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# A View from the Trenches: The Military Role in the Pursuit of Justice

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# "A VIEW FROM THE TRENCHES": THE MILITARY ROLE IN THE PURSUIT OF JUSTICE

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*Our nation's cause has always been larger than our nation's defense. We fight, as we always fight, for a just peace – a peace that favors human liberty . . . Building this just peace is America's opportunity, and America's duty.*

President George W. Bush[1]

As a combat arms officer who later went to law school, it is really a pleasure to focus on the stated topic for this panel because that's what I do. As a former armor officer, my roots are literally in the trenches. In sharing my figurative view from the trenches regarding the pursuit of justice, you should know that the pursuit of justice is the very core of our professional ethic among military lawyers. I was also privileged to serve as one of the foot soldiers within the ranks of the Department of State whose diplomatic focus revolved around the pursuit of personal accountability. My "view from the trenches" is therefore centered on a candid discussion of the pragmatic aspects of developing justice systems within the conditions and confines of military operations.

When focusing on the pursuit of justice, more efforts are necessary to bridge the gap between the tactical, ground-based, mission-focused perspective of soldiers and commanders and the more abstract, professional perspective that lawyers bring to the effort. There is no cookie-cutter

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[1] President George W. Bush, Remarks at the 2002 Graduation Exercise of the United States Military Academy (June 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

approach, but this essay will explore some of the concrete lessons learned and some practicalities inherent in actualizing justice within an operational environment. At the outset, it is important to realize that military forces will never deploy with the sole mission statement, "Exercise military power to facilitate the pursuit of truth-based justice." The corollary to this is that military efforts to support accountability mechanisms will at most be merely a component of a much larger, more complex mission.

The transition from justice as an esoteric intellectual aspiration to a tangible objective that takes form and shape within the context of a military operation is very difficult. The necessity for a commander to direct every operation towards a defined, decisive, and attainable objective is derived from a basic principle of war, and is fundamental to American military doctrine.[2] Depending on the circumstances and the mission objectives, military actions directed towards truth-based justice may be high profile, purposeful actions that are deliberately planned and resourced or they may be an operational afterthought.

For example, the United Nations Security Council passed Resolution 837 on June 6, 1993 in response to the murders of twenty-five Pakistani peacekeepers in Somalia. The Security Council invoked its Chapter VII authority to permit United Nations forces to "take all necessary measures against all those responsible for the armed attacks . . . including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."[3] Based on this clear mission statement, U.S. forces subsequently began the highly publicized and ultimately

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[2] The principle of war is objective. Army doctrine captures this principle for multinational operations as follows:

> Commanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation's motivation tends to change during the situation. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually attainable objectives.

DEP'T OF THE ARMY, FIELD MANUAL 100-8: THE ARMY IN MULTINATIONAL OPERATIONS 1-2 (1997).

[3] S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. ¶ 5, U.N. Doc. S/RES/837 (1993) (expressing grave alarm at the premeditated attacks apparently directed by the United Somali Congress).

unsuccessful campaign to capture the local warlord, Mohammed Farrah Aidid.[4]

The apprehension efforts in Somalia stand in sharp contrast to the initial NATO posture in Bosnia-Herzegovina during 1996 and early 1997. The parties to the General Framework Agreement for Peace accepted the legal obligation to "cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law."[5] This meant that the signatories of the treaty (*e.g.* Croatia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia) had the legal mandate to arrest suspects, along with a range of other responsibilities such as access to witnesses, provision of evidence, travel of Tribunal officials, etc.[6] The North Atlantic Council subsequently determined that military apprehension of suspects indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) would destabilize the region and undermine overall operational goals by enhancing the status of the radical nationalist parties. On the strength of a narrow reading of the Security Council resolution authorizing NATO operations,[7] the North Atlantic Council approved rules of engagement that permitted military personnel to detain indicted persons

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[4] Patrick J. Sloyan, *Hunting Down Aidid; Why Clinton Changed His Mind*, NEWSDAY, Dec. 6, 1993, at A1.

[5] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, art. IX 35 I.L.M. 75, 90 [hereinafter GFAP], *available at* http://www.nato.int/ifor/gfa/gfa-frm.htm.

[6] In light of this legal obligation, the United States Congress conditioned United States foreign aid to these nations on their cooperation with the work of the Tribunal as early as 1998. *See, e.g.*, Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2002, Pub. L. No. 107-115 § 581, 115 Stat. 2118, 2170-71 (2002) (Known as the Lautenberg amendment, the Act has led to intensive diplomatic and military efforts just prior to the certification window each year, and has produced positive results on balance, to include assisting in the FRY decision to transfer Slobodan Milosevic to The Hague. The key provision follows: "(a)(1) None of the funds appropriated or otherwise made available pursuant to this Act may be made available for assistance, and the Secretary of the Treasury shall instruct the United States executive directors to the international financial institutions to vote against any new project involving the extension by such institutions of any financial or technical assistance, to any country, entity, or municipality whose competent authorities have failed, as determined by the Secretary of State, to take necessary and significant steps to implement its international legal obligations to apprehend and transfer to the International Criminal Tribunal for the former Yugoslavia (the 'Tribunal') all persons in their territory who have been publicly indicted by the Tribunal and to otherwise cooperate with the Tribunal. (2) The provisions of this subsection shall not apply to humanitarian assistance or assistance for democratization.").

[7] S.C. Res. 1030, U.N. SCOR, 50th Sess., 3607th mtg. ¶¶ 14-15, U.S. Doc. S/Res/1031 (1995) (acting under Chapter VII to establish the multinational force to ensure compliance with the GFAP and to "take all necessary measures to effect the implementation of and ensure compliance with" the military aspects of the GFAP).

"only if they come into contact with such individuals in the execution of assigned tasks and the situation permits detention."[8]

Operational experience has shown that although efforts to achieve justice will rarely, if ever, be the sole military mission, they are often an integral component of the broader military mission. The phrase "pursuit of justice" is really nothing more than coded shorthand for the intimate linkage between justice and liberty that most of us would embrace in the deepest part of our consciousness as being an innate and enduring truth worthy of our mutual efforts. In fact, the most dramatic trend in military operations over the past twenty years has been the expansion of ancillary tasks other than pure war-fighting such as the effort to nurture, or in some cases restore, the rule of law.[9]

The societal rule of law generates the intellectual and bureaucratic superstructure necessary for justice to become actualized in everyday practice. The military has the dominant role in establishing the environment necessary for the rule of law to take root and develop, which in turn provides the societal stability that permits the military to salute smartly and declare "mission accomplished, we are going home." In Bosnia, while the military role in ending the conflict and promoting "an enduring peace and stability"[10] was clearly outlined in Annex 1A of the General Framework Agreement for Peace in Bosnia-Herzegovina,[11] the overall success of the mission was linked to the civilian tasks addressed in annexes 2 through 11.[12]

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[8] TASK FORCE EAGLE, JOINT MILITARY COMMISSION, POLICIES, PROCEDURES AND COMMAND GUIDANCE HANDBOOK (6th ed. 1998) (on file with author). In sharp contrast, KFOR arrested three suspected war criminals in coordination with the ICTY barely six weeks after entering Kosovo based on the clear mandates of Resolution 1244. *See infra* notes 63-76 and accompanying text.

[9] *See generally* RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD (1999); DANA PRIEST, THE MISSION: WAGING WAR AND KEEPING PEACE WITH AMERICA'S MILITARY (2003).

[10] GFAP, *supra* note 5, 35 I.L.M. at 89.

[11] GFAP, *supra* note 5, Annex 1A, art. VI, para. 2, 35 I.L.M. at 97 (Annex 1A provided the primary military aspects of the mission: "to monitor and help ensure compliance by all Parties" with their obligations to withdraw and redeploy Forces within agreed periods, and establish Zones of Separation; "to authorize and supervise the selective marking of the Agreed Cease-Fire Line and its Zone of Separation and the Inter-Entity Boundary Line and its Zone of Separation as established by the General Framework Agreement; to establish liaison arrangements with local civilian and military authorities and other international organizations as necessary for the accomplishment of its mission; and to assist in the withdrawal of UN Peace Forces not transferred to the IFOR, including, if necessary, the emergency withdrawal of UNCRO Forces.")

