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New Options for Prosecuting War Criminals in Internal Armed Conflicts

GEOFFREY S. CORN and JAN E. ALDYKIEWICZ

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Assume that instead of Australians, the US Army provided the main combat element to enter East Timor pursuant to United Nations authorization.[1] During an initial patrol, a US Army element encounters a local civilian who insists that an Indonesian officer who ordered the execution of two civilian villagers is hiding in a nearby house. After receiving command guidance, the patrol cordons and searches the house, and indeed finds an Indonesian lieutenant hiding inside. The lieutenant is taken to a joint detention facility and questioned about the allegation. He subsequently admits ordering the execution, but insists that he was merely obeying orders to eliminate key Timorese civilian leaders prior to the arrival of the UN force. Further investigation corroborates his confession by uncovering the bodies of the victims, both of whom had their hands bound behind their backs and were shot point-blank in the back of the head. The commander of the US task force now asks a simple but important question, "What do we do with him?"

The answer to this question depends on multiple considerations. Most of these considerations fall into the realm of national and international policy, including the desire to maintain positive relations with Indonesia, the concern over the appearance of impartiality on the part of the UN force, the availability and legitimacy of local criminal courts, and public relations concerns. However, before analyzing these policy considerations, it is first necessary to determine the legally permissible options available to the commander for dealing with this incident of summary execution. Assuming the command and the national and international chain of command express a desire to hold this officer accountable for his misconduct, the first instinct might be to hand him over to an international tribunal. However, unless and until the International Criminal Court becomes operational,[2] no such forum exists.

Until recently the only other legal option available to the command would be to turn the lieutenant over to local or Indonesian authorities. However, such a course of action could seriously undermine the probability of achieving justice, or at a minimum create the impression that justice was not a significant concern for the international community, and specifically for the force holding the offender. Today, however, the US commander might have one additional option: try the lieutenant before a US general court-martial. This article will outline the recent developments in international law justifying such a conclusion, and illustrate how these developments, when coupled with long-standing US military law, provide this new option for such cases.

International Law: The Foundation for Prosecuting War Crimes

When the Second World War came to an end, the trial of notorious war criminals by the International Military Tribunal at Nuremberg captured the attention of the international community. This episode in the history of the 20th century is most commonly associated with the dramatic exchanges between key members of the Nazi leadership and those selected to sit in judgment of their conduct. However, the most profound aspect of the cases tried before this tribunal, and other postwar military tribunals in both Europe and the Far East, was not the suspense associated with the trials, but their impacts on the law of war. Chief among these impacts was the evolution of the doctrine of individual criminal responsibility for violations of the laws of war. While this doctrine might seem an obvious element of the law of war to today's military and international legal professionals, it was in fact a relatively new component of international law in the immediate aftermath of World War II.[3]

During the period immediately following World War II, the international community revised the Geneva Conventions in an effort to establish a comprehensive regime for the protection of noncombatants during armed conflict. This revision led to the four Geneva Conventions of 1949, each devoted exclusively to a particular class of "war victims" (the wounded and sick; the wounded, sick, and shipwrecked at sea; prisoners of war; and civilians) and each incorporating the doctrine of individual criminal responsibility. In spite of the fact that the pre-war period had involved

several extremely bloody civil wars (Russia, Spain, China), the primary focus of this effort was the regulation of conduct during international (state versus state) armed conflicts. Little effort was devoted to dealing with the protection of war victims during internal armed conflict or civil war. As a result, the provisions of the Geneva Conventions establishing criminal responsibility for violations of the mandates of the treaties applied exclusively to state-versus-state conflicts. Thus, in the half-century following World War II, the doctrine of individual criminal responsibility for violations of the law of war remained limited to acts committed during state-on-state conflicts.[4]

