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## The ICC Prosecutor, Collateral Damage, And NGOs: Evaluating The Risk Of A Politicized Prosecution

Richard John Galvin

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**THE ICC PROSECUTOR, COLLATERAL DAMAGE, AND NGOS:  
EVALUATING THE RISK OF A POLITICIZED PROSECUTION**

*Richard John Galvin\**

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*In the images of falling statues, we have witnessed the arrival of a new era. For a hundred of years of war, culminating in the nuclear age, military technology was designed and deployed to inflict casualties on an ever-growing scale. In defeating Nazi Germany and Imperial Japan, Allied forces destroyed entire cities, while enemy leaders who started the conflict were safe until the final days. Military power was used to end a regime by breaking a nation.*

*Today, we have the greater power to free a nation by breaking a dangerous and aggressive regime. With new tactics and precision*

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\* Lieutenant Colonel, U.S. Army Judge Advocate General's Corps. LL.M. in International and Comparative Law, 2002, *with distinction*, Georgetown University Center of Law. Graduate paper, *The case for a Japanese Truth Commission covering World War II Era Japanese War Crimes*, published in Volume 11 of the Tulane Journal of International and Comparative Law. LL.M., 1997, The Judge Advocate General's Legal Center and School, J.D., 1988, *cum laude*, University of Minnesota Law School, B.A., 1985, Macalester College. The author thanks Suji Rodgers and Shanna Conner for their superb assistance and research in helping prepare this article while they served as Army Judge Advocate General's Corps Summer Interns in 2003. The views expressed in this article are those of the author and do not represent the views of the Department of Defense or the Department of the Army.

*weapons, we can achieve military objectives without directing violence against civilians. No device of man can remove the tragedy from war; yet it is a great moral advance when the guilty have far more to fear from the war than the innocent.*—President George Bush<sup>1</sup>

*“(If I were an American GI, I’d much prefer being held in a cell in the Hague to one in Baghdad.”*—Richard Dicker, Human Rights Watch, responding to a hypothetical question about the prospect of Saddam Hussein referring allegations against U.S. soldiers to the International Criminal Court<sup>2</sup>

## I. Introduction

In recent military conflicts, the United States has gone to extraordinary lengths to seek to minimize unintended civilian deaths and injuries in combat, commonly referred to as “collateral damage.” The U.S. has shown its effort in many forms: it has withheld target approval for the Secretary of Defense or President in cases involving potentially high collateral damage, incorporated military legal advisors throughout the operational and targeting planning stages, and used more precision guided munitions as well as sophisticated computer programs that help forecast potential collateral damage. Yet, international human rights non-governmental organizations (NGOs) often protest that enough is not done and that the U.S. may be guilty of war crimes due to collateral damage. NGOs have become a force to be reckoned with in the law of war arena and have attempted to have their complaints heard in judicial

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<sup>1</sup> Remarks by the President from the USS Abraham Lincoln At Sea off the Coast of San Diego, California (May 1, 2003), at <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html> (last visited Feb. 23, 2005).

<sup>2</sup> Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 106-107 (Sarah B. Sewall & Carl Kaysen eds., 2000). During the 1998 Rome Conference deliberations over the International Criminal Court, U.S. Ambassador for War Crimes David Scheffer discussed a major U.S. concern: “‘What if,’ Scheffer postulated, ‘the American army finds itself deployed on the territory of Iraq as part of a U.N. force. Now, Hussein and his nationals are not subject to this treaty because he hasn’t signed on. But what if suddenly he pulls a fast one, accuses some of our men of war crimes, and, as head of the territory in question, extends the Court permission to go after them on a one-time basis?’” *Id.*

forums. Now that the International Criminal Court (ICC) is operating,<sup>3</sup> the NGOs may seek to use it as a permanent forum to argue that the U.S. is guilty of war crimes in cases of unintended collateral damage resulting from U.S. military operations. The potentially combustible combination of the ICC Prosecutor, NGOs, and collateral damage raises the question of the possibility of a politicized prosecution in the ICC.

This article explores the prospect of a politicized prosecution in the ICC directed against the U.S. military or senior U.S. civilian government officials. In the United States, those who oppose the Court are uneasy with the prospect that an independent prosecutor may initiate politically motivated criminal investigations into U.S. military operations.<sup>4</sup> Conversely, proponents of the Court assert that the ICC contains sufficient safeguards to protect against this possibility.<sup>5</sup>

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<sup>3</sup> The ICC was established by the Rome Statute of the International Court. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute or RS], *reprinted in* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 167 (2001).

