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**THE EXERCISE OF RESPONSIBLE COMMAND IN THE
ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW:
A NEW MODEL**

A Thesis Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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**The Exercise of Responsible Command in the
Enforcement of International Criminal Law:
A New Model**

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Abstract: The following article argues that the current regime for the enforcement of international criminal law against alleged war criminals fails to live up to its promises, largely because system participants lack (or refuse to gain) an understanding of the realities of criminology and law enforcement management. Relying heavily on a consideration of current events in the Bosnian theater of operations, in particular the operation of the International Tribunal responsible for war crimes committed in the Former Yugoslavia, the paper suggests that a realistic appraisal of the Tribunal's organizational dynamics leads to a new sociological understanding, which in turn raises fundamental jurisprudential questions about the preconceptions and demands of the most vocal participants of the international community. The author argues that a well developed and relevant jurisprudential sociological model for this (or any) Tribunal's operations already exists, and the U.S. should be exploit it to better articulate national policy with respect to the apprehension of war criminals in the midst of ongoing peace operations. That new model derives from a policy-oriented consideration of the moral, political, and legal landscape and an extension of that analysis to take advantage of "lessons learned" found in the large body of legal, sociological and jurisprudential literature concerning discretionary decision-making in the domestic law enforcement context.

The better part of valor is discretion, in the which better part I have saved my life.¹

I. Introduction.

The future of international criminal law enforcement with respect to war crimes depends upon meeting world community expectations concerning the treatment of serious violations. While the Nuremberg and Tokyo war crimes trials established fundamental substantive and procedural norms for international criminal law, many questions today remain unanswered.² International legal scholars and an influential section of the world public active in political/legal affairs point to the Post World War Two tribunals as historic precedents establishing new paradigms of effective law enforcement. They often go on to contrast them with the tribunals recently established to dispose of cases arising out of the conflicts in the Former Yugoslavia and Rwanda, which various critics have termed ineffectual, illusory, even immoral. They arrive at this conclusion because the vast majority of those indicted by the court remain out of the tribunal's physical control and so effectively beyond its jurisdiction.³ Trials never start, and no means exist to punish those who likely would be found guilty of some of the most heinous crimes in the catalogue of "war crimes."

¹ WILLIAM SHAKESPEARE, HENRY IV, PART ONE, act 5, sc. 4 (David Bevington, ed., Bantam Books 1988).

² International criminal law gains steadily in importance in the academic legal community. See REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON TEACHING INTERNATIONAL CRIMINAL LAW, *reprinted in* 5 CRIM. L.F. 91 (1994),

³ At the time of this writing, International Criminal Tribunal for the Former Yugoslavia has physical custody of only 6 of the 85 individuals it has indicted under its Statute.

Legal scholars, politicians, nongovernmental organizations (NGOs), and many citizens around the globe demand the immediate arrest of indicted war criminal such as Radko Mladic, the indicted former military commander of Bosnian Serb forces in the Former Yugoslavia. The internet (and its fastest growing segment, the World Wide Web) offers a new avenue for people to petition and agitate in large numbers for an active program of war criminal apprehension.⁴

Yet, very few accused war criminals are actually being brought to trial. The Tribunal has indicted 74 suspects, of which 7 are in custody at the Hague.⁵ The media persistently report a lack of interest in executing such arrests, particularly by the NATO Implementation Force (IFOR) in the Former Yugoslavia and its successor, the S-FOR. As will be discussed below, the Dayton accords establishing the parameters of the peace process *permitted* apprehension of war criminals⁶, but failed to *require* it. The political fallout of this decision by the framers of the text continues to this day. Moreover, the commanders of the IFOR and

⁴ See, e.g., web pages maintained by the Coalition for International Justice at <http://www.cij.org/cij/>.

⁵ All Things Considered, The United Nations Tribunal Update (National Public Radio) broadcast, March 14, 1997.

⁶ For purposes of this paper, unless otherwise specified or indicated by surrounding language, the term "war criminals" will refer not only to those who allegedly or actually committed violations of the laws or customs of war, see, e.g. 2 L. OPPENHEIM, INTERNATIONAL LAW § § 252-52 (7th ed., H. Lauterpacht, 1955); but also to those who may have committed "Crimes Against Peace" and "Crimes Against Humanity", as they are defined in international law since the end of the Second World War. See Charter of the International Military Tribunal, art. 6, *annexed to* the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter]. This approach, although arguably imprecise, comports with popular usage and perceptions of the indictees, and is therefore appropriate to the concerns of this article, which considers the question of public perception and justification of policy.

now SFOR must continually go on the defensive when confronted by the ongoing demands, both within Bosnia and from the rest of the global community, for the arrest of those indicted by the international tribunal.

This article concerns itself with the ability of, and justification for, nation-states' to exercise discretion⁷ with respect to the apprehension of indicted or otherwise suspected war criminals in the midst of Operations Other Than War, particularly that subset of operations known as peace operations. NATO operations in Bosnia represent a concrete example of such an operation, although the argument here might pertain equally to other theaters of operation endowed with similar characteristics, such as:

1. A complex political environment, with various factions (ethnic, religious, etc.) vying for military, economic, and/or political control.
2. An intervening force capable of maintaining at least a modicum of social order for a limited period of time with the consent of a significant proportion of the local population.

⁷ Discretion in bureaucratic and judicial decisionmaking has generated a vast literature. One scholar has suggested a bifurcation between the jurisprududes, who attempt to get inside the head of a judge exercising discretion, and proceduralists, who focus on the institutional allocations of decision-making authority. See Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 252-257 and accompanying notes. He describes three frames of analysis for evaluating claims of discretion: discretion as skill, discretion as expediency, and discretion as creativity. *Id.* at 260-277. Though the author applies them to the judicial decisionmaking process, they may also shed light on agency decisionmaking. That is, discretion may be viewed as a decision that is neither reducible nor justifiable in terms of a rule (skill), the exercise of choice among legitimate options under severe time pressures (expediency), or as the rendering of a decision based on factors beyond any stated in an authoritative rule (creativity). *Id.*

3. The presence of numerous social power bases of significant political/military consequence. Depending on the setting and the domestic support for the intervening army's activities, a single sniper may represent a significant political threat.

4. A multi-tracked mission for the intervening force, which seeks to achieve numerous political and military goals simultaneously.

5. An interplay of interplay of the above factors imposing a requirement that the military display restraint⁸ in the use of force to maintain legitimacy with the local population, the American public, and the international community (diplomats, the UN, the ICRC, NGOs).

This would distinguish the newer, more complex missions from traditional peacekeeping operations, which utilized lightly armed observation forces at borders or other well recognized geographic features. Their mission might have been difficult, but it was singular.

The breakdown of tradition governmental structures points to heightened demand for international intervention in conflicted areas around globe by invitation of the remaining governmental authorities. Numerous conflicts around the world suggest the flowering of Bosnia-like situations in a number of countries. Treaties authorizing international intervention (not necessarily or solely military) of internal disputes have been or might be a factor in such disparate nations as Cambodia,⁹ Georgia,¹⁰ Somalia,¹¹ and Libya.¹² They will

⁸ See F.M. Lorenz, *Rules of Engagement: Were They Effective?*, 42 NAVAL L. REV. 62, 64 (1995) (noting restraint as a distinguishing characteristic of OOTW based on the author's experiences as a legal adviser to U.S. forces in Somalia).

⁹ See, e.g., AGREEMENT ON A COMPREHENSIVE POLITICAL SETTLEMENT OF THE CAMBODIA CONFLICT (Oct 30, 1991), Art. 6, attached to United Nations, General Assembly and Security Council, Letter dated 30 October 1991 from the Permanent Representatives of France and

demand of the international community a complex mix of mediation, security, and humanitarian services.¹³

This article considers and explains the new operating environment represented by these types of peace operations, and then sets forth the following argument: the occasional nonenforcement of international criminal law, both short and long-term, can be justified as a matter of jurisprudence, policy, and military practice. In view of the public nature of military operations and the need to articulate a justifying rationale for them, political and military leaders should employ such justifications when they are available. The primary justification offered here derives from the law surrounding police practice in the United States, drawing

Indonesia to the United Nations addressed to the Secretary-General 10, UN Doc. A/46/608, S/23177 (1991), reprinted in 31 *Int'l Legal Mat* 180 (1992).

¹⁰ See, e.g., United Nations Security Council, Georgia's Head of State Outlines Conditions for Solution to Abkhazia Situation, in Statement to Security Council, UN Doc SC/5803 (1994) (proposing international supervision for joint administration of Abkhazia)

¹¹ See United Nations, Department of Public Information, THE UNITED NATIONS AND THE SITUATION IN SOMALIA (1996).

¹² See Cotonou Agreement (July 25, 1993), IGNU-NPFL-ULIMO, Art 8, S 3, attached to United Nations Security Council Letter dated 6 August 1993 from the Charge d'Affaires A.I. of the Permanent Mission of Benin to the United Nations Addressed to the Secretary-General 7, UN Doc S/26272 (authorizing peace enforcement action by ECOMOG, a peacekeeping force formed by a coalition of West African Nations).

¹³ James Kitfield has written an excellent piece conveying the full spectrum of unorthodox pressures that these new kinds of operations bring to bear on military commanders and their subordinates, and the implications for future training and military preparedness. See James Kitfield, National Security, *National Journal*, October 3, 1996, in 10/3/96 Nat'l J. in 1996 WL 10107759.

especially upon the U.S. experience, law, and policy regarding discretion in the criminal justice system, especially police¹⁴ discretion.

II. Intellectual Perspective.

In some situations, a commander may rightfully deem nonenforcement a mission necessity. If the law is an evolving social process that reacts to the needs of the relevant community, then it follows from this assertion that international and relevant national law should accommodate this military necessity. However, such a determination must also be subject to controls or else the rule of law gets lost.

Military commanders and their political leaders, from the tactical up to the strategic levels, are making such determinations. They do so without offering comprehensive justifications for their decisions. Perhaps they lack the conceptual and legal tools to adequately articulate their position. A jurisprudence of international law enforcement would provide those tools. While this article stops short of offering such a comprehensive jurisprudence, it will suggest that the keys opening the doors to one exist already.

¹⁴ As used here, the term "police" incorporates law enforcement organizations beyond local police forces, to include large urban forces, county sheriffs, Federal Bureau of Investigation agents, federal marshals, and other individuals who perform law enforcement functions, regardless of institutional niche. The use of National Guard forces as supplemental police forces gets into a gray area because it mixes military tasks in an unorthodox fashion analogous to peace enforcement operations. Police serving as peacekeepers in the same manner as soldiers would fall outside the rubric of "policing" as traditionally understood and used herein. For an evaluation of the use of police as military style peacekeepers, see generally Gavin Brown, Barry Barker, & Terry Burke, *Police as Peace-keepers* (1984).

The international law and international relations academic communities increasingly converge in terms of interests, methods, and agendas. The cross-pollination of the last decade yielded important insights to both communities. In particular, both groups now engage similar political/normative questions regarding compliance with established and emerging norms. Indeed, this paper takes as its starting point the worthy description of law as "legitimized politics."¹⁵ Of course, law is not *only* legitimized politics, and by no means does such a description of law force one to agree with the devotees of *realpolitik* that law, international law especially, reflects nothing more than pure power politics. In fact, politics defined broadly implies the inclusion of various sources of authority and persuasion, both within and without formal legislative and judicial bodies. In the international context, this approach signals an acknowledgment that relevant and powerful legitimizing acts are performed by bodies other than nation-states, the traditional unit of inquiry for both international relations and international law.

In much the same way, this assumption directly conflicts with the proponents of the Critical Legal Studies movement who deny the possibility of neutral legal principles. Instead, the paper adopts an intellectual stance congruent with the New Haven or policy-oriented

¹⁵ Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility* in W. Michael Reisman & Burns H. Weston eds, *TOWARD WORLD ORDER AND HUMAN DIGNITY* (1976) at 115, 117. Weston fleshes this out by continuing " a Hydra-headed process of social decision, involving persons at all levels and from all walks of public and private life who, with authority derived both explicitly and implicitly from community consensus or expectation, and supported by formal and informal sanction, effect those codes or standards of everyday conduct by which we plan and go about our lives." *Id.* at 117.

school of jurisprudence.¹⁶ The New Haven tradition displays particular salience in an area of emerging law and burgeoning institutions such as international criminal law because of its willingness to consider almost all manner of inputs into the global legal system,¹⁷ to include the legal interpretation and decision-making engaged in by leaders of armed forces:

"Conspicuous among decision-makers is, of course, the military commander who must on occasion, at least in the first instance, pass upon the lawfulness both of his own proposed measures and of measures being taken against him."¹⁸

In particular, the New Haven school's open-minded view of actors in the international system suggests that NGOs, the UN and its subsidiary organizations, transnational corporations, and individuals all contribute to the continuing evolution of legal norms and their implementation.¹⁹ Nation-states continue to play a central, often dominant role.

¹⁶ The New Haven or policy-oriented school of jurisprudence was started by the collaborative efforts of Professor Myres S. McDougal and Harold Lasswell at Yale University. They were later joined in their efforts by Michael Reisman, now also on the law faculty at Yale. The main corpus of the work of McDougal spreads over many large volumes, culminating in the publication of a two volume recapitulation and overview of over half a century's work. Harold Lasswell & Myres McDougal, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (2 vols. 1992). This analysis also draws significantly upon the perspective of a law review article applying the policy-oriented jurisprudential model to the field of international law. See McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 189 (1968).

¹⁷ They generally would prefer "global" or "transnational" instead of "international" in order to emphasize the significant roles played by actors in the world's legal system other than nation-states. Note the recent ascendancy of "international law" journals with "transnational" in their titles.

¹⁸ MYRES MCDUGAL AND FELIPE FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* at 48 (1961).

¹⁹ See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (describing the measures international judicial bodies have taken to incorporate NGO input into the decisionmaking process).

Inasmuch as they derive their legitimacy from participatory systems of governance, and accrue more legitimacy by acting in accordance with fundamental standards of due process, they cannot justly be denied their centrality.²⁰ Nevertheless, the other actors can at times play a major, even determinative role. As one commentator wryly put it, no observer should ignore " . . . the patently observable fact that in the great chess game of life even mere pawns, especially when working together, can checkmate the king."²¹

Further, the New Haven school's emphasis on the nitty gritty of actual lived experience drives some to refer to it as a sociological jurisprudence, i.e., a jurisprudence taking full advantage of the possibilities of modern social science. Although common-place today, the use of social scientific evidence was deemed revolutionary when it first occurred at the U.S. Supreme Court just over forty years ago.²² The founders of the New Haven School, Myres McDougal and Harold Lasswell, built a formidable edifice of policy-oriented jurisprudence predicated upon the effective gathering, processing, and distribution of relevant

²⁰ The necessity of full-fledged recognition and sovereignty to the effective functioning of large-scale political units in the world community opens up a range of enforcement opportunities. Some international lawyers, therefore, are suggesting a move away from an enforcement model in international law to a managerial model focusing on the continuing interplay between nation-states, international organizations, and nongovernmental organizations as the best means for resolving issues of compliance. *See generally* Abram Chayes and Antonia Handler Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

²¹ *Supra* note 15 at 127.

²² *See Brown v. Board of Education*, 347 U.S. 483 (1954).

decisional information, the first of the seven decision functions they found at work in legal systems.²³

In analyzing the ways that law is made, McDougal and Lasswell noted the following functions:

1. the promotion function, through which people recommend and advocate their positions;
2. the prescription function, through which people and their representatives authoritatively project social policies;
3. the invocation function, through which people may provisionally characterize an action as inconsistent with established community norm;
4. the application function, through which facts of a particular case or incident are organized, relevant norms are adduced, and an authoritative and controlling formulation is generated;
5. the appraisal function, by which people monitor and evaluate previous binding decisions to determine whether they assist in achieving the desired policy goals underlying them at the time of adoption; and
6. the termination function, by which people seek to end binding communal arrangements that are not effective or appropriate.²⁴

²³ See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385-87 (1971). These criteria are again definitively formulated in Harold Lasswell & Myres McDougal, *JURISPRUDENCE IN A FREE SOCIETY* (1992).

