CHAPTER-VIII

WAR CRIMES AND COMMAND RESPONSIBILITY

The ancient Chinese (500 B.C.)were governed by certain rules of war. For example, it was forbidden in combat to strike elderly men or further injure an enemy previously wounded.[360] Later on in the Byzantine Empire, (527- 1071 A.D.) Even when surrounded by numerous and savage enemies, the Byzantine Horse-Archers' creed included immunity for women and other non-combatants.[361] In the Middle Ages. Warriors developed a code of conduct that became known as chivalry and the forerunner to modem laws of war. The code was a result of the notion that those that bore arms were honorable and those that did not lacked honor. The focus was on the preservation of honor between combatants, not on humanitarian protections for non-combatants. For example, although outlawed in many codes of chivalry, rape was considered a proper incentive in some armies for soldiers involved in siege warfare. Jus Armorum or Jus Militare, the Law of Arms, was not a body of law between nations; but rather, a body of norms which governed the conduct of military professionals. These rules regulated the conduct of soldiers within Christendom, but not those outside such as Muslims or non-Christians.[362]

The Scottish Wars of Independence From England. Scottish national hero Sir William Wallace was tried in England in 1305 for the wartime murder of civilians.[363] (reporting that Sir Wallace allegedly spared

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[360] Sm Tzu, THE ART OF WAR (Samuel B. Griffith trans., Oxford Univ. Press 1963).

[361] LYNN MONTROSS, THE AGES WAR THROUGH 105, 164 (Third Edition, 1960).

[362] Theodor Meron, Crimes and Accountability in Shakespeare, 92 Am. J. Int'l L. 1 1998); Theodore Meron, Shakespeare's Henry the Fifth and the Law of War, 86 Am. J. Int'l L. 1 (1992); YORAM DINSTEIN &MALATABORY, ININTERNATIONAL WAR CRIMES LAW (1996).

[363] G.W.S. BARROW, ROBERTBRUCE203 (1965)

"neither age nor sex nor nun"). In the Trial of Peter Von Hagenbach, 1439 an international tribunal of judges from 28 states stripped Hagenbach of his knighthood and sentenced him to death for murder, rape, perjury and other crimes against "the laws of God and man," what today would be described as Crimes Against Humanity.[364] During the American War of Independence, The most frequently punished violations were those committed by forces of the two armies against the persons and property of civilian inhabitants. Trials consisted of courts-martial convened by commanders of the offenders.[365] In the American Civil War in 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia prisoner of war camp, was tried and convicted and sentenced to death by a Federal military tribunal for murdering and conspiring to ill-treat Federal prisoners of war. [366] In 1902, in the Anglo-Boer War. British courts-martial tried Boers for acts contrary to the usages of war. [367] During the Counter-insurgency operations in the Philippines. Brigadier General Jacob H. Smith, US Army, was tried and convicted by court-martial for inciting, ordering and permitting subordinates to commit war crimes.[368] During World War I. Because of German resistance to the extradition--under the 1919 Versailles peace treaty-of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the supreme court of Leipzig, Germany. The accused were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt.

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[364] William H. Parks, Command Responsibility For War Crimes, 62 MIL. L. REV. 1 (1973).

[365] George L. Coil, War Crimes of the American Revolution, 82 ML.L. REV. 171, 173-81 (1978).

[366] J. MCELROY, ANDERSONVILLE(1 879); W.B. HESSELTINE, CIVIL WAR PRISONS (1930); LAW OF WAR: A DOCUMENTARY VOL. 1 783 798 (Leon Friedman, ed.) HISTORY. -(1 972).

[367] THE MILNER PAPERS:SOUTHAFRICA, 1 897- 1 899, 1899-1905 (1933).

[368] L. C. Green, Command Responsibility in International Humanitarian Law, 5 TRANSNAT'LL. & CONTEMP. PROBS.3 19, 326 (1995); S. DOC. 213, 57'h Cong. 2nd Session, p. 5.

[369] In World War II, the victorious allied nations undertook an aggressive program for the punishment of war criminals. This included the joint trial of 24 senior German leaders (in Nuremberg) and the joint trial of 28 senior Japanese leaders (in Tokyo) before specially created International Military Tribunals; twelve subsequent trials of other German leaders and organizations in Nuremberg under international authority and before panels of civilian judges; thousands of trials prosecuted in various national courts, many of these by British military courts and US military commissions. [370]

Geneva Conventions. Marked the codification--beginning in 1949 when the conventions were opened for signature--of specific international rules pertaining to the trial and punishment of those committing "grave breaches" of the conventions.[371]

U.S. soldiers committing war crimes in Vietnam were tried by US courts-martial under analogous provisions of the UCMJ.[372] In Panama war, a much-publicized case arising in the 82d Airborne Division, a First Sergeant charged, under UCMJ, art. 1 18, with murdering a Panamanian prisoner, was acquitted by a general court-martial.[373]

During the Persian Gulf War. Although the United Nations Security Council (UNSC) invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the post-conflict resolutions were

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[369] DA Pam 27-1 61 -2 at 221.

[370] DA Pam 27-161-2 at 224-35; NORMAN E. TUTOROW, WAR CRIMINALS, TRIALS: AN WAR CRIMES, AND WAR CRIMES ANNOTATED AND SOURCE BIBLIOGRAPHY BOOK 4-8 (1 986).

[371] Pictet at 357-60.

[372] MAJOR GENERAL S. PRUGH, GEORGE LAWAT WAR: VIETNAM 1964- 1973 76-77 (1975); W. Hays Parks, Crimes in Hostilities, Marine Corps Gazette, Aug. 1976, at 16-22.

[373] See US v. Bryan, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 3 1 Aug. 1990) [on file with the Office of the SJA, 82d Airborne Div.].

silent on criminal responsibility.[374] The Former Yugoslavia is another case to discuss. On 22 February 1993, the UNSC established the first international war crimes tribunal since the Nuremberg and Far East trials after World War II.[375] On 25 May 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings and other matters.[376] In Rwanda. On Nov. 8, 1994 the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda.[377] Art. 14 of the Statute for Rwanda provides that the rules of procedure and evidence adopted for the Former Yugoslavia shall apply to the Rwanda Tribunal, with changes as deemed necessary. Sierra Leone is another incident related to this. On August 14,2000 the UNSC adopted Resolution 1315, which authorized the Secretary General to enter into an agreement with Sierra Leone and thereby establish the Special Court for Sierra Leone (signed January 16, 2002). The court is a hybrid international-domestic Court to prosecute those allegedly responsible for atrocities in the Sierra Leone.