<sup>4</sup> Marc Grossman, Remarks to the Center for Strategic and International Studies (May 6, 2002), at <http://www.state.gov/p/9949.htm> (last visited Feb. 23, 2005) (“The Rome Statute creates a prosecutorial system that is an unchecked power . . . . We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.”); Pierre-Richard Prosper, United States Ambassador for War Crimes Issues, Address at the Peace Palace, The Hague, The Netherlands (Dec. 19, 2001), in John Washburn, *Assessments of the United States Position: The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 FORDHAM INT’L L.J. 873 (2002) (“As many of you know, the International Criminal Court has been a point of concern for the United States . . . . We are steadfast in our concerns and committed to our beliefs that the United States cannot be part of a process that lacks the essential safeguards to avoid a politicization of the process.”); Alfred P. Rubin, *The United States and the International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 LAW & CONTEMP. PROBS. 153, 154 (2001) (“As proposed, the discretion given to the prosecutor is enormous. Thus, the potential for abuse of that discretion is also enormous . . . .”); John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, 41 VA. J. INT’L L. 186, 196 (2000) (“Today, however, precisely contrary to the proper alignment, the ICC has almost no political accountability, and carries an enormous risk of politicization.”).

<sup>5</sup> Washburn, *supra* note 4, at 877 (“Supporters of the Court say that, taken together, this array of safeguards gives almost 100% protection against political abuse or harassment through the Court for the United States . . . .”); Leila Nadya

Although the U.S. is not a party to the ICC, the power of the ICC Prosecutor has become a pivotal issue because ICC state parties—and even non-state parties—could ask the ICC to extend jurisdiction over U.S. personnel in their territory.<sup>6</sup>

Part II of this article sets forth the Prosecutor's powers and analyzes them. Part III deals with the law surrounding collateral damage and how it evolved into Article 8(2)(b)(iv) of the Rome Statute (RS). This provision prohibits indiscriminate attacks that cause "incidental loss of life or injury to civilians or damage to civilian objects" which is "clearly excessive in relation to the concrete and direct overall military advantage anticipated."<sup>7</sup> As this Rome Statute provision is derived from the proportionality principles of the Additional Protocol I (AP I) to the 1949 Geneva Conventions, this article will thus delve into the history and background of the AP I proportionality principles. In examining AP I, this article will establish that while these principles are widely accepted as creating a useful balancing test for military planners and commanders, their status as a universal criminal law standard is much less certain.

Having reviewed the power of the ICC Prosecutor and the law surrounding collateral damage, Part IV of the article turns to the rise of international human rights NGOs in the law of war arena. In particular, Part IV concentrates on the substantial influence of the NGO movement

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Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 401 (2000) ("[N]umerous procedural safeguards are built into the Statute to prevent the Prosecutor from abusing his or her power.").

<sup>6</sup> Although President Clinton signed the Rome Statute on December 31, 2000, the Bush administration informed U.N. Secretary General Kofi Annan that the United States has no intent to become a state party to the ICC: "Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as reflected in this letter, be reflected in the depositary's status lists relating to this treaty." See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to UN Secretary General Kofi Annan (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited Feb. 23, 2005). The issue of potential ICC jurisdiction over U.S. personnel remains, though, as Article 12 of the Rome Statute authorizes ICC jurisdiction over non-state party personnel if the alleged misconduct occurs on the territory of a state party or if a non-state party requests that the ICC take jurisdiction over crimes committed within their territory. Rome Statute, *supra* note 3, art. 12.

<sup>7</sup> *Id.* art. 8(2)(b)(iv).

in creating both the Ottawa Convention, which prohibits land mine usage, and the ICC, and analyzes the NGO stance on collateral damage.

Part V uses the U.S. military operations in Kosovo and Iraq as case studies to examine the interaction of U.S. military practice, NGO criticism of U.S. efforts, and how NGO claims were presented and settled by prosecutors. The U.S. approach to preventing and minimizing collateral damage in both operations is analyzed, as well as how, in both case studies, NGOs sought prosecution of U.S. personnel for alleged war crimes due to the collateral damage. In the Kosovo case, the allegations were addressed by the International Criminal Tribunal for Yugoslavia Prosecutor, while in the Iraq case, allegations were filed in Belgium pursuant to the country's universal jurisdiction law.