²⁴ See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385-87 (1971).

The difficulties of enforcing the war crimes provisions of international law demand a reappraisal, based on a proper exercise of the intelligence function, so as to better understand the authoritative sources of law justifying or condemning present policies. This article constitutes one effort to do so. To put it more concretely, this paper will reappraise current U.S. and NATO policy with respect to the apprehension of indicted war criminals in the Former Yugoslavia, consider relevant social science information derived from studies of international and domestic law enforcement study, and argue that new justifications of current policy flow from this consideration. Furthermore, this article examines the policy implications flowing from this new paradigm of justification. Pertinent, politically available improvements to the U.S. justifications of its policy are also suggested by other relevant models of conflict control and resolution. Such an enhanced jurisprudential framework could benefit both the U.S.'s public position and the long-term viability of international criminal law enforcement. In addition, as most future contingency operations will fall into the category of "operations other than war," establishing a normative framework for high profile law enforcement activities during operations assumes premier importance.²⁵

²⁵ Military and other U.S. government attorneys continue in their attempts to gather, list, and train U.S. personnel on relevant law in these new operational settings. See, e.g., Major Richard M. Whitaker, *Civilian Protection Law in Military Operations*, ARMY LAWYER 3 (Nov 1996)(suggesting the full spectrum of laws protecting civilians in OOTW). Others believe a new, clarified codification of law is necessary. See Thomas B. Baines, *The Laws of War and the Rules of Peacekeeping*, speech given at National Defense University, text available at <http://www.duke.edu/jscope/Baines97.htm>. (outlining legal and practical difficulties faced by military forces in multifunctional peace operations). For an earlier effort to codify a new set of standards, see Asbjorn Eide, Allan Rosas and Theodor Meron, *Current Development: Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 A.J.I.L 215 (1995) (reprinting and commenting on Declaration of Minimum Humanitarian Standards from the United Nations' Sub-Commission on Prevention of Discrimination and Protection of Minorities).

The contours of world politics in 1997 display a shape unknown to veterans of power-bloc wars (World Wars I and II) and the subsequent cold war.²⁶ Nuclear weapons in the hands of expansionist communist forces no longer threaten the survival of the United States as they did before the breakup of the Soviet Union into constituent states.²⁷ Instead, low level conflict now assumes central importance, involving U.S. forces in such non-traditional missions as drug interdiction, humanitarian assistance, and peace operations. The U.S. Army continues to adapt its doctrine to the changing needs of American national security, especially in its development of doctrine for "operations other than war"²⁸ ("OOTW") and "peace operations."²⁹ Operations other than war are "military activities during peacetime and conflict that do not necessarily involve armed clashes between organized forces."³⁰ Peace

²⁶ White House, National Security Stately, at 1.

²⁷ *Id.*

²⁸ See DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-0, ch. 13 (14 June 1993) [hereinafter FM 100-5 Operations]. For joint military doctrine concerning this area, see Joint Chiefs of Staff Publication 3-0, DOCTRINE FOR JOINT OPERATIONS I-3 to I-4 (9 Sept. 1993). The Joint Staff has packaged the same notion as "MOOTW," military operations other than war, defined as encompassing "the use of military capabilities across the range of military operations short of war." See Joint Chief of Staff Publication 3-07, Joint Doctrine for Military Operations Other Than War (16 June 1995). The use of this terminology has generated controversy and uncertainty because it seeks to comprehend a range of actives including anti-drug efforts, peace enforcement, and counter-terrorism. See Message, Headquarters US Army Training and Doctrine Command, DTG 272016Z Oct 95, subject: Commander TRADOC's Philosophy on the Term "Operations Other Than War" (OOTW). For the purposes of this article, OOTW serves as a shorthand reference to peace operations and humanitarian operation conducted in hostile environments. Other meanings are not intended.

²⁹ See DEP'T OF ARMY, FIELD MANUAL 100-23 (30 Dec. 1994) [hereinafter FM 100-23].

³⁰ See FM 100-5, Operations, *supra* note 28, glossary, at 6.

operations is "an umbrella term that encompasses three types of activities; activities with predominantly diplomatic lead (preventive diplomacy, peacemaking, peace building) and two complementary, predominately military, activities (peacekeeping and peace-enforcement)."³¹ Most large-scale U.S. operations over the last five years constitute peace operations, from the quelling of conflict and provision of aid in Somalia³², to the reestablishment of order and a democratically elected government in Haiti, and on to the implementation of the Dayton Accords in Bosnia as part of the NATO Implementation Force and its successor, the NATO Stabilization Force.³³

The prevalence of these operations as part of the regular "business" of the Army, the entire U.S. military force structure, and many other military forces around the world, lies in the fact that they seldom have a definitive "front." These operations are multi-dimensional and draw on all branches of the U.S. military in an unprecedented manner. For instance, for a commander operating in the midst of a country with limited or depleted fresh water supplies, his or her soldiers possessing expertise in water purification techniques and technology assume first-rank importance, an honor typically reserved for combat arms soldiers.

Their lack of a defined front in these operations also means that the "players" may be scattered throughout the entire area of military activity. As the Canadian Peacekeeping

³¹ See FM 100-23, supra note 29, glossary, at 111.

³² Although begun as a solely humanitarian aid operation, the U.S. mission steadily grew beyond this, generating the concerns about "mission creep" discussed elsewhere in this paper.

³³ National Security Strategy at 4.

Centre catalogues the "partners" in peace operations, they may include military representatives, government officials, nongovernmental organizations (e.g., Doctors without Borders), international organizations (e.g., the International Committee of the Red Cross), election monitors, media representatives, and civilian police personnel.³⁴ These widely disparate intervenors into the conflict can filter in and out of the crisis area subject to minimal military control. This points up the other key factor differentiating peace operations from traditional war: victory, even if achieved, occurs slowly, steadily, and primarily as the result of a commander's effective weaving together of diverse elements of command and control (such as civil affairs, electoral oversight, reconstruction of local infrastructure) in coordination with humanitarian and political actors within and without the U.S. government.³⁵

The lack of a front and a well-defined moment of victory imply that fugitives from local law are also passing through unimpeded. Local law enforcement authorities, if they exist, are likely overwhelmed by the most basic tasks of maintaining a semblance of public

³⁴ This list is merely suggestive of the general categories of people active in a modern crisis situation. The full name of the government-supported institute in Nova Scotia is The Lester B. Pearson Canadian International Peacekeeping Training Centre, set up with the support of the Canadian government to support its long-standing and increasing commitment to peace operations. The Centre terms this list the "New Peacekeeping Partnership." The degree of genuine cooperation among all these groups remains at issue.

³⁵ The anarchic elements of these new, complex operations force the non-military actors to reappraise some of their traditional *moda operandi*. Most notably, after hostile locals killed or injured ICRC volunteers providing humanitarian assistance in various contingencies around the world, the ICRC has moved to revise its security policies to provide better protection. ICRC personnel traditionally eschewed coercive security practices, such as armed guards, relying instead upon their special status as neutral non-belligerents. That special status has waned in significance.

order. This being the case, war criminals may also be in the theater of operations, that is, in close physical proximity to U.S. forces and any cooperating contingents from other nations. This triggers the hard question of what U.S. and other forces should do to detain such personnel.³⁶

In answering this hard question, U.S. officials have relied upon an essentially *realpolitik* answer, asserting it is not in the nation's interest to go after them. Otherwise, they murmur about the practical difficulties of taking on the job. Press reports tend to blame military leaders for being overly cautious in their willingness to use the forces at their disposal. Some commentators go so far as to assert that military leaders refuse to order their soldiers after the indictees, framing the issue as one of effective civilian control over the military.

Civilian versus military control over the military assets fails to describe the genuine difficulties faced by leaders attempting to manage and transform chaotic social conflict, whether those leaders wear civilian suits or uniforms. In terms of U.S. domestic politics, both sets of leaders fear "another Somalia.." That is, they fear engaging in a manhunt that

³⁶ The reader may query whether the term "war criminal" properly applies to one who commits offenses in an OOTW setting. If the conflict may be characterized as a civil war, and is not therefore an "international armed conflict," then it arguably fails to trigger the provisions of the "law of war." The International Tribunal at the Hague appears to have mooted this question with its ruling in the case of Dusan Tadic that regardless of whether the conflict in Balkans was internal or international, he could be tried for violating Common Article 3 or for crimes against humanity. *See* International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Decision on the Defense Motion at 10, ¶¶ 65-83 (10 Aug 1995).

shifts the political balance within the area of operations against the U.S. They especially dread another Somalian-type result--graphic pictures of gleeful locals dragging an American military pilot through the streets of Mogadishu.³⁷ These complex, high-stakes responsibilities of the military commander as policy maker and implementer must be fully understood by policy makers before curtailing his range of response options with respect to any potential threat, including war criminals.

If anything, U.S. military forces come to the negotiating table with a great deal of credibility as far as their own preparations to comply with the law of war.³⁸ The U.S. Army and its sister services engage in comprehensive training programs geared to ensure that U.S. personnel commit no violation of international law in the execution of operations.³⁹ They are

³⁷ The event sparked a political firestorm in the U.S., while also causing American forces around the world to reassess their force protection postures. Several members of Congress called for the resignation of Secretary of Defense Aspin when press reports indicated he had denied a field commander's request for

³⁸ The professionalism of U.S. forces may not be understood overseas, where local troops may be viewed with a mix of condescension, envy, and hatred, precisely because they may not have behaved in a professional manner. Indeed, the success of a law of war program may be explained in large part by the cultures of national military organizations that mediated the influence of the international rules. See Jeffrey W. Legro, *Which Norms Matter? Revisiting the "failure" of Internationalism*, *International Organization*, 51 *Survival*, number 1 (Winter 1997) pages 31-63.

³⁹ See Dep't of Defense, Directive 5100.77, DOD Law of War Program, para. E(1)(a) (10 July 1979) [hereinafter DOD Dir. 5100.77] (requiring compliance with "the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized). See also Joint Chiefs of Staff Memorandum, MJCS 0124-88, subject Implementation of DOD Law of War Program (4 Aug. 1988) (requiring legal reviews of all operations plans and rules of engagement to ensure adherence with the Department of Defense Law of War Program); DEP'T OF ARMY, Reg. 27-1, Judge Advocate Legal Service, para. 2-1g (3 Feb. 1995) (implementing requirement that The Judge Advocate General review operations plans and rules of engagement for compliance with international law).

trained to comply with the international law of war regardless of the lawlessness of opposing forces.⁴⁰ In sum, in a world marked by religious and ethnic tensions threatening to boil over, with many military forces having more in common with gangs than well-trained, disciplined forces, the U.S. military and the similarly disciplined⁴¹ armed forces of allies should be treated as valuable persons pledged to honorably defend the finest traditions of modern civilization.⁴²

⁴⁰ See generally F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS 27 (Winter 1993-94) (outlining the lawless conditions created by the absence of a functioning government). One critic has suggested that opponents' failure to abide by international rules regulating combat put U.S. forces at a marked disadvantage. See Major Paul D. Adams, *Rules of Engagement: The Peacekeeper's Friend or Foe?* Marine Corps Gazette, Oct. 1993, at 21.

⁴¹ Discipline is one distinguishing feature of Army operations. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) at 2-3.

⁴² See generally Major Ralph Peters, *The Culture of Future Conflict*, PARAMETERS 25 (Winter 1995-96) (bemoaning the oncoming widespread decay of effective governments and disciplined militaries as populations pressures grow). Major Peters projects that Western armies will find that "[B]y the middle of the next century, if not before, the overarching mission of our military will be the preservation of our quality of life. Id. at 27. An oft-published commentator in military circles, Major Peter later had occasion to call for a full reevaluation of the ethical/legal rules governing military forces in the midst of anarchic conditions. See generally Major Ralph Peters, *A Revolution in Military Ethics?*, 26 Parameters 26 (Summer 1996). He elaborates:

The practical difficulty today lies in the range of unconventional conflicts, from peacekeeping operations to punitive expeditions by any other name. The close-in nature of combat in these conflicts insists on re-humanizing an activity we believed we had successfully dehumanized. In the streets and alleys of Mogadishu, the divide between subject and object collapses, and the alienation is cultural, not physical. This cripples our ability to fight.

The ethical restrictions on our military organizations function well enough in combat against other militaries, but increasingly our enemies, our potential adversaries, and even our provisional partners either do not know or reject our Western ethics (at times they do not even adhere to the ethics of their own society or civilization, since some cultures find mass ethics fungible, although

Instead, major international "players" in complex operational environments have condemned NATO for its stance on war criminals. Groups such as Amnesty International, the International Crisis Group, and the Coalition for International Justice have waged a two-track campaign of censuring the West and at the same time lobbying it for direct enforcement action.⁴³ These groups have questioned the military judgments of NATO commanders in Bosnia.⁴⁴ Like UNPROFOR before it, war criminals have embarrassed the force by living openly, even coming into areas under their direct operational control, and the world press have reported each such incident in detail.⁴⁵

collective taboos are not). We face opponents, from warlords to druglords, who operate in environments of tremendous moral freedom, unconstrained by laws, internationally recognized treaties, and "civilized" customs, or by the approved behaviors of the international military brotherhood. These men defeat us. Terrorists who rejected our world view defeated us in Lebanon. "General" Aideed, an ethical primitive by our standards (and probably by any standards) defeated us in Somalia. Despite occasional arrests, druglords defeat us on a daily basis. And Saddam, careless of his own people, denied us the fruits of our battlefield victory.

Id at 105-106.

⁴³ Steven Lee Myers, In Balkans, War Crimes Suspects often don't have to hide, Milwaukee Journal Sentinel 9 (December 1, 1996). *See also* Press Release, International Crisis Group (pressuring former Yugoslav republics and NATO nations to make apprehension a top priority). Available at <http://www.intl-crisis-group.org/projects/bosnia/report/bhxxpr01.htm>.

⁴⁴ Little Risk of violence if Karadzic arrested: experts, Agence France-Presse

⁴⁵ See, e.g., Liam McDowell, U.N. Spokesman: War Crimes Suspect Passed through U.N. Police Department, November 7, 1996, in Westlaw /AP online library on 11/7/96 1996 WL 4448305.

III. The Moral, Political, and Legal Landscape.

A. *The Moral Landscape.*

Though one might argue about the precise nature of the U.S. difficulties facing the American policy maker, the practical and philosophical aspects of OOTW's dilemmas pose, at root, a moral problem. That being the case, we must at least consider the moral environment, the milieu of values undergirding calls for greater international (and U.S.) participation in a program of active apprehension.

Philosopher Michael Walzer established himself long ago as one of the more thoughtful prominent voices concerning the achievement of a just society, as well as the duties of members of the armed forces in light of the ethical (and legal) imperatives of war.⁴⁶ Recently, he has chosen to extend his arguments further in both time and complexity.⁴⁷ He felt this necessary because of the changed nature of recent world politics. In his words, he wanted to:

put my arguments to work in the new political world that has arisen since I first presented them. This new world is marked by the collapse of the totalitarian project--and then by a pervasive, at least ostensible, commitment to democratic

⁴⁶ Professor Walzer's writings are extensive, but he laid out his theories of social justice most comprehensively in MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). He set out a classic reconsideration of the just war theory and its implications in contemporary conflicts in MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

⁴⁷ See MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994).

government and an equally pervasive, and more actual,
commitment to cultural autonomy and national independence.
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As he suggests, this globalization of the ideal of democracy, now paradoxically set afloat in a world increasingly riven by intense loyalties to ethnic and religious groupings, presents a set of unprecedented moral and practical challenges to actors in the world community. He terms it a conflict between justice and tribalism.⁴⁹ Other philosophers and public intellectuals have adopted this framework (though not necessarily Walzer's position) in terms of the numerous conflicting loyalties facing all citizens of the world. Some shift the emphasis to debating the relative merits of a cosmopolitan ethic versus a patriotic one⁵⁰, but the underlying tensions are essentially the same. The nation-state now fails to damp down deep-rooted group allegiances and their associated passions, leaving the world a less stable place.

