945) CALIFORNIA LAW REVIEW 177, who bases jurisdiction over war criminals by referring to piracy, and Schick, *International Criminal Facts and Illusions*, 1948 MODERN LAW REVIEW 290, who argues to the contrary. See also H. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1977), 261–262.

45. See L.C. GREEN, INTERNATIONAL LAW (1984), 179. The assimilation of the slave-trader to the pirate probably stems from the fact that slave trading was declared by an Imperial Statute of the British Parliament to be piracy. (1824), 5 Geo. IV, c. 113, ss. 9–10. See R. v. *Zulueta*, 1 Cat. & K. 215, 1 Cox C.C. 20 and *Le Louis* (1817), 2 Dods. 210. There is no indication that the 1926 Slavery Convention, 60 L.N.T.S. 253, as amended by the *Protocol* of 1953, 182 U.N.T.S. 51, or the Supplementary Convention of 1956, Can. T.S. No. 7, subjected alleged perpetrators to universal jurisdiction. But for rights of visit on the high seas of suspected slave-trading ships, see Article 110 (1) (b) of the *United Nations Convention on the Law of the Sea* 1982, *ibid.* Note M.C. Bassiouni & V. Nanda, *Slavery and the Slave Trade: Steps Towards its Eradication*, (1972), 12 SANTA CLARA L. REV. 424.

46. The International Military Tribunal (IMT) at Nuremberg was established based on universal jurisdiction under the London Charter of August 8, 1945, 82 U.N.T.S. 279. The IMT stated in its judgment that the allied powers in signing the Charter had "done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." (1948) 22 TRIALS OF THE MAJOR WAR CRIMINALS 461. See Article 6 (b) of the Charter. See also, e.g., under Control Council Order No. 10, *Trial of Otto Sandrock and Three Others* ("*The Almelo Trial*"), (1945), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42; the "Hostages Case" (1947), 8 Case No. 47, 43; and the *Remmele Trial*

(1947), 15 L.R.T.W.C. 44. Note also the application of the principle for grave breaches of the four 1949 Geneva Conventions: Art. 49, Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Art. 50, Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Armed Forces at Sea, 75 U.N.T.S. 85; Art. 129, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 and Art. 146, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; Additional Protocol I of 1977, 1991 Canada Treaty Series No. 2 and Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240. There is also national legislation to support universal jurisdiction as detailed in International Committee of the Red Cross, Universal Jurisdiction vs. State Consent, Doc. ICRC/NYC/, October 12, 1997, 2: see, e.g., the Geneva Conventions Act of Australia (1957 as am. 1991); the Geneva Conventions Act of Canada 1965; the Geneva Conventions Act of India 1960; the Belgian *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*. As well, States have adopted more general legislation referring to war crimes and universal jurisdiction without reference to the Geneva Conventions. See, e.g., s. 7 (3.71)(b) of the Canadian Criminal Code, and BRITISH LAW OF WAR ON LAND (BEING PART III OF THE MANUAL OF MILITARY LAW) (1958), Ch. XIV, para. 637, 180. Domestic prosecutions also evidence the use of universal jurisdiction: see *Polyukhovich* v. *Commonwealth of Australia* (1991), 172 C.L.R. 501, 562–3, 565 (Aust. H.C.). Note also in a civil claim context the discussion of universal jurisdiction in *Kadic* v. *Karadzic*, 70 F. 3d 232, 243 (2nd. cir. 1995).