The International Criminal Court. The treaty entered into force on 1 July 2002. As of 22 December 2003,92 countries have ratified the Rome Statute of the International Criminal Court.

1. Although the U.S. is in favor of a standing permanent forum to address war crimes, the US does not support the treaty as written. The United States signed the Rome Treaty on 3 1 December 2000. Based on numerous concerns, however, President George W. Bush directed on 6 May 2002 that notification be sent to the Secretary

[374] S.C. Res. 692, U.N. SCOR, 2987th mtg., U.N. Doc. S/RES/692 (1991), reprinted in 30 I.L.M. 864 (1991); see also Theodore Meron, The Case for War Crimes Trials in Yugoslavia, Foreign Affairs, Summer 1993, at 125.

[375] S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993).

[376] S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

[377] S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

General of the United Nations, as the depositary of the Rome Statute, that the United States does not intend to become a party to the treaty and has no legal obligations arising from its signature on 3 1 December 2000.

2. A brief summary of the position of the United States is in the statement made on 6 May 2002 by Marc Grossman (see Appendix A).

3. The United Nations Security Council passed Resolution 1487 on June 12, 2003 (although with abstentions by France, Germany and Syria). This requests that the ICC not commence or proceed with investigation or prosecution of any case involving current or former officials or personnel from a contributing state that is not a party to the ICC over acts or omissions relating to a UN established or authorized operation. This is to continue for 12 months with the expressed intent to renew the request each year (and it continues the same request started in UNSC Resolution 1422).

4. During its session held in New York from 3 to 7 February 2003, the Assembly of States Parties elected the eighteen judges of the Court for a term of office of three, six, and nine years. The judges constitute a forum of international experts that represents the world's principal legal systems. Seven were elected from the Western European and others Group of States (WEOG), four from the Latin American and the Caribbean Group of States (GRULAC), three from the Asian Group of States, three from the African Group of States, one from the Group of Eastern Europe. Seven are female and eleven are male judges.

5. In accordance with Article 38 of the Rome Statute, the 18 judges of the Court elected the Presidency on 11 March 2003. It is composed of Judge Philippe Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice- President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice- President of the Court. The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor.

However, the Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern.

6. On 26 March 2003, Luis Moreno-Ocampo became the first Chief Prosecutor for the ICC. In July 2003, he rejected requests to investigate allegations of war crimes by US forces during the war in Iraq because the ICC is not "mandated to prosecute such acts since neither Iraq nor the United States is a state party to the court." He has stated that the ICC may investigate charges of crimes against humanity for the massacre of thousands of civilians in Congo.

7. On 24 June 2003, Mr. Bruno Cathala from France was appointed first Registrar of the Court, he will hold office for a renewable term of five years and will exercise his firm actions under the authority of the President. President George W. Bush issued an order on November 13,2001 authorizing the trial by military commission of certain terrorists or others supporting or aiding terrorism against the United States (66 Fed. Reg. 57833).

1. This order was further refined by DoD Military Commission Order No. 1 dated March 21,2002 and eight DoD Military Commission Instructions dated April 30,2003.

2. On July 3,2003, President Bush determined that six enemy combatants currently held by the US are subjected to his Military Order of November 13, 2001.

With the approval of the Civilian Provisional Authority, The Iraqi Governing Council approved the creation of a Special Iraqi Court on December 9,2003. It will be run by Iraqis to try members of former President Saddam Hussein's government on charges of genocide, crimes against humanity, war crimes and a number of specific offenses under Iraqi law, such as misappropriation of government funds and the invasion of another Arab nation.

1. The court will try the most senior members of the regime for crimes

committed between July 17, 1968, when the Baath Party came to power, and May 1,2003, the day President Bush declared an end to major combat in Iraq.

2. The court will be staffed by Iraqis, but will use international legal experts as advisors to the judges, lawyers and investigators. There is also the potential for international judges to be appointed if needed.

3. There will be 10 trial chambers, each with a five-judge panel and a nine- judge appellate level court.

Definition of WAR CRIME:

A. Definition. The lack of a clear definition for this term stems from the fact that both "war" and "crime" themselves have multiple definitions. Some scholars assert that "war crime" means any violation of international law that is subject to punishment. However, it appears that there must be a nexus between the act and some type of armed conflict.

1. "In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."[378]

2. "Crimes committed by countries in violation of the international laws

governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried."[379]

(defining a broader category of "crimes under international law" of which "war crimes" form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).

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[378] L. OPPENHEIM, INTERNATIONAL LAW 9 25 1 (7th ed., H. Lauterpacht, 1955); accord TELFORDTAYLOR,NUREMBERG 19-20 (1970).

[379] BLACK'S LAW DICTIONARY 15 83 (6th ed. 1990); ef.FM27-10, para. 498

3. "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." [380]

4. As with other crimes, there is an ActusReus and MensRea element.

5. Application of the principle of nullum crimen sine lege requires that the law to be applied in the trial be binding on the defendant at the time the offense was committed. Application of either customary international law or applicable treaty provisions is required.

6. Nulla poena sine lege requires that acts that may be punished as war crimes be clearly defined such that the defendant is on notice.

7. Prosecution of war crimes and difficulties arising there from:

a. Partiality

(1)War crimes prosecutions are subject to criticism as "Victor's Justice"

vice truly principled prosecution. A primary focus must be on a fundamentally fair system of justice with consistent application of the laws applied to all.

(2)In the trial of Admiral Donitz in part for the crime of not coming to the aid of enemy survivors of submarine attacks he argued the point that this was in fact the policy of U.S forces in the Pacific under General Nimitz.[381]

(3)Influence of Real politic impacts prosecutions.