[12] GFAP, *supra* note 5, Annexes 2-11 (The civilian tasks include monitoring elections, the return of refugees and displaced persons, fostering respect for human rights, and the establishment of an international police force.).

Though only obligated to support the civilian functions "within the limits of its assigned principal tasks and available resources, and on request," the military discovered that its mission accomplishment and the larger civilian goals were interconnected in a subtle yet powerful way.[13] This perspective helps explain why the Commander of NATO forces in Bosnia-Herzegovina (COMIFOR) ordered a team of military lawyers from France, Canada, the United States and the United Kingdom to prepare a comprehensive report assessing the justice system in Bosnia in the early days of the operation.[14] Furthermore, in an effort to speed progress towards achieving the political goals of the operation, NATO shifted its policy guidance in mid-1997 to actively assist the ICTY in apprehending indicted war criminals forces found within Bosnia-Herzegovina.

In the context of Somalia, President Clinton summarized the role of the American military in facilitating the restoration of civil stability in his address to the nation on October 7, 1993 by saying:

And make no mistake about it: If we were to leave Somalia tomorrow, other nations would leave too. Chaos would resume, the relief effort would stop, and starvation soon would return. That knowledge has led us to continue our mission. It is not our job to rebuild Somalia's society, or even to create a political process that can allow Somalia's clans to live and work in peace; the Somalis must do that for themselves. The United Nations and many African states are more than willing to help. But we – we in the United States – must decide whether we will give them enough time to have a reasonable chance to succeed.[15]

From the perspective of an American military professional, the roots of the intellectual effort to describe the concept of justice are relevant to its present incarnation as an operational objective. The pursuit of justice in modern military operations reflects the evolution of a very old philosophical quest. For the Greeks, the pursuit of justice symbolized a

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[13] GFAP, *supra* note 5, Annex 1A art. VI, para. 3, 35 I.L.M. at 97 (articulated supporting tasks are: "to help create secure conditions for the conduct by others of other tasks associated with the peace settlement, including free and fair elections; to assist the movement of organizations in the accomplishment of humanitarian missions; to assist the UNHCR and other international organizations in their humanitarian missions; to observe and prevent interference with the movement of civilian populations, refugees, and displaced persons, and to respond appropriately to deliberate violence to life and person; and, to monitor the clearing of minefields and obstacles.").

[14] THE OFFICE OF THE LEGAL ADVISOR, HEADQUARTERS ALLIED COMMAND EUROPE RAPID REACTION CORPS, A REPORT ON THE LEGAL SYSTEM IN BOSNIA-HERZEGOVINA (Oct. 8, 1996)(copy on file with author).

[15] President William J. Clinton, U.S. Military Involvement in Somalia, Washington, D.C., Address to the Nation, (Oct. 7, 1993), *reprinted in* 4 DEP'T OF STATE DISPATCH, No. 42, 1 (Oct. 18, 1993), *available at* http://gopher.state.gov/ERC/briefing/dispatch/1993/html/Dispatchv4no42.html.

quest for order and harmony.[16] Plato conceived of justice as "the highest order of things" on both the personal and societal level.[17] The principle of justice embodies the proper balance of power, wisdom, and temperance which in turn generates societal and personal stability. Growing out of this philosophical framework, the need for justice and an end to repression have been a major demand of the population even during operations in areas where the civilians suffered from extreme poverty and overwhelming material needs.[18] The quest for justice based on truth and the rule of law is a key thread of continuity that begins with the initial response and runs throughout the stability, transformation, and sustainability phases of the mission.

The quest for justice was enmeshed with the values of our Republic from its earliest days. America was born as a fragile republic very much aware of its vulnerability, yet facing the future with faith built on dedication to the dual pillars of peace through justice and peace through strength.[19] As President Jefferson rose to deliver his first inaugural address, America faced a century filled with new dangers and unfolding challenges that threatened to erode the very foundations of our liberty and collective peace (in that sense not all that different from our present national milieu).[20] His

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[16] BRIAN R. NELSON, WESTERN POLITICAL THOUGHT: FROM SOCRATES TO THE AGE OF IDEOLOGY 31 (1982).

[17] PLATO, THE REPUBLIC OF PLATO 52-53 (Francis MacDonald Cornford trans., Oxford University Press 1945).

[18] *See* Georges Anglade, *Rules, Risks, and Rifts in the Transition to Democracy in Haiti*, 20 FORDHAM INT'L L.J. 1176, 1190 (1997) ("In the presence of an inhuman spectacle of misery and its urgent material needs, one tends to forget that the primary needs of people are liberty, justice, and security. Because a pauper also needs justice, the object of a transition to democracy becomes the modern organization of justice in a State of law. This demands destruction of the old military-police apparatus in order to give birth to another organization in charge of public order. It also requires that the institutions of justice and the body of functionaries that make them work be reconsidered so as to produce a 'just justice' and in order to guarantee a 'free freedom.' Haiti must reconstruct judicial power separate from the executive power, which too often has controlled judicial power. Justice by law is thus the initial goal in the transition to democracy as well as the object of the transition itself. It is essentially through the achievement of this goal that Haiti can unite a country broken in two, and create a single people from two profoundly antagonistic factions. Economic analysis also poses justice as a preliminary condition necessary to development.").

[19] Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World, in* LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT, 67 U.S. NAVAL WAR C. INT'L L. STUD. 43, 44 (Alberto R. Coll et al. eds., 1995).

[20] On September 20, 2001, President Bush addressed a Joint Session of Congress, aware that the world – - and perhaps the terrorist network – was listening. The President declared, "we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to

inaugural message articulated an enduring American vision to propel us forward as a nation of purpose and principle in the international arena.

Summarizing the themes that would guide America through the uncertainties of a new century, President Jefferson asserted that the foundational American principle should be to seek "[e]qual and exact justice to all men, of whatever state or persuasion, religious or political."[21] President Jefferson portrayed a "bright constellation" composed of nonnegotiable values that would combine to form the "creed of our political faith" and serve as the touchstone for the future.[22] He pointedly told the nation that "should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads us to peace, liberty, and safety."[23] After over two hundred years, the values of justice and liberty remain the core objectives for which we strive, albeit in a much more complicated and changed world.

In time, the pursuit of justice became the cornerstone of our domestic legal culture because of the balance between power, law, and liberty. The great jurist Learned Hand captured the essence of this connection when he said that,

> [t]he liberty that must lie in the hearts of men is not the ruthless, the unbridled will, the freedom to do as one likes. That is the denial of liberty and it leads straight to its overthrow. A society in which men recognize no check upon their freedom, soon

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our enemies, justice will be done." *Available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

Secretary of State Powell echoed a similar sentiment in his first public comments made from Lima, Peru:

> A terrible, terrible tragedy has befallen my nation, but . . . you can be sure that America will deal with this tragedy in a way that brings those responsible to justice. You can be sure that as terrible a day as this is for us, we will get through it because we are a strong nation, a nation that believes in itself."

BOB WOODWARD, BUSH AT WAR 10 (2002).

[21] Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *reprinted in* THE SPIRIT OF AMERICA 348 (William J. Bennett ed., 1997).

[22] *Id.* Among the other principles that President Jefferson promulgated were "peace, commerce, and honest friendship, with all nations – entangling alliances with none; the support of state governments in all their rights, as the most competent administration for our domestic concerns and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad . . . the diffusion of information and the arraignment of all abuses at the bar of public reason; freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected." *Id.*

[23] *Id.*

> becomes a society in which freedom is the possession of the savage few.[24]

Learned Hand recognized that the pursuit of justice is found in the very fabric of a society built on the rule of law rather than being dominated by force, terror, and the personal predilections of a despot.

In the parlance of international criminal law, when the "savage few" are able to impose their will on the rest of society without legal or moral constraint, that is what we really mean when we decry the culture of impunity.[25] In light of this intellectual reality, the practical challenge is what do we do about the pursuit of justice? How do we best grapple with these problems that we have recognized since at least 1802? The operational challenge confronting military commanders and their lawyers is how to balance the quest for justice with the overall military and political mission.