Paradoxically, some of the most impassioned arguments for intervention, even in the form of military forces, resound in those intellectual quarters recognizing the political reality of national sovereignty. Most prominently, Lea Brilmayer argues that moral considerations are central to questions of international legal responsibility. She suggests that the international legal system differs from domestic legal system in its lesser institutional capacities. In particular, whereas most domestic governments retain a virtual monopoly on

⁴⁸ *Id.* At ix.

⁴⁹ Thus the title of his fourth chapter, "Justice and Tribalism: Minimal Morality in International Politics in *id.*, at 63.

⁵⁰ See generally JOSHUA COHEN, ed., FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (1996).

the use of force to enforce domestic law, the international legal systems lacks anything approaching such a monopoly. In fact, except for those instances when the member nations of the United Nations or a regional organization agree to provide nation forces to the UN for peace enforcement or peacekeeping on an *ad hoc* basis, the international legal community, as such, lacks any direct enforcement unit entirely. Those forces so provided to the UN are geared to remedying state violations of international law in order to preserve "international peace and security," not to applying coercive sanctions to individual leaders or their subordinates.

With a perceived and real lack of centralized enforcement mechanisms, the international legal system promotes the search for extralegal means of achieving various social goals, including justice. The brutalities of the fighting in the Former Yugoslavia demonstrate that belligerents ratchet up the intensity of the conflict partly because they recognize that no enforcement mechanism will likely implement justice. In other words, violence leads to atrocity, atrocity to greater atrocity, as each party to a conflict feels that justice, deterrence, and retribution can be accomplished in no other way. Heinous acts come to be seen by the actor as justified in light of the state of anarchy he/she sees to exist in the international community. As Brilmayer puts it, ". . . it is important in understanding the situation to appreciate that from his or her own point of view, the person who undertakes illegal violence is taking up a function that international law has not fulfilled: provision of corrective justice."⁵¹

⁵¹ Lea Brilmayer, *International Justice and International Law*, 98 W.VA. L. REV. 611, 645 (1996).

This article asserts that as a matter of moral argument, when nation states take on tasks such as the enforcement of international law generally, and international criminal law especially, they take up a function that "international law has not fulfilled." For instance, with respect to NATO's intervention in the Former Yugoslavia under U.S. leadership, the spectacular failure of the United Nations Protection Force (UNPROFOR) demonstrated that the world community as a whole could not institutionally react appropriately to the conflict in Bosnia and its surrounding area. This being the case, the U.S. took upon itself the mission of brokering a peace and molding a political coalition and combined military force capable of enforcing peace in the region.

Note that the U.S. avoided such a role for years, generally deferring to its European allies on the matter. Once it moved into developing a conflict resolution framework in the form of the Dayton Accords, the U.S. arguably did so with the understanding that it would be granted a high degree of flexibility in the execution of the mission. As with most such authorizing documents, the UN resolution authorizing the mission lacked any hint of specific guidance about mission accomplishment. Such a lack of guidance should be interpreted as providing broad decision-making authority to the NATO forces. Implicitly, NATO forces retain the right to exercise command prerogative in prioritizing mission tasks. Previous UN-directed interventions, such as the semi-permissive U.S. intervention in Haiti, serve as precedent for such an interpretation.⁵²

⁵² LTC Karl Warner, the Staff Judge Advocate for the 10th Mountain Division, explained to the press the operational need to detain dangerous individuals as a stopgap measure because no effectively functioning Haitian institution could so preserve public order. He noted the uniqueness of the operational setting in explaining the discontinuity in international law: "At war, we have the mechanism for trying criminals with military courts and commissions. But this isn't exactly war and those rules don't apply."

As a postulate of the current world order, a planet whose most powerful authoritative institutions remain nation-states, decisions of execution will continue to be decentralized. The U.S. and NATO held fast to the general notion of accountability and criminal responsibility to the extent possible. Although the granting of amnesty could have become part of the peace accord, the West refused to consider it. As a moral matter, NATO should be credited with good faith on the matter of accountability.⁵³

B. The Political Landscape.

1. The Balkan crisis.

In 1991, then unified Yugoslavia began to politically disintegrate as Slovenia and Croatia declared their independence.⁵⁴ Ethnic conflict with national borders began at about the same time, with ethnic Serbs in Croatia seizing large parts of the country and forcing non-Serbs from their homes in what would come to be known as "ethnic cleansing."⁵⁵ In the

⁵³ "Good faith" plays an important role in evaluating discretionary decisionmaking. Traditionally, courts viewed misconduct as criminal when it was motivated by personal gain. So courts initially found themselves paralyzed in the face of discretionary decisions grounded in a mix of altruistic, institutional, and other motives not easily categorized as promoting the decisionmaker's interests. See H. Goldstein, *Policing a Free Society* 188-89 (1977).

⁵⁴ See Arthur L. Clark, *Bosnia: What Every American Should Know* (1996) at 88.

⁵⁵ Id. "Ethnic cleansing," a term created during this conflict, has been defined as the practice of "rendering an area ethnically homogenous by using force or intimidation to remove persons or given groups from the area. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, Annex ¶ 55, U.N. Doc. 5/25274 (10 Feb. 1993). The Commission later went on to describe it as "a purposeful policy designed by one ethnic or religious group to remove by violent or terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas." *Final Report of the Commissioners Established Pursuant to Security*

autumn of 1991, the United Nations Security Council met for the first time to consider the Balkan problem and imposed an embargo on all the parties to the conflict.⁵⁶ Germany forced the political issue by recognizing Slovenia and Croatia as nation-states before the end of the year.⁵⁷ By April, 1992, Serbia and Montenegro were the only remaining constituent parts of the original nation left to form the Federal Republic of Yugoslavia as a successor state.⁵⁸ By June, 1992, the UN began deploying troops into Bosnia to protect the delivery of humanitarian aid in the midst of what became a vicious conflict among Croats, Serbs, and Muslims.⁵⁹ The UN Protection Force, UNPROFOR, finally proved itself incapable of halting the conflict. Even with the assistance of occasional NATO airstrikes and the imposition of UN embargoes, the parties continued to struggle militarily, especially in the region of Bosnia.⁶⁰ As the world community grew increasingly frustrated with the steady reports of

Council Resolution 780 (1992), U.N. SCOR, Annex, ¶ 130, U.N. Doc S/1994/674 (27 May 1994). The term covers a multitude of sins. As Bassiouni and Manikas put it, "Serb forces have used the mass killings of civilians, sexual assault, the bombardment of cities, the destruction of mosques and churches, the confiscation of property and similar measures to eliminate, or dramatically reduce, Muslim and Croat populations that lie within Serb-claimed territory." M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) at 49. For a thorough, harrowing, and somewhat polemical review of the issue of rape as a means of warfare and the consequent applicability of the Genocide Convention from a nonlawyer's perspective, see generally BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA* (1996).

⁵⁶ S.C. Res. 713, 3009th mtg, U.N. Doc. S/23067 (25 Sept. 1991).

⁵⁷ *Id.*, at 90.

⁵⁸ *Id.*, at 91

⁵⁹ *Id.*, at 93-110.

⁶⁰ As one British negotiator at Dayton said, "The humiliation of the UN Protection Force (UNPROFOR) had been keenly felt and it was reassuring that decision-makers once again seemed to be in charge of, rather than at the mercy of, events. This time, we had an

violence and atrocities coming from the Balkans in defiance of UNPROFOR and the humanitarian standards it attempted to uphold, the United States, which had avoided any deployment of its own troops into the heart of the conflict, intervened diplomatically. Under the personal leadership of Assistant Secretary of State Richard Holbrooke, the U.S. gathered representatives of the major parties to the conflict in Dayton, Ohio and hammered out peace agreements known as the Dayton Accords, which were formally signed in Paris on November 22, 1995.⁶¹ A NATO-led Implementation Force (IFOR) entered the region at the end of 1995 and has since maintained order in the region while implementing the elaborate provisions of the Dayton Accords.⁶² In December, 1996, the NATO force changed its name to Stabilization Force (SFOR) and reduced its troop total, in anticipation of a less demanding tasks, as local political leaders and governmental institutions took responsibility for maintaining peace and security.⁶³

agreement, a plan of action and a reputable military force." Pauline Neville-Jones, *Dayton, IFOR and Alliance Relations in Bosnia*, SURVIVAL 38 (Winter 1996-97) 45, 45.

⁶¹ Clark at 121.

⁶² Operation Joint Endeavor proved itself remarkably capable at implementing the military provisions of the accords. However, the civilian efforts at reconstruction have faced grave difficulties from the start, despite the best efforts of the High Commissioner, Carl Bildt. For a useful evaluation of the various components of the operation and how their chances for success derived from decisions made by the major powers at Dayton, see Neville-Jones, *supra* note 60.

⁶³ The historical literature on the Balkans as a region of conflict is massive. For a historical perspective on the underlying historical, cultural, and ethnic tensions at play, see generally IVO BANAC, *THE NATIONAL QUESTION IN YUGOSLAVIA* (1984); CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE OTHER BALKAN WARS* (1993) (originally published in 1914 as *REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO THE CAUSES AND CONDUCT OF THE BALKAN WARS*). Since the turmoil began, several authors have produced notable histories and analyses of the conflict. See, e.g., TOM GJELTEN, *SARAJEVO DAILY: A CITY AND ITS NEWSPAPER UNDER SIEGE* (1995); MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (rev. ed. 1994); ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY*

Beyond the general political layout of the Former Yugoslavia, of equal importance is the continued power of individual leaders indicted for war crimes, especially Mladic and Karadzic. Never before has a nation faced the task of negotiating with political leaders (or their representatives - Milosevic of Serbia spoke for the Serbs in Bosnia at Dayton) in fear of being dragged before an international criminal court.

2. *U.S. and NATO policy.*

The U.S. and NATO failed, and continue to fail, to articulate a principled justification for its stance with reference to war criminals in Bosnia. In an age when legitimacy propels geopolitical success as much as does brute force, the U.S. must explain its position in Bosnia, demonstrate not merely the expediency but also the legitimacy of its stance, and then marshal the moral strength of its position to advance U.S. interests. Numerous observers would suggest that there exists a *prima facie* need to justify a high profile decision not to prosecute.⁶⁴

A press release released by NATO on May 6, 1996 typifies the weak attempts to articulate a principled policy throughout IFOR's presence.⁶⁵ The Supreme Headquarters Allied Powers Europe (SHAPE) had just concluded a Memorandum of Understanding

THROUGH HISTORY (1993); DAVID RIEFF, *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* (1995).

⁶⁴ See, e.g., MORTIMER R. KADISH AND SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 82-85 (1973).

⁶⁵ Press Release, *FOREIGN POLICY BULLETIN* 7, (July-Aug. 1996) at 86-87.

(MOU) with the International Tribunal. Instead of taking advantage of the opportunity to build support for its position, NATO released a bland statement, the most relevant part being:

As agreed when the IFOR operation was authorized on 16th December 1995, it is NAC policy for IFOR to detain and transfer to the ICTY persons indicted for war crimes, when they it comes into contact with them in carrying out its duties as defined by the military annex of the Peace Agreement. . . The MOU--the text of which will not be released--codifies interim arrangements already in place.⁶⁶

The world community may not resolve this problem by staging cases at the tribunal without the presence of the defendant, as the Tribunal's rules prohibit trials *in absentia*.⁶⁷

Without action to apprehend those indicted for war crimes, the Tribunal may not try them. If they avoid arrest for a long enough period of time, they may avoid prosecution altogether.

⁶⁶ *Id.*, at 87. Note the use of the word "transfer" rather than extradite. Although similar in concept, transfer is different from extradition because the prisoner is not turned over to, nor subjected to the jurisdiction of, another sovereign because the International Criminal Tribunal (and the UN of which it is a subsidiary organ) lacks status as a sovereign. See Karine Lescure & Florence Trintignac, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 81-84 (1996). Thus, this analysis raises questions wholly different from the issue of a nation's right to abduct its own nationals from another state with which it may have a valid extradition treaty, as occurred in the controversial case of *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992) (upholding abduction of U.S. national from Mexico by U.S. law enforcement agents).

⁶⁷ STATUTE OF THE INT'L TRIBUNAL, art. 21(4)(d), *annexed to* United Nations, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159-1202. Some now question the wisdom of the appearance requirement. See William Pfaff, Commentary: War Criminals Should be Tried in Absentia, October 8, 1996, 10/8/96 Chi.Trib. 21 in 1996 WL 2714869.

Richard Goldstone, the first chief prosecutor of the International Criminal Tribunals on the Former Yugoslavia and Rwanda⁶⁸, has since his appointment hammered away at NATO officials in general, and U.S. leaders in particular, for inaction on the issue of getting the indicted war criminals to trial. His arguments include both moral and legal demands for action. His successor, Louise Arbour, a Canadian national, has been equally vociferous:

There is no single issue more important to the survival of this tribunal . . . than the actual arrest of indicted war criminals. . . . In my mind, it will be my very top priority. . . . [The NATO interpretation of the mandate is] disappointing."⁶⁹

Of the need for the local governments in the conflict region to take concerted action against indicted war criminals within their borders, he states:

If there are no further meaningful arrests, the Yugoslav tribunal, which was set up by the United Nations Security Council in 1993 (a year before it established a similar tribunal on Rwanda) will have been prevented from carrying out its mandate, and war-crime victims will have been dealt another blow. Also dealt a blow will be the credibility of the Security Council, whose binding resolutions about enforcing tribunal orders are being disobeyed equally by Serbia, Croatia, the Bosnian Serbs and the Bosnian Croats - all legally bound by these orders.⁷⁰

He then attacked the international community:

The Security Council has the power, through diplomatic and economic sanctions, to enforce the tribunal's orders. But it has not put the governments in the former Yugoslavia under real pressure to arrest those indicted. At the same time, the Western powers who control NATO - Britain, France and the United States - have conspired to avoid encouraging their troops to arrest

⁶⁸ Note that the two tribunals, though geographically separate (at the Hague and in Arusha, Tanzania) and handling entirely different sets of cases, share the same Chief Prosecutor and appellate court.

⁶⁹ Canadian UN prosecutor sees arrest of indicted war criminals as top priority, Ottawa Citizen October 1, 1996, 10/1/96 Ottawa Citizen A8, in 1996 WL 3619065.

⁷⁰ Richard J. Goldstone, *No Justice in Bosnia*, N.Y. Times, March 3, 1997.

those indicted by the tribunal - despite clear jurisdiction and an implicit if not explicit obligation under the Dayton accord to do so.

C. The Legal Landscape.

1. Historical background.

The end of the Second World War brought joy throughout the lands of the victorious powers, but it also triggered that staging of war crimes trials that became the stuff of legend, as well as the subject of laudatory legal commentary. This legendary character of those trials has obscured the collective memory of what occurred over 50 years ago. That nostalgic blur explains in part how we come to speak today of the Nuremberg legacy, as opposed to Nuremberg history. No doubt the Allied Powers' determination to wring justice from the cloth of post-war Europe signaled a fundamental shift in outlook, but a close historical analysis reveals a mixed Allied record in dealing with war criminals. For instance, most historians and legal scholars concede that grave inequities in practice and outcome resulted from the Tribunal in Tokyo. Even the Nuremberg trials fail to fully escape the charge of implementing victor's justice.⁷¹ No third-party judges sat on the adjudicating panels, and no Allied personnel were tried. This led one German legal scholar to conclude that the Nuremberg proceedings were "a tool of Allied foreign policy and American occupational policy."⁷² American legal scholars need reminding that other serious professional observers

⁷¹ Otto Kranzbuhler, *Nuremberg Eighteen Years Afterward*, 14 DEPAUL L. REV. 333, (1964) at 334.