(a) Yamashita. Appearance of expedited trial with sentence (death) announced on 7DEC45. Justice Rutledge stated in his dissent that the trial was "the uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander."[382]

(b)War crimes prosecutions not pursued post conflict. In Korean Conflict, 23 cases were ready for trial against EPWs in US custody yet

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[380] FM 27-10, at para. 499.
[381] 22 I.M.T. 559 (1949).
[382] 327 U.S. 1,4 1 (1946).

they were released under terms of the armistice. Prosecution not mentioned in First Gulf War Ceasefire agreement.

b. Legality.

(1) Ongoing issues with respect to nullurn crirnen sine lege and ex post facto laws and balancing gravity of offenses yielding no statute of limitations against reliability of evidence witness testimony.

(2) Lack of a coherent system to define and enforce this criminal system presupposes a moral order superior to the states involved. This legally positivistic system requires a shared ethic that may or may not exist and is certainly disputed.

(3) Status of individuals under international law is relatively new, although arguably has now crystallized into customary international law principle. Historically states were held responsible as such, however, beginning with the Treaty of Versailles and definitely after WWII individuals were held responsible as actors for the state. In addition historically individuals were prosecuted in national courts for war crimes but now focus is moving to international tribunals.

c. Recording history. Didactic function of war crimes trials is important but may interfere with evidentiary procedures, e.g. by admitting more

evidence than may otherwise be admitted.[383]

B. The Nuremberg Categories. The Charter of the International Military Tribunal defined the following crimes as falling within the Tribunal's jurisdiction:

1. Crimes Against Peace. Planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or war otherwise in violation of international treaties, agreements, or assurances. This was a charge intended to be leveled against high-level policy planners, not generally at ground commanders.

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[383] McCormack and Simpson, eds., The Law of War Crimes: National and International Approaches (1997)

2. Violation of the Laws and Customs of War. The traditional violations of the laws or customs of war. For example, targeting non-combatants.

3. Crimes Against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war.[384]

C. Grave Breaches Versus Simple Breaches of the Law of War. The codification in 1949 of crimes involving certain serious conduct gave rise to a distinction between those crimes and acts violative of other customs or rules of war. For a grave breach, there must first be an international armed conflict. Second, the victim must be a "protected person" in one of the conventions.[385]

1. Grave Breaches. Serious felonies. Examples include: Willful killing; Torture or inhumane treatment; Biological experiments; Willfully causing great suffering or serious injury to body or health; Taking of hostages; Extensive destruction of property not justified by military necessity; Compelling a prisoner of war to serve in the armed forces of his enemy; Willfully depriving a prisoner of war of his rights to a fair and regular trial.

2. Simple Breaches. Examples include: Making use of poisoned or otherwise forbidden arms or ammunition; Treacherous request for quarter; Maltreatment of dead bodies; Firing on localities which are undefended and without military significance; Abuse of or firing on the flag of truce; Misuse of the Red Cross emblem; Use of civilian clothing by troops to conceal their military character during battle; Improper use of privileged buildings for military purposes; Poisoning

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[384] See Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, reprinted in 1TIUALS OF WAR CRIMINALS 257 (noting that only one 9-16. See generally OPPENHEIM accused was found guilty solely of crimes against peace and two guilty solely of crimes against humanity).

[385] GWS, art. 50; GWS Sea, art. 51; GPW, art. 130; GC, art. 147.

of wells or streams; Pillage or purposeless destruction; Compelling prisoners of war or civilians to perform prohibited labor; Killing without trial spies or other persons who have committed hostile acts; Violation of surrender terms.[386]

3. Protocol I of the 1949 Geneva Conventions lists additional acts that

constitute a grave breach of that Protocol.[387]

D. Violations Charged in current tribunals.

1. International Criminal Tribunal for the Former Yugoslavia,

a. Crimes against Peace are not among listed offenses to be tried.

b. Violations of the Laws or Customs of War (War Crimes) traditional offenses such as murder, wanton destruction of cities, towns or villages or devastation not justified by military necessity, firing on civilians, plunder of public or private property and taking of hostages.

(1) The Opinion & Judgment in the Tadic case set forth elements of proof required for finding that the Law of War had been violated:

(a) An infringement of a rule of International humanitarian law (Hague, Geneva, other);

(b) Rule must be customary law or treaty law;

(c) Violation is serious; grave consequences to victim or breach of law

that protects important values;

(d) Must entail individual criminal responsibility; and

(e) May occur in international or internal armed conflict.

c. Crimes Against Humanity. Those inhumane acts that affront the entire international community and humanity at large. Crimes when committed as part of a widespread or systematic attack on civilian population.

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[386] See FM 27-10, para. 504.

[387] Cf.Protocol I, arts. 11(4), 85.

(1) Charged in the current indictments as murder, rape, torture, and persecution on political, racial, and religious grounds, extermination and deportation.

(2) In the Tadic Judgment, the Court cited elements as:

(a) A serious inhumane act as listed in Statute;

(b) Act committed in international internal armed conflict;

(c) At the time accused acted there were ongoing widespread or systematic attacks directed against civilian population;

(d) Accused knew or had reason to know he/ she was participating in widespread or systematic attack on population (actual knowledge);

(e) Act was discriminatory in nature; and

(f) Act had nexus to the conflict.

(3) Crimes against humanity also act as a gap filler to the crime of Genocide because a crime against humanity may exist where a political group becomes the target.

d. Grave Breaches. As defined by the Geneva Conventions, may occur only in the context of an international armed conflict. There are eight as listed in outline, above.

(1) Charged in indictments as willful killing, torture, ,inhumane treatment, and extensive destruction of property not justified by military necessity or causing great serious injury to body or health.

(2)The Tadic court found there was no international armed conflict during the time covered by the indictment and therefore victims were not protected persons. Therefore, the court felt it lacked jurisdiction to

hear grave breaches because the court first determined that the conflict was purely internal. The court concluded that for a prosecution of a grave breach, the elements are:

(a) One of eight listed acts committed;

(b)International armed conflict; and

(c) Act committed against a protected person or property.

(3) On July 15, 1999, the Appellate Chamber reversed the Trial Chamber and found that the conflict was international. The Appellate Chamber therefore found Tadic guilty of9 counts of grave breaches. The Trial Chamber had based its finding of not guilty solely on the grounds that the conflict was internal so the Appellate Chamber actually found him guilty of the counts rather than sending the case back to the Trial Chamber.