47. As with war crimes, the IMT had jurisdiction over crimes against humanity. However, because of the grammatical construction of Article 6(c) of the Charter, the IMT restricted its jurisdiction to crimes against humanity connected to the conduct of the war: (1947), 1 TRIAL OF THE MAJOR WAR CRIMINALS 17; Secretary General of the United Nations, *Memorandum*, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL (1949), 66. Prosecutions by the Allied Military Tribunals acting under Control Council Order No. 10 were not so restricted. See *Alstoetter et al., "The Justices Trial"* (1947), VI L.R.T.W.C. 1, 45–46. Domestic consideration includes *Attorney-General of Israel v. Eichmann* (1961–1962), 36 INT'L LAW REP. 26; *Demjanjuk* v. *Petrovky*, 776 F. 2d 571, 582 (6th Cir., 1985); *Fédération nationale des déportés et internés résistants et patriotes et al.* v. *Barbie*, (1983), 78 I.L.R. 125, 130 (Cass. Crim.); and *R.* v. *Finta*, (1994), 1 S.C.R. 701. Note also Article IV of the Apartheid Convention, G.A. Res. 3068 (XXVII), 28 U.N. GAOR, Supp. (No. 30), 75, U.N. Doc. A/9030 (1973); Article 5 (2) of the Torture Convention, 1987 Can. T.S. No. 36. In a civil case in the United States, *Filartiga* v. *Peña Irala*, 630 F. 2d 876 (2nd Cir., 1980), it was stated that those who commit torture are akin to pirates and enemies of all mankind.

48. The Genocide Convention, 78 U.N.T.S. 277, does not provide for universal jurisdiction *per se*, but for jurisdiction by the State where the offence was committed or by an international penal tribunal (article VI). However, the Convention does not prohibit States from using other bases of jurisdiction, and it has been argued that universal jurisdiction may be exercised on the basis of customary international law. As to what is not prohibited is permitted, see the *SS Lotus* case (France v. Turkey), *supra* note 44. Concerning genocide as a crime under customary international law, see *Reservations to the Convention on Genocide* (Ad. Op.) [1951] I.C.J. Rep. 23; *Barcelona Traction, Light and Power Company Case* (Prelim. Obj.) (Belgium v. Spain), [1970] I.C.J. Rep. 32; U.N.G.A. Res. 96 I; *Attorney-General of Israel* v. *Eichmann* (1961), 36 I.L.R. 18, 39 (Dist. Ct); (1962), 36 I.L.R. 277, 304 (Supreme Ct.); and AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), Reporter's Note on § 404, 256. Note L.R. Beres, *Genocide and Genocide-Like Crimes*, in

M.C. Bassiouni (ed.) INTERNATIONAL CRIMINAL LAW: CRIMES, vol. 1 (1986), 271, 275. It is submitted that the interest in and the prevention of genocide is an *erga omnes* obligation. See *Barcelona Traction, ibid.*, and C.C. Joyner, *supra*, note 42, 168.

49. *Amicus curiae* brief presented on behalf of the Government of the United States of America, July 25, 1995, in *The Prosecutor of the Tribunal* v. *Dusan Tadic* Case, No. IT-94-I-T, 20, as quoted in International Commission of Jurists, *supra* note 38, 5.

50. Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T (1998), para. 153.

51. March 24, 1999, House of Lords (1999), 38 I.L.M. 581, 589.

52. The Rome Treaty Conference Monitor, July 10, 1998, 1–2.

53. E.g., International Committee of the Red Cross, International Commission of Jurists, Lawyers Committee for Human Rights, Amnesty International and Human Rights Watch.

54. Note that Germany also called this "the German version of automatic jurisdiction." See Statement by Hans-Peter Kaul, Acting Head of the German Delegation in the CW, July 9, 1998, 1. Thus, Germany used "inherent" and "automatic" in the same way to mean that the ICC was vested with universal jurisdiction upon ratification by States. This must be contrasted with the term "automatic" as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal, and in the final text of the Statute, where although acceptance of the Court's jurisdiction is automatic, there are preconditions. However, they did not require a second State consent as did the "opt-in" and State consent regimes.

55. Statement by Hans-Peter Kaul, Acting Head of the German Delegation, Rome Conference, June 19, 1998.

56. See Article 13 (b).

57. J.F. Bertram - Nothnagel, Report to the Union Internationale Des Avocats, August 12, 1998, 10.

58. Contrast the Statutes of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda, set up by U.N. Security Council Resolutions 827 of May 25, 1993, and 955 of November 8, 1994, acting under Chapter VII of the Charter, which obligate all States to cooperate.