The case studies provide a means to review how collateral damage allegations have been treated in the past and offer insight and lessons for the ICC Prosecutor. Accordingly, Part VI analyzes the implications of the case studies for the ICC Prosecutor. The article concludes that an ICC Prosecutor should abide by the Rome Statute guidelines and generally refrain from ICC investigations of military operations based solely on allegations of collateral damage. Moreover, the article recommends that the ICC Prosecutor promulgate prosecutorial guidelines that explicitly announce this policy.

## II. The ICC Prosecutor

On July 17, 1998, in Rome, Italy, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court drafted the Rome Statute of the International Criminal Court (Rome Statute).<sup>8</sup> After 60 nations ratified the Rome Statute, the ICC became operational on July 1, 2002.<sup>9</sup> On April 21, 2003, the Assembly of State Parties to the Rome Statute of the ICC, in a unanimous vote, elected Luis Moreno-Ocampo of Argentina to be the first Chief Prosecutor of the ICC.<sup>10</sup> This section will address the

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<sup>8</sup> SCHABAS, *supra* note 3, at 167.

<sup>9</sup> International Criminal Court: Historical Introduction, at <http://www.un.org/law/icc/statue/status.htm> (last visited Feb. 23, 2005).

<sup>10</sup> International Criminal Court: Office of the Prosecutor, at [http://www.icc-cpi.int/otp/otp\\_bio.html](http://www.icc-cpi.int/otp/otp_bio.html) (last visited Feb. 23, 2005). See also Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy towards the International Criminal Court*, 21 WIS. INT'L L.J. 557, 583 (2003). Professor Sadat points out:

potential powers of the ICC Prosecutor through reviewing and analyzing the provisions of the Rome Statute.

#### A. Text of the Rome Statute

In assessing the powers and limitations of the ICC Prosecutor, one must first consider the text of the Rome Statute itself. The Rome Statute sets forth the qualifications and procedure for selecting and removing the Prosecutor, the process by which the Prosecutor can independently initiate an investigation, several checks on the Prosecutor's investigating power, and language that guides the Prosecutor's discretion regarding certain categories of crimes.

To begin, the Rome Statute's text sets out clear qualifications and a procedure for selecting an ICC Prosecutor. RS Article 42 creates the Office of The Prosecutor (OTP) and requires that the Prosecutor be a person of "high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases."<sup>11</sup> The Assembly of State Parties chooses the Prosecutor by "an absolute majority" and the Prosecutor serves for a nine-year term.<sup>12</sup> The Prosecutor "shall act independently and as a separate organ of the Court."<sup>13</sup> RS Article 46 enables an "absolute majority of the States Parties" to remove the Prosecutor for "serious misconduct or a serious breach of his or her duties" or for an inability to "exercise the functions required by this Statute."<sup>14</sup>

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The selection of the Court's Prosecutor was more difficult, as States tried very hard to find a candidate that could be chosen by consensus. Ultimately, a distinguished Argentinean lawyer and law professor was chosen, Luis Moreno Ocampo. Sr. Moreno Ocampo had established his reputation as a prosecutor during several high profile trials involving leading figures from Argentina's military junta. He is also a renowned academic in the field of human rights, and is the Robert F. Kennedy Visiting Professor at Harvard Law School. His nomination was uncontested, and he was selected by consensus at the ASP's third meeting, and installed in the Hague on June 16, 2003.

*Id.* (citations omitted).

<sup>11</sup> Rome Statute, *supra* note 3, art. 42.

<sup>12</sup> *Id.* art. 42(4).

<sup>13</sup> *Id.* art. 42(1).

<sup>14</sup> *Id.* art. 46.