This fact is well highlighted by the first war crimes prosecution related to the civil war in the former Yugoslavia: *Prosecutor v. Tadic*.^[5] In this case, the tribunal established by the United Nations Security Council to try war criminals from the Yugoslav conflict acknowledged the different level of regulation of state-versus-state conflict as opposed to purely internal conflict, and noted that this difference was based upon the concept of state sovereignty.^[6] As a result, although the violence and suffering associated with such conflicts often seems even more intense than that associated with state-versus-state conflict, the scope of international regulation applicable to them has been and continues to be far less comprehensive than that applicable to state-on-state conflicts. The primary source of this regulation is contained in Article 3 of the Geneva Conventions, a provision that is identical in all four treaties and thus referred to as a "common" article. This provision, the exclusive source of internal conflict regulation resulting from the revision of the Geneva Conventions in 1949, established the requirement that warriors in a civil war must treat humanely individuals who were never participants (civilians), or who are no longer participants (hors de combat) in the conflict. However, unlike rules applicable to state-versus-state conflicts, these limited rules for internal armed conflicts contained no provision for holding violators criminally accountable for their misconduct.

Until recently, this absence of criminal responsibility provisions related to civil wars resulted in a lack of legal authority for holding individuals who commit violations of the law of war during internal armed conflicts criminally accountable for their misconduct. However, this is no longer the case. The conflicts in the former Yugoslavia and Rwanda led to one of the most profound developments in the law of war since the end of World War II, and certainly the most profound development in the realm of war crimes since that time: the application of individual criminal responsibility to violations of the law of war committed during internal armed conflicts. Stated more simply, international law has evolved to recognize that violations of the law of war during civil wars are war crimes.^[7]

This development in the law of war resulted from the creation by the United Nations Security Council of ad hoc international criminal tribunals for Yugoslavia (ICTY) and Rwanda (ICTR), and the prosecutions conducted by these tribunals. These actions by the international community have affirmatively answered the question of whether violations of the laws and customs of war committed during internal armed conflicts constitute war crimes. However, this has raised new questions regarding the extent of the rules applicable to internal conflicts, and the forums available for prosecuting those individuals who violate these rules. Although it is convenient to dismiss these questions as falling within the exclusive realm of civilian judges sitting on international courts, the answers are potentially significant for a military profession now almost routinely called upon to intervene in such internal conflicts.

ICTY and Jurisdiction over Internal Conflicts

In the first years of the last decade of the 20th century, the international community was reminded of the horror of civil war when the breakup of the former Yugoslavia erupted into armed conflict in Croatia, Slovenia, and Bosnia. As the evidence of inhumane treatment of civilians and detainees and wanton destruction of property mounted, so did pressure for an international response. Holding individuals criminally accountable for such excesses was among the potential responses. This idea blossomed into a proposal by the United Nations Security Council for the creation of an ad hoc international criminal tribunal established specifically to deal with the cases from Yugoslavia, vested with jurisdiction over "war crimes" committed in these conflicts, as opposed to a permanent court vested with wider jurisdiction.

In 1993, after addressing the conflict in Bosnia-Herzegovina on at least 15 occasions, the UN Security Council invoked its "enforcement" authority under Chapter VII of the United Nations Charter and passed UN Security Council Resolution (UNSCR) 827,^[8] creating the ICTY.^[9] This Security Council Resolution resulted in the first international war crimes tribunal since World War II and was hailed by many as a major step forward in the protection of innocent victims of war. However, as would be illustrated by the first case tried by this new tribunal, the Security Council

created almost as much uncertainty as it did clarity with this action.

The most obvious initial task for the new criminal tribunal was to get itself up and running. The UNSCR authorizing the tribunal's creation provided virtually no guidance on how to do this. Instead, the tribunal was vested with essentially unlimited authority to establish the parameters for its existence and for the prosecution of cases before it. This would enable the tribunal to determine the scope of its authority over the international law violations alleged to have been committed in the former Yugoslavia. The rules for the operation of the tribunal were established remarkably quickly, and soon the prosecutor presented the first case to the ICTY. The questions answered by the tribunal during the course of this case would dramatically alter the landscape of legal regulation of internal armed conflicts.

Dusan Tadic was a low-level member of the Bosnian Serb militia. Under other circumstances he would have been just another unknown thug in a conflict characterized by bitter hatred and grotesque atrocities. But Tadic had the dubious distinction of being the first individual tried before the ICTY.