⁷² Otto Kranzbuhler, *Nuremberg as a Legal Problem*, in *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* (Wilbourn E. Benton & Georg Grimm eds., 1955) at 106.

of the Nuremberg Tribunal were less than enthusiastic about their operation.⁷³ Nonetheless, despite these concerns, most historians and international lawyers would concede to Professor Geoffrey Best's measured comment that the International Military Tribunal at Nuremberg "was not truly a cosmopolitan court, but that did not stop it doing much good work, along with some less good work, on behalf of the international community."⁷⁴

In addition to the high profile International Military Tribunal, the U.S. and its allies organized the trials of thousands of alleged war criminals in post-war Germany. They tried 182 defendants before the Nuremberg Military Tribunals pursuant to Allied Control Council Law Number 10.⁷⁵ The U.S. and other Allied powers also established thousands of military courts and commissions to try German soldiers throughout Germany.⁷⁶ They tried and convicted thousand of Germans of war crimes.⁷⁷

⁷³ For an excellent outline of the range of criticisms leveled at the Nuremberg Tribunal and their implications for Hague operations today, see generally Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 Dickinson J. Int'l Law (1995). For a selection of other critical literature, *see generally* DONALD A. WELLS *WAR CRIMES AND THE LAWS OF WAR* 81-118 (1984); ROBERT CONOT, *JUSTICE AT NUREMBERG* (1983).

⁷⁴ GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 400 (1994). By it not being cosmopolitan, the author suggests that the tribunal lacked even the appearance of impartiality by virtue of its being staffed entirely by citizens of the victor countries.

⁷⁵ *See, e.g.*, NORMAN E. TUTOROW, *WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* 4-5, 11-13 (1986).

⁷⁶ *See id.*, at 5.

⁷⁷ For a breakdown of the numbers tried and convicted by courts and commissions established by Britain, France, the Soviet Union, Belgium, Denmark, Luxembourg, the Netherlands and Norway, see Adalbert Rückerl, *The Investigation of Nazi Crimes 1945-1978* (1979) at 29-31.

However, Germans (and other nationals) who feared that their war-time activities could lead to their being tried for war crimes attempted to circumvent the process. The occupying powers in post-war Germany were confronted with the massive task of meeting the food and shelter needs of hundreds of thousands of displaced persons. In the midst of chaos, it became easy for many Germans to blend conveniently back into the woodwork without a trace. Others took advantage of their connections with those in other European countries who remained sympathetic to their cause (or at least the anti-Semitic strain of it) and were willing to assist.

As one expert points out:

Generally, underground railroads were put in place in order to camouflage the true identities of the more prominent war criminals, to forge travel documents, to transfer plundered wealth out of Germany, and to open escape routes to countries that were willing to give them sanctuary for self-interested political or economic reasons. Too often the persecutors and murderers were, on the surface, indistinguishable from others who were seeking a safe haven from the wreckage of war, provided that they were among the preferred "national" groups from the prospective host country's point of view. Besides, many of these immigrants with a Nazi past simply concealed their criminal involvements by lying on their immigration papers.⁷⁸

This process occurred after an historic, total victory, which was then followed by four years of occupation and by the main victorious powers.⁷⁹ If the apprehension of war

⁷⁸ ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 68 (1993).

⁷⁹ See generally, BOYD L. DASTRUP, CRUSADE IN NUREMBERG: MILITARY OCCUPATION, 1945-1949 (1985). Moreover, the Americans and other occupying powers implemented ruthless denazification programs, removing German leaders at all levels of government and

criminals in a situation of almost total political, military, and economic dominance was that difficult, that vulnerable to being defeated by the simplest techniques of deception and concealment, modern observers today should not display surprise that military authorities in Bosnia or in a similar operating environment view the task as daunting, perhaps impossibly so.

The world community remains uncomfortable with the ease with which numerous Nazi war criminals escaped judgment in a public forum. But far more galling were the cases of the U.S. throwing out the welcome mat for Nazi war criminals in order to harbor, monopolize, and exploit their scientific knowledge.⁸⁰ When necessary, U.S. government officials created the false documents necessary to garner the Nazis entry into the U.S.⁸¹ Post-war Germany exported not only war criminals, but also many of their ill-gotten gains in cash, gold, and other forms of wealth which were used to enhance the lives of war criminals and those who chose to assist them.⁸²

Professor Rosenbaum lays out the facts above to condemn the ease with which war criminals escaped. But in the end, he turns to the misapplication of prosecutorial discretion as a major cause of unleashed criminality: "There is a vast number of suspected criminals

"reeducating" the German public to the new Western order. *Id* at 20-47 and accompanying notes.

⁸⁰ *See Rosenbaum*, at 69.

⁸¹ *See id.*, at 69.

⁸² *See id.*, at 69.

who are not brought to justice, and this fact raises questions about the effectiveness, determination, and integrity of a legal system. But it also reflects discretionary problems associated with the prosecutor's role. The prosecutor is the port of entry into the judicial (criminal) process, but the process itself is not entirely precise, as suggested in reference to sometimes uncontrolled prosecutorial discretion."⁸³

The U.S. Army conducted most of the war crimes trials in post-war Germany, with a total of 1627 individuals prosecuted between 1944 and 1947.⁸⁴ Although this program intended to deal out a measure of justice, the U.S. also expected it would complement other measures in the effort to democratize of Germany.⁸⁵ In a persuasive study of the documentary evidence, one commentator concluded that in this respect the U.S. war crimes trial program failed, in part because the German public (and many of the Americans implementing it) found it lacking in due process and overall legitimacy.⁸⁶ War crimes trials failed as a method of large-scale social change. As Professor Buscher puts it,

[F]uture war crimes programs should be limited to punishing the perpetrators only and should not be used as a policy to reform and reeducate an entire people. It is questionable if the occupation as a whole convinced the Germans that their society needed to undergo significant change, or if later events such as the economic miracle actually achieved what the occupation tried to accomplish--a Federal Republic which shared the values of the West. The war crimes program, criticized because of its procedural rules and lack of legal

⁸³ *Id.*, at 61.

⁸⁴ See FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955* (1989), at 2. The Army opened a total of 3,887 case files, resulting ultimately in 1,415 convictions. *Id.* at 50.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*, at 159-164.

precedent, was hardly suited for another controversial undertaking, the reform of post-war German society.⁸⁷

If Nuremberg reflected the difficulties of launching the first large-scale attempt to try individuals for war crimes, then the International Military Tribunal for the Far East (IMFTE) showed how blunders could nearly cripple such an enterprise. Most experts viewing the historical record now fault the Allied Powers for failing to effectively and fairly conduct the trials.⁸⁸ By attempting to inject attacks on Japanese governance before the war, the prosecutors lost their way and guaranteed that onlookers would lose interest. By adopting a social reform program in the criminal courtroom, they inhibited that program's chances of success.

The Allied powers made one remarkable discretionary decision after decisively defeating Japan with atomic attacks on Hiroshima and Nagasaki. After demanding an unconditional surrender, they relented, finally allowing the Emperor to retain his position without direct political powers. They concluded that his continued presence would advance long-term strategic interests of the U.S.⁸⁹

⁸⁷ *Id.*, at 164.

⁸⁸ See ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS*, at 23.

⁸⁹ For a thoughtful consideration of the dilemmas facing the Western powers negotiating with Balkan representatives in view of the Post World War II historical record, see Anthony D'Amato, Comment: Peace vs. Accountability in Bosnia, 88 *A.J.I.L.* (1994) 500, 500-502. D'Amato succinctly states the West's quandary: "The question clearly presented is that, however desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities. This would surely be a paradoxical result, for the idea of war crimes accountability is to deter the commission of war crimes and not to serve as a barrier to

2. *History of the conflict in Former Yugoslavia.*

Bosnia's crisis has most directly triggered the issues dealt with in this paper, that is, the appropriate role of troops in the midst of a peace operation where the legal and de facto status of their operation lacks the clarity previously accorded military forces engaged in war, occupation, pure peacekeeping, and other operations contemplated by international legal instruments. The world community initiated establishment of the Tribunal in 1993,⁹⁰ the first time the community of nations organized a collective judicial effort to prosecute war crimes since the post-World War II period. The Security Council determined that the violent strife in the Former Yugoslavia constituted "a threat to international peace and security" and concluded that the "establishment of an international tribunal . . . would contribute to the restoration and maintenance of peace."⁹¹ The ongoing brutality of the factional forces instigated a UN presence in the form of UNPROFOR meant to quell the violence and further efforts at diplomacy and conflict resolution. It also culminated in the creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

discontinuing them. *Id.*, at 502. He also posits a law and economics model for resolving the dilemma. For instance, the UN could establish a tribunal and then agree to disband it only upon the restoration of peace. *Id.*, at 503. Philosophically, such an approach is morally justifiable because it "transforms a war crime into a cost of war." *Id.* at 505. Ultimately, such a policy implemented over time would serve as an effective deterrent to war crimes. *Id.* at 506

⁹⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Annex (1993), Statute of 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.

⁹¹ S.C. Res. 808 (Feb. 22, 1993).

International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 when the Security Council passed Security Council Resolution 827 of May 25, 1993.⁹²

Similarly, the genocidal events in 1994 Rwanda led the world community to establish the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994 with the approval of Security Council Resolution 955 of November 8, 1994.⁹³

The founding documents of the Tribunal pronounce its aims to be judicial as distinguished from political. For instance, the Secretary General's report on the tribunal commented that:

⁹² S.C. Res. 827, U.N. SCOR, 48th Year, 3127th mtg. At 1. U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203. The initial excitement that followed the creation of the tribunal was quickly tempered by the harsher realities of international politics and finance. According to the Chair of the Commission of Experts that filed initial reports on human rights violations in the Former Yugoslavia, M. Cherif Bassiouni, France and Britain were in no hurry to begin the process of chasing alleged war criminals. William H. Horne, *The Real Trial of the Century*, Am. Law. Sept 1995, at 8. As the United Nations funded only the salary of the chairman and five staff personnel, along with travel costs, Bassiouni was forced to raise substantial amounts of private monies to fund the Commissions investigative research on-site and the development of a computer database. M. Cherif Bassiouni, *Current Development: The United Nations Commission of Experts Established Pursuant to Security Council 780* (1992), 88 Am J. Int'l L. 784, 790-91 (1994).

⁹³ S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg at 1, U.N. Doc. S/RES/955 (1994), *available in* U.N. Gopher\Documents\Security Council Resolutions.

[T]he Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related there.⁹⁴

Although the Nuremberg precedent and subsequent developments in treaty and customary international law settled the question of the applicability of the law of war, representatives of the six Yugoslav republics, including Croatia, the Socialist Federal Republic of Yugoslavia, and the Republic of Serbia met and agreed to a "Memorandum of Understanding" on November 27, 1991, in which they pledged to comply with specified provisions of the Geneva Conventions.⁹⁵

IV. The current status of the legal duty to apprehend war criminals.

First it must be remembered that "war criminals" constitute but one subset of international criminals generally. International criminal law is a steadily advancing discipline

⁹⁴ *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc S/25704, reprinted in 32 I.L.M. 1163.

⁹⁵ They agreed to abide by the provisions of Geneva Conventions I and II with respect to the care of all wounded and sick combatants; the provisions of Geneva Convention III with respect to the treatment of captured combatants; the provisions of Geneva Convention IV and Protocol I with respect to the treatment accorded civilian noncombatants. They also agreed to act in accordance with Protocol I and the Protocol On Prohibition or Restrictions On the Use

within the law school, reflecting the ever increasing level of international crime and heightened efforts to combat it. Professor Bassiouni, in his authoritative catalogue of the types of international crime, lists twenty-two types of criminal offenses.⁹⁶ With respect to any type of international crime, treaties and other less formal arrangements concluded by states provide for international cooperation in the identification, prevention, prosecution, and punishment of such crime.⁹⁷ Obligations arising from such treaty arrangements are reciprocal. No centralized criminal code exists. The world community also lacks a supranational, independent international court to adjudicate it, nor does it possess a law enforcement implementation mechanism, specifically, a policing force. "Direct enforcement"

of Mines, Booby Traps and Other Devices, annexed to the 1980 Weapons Convention. *See* 1 HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 201-02 (vol. 1, 1992, vol.2, 1993).

⁹⁶ These offense categories are: aggression; war crimes; crimes against humanity; unlawful use of weapons, genocide; apartheid; slavery and slave-related practices; torture; unlawful human experimentation; piracy; aircraft hijacking; threat and use of force against diplomats other persons protected under international law; taking of civilian hostages; drug offenses; international traffic in obscene materials; destruction or theft of national treasures; environmental protection; theft of nuclear materials; unlawful use of the mails; interference with sub-marine cables; falsification and counterfeiting; bribery of foreign public officials; offenses against the safety of maritime navigation; and mercenarism. *See* Bassiouni and Wise at 7. The last two on the list have only recently been added by Bassiouni to the earlier versions of the typology. For the earlier listing and associated analysis, see M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: DIGEST INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985 (2 vols. 1986) [hereinafter DIGEST].

⁹⁷ Professor Bassiouni has developed a typology of those substantive international criminal matters subject to international agreement: 1. Explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law; 2. Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; 3. Criminalization of the proscribed conduct; 4. Duty or right to prosecute; 5. Duty or right to punish the proscribed conduct; 6. Duty or right to extradite; 7. Duty or right to cooperate in prosecution, punishment (including judicial assistance); 8. Establishment of a criminal jurisdictional basis; Reference to the establishment of an international criminal court or international tribunal with penal characteristics; and 10. No defense of obedience to superior orders. M. Cherif Bassiouni, Characteristics of International Criminal Law Conventions, in 1 International Criminal Law: Crimes 7. (M. Cherif Bassiouni ed., 1986)

typical of domestic criminal justice systems therefore is impossible. Although sometimes misunderstood as a true police authority, the International Criminal Police Organization (commonly referred to as INTERPOL) lacks worldwide jurisdiction, relying instead upon the cooperation of national governments and serving to coordinate their efforts.⁹⁸ Although, interactions have steadily increased since its founding in 1923, they have not amounted to anything resembling the powers of a domestic law enforcement organization such as the Federal Bureau of Investigation.⁹⁹ Thus, the international community has turned to a patchwork quilt of "indirect enforcement" mechanisms to implement substantive international criminal law.¹⁰⁰

The Statute of the International Criminal Tribunal for the former Yugoslavia provides for a mix of direct and indirect international criminal law enforcement, as jurisdiction resides concurrently with both the Tribunal and national courts.¹⁰¹ The Tribunal was originally conceived as a forum for trying some of the higher profile defendants, with the national court systems of the former Yugoslavia left to treat the rest. This follows closely the historical

⁹⁸ Mary J. Grotenruth, *INTERPOL's Role in International Law Enforcement*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 375 (M. Cherif Bassiouni ed., 1988).

⁹⁹ *Id.* at 375-76.

¹⁰⁰ For a review of direct and indirect systems of international criminal enforcement, see M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

¹⁰¹ Security Council Resolution 827 (1993), U.N. Doc. S/RES/827 (May 25, 1993), reprinted in 32 I.L.M. 1203 (1993).

precedent established by the Nuremberg tribunal, which also left the vast majority of defendants to be tried before other national courts, civilian and military.¹⁰²

With respect to war criminals, the dominant jurists and activists¹⁰³ in the field consider this a passing opportunity to reestablish and expand upon the Nuremberg legacy, and they view the failure of nations to either extradite or prosecute war criminals as inhibiting not just the prosecution of certain individuals, but the development of peace in the Balkans, and in the very long-term, the development of a world community characterized by human dignity. For instance, in the words of Professor Bassiouni:

As long as the world remains divided into nations possessed of exclusive power to enforce the law against persons situated within their own territories, bringing an offender to trial must necessarily depend on the willingness of the authorities of the state where the offender is found to undertake prosecution themselves or hand the offender over for trial elsewhere. The efficacy of any kind of system of international criminal law thus requires that states accept an obligation either to try international offenders before their own courts or to surrender them for trial before a foreign (or international) court. To the extent that states accept and act on this obligation, the idea of an international community comes closer to reality; to the extent that they do not, efforts to realize that idea suffer a setback.¹⁰⁴

¹⁰² M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* x (1995).