Next, the Rome Statute text establishes a process by which the Prosecutor can initiate an investigation. In performing an investigation, RS Article 54(1)(a) requires the Prosecutor to “investigate incriminating and exonerating circumstances equally.”<sup>15</sup> RS Article 15(1) enables the Prosecutor to “initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.”<sup>16</sup> RS Article 15(2) allows the Prosecutor to “analyze the seriousness of the information received.”<sup>17</sup> If more information is required, the Prosecutor may “seek additional information” from States, U.N. organs, international institutions, or non-governmental organizations (NGOs).<sup>18</sup>

Although the Prosecutor is given the important power to initiate investigations, there are several formal and informal checks on the Prosecutor’s power. The first major check on the Prosecutor’s power is the Pre-Trial Chamber review requirement. After assessing information on crimes within the jurisdiction of the court, if the Prosecutor determines there is a “reasonable basis” to “proceed with an investigation,” RS Article 15(3) requires the Prosecutor to first obtain approval from the Pre-Trial Chamber.<sup>19</sup> This means two out of three judges of the Pre-Trial Chamber must concur that there is a “reasonable basis” to investigate before the Prosecutor may proceed.<sup>20</sup>

In addition to the Pre-Trial Chamber review requirement, the text of the Rome Statute contains two other major formal checks on the Prosecutor’s authority to initiate an investigation. First, under RS Article 16 the United Nations Security Council can vote to defer a prosecution

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<sup>15</sup> *Id.* art. 54(1)(a).

<sup>16</sup> *Id.* art. 15(1). See also STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 212 (2001) (defining the Prosecutor’s power to initiate cases *proprio motu* as on his or her own initiative).

<sup>17</sup> Rome Statute, *supra* note 3, art. 15(2).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* art. 15(3) (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”).

<sup>20</sup> *Id.* art. 39(2)(b)(iii) (“The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.”). See also *id.* art. 57(2)(a) (“Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.”).



for twelve months at a time as long as the Council acts under Chapter VII of the U.N. Charter.<sup>21</sup> Second, perhaps a more commonly used check will be the complementarity system under RS Articles 17 and 18. Under Articles 17 and 18, the Prosecutor must defer to a State Party if the State Party investigates or prosecutes the case the Prosecutor intended to investigate, unless the State Party is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>22</sup>

Aside from these formal controls on the Prosecutor’s discretion, the Rome Statute text also provides guidance for the Prosecutor regarding his or her choice of charging offenses. For example, the Preamble recognizes the “unimaginable atrocities that deeply shock the conscience of humanity,” “grave crimes” that “threaten the peace, security and well-being of the world,” and affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>23</sup> Accordingly, RS Article 1 states the ICC “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”<sup>24</sup> Similarly, RS Article 5 limits the Court’s jurisdiction to “the most serious crimes of concern to the international community as a whole.”<sup>25</sup> RS Article 8(1) further provides that “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large scale commission of such crimes.”<sup>26</sup> Under RS Article 53, the Prosecutor must take “into account the gravity of the crime” and shall consider if there are “substantial reasons that an investigation would not serve the interests of justice.”<sup>27</sup> Similarly, under RS Article 17(1)(d), the

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<sup>21</sup> *Id.* art. 16.

<sup>22</sup> *Id.* arts. 17-18.

<sup>23</sup> *Id.* pmb. l.

<sup>24</sup> *Id.* art. 1.

<sup>25</sup> *Id.* art. 5.

<sup>26</sup> *Id.* art. 8(1).

<sup>27</sup> *Id.* art. 53. Specifically, RS Article 53(1) provides:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into

Court must find that a case is inadmissible if the case “is not of sufficient gravity to justify further action by the Court.”<sup>28</sup> Finally, RS Article 22 sets forth the rule of “strict construction” and provides that: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>29</sup>

Another potential source of constraints upon the Prosecutor is the Assembly of State Parties. RS Article 112 governs the Assembly of State Parties. It provides that each State Party can send one representative, who each will have a single vote, to the annual meeting of the Assembly.<sup>30</sup> Among its powers and functions, the Assembly of State Parties approves the Court’s budget<sup>31</sup> and provides “management oversight” of the Prosecutor.<sup>32</sup> In this capacity, the Assembly may create a “subsidiary body” such as an “independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.”<sup>33</sup> While it is not clear at this stage how the oversight mechanism functions will operate, one commentator has suggested that the Assembly’s fiscal powers could be used to effectively deprive a Prosecutor the ability to investigate a particular case or situation.<sup>34</sup> Moreover, both State Parties and

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account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

<sup>28</sup> *Id.* art. 17(1)(d).

<sup>29</sup> *Id.* art. 22(2). The rule “aims to ensure that criminal prohibitions are read to the advantage of the person being investigated or prosecuted, in accordance only with their clear meaning and with residual ambiguities resolved in favour of the defense.” BRUCE BROOMHALL, *INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT* 34 (2003).