(4) In the Celebici case, the ICTY found that the indictment covered a

period of international armed conflict. Three of the four accused were convicted of grave breaches.

e. Genocide. Any of the listed acts committed with intent to destroy, in

whole or in part, a national, ethnic, racial or religious group.

(1) Has been charged as persecution, murder, torture, serious bodily injury done to ethnic groups at detention camps, and where civilians fired upon and killed due to national or ethnic affiliation. Includes preventing births within a group, transferring children of group, serious bodily injury to member of a group or killing members of a group.

(2) Genocide v. "Ethnic Cleansing." Ethnic cleansing is a subset of genocide; it is not a separate crime.

2. International Criminal Tribunal for Rwanda.

a. Genocide. Same definition as above. Charged in all indictments for acts such as torturing or killing of Tutsis.

b. Crimes against Humanity. Crimes when committed as part of widespread or systematic attack against any civil population on national, political, ethnic, racial or religious grounds.

(1) Charged in all indictments for acts such as extermination of all Tutsis in a village, murder, torture or rape of ethnic group (Tutsi) or liberal political supporters.

(2)Fills gap in definition of genocide. Authorizes prosecution for persecution on political grounds.

c. Article 3 Common to the Four Geneva Conventions and Additional Protocol 11. There are eight acts specified in the statute, including taking of hostages; violence to life, health, and physical or mental well being; terrorism; pillage; and executions without judgment by regularly constituted court. This list is illustrative, not exhaustive.

(1) These are war crimes committed in the context of an internal armed conflict and traditionally left to domestic prosecution, but made

subject to international prosecution pursuant to the Rwanda Statute.

(2) Charged in all indictments for acts in which the inductee personally

participated in or directed the crime. For example, running over a person with a vehicle to induce them to "talk," burning homes, rape, and murder.

(3) Tadic interlocutory appellate court decision on jurisdiction held that

Common Article 3 protections apply in both international and internal armed conflict. The Tadic judgment set out elements as follows-

(ICTR statute links ICTR to ICTY jurisprudence):

(a) An armed conflict whether international or internal;

(b)Victim is person taking no part in hostilities;

(c) Act against victims is one of those listed in Common Article 3 or Protocol 11; and

(d)Act committed in context of armed conflict (need not be while the conflict is ongoing).

E. International Criminal Court. The ICC has jurisdiction over the following crimes:

1. Genocide. "For the purpose of this Statute, "genocide" means .. . acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.. ." There does not appear to be a

need to tie the crime of genocide with an armed conflict in order for the ICC to have jurisdiction. This is consistent with the Genocide convention.

2. Crimes against Humanity. "For the purpose of this Statute, "crimes against humanity" means . .. acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.. ." This includes acts such as murder, extermination, enslavement, deportation or forcible transfer, imprisonment or severe depravation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group based on political, racial, national ethnic, cultural, religious, gender.. ., enforced disappearance, apartheid, and other inhumane acts.

a. Although arguably customary international law no longer requires it, traditionally, there had to be a link between crimes against humanity and an armed conflict, however, the ICC Statute does not specifically require such a nexus.

b. However, jurisdiction exits only where the "attacks" are "widespread or systematic." This language suggests that there must be something akin to an armed conflict or at least a large-scale governmental abuse.

3. War Crimes. For the purposes of the ICC, war crimes means:

a. In the case of an International Armed Conflict:

(1) Grave Breaches of the Geneva Conventions.

(2) Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute lists what it considers to be serious violations.

b. In the case of an Internal Armed Conflict: (1)Violations of Common Article 3.

(2)Other violations of the laws and customs of war "applicable .. . within the established framework of international law."

(a) The Statue provides a laundry list of these crimes from various treaties.

(b) It also criminalizes the attack of personnel, equipment, installations, or vehicles involved with a UN peacekeeping or humanitarian mission.

(c) Recognizes that the Statute does not apply to situations of mere internal disturbances and tensions that do not rise to the level of a Common conflict.[388]

4. Crime of Aggression. Article 5(2) states that the ICC will have jurisdiction over the crime of aggression after a provision is adopted defining the crime and setting out the conditions under which the ICC will exercise this jurisdiction.

F. Common Article 3 of the Four Geneva Conventions. Minimum standards that Parties to a conflict are bound to apply, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties. Nothing in Common Article 3 discusses individual criminal liability.

1. ICTY has held that prosecutions for violations of Common Article 3 can be brought in international as well as internal armed conflicts.

2. The International Criminal Court statute provides for prosecution of

violations of Common Article 3 in non-international armed conflicts.[389]

3. 18 U.S.C. $2441 now permits prosecutions for violations of Common Article 3 in the U.S. federal court system.

G. Genocide. In 1948, the U.N. General Assembly defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, "whether committed in time of peace or in time of war." Convention on the Prevention and Punishment of the Crime of Genocide, opened

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[388] Article 3

[389] See Rome Statute, article 8(c).

for signature Dec. 11, 1948,[390] U.S. ratification was given advice and consent by Senate in the Genocide Convention Implementation (Proxmire) Act of 1987.[391]

H. Other Treaties. Violations of treaties to which the United States is a party also create bases for criminal liability. For example, the 1993 Chemical Weapons Convention and the 1980 Conventional Weapons Convention.

I. Conspiracy, Incitement, Attempts, and Complicity. International law allows for punishment of these forms of crime. GPW, art. 129 (subjecting to penal sanctions "persons alleged to have committed, or to have ordered to be committed" serious war crimes) (emphasis added).[392]

J. Distinctive of Crimes against Humanity:

i. General Requirements of Crimes against Humanity:

a. There is an "attack." This is distinct from any ongoing armed conflict. An attack for these purposes does not require an ongoing internal or international armed conflict but may be conducted by a regime against its own people. This differs from the original definition in Article 6(c) of the Nuremburg Charter that required a nexus to an armed conflict and reflects a change in customary international law.[393]

b. There is a nexus between that attack and the act(s) of the accused.

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[390] Art. 2, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951)

[391] Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. 3 1091).