¹⁰³ The two fields clearly overlap, most notably in the work and life of M. Cherif Bassiouni, who was indispensable to the efforts of the Commission of Experts that preceded the formation of the Tribunal, but who has also produced a prodigious literature about the Tribunal itself and its associated substantive and procedural law.

¹⁰⁴ *Supra* note 102 at xi.

Indeed, Prof. Bassiouni considers the duty to prosecute or extradite to have become a part of customary international law or as a rule of *jus cogens*. However, he bases this claim not so much on prior state practice, but upon the structure of the world community and the normative structures necessary to its proper functioning. A full consideration of the arguments of Professor Bassiouni's, even after considering the advocacy embedded in the scholarship, leaves open the question of whether any rule of customary international law has been established. Viewed in conjunction with the various treaty arrangements arrived at by various states, the opposite argument has as much strength. The numerous forms of international agreement are so diverse that one may reasonably conclude that no recognizable norm underlies them.¹⁰⁵

Even if no customary law controls the matter, relevant treaty law and public pressure may force activity by states regardless, especially with reference to war crimes. The particulars of the situation in Yugoslavia augur the shape of future institutional arrangements for ad hoc tribunals, assuming that a permanent international criminal court fails to come to pass.¹⁰⁶ First, once the jurisdictional questions are settled by the U.N, other international

¹⁰⁵ As hinted in the Preface to *Aut Dedere*, the two authors of the volume themselves disagree about the degree to which state practice, let alone world community structure, imply the development of a new international rule of law with the respect to nation-state responsibilities to extradite or prosecute. As one expert reviewer put it, "The reader is left to draw his or her own conclusions on whether a custom has been established. I take it that Bassiouni did not persuade Wise that such is the case." See Book Review by Roger S. Clark in 91 *A.J.I.L.* at 204 (1997).

¹⁰⁶ Numerous organizations and scholars rally around proposals for a permanent international criminal court. However, creation of such a court and an associated criminal code, in and of itself, will not resolve the issue of arrests in the midst of factional conflict. Even an international police force working under the auspices of the court would continue to confront

bodies, and the Tribunal itself,¹⁰⁷ the adjudicating body will likely refer to the same controlling body of substantive and procedural law prohibiting grave breaches,¹⁰⁸ violations

the dilemma of peace vs. Justice. It would, however, clearly separate international law enforcement responsibilities from peacekeeping responsibilities. A vast literature exploring the possibilities now exists. See, e.g., Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 *Tex. Int'l L.J.* 57 (1996). Benjamin B. Ferencz, *An International Criminal Court: A Step Towards World Peace* (1980) (describing history of attempts to create international tribunals); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 *Ind. Int'l & Comp. L. Rev.* 1 (1991), M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code 1980* (outlining an international code proposal); Max Radi, *International Crimes*, 32 *Iowa L. Rev.* 33 (1946) (describing crimes under international law); Barbara J. Yarnold, *Doctrinal Basis for the International Criminalization Process*, 8 *TEMP. INT'L AND COMP. L.J.* 85. (1994) (describing the historical process by which substantive municipal infractions moved into the jurisdictional zone of international criminal law)

¹⁰⁷ The Statute and subsequent Tribunal case law have consistently evidence an aggressive approach to the question of jurisdiction. The decision in the Tadic mooted the question whether the conflict in the former Yugoslavia was international or civil in nature. This follows from the broad mandate of its establishing Statute, which flatly stated

"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.

¹⁰⁸ Article 2 of the Tribunal's Statute established jurisdiction as follows:

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;

of the laws or customs of war,¹⁰⁹ genocide,¹¹⁰ and crimes against humanity.¹¹¹ The Geneva Conventions, for instance, confer the following obligation upon signatories:

-
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
 - (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
 - (h) taking civilians as hostages.

¹⁰⁹ Article 3 provides:

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

¹¹⁰ Article 4 provides:

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

. . . Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

¹¹¹ Article 5 provides:

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial, and religious grounds;
- (i) other inhumane acts.

High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.¹¹²

The Statute of the Tribunal also set out to assign broad responsibility for cooperation with its operations at every step. States must cooperate with the Tribunal in accordance with the provisions of Article 29:

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.¹¹³

¹¹² Art. 49, Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 62; Art. 50, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85,116; Art.129, Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135,236; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S.287, 386. Subsequent "Geneva" law has continued to obligate states to extradite or prosecute, although that agreement has failed to gain U.S. ratification. See Art. 85 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of the Geneva Convention.

¹¹³ Statute at art. 29. Generally, a commander (or other national authority) contemplating the release of a prisoner to a foreign power must resolve the threshold question whether the incarceration standards of the governmental authority taking control of the prisoner comport with international humanitarian standards. See, e.g., Standard Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and The Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended* E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. No.1, at 35, U.N. Doc. E/5988 (1977).

Moreover, the Security Council reaffirmed the obligation to cooperate in the adopting Statute:

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.¹¹⁴

Many states have passed implementing legislation guaranteeing cooperation with the Tribunal in the areas of investigating identifying, and transferring suspected war criminals to the Tribunal.¹¹⁵

V. The Domestic Criminal Law Analogy.

The search for a superior justification of current U.S. practice requires a functional analysis of the role of U.S. forces and a consideration of functionally analogous situations and institutions. No scholar has seriously or comprehensively explored the analogies to be drawn between the international system of criminal law enforcement with respect to suspected war criminals and the domestic U.S. system of criminal law enforcement, although as previously indicated, Professor Brilmayer has touched upon the subject while dismissing its significance.¹¹⁶ This paper suggests that the history, jurisprudence, and practice of the

¹¹⁴ Security Council Resolution 827 (1993), *supra* note X.

¹¹⁵ At this writing, the following nations have passed implementing legislation: Finland, France, Italy, the Netherlands, Norway, Spain, Sweden, Turkey, and the United States. A useful web page tracking the progress of such legislation is maintained by the International Coalition for International Justice may be found at <http://www.his.com/~cij/elsewhere.html>.

¹¹⁶ Lea Brilmayer, *What's the Matter with Selective Intervention?*, 37 *Ariz. L. Rev.* 955, 966-967 (1995). She focuses on the question of how to justify America's policy of intervening to quell conflict or relieve suffering in some crisis situations and not others. Although much

American criminal law enforcement system comprise an unexplored treasure trove of concepts and data that can lead to a new, principled justification of authoritative U.S. action in support of the world's communal norms. For as Professor Brilmayer states,

More importantly for present purposes, though, what the domestic analogy suggests is that there are ways of making determinations of when to enforce the law that are principled. To respond to the pragmatic limitations on one's own ability to compel respect for norms is not necessarily to act in disregard of principle. Instead of stopping dead at the observation that it is not possible to enforce the law all of the time, we should take this as the beginning of analysis. What principled reasons might there be for less than full enforcement?¹¹⁷

The strategic decision to not intervene as an arrest authority in support of the tribunal constitutes, if nothing else, an exercise of political, and presumably legal, discretion.

Discretion plays a major if poorly understood role in any legal system, especially the component tasked with implementing the criminal code. Some legal questions have a "right" answer. Many do not. Most persons in authoritative positions of power employ sets of

broader than the issue of whether to assume the particular task of actively pursuing particular war criminals, her published lecture conveys the tensions between national interest as a determinant of nation-state action and the principled justifications demanded by international law, jurisprudence, morals, and the world community as a whole. As she puts it:

It's interesting that one does not hear the argument made in the domestic context that because the police could not possibly enforce all of the laws one hundred percent, they should have complete discretion to enforce it in only those cases where they feel like doing so. In the domestic context, just as in the international context, there are insufficient resources for full enforcement of the laws. While police have a great deal of discretion to enforce the law or not --and while their decisions are ordinarily not judicially challengeable--this does not mean that we feel that they are entitled to make such decisions either on self-interest or on whim. As a moral matter, it is clear that we feel that principle must play a part in these decisions.

¹¹⁷ Id at 967.

discriminating factors, some legal, some extralegal, some practical, some personal, in arriving at an "official" decision. Yet these decisions are "legal" in that they fall within parameters established by the legal order. If the exercise of discretion by nation-states bears any resemblance to its exercise by actors in the domestic criminal law enforcement system, then the domestic experience may offer guidance in how best to understand and regulate discretion in the international arena.

Analogies to the domestic criminal order may strike some as ill conceived,¹¹⁸ yet they are justified for a number of reasons. First, the global community's development and increasing complexity militate in favor of looking to more fully developed normative systems. In Michael Walzer's terminology, "thin" moral spheres may benefit from the history and experience of "thick" moral spheres. The New Haven school uses different terminology with similar meaning: McDougal and associates postulate "minimum public order" as the policy goal toward which all of law, especially international law, should be oriented. Minimum public order is characterized as a move away from the legitimized use of violent forms of coercion in the international system.

Second, natural affinities pertain between police and military organizations.

The both tend to be driven by mission statements crafted under the guidance of "civilian"

¹¹⁸ The notion of a "global community" is not a static concept or reality. It may be the case that it is best viewed along functional lines. For instance, we might say that there exists an effectively functioning global community with respect to the rights of planes and sea vessels to travel in international airspace and ocean, but no international community with respect to just food distribution. The New Haven school has been harshly criticized for assuming the existence of a "community" where one may not exist. See, e.g., Book review essay, Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, reviewing 3 books, 42 *Stan. L. Rev.* 811, at 815. Nonetheless, this assumption is not fundamental to the analysis here, whereas the New Haven school's attention to the policy orientation of the decisionmaker is.

political leaders. Yet they are both granted wide-ranging powers within their grant of authority. Indeed, both types of organizations have struggled over the last fifty years to be recognized as "professions." Yet these efforts have been impeded because the practice of these professions takes place within hierarchical governmental organizations which define the "profession" without reference to independently authorized licensing institutions.

Lawyers, doctors, and clergy, the traditionally recognized professions, all must define their professional identity not only in terms of their immediate, current employer, but also in terms of professional codes and standards administered by disciplinary boards, courts, or church ordination committees. The professional autonomy granted to police and military officers pales in comparison to the unsupervised decision-making authority exercised by those in the traditional professions. The contrasting means by which the various professions are "policed" are instructive. A lawyer who generates client complaints will be called to answer before a state disciplinary committee. A police officer suspected of serious misconduct may trigger an undercover investigation by a specially designated police squad.

One organizational technique common to both types of unit is strict adherence to a chain of command. As part of efforts to professionalize, police forces across the country adopted military rank and titles to confer and denote status and authority, and to reinforce the notion of accountability through a chain of command.¹¹⁹ Most pertinently, the OOTW

¹¹⁹ See Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, in *Modern Policing* 51-97 (Michael H. Tonry & Norval Morris eds., 1992) (describing shifts in police department organization). The move to a military style, in combination with a deemphasis on foot patrolling, arguably moved police forces to view the public as the "enemy," resulting in heightened levels of police abuse and brutality. See Independent Comm'n on the L.A. Police Dep't, *Report of the Independent Commission on the Los Angeles Police Department* xiv(1991). The publication of the influential J. Wilson & J. Kelling, *Broken Windows* augured the inevitable pendulum swing to a more "user-friendly" and personal approach to

missions of late have force soldiers to take on the tasks of police. Police duties may be broken down into at least two broad categories, peacekeeping and law enforcement.¹²⁰

Sociologist Hans Geser expands this into the following trinity:

1. enforcing law and public order (the "guardian of society" - role)
2. mediating and solving conflicts (the "peacekeeper" - role)
3. helping in cases of emergencies (the "public servant"-role).¹²¹

Both organizations are trained in the discipline use of coercive force. Police are accustomed to the idea that the use of force, especially via firearms, is likely to generate intense community reaction, and hostile one at that if there is no clear articulable justification for that act.¹²²

VI. Examination of Paradigms for the Principled Exercise of Discretion.

The notion of discretion can only be understood within the context of its historical development, its philosophical underpinnings, and its interplay with the effective functioning

policing, commonly referred to a "community policing." Another common term for this law enforcement mode is "problem-oriented policing." See Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, in *Thinking About Police: Contemporary Readings 480-94* (Carl B. Klockars & Stephen D. Mastrofski eds., 1991).

¹²⁰ These categories are used throughout an influential book on policing. See John Kleinig, *The Ethics of Policing*. (1996).

¹²¹ Hans Geser, *International Policing: A New Evolutionary Stage of Military Organization? Peace-keeping Missions in a Sociological Perspective* (14 May 1996) at site <http://www.unizh.ch/%7Egeserweb/inpo/ftext.html>, pages correspond to printout on file with author.

¹²² NATIONAL ADVISORY COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 189 (1967).

of democratic government generally and the law enforcement implementation system in particular.

Professor Carl F. Pinkele provides straightforward, useful terminological clarity. He defines *discretion* as referring to scenarios allowing an

"implementation system to act with considerable autonomy. When an individual or set of individuals has the capability of making decisions based upon personal choices or preferences without being behaviorally constrained in their actions by rules or by others in positions of greater authority, the resulting behavior is discretionary in nature."¹²³

Structural discretion "obtains within an organizational framework when options are permissible according to a prefigurative established rule."¹²⁴ This description should be familiar to attorneys, for it describes most legal decision-making processes of complexity where no particular result is clearly mandated by a normative regime, be it statutory, regulatory, or a product of judicial decision-making. Pinkele distinguishes this form of discretion from *individual discretion*, which

"obtains when either one of two circumstances occur: (1) individuals in the law implementation system have no rule or policy guidelines by which to set their course and thus are able to act according to personal, rather than institutional or systemic, motives (a feature unlikely to occur in any organized environment, particularly one associated with the law process); or (2) individuals are able for one reason or another to chart a course independent of an existing rule, an existing set of policy guidelines, or superior rule interpreter. Because of the centrality of implementation within any political

¹²³ Carl F. Pinkele, *Introduction*, in *DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE*, at x (1985).

¹²⁴ *Id.* at x.

system, particularly one that professes to be democratic, the presence and impact of individual discretion is of utmost concern."¹²⁵

Finally, the *law implementation system* requires description. Pinkele, working within a domestic law context, says that it "refers to those institutions charged with putting the country's laws into operation. In a technical sense, authorities in the law implementation system do not make the law. They deliver, put into place, and carry out the laws made by those who are legitimately constituted to make them."¹²⁶ The next step is to adapt this definition for the international context under consideration here. Simply put, the *international criminal law implementation system* refers to those international institutions charged with putting global norms into operation.

A. *Police discretion.*

1. *Relevance and History.*

Police departments stress the importance of enforcing the law in accordance with their mission statement. Thus, mission definition takes on supreme importance. The overriding issue guiding police is mission definition. An ABA listing of the Standards of Criminal Justice) of modern police functions includes the duty to:

identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent court proceedings; reduce the opportunities for the commission of some crimes through preventive patrol and other measures; aid individuals who are in danger of physical harm; protect constitutional guarantees; facilitate the movement of people and

¹²⁵ Id. at x.

¹²⁶ Id. at x.

vehicles; assist those who cannot care for themselves; resolve conflict; identify problems that are potentially serious law enforcement or governmental problems; create and maintain a feeling of security in the community; promote and preserve civil order; and provide other services on an emergency basis.¹²⁷

In view of these number and complexity of these tasks, the need for police discretion in executing them should come as no surprise. However, the legal and police communities were both slow to recognize this need and were especially reluctant to formalize it and thereby exercise control over it. Historically, this has left the stereotypical "foot patrolman" in the worst of all worlds, in that he or she has been held responsible for making extraordinarily difficult decisions without adequate guidance and training in how to follow that guidance.

Legislative guidance and enactments to control police behavior came slowly, and in many cases vast gaps in the scope of legislative coverage persists. Courts found it difficult to evaluate good faith police actions driven by factors not easily captured and analyzed in the courtroom, to include such issues as credibility, cooperativeness with government officials, attitude, demeanor, and other personal characteristics police learn to appraise quickly in their line of work.¹²⁸ Legislative intervention into the arrest process has failed to show much

¹²⁷ American Bar Association Standards for Criminal Justice ¶ 1 Police Functions (2d ed. 1986 supp.)