<sup>30</sup> Rome Statute, *supra* note 3, art. 112(6).

<sup>31</sup> *Id.* art. 112(2)(e).

<sup>32</sup> *Id.* art. 112(2)(b).

<sup>33</sup> *Id.* art. 112(4).

<sup>34</sup> LOUISE ARBOUR ET AL., *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT, INTERNATIONAL WORKSHOP IN CO-OPERATION WITH THE*

non-state parties will retain some indirect ability to influence the Prosecutor because the Prosecutor must rely upon the states' cooperation to conduct investigations.<sup>35</sup>

### B. Analysis of the Rome Statute Provisions

The Rome Statute provisions concerning the Prosecutor and related issues were forged together at the Rome Conference. Many of the proposals generated intense debates as the parties sought to protect their perceived interests. Consequently, key components of the Rome Statute stemmed from negotiated compromises. Understanding the issues raised at the Conference and the negotiating history helps place the end result in perspective. Specifically, reviewing the origin of the Prosecutor's independent investigatory powers and the various checks on these powers provides some insight into the likely effect of the provisions.

The debate over the Prosecutor's ability to independently pursue an investigation was highly controversial. The argument over competing positions created a "deep schism" between proponents of two separate positions; an NGO influenced group of states favored an independent prosecutor while several powerful states adamantly opposed an independent prosecutor.<sup>36</sup> The states who opposed the independent

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OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNALS (ICTY AND ICTR) 133 (2000). However, the same commentator also stated that such a practice would contradict Article 42, which gives the Prosecutor the ability to act "independently as a separate organ of the Court." An alternative view is that "the Prosecutor should determine what proportion of its overall resources should be allocated to each of the different matters the Office of the Prosecutor is investigating and prosecuting." *Id.*

<sup>35</sup> *Id.* at 146. "But given the State cooperation regime of the ICC Statute, the Prosecutor will in practice depend largely on the police and judiciary of States, in particular territorial States where it is likely that many witnesses will be living and where sites relevant to the alleged crimes are located." *Id.*

<sup>36</sup> Sadat & Carden, *supra* note 5, at 400.

Defining the powers of the Prosecutor was a highly contentious issue during the PrepCom I meetings, specifically with respect to whether the Prosecutor should be able to act *proprio motu* or *ex officio*, that is, on his or her own motion, in bringing cases to the Court. This issue created a deep schism among the PrepCom I delegates, with many smaller nations, some European nations, and the NGOs strongly supporting a Prosecutor able to act independently of State referral, and

Prosecutor, including the United States, preferred the initial proposal that allowed ICC prosecution only following a Security Council or state party referral.<sup>37</sup> This group generally feared the “politicization of the Court” by a partisan or biased Prosecutor.<sup>38</sup> Conversely, the advocates of an independent Prosecutor, known as the “like minded group,” believed that the original proposal to allow prosecutions only after a State complaint or a United Nations Security Council mandate would make the Court ineffective.<sup>39</sup> They cited the extremely limited use of State complaints in other analogous settings<sup>40</sup> and the many political considerations that could frustrate obtaining unanimity among the Permanent Members of the Security Council<sup>41</sup> to support their view. Ultimately, the group favoring an independent Prosecutor prevailed, in part due to the strong

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many larger countries, including most of the permanent five members of the Security Council, opposing an independent Prosecutor.

*Id.* (citation omitted).

<sup>37</sup> SCHABAS, *supra* note 3, at 97. “During the Rome Conference, the United States declared that an independent prosecutor ‘not only offers little in way of advancing the mandate of the Court and principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor’s central task of thoroughly and fairly investigating the most egregious of crimes.’” *Id.*

<sup>38</sup> M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A DOCUMENTARY HISTORY* 408 (1998).

<sup>39</sup> *Id.*

<sup>40</sup> CHRISTOPH J.M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 84 (Oxford University Press 2001) (“[S]tate complaint procedures in human right treaties have proved inefficient. Twelve states have made use of the state complaint possibility of the ECHR, whereas no such procedure has been invoked to date in the case of the ICCPR, the ACHR, or the AFCHPR.”).

<sup>41</sup> *Id.* at 81.