[392] Allied Control Council Law, No. 10, art. 11, para. 2, Dec. 20, 1945, reprinted in 1 TRIALS OF WAR CRIMINALS 16; S. C. Res. 827, U.N. SCOR, U.N. DOC. S/RES/827 (1993), art.7; S. C. Res. 955, U.N. SCOR, U.N.DOC S/RES/955, art. 6; FM 27-10, 500.

[393] See Antonio Cassese, Crimes Against Humanity, in Cassese, Gaeta and Jones, eds., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1, at 356.

Requires an act by the defendant, which by its nature or consequences is liable to further the attack AND the defendant knows that there is this broader attack and he/ she is part of it.

c. The attack is directed against any civilian population. The subject civilian population must be the primary object of the attack and not just an incidental victim. This element addresses the broader attack, not the immediate victim of the defendant's action. "Any" denotes the need to identify some characteristic used to distinguish this group, i.e. a trait or location, from a more general population. This may be limited as in the ICTR Statute (only national, political, ethnic, racial, or religious discrimination), however, with the exception of persecution there is no specific discriminatory intent required. The idea of "population" requires more than just an isolated or random act against a few individuals.

d. The attack is systematic or widespread. This addresses the larger scale of the attack, i.e. the number of victims or the organized nature of the acts.

e. The defendant must know of the attack and that the acts are part of that attack or may further that attack. This is the key mens rea element that distinguishes Crimes Against Humanity. In addition to these general requirements, there must be a foundational crime, likely to be identified in the courts statute, i.e. murder, enslavement, deportation, torture, rape, etc.

ii. The idea that the offense is a "crime against humanity" derives from the notion that the act injures not just the victim(s), but tears at the fabric of what it means to be human.

iii. Differs from war crimes because:

a. War crimes require an armed conflict whereas Crimes Against Humanity do not.

b. War crimes do not require a connection to a widespread or systematic attack.

c. War crimes are a broader category of offenses, some of which could be the underlying foundational offense for a Crime Against Humanity. Note that the additional element to prove a crime against humanity overcomes problems of multiplicious charging for a single act.

5. Differs from Genocide because:

a. Mensrea element in genocide requires intent to destroy all or part of a group, while Crimes Against Humanity does not.

b. Genocide does not require proof of a widespread or systematic attack. It could actually be the acts of one person with requisite intent.

c. Victims of Genocide can be anyone, however, Crimes Against Humanity must be committed against a civilian population.

d. Genocide must be based upon national, ethnic, racial or religious identity and Crimes Against Humanity address broader categories.

6. "Hermann Goering was a criminal against humanity, but so was the

unremarkable German citizen who denounced his Jewish neighbor to the Gestapo, knowing what his neighbor's fate would be."[394]

K. Defenses in a War Crimes Prosecution. Not well settled based upon the competing interests of criminal law principles and the seriousness of protecting victims from war crimes, crimes against humanity, etc. Defenses available will be specifically established in the court's constituting documents (although an argument from customary international law is always open as a possibility for a zealous defense counsel).

1. Official Capacity or Head of State Immunity. While historically this was a possible defense rooted in sovereign immunity, current jurisprudence indicates that it is likely no longer available.

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[394] See Guenael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for The Former Yugoslavia and for Rwanda, 43 HARV.INT'LL.J. 237 (2002).

2. Superior Orders. Generally, it is only a possible defense if the defendant was required to obey the order, the defendant did not know it was unlawful and the order was not manifestly unlawful.

3. Duress. May be available as a defense, however, it may also only be taken into account as a mitigating factor depending on the specific law governing the court. For example, the ICTY and ICTR only allow duress to be considered as a mitigating factor and not as a full defense. In general, duress requires that the act charged was done under an immediate threat of severe and irreparable harm to life or limb, there was no adequate means to avert the act, the act crime committed was not disproportionate to the evil threatened (crime committed is the lesser of two evils), and the situation must not have been brought on voluntarily by the defendant (i.e. did not join a unit known to commit such crimes routinely).

4. Lack of Mental Responsibility. Not clearly defined in customary international law. Possibly available if the defendant, due to mental disease or defect, did not know the nature and quality of the criminal act or was unable to control his there conduct.

COMMAND RESPONSIBILITY FOR THE CRIMINAL ACTS OF SUBORDINATES

A. Commanders may be held liable for the criminal acts of their subordinates even if the commander did not personally participate in the underlying offenses if certain criteria are met. Where the doctrine is applicable, the commander is accountable as if he or she was a principal.

B. As with other customary international law theories of criminal liability, the doctrine dates back almost to the beginning of organized professional armies. In his classical military treatise, Sun Tzu explained that the failure of troops in the field cannot be linked to "natural causes," but rather to poor leadership. International recognition of the concept of holding commanders liable for the

criminal acts of their subordinates occurred as early as 1474 with the trial of Peter of Hagenbach.[395]

C. A commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense. Japanese Army General Tomoyuki Yamashita was convicted and sentenced to hang for war crimes committed by his soldiers in the Philippines. Although there was no evidence of his direct participation in the crimes, the Military Tribunal determined that the violations were so widespread in terms of time and area, that the General either must have secretly ordered their commission or failed in his duty to discover and control them. Most commentators have concluded that Yamashita stands for the proposition that where a commander knew or should have known that his subordinates were involved in war crimes, the commander may be liable if he or she did not take reasonable and necessary action to prevent the crimes.[396]

D. Two cases prosecuted in Germany after WWII helped to define the doctrine of command responsibility.

1. In the High Command case, the prosecution tried to argue a strict liability standard. The court rejected this, however, and stated: "Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . .A high commander cannot keep completely informed of the details of military operations of subordinates . . .He has the right to assume that details entrusted to responsible subordinates will be legally executed . . .There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his

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[395] William H. Parks, Command Responsibility for War Crimes, 62 MIL L. REV. 1 (1973).

[396] US v. Tomoyuki Yamashita, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945. William H. Parks, Command Responsibility For War Crimes, 62 MIL L. REV. 1 (1973).

subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations."

2. The court in the Hostage Case found that knowledge might be presumed where reports of criminal activity are generated for the relevant commander and received by that commander's headquarters.

E. Protocol I, art. 86. Represents the first attempt to codify the customary doctrine of command responsibility. The mens rea requirement for command responsibility is "knew, or had information, which should have enabled them to conclude" that war crimes were being committed and "did not take all feasible measures within their power to prevent or repress the breach."