¹²⁸ H. Goldstein, Policing a Free Society 188-89 (1977).

promise.¹²⁹ Local police administrators have stepped in to fill this void through administrative rule-making.

All of the above sets the stage for what can only be called a revolution in the way the criminal justice system in the U.S. views itself. As explained in the most comprehensive recent treatment of the whole matter of discretion in the criminal justice system, 50 years ago there existed little understanding or even acknowledgment of the whole question of discretionary decision-making in the criminal justice system.¹³⁰

The notion of discretion in the criminal justice system came to the attention of serious students of justice when the American Bar Foundation in 1956 decided to conduct a survey of the administration of justice in the U.S. Experts consider this survey to have been a seminal document establishing modes of thought and discourse regarding criminal justice for the years that followed to this day.¹³¹ Indeed it is remarkable to consider that decades of both popular consideration, and serious, professional study, neglected to reveal the importance of discretion in the justice process. Walker himself characterizes this as a paradigm shift

¹²⁹ See generally Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 *Pace L. Rev.* 97 (1995) (describing the difficulties created by a legislated requirement for arrest in domestic abuse cases).

¹³⁰ SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* 6 (1993).

¹³¹ *Ibid.*, at 6. *Supra* note 130

comparable to the fundamental changes in scientific approach wrought by revelatory discoveries.¹³²

What caused such blindness? The historical record offers no firm guide, but one can surmise the following: the U.S. system *qua system* was young, evolving, and the notion that it should in fact work as a system was new. The states today dominate criminal law in terms of statutory and regulatory law, as well as the sheer numbers of supporting institutions (police organizations, courts, and prisons) and personnel, as compared to the federal criminal justice system. The idea of an integrated national system of criminal justice was merely a notion, if that. Most people could not conceive of the need for one.

Explaining this lacuna in vision also draws one to consider the ideological assumptions of the times. For instance, most observers in the first half of this century viewed discrepancies between crime rates and arrest/conviction/incarceration rates as failures. They faulted political influence, corruption, and faulty or inadequate resource allocations for these incongruities, but never considered that factors persisting throughout the criminal justice decision-making process might better have accounted for them. In accordance with the Progressive reform movement of the period, experts recommended professionalization of personnel and rationalization as solutions to the "failures" they observed.¹³³

¹³² See *id.* At 8. Walker himself cites to the classic (yet still controversial) text on the matter of paradigm shifts, Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. 1970.

¹³³ See *id.* At 8. *Supra* 130

Jurisprudence provides numerous theories for the sociological basis of "law," both in terms of substantive rules and the more process-oriented approach favored by later legal theorists, but most modern philosophies of law as it exists in democratic societies rely upon a link between law and popular consent. That is, the law (as embodied by official police, legal, and judicial institutions) responds, however slowly, to public needs and demands. As the on-the-ground interface between the average citizen and the criminal justice system, the police officer often feels compelled to adjust quickly to such community expectations, which may in some contexts lead to a decision to not enforce a rule on the books. While this raises numerous conceptual difficulties in terms of efficiency and democratic theory, most would agree as to its necessity. As one scholar put it years ago:

Equating actual enforcement with full enforcement, however, would be neither workable nor humane nor humanly possible under present conditions in most, if not all, jurisdictions. Even if there were "enough police" (and there are not) to enforce all of the criminal laws, too many people have come to rely on the nonenforcement of too many "obsolete" laws to justify the embarrassment, discomfort, and misery which would follow implementation of full enforcement programs for every crime.¹³⁴

2. Limitations on Police Discretion.

Perhaps the best summary of the consensus view of the outer limits of police discretion is the following quote:

When a legislative body enacts that an act is a crime, and when it delegates no power to the police to substitute their judgment as to what should be crime,

¹³⁴ Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 587-588 (1960).

police nonenforcement on the ground that the enactment is unwise seems clearly an unlawful assumption of power. When administrators flagrantly violate clear statutory provisions, they reject the central idea of the rule of law.¹³⁵

Professor Davis greatly advanced the study of police discretion with his numerous studies and publications. He exploited his background as an administrative law expert to devise regulatory schemes for the control of police discretion. Codes of conduct for police officers spread throughout the nation and police chiefs asserted greater authority, thereby further limiting the discretion of the patrol officer on the beat.

At the same time, the U.S. courts at all levels demonstrated diminishing deference to decision-making by law enforcement personnel. In the process, they (especially the Supreme Court) built a huge body of law now taught as a separate course in virtually every American law school - Criminal Procedure. The Miranda case best illustrates the regulatory nature of court intervention in that era, as the Supreme Court issued not only a decision concerning the procedural rights of detained suspects, but it moved beyond that to outline the precise wording necessary to insulate police officers against subsequent charges of intimidation and coercion.¹³⁶ Miranda didn't remove discretion; rather, it gave very specific guidance limiting discretion in a particular set of circumstances. Police still need to assess such difficult issues as voluntariness and interrogation when questioning a particular suspect. In reviewing the

¹³⁵ K. DAVIS, DISCRETIONARY JUSTICE 87 (1969).

¹³⁶ See U.S. v. Miranda.

historical record, one must conclude that police have maintained their wide-ranging despite the Warren court's efforts to restrict it.¹³⁷

The controversies raised by police abuses have abated in the popular mind since the 1960's, but they occasionally resurface on the front page. Relations between police forces and ethnic subcommunities can be explosive. Recently, New York City politics became preoccupied with a ruling by federal Judge Harold Baer, Jr., who noted in dicta:

[R]esidents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding [this discord], had the men not run when the cops began to stare at them, it would have been unusual.¹³⁸

Locals were outraged that the police, not the defendants, appeared to be on trial. However, most interpreters viewed this as only a temporary hesitation in an overall national judicial trend, led by the U.S. Supreme Court, to give ever greater deference to police decision-making.¹³⁹

¹³⁷ See, e.g., Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* (1993) (reviewing the history of the Warren court's attempts to control police practices and adjudging them a failure).

¹³⁸ *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996) (describing four men in the Washington Heights neighborhood of Manhattan who ran when police officers merely looked at them), vacated, 921 F. Supp. 211 (S.D.N.Y. 1996). Judge Baer vacated the ruling less than three months later, seemingly due to the opprobrium and political pressures brought to bear.

¹³⁹ See, e.g., Susan Herman, *No, the Courts Are Not Out of Control*, 2/9/96 *Newsday* A43, February 9, 1996. (assessing the state of modern criminal procedure law as a control of police discretion and lamenting the unwillingness of most judges to limit it).

B. Prosecutorial discretion.

1. Relevance and History.

a. American military justice system.

Although military prosecutors play a major role in the military criminal justice system by advising commanders, assessing evidence, and trying cases pursuant to the standards of the military criminal justice system as codified in the Uniform Code of Military Justice, they lack the independence of their civilian counterparts. In the military, the trial counsel takes to court those cases sent for court-martial by the convening authority.¹⁴⁰

Although the government representative in the courtroom lacks prosecutorial discretion, the concept still operates, but at a higher level in the decision-making system. The General Court-Martial Convening Authority, usually a commanding general officer, determines which cases get sent to the highest level courts-martial. Lower level commanders have correspondingly less severe punitive actions available to them.¹⁴¹ The comments below regarding the role of civilian prosecutors generally correspond to the appropriate level of decision within the military justice system.

b. American civilian justice system.

The scope of prosecutorial discretion in the American civilian system remains a complex area of law and practice, but in contrast to the military justice system, its existence

¹⁴⁰ R.C.M. 601(a) (Only a convening authority has the power to order trial by court-martial).

¹⁴¹ For a nuanced review of the history of the exercise of prosecutorial decision in military channels and of provocative proposals for change, see Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 Am. J. Crim. L. 395 (1992).

is assumed and acknowledged. In one observer's words, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."¹⁴² Few attack its legitimacy in principle, although controversial applications of the principle can create a stir.¹⁴³ However, as prosecutors face perpetual political pressures as elected or appointed government officials, few fear that an absolutely outrageous exercise of prosecutorial discretion would go unnoticed and unpunished (whether by a court or at the ballot box). Nonetheless, numerous experts (and public figures lacking special expertise) have criticized discretionary prosecution power and the lack of control over that decision-making point in the system.¹⁴⁴

The broad outlines of how prosecutorial discretion gets exercised can be found in the ABA's Standards for Criminal Justice. For instance, Standard 3-3.8 indicates that prosecutors should: explore noncriminal disposition of cases when appropriate; and be aware of social agency resources that can help divert cases from the criminal process. As to the standards for applying such standards, they can be found in Standard 3-3.9, which reads in part:

¹⁴² Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940).

¹⁴³ The poor exercise of prosecutorial discretion may partly explain the sway of the victim's rights movement in the United States, which if successful would alter the balance of power in criminal justice administration by "giving the victim a systematic influence from investigation and arrest through parole." Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 Utah L. Rev. 517, 518. A historical perspective on the whole issue of victims' rights reminds us that the centralized institutions of criminal justice evolved over time to replace "privatized" communitarian means of implementing justice. For a useful history of this aspect of criminal justice, see McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651-61 (1976).

¹⁴⁴ Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521-22 (1981) (noting controls put in place over police, parole boards, magistrates, correctional officials, and judges, but not prosecutors).

(b) the prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others;
- (vii) availability and likelihood of prosecution by another jurisdiction.¹⁴⁵

These standards, and those similar rules adopted by various prosecutorial offices around the country, allow district attorneys to provide guidance to young attorneys, guarantee a measure of uniformity, and avoid public embarrassment, an important consideration for an elected officeholder.¹⁴⁶ Like standards for domestic police discretion, must be placed within the context of history and public justification. First, recall the background position: discretion was not only not recognized, legislators often sought to outlaw it. The classic statement of the predominant view of American experts during the first half of this century can be found in this commentary:

¹⁴⁵ American Bar Association, Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.9.

¹⁴⁶ See William Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 Ohio St. L.J. 1325, at 1344-45.

The duties of the prosecutor, as set forth in the statutes, say nothing about compromise or adjustment, bargaining with defendants, mediation in quarrels, or crime prevention. On paper, the rules for the administration of the criminal law provide that all offenders should be treated equally--no defendant should receive more or less punishment than another who committed a similar offense.¹⁴⁷

The justification of the discretionary exercise rests first and foremost on an argument of necessity. Regardless of the intensity with which a government regulates or legislates in a particular area of the law, gaps in that body of law appear and the prosecutor must often cope with that gap without determinative direction. In recent years, one of the pioneers in the field of discretion in the criminal justice system put it this way: ". . . it is naïve to believe that the criminal justice system can operate sensibly by rules alone without the exercise of discretionary judgment. The problems are too complicated, the factual variations are too numerous, and the experiences of the front-line practitioners are clearly to the contrary . . . It is also the conclusion reached by those who, in the ensuing three decades, have studied prosecutor day-to-day practices."¹⁴⁸

In addition, those laws attempting to direct human behavior in realms commonly referred to today as matters of "private morality" (e.g., laws against adultery, against gambling, imposing observance of religious holidays) create special difficulties. Although

¹⁴⁷ N. Baker, *The Prosecutor--Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770 (1933).

¹⁴⁸ Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 73, 112 (Lloyd E. Ohlin et al. eds., 1993). Remington refers to the three decades following the 1950s American Bar Foundation of Criminal Justice which opened up the issue of discretion in the American

such laws may be popular, and may accrue short-term electoral benefits to legislators voting in their favor, they are extraordinarily difficult to enforce and even more difficult to successfully prosecute in the modern courtroom. Yet, such laws have proved remarkably resilient in the face of reform efforts because politicians don't wish to be perceived as lowering societal standards by virtue of an on-the-record vote. The real-world compromise has been for legislators to pass or retain such legislation and, with a wink and a nod, look away when prosecutors opt to direct their resources elsewhere.

This leads into the second primary justification for prosecutorial discretion. As with most government programs, prosecutorial resources almost never match the societal "need." In short, were a prosecutor's office to try every offense committed in its area of jurisdiction under a strict reading of all relevant and legally *valid* criminal statutes, it would disburse its budget long before a new appropriation becomes available. Therefore, as a practical matter, prosecutors engage in the only practices known to stretch a budget: long-range planning and prioritizing. And prioritizing means deciding which crimes to deter and which criminals to pursue, and, conversely, which criminals and crimes to let pass, at least temporarily. Even continental European prosecutorial offices, supposedly guided by the civil law concept of "compulsory prosecution," are confronting budgetary limitations with explicit recognition of the need for prosecutorial discretion.¹⁴⁹

law implementation system and for which he served as the director of field research. He also edited five volumes published as a result of that survey.

¹⁴⁹ Gunther Arzt, *Responses to the Growth of Crime in the United States and West Germany: A Comparison of Changes in Criminal Law and Societal Attitudes*, CORNELL INTERNATIONAL LAW JOURNAL 12, 15 (1979). Another factor in the relatively lesser importance of

More prosaic factors also contribute to the existence of prosecutorial discretion. Prosecutors seek victory. Like other ambitious participants in competitive environments, criminal prosecutors attain personal satisfaction, professional credentials, and public esteem by winning the vast majority of their cases, not losing them. As many prosecutors hold elective office or work for those who do, this can boil down simply to maintaining and enhancing one's job security. Systemic rewards also militate in favor of ensuring a winning record. Perhaps most directly, the defense lawyers (and ultimately, their clients) track the

prosecutorial discretion in the German system is the that penalties there tend to be much lower than the penalties generally imposed in the American system. An overall lower range of penalties leaves less "wiggle room" for prosecutors; some would also suggest it results in a system inherently less reliant upon prosecutorial discretion. For a useful review of British disputes about exercises of police discretion, see generally Gregory H. Williams, *Police Discretion: A Comparative Perspective*, 64 *Ind. L. J.* 873 (1989). He cites a wonderful though historically inconsequential set of punishments for constables who failed in an earlier period of English history to fully enforce the law:

Twenty pounds for non-enforcement of the laws relating to hawkers and peddlers, bawdy houses, gaming houses or disorderly houses not licensed for music and dancing. Two pounds for failure to attend the prosecution of persons bound on recognisances to appear, failure to apprehend persons throwing fireworks, to execute the summons of a justice, to report persons keeping alehouses without licenses, or to enforce certain laws relating to the armed forces. One pound for failure to assist the officers of Customs and Excise, for failure to carry out the orders of a justice regarding vagrants or for neglecting to prosecute fraudulent bakers Ten shillings for neglect of duty relating to drunkenness, idle or disorderly persons, rogues and vagabonds; and to road offenses, including the depositing of rubbish in the streets. Five shillings for various instances of neglect in connection with the laws concerning the armed forces. Two shillings in a great variety of cases: for the non-enforcement of laws against profanity; for not apprehending lunatics when required to do so by a justice; for refusal to search for gun-powder; for failure to apprehend drivers of vehicles who misbehaved themselves; for failure to return a list of persons required to repair highways, or to apprehend persons committing nuisances, or to execute a warrant for a justice.

Id. at 877, n. 19.

win/loss records of individual prosecutors and offices in their entirety, and this information provides them leverage in negotiating plea bargains for their clients. Obviously, statistics demonstrating a very high conviction rate at trial compel defense attorneys to hesitate before telling their clients to reject such offers.

Prosecutorial discretion is discussed here in isolation, but in fact it complements and shapes police discretion. For instance, although police make most arrest decisions in state jurisdictions, those decisions are shaped by the charging policies of the local prosecutor. Moreover, the prosecutor also exercises discretion in pushing for an appropriate sentence for a convict. These decisions inevitably filter down to the "bottom" of the law enforcement implementation mechanism and affect enforcement and arrest decisions made at that level. Crimes that persistently generate little more than the proverbial slap on the wrist as punishment, with little or no objection by the personnel performing the prosecution function, end up unenforced. Again, the wink and the nod among police, prosecutors, and legislators result in nonenforcement of statutory law.¹⁵⁰

2. Objections to prosecutorial discretion.

¹⁵⁰ Against his initial instincts, even Professor Davis concluded that the American democratic system had always worked in this manner and accurate descriptions of, and prescriptions for, the system had to account for this. See KENNETH CULP DAVIS, *POLICE DISCRETION*, 92-97 (1975). Note that in this volume Davis reverses his earlier position on the morality and legality of discretionary decision-making, largely as a result of his understanding of the political system's techniques for accommodating various institutional imperatives. He voiced his previous objection to discretion in his prior volume on the subject. See *supra* note 135.