59. U.N. Doc. A/CONF. 183/C.1/L.6, June 18, 1998. A similar proposal had been made earlier by Sweden: ICJ BRIEF, *supra* note 38, 4.

60. Terra Viva, *Seoul Floats a Compromise on Jurisdiction*, 22 June 1998, No. 6, 7. See also The International Criminal Court Monitor, July 10, 1998, 1, where it states that 79 percent of the States supported the Korean Proposal.

61. *Ibid.*

62. U.N. Doc. A/Ac. 249/WG.3/DP.1.

63. See e.g., Lawyers Committee for Human Rights, *Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction* (May 1998), 1 (8) INTERNATIONAL CRIMINAL COURT BRIEFING SERIES 5.

64. U.N. Doc. A/CONF.183/C.1/L.70, July 14, 1998.

65. See testimony of Ambassador David Scheffer, Head of the United States Delegation in Rome, before Senate Foreign Relations Committee, July 23, 1998.

66. 1969, 1155 U.N.T.S. 331.

67. Scheffer, *supra* note 65.

68. J. Podgers, *War Crimes Courts Under Fire* (September, 1998), AMERICAN BAR ASSOCIATION JOURNAL 64, 67.

69. Lawyers Committee for Human Rights, *Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction* (1998), 1(8) INTERNATIONAL CRIMINAL COURT BRIEFING SERIES, 3.

70. Human Rights Watch, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN EFFECTIVE INTERNATIONAL CRIMINAL COURT (1998), 46.

71. U.N. Doc. A/CONF. 183/C.1/L.53, July 6, 1998, 11–13.

72. P. Kirsch and J.T. Holmes, *supra* note 3, 9.

73. U.N. Doc. A/CONF. 183/C.1/L.59, July 10, 1998, 10–12.

74. According to The Rome Treaty Conference Monitor, July 10, 1998, 2, "23 States displayed their dismay that universal jurisdiction was not reflected." Note also the reaction of the German Delegation, as expressed in a statement by Hans-Peter Kaul, Acting Head of Delegation, in the CW on July 9, 1998, which was also one of dismay and reiterated the belief that their approach was legally sound "and acknowledged in international legal doctrine as well as through extensive State practice."

75. P. Kirsch, *The Rome Conference on the International Criminal Court: A Comment* A.S.I.L. NEWSLETTER, Nov–Dec. 1998, 1, 8.

76. The United States had argued earlier for a ten-year transitional period for war crimes and crimes against humanity. Note that Article 124 is to be reviewed at the review conference to be convened seven years after the entry into force of the Statute, in accordance with Article 123. Those States participating in the Assembly of States Parties established in Article 112 will be eligible to be present.

77. The Rome Treaty Conference Monitor, July 18, 1998, No. 26, 2.

78. U.N. Doc. A/CONF. 183/C.1/L.90.

79. Proposed by Norway. Sweden and Denmark spoke for and China and Qatar against.

80. The new Preparatory Commission (PrepCom) set up by the United Nations General Assembly had four meetings between February 16–26, 1999, July–August 1999, November–December 1999, and March 2000. Its mandate includes defining aggression. Such a definition will then have to be adopted under the provisions dealing with amendments and review of the Statute, namely Articles 121 and 123. However, this is not subjected to the same time constraints as the drafting of the Rules of Evidence and Procedure and The Elements of Crimes which must be accomplished by the end of the June 2000 meeting.

81. In accordance with Article 14.

82. In accordance with Article 15.

83. At the outset of the Conference many delegations, including China, France, India, Mexico and several non-aligned States, had supported the "State consent" proposal, requiring consent even from States Parties for each prosecution.

84. The various United Nations Conventions dealing with international terrorism use these bases of jurisdiction along with passive personality and the presence of the accused (custodial State) to allow for extradition or prosecution by domestic criminal courts. See, e.g., Article 6 of the 1979 International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205, and Article 6 of the 1997 International Convention on the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164.