F. The International Criminal Tribunals for the Former Yugoslavia & Rwanda.

1. "Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[397]

2. In ICTR, the doctrine of superior responsibility is used in numerous indictments, for example those against Theoneste Bagosora (assumed official and de facto control of military and political affairs in Rwanda during the 1994 genocide) and Jean Paul Akayesu (bourgmestre (mayor), responsible for executive functions and maintenance of public order within his commune), high-ranking

[397] ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

civilian officials in the Rwandan national and local governments, respectively.

3. In ICTY, the doctrine of command responsibility is used in numerous

indictments, to include those against Slobodan Milosevic (President of the FRY) (See Appendix), Radovan Karadzic (as founding member and

President of Serbian Democratic Party) and Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army).

G. The International Criminal Court establishes its definition of the requirements for the responsibility of Commanders and other superiors in Article 28 of the Rome Statute. Note that it denotes the responsibility for military commanders and those functioning as such (sub paragraph a) differently from other superiors, i.e. civilian leaders (sub paragraph b).

1. Subparagraph **"a"** states: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

a. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

b. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

2. Subparagraph **"b"** states: "With respect to superior and subordinate

relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court

committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

a. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

b. The crimes concerned activities that were within the effective responsibility and control of the superior; and

c. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

H. Prosecution of command responsibility cases in the U.S. Military.

1. It is U.S. Anny Policy that soldiers be tried in courts-martial rather than international forums.[398]

2. No separate crime of command responsibility or theory of fiability, such as conspiracy, for command responsibility in UCMJ. For a discussion of this and some proposed changes.[399]

3. UCMJ, art. 77, Principals. For a person to be held liable for the criminal acts of others, the non-participant must share in the perpetrators purpose of design, and "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist.. .." Where a person has a duty to act, such as a security guard, inaction alone may create liability. However, Art. 77 suggests that actual knowledge, not a lack of knowledge due to negligence, is required.

a. At the court-martial of Captain Medina for his alleged participation in the My Lai incident in Vietnam, the military judge instructed the

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[398] FM 27-1 0, para. 507.

[399] Michael L. Smidt, Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL.L. REV. 155 (2000).

panel that they would have to find that Medina, the company commander, had actual knowledge in order to hold him criminally liable for the massacre. There was not enough evidence to convict Captain Medina using that standards and he was acquitted of the charges.

b. Accordingly, it appears that in domestic courts-martial, a prosecutor must establish actual knowledge on the part of the accused.[400]

c. Army Policy. "The commander is responsible if he ordered the commission of the crime, has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[401]

FORUMS FOR THE PROSECUTION OF WAR CRIMES

A. International v. Domestic Crimes

1. Built on the concept of national sovereignty, jurisdiction traditionally follows territoriality or nationality.

2. In war crimes prosecutions, the veil of sovereignty is pierced.

3. Universal international jurisdiction first appeared in Piracy cases where the goal was to protect trade and commerce on the high seas, an area generally believed to be without jurisdiction.

4. Universal jurisdiction in war crimes first came into being in the days of chivalry where the warrior class asserted its right to punish knights that had violated the honor of the profession of arms irrespective of nationality or location. The principle purpose of the law of war eventually became humanitarianism. The international

[400] See US v. Calley,46 C.M.R. 1131 (A.C.M.R. 1973); US v. Medina, C.M. 427162 (A.C.M.R.1971).

[401] FM 27-10,T 501; see also TC 27-10-3 at 19-21.

community argued that crimes against "God and man" transcended the notion of sovereignty.

B. Current International Jurisdictional Bases.

1. International Criminal Court.

2. Ad hoc tribunal under the authority of UN Charter (ICTY or ICTR) or

separate treaty (Sierra Leone).

3. Some states claim universal jurisdiction over all war crimes despite the lack of any nexus to the alleged crime.

a. Belgium passed a law in 1993 invoking universal jurisdiction over any war crimes which did not require either complainants or accused to have a connection to Belgium. After successfully trying four cases from Rwanda, many complaints were filed with the courts. The statute was amended in April 2003 to state that mandatory investigation could begin only if the complaint had a direct link to Belgium. The statute was further revised effective August 1,2003 when the previous statute was repealed and pending complaints nullified. (repeal and nullification upheld by the Belgian Supreme Court in September 2003).

C. Domestic Jurisdictional Bases. Each nation provides its own jurisdiction. The following is the current U.S. structure.

1. General Courts-Martial.

a. In addition to the jurisdiction to try U.S. service members, the military may try by general court-martial anyone subject to trial for violations of the law of war.[402]

b. If there is a declared war, then civilians accompanying U.S. forces may be prosecuted in the same forum as U.S. soldiers.[403] UCMJ jurisdiction, both personal and substantive, over civilians accompanying the force exists only during "time of war." This time of

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[402] UCMJ, art. 18.

[403] See UCMJ, art. 2(a)(10).

war qualifier has been interpreted to require an actual declaration of war.[404]

2. The War Crimes Act of 1996 (18 U.S.C. $2441) (amended in 1997).

Authorizes the prosecution of individuals in federal court if the victim or the perpetrator is a US national (as defined in the Immigration and Nationality Act) or member of the armed forces of the US, whether inside or outside the US. Jurisdiction attaches if the accused commits:

A Grave Breach of the 1949 Geneva Conventions.

b. Violations of certain listed articles of the Hague Conventions.

c. Violations of Common Article 3 of the Geneva Conventions, and of Protocol I or Protocol I1 of the Geneva Conventions when and if the US

becomes parties to either of the Protocols.

d. Violations of Protocol I1 to the Amended Conventional Weapons Treaty.

D. Military Commissions.

1. Military commissions, tribunals, or provost courts may try individuals for violations of the law of war. UCMJ, art. 21. This jurisdiction is concurrent with that of a general court-martial.