Lest some begin to think of these things as a mushy, starry-eyed dream of a few idealistic lawyers and liberals who aspire just to do good regardless of the costs, the current U.S. National Security Strategy promulgated by the Bush Administration is on point. Seeking to achieve the goal of justice, the Bush Administration has reshaped the machinery of government around the changed security environment after 9/11. To that end, the U.S. National Security Strategy focuses on attaining the goal of justice:

> In pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere. No nation owns these aspirations, and no nation is exempt from them. Fathers and mothers in all societies want their children to be educated and to live free from poverty and violence. No people on earth yearn to be oppressed, aspire to

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[24] Learned Hand, Remarks to the "I Am an American" Day Celebration at Central Park, New York (May 21, 1944), *reprinted in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189 (Irving Dilliard ed., 3d ed. 1974).

[25] German forces were able to commit almost unthinkable brutalities under the shield of Nazi sovereignty. Adolf Hitler imposed the *Fuehrerprinzip* (leadership principle) in order to exercise his will as supreme through the police, the courts, the military, and all the other institutions of organized German society. The oath of the Nazi party stated: "I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me." *See* 2 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 1037-38 (1999). Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson's famous words to "a National Socialist despotism equaled only by the dynasties of the ancient East." 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99-100 (AMS Press 1971) (1947).

> servitude, or eagerly await the midnight knock of the secret police. America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.[26]

"Justice" as a component of United States foreign policy is an admittedly vague objective. Nevertheless, American forces become living demonstrations of American values – Ambassadors for Freedom[27] – the moment they depart from American soil. That is the unstated role in which American forces are cast upon deployment to Somalia, Afghanistan, Iraq, or any one of a hundred other nations. Protecting and promoting the rule of law is a national goal that springs from the wellspring of our Constitution and is in the very spine of American military professionalism. Though the concept of seeking "justice" to achieve core national security goals has been a thread of American political dialogue from the early days of our Republic, the concrete form of that pursuit in practice retains an elusive, often ephemeral, character. Military commanders and lawyers are on the front lines in that effort. They are increasingly confronted with the challenge of taking our national vision, now captured in the U.S. National Security Strategy policy statement, and implementing it on the ground in practical and visible ways.

In focusing on the practical aspects of actualizing justice, it is necessary to describe three fundamental principles that will shape the pursuit of justice in every military endeavor. Think of them as grundnorm, the terrain, the foundation upon which all efforts to do justice will actually be built. The three fundamental factors that always shape military efforts to pursue justice on the ground are: (1) the reality that domestic states always have responsibility for prosecuting their own nationals; (2) the almost seismic tension between domestic accountability mechanisms and internationalized mechanisms, and (3) the undercurrent caused by limited resources between military and civilian actors in moving towards a workable justice system.

The three abovementioned trends provide the backdrop to every operational effort towards justice. They provide the framework within which military practitioners operate and each will have varying effects on the practical steps that the military may or may not take towards achieving justice. In light of the above-listed considerations, this essay will proceed to highlight a number of associated practical issues that are best thought of

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[26] THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[27] For a broader explication of this theme, *see* David J. Scheffer & Michael A. Newton, *Ambassadors for Freedom*, 4 J. NAT'L SECURITY L. 167 (Dec. 2000).

as the stepping stones towards military efforts to facilitate the pursuit of justice. After discussing some of the pragmatic issues and practical barriers, this essay will conclude by highlighting three specific areas that are emerging to potentially undermine the pursuit of justice in the real world and on the ground.

The first background factor is almost so basic that it goes without saying. Any lawyer in any domestic system in the world recognizes that a sovereign state has not only the right, but the legal obligation, to pursue justice for violations of domestic criminal law. The basic exercise of punitive criminal accountability pursuant to domestic laws is at the heart of our understanding of what it means to have a society built on the rule of law. It is so essential and so basic that we take it for granted, and therefore forget its implications for a military force deployed to a society where the legislative and judicial systems have become corrupted, replaced, or have simply collapsed under the weight of tyranny or corruption.

As a logical application of this principle, Article 146 of the Geneva Convention Relative to the Protection of Civilians in Time of War specifies that nation states have the obligation to search for persons suspected of committing grave breaches. States have a corresponding obligation to bring them before their own courts or to transfer them to another state for prosecution.[28] During operations, one of the most critical functions for

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[28] Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention].

> Art. 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by

military lawyers is to define the line between legal obligations and policy pronouncements.[29] Lawyers advise – commanders command. Military lawyers must advise commanders on the precise scope of their legal obligations.[30] After meeting the obligations of the law, further efforts to punish war criminals are made on the basis of policy decisions in accordance with the mission statement and the intent of the superior commander.

In the context of achieving justice, two important legal conclusions flow from the language of Article 146. One is that the legal obligation, as a clear provision of an international treaty, is a limited obligation applicable only to states within their territory or in territory over which they exercise judicial control by virtue of the law of occupation.[31] Hence, NATO did not have the affirmative legal obligation to search for war criminals in Bosnia-Herzegovina because it is an international organization and because the forces deployed by NATO nations entered Bosnia-Herzegovina pursuant to international treaty and not as an occupation force. The obligation to search for war criminals and bring them to justice extended to the nations within the Former Yugoslavia by virtue of the Geneva Conventions, even if they had not explicitly accepted that obligation in the GFAP.[32]

Some NGOs have attempted to stretch the treaty-based obligation to pursue war criminals into extraterritorial baggage that follows deployed military forces wherever they go and whatever the mission. However, as a matter of law, it is simply incorrect to extrapolate from the language of the

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Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[29] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims Of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 82, 1125 U.N.T.S. 3, 41, 16 I.L.M. 1391 (1977) [hereinafter Protocol I], (requiring the presence of legal advisors to advise commanders and conduct training in the obligations arising from the law of armed conflict).

[30] For the implementation of the current duty to provide substantive operational law advice, *see* IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 5810.01B (2002) (updating earlier instructions with similar substantive content and stating that legal advisors will provide guidance concerning law of war compliance "at all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations.").

[31] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Jean S. Pictet ed., 1960) [hereinafter RED CROSS COMMENTARY] ("The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.").

[32] *See supra* note 5 and accompanying text.

Geneva Conventions and impose binding obligations on American forces or those of any other coalition ally anytime they deploy. The net effect of imposing a legal obligation to search out war criminals, and the legal obligation to prosecute them, and the legal obligation to set up tribunals and the legal obligation to support any such efforts could be to undermine the pursuit of justice by creating a disincentive for the very forces capable of restoring respect for the rule of law. If forces are to deploy with the affirmative legal duty to apprehend suspects or convene trials of war criminals, the mission statement must be based on an affirmative source of legal authority such as a Security Council resolution.

The second notable aspect of Article 146 as it relates to the pursuit of justice is less visible, but no less significant. In December 1948, the ICRC submitted a draft negotiating text for Article 146 to delegates. The ICRC text would have required states to prosecute grave breaches before their own courts or "any international jurisdiction, the competence of which has been recognized by them."[33] That was rejected in the negotiations of the Geneva Conventions. Therefore, the language and the practice of states, and the negotiating history of Article 146 all support the conclusion that the primary obligation to pursue justice lies in the domestic forums of the state in which either the grave breaches were committed or in which the suspect is present.[34] This, in turn, means that international law does not support the inference that an international forum is the only appropriate judicial avenue simply by virtue of the nature of the violations.

Despite the primacy for domestic forums built into the law of war, professional military forces are often confronted with circumstances in which the enemy forces disregard applicable rules of international humanitarian law[35] without threat of sanction in their own system. U.S.

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[33] RED CROSS COMMENTARY, *supra* note 31, at 586 ("Without prejudice to the provisions of the foregoing Article, grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction the competence of which has been recognized by them. Grave breaches shall include in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.").

[34] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31 1155 U.N.T.S. 331, 8 I.L.M. 679 (*entered into force* Jan. 27, 1980), .

[35] This vague and not altogether satisfactory rubric is increasingly used as shorthand to refer to the core body of the law of armed conflict as well as other norms related to the protection of persons. The term international humanitarian law generally includes the body of treaty norms that apply in the context of armed conflict as well as the less distinct boundaries of internationally accepted custom. The core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31

forces have an encompassing obligation to comply with the "law of war during all armed conflicts, however such conflicts are characterized."[36] This creates a legal disparity in which military lawyers in post-conflict settings have repeatedly grappled with the reality that the applicable domestic law is unsettled and inadequate to provide a basis for the restoration of justice.[37]

The legal regime is not so inflexible that it would elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. Thus, despite the general rule that the criminal laws of an adversary occupied in the aftermath of an international armed conflict remain in force, the occupying power may repeal or suspend the existing criminal law in circumstances when the domestic law infringes on the right of the civilian to a fair and effective justice system.[38] Furthermore, the Geneva Conventions expressly permit the occupying power to modify domestic institutions (which would include the judicial system and the laws applicable thereto) when the existing institutions or government of the occupied territory operate to deprive human beings of "the rights and

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(replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (replacing Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (replacing the Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021) [hereinafter Convention on Prisoners of War]; To a more debatable degree, later treaty texts evolved into customary international law. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, 1125 U.N.T.S 609, 26 I.L.M. 561 (1987) [hereinafter Protocol II],.