[T]he real power to prosecute would be left to the UN Security Council. This organ is, to say the least, heavily political and easily deadlocked. Establishing a prosecutor who is highly dependent on this organ might possibly make a mockery of the whole undertaking. The prosecutor would never be able to initiate investigations against heads of governments that occupy permanent seats at the UN Security Council, because these states would simply protect themselves or their ‘allies’ through the veto.

*Id.* (citations omitted).

lobbying pressure of the NGOs.<sup>42</sup> However, in order to placate the group opposed to the independent Prosecutor, a “system of checks and balances” on the Prosecutor’s authority was adopted as well.<sup>43</sup>

As discussed above, the major “checks” on the Prosecutor’s discretion include the Pre-Trial Chamber approval process, the complementarity system, and the general textual limitations, such as RS Article 8(1). What practical effect will these checks have on the Prosecutor? The Rome Conference negotiations, and the subsequent commentary and analysis, provide some clues; ultimately, though, only

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<sup>42</sup> Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 23 (1999). Mahnoush H. Arsanjani, the Senior Legal Officer, Office of Legal Affairs, United Nations, served as the Secretary of the Committee of the Whole of the Rome Conference.

Nongovernmental organizations played a significant role in the negotiation process at the Preparatory Committee and the conference. From the beginning, a large group of NGOs committed themselves to the establishment of the ICC and lobbied intensively. Their influence was felt on a variety of issues, particularly the protection of children, sexual violence, forced pregnancy, enforced sterilization and an independent role for the prosecutor. Throughout the Preparatory Committee’s sessions and the Rome Conference, they provided briefings and legal memoranda for sympathetic delegations, approached delegations to discuss their points of view, and even assigned legal interns to small delegations. On occasion, they increased pressure on unsympathetic delegations by listing them as such in the media.

*Id.* See also M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 455 (1999), where Professor Bassiouni writes:

The 238 NGOs at the conference also played a significant role in discussing the issues and proposing options to government delegations. The NGOs had contributed so greatly to the Ad Hoc Committee and the PrepCom meetings that they were given unprecedented access to meetings at Rome. Several notable organizations actively lobbied for the tribunal and provided legal and technical expertise.

<sup>43</sup> Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT’L L.J. 1, 11 (2002).

time will tell how the Prosecutor's powers under the Rome Statute will actually function in practice.

The Pre-Trial Chamber review process is a direct check on the Prosecutor's ability to initiate an independent investigation. Under RS Article 15(3), the Prosecutor must establish that a "reasonable basis" exists before proceeding.<sup>44</sup> On the one hand, this can be viewed as a significant control mechanism at a very early stage in the process.<sup>45</sup> Conversely, others point to the fact that the Prosecutor does not have to receive approval from a unanimous Pre-Trial Chamber and that the "reasonable basis test" is a "relatively low threshold."<sup>46</sup> It remains to be seen how strong of a check the Pre-Trial Chamber review process will be.

Similarly, the complementarity system has yet to be tested. The system's supporters contend that complementarity represents "an expression of concerns of State sovereignty" and is a significant constraint on the Prosecutor.<sup>47</sup> However, others are not so sure. As former U.S. Ambassador at Large for War Crimes Issues, David Scheffer, stated:

[C]omplementarity is not a complete answer, to the extent that it involves compelling states (particularly those not yet party to the treaty) to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. Even if the United States has conducted an investigation, again as a nonparty to the treaty, the court could decide there was no genuine investigation by a 2-to-1 vote and then launch its own investigation of U.S. citizens, notwithstanding that the U.S. Government is not obligated to cooperate with the ICC because the United States has not ratified the treaty.<sup>48</sup>

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<sup>44</sup> Rome Statute, *supra* note 3, art. 15(3).

<sup>45</sup> ARBOUR ET. AL., *supra* note 34, at 11 ("[O]ne must recognize, from a comparative law point of view, that the Prosecutor is thus subjected to a very early pre-trial control- earlier than is usual in national procedures.").

<sup>46</sup> Gurulé, *supra* note 43, at 20.

<sup>47</sup> ARBOUR ET. AL., *supra* note 34, at 142-43.

<sup>48</sup> David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L. L. 12, 19 (1999).