Prosecutorial discretion raises widespread concern, and rightly so. Discretion without limit would quickly serve as a patina of legitimacy covering a dark underside of tyranny. Academic awareness of the significance of prosecutorial discretion paralleled the civil rights movement in America.¹⁵¹ Minority ethnic groups viewed many police and prosecutorial decisions as oppressive and made without regard to principle or regard for democratic values. The assertion and protection of individual rights attained preeminence in both social and legal thought, and impinged upon the whole notion of discretion in the law implementation system.¹⁵² The language of constitutional rights leaves little room for the concept of discretion.¹⁵³

¹⁵¹ As already discussed, the American Bar Foundation conducted its pathbreaking surveys in the 1950s. The Goldstein article, *supra* note 134, began to translate the significance of those studies and the concomitant academic output for the legal community, as documented by a recent survey showing the Goldstein piece to be one of the most cited articles ever to have appeared in the Yale Law Journal. See Fred R. Shapiro, Yale Law Journal, *The Most Cited Articles from the Yale Law Journal*, 100 Yale L.J. 1449, 1485-86 (1991).

¹⁵² See Peter P. Legins, *Discretion and the System of Formal Social Control*, in *DISCRETION AND CONTROL* 7, 15-17 (1978).

¹⁵³ Similarly, the notion of prosecution with lawyers of other countries. European lawyers in the continental civil law tradition are unaccustomed to a government attorney having the independent authority possessed by the American prosecutor, and numerous writers argue they are right to prefer their own systems' allocation of decision-making authority. See, e.g. Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); Joachim Herrmann, *The German Prosecutor*, in *Discretionary Justice in Europe and America* 16 (Kenneth C. Davis ed., 1976); Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468 (1974). For a broader comparison of discretionary decision-making systems, see generally Kenneth C. Davis, *American Comments on American and German Prosecutors*, in *Discretionary Justice in Europe and America* at (Kenneth C. Davis ed., 1976)

Moving beyond the spectre of totalitarianism hiding behind the visage of the all-wise decision-maker, an unfounded confidence may grow in a system too dependent on discretionary decision-making. As one commentator put it:

Excessive reliance on discretion has a deeper effect. It hides malfunctions in the criminal justice system and avoid difficult policy judgments by giving the appearance that they do not have to be made. It obscures the need for additional resources and makes misapplication of available resources more likely. And it promotes a pretense that we know more than we do, thereby leading to wrong decisions and preempting research and evaluation on which change should be based. Discretionary decisionmaking has helped keep cases moving through the system without too many embarrassing questions, while promoting the sense that compassion and wisdom are at work. The result has been some compassion (often matched or exceeded by unfairness) and very little wisdom.¹⁵⁴

3. *Advantages of Discretionary Decision-making*

The advantages of discretionary decision-making may be summarized as follows. First, it promotes efficiency. The decision to not waste prosecutorial resources on a weak case or on a crime not deemed troublesome by the local community allows those resources to be expended more sensibly in terms of community values, the support of which is one of the primary functions of a prosecutor. Second, it may also promote justice. For instance, the decision not to prosecute or charge an offense can allow prosecutors to consider legitimate social factors or mitigating circumstances not always explicitly codified in the law, such as the age, mental state, emotional immaturity, and experience of the accused.¹⁵⁵ Third, it allows decision-makers to adjust to changing conditions. For instance, police forces

¹⁵⁴ James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, DUKE LAW JOURNAL 651, 652 (1976).

suddenly confronted by civil unrest must shift their focus to the short-term minimization of violence, and this justifies giving them greater leeway in making on-the-spot decision-making authority.¹⁵⁶

Similar advantages apply in the international arena. The combination of prosecutorial and police decision-making must be refined in order to optimize the opportunities to authoritatively impose justice on individual criminals while at the same time preserving social order in conflicted states. Linking the indicting and arrest process in open forums would remove much of the criticism the U.S. now endures. The international criminal justice system lacks such a finely tuned process of decision, but it must develop one, despite the professional gaps pitting lawyers philosophically against one another. As commentator Ruth Wedgwood, a former prosecutor states:

Continental justice, . . . has maintained a model of full prosecution, the norm that available proof must always be acted on. To Americans, this model may ignore the prosecutor's role in developing proof. It may be better to make instrumental logic open and transparent so it can be critiqued. In any event, international war crimes prosecutions will require a careful and justified selection of targets. Full prosecution is constrained by the difficulty of the cases, the limit of resources, and the wide scale of violations, even where the heinousness of the offenses makes it difficult to conceive of curtailing any charges.¹⁵⁷

¹⁵⁵ FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME, 6 (1969).

¹⁵⁶ See generally A. Kenneth Pye & Cye H. Lowell. The Criminal Process During Civil Disorders (pts 1 & 2), 1975 Duke L.J. 581, 595. The authors describe the shift in priorities thus: "Unlike its function in non-emergency periods, the criminal process in emergency situations is not primarily punitive, deterrent, rehabilitative, or retributive. Rather it is preventive and restorative." *Id.*, at 597.

¹⁵⁷ Ruth Wedgwood, Prosecuting War Crimes, 149 Mil. L. Rev. 217, 220-21 (1995).

VII. Outline of new model for the exercise of discretion within a responsible command framework.

A. Stated Goals.

A New Haven analysis of the analogy suggested here, between domestic and international criminal law enforcement, first requires an assessment of the policy goals driving the process. Based on traditional policy goals of U.S. domestic criminal law, a fair statement of the policy goals of transnational criminal law enforcement would be:

1. To educate the world community that when the United Nations or other another body "deputizes" a nation, group of nations, or a multinational organization (such as NATO) to enforce international criminal law, that nation, group, or organization will inevitably engage in ad hoc policy making.

2. To induce the United Nations (in particular the Security Council) to define crimes so that statutory law will be practically enforceable.

3. To write or rewrite legislative directives, such as Security Council Resolutions, to make clear what powers are granted to the enforcing power(s) and what powers are withheld.

4. To close the gap between the pretenses and vagueness of international legal documents and the actualities of how enforcers of international criminal law actually behave.

5. To transfer most of the policy-making power to the appropriate level, balancing between the need for local, reactive ad hoc decision-making without a total disconnect with norms established in international law.

6. To bring the policy decisions of international criminal law enforcers out into the open, except when special circumstances dictate confidentiality, standards for which can also be established.

7. To improve the quality of work of international criminal law enforcers by establishing forums for public suggestions and criticisms by interested parties. In the domestic context, police discretion finds itself bound by various legal and political pressures. While numerous commentators and scholars contend that various institutional barriers make it difficult to bring such pressures to bear effectively, no one doubts that they exist and ultimately have an effect. In the arena of international criminal law, the difficulties of democratic control expand exponentially because of the lack of public understanding of the niceties of international law and because the most interested groups (such as, say, the Bosnians) typically lack a strong voice in international institutions such as the UN, the World Bank, etc. This leads to the next goal.

8. To bring the procedure for policy determination into harmony with the democratic principle, instead of running counter to it.

9. To replace present policies (or lack thereof) based on guesswork with policies based on appropriate investigations and studies made by qualified and knowledgeable personnel.

10. To promote justice by moving from an ad hoc, unprincipled determination of policy by particular nations and individual military commanders to a system of principled

limitations upon discretion which still allows for on-the-ground judgments to be made by commanders in the midst of the situation.

B. Policy Recommendations.

No new insight, paradigm, analogy, or jurisprudence leads inexorably to a particular policy. Indeed, one might say that a political actor, once convinced of an insight's truth or a jurisprudence's usefulness, exercises broad discretionary powers in selecting the best means for implementing its policy implications. At root level, this paper propounds a new avenue for justifying currently existing U.S. practice with respect to the apprehension of war criminals in Bosnia. This paper argues only that the practitioner needs to engage a new, more vigorous, robust justification.

However, the following policy implications seem to naturally flow from the exercise of the invocation function suggested here:

1. The education function embedded in policy goal number one listed above is critical. As a matter of responsible governance and command, U.S. and other national leaders will never allow their troops to be given over to UN command as part of a blank check. The UN's bureaucratic ability to administratively regulate and control the activities of national contingents knows no bounds, yet national contingents remain bound to their national governments when pushed to move beyond initially specified mission parameters. Much like police, soldiers and their commanders plan and deploy in accordance with nation-state driven mission statements.

Moreover, individual peace operators owe their allegiance to their sending state. Most importantly, national mechanisms for most administrative and all criminal sanctions

apply to peace operators, whether the operation is UN-directed or UN-authorized. So long as this situation persists, the legal responsibilities of commanders and the forces under them will continue to be mediated by and through nation-state mechanisms which are not insulated from "political" considerations, including national self-interest.

2. The tribunal is part political animal, part judicial fact-finder and sentencer, part law enforcement mechanism. The political aspect of the tribunal may no longer be glossed over. Richard Goldstone and his successor, Louise Arbour, exercise immense influence within and without the UN system. Their condemnation of NATO's "paralysis" on the apprehension issue stung. Similar statements by some of the tribunal's judges present the same difficulties. If law in some respects represents legitimized politics, the institutional divide between the Tribunal and the Security Council demands reconsideration. Demanding arrest of indicted personnel makes little sense if no provision for arresting personnel has been made previously. If failure to arrest these individuals threatens, as critics say, to "doom international criminal law forever," one feels compelled to ask whether the indictments were issued prematurely.

3. To lay out the law enforcement tasks of troop contingents in Security Council Resolutions with some statement (or reference to a continually revised SOP) there concerning the decision-making parameters for national contingents. Acceptance of these limitations would be required before the UN would accept the troops for participation in an operation. For a NATO-run operation, similar provisos could be incorporated in planning and decision documents.

4. Policy goal four requires that authoritative bodies prescribing international law make tough choices about how forces, be they UN, coalition, or national, are to go about the business of implementing international criminal law. How are the "pretenses" to be overcome. In the domestic law arena in the U.S., police administrators and their civilian bosses have traveled down two paths, sometimes simultaneously, in their attempts to control and channel police discretion. One option is the road of administrative rule-making. It is more than mere coincidence that the first major scholar in the field, Professor Kenneth Culp Davis, was best known as an expert in the field of administrative law. His initial reaction to the discovery of the wide-ranging discretionary powers of the police was to suggest that forces develop and implement elaborate systems of internal administrative regulations. Thus would discretion be uprooted.

Although this approach continues to this day with some measure of success, observers also know after over thirty years of administrative reform that administrative rule-making fails as a total solution to the "problem" of discretion. First, no set of rules can anticipate the configuration of every possible crisis scenario that will face a police force, either at the operational level (flood, power outages, riots) or at the tactical level of the individual patrol officer. Second, police forces have had to face the difficulty of implementing even those regulations they have designed, if only because of a predilection of many in the force to dismiss "academy" training in favor of "what works on the street." Police forces quickly assimilate new recruits and educate them in the local stance toward regulations coming down from "on high" -- city hall or police headquarters.

Modern American military organizations engage in similar administrative rule-making, although most commanders and their legal advisors never conceive of themselves as

engaging the practice of administrative law. First, the powers of command may be conceived in terms of administrative law. A unit commander may direct the activity of his or her subordinates by written or verbal order.¹⁵⁸ A local commanding general may formalize such directives by issuing a general order or a local regulation. He or she may also supplement or even change such directives by verbal command.¹⁵⁹

Although administrative law in military circles is usually conceived as that set of regulations and related statutes and practices surrounding base or post operations, administrative law pertains to every military context, including exercises and deployments for actual missions.¹⁶⁰ In particular, the range of permissible uses of force is governed by "rules of engagement," best known by the acronym "ROE." In peace operations, they primarily focus on the appropriate reactions to perceived threats, which may take the form of actual force or the form of another party's intention to imminently use force against U.S. (and in some cases, allied) forces. At its most basic, the rules of engagement are a "commander's

¹⁵⁸ They suffer the threat of court-martial or lesser punishment if they fail to comply. MCM

¹⁵⁹ No doubt the speed of operational decision-making masks much of its administrative character. The urgency and mission-focus of military decision-making separates it from most other administrative law-making, if only in style. Some observers lament the procedural emphasis of modern administrative legal process. For instance, Judge Loren Smith emphasizes the need to view administrative law decisions as part of the larger political milieu, not separate from it. Loren Smith, *Judicialization: The Twilight of Administrative Law*, 1985 Duke L.J. 427, at 429-32 (contrasting "political" and "legal" decisionmaking and arguing that administrative law misconstrues the two).

¹⁶⁰¹⁶⁰ If only in terms of its procedural elaboration and complexity, the modalities for the formulation of military formulation, approval, and transmission of operational plans are comparable to other sophisticated regulatory schemes. The Joint Operations Planning and Execution System (JOPES) sets out complex procedures for combatant commands preparing planning documents through either the "deliberate planning process" or through crisis action planning. See Joint Pub 5.02.1, JOPES Volume I, Deliberate Planning Procedures.

standards for the use of force,"¹⁶¹ thus directing a soldier how and when he or she may react to such perceived threats. If a soldier sees or hears rounds being fired in his direction, he may take appropriate action, to include responding with small arms fire as he and his unit commander deem appropriate and necessary.

Note, however, that a soldier faced with such a situation retains discretion in how to appropriately respond to displays of force. That is, the rules of engagement do not *require* a particular tactical response; they simply *authorize* a range of response options.¹⁶² The unit leader may select from a number of options: withdraw; take cover and hold the position; radio for reinforcements; respond with defensive fire; initiate offensive maneuvers with his own forces to repel the opposing force. Modern communications capabilities allow for relatively quick coordination of response with higher military authorities, but an attack in a remote area requires an immediate response. Thus, units educate and train soldiers on the particular ROE appropriate to the mission they are about to undertake and the weapon systems the unit is trained to use. Obviously, an armor unit's options extend over a vastly different range of possibilities than a pure infantry unit's.

¹⁶¹LTC Marc L. Warren, 152 Mil.L. Rev.(1996) at 52.

¹⁶² For a selection of demonstrative sample ROE cards distributed to soldiers in various operations, see The Judge Advocate General's School, United States Army, JA 422, Operational Law Handbook 1-1 (1996) [hereinafter Operational Law Handbook] Chapter 8, pages 7-14. ROE cards are useful training tools, but soldiers and units must train to the standards set therein. The dangers of relying on written guidance alone are exacerbated in a multinational task force setting. See, e.g., Colonel F.M. Lorenz, Forging Rules of Engagement: Lessons Learned in Operation United Shield, Mil. Rev., Nov.-Dec. 1995, at 17. The experience of the author in a combined force in the Former Yugoslav Republic of Macedonia confirms that forces with different linguistic and cultural background and personal experiences will evince a wide range of interpretations of the same written ROE guidance.

If peace operations units engaged in gray area peace enforcement are to enforce international law, and their discretion is to be channeled and controlled in ways similar to those used by police forces over the past thirty years, then new administrative rule-making appropriate to the military context will be part of that process. Military legal experts commonly categorize ROE as the chain linking the intentions of the National Command Authority through the chain of command's strategic, operational, and tactical levels.¹⁶³ In the case of ground forces, ROE allow the National Command Authority to designate the parameters of authorized action down to the individual infantryman.¹⁶⁴ U.S. forces have developed a complex, fully elaborated system for the promulgation, transmission, and revision of ROE at every level of command. Military commanders and their legal advisors

¹⁶³ Joint Chiefs of Staff Publication 1-02, DoD Dictionary of Military and Associated Terms (23 Mar. 1994) defines ROE as: "Directives issue by competent military authority which delineate the circumstances and limitations under which United States Forces will initiate and/or continue combat engagement with other forces encountered."