[36] IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 5810.01B (2002) (stating that United States Armed Forces "will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless directed by competent authorities, the U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations."). *See also* U.S. DEP'T OF DEFENSE, DOD LAW OF WAR PROGRAM, DIRECTIVE 5100.77 (1998) [ hereinafter DOD Dir. 5100.77] (mandating prompt reporting of allegations of violations of international humanitarian law, training of military forces in that body of law, and the provision of "qualified legal advisors").

[37] *See generally* F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS, Winter 1993-94, at 27 (describing the conditions faced by United States forces deployed to Somalia). For a description of the conditions in Panama prior to the United States invasion in December 1989, *see* John E. Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

[38] Civilians Convention, *supra* note 28, art. 64.

safeguards provided for them" under the Fourth Geneva Convention.[39] Military lawyers and commanders will be the eye in the storm of efforts to reinvigorate a functional justice system in a setting governed by the law of occupation.

Attempting to apply the spirit of these norms in a non-occupation setting, the military on the ground will work with other international organizations. For example, the Senior Representative of the Secretary General (SRSG) in Kosovo (who also served as the head of UNMIK, the United Nations Mission in Kosovo), used his Chapter VII authority[40] to promulgate a regulation that preserved the domestic law in place at the time NATO entered Kosovo.[41] However, the existing criminal code had served as the vehicle for repression of the Albanian community. As a result, the predominately Albanian judges appointed to the Emergency Judicial System in Kosovo were adamant in their insistence that the applicable law was the Kosovo Criminal Code which had been superceded by the Serbs along with the revocation of Kosovo autonomy in 1989. This legal standoff left military attorneys and commanders (as well as international organizations, non-governmental organizations, UNMIK officials, and international police) with conflicting undercurrents of law and a legal void that brought uncertainty and instability despite the military presence.[42] Military forces were also hampered by the practical problem that English language copies of either criminal code were unavailable.

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[39] RED CROSS COMMENTARY, *supra* note 31, at 274 (explaining the intended implementation of the language of Article 47, Civilians Convention, *supra* note 28, art. 47 ("any change introduced" to domestic institutions by the occupying power must protect the rights of the civilian population)).

[40] S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. ¶ 10, U.N. Doc. S/RES/1244 (1999).

[41] *On the Authority of the Interim Administration in Kosovo*, UNMIK Reg. 1999/1 (Aug. 12, 1999) [hereinafter UNMIK Reg. 1999/1], *available at* http://www.unmikonline.org/regulations/1999/reg01-99.htm (Section 3 states: "The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2, the fulfillment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.").

[42] For a detailed description of this problem, *see* ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE), LEGAL SYSTEMS MONITORING SECTION (LSMS), KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM: 1 SEPTEMBER 2000-28 FEBRUARY 2001 12 [hereinafter LSMS REPORT], *available at* http://www.osce.org/kosovo/documents/reports/justice/criminal_justice2.pdf; LAWYERS COMMITTEE FOR HUMAN RIGHTS, A FRAGILE PEACE: LAYING THE FOUNDATIONS FOR JUSTICE IN KOSOVO § II.A. (1999) [hereinafter FRAGILE PEACE], *available at* http://www.lchr.org/pubs/kosovofull1099.htm.

The SRSG formally addressed the gap on December 12, 1999 when he promulgated UNMIK Regulation 1999/24 to clarify the applicable law.[43] UNMIK Regulation 1999/24 was nevertheless not a complete solution because its exceptions allow application of the post-1989 law when it "is not discriminatory" and either fills a gap in the 1989 law[44] or provides more rights to a criminal defendant.[45] Finally, the UNMIK Regulation requires that the criminal laws be implemented by domestic judges in compliance with a range of human rights instruments[46] that have only recently become available in the Albanian language for use by domestic judges. This legal milieu meant that military attorneys faced building pressure from a restless population that desired to see the rule of law in practice sooner rather than later. The legal indecision also meant that persons detained by KFOR (the NATO command in Kosovo deployed under the authority of Security Council Resolution 1244) based on force protection requirements were detained for significant periods of time pending clarification of the applicable domestic law and the establishment of suitable forums.

The second major contextual factor derives from the previously discussed principle that domestic criminal justice systems should normally exercise jurisdiction for serious crimes. In situations where there is an internationalized judicial mechanism capable of exercising jurisdiction, there is an increasing tendency to view international institutions as a panacea for addressing those violations. As noted above, truth-based justice and an established system for administering justice are the foundation for lasting peace within a society.

Deployed military forces are increasingly confronted with the necessity of navigating through the conflicting interests between the long

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[43] *On the Law Applicable in Kosovo*, UNMIK Reg. 1999/24, at § 1.1 (Dec. 12, 1999), *available at* http://www.unmikonline.org/regulations/1999/reg24-99.htm. This law provides:

> The law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

[44] *Id.* at §1.2 ("If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 3 of the present regulation, the court, body or person shall, as an exception, apply that law.").

[45] *Id.* at §1.4 ("In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation.").

[46] *Id.* at §1.3 (mandating compliance with a range of aspirational human rights instruments as well as binding European conventions).

term stability of the state, the short term need to establish accountability mechanisms, and the urgent desire of the population to see justice done for the crimes which often devastated their lives. This balancing act, in turn, requires military forces to decide about the best allocation of their limited resources. Commanders must sort through options ranging from an internationalized judicial process, vigorous support to the revitalized domestic process, garnering international judges, court administrators and lawyers to assist domestic efforts, development of a hybrid model, or a combination of the options.

In making these decisions, there is no easy answer. The advisability and feasibility of various judicial forums involve estimations of the political will of nations contributing forces, the capacity of the local judiciary, the local legal culture, the necessity for international mechanisms, and the nature of the crimes committed. Military forces today deploy to a changed legal landscape because of the striking development of a distinct discipline termed international criminal law and the parallel evolution of international forums to adjudicate crimes.[47] Some states and scholars questioned the development of this dynamic field because of the implication that internationalized judicial processes would erode the right of sovereign states to prosecute serious violations of international law. The very phrase "international criminal law" sparked diplomatic debate based on an underlying tension between the international respect for sovereign justice systems and the transcendent importance of truth and accountability.[48] In

[47] The field of "international criminal law" is an ambiguous concept with indistinct boundaries. Because no single class of crimes or isolated body of law forms an accurate and complete foundation for the currently existing tribunals created at the international level to punish individuals for violations of international law, one distinguished scholar and diplomat has proposed the unifying concept of "atrocity crimes." David J. Scheffer, *The Future of Atrocity Law*, SUFFOLK TRANSNAT'L L. REV. 389, 398 (2002).

[48] For a description of this analytical difficulty encountered and eventually overcome by delegates negotiating the Elements of Crimes for the International Criminal Court, *see* Michael A. Newton, *International Criminal Law Aspects of the War Against Terrorism*, *in* INTERNATIONAL LAW AND THE WAR ON TERRORISM, 79 U.S. NAVAL WAR C. INT'L L. STUD. 325, 336-345 (Paul Wilson and Frederic Borch eds., 2003). *See, e.g.*, Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983). The current United States policy is focused on encouraging states to exercise their sovereign rights to pursue accountability for war crimes and other egregious violations of international and domestic law. The United States Ambassador-at-Large for War Crimes has publicly stated that:

"the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible . . . . International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis as it did in Rwanda and the former Yugoslavia."

*Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 138-39 (2001)

practice, internationalized mechanisms have been created only as a necessary fallback when domestic forums were unable to enforce the transcendent norms of international law.