85. *Compania Naviera Vascongado* v. *Steamship Cristina,* [1938] A.C. 485, 496, per Lord MacMillan. The ambit of the territorial principle has been interpreted in some domestic courts to allow for criminal prosecution when a significant portion of the elements, if not all, of the crime occur in the State. It is a real and substantial link test that is applied and it is in accord with the principle of international comity. See, e.g., the Canadian case of *Libman* v. *The Queen,* [1985] 2 Supreme Court Reports 178.

86. See, e.g., North Atlantic Status of Forces Agreement, 1951, 1953 Can. T. S. No. 13, and the Agreement Concerning the Jurisdictional Immunities of U.N. Forces Between the United Nations and Cyprus, 1964, 492 U.N.T.S. 57.

87. *Supra* note 84. Furthermore, the international terrorism conventions oblige States Parties to amend their domestic criminal law to provide for wide bases of jurisdiction over the offence, including the presence of the offender in its territory, and the obligation of *aut dedere, aut*

judicare, that is, to extradite or to submit the case to a State's own authorities for the purposes of prosecution.

88. See, e.g., Article 6(1) (a) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), 27 I.L.M. 672. Note L. Sadat Wexler (ed.), *Model Draft Statute for the International Criminal Court*, (1998), 13 NOUVELLES ETUDES PENALES 25, includes also the State of registration of spacecraft or space stations.

89. Once the preconditions of Article 12(2) have been met, other States Parties are obliged to cooperate with the ICC.

90. 1969, 1155 U.N.T.S. 331.

91. Note *United States* v. *Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir., 1991). Here the United States prosecuted Yunis on the basis of the passive personality principle for hijacking and hostage taking. Lebanon, the State of nationality of the accused was not a State Party of either the International Convention Against the Taking of Hostages, *supra* note 23, or the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 23.

92. The argument that such delegation is either illegal or unprecedented has been put forward recently by D. Scheffer, *International Criminal Court: the Challenge of Jurisdiction*, *supra* note 1.

93. SS *Lotus* (France v. Turkey) (1927), P.C.I.J. Ser. No. 10.

94. See, e.g., the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1977 Can. T.S. No. 43, Article 3 (1) (b).

95. See Article 7[4], Article 9, option 1, para. 3, option 2, para. 4, and further option para. [2].

96. Article 7 *ter*.

97. Article 7 *ter*.

98. Lawyers Committee for Human Rights, *The Rome Treaty for an ICC: A Brief Summary of the Main Issues*, ICC BRIEFING SERIES, vol. 2 (1).

99. T. Meron, *The Court We Want*, WASHINGTON POST, October 13, 1998, reprinted in A.S.I.L. NEWSLETTER, Nov.–Dec. 1998, 9, and D. Scheffer, *America's Stake in Peace, Security and Justice*, A.S.I.L. NEWSLETTER, Sept.–Oct. 1998, 1, where he states that the ICC "could not on its own prosecute Saddam for massacring his own people."

100. Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, Belize, Takjikistan and Iceland.

101. R. Wedgewood, *The International Criminal Court: An American View* (1999), 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 97, 102.

102. *Ibid.*

103. G. Hafner, K. Boon, A. Rubesame and J. Huston, *A Response to the American View as Presented by Ruth Wedgewood* (1999), 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 108, 119.

104. Statement by Secretary of State Madeleine Albright, as reported in The Deseret News (Salt Lake City), May 6, 2000, p. A4.

105. Article 121.

106. Statement of Ambassador David Scheffer, as reported in The Deseret News (Salt Lake City), May 6, 2000, p. A4.

Appendix

Principal Publications of Professor L. C. Green

Books

Authored

International Law Through the Cases. 1st ed. 1951; 2d ed. 1959; 3rd ed. 1970; 4th ed. 1978.
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Superior Orders in National and International Law. 1976.
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