¹⁶⁴ The policy guidance from the National Command Authority flows down to the unified commanders-in-chief (CINCs) via the JCS ROE. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT FOR US FORCES (1 Oct. 1994). Judge advocates played an active role in the staffing process leading up to adoption of the new SROE. See International Law Note, *"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, ARMY LAW., Dec. 1993, at 14. Of course, the implications of ROE differ depending on the level of command and the weapons systems at the disposal of that level of command. With reference to most peace operations, with units strewn over large geographic areas, small unit decision-making gains new importance. Although such activities fall within the purview of what military planners would call the tactical level of decision-making, the abundant presence of press representatives, third-party observers, and members of nongovernmental organizations, raises the likelihood that errors in judgment at the tactical level may have strategic implications in ways impossible in traditional combat operations characterized by clear lines between friend and foe. For instance, a soldier's misidentification of a threat may turn into a public relations disaster for the all units in an area, even if soldier's error was honest and made in good faith. If not honest, then the repercussions may be even more severe. For instance, the court-martial cases coming out of American operations in Somalia demonstrate the fine distinctions that young soldiers needed to draw.

continually refine the training given soldiers. At the level of execution, soldiers need to be concretely aware of, and practiced in, the tasks they are to accomplish. Soldiers can leave behind thoughts about the finer points of the law, as they become second-nature as a result of the U.S. military's extensive ROE training programs, which incorporate international law as well as U.S. policy. As the title of a recent influential article put it, ROE becomes "a matter of training, not lawyering."¹⁶⁵

The matter of ROE and discretion poses central policy questions for the whole chain of command. Major Michael A. Newton attorney argues that the protection of U.S. and allied military personnel, or force protection, militates in favor of expanding the military's role in apprehending and prosecuting foreign nationals in the midst of peace operations.¹⁶⁶ He suggests that a program of vigorous criminal law enforcement promotes force security.¹⁶⁷

This article suggests the opposite.

His argument centers on the primary principle of all sets of rules of engagement for U.S. forces, the inherent right of self-defense.¹⁶⁸ The Standing Rules of Engagement for United States Armed Forces state:

THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT
AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS
AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-

¹⁶⁵ See Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

¹⁶⁶ See Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. (1996) 1, 85-87.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

DEFENSE OF THE COMMANDER'S UNIT AND OTHER FORCES IN
THE VICINITY.¹⁶⁹

Major Newton then suggests that this provision militates in favor of an assertion of U.S. criminal jurisdiction over offenders. However, his focus in this phase of his argument is clearly on scenarios where:

1. The offending individual commits some form of criminal offense against the military force itself, not against a fellow national;
2. The local populace concedes a measure of legitimacy to the exercise of U.S. jurisdiction; and
3. The U.S. and allied forces maintain a dominating (if not overwhelming) military presence should political support not exist or dissipate.

In Operation Joint Endeavor, the pressure to arrest arises in a circumstance where:

1. The indicted parties are accused of committing international crimes against other locals, not against IFOR;
2. The local political situation constantly evolves, leaving open the question of the local public reaction to the flexing of IFOR or the SFOR's muscle; and
3. The international military presence, though robust, would have had difficulty maintaining order should public consent be withdrawn.

With the transition from IFOR to SFOR, the size and capabilities of that NATO-led military force diminishes.¹⁷⁰

Major Newton concedes that a military commander would make arrest and prosecution decisions only after considering the possible effects on mission

¹⁶⁹ SECRET, Chairman of the Joint Chiefs of Staff, Instruction 3121.01, Standing Rules of Engagement for US Forces (1 Oct 94) (The extract appears in the unclassified and widely available Appendix A).

accomplishment¹⁷¹ and coordinating with appropriate authorities in the U.S. chain of command, to include civilian leadership.¹⁷² In other words, even with the expanded jurisdictional authority proposed by Newton, commanders and their superiors would need to exercise discretion.

Discretion would be of great importance in order to avoid having the unit get distracted by tasks for which it is not trained, equipped, or appropriately deployed. In other words, in a very fluid operational setting, the commander must ensure that his responsiveness to request (or demands) for various kinds of assistance do not lead him to fall prey to mission creep, popularly understood as the unintended drift into taking on responsibilities not originally contemplated by political/military/humanitarian planners.¹⁷³

¹⁷⁰ IFOR's strength number approximately 53,000 personnel. SFOR has about 31,000 troops at its disposal. F.M. Lorenz, Peace Operations and War Criminals: Testing the Limits of Military Force, (paper submitted to Joint Forces Quarterly, 11 February 1997 draft).

¹⁷¹ In his words:

Authority to prosecute suspects for continuum crimes raises some tactical and practical concerns. There will be cases which the commander decides not to prosecute because of lack of evidence, as well as potential short term escalation of hostilities, or other operational concerns. In other cases, the commander may grant some form of leniency in exchange for a tactical or political concession by opposing forces. In still other cases, the commander may decide to turn the suspect over to local justice authorities.

Newton at 86-87.

¹⁷² Id. at 89-90 (suggesting a coordination procedure be prescribed by the President through the *Manual for Courts-Martial*).

¹⁷³ A more formal military description would be any move to enlarge the commander's mission without coordination with and approval of the chain of command up to the National Command Authority (NCA). See Dep't of Army, Field Manual 100-23-1, Multiservice Procedures for Humanitarian Assistance Operations 3-1, 3-2 (31 Oct. 1994)

However, this line of argument, though noting tactical concerns, neglects the very real strategic level command considerations raised by an active program of arrest and prosecution. These concerns should be made explicit. The strategic goals of the United States in the former Yugoslavia are clear:

1. Sustaining a political settlement in Bosnia that preserves the country's territorial integrity and provides a viable future for all its peoples;
2. Preventing the spread of the conflict into a broader Balkan war that could threaten both allies and the stability of new democratic states in Central and Eastern Europe;
3. Stemming the destabilizing flow of refugees from the conflict;
4. Halting the slaughter of innocents;
5. Helping to support NATO's central role in Europe while maintaining the US role in shaping Europe's security architecture.¹⁷⁴

Moreover, these regional goals are to be reached within the context of a world-wide strategy of engagement and enlargement.¹⁷⁵ This strategic vision incorporates a *balance* between maintaining order and promoting democracy and human rights.¹⁷⁶ Combating international crime obligates U.S. forces as it instrumentally advances these broader goals.¹⁷⁷

¹⁷⁴ THE WHITE HOUSE, A NATIONAL SECURITY STATELY OF ENGAGEMENT AND ENLARGEMENT (Feb. 96) at 35.

¹⁷⁵ *Id.* at iv.

¹⁷⁶ See *id.* at 2-3. The document indicates the imperative to balance and effectively synergize the various diplomatic and military tools available to the nation:

Our national security strategy is therefore based on enlarging the community of market democracies while deterring and limiting a range of threats to our nation, our allies and our interests. The more that democracy and political and economic liberalization take hold in the world, particularly in countries of strategic importance to us, the safer our nation is likely to be and the more our people are likely to prosper.

However, as the police analogy suggested, administrative rules and regulations by themselves are never enough. Which is why police forces have at times turned to another model, the professional model, for the control of discretion. As indicated previously, police officers (much like military officers) have struggled to achieve recognition of policing as a profession. In other words, police sought to indicate that they brought special skills to the negotiating table of public policy, and therefore their activities and proposals should be granted at least a modicum of deference. Professional education played a central role in changing the professional image of policing. From the 1950's to the 1970's, the number of police training college programs expanded by several orders of magnitude. Nonetheless, the professional model appears to have stalled, at least in the sense that administrative and judicial oversight efforts continue unabated, although one could argue that the judicial rulings on criminal procedure over the last twenty years, especially those of the Rehnquist court, evidence a deference to the professional judgment and goodwill of police officers. Fundamentally, professional training for police has failed to insulate them from criticism within local governments for their nonenforcement or selective enforcement of the law.

Id. at 2-3.

¹⁷⁷ The subordination of crime fighting to other goals remains explicit, although unexplained:

For the American people to be safer and enjoy expanding opportunities, our nation must work to deter would-be oppressors, open foreign markets, promote the spread of democracy abroad, combat transnational dangers of terrorism, drug trafficking and international crime, encourage sustainable development and pursue new opportunities for peace.

Id. at iv.

The professional model for military officers, if not the enlisted branch of the armed forces, has also taken hold, with virtually all officers in today's U.S. military holding college diplomas, with many earning advanced degrees over the course of their careers. Moreover, this professionalization has succeeded in gaining them a large degree of respect and deference from other agencies within the executive branch. More remarkably, military officers have garnered professional deference from leaders of both the legislative and judicial branches of government. The U.S. Supreme Court, through its case law and development of doctrines, has managed to grant heightened deference to the U.S. military decision-making process. Arguably, no arena of governmental activity operates with so great a social effect and so little judicial intervention. Judicial deference ascends to its highest level with reference to operational questions. Courts are reluctant to interfere with military matters whose success most clearly depends upon the unfettered exercise of expert strategic judgment. For this reason, should a question of how and when forces should be deployed to perform a particular function of international law ever come to the court, it would almost assuredly avoid rendering a binding judgment. Instead, the court would send the matter back to the political branches of government, the executive and legislative, for resolution.

The professional model of U.S. military personnel, in combination with the administrative rule-making capacity of the military chain of command up to the civilian commander-in-chief, has insulated the discretionary decision-making authority of the military. Of course, the historical context surrounding the ascendancy of military decision-making must be considered. That is, OOTW represents a new type of military operation in a new environment. Military discretion may be curtailed as it becomes clear that U.S. survival

is not at stake and that the U.S. interests involved are minimal or difficult to discern.¹⁷⁸

However, no court decisions indicate such a trend. If anything, the civilian leadership has more often been criticized for failing to defer to the advice of senior leadership, especially with respect to issues of force protection. This accounts for Congressional vilification of Secretary of Defense Les Aspin concerning U.S. casualties in Somalia.¹⁷⁹

VIII. Application of lessons learned from models examined above.

The history of various models of discretion suggest that real world factors affecting decision-makers cannot be ignored and must be integrated into the normative and legal jurisprudence of decision-making. Additionally, a criminal justice system may not be judged a "failure" purely on the basis of a failure of arrests, indictments, or other statistical categories to result in swift punishment. If anything, they suggest that hidden factors are driving the process.

¹⁷⁸ The Clinton administration, when pressed to list the U.S. interests at stake in places such as Somalia and Bosnia, has responded with nebulous statements including such phrases as "saving NATO," "preserving American leadership," and "supporting America's humanitarian interests." These statements of interests differ in type from the justifications for U.S. involvement in this century's two world wars or even U.S. participation in Operation Desert Shield/Storm in the Persian Gulf.

¹⁷⁹ News reports indicated that Secretary Aspin failed to respond to a request for more armored vehicles, which might have assisted in rescue efforts launched to save U.S. servicemen caught in hostile fire in Mogadishu, Somalia. The long term policy implications of casualties resulting from the chaos of Somalia are explored in Rick Atkinson, *The Raid That Went Wrong: How an Elite U.S. Force Failed in Somalia*, WASH. POST, Jan. 30, 1994, at A1; Rick Atkinson, *Night of a Thousand Casualties: Battle Triggered U.S. Decision to Withdraw from Somalia*, Wash. Post, Jan. 31, 1994, at A1.

If the national criminal justice system in the U.S. reflected "immaturity" earlier in this century, then surely the international criminal justice system remains in its infancy. It lacks the resources, personnel, and institutional infrastructure essential to what would generally be considered an effective justice system. Although the UN and its member nation-states continue to study and discuss the possibilities of a permanent international criminal tribunal, its prospects remain in doubt because national leaders fear the potential uses for such a politically controversial institution.

In order to directly implement international criminal law, the world community has acted through ad hoc institutions, such as the tribunals at Nuremberg and Tokyo and now the tribunals considering international crimes in Bosnia and Rwanda. It lacks any true police force. Interpol serves as a coordinating law enforcement organization ultimately relying upon national law enforcement mechanisms. The International Police Task Force supports local policing efforts in areas of humanitarian or political crisis, but they lack independent authority to implement law. And it took the advent of the current ad hoc tribunals to generate planning and execution of plans for holding cells and prison space for those tried there.

If ever there was an "immature" criminal justice system, it is that servicing the global community. Perhaps that explains, in part, the current international obsession with the very same elements of criminal justice that American reformers were concerned with: corruption, political influence, and resourcing. The persistent reports of the logistical and personnel problems with the international tribunal in Rwanda ring a familiar bell to the ear of a student of American criminology, confirming the evolutionary stage the system is now enduring.

Although the facts continue to surface at the time of this writing, it can safely be said that the tribunal in Rwanda has been slowed by administrative inefficiencies, corruption, and a lack of professionalism. The political and judicial consequences of these difficulties became so grave that the UN Secretary-General, Kofi Annan, removed the tribunal's chief administrator and the deputy prosecutor from their positions.¹⁸⁰

IX. Prospects for a new open model of international discretionary decision-making.

An open, democratic model of decision-making will succeed if only because in scenarios such as the muddled one now pertaining in Bosnia, it alone promises success. The only other practical alternative is a *closed*, perhaps undemocratic model of decision-making. First, discretion is now being exercised and will by force of nature and political will be exercised in peace operations of the future. Even some of the harshest critics of the U.S.'s failure to consistently intervene to combat violations of international humanitarian law are coming to realize that political and financial considerations will play a role in the decision-making process. For instance, Diane Orentlicher concedes that

[C]onsideration of the United States' responsibilities in a nascent system of global policing may lead to an ironic conclusion: at times, the United States can best support humanitarian operations by not contributing troops to them. . . Above all, the United States should provide clear-sighted leadership in defining appropriate occasions for humanitarian intervention - notably including situations of genocide - as well as situations warranting restraint.¹⁸¹

¹⁸⁰ John M. Goshko, *U.N. Chief Fires Top Officials of Rwanda War Crimes Tribunal*, WASH. POST, Feb. 27, 1997, at A28.

¹⁸¹ Diane F. Orentlicher, Boston Review online Democracy Reader December/January 1993-94--Vol. XVIII, No. 6, at <http://www-polisci.mit.edu/BostonReview/BR18.6/risklives.html>.

In the words of human rights scholar David P. Forsythe, "Almost every combatant in this theater [former Yugoslavia] is a war criminal."¹⁸² This reality leads Forsythe to recommend against utilizing tribunals to achieve justice in a political and ethnically divided nation such as Bosnia. Instead, he urges that "it would have been preferable in the Balkans to deal with war crimes by an international truth commission along the lines of El Salvador, combined with national criminal proceedings."¹⁸³

Cynics would suggest that nations avoid the noble tasks involved in building a world community and do only the expedient, the convenient, the self aggrandizing. A nation without a significant self-interest in an operation, be it military or otherwise, will lack staying power and so be vulnerable before a foe determined to win over the long haul. Yet expediency, for a nation-state that defines its national interests even partly as humanitarian interests, harbors within it motivational and idealistic elements worthy of examination. Under certain situations, the expedient becomes the noble. The nation-states engaged in the hard task of keeping the peace around the world can articulate the commingling of expediency and principle in a disciplined manner. And so we should not hesitate to take to heart the words of Diodotus in his Speech to the Athenians about war criminals of his age:

Professor Orentlicher wrote a commonly cited law review article outlining the arguments support the notion that states have a duty to prosecute violations of international humanitarian law in a different context. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991).

¹⁸² David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, in *THE PROSECUTION OF INTERNATIONAL CRIMES* (Roger S. Clark & Madeleine Sann, eds.) 185, 199 (1996).

¹⁸³ *Id.*, at 201.

The question for us rightly considered is not, what are their crimes? but, what is our interest? If I prove them ever so guilty, I will not on that account bid you put them to death, unless it is expedient.¹⁸⁴

¹⁸⁴ Diodotus of Athens: Speech to the Athenians, 427 B.C., reprinted in Col. Robert Debs Heintz, Jr., (ret.), *Dictionary of Military and Naval Quotations* at 355 (1966).