After his participation in the war, Tadic moved to Germany. While living there illegally, he was arrested by German authorities. When they learned of his participation in the abuse of Bosnian Muslims in the Omarska Detention Camp during the Bosnian Civil War, they decided to try him for violations of the laws of war under a German domestic law that allowed German courts to try such cases, even if there was no direct connection between the offense and Germany. Before he was tried, however, the prosecutor for the newly formed ICTY requested that Germany turn Tadic over for prosecution before the new tribunal. Germany granted the request.

The following excerpt from the indictment against Tadic illustrates the nature of the offenses he committed:

About late June 1992, a group of Bosnian Serbs, from outside the camp, including Dusan Tadic, entered the large garage building known as the "hangar" and called prisoners out of their rooms by name, including Emir Karabasic, Jasmin Hrnica, Enver Alic, Fikret Harambasic, and Emir Beganovic. The prisoners were in different rooms and came out separately. The group of Serbs, including Dusan Tadic, severely beat the prisoners with various objects and kicked them on their heads and bodies. After Fikret Harambasic was beaten, two other prisoners, "G" and "H," were called out. A member of the group ordered "G" and "H" to [perform sexual acts on Harambasic] and then to sexually mutilate [him] . . . Emir Karabasic, Jasmin Hrnica, and Fikret Harambasic died from the attack. Enver Alic, who was severely injured, was thrown onto the back of a truck with the dead and driven away.[10]

The case of *The Prosecutor of the Tribunal Against Dusan Tadic a/k/a "Dule" Goran Borovnica* involved a multitude of international legal issues. Several are not relevant to this article.[11] The ICTY's resolution of two issues, however, had a potentially profound effect on the future of the law of war: Which rules apply to civil wars, and are individuals who violate these rules subject to criminal liability under international law?

When Tadic and his lawyers were brought before the ICTY, they made a determined effort to have the case thrown out from the outset. The legal argument made to support this effort was that the law of war did not provide for prosecuting an individual for misconduct committed during a civil war. The lawyers for Tadic argued that because the law-of-war treaty provisions providing for the prosecution of offenders applied only during state-versus-state conflicts, applying such liability to civil war was illegal.[12] They then argued that the absence of similar provisions in the limited law regulating conduct during pure civil wars supported their position. Thus, the central argument presented on behalf of Tadic was that prosecution of law-of-war violations committed during purely internal conflicts was the exclusive responsibility of domestic law and not the proper subject of an international criminal tribunal.

The ICTY rejected this argument. This rejection, however, forced the ICTY to interpret the scope of authority the UN Security Council had given it.[13] The Security Council Resolution creating the ICTY explicitly granted the power to try individuals alleged to have committed the following violations of international law:

- Violations of the Geneva Conventions of 1949 which qualify as "grave breaches" as defined by those treaties
- Violations of the laws or customs of war

- Genocide
- Crimes against humanity[14]

Tadic was indicted both for "grave breaches" of the Geneva Conventions and for violations of the laws and customs of war. For reasons beyond the scope of this article, the ICTY granted the defense request to throw out the grave breaches charges. This left only charges based on the authority to try individuals who violate the laws and customs of war.[15] While this provision seemed broad enough to cover Tadic's misconduct, there was one potentially glaring omission: the UN Security Council Resolution did not explicitly apply to internal armed conflicts. Thus, Tadic argued that the power granted the ICTY by this provision did not extend to internal armed conflict and therefore could not be a basis for his prosecution.

This challenge forced the ICTY to address a critical issue: How and to what extent does the law of war regulate conduct during civil wars? If, as Tadic asserted, this regulation was based exclusively on treaty provisions specifically applicable to such conflicts, then the tribunal had no authority to try him, because the statute granted the tribunal the power over only *customary*, and not *treaty* based violations. The ICTY, however, was able to reject this challenge by concluding that the treaty provisions which regulated civil wars had evolved over time into customary international law and were therefore properly captured under the umbrella term "laws and customs of warfare." The ICTY also concluded that other law-of-war obligations found in treaties regulating state-versus-state conflicts had also evolved to become applicable to civil wars by becoming customary international law.[16] Through this conclusion, the ICTY vested itself with authority over numerous offenses committed during purely civil wars.