Former Ambassador Scheffer's concern is based on RS Article 17(2)(c), which allows the Prosecutor to proceed with a case, even after the State has investigated the case, if the proceedings were not "being conducted independently or impartially."<sup>49</sup> RS Article 17(2) provides minimal statutory guidance for the Court to make this determination, though; the Court need only consider the "principles of due process recognized by international law."<sup>50</sup> As this gives the Court an undetermined amount of discretion, the complementarity system's reliability and fairness become questionable in practice.<sup>51</sup>

The general consensus surrounding the Rome Statute's textual limitations on the Prosecutor's discretion is that they provide non-compulsory guidance. Certainly, a theme throughout the Rome Statute is that the ICC is for the most "heinous" offenses.<sup>52</sup> As discussed above, this theme is woven through the preamble and some of the initial articles. Following Moreno-Ocampo's election as the ICC Prosecutor, a policy paper for the Office of the Prosecutor (OTP) recently emphasized this "heinous offense" theme. The policy paper discussed the Prosecutor's discretion:

Should the Office seek to bring charges against all alleged perpetrators? The Statute gives some guidance to answer this question. The Preamble reaffirms that "*the most serious crimes of concern to the international community as a whole must not go unpunished.*" It

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<sup>49</sup> Rome Statute, *supra* note 3, art. 17(2)(c).

<sup>50</sup> *Id.* art. 17(2).

<sup>51</sup> Gurulé, *supra* note 43, at 27-28.

Plainly speaking, if the Court disagrees with the outcome in the State proceedings, it has the final say on the matter. The Court may override the complementarity principle, and trump the State proceedings if it concludes that they were not conducted 'independently or impartially' because such proceedings were inconsistent with 'principles of due process recognized by international law.

*Id.*

<sup>52</sup> SCHABAS, *supra* note 3, at 21 ("The crimes over which the International Court has jurisdiction are 'international' not so much because international cooperation is needed for their repression...but because their heinous nature elevates them to a level where they are of 'concern' to the international community.").

continues that States Parties to the Statute are determined to establish a “permanent International Criminal Court in relationship to the United Nations system, with jurisdiction *over the most serious crimes of concern to the international criminal community as a whole.*” Article 17, dealing with admissibility, adds to the complementarity grounds one related to the gravity of a case. It states that the Court (which includes the Office of the Prosecutor) shall determine that a case is inadmissible where “*the case is not of sufficient gravity to justify further action by the Court.*” The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission. Furthermore, the Statute gives to the Prosecutor the power not to investigate or not to prosecute when such an investigation or prosecution would not serve the interests of justice.<sup>53</sup>

In addition to RS Article 17, RS Article 53 also invokes the concept that a case requires a sufficient “gravity.”<sup>54</sup> The emphasis on gravity reflects that the “framers intended the ICC to be a forum for trying major offenders, rather than pursuing perpetrators of isolated acts falling under the Court’s jurisdiction.”<sup>55</sup> However, two expert legal commentators who provided a paper to the Office of the Prosecutor as part of the OTP “expert consultation process” were critical of RS Article 53, stating that it “begs more questions than it answers” and that RS Article 53(1)(c) is primarily “characterized by its vagueness.”<sup>56</sup> To remedy this situation, they suggested the Prosecutor adopt criteria that

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<sup>53</sup> OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 6-7 (Sept. 2003), at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) (last visited Feb. 23, 2005) (emphasis added).

<sup>54</sup> Rome Statute, *supra* note 3, art. 53.

<sup>55</sup> RATNER & ABRAMS, *supra* note 16, at 213.

<sup>56</sup> AVRIL McDONALD & ROELOF HAVEMAN, PROSECUTORIAL DISCRETION—SOME THOUGHTS ON ‘OBJECTIFYING’ THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC 2 (Apr. 15, 2003), at [http://www.icc-cpi.int/library/organs/otp/mcdonald\\_haveman.pdf](http://www.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf) (last visited Feb. 23, 2005).



will aid in evaluating whether RS Article 53 has been satisfied.<sup>57</sup> Nonetheless, until OTP promulgates such criteria or guidelines, one cannot safely predict what cases will satisfy the gravity requirement. Instead, international observers must await the Prosecutor and Court's future practice to see if the requirement will develop into a meaningful concept.