Though internationalized judicial mechanisms have permanently altered the face of international law,[49] the principle that sovereign states retain primary responsibility for adjudicating violations of international humanitarian law is a cornerstone principle of the edifice of internationalized justice. For example, in responding to the "blackest crimes of all history,"[50] the Moscow Declaration made the apprehension and punishment of German criminals a major objective of the war as early as October 30, 1943.[51] It is important to note that the Moscow Declaration specifically favored punishment through the national courts in the countries where the crimes were committed.[52] The military commissions established in the Far East similarly incorporated the principle that the international forum did not supplant domestic mechanisms.[53]

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(statement of Pierre-Richard Prosper, United States Ambassador-at-Large for War Crimes Issues).

[49] *See generally* PAUL R. WILLIAMS & MICHAEL SCHARF, PEACE WITH JUSTICE ?: WAR CRIIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA (2002).

[50] Press Release, White House, Statement by the President (Mar. 24, 1944), *reprinted in* U.S. DEP'T OF STATE, REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 12 (1945) [hereinafter Jackson Report] (quoting President Roosevelt's description of Nazi atrocities).

[51] 9 Department of State Bulletin 310 (1943), *reprinted in* Jackson Report, *supra* note 50, at 11 [hereinafter Moscow Declaration]. The Moscow Declaration was actually issued to the Press on November 1, 1943. Jackson Report, *supra* note 50, at 11 n.1. For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, *see* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 85-110 (2000).

[52] The Declaration specifically stated that German criminals were to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein." Moscow Declaration, *supra* note 51, *reprinted in* Jackson Report, *supra* note 50, at ll. The international forum was limited only to those offenses where a single country had no greater grounds for claiming jurisdiction than another country. Justice Jackson recognized this reality in his famous opening statement. He accepted the fact that the International Military Tribunal was merely a necessary alternative to domestic courts for prosecuting the "symbols of fierce nationalism and of militarism." 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (AMS Press 1971) (1947). He further clarified that any defendants who succeeded in "escaping the condemnation of this Tribunal . . . will be delivered up to our continental Allies." *Id.* at 102.

[53] *See* Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5, Sept. 24, 1945, para. 5(b) ("[p]ersons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction.") (on file with author).

Following the legacy of Nuremberg by nearly fifty years, the current *ad hoc* tribunals were both created in contexts where justice would not be achieved or even pursued in domestic forums. The International Criminal Tribunal for the Former Yugoslavia was created to fill the domestic enforcement void caused by the dictatorial control that the Milosevic regime exercised over the Yugoslav judicial system.[54] Similarly, in the context of the genocide in Rwanda, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) where there would have otherwise been a prosecutorial void due to the total disarray of the domestic judicial system.[55] Against this backdrop of international law and practice, the Rome Statute of the International Criminal Court (ICC)[56] implicitly concedes that states will remain responsible for prosecuting the vast majority of offenses even in a mature ICC regime.

The drafters in Rome recognized the reality that the ICC will have limited resources and political capital. The Rome Statute accordingly incorporated a number of subjective thresholds designed to ensure that domestic forums will continue to adjudicate the vast majority of cases, while the ICC itself focuses on a smaller number of more severe or difficult prosecutions.[57]

Despite the rebirth of international mechanisms as a viable alternative, history shows that the overwhelming number of prosecutions for violations of international humanitarian law and other serious crimes have come in national forums as opposed to international tribunals. In contrast to the original twenty-four defendants charged before the International Military Tribunal at Nuremberg,[58] Allied zone of occupation courts, exercising

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[54] *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); *see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., ¶ 26, U.N. Doc. S/25704 (1993). The "particular circumstances" of the impunity in the Former Yugoslavia warranted the creation of the international tribunal.

[55] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994); *see generally* VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL COURT FOR RWANDA (1998).

[56] Rome Statute of the International Criminal Court, arts. 12–19, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute].

[57] Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 37 (2001); *see* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 429-430 (1998) (discussing the initial proposal for a threshold requirement).

[58] Of the original twenty-four accused, one committed suicide before trial, one was tried in absentia, and one had charges dismissed by the court due to mental incapacity to stand trial. The Tribunal handed down twelve death sentences, seven prison terms, and three acquittals (all of whom were later convicted in German domestic courts). M. CHERIF

sovereign power on German soil, sentenced over five thousand Germans for war crimes.[59] Similarly, from 1946 to 1948, Australian, American, Filipino, Dutch, British, French, Chinese, and Australian courts convicted some 4,200 war criminals in the Pacific theater.[60] Based on the clear textual tenet of complementarity,[61] even the most ardent advocates of the ICC concede that the very best world is one in which the ICC is useless and irrelevant. Why? Because crimes are being handled in a timely fashion in the country where people see justice being done. That's where the physical evidence is located and where the victims live. That's where justice can be achieved in the most expeditious manner which also does the most to restore long term societal stability.

The policy choice among alternative judicial forums is not simply an intellectual, esoteric exercise for deployed military commanders. They must confront a restless population that demands justice. Military Civil Affairs Teams are the ones who must explain to local officials the delays inherent in actualizing justice at the domestic level, and conversely help explain the reasoning behind the substitution of international forums for domestic efforts. In some circumstances, the presence of viable international forums can also create false expectations among the civilian population.

For example, the Security Council repeatedly affirmed ICTY jurisdiction in an ongoing effort to prevent abuses by the Milosevic regime inside Kosovo. The Security Council expressly ordered the Belgrade regime to cooperate with the investigative efforts of tribunal personnel,[62] and directed the Office of the Prosecutor to "begin gathering information

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BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 528 n.91, 529 (2d ed. 1999).

[59] MARJORIE WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 947-56 (1968). The United States convicted 1814 (with 450 executions); the French convicted 2107 (109 executed); the British convicted 1085 (240 executed); there are no reliable numbers for the thousands executed by the Russians. Bassiouni, *supra* note 58, at 532. *See generally* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 20-21 (1997) (describing the failures of the Allies to prosecute alleged war criminals at the conclusion of World War I).

[60] WHITEMAN, *supra* note 59, at 1005; Bassiouni, *supra* note 58, at 36 n.14 (citing R. John Pritchard, The Quality of Mercy: Appellant Procedures, the Confirmation and Reduction of Sentences and the Exercise of the Royal Prerogative of Clemency towards Convicted War Criminals, *in* 8 BRITISH WAR CRIMES TRIALS IN THE FAR EAST, 1946-48 (R. John Pritchard ed., 21 vols.) (documenting 2248 trials, involving 5596 accused, which resulted in 4654 convictions).

[61] *See* Rome Statute, *supra* note 56, arts. 17, 19(1), 19(2), 20(3).

[62] *See, e.g.*, S.C. Res. 1160, U.N. SCOR, 54th Sess., 3868th mtg. ¶ 17, U.N. Doc. S/RES/1160 (1998).

related to the violence in Kosovo that may fall within its jurisdiction."[63] Despite the clear warnings of the international community, and express jurisdiction of a functioning international tribunal, Belgrade's forces expelled over 1.5 million Albanians from their homes, committed uncounted rapes, pillaged whole communities, destroyed tens of thousands of civilian homes in at least 1,200 communities, and murdered what was estimated at the time to be up to 10,000 Kosovar civilians.[64]

After NATO forces entered Kosovo under the authority of Resolution 1244, Albanian judges attending the first judicial training institute held in Pristina were dismayed to discover that the ICTY would not assume responsibility for prosecuting all of the war crimes and crimes against humanity committed by Serbian military and paramilitary forces. The judges, along with much of the Albanian population, assumed that the ICTY was prepared to fill the judicial void left by the demolition of the local system by the Serbs. Supported by representatives sent from The Hague, military lawyers from both the United Kingdom[65] and the United States[66] explained that the ICTY would focus on a small number of the most culpable within the killing machines that committed the atrocities leaving the balance to the reconstituted Kosovar judiciary. The capacity deficit of the ICTY meant that the road to justice using the rebuilt domestic system would be longer and more difficult, but ultimately more conducive to long term societal stability and the respect for the rule of law.[67]

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[63] *Id.*

[64] U.S. DEP'T OF STATE, ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING 3 (1999); *The Great Exodus*, THE ECONOMIST, Apr. 24-30, 1999, at 48; ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE, KOSOVO/KOSOVA AS SEEN, AS TOLD: AN ANALYSIS OF THE HUMAN RIGHTS FINDINGS OF THE OSCE KOSOVO VERIFICATION MISSION OCTOBER 1998 TO JUNE 1999 (1999), *available at* http://www.osce.org/kosovo/documents/reports/hr/part1/ (last visited Feb. 5, 2004).