In this one conclusion, the ICTY both labeled Common Article 3 and other basic provisions of the law of war as "customary international law" and placed them within the scope of international criminal liability. Although before this decision there was widespread academic and governmental support for this conclusion,[17] extending criminal responsibility for such violations beyond domestic law and into the realm of international law was a major development in the law of war. This decision has resulted in expanded available forums for prosecuting such violations, and it provides solid support for the use of domestic courts to try individuals who commit atrocities during civil war.[18]

Certainly, the ICTY could have limited its conclusion to finding that violations of Common Article 3 and Protocol II fell within the category of violations of "the laws and customs of war," and established jurisdiction over the Tadic case. However, the ICTY took a more comprehensive approach. The decision it reached, if considered a valid reflection of customary international law,[19] not only established that violations of the rules for civil war were crimes under international law, but also expanded the number of rules that apply to such conflicts. As the following excerpt illustrates, the ICTY concluded that this was required to protect the victims of modern conflict:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* [all law is created for the benefit of human beings] has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture, or the wanton destruction of hospitals, churches, museums, or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[20]

Based on this motive, the ICTY extended a number of basic customary international law rules regulating conduct during state-versus-state warfare to apply to civil wars.[21] Although not a "mechanical transplant" of these rules, the ICTY did establish that the basic regulatory provisions of the law of war, which operate to limit suffering and inject humanity into armed conflict, were equally applicable to internal as well as international armed conflicts. According to

the opinion, both the evidence of customary international law mustered by the prosecutor and simple common sense mandated this conclusion.

The ICTY also noted that the importance of protecting human rights had steadily gained momentum in the realm of international law since the end of World War II. Accordingly, the tribunal should consider this interest when determining what rules applied to civil wars, because the human victims of such conflicts face the same risks and dangers as human victims of international conflicts. In essence, the ICTY relied on the need to protect human rights as a justification for concluding that customary international law now intruded into an area of state sovereignty previously only minimally regulated through limited treaty provisions. The following passages from the opinion illustrates this point:

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife

It cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

For members of the US and other armed forces whose nations impose policies mandating compliance with these basic rules during all military operations,[22] this might seem like an inconsequential conclusion. However, no matter how well-intentioned or enlightened such a policy-based application of law-of-war principles might be, it provides no legal basis for the punishment of opponents who violate these principles. The *Tadic* decision does. By reaching the conclusion that these basic rules apply to internal armed conflict, thereby providing a basis for applying the doctrine of individual criminal responsibility under international law, the ICTY established a basis for jurisdiction under international law for the prosecution of perpetrators of inhumane acts and wanton destruction committed during civil war.

If there was any doubt about the legitimacy of this result, the establishment by the UN Security Council of the International Criminal Tribunal for Rwanda (ICTR) dispelled it. The conflict in Rwanda that led to the creation of the ICTR was purely internal. Thus, when the Security Council acted to create the ICTR, there was no question whatsoever that the tribunal would be vested with the power to prosecute individuals whose misconduct occurred during a purely internal conflict. The crimes in violation of international law made subject to the power of the ICTR by the Security Council Resolution included genocide, crimes against humanity, and violations of Common Article 3 and Protocol II.[23] The ICTR statute,[24] unlike the ICTY statute,[25] specifically mentions violations of Common Article 3 and Protocol II as crimes within the jurisdiction of the tribunal:[26]

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;

e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault;

f) Pillage;

g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) Threats to commit any of the foregoing acts.[27]

The specific grant of jurisdiction over violations of Common Article 3 and Protocol II seem to serve as indisputable evidence that the Security Council was cognizant of the *Tadic* decision at the time of the creation of the ICTR and concurred with the conclusions from that decision. This endorsement of the *Tadic* conclusions continued with the development of the still-nascent International Criminal Court. Should this court come into existence, it will be vested with the power to try "serious violations of the law of war," whether committed during international or internal armed conflict. Thus, the decision of the ICTY in *Tadic* laid the foundation not only for subsequent prosecutions of war criminals from the former Yugoslavia and Rwanda, but also for the application of international criminal responsibility to future internal armed conflicts.