In defining the war crimes that may be prosecuted in the ICC, the framers debated whether a definitional threshold should be placed on war crimes. A "built in threshold" effectively restricts the Prosecutor's discretion in the other two categories of crimes in the Rome Statute, genocide and crimes against humanity.<sup>58</sup> The RS Article 6 definition of genocide requires proof of intent to "destroy, in whole or in part, a national, ethnical or religious group," and the RS Article 7 definition of crimes against humanity requires proof of "a widespread or systematic attack directed against a civilian population."<sup>59</sup> Given the serious magnitude of these crimes, they clearly fall within the ICC's overall purpose, as reflected in the Preamble and RS Articles 1 and 5. Moreover, there is less concern with a Prosecutor pursuing frivolous investigations with these crimes, as it is inherently difficult to pursue genocide or crimes against humanity without some compelling evidence of horrendous acts.

In an attempt to treat war crimes in a similar manner, the U.S. delegation proposed that war crimes be limited to those war crimes perpetrated "as part of a plan or policy or as part of a large-scale commission of such crimes."<sup>60</sup> This would have ensured that only the most serious war crimes were prosecuted in the ICC. This also reflected a strong U.S. concern over a potential ICC prosecution involving unintended collateral damage stemming from U.S. military operations.<sup>61</sup>

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<sup>57</sup> *Id.* at 3.

<sup>58</sup> SCHABAS, *supra* note 3, at 24 ("Both genocide, by its very nature, and crimes against humanity, by the widespread or systematic application, have a quantitative dimension. They are not isolated crimes, and will in practice only be prosecuted when planned or committed on a large scale.").

<sup>59</sup> Rome Statute, *supra* note 3, arts. 6, 7.

<sup>60</sup> Barton S. Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 2, at 61, 69.

<sup>61</sup> *Id.*

The limitation originated with the U.S. government, which was concerned that if civilians inadvertently were killed in the

However, since a majority of delegates disapproved of any limitation on the war crimes definition, the participating states approved a compromise non-binding “in particular” threshold instead.<sup>62</sup> Consequently, RS Article 8(1) reads, “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>63</sup> Here, once again, the Rome Statute provides the Prosecutor direction, but it does not compel a specific result.<sup>64</sup> Some view this as a useful “technique to limit the jurisdiction of the Court;”<sup>65</sup> but others have derided the statutory language as the “so called threshold” or the “non-threshold threshold.”<sup>66</sup>

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course of a U.S. peacekeeping mission abroad, U.S. troops might be exposed to ICC jurisdiction. The original U.S. proposal would have strictly limited the ICC’s jurisdiction over war crimes to those that were part of a policy or that were committed on a large scale. As adopted in the form proposed by the Bureau, the Statute makes these crimes the focus while leaving the ICC with the flexibility to prosecute other war crimes in appropriate cases. This illustrates the struggle of the Conference, and of the Bureau, to balance the minimum jurisdictional requirements of an effective ICC with U.S. concern that such a court might investigate war crimes after every U.S. military mission.

*Id.*

<sup>62</sup> Gurulé, *supra* note 43, at 30 n.153.

<sup>63</sup> Rome Statute, *supra* note 3, art. 8(1).

<sup>64</sup> Arsanjani, *supra* note 42, at 32-33. “The inclusion of the words ‘in particular’ was intended to indicate the type of war crimes over which the court has jurisdiction. The language as drafted, however, does not exclude jurisdiction over a single war crime listed in the subsequent paragraphs of the article.” *Id.* at 33.

<sup>65</sup> SCHABAS, *supra* note 3, at 25. (“It should not be taken as any new restriction on the customary definition of war crimes but rather as a technique to limit the jurisdiction of the Court.”). See also Roy S. Lee, *Elements of Crimes and Rules of Procedure and Evidence*, in THE INTERNATIONAL CRIMINAL COURT 110 (Transnational Publishers, Inc. 2001) (“This provision underlines that the Court should exercise jurisdiction *in particular* in relation to systematic or large-scale occurrences of war crimes, since these are primarily the situations that are of concern to the international community. But, deliberately, the formulation does not exclude that the Court may exercise jurisdiction in relation to isolated war crimes.”); Theodor Meron, *Crimes under the Jurisdiction of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, ESSAYS IN HONOUR OF ADRIANN BOS 52 (Herman A.M. von Hebel et al. eds.,

Having reviewed the ICC Prosecutor's discretion, it becomes clear that the Rome Statute provides the Prosecutor more in the way of thematic guidance rather than absolute limitations. While the Statute manifests its intent to plainly focus its jurisdiction on the "most serious crimes of concern to the international community as a whole" in RS Article 5 and elsewhere, it also