2. Historical use can be traced back to Gustavus Adolphus and his use of a board of officers to hear law of war violations and make recommendations on their resolution. Frequent use in British military history, which was incorporated into the U.S. Military from its beginning. Used first in U.S. to try Major John Andre for spying in conjunction with General Benedict Arnold. Later used by then General Andrew Jackson after the Battle for New Orleans in 18 15, and again during the Seminole War and the Mexican- American War. Used extensively in Civil War to deal with people hostile to Union

[404] US v. Averette, 19 U.S.C.M.A. 363,41 C.M.R. 363 (1970).

forces in "occupied" territories. Their used continued in all subsequent conflicts and culminated in World War II where military commissions prosecuted war crimes both in the United States and extensively overseas. Such use places the legitimacy of military commissions to try persons for war crimes firmly in customary international law.

3. Constitutional Authority. "Congress and the President, like the courts, possess no power not derived from the Constitution."[405]

a. Congressional authority to create military commissions derived from

Article I, section 8, clauses 1, 10, 11, 14 and 18. Especially relevant is

clause 10, which grants authority to define and punish . .. offenses against the Law of Nations."

b. Presidential authority is derived from Article 11, section 2, clause 1

(powers as Commander in Chief).

c. Confirmed by the Supreme Court in Exparte Quirin, In re Yamashita,

and *Madsen v. Kinsella*.[406] The first two recognized the dual authority of the Congress and President, while the third concluded that absent congressional action to the contrary, the President has authority as the

Commander in Chief to create military commissions.

4. Types of Military Commissions. A key distinguishing factor regarding not only jurisdictional basis, but also crimes that may be tried and who is subject to trial by military commission is determining which type of military commission is at issue.

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[405] Ex Parte Quirin,317 U.S. 1,25 (1942).

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a. Martial Law Courts, when used within the U.S. or its territories when
replacing the civil government.
b. Military Government Courts, when used outside of the U.S. (or within the U.S. in rebel territory during the Civil War) in lieu of the civil
government.
c. War Courts, when used by a military commander for the purpose of trying someone for violations of the law of war.
5. Limitations on Jurisdiction based on Location.
a. Historically, offenses within a military commission's jurisdiction (when sitting as a Military Government Court or a War Court) must have been committed (1) within a theater of war, (2) within the territory controlled by the commander ordering the trial, and (3) during a time of war.
b. In the Civil War, all three types of military commissions were used extensively, especially after Lincoln's 1862 declaration of a state of martial law throughout the country. Some thought the expansive use authorizing the trial of U.S. citizens outside of a zone of occupation or insurrection was not proper, while others accepted this stating the entire country was within a theater of war. In Exparte Milligan,[407] the Supreme Court limited the jurisdiction to areas under valid martial law or occupation, thus commissions were still valid in the occupied South.
c. World War II saw the next extensive use and due to the global nature of the war, the "theater of war" requirement lost much relevance. For example, in Quirin, neither the trial nor the defendants' crimes were committed in the theater of war as traditionally defined; yet the Supreme Court said the military commission had jurisdiction because the crime was committed when

[407] 71 U.S. (4 Wall.) 2 (1866),

the defendants passed through the U.S. military lines and remained in the U.S. (U.S. briefing argued that the global nature of the war put "every foot of this country within the theater of war.").

6. Limitations on Jurisdiction based on the Person.

a. U.S. citizens.

(1) Military commissions lack jurisdiction to try U.S. civilians when the

civil courts are still open. This does not apply to areas under valid martial law or areas in rebellion; however, these circumstances will be

extremely limited, even during a state of war.[408]

(2) Military commissions acting as a Military Government Court may try U.S. citizens for violations in an occupied territory. *Madsen v. Kinsella.*[409]

(3) Military Commissions (sitting as a War Court) may try U.S. citizens

who engage in belligerent acts against the U.S. for war crimes. Quirin,

317 U.S. at 37 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.").

b. Foreign Nationals.

(1) During international armed conflict, under Geneva Convention III articles 84, 85, and 102, the U.S. can only use military commissions to

try prisoners of war if they are also used to try U.S. military personnel.

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[408] See Exparte Milligan 71 U.S. (4 Wall.) 2 (1866), and Duncan v. Kahanamoku, 327 U.S. 304 (1 946).
[409] 343 U.S. 341 (1952).

The U.S. does not currently use military commissions to try U.S. service members.

(2) Doing international armed conflict, Geneva Convention IV, articles 64, 66 and 70 authorize, but place some restrictions on, the use of military commissions to try protected civilians in occupied territories.

(3) Habeas Corpus Issues.

(a) May have access to U.S. court review based on territorial jurisdiction, i.e. the crimes, trial or confinement are in the U.S. or its territories.

(b) Will not have access to habeas review if they are nonresident enemy aliens whose crimes, trial, and confinement are all outside of the U.S. or its territories. *Johnson v. Eisentrager*,[410]

7. Absent action by the President pursuant to art. 36, UCMJ, to set rules and procedures, and in the absence of applicable international law, military commissions "shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."[411]

8. In theory, could provide very limited evidentiary and procedural formality;[412]

9. International treaty obligations, however, may provide a floor of procedural rights.[413] The party to the Rome Statute of the International Criminal Court. This morning, at the instruction of the President, our mission to the United Nations notified the UN

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[410] 339 U.S. 763 (1950).

[411] MCM, pt. I, & 2(b)(2).

[412] see e.g, Yamashita, 327 US 18, and a very streamlined appeal process. See *Johnson v. Eisentrager,* 339 US. 763 (1950).

[413] See Geneva Convention III and the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (to which the U.S. is a party). See also HOWARD S. LEVIE, PRISONERS OF WARIN INTERNATIONAL ARMED CONFLICT 321 n. 29, 335 n. 98, 383 (1976); IV Pictet at 413-14; 2 Final Record of the Diplomatic Conference of Geneva of 1949 389-90; JOHN N. MOORE,ET. AL., NATIONAL LAW 373 (1990).