What Court should Prosecute Crimes Committed in Civil Wars?

While many observers criticize the seemingly slow-moving nature of prosecutions in the Yugoslav and Rwanda tribunals, their existence, and the decisions they have made, have changed the landscape of the law of war. Customary international law of war now extends liability to participants in purely internal conflicts. The inclusion of war crimes committed during internal armed conflict within the jurisdiction of the proposed International Criminal Court[28] is a clear indication that this is a development that has become generally accepted as valid law. Indeed, one perceived benefit of the ICTY and ICTR is that they contributed to the movement to establish a permanent international court vested with the jurisdiction to try war criminals. What has received very little attention, however, is the possibility of relying on other forums to enforce the emerging norms of customary international law enunciated by the existing ad hoc tribunals.

One such potentially overlooked forum is the military court. The remainder of this article will argue that recent developments in the law of war make the use of US courts-martial another potential venue for the prosecution of individuals who commit war crimes during internal armed conflicts.

The legal foundation for all US courts-martial is the Uniform Code of Military Justice (UCMJ), a statute which establishes the power of courts-martial to try certain cases. This power is granted over both specific classes of people and specific crimes. It is the latter aspect of the UCMJ that most military personnel are familiar with, the "punitive articles." However, while jurisdiction to try someone for a violation of these punitive articles clearly extends to members of the US armed forces, it does not extend to non-US military personnel who violate the law of war, even if they subsequently fall into US custody (although if they are prisoners of war when the offense is committed, they are subject to the punitive articles). How then can a US court-martial be a legal option to try cases involving foreign nationals who may have committed war crimes in the course of their civil wars?

The answer to this question is found in an alternate source of jurisdiction within the UCMJ: Article 18, which establishes the jurisdiction of general courts-martial.[29] The prong of Article 18 that is normally relied upon to exercise general courts-martial jurisdiction is Clause 1, which grants power to try individuals subject to the Uniform Code of Military Justice, in most cases US service-members. However, Article 18 also includes grant of power for such courts to try *any* person for violations of the laws of war, even those not subject to the punitive articles. According to Clause 2 of Article 18, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." [30] This grant of jurisdiction is not limited by the nationality of the accused, the nationality of the victim, the military status of the accused, the parties to the conflict in which the offense was committed, or the time when the offense was committed. The only requirement to trigger this grant of judicial power is that the offense be a violation of the law of

war, and that the law of war provide for individual criminal responsibility for such a violation.

It is critical to recognize that the judicial power to try violations of the law of war established by the UCMJ is distinct from the power to try violations of the UCMJ (punitive articles) itself. In the first instance, the UCMJ is simply empowering the general court-martial to hear cases arising under international law. In the latter, the UCMJ is subjecting specific individuals to its own internal criminal prohibitions. Thus, in this instance, an individual would be subjected to the power of a court-martial based on a violation of the law of war; there is no application of domestic criminal law to the individual, as in the case of trial for a violation of the punitive articles. International law specifies the crime. Because the prohibition is international in nature, and therefore applicable prior to the violator falling into US custody, that trial for the offense would be valid under international law. In short, the United States would not be imposing its own law upon the accused, but instead providing a forum for the application of international law.

As far back as the Middle Ages, tribunals composed of members of the profession of arms were established to try other members of the profession when basic norms of conduct were transgressed.[31] The original version of Article 18 dates back to 1916, and the United States embraced the use of the military tribunal to prosecute individuals alleged to have violated the laws and customs of war as early as the Mexican War.[32] Perhaps the best known and most widespread use of the military tribunal to try violations of the law of war were the post-World War II tribunals in both the European and Pacific theaters. Hundreds of cases were tried before such courts. For the United States, this reliance on the military tribunal was even approved by the Supreme Court.[33] Furthermore, the use of military tribunals to try violations of the laws and customs of war is not only provided for in the UCMJ, but is also consistent with the history of punishing war criminals.[34]