[65] LTC Richard Batty, Senior Legal Advisor, Allied Rapid Reaction Corps (ARRC).

[66] MAJ Michael A. Newton, serving at the time as the Military Advisor to the United States Ambassador-at-Large for War Crimes Issues.

[67] This policy perspective is at the heart of the political decision that the Bush Administration made after more than a year of deliberation with regard to the U.S. policy towards the International Criminal Court. Under Secretary Marc Grossman, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, DC (May 6, 2002) [hereinafter U.S. ICC policy], *available at* http://www.state.gov/p/9949.htm. Under Secretary Grossman summarized the U.S. philosophical decision as follows:

> While we oppose the ICC we share a common goal with its supporters - the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should not be able to interfere in this delicate process. For example: When a society makes the transition from oppression to

Military commanders and their lawyers must also grapple with a series of pragmatic problems that flow from the strategic/political decisions about which basket should hold the proverbial prosecutorial eggs. As noted above, military efforts flow from a clear articulation of the mission. The process of analyzing the mission, developing courses of action, and honing a military plan rests on the fulcrum of properly describing the specified requirements in the mission statement.[68] After delineating the specified tasks, lawyers and planners will incorporate the tasks that are necessarily implied into the overall mission statement, and allocate resources against the entire range of functions. In fact, U.S. forces are prohibited from spending resources for things outside their authorized duties, hence the inclusion of justice as a component of the mission is a necessary predicate for military efforts.[69] The profile of the justice component within the larger

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> democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC. If the state chooses as a result of a democratic and legal process not to prosecute fully, and instead to grant conditional amnesty, as was done in difficult case of South Africa, this democratic decision should be respected. Whenever a state accepts the challenges and responsibilities associated with enforcing the rule of law, the rule of law is strengthened and a barrier to impunity is erected. It is this barrier that will create the lasting goals the ICC seeks to attain. This responsibility should not be taken away from states. International practice should promote domestic accountability and encourage sovereign states to seek reconciliation where feasible. The existence of credible domestic legal systems is vital to ensuring conditions do not deteriorate to the point that the international community is required to intercede. In situations where violations are grave and the political will of the sovereign state is weak, we should work, using any influence we have, to strengthen that will. In situations where violations are so grave as to amount to a breach of international peace and security, and the political will to address these violations is non-existent, the international community may, and if necessary should, intercede through the UN Security Council as we did in Bosnia and Rwanda. Unfortunately, the current framework of the Rome treaty threatens these basic principles.

*Id.*

[68] This principle is at the heart of the military planning doctrine embodied in a range of Joint Publications. *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK 488 (William O'Brien ed., 2003) (Chapter 27 provides an excellent summary of this complex process), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf (last visited Feb. 5, 2003).

[69] 31 U.S.C. § 1301(a) (2000) ( "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). This provision is enforced through the Antideficiency Act, 31 U.S.C. § 1341 (2000).

mission then drives the commander's decisions about the prioritization of resources. For example, an infantry company that is guarding a mass grave, is not patrolling and performing other duties. An Unmanned Aerial Vehicle tasked to look for groups of civilian victims of the crimes against humanity, is not out seeking enemy equipment or personnel.

In Bosnia, the opaque verbiage of Annex 1A[70] of the GFAP regarding military support to efforts to seek justice left a gap in the mission planning that commanders later filled through the Rules of Engagement and through legal opinions disseminated through command channels. The result was mixed guidance that allowed only limited military support to ICTY investigative teams such as life support, emergency assistance, helicopter reconnaissance, and overall security considerations.[71] Within the constraints of the NATO mission in Bosnia, subordinate units could not provide guards for ICTY investigators, direct escorts for teams, investigation of mass graves, or witness protection.[72]

In contrast, Resolution 1244 included a specific paragraph mandating "full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia."[73] The military supported ICTY investigative teams in almost every way based on this clear mission. KFOR compiled a detailed database of over 150 crime scenes, together with available witness statements and digital photos that was forwarded to the Tribunal. ICTY investigative teams were nestled within the command structure in each of the sector headquarters.[74] Military teams secured mass graves, protected the ICTY teams when needed, escorted them back and forth as they did the forensics work at the sites identified in the Milosevic indictment, and executed a myriad of other support functions. The difference was that the justice component of the mission was clear, and NATO had clear legal authority to support the Tribunal (which included apprehension of suspects).

The clear mandate of Resolution 1244 masked some larger legal difficulties that U.S. forces will confront in order to assist a court established under the auspices of the United Nations. From the perspective of Charter legal authority, the ICTY and ICTR are best understood as enforcement measures of a judicial nature. The circumstances of the conflicts forced the Security Council to assume a quasi-sovereign role by

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[70] GFAP, *supra* note 11 and accompanying text.

[71] CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 125 (1998).

[72] *Id.*

[73] S.C. Res. 1244, *supra* note 40, ¶ 14.

[74] Each sector in Kosovo was under the overall command of one national headquarters. The five sectors correspond to the German, French, Italian, British, and American headquarters.

creating judicial structures within the territorial bounds that would otherwise have been policed by responsible governmental structures.[75] Nations are legally obligated to accept the decisions of the Security Council.[76] Hence, the use of Chapter VII authority in this manner was both unprecedented and ingenious because the international tribunals were grounded on a Security Council determination that judicial accountability for crimes would facilitate the maintenance and restoration of international peace and security.[77]

Despite the force of these obligations, United States law presents two key barriers to military efforts aimed at supporting any international forum created under the authority of the UN. In the first place, unless Congress appropriates particular funds to the Department of Defense to support an international tribunal, such support can only be made based on specific statutory authority. During Operation Uphold Democracy, the U.S. military provided some assistance to UN efforts at building the Haitian judiciary under the authority of section 628 of the Foreign Assistance Act.[78] Based on a presidential determination, the Secretary of Defense may permit U.S. military personnel to "render any technical, scientific, or professional advice or service" to an international organization.[79] This authority is limited to peacekeeping operations, and is available only up to the amounts appropriated by Congress each year. This authority has been used to provide military expertise in support of the "justice mission." In Haiti, U.S. military teams assisted with the UN Mission by assessing the domestic justice system and offering suggestions for improvements.[80] Similarly subject to congressional appropriations each fiscal year, the President is authorized to provide support to "friendly countries and international organizations" for programs carried out "in furtherance of the national security interests of the United States."[81]

Two other key provisions of the Foreign Assistance Act are especially important sources of authority for military support to justice mechanisms even in the absence of specific appropriations. One provision permits the "drawdown of defense articles", "defense services" or "military education and training" based on an "unforeseen emergency . . . which requires

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[75] *See* U.N. CHARTER art. 29; *see also* Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994).

[76] U.N. CHARTER art. 25.

[77] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., ¶¶ 18-30, U.N. Doc. S/25704 (1993).

[78] 22 U.S.C. § 2388 (2000).

[79] *Id.*

[80] *See* Justice Team III Report: Republic of Haiti, 358th Civil Affairs Brigade, U.S. Army Civil Affairs and Psychological Operations Command, Fort Bragg, North Carolina (Dec. 12, 1995) (copy on file with author).

[81] 22 U.S.C. § 2348 (2000).

immediate military assistance to a foreign country or international organization."[82] Assuming that the relevant Department of Justice agencies were insufficient, this broad provision could be used to provide military support for efforts to revive domestic justice systems or to support UN efforts. However, Section 552(c) of the Foreign Assistance Act is the most foreseeable tool for providing support to justice mechanisms. The President has statutory authority to "direct the drawdown" of goods and services from the Department of Defense based on a determination and report to Congress that there are insufficient appropriated funds to respond to "an unforeseen emergency" and that such assistance is "important to the national interests of the United States."[83]

Beginning in the 1994, Congress anticipated the use of section 552 as authority for draw downs of goods and professional services (to include military expertise) used to buttress mechanisms designed to establish accountability for genocide or other violations of international humanitarian law. This was the authority used to provide both military and Department of Justice attorneys to the ICTY in its infancy. Each subsequent year, the President has had specific authority to direct drawdowns in support of the ICTY or "such other tribunals or commissions as the [Security] Council may establish or authorize. "[84] In addition to the established *ad hoc* tribunals, Congress has specifically admonished that this authority extends to U.S. support for the Special Court in Sierra Leone.[85]

The provision of evidence to war crimes tribunals provides another major set of legal challenges. In post-conflict areas, the entire country can be seen as one huge crime scene.[86] Military forces entering the area are uniquely situated to preserve evidence, begin forensics work at mass graves, and generate other highly probative evidence. The fact that the ICTY has over six million documents in its database shows that the collection of evidence can be a massive job. In addition, war crimes trials in particular are extremely complex and evidence intensive. Prosecutors at

[82] 22 U.S.C. § 2318(a)(1) (2000).