Secretary General in his capacity as the depository for the Rome Statute of the President's decision. These actions are consistent with the Vienna Convention on the Law of Treaties. The decision to take this rare but not unprecedented act was not arrived at lightly. But after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it is our only alternative. Historical Perspective Like many of the nations that gathered in Rome in 1998 for the negotiations to create a permanent International Criminal Court, the United States arrived with the firm belief that those who perpetrate genocide, crimes against humanity, and war crimes must be held accountable -and that horrendous deeds must not go unpunished. The United States has been a world leader in promoting the rule of law. From our pioneering leadership in the creation of tribunals in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States has been in the forefront of promoting international justice. We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world -and perhaps one day such a court will come into being. A Flawed Outcome But the International Criminal Court that emerged from the Rome negotiations, and which will begin functioning on July 1 will not effectively advance these worthy goals. First, we believe the ICC is an institution of unchecked power. In the United States, our system of government is founded on the principle that, in the words of John Adams, "power must never be trusted without a check." Unchecked power, our founders understood, is open to abuse, even with the good intentions of those who establish it. But in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way. Proposals put forward by the United States to place what we believed were proper checks and balances on the Court were rejected. In the end, despite the best

efforts of the U.S. delegation, the final treaty had so many defects that the United States simply could not vote for it. Take one example: the role of the UN Security Council. Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself. In Rome, the United States said that placing this kind of unchecked power in the hands of the prosecutor would lead to controversy, politicized prosecutions, and confusion. Instead, the US. argued that the Security Council should maintain-its responsibility to check any possible excesses of the ICC prosecutor. Our arguments were rejected; the role of the Security Council was usurped. Second, the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned. The treaty creates an as-yet-to-be defined crime of "aggression," and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression. Yet the ICC, free of any oversight from the Security Council, could make this judgment. Third, the treaty threatens the sovereignty of the United States. The Court, as constituted today, claims the authority to detain and try American citizens, even though our democratically-elected representatives have not agreed to be bound by the treaty. While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate. Fourth, the current structure of the International Criminal

Court undermines the democratic rights of our people and could erode the fundamental elements of the United Nations Charter, specifically the right to self defense. With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests. This power must sometimes be projected. The principled projection of force by the world's democracies is critical to protecting human rights -to stopping genocide or changing regimes like the Taliban, which abuse their people and promote terror against the world. Fifth, we believe that by putting US. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC will complicate US. military cooperation with many friends and allies who will now have a treaty obligation to hand over U.S. nationals to the Court -even over U.S. objections.

The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

Our Efforts

The President did not take his decision lightly. After the United States voted against the treaty in Rome, the US. remained committed and engaged-working for two years to help shape the court and to seek the necessary safeguards to prevent a politicization of the process. U.S. officials negotiated to address many of the concerns we saw in hopes of salvaging the treaty. The U.S. brought international law

experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court. While we were able to make some improvements during our active participation in the UN Preparatory Commission meetings in New York, we were ultimately unable obtain the remedies necessary to overcome our fundamental concerns.

On December 3 1,2000, the previous administration signed the Rome Treaty. In signing President Clinton reiterated "our concerns about the significant flaws in the treaty," but hoped the US. signature would provide us influence in the future and assist our effort to fix this treaty. Unfortunately, this did not prove to be the case.

On April 11,2002, the ICC was ratified by enough countries to bring it into force on July 1 of this year. Now we find ourselves at the end of the process. Today, the treaty contains the same significant flaws President Clinton highlighted. Our Philosophy

While we oppose the ICC we share a common goal with its supporters -the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should not be able to interfere in this delicate process. For example: When a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should

not be made by the ICC. If the state chooses as a result of a democratic and legal process not to prosecute fully, and instead to grant conditional amnesty, as was done in difficult case of South Africa, this democratic decision should be respected.

Whenever a state accepts the challenges and responsibilities associated with enforcing the rule of law, the rule of law is

strengthened and a barrier to impunity is erected. It is this barrier that will create the lasting goals the ICC seeks to attain. This responsibility should not be taken away from states.[414]

Information available to the superior which can provide the requisite notice includes, for example, reports addressed to the superior, the tactical situation, and the training, instruction and character traits of subordinate officers and troops.[415]

Necessary and Reasonable Measures

1. A superior must take "necessary and reasonable measures" to satisfy his or her obligation to prevent offences or punish offenders under Article 7(3).2174 The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.2 175 Insofar as a superior is in effective control, therefore, he or she must exercise whatever ability he or she has to prevent crimes or punish perpetrators.

2. The Trial Chamber should consider the accused's "actual ability or effective capacity" to take action, rather than his legal or formal authority.2176 "A superior is not obliged to perform the impossible[;] [however, the superior has a duty to exercise the powers he has within the confines of those limitations".2177 The duty to prevent or to punish "includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. 2178 Whether the accused's effort to prevent or punish the crimes committed by subordinates rises to the level of "necessary and reasonable measures" is for the Trial Chamber to evaluate under the facts of the particular case.2179 1029. The obligation to prevent "or" to punish "does not provide the accused with two alternative and equally satisfying options7'.21 80 If the accused failed to prevent

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[414] 2173 Celebici Appeals Judgement, para. 238.

[415] Celebici Appeals Judgement, para. 238, IT-02-54-T

crimes he knew or had reason to know were about to happen, "he cannot make up for the failure to act by punishing the subordinates afterwards".218 1 Similarly, an accused who lacked the opportunity to prevent crimes by assuming command after they were committed by subordinates would not be excused from the duty to punish.2182

PERTINENT ARTICLES FROM THE ICTY STATUTE:

Article 7

Individual criminal responsibility

I. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

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

Sum Up: In view of change in the methods of war of development of devastating weapons, particularly nuclear weapons it has become necessary to bring about changes in the laws of war' Besides this, following are the reasons which have necessitated changes in the

laws of war; (1) Development of the concept or total war; (2) Expansion of the world' community as a result of the independence of new States; (3) Development of human rights; (4) Need for protecting the civilian population from the scourge of war; (5) Need for enforcement of human rights during war; and (6) The laws of war were codified long ago; since then revolutionary changes have taken place. They should, therefore, be revised and recodified. The First and Second World Wars exhibited the inadequacy of the existing laws of war. Josef L. Kunz has, therefore, rightly remarked, "That the Laws of War are actually in a chaotic state and urgently need revision, is a fact which cannot be challenged. Despite the urgent need for the amendment in the laws of war, there is no likelihood of sincere efforts to amend them for the obvious reason that war, may even use of force has been prohibited under the charter for the settlement of international disputes. It is feared, and rightly too, that if laws of war are amended position of outlawry of war to the reverse gear.