While past uses of the military tribunal have involved cases where there was a connection between the United States and the conflict in which the violation of the law of war occurred, there has never been any legal requirement that such a connection exist. So long as the tribunal applies international law as the basis for the offense, adjudication seems permissible. Nor is there a "conflict connection" requirement in the plain meaning of Article 18. Furthermore, it has become common for nations to establish criminal jurisdiction in their domestic courts over individuals who violate the law of war, regardless of where or against whom the violation occurred. Indeed, Dusan Tadic was actually pending trial in Germany for his misconduct when he was turned over to the ICTY. Such assertion of jurisdiction is based on the international law doctrine of "universal jurisdiction," which essentially allows any nation to prosecute violators of certain international laws on the theory that the violation offends every member of the community of nations. This concept is explicitly included in the Geneva Conventions of 1949, which require states bound to the treaty to enact domestic legislation providing for the prosecution of individuals who commit grave breaches of the Conventions. By concluding that law-of-war violations committed during internal armed conflict result in individual criminal liability under international law, the ICTY and ICTR have essentially provided a basis for other nations to apply this doctrine to future violators. In fact, in Kosovo today, prosecutors are relying on Yugoslav law prohibiting "war crimes" as a basis to try individuals for atrocities committed during the civil war which preceded the NATO intervention.

The second distinction between the hypothetical use of a US court-martial in this situation and past cases is that prior uses of the military tribunal have involved law-of-war violations committed during an international armed conflict, not an internal one. Indeed, until the cases arising out of Yugoslavia and Rwanda, there was no consensus that the law of war subjected violators to criminal liability when the violation occurred during an internal armed conflict. This is no longer the case. The developments discussed above demonstrate that today violations of the law of war committed during an internal armed conflict result in individual criminal liability under the law of war. Thus, they qualify as offenses that, by the law of war, are subject to trial by military tribunal, and therefore fall squarely within the judicial power granted by Article 18.

This application of jurisdiction over war criminals by general courts-martial based on Article 18 is not only legally permissible, it is also applicable to any contingency operations where US forces gain custody of alleged war criminals. Clearly, the application of such jurisdiction to any given situation is not simply a legal issue, but also a delicate policy issue. However, before the current instinct to submit such a case to an international tribunal is acted upon, it might be worthwhile to consider whether there is a proper role for the use of a US military court to deal with the allegations.

In 1945, Japanese General Yamashita, Commander of Imperial Japanese Forces in the Philippines, became a prisoner

of US forces. After his capture, he was tried by a military commission for war crimes. The commission held him accountable for the rampage of pillage, murder, and destruction conducted by his forces in the Philippines before his capture. His conviction, appeal to the US Supreme Court, and subsequent execution is best known in the international legal community for establishing the doctrine of "command responsibility." [35] There is another aspect of this case that perhaps holds renewed relevance today, an aspect rarely given attention, yet eloquently expressed by General MacArthur when he approved the sentence of the commission: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult, but threatens the fabric of international society." [36]

While the drama of this quotation was almost certainly intended to rationalize sending General Yamashita to the gallows, it nonetheless expresses a fundamental tenet of the law of war: professional warriors share a common responsibility to respect the basic rules of warrior conduct. At the point in history when General Yamashita faced the hangman as a consequence of his war crimes, it was routine practice for warriors to be judged by other members of the warrior class. This is no longer the case. The international diplomatic and legal response to the atrocities associated with the wars in the former Yugoslavia and Rwanda has been to rely exclusively on tribunals composed of civilian judges to try alleged violations of the law of war. This trend to move away from the tradition of warriors judging warriors is rarely questioned, but it may have potential negative consequences. Most significant among these is the perception that civilian courts should adjudicate war crimes, and the resulting lack of military influence on the development of the international law related to warrior conduct that results from these adjudications. This article has demonstrated that as a matter of international law, the use of such civilian tribunals need not be the only option for holding those who commit atrocities during civil wars accountable for their misconduct. The use of military tribunals in such circumstances could serve the interests of justice, facilitate restoration of peace and stability, and ensure that warriors are called to account for their misconduct before members of the profession of arms.