[83] 22 U.S.C. § 2348a(c) (2000).

[84] Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 544, 117 Stat. 11, 198 (2003).

[85] S. REP. NO. 107-219, at 33 (2002) ("The Committee continues to strongly support the war crimes tribunals in Yugoslavia, Rwanda, and Sierra Leone. The Committee expects the administration to ensure that the tribunals have sufficient budgets, staff, and equipment, and provides $30,000,000 in drawdown authority for war crimes tribunals established or authorized by the U.N. Security Council with U.S. support, including the tribunal in Sierra Leone. The Committee also urges the administration, where appropriate, to support commissions or judicial bodies that complement the activities of these tribunals. The Committee notes that drawdowns made under this section are unrelated to the establishment of an international criminal court.").

[86] Sebastian Junger, *The Forensics of War*, VANITY FAIR, Oct. 1999, at 138.

Nuremberg reviewed over 100,000 captured German documents, millions of feet of captured film, over 25,000 photographs prior to conducting a trial that consumed 216 days and produced a record of over 17,000 pages.[87] The Dachau trial required 170 witnesses and almost 2,000 exhibits.[88]

By doctrine, U.S. military forces must collect evidence of known or suspected war crimes and preserve such evidence "pending turnover to U.S., allied, or other appropriate authorities."[89] However, the military commander may be required to resolve conflicting demands for the available information. On the one hand, information obtained by military forces is generally processed for its intelligence value. The military does not routinely examine information or documents with an eye towards their probative value at trial. Once information is processed into military channels, it is legally equivalent to intelligence and is property of the government that obtained it. The prosecutors scrambling to build cases also need access to relevant information as quickly as possible, and the local population will be most impatient to exhume mass graves and identify the possible remains of family member or friends. NGOs are often demanding access to particular pieces of evidence as well. The commander and military attorney are in the eye of the storm and must decide the most optimal destination for information in military custody. Moreover, those decisions are often made under time pressure, with little or no guidance. In Kosovo, for example, KFOR permitted the ICTY to fill a truck with documents from the police station in Pristina, which allowed the Tribunal to process the documents in its possession for possible use at trial without further coordination with national governments.

At the other extreme, information in U.S. intelligence channels is subject to strict rules regarding its releasability and rigid procedures for its transfer. A basic provision of the National Security Act mandates that no information can be released to "any organization affiliated with the United Nations" or any affiliated "officials or employees" without a presidential certification that procedures to protect U.S. sources and methods are in place.[90] The United States has provided thousands of documents and other pieces of evidence to both the ICTY and ICTR. Such evidence has been provided using stringent procedures to account for documents and institute safeguards against the possible unauthorized release of intelligence information. The Rules of Procedure for the International Tribunals include specific provisions that allow the providing government to prevent public release without its consent.[91] This principle is also an important feature of

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[87] Jackson Report, *supra* note 50, at 432-33.

[88] JOSHUA M. GREENE, JUSTICE AT DACHAU 36 (2003).

[89] DOD Dir. 5100.77, *supra* note 36, at para. 4.4.

[90] 50 U.S.C. § 404g(a) (2000).

[91] Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, Rule 70, U.N. Doc. IT/32/REV.28 (2003), *available at*

the Rome Statute.[92] Beyond the categorical imperative that commanders cannot simply hand over information to UN sponsored forums, there is no easy solution to the "right" option in the realm of evidence collection and sharing. In this, as in other aspects of support for efforts at achieving justice, the military must rely on the judgment and discretion of soldiers and commanders in the field.

Finally, efforts to create a functioning judicial system in Kosovo illustrate the third of the recurring background factors faced by military forces on the ground. Both military and civilian actors are constrained by resource limitations in moving towards a workable justice system. Simply put, there is often a gap between the ideal transition from military to civilian efforts in post-conflict settings and the actual transition in fact. The military deploys with the primary task of accomplishing its mission by ending hostilities and establishing a secure environment for the delivery of humanitarian relief. Military forces, NGOs, and the relevant United Nations humanitarian agencies[93] work hand in hand to achieve the cessation of hostilities accompanied by the most effective alleviation of the human suffering inevitably caused by the conflict. As a typical example, the first humanitarian convoy entered Kosovo within hours of the time that KFOR secured the key route from the border at Blace to the city of Pristina. In Kosovo, as in many other post-conflict settings, the international community and organizations faced a staggering array of tasks as they began the slow process of building civil society and democratic institutions.[94]

Military commanders realize that the necessities of conflict may prevent international organizations and United Nations agencies from being positioned to contribute during the initial stages of the international response. Though this role was explicit in Resolution 1244 regarding

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http://www.un.org/icty/basic/rpe/IT32_rev28.htm (providing in pertinent part, "If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.").

[92] Rome Statute, *supra* note 56, art. 72. Some delegations expressed the view that the provisions for protecting their national intelligence information were critically important for their government. Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT'L L. 204, 212 (2000).

[93] These generally include the United Nations High Commissioner for Refugees (UNHCR), the World Food Program (WFP), UNICEF, the World Health Organization (WHO) as well as other groups such as the International Organization for Migration (IOM).

[94] *See generally* CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES & ASSOCIATION OF THE UNITED STATES ARMY, POST-CONFLICT RECONSTRUCTION TASK FRAMEWORK (May 2002) (copy on file with author).

NATO operations in Kosovo,[95] military forces will often be responsible by default for public security during the initial phases. They nevertheless assume that role with the expectation that the civil administration and international community will field a properly trained police force as promptly as possible to assume the law enforcement functions. Therefore, planners hope for a smooth transition in which revitalized domestic institutions, civilian organizations, international organizations, and NGOs gradually assume increased responsibility for transforming society and rebuilding institutions. In theory, this would permit a gradual decrease in the military effort, as shown in figure 1.

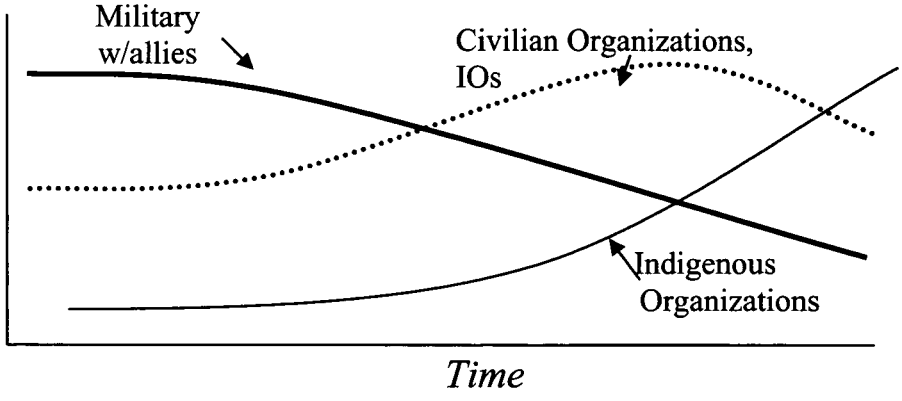


*Figure 1*

In practice, it is exceedingly difficult for a newly formed civilian administration to move into a war-torn nation, begin operations, and reach agreement with the relevant international organizations on an integrated framework based on a clear understanding of their diverse roles and responsibilities. In the wake of hostilities, military forces will often be required to sustain their efforts well into the transformation period as the civil structures work to achieve an integrated and effective effort. In contrast to the ideal vision, this results in a model more akin to that shown in figure 2.

[95] S.C. Res. 1244, *supra* note 40, ¶ 9(d) (specifically describing the KFOR task of "ensuring public safety and order until the international civil presence [could] take responsibility for this task.").