NOTES

1. This article is based on our recent law review article, "Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts," published in *Military Law Review*. That article extensively addressed the international and domestic legal foundations and authorities for bringing such individuals before US military courts. This article is intended to provide a survey of the profound developments in the law of war that have occurred in the past decade which make consideration of such an option legally sustainable. It also is intended to highlight the various courts available for prosecuting such individuals, and to provoke consideration of whether it is time to reconsider the use of military tribunals for such prosecutions.
2. A development opposed by the United States.
3. See Malham M. Wakin, ed., *War, Morality, and the Military Profession* (Boulder, Colo.: Westview Press, 1979), pp. 415-30.
4. In the lexicon of the law of war, such conflicts are referred to as "international armed conflicts," and the laws of war applicable to such conflicts have been, and remain, substantially more comprehensive than the laws of war applicable to the other type of conflict that has plagued the second half of this century: civil war. These conflicts, occurring solely within the borders of an existing state, and involving internal forces and dissidents, are referred to in the law of war as "internal armed conflicts." Unlike state-on-state conflicts, these conflicts have been treated under international law primarily as domestic affairs, and therefore not the subject of international regulation.

"A non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 4339 (Yves Sandoz, Christopher Swinarski, and Bruno Zimmerman, 1987). At para. 4341, it continues:

The expression "armed conflicts" give an important indication . . . since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree.

Internal disturbances and tensions, characterized by isolated or sporadic acts of violence do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within a territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new state.

Although Serbia was involved in the fighting, alongside the Federal Republic of Yugoslavia, its involvement did not change the character of the conflict from non-international to international. Serbia's involvement was at the behest and with the consent of the Yugoslav government, the legitimate government, and was directed at the Kosovo Albanians, not Yugoslavia. Thus, there was no state-on-state conflict, which would cause the conflict to be characterized as an international armed conflict.

5. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995), reprinted in 35 *I.L.M.* 32 (1996).

6. *Ibid.*:

Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny, and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

7. See generally William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords, and a World of Endless Conflicts* (New York: Simon & Schuster, 2000), discussing the conflicts in the Former Yugoslavia and Rwanda, and the United Nations response to them.

8. UN Security Council Res. 827, UN SCOR, 3217th mtg., UN Doc. S/RES/827 (1993), reprinted in 32 *I.L.M.* 1203 (1993), establishing the International Criminal Tribunal for the Prosecution of War Crimes in the Former Yugoslavia (ICTY) and adopting the statute recommended in the Secretary-General's report.

9. For a general overview of the development of the ICTY, and the *Tadic* proceedings, see Michael P. Sharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, N.C.: Carolina Academic Press, 1997).

10. The International Criminal Tribunal for the Former Yugoslavia website, *The Prosecutor of the Tribunal Against Dusan Tadic a/k/a "Dule" Goran Borovnica, Indictment*, para. 5.1, internet, <http://www.un.org/icty/indictment/english/tadicint.htm>, accessed 26 March 2000.

11. Such as the authority of the UN Security Council to establish the tribunal, the authority of the tribunal to establish its own rules of procedure and evidence, and the legitimacy of the ICTY taking jurisdiction over the case from Germany when a trial for the accused was already pending there.

12. This is most apparent with regard to the Geneva Conventions, which all include provisions for the punishment of

violations of the treaties. However, these provisions, sometimes referred to as the "prosecute or extradite" obligations, are applicable only when the violation was committed against a "protected person," a legal status that does not exist during internal armed conflict.

13. UN Security Council Res. 827.

14. *Ibid.*

15. *Ibid.*, art. 3:

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

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

16. Although the term "war" is used here, its use is somewhat of a historical anachronism. The application of the laws of war to a given situation is no longer contingent on the existence of "war." Because of the difficulties associated with defining such a term, the trigger for application of the laws of war was changed in 1949 to "armed conflict." This trigger was further subdivided into two categories: international (state versus state) and internal (purely within the state) armed conflict. See note 4, above.

17. Customary international law is that body of international regulation generally regarded as binding on all nations, absent any expression of consent. In this regard, it is substantially different from a treaty obligation, which exists only when the state expressly consents to be bound. It is well accepted in international law that a treaty obligation may "ripen" into customary international law, and thereby become binding on states which are not party to the treaty. See generally, F. Giba-Matthews, "Customary International Law Acts as Federal Common Law in U.S. Courts," 20 *Fordham Int'l. L.J.* 1839 (1997); Beth Stephens, "Human Rights on the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Law of Our Land: Customary International Law as Federal Law After Erie," 66 *Fordham L. Rev.* 393 (1997).

18. It is interesting to note that United Nations-sponsored prosecutors in Kosovo are today routinely charging individuals alleged to have committed atrocities during the Kosovo conflict with violation of Yugoslav domestic law prohibiting "war crimes."

19. In this regard, it is important to note that the United States supported this extension in the "friend of the court" brief filed with the tribunal by the Department of State.

20. *Prosecutor v. Tadic.*

21. *Ibid.*

22. Department of Defense Directive 5100.77 (9 December 1998), as implemented by CJCSI 5810.01A (27 August 1999) imposes the requirement that US armed forces comply with the "principles and spirit" of the law of war in all military operations, even those that are not considered "armed conflict." The armed forces of Canada, the United Kingdom, Germany, and France comply with similar directives, and the United Nations also requires forces operating in UN missions to apply a similar policy.

23. UN Security Council Res. 955, UN SCOR, 3453d mtg., UN Doc. S/RES/955 (1994), reprinted in 33 *I.L.M.* 1598 (1994), establishing the International Criminal Tribunal for the Prosecution of War Crimes in Rwanda (ICTR) and adopting the statute of the tribunal which is annexed to the Security Council Resolution.
24. *Ibid.*
25. UN Security Council Res. 827.
26. UN Security Council Res. 955, art. 4.
27. *Ibid.*
28. See *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9 (1998), reprinted in 37 *I.L.M.* 998 (1998).
29. The modern-day Uniform Code of Military Justice has its history and origin, at least in part, in the numerous military codes, formerly known as Articles of War, promulgated since the American Revolution. See Walter T. Cox III, "The Army, The Courts, and The Constitution: The Evolution of Military Justice," 118 *Mil. L. Rev.* 1 (1987). See also, Robert O. Rollman, "Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice," 11 *A. F. JAG L. Rev.* 212 (1969); Robinson O. Everett and Scott L. Silliman, "Forums for Punishing Offenses Against the Law of Nations," 29 *Wake Forest L. Rev.* 509 (Summer 1994). The authority to promulgate the Articles of War and finally the Uniform Code of Military Justice derives from Congress's authority under Article I, Section 8, Clause 14 of the Constitution giving Congress the power to "make Rules for the Government and Regulation of the land and naval forces." See *US Constitution*, article I, sect. 8, clause 14. However, it is also important to note that the Congress is also vested in Article I of the Constitution with the power to "define and punish . . . Offenses against the Law of Nations," see *US Constitution*, article I, sect. 8, clause 10, a power arguably exercised through Article 18.
30. 10 U.S.C.S. sect. 818, clause 2 (LEXIS 2000).
31. See Leslie Green, "The Law of War in Historical Perspective," *International Law Studies--U.S. Naval War College*, Vol. 72, 39 (1998).
32. See Scott Morris, "The Laws of War: Rules by Warriors for Warriors," DA Pamphlet 27-50-301, *The Army Lawyer*, pp. 6-7 (1997) (discussing the imposition of martial law and the establishment of military occupation tribunals by General Winfield Scott during the US campaign in Mexico during the Mexican-American War).
33. *In Re Yamashita*, 327 U.S. 1 (1945).
34. There are, nonetheless, two key distinctions between the case proposed in the hypothetical and those of the past. However, as will be seen, these distinctions do not invalidate the use of the general courts-martial in such situations.
35. This is a dramatically different standard of criminal liability than individuals are normally exposed to. The traditional concept of "principle" liability requires an individual to have either committed, commanded, counseled, or procured the commission of an offense to be held criminally responsible for its commission. Although under the Uniform Code of Military Justice, a commander who should have known that a war crime would occur, and took no remedial action, could certainly be exposed to a charge of dereliction of duty, this is a far less severe crime than holding the same commander accountable for the war crime itself. The Yamashita standard provides a basis for such accountability by charging the commander with a violation of international law.
36. Wakin, p. 223, quoting Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam, 1970).

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