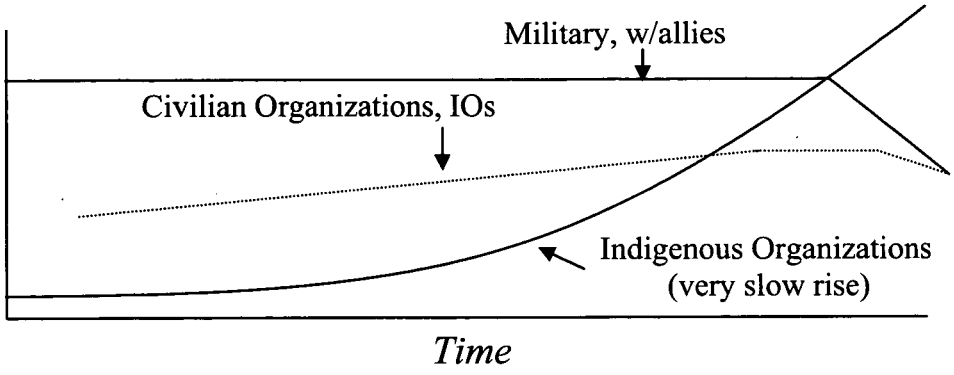


*Figure 2*

Even when the pursuit of justice is a focal point of concern, and a specific component of the mission, civilian agencies lack a dedicated planning cadre and a "surge capacity" to concentrate resources quickly.[96] As early as July 1999, the SRSG identified the "urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary."[97] The goal of a multi-ethnic system of justice required a complete overhaul of existing civil and criminal codes, recruitment of judges and lawyers, and extensive legal training. UNMIK began to plan an integrated effort in which the Organization for Security and Co-operation in Europe (OSCE) took the lead role in matters relating to the establishment of institution building and human rights. This lead role was augmented by the UNMIK Judicial Affairs Office,[98] European Union representatives, and an array of private NGOs with expertise in transitional justice.

The consortium of agencies and talents faced the daunting task of jumpstarting the domestic judiciary using available Albanian legal talent. Serbian judges refused to participate in the Emergency Judicial System established to review pre-trial detentions made by KFOR in the interests of

[96] INTERAGENCY AND POLITICAL-MILITARY DIMENSIONS OF PEACE OPERATIONS: HAITI – A CASE STUDY, NATIONAL DEFENSE UNIVERSITY 53 (Margaret Daly Hayes & Gary F. Wheatley eds., 1996); *see also* RICHARD H. SHULTZ, JR., IN THE AFTERMATH OF WAR: US SUPPORT FOR RECONSTRUCTION AND NATION-BUILDING IN PANAMA FOLLOWING JUST CAUSE 49 (1993) (noting that ICITAP was "not really geared up" and lacked the personnel to move into Panama quickly).

[97] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 66, U.N. Doc. S/1999/799 (1999).

[98] This office had four major areas of responsibility: "the administration of courts, prosecution services and prisons; the development of legal policies"; the review and drafting of legislation related to the goals and purposes of UNMIK; and "the assessment of the quality of justice in Kosovo." *Id.* ¶ 67.

force protection. Of the 756 judges and prosecutors in Kosovo, only 30 Albanians remained at the time NATO entered Kosovo.[99] One of the Albanian judges who yielded to the repeated UNMIK requests that he participate in the effort to resuscitate the judiciary was murdered on his doorstep by unknown gunmen the following morning.

In this climate of simmering ethnic hostility, KFOR was forced to continue to hold detained persons for long periods of time pending trial in a reconstituted domestic judiciary. The civilian population watched uneasily for months as no suspect faced trial for the war crimes and crimes against humanity committed in Kosovo. Almost a year after its creation, UNMIK nearly completed plans to augment the emerging domestic judiciary with an extraordinary court comprised of international judges and prosecutors working alongside local officials. Commonly termed the Kosovo War and Ethnic Crimes Court (KWECC),[100] the proposal was ultimately stillborn because of resistance to the idea of a combined judiciary, concerns that such a special court would divert staff and resources from the local systems, and fears that the KWECC would only serve to heighten ethnic tensions. These delays in building institutional capacity forced KFOR to prevent a law enforcement/punishment void by sustaining its "temporary" efforts to fill the law and order gap for over a year.[101]

General Douglas MacArthur famously noted that "[i]n war there can be no substitute for victory."[102] For deployed military forces, the essence of professionalism is to accomplish the mission while dealing in uncertain environments, against an uncertain enemy, with limited resources and a mission that is constantly changing. The post-conflict pursuit of justice requires military forces to operate in a multidimensional environment filled with multinational players and a complex combination of organizations and individuals, each of whom has different aims and agenda, but whose collective efforts are required to build a sustainable system of justice. One senior U.S. officer described stability efforts in Bosnia as "Ph.D. warfare."[103]

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[99] *See id.* ¶ 66.

[100] Officially styled the Court for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law and Other Serious Crimes Committed on Political, Ethnic, or Religious Grounds. *See* UNMIK/REG/2000/XX (unpublished draft on file with author).

[101] KFOR built on the lessons learned when United States forces were operating in Haiti after the fall of the Cedras regime. *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW AND MILITARY OPERATIONS IN HAITI 1994-1995: LESSONS LEARNED FOR THE JUDGE ADVOCATE 63-64 (1995).

[102] Letter from Douglas MacArthur to Joseph Martin, Jr. (Apr. 6, 1951), *quoted in* ROBERT DEBS HEINL, JR., DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 338 (1966).

[103] Howard Olsen & John Davis, *Training U.S. Army Officers for Peace Operations: Lessons from Bosnia*, United States Institute of Peace Special Report, Oct. 29, 1999, at 3.

Despite its difficulty, the justice component is a recurring feature in military operations. In the future, the military needs to ensure that the right mix of legal talent, translation skills, forensics expertise, and investigative capacity is frontloaded as far as possible in the deployment cycle. Military planners must allocate the right mix of resources in the right sequence to get them in to accomplish their mission.[104] For an armed conflict, the right resources are infantrymen, mortars and artillery. The package of resources focused on the justice mission should be well trained and ready to contribute to a lasting and just peace. If achieving justice is to be anything more than an aspiration, that team should be among the first personnel to enter the area of operations.

Secondly, the pursuit of justice is not a media tool to be manipulated and sensationalized. Over time, such efforts delegitimize the process and hence undermine the fundamental goal of restoring respect for the rule of law. There is a very real danger that the media can be manipulated and used to mask genuine progress with spurious allegations and misrepresentations of the actual state of the law. This feeds into an undercurrent of suspicion and politicization that could erode the very foundations of the quest for the rule of law. False perceptions created by the media can lead to a cycle of cynicism and second guessing that could weaken the commitment of the judges and lawyers who carry the burden of implementing the rule of law on a daily basis.

In closing, a word of caution is appropriate. When seeking justice, the only certainty is that the effort will be difficult and proceed slower than some observers would hope, and ultimately will produce an imperfect result by some standards. Neither the military nor civilian agencies have sleek teams of lawyers and preloaded equipment vans and energetic investigators idly waiting for the chance to deploy and work for justice in a post-conflict environment. This reality does not make the effort any less vital.

For the future, the logical corollary to General MacArthur's dictum is that in peace, there is no substitute for justice. As the world proceeds towards a future in which justice is more certain and devoid of political

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[104] In the language of U.S. Joint Doctrine, this process is known as the Time Phased Force and Deployment Data (TPFDD). "Time-phased force and deployment data (TPFDD) is the list of units and sustainment requirements needed to execute the operation plan (OPLAN). It phases them into the theater of operations at the times and places required to support the concept of operations. Its development and refinement are critical to achieving executable OPLANs and to developing executable operation orders when using an approved TPFDD in crisis action planning. US Transportation Command uses TPFDD to analyze the flow of forces and cargo from their points of origin to arrival in theater. They distribute the apportioned strategic

transportation resources. During this process, Commander in Chief, US Transportation Command follows the Chairman of the Joint Chiefs of Staff guidance and coordinates all major decisions with the supported combatant commander." JOINT CHIEFS OF STAFF, JOINT DOCTRINE ENCYCLOPEDIA 703 (1997).

posturing, there may be a tendency in some quarters to simply accept that the rule of law is just too hard to achieve in practice. Succumbing to such cynicism would be to concede the battlefield to the forces of lawlessness and chaos. We cannot succumb to such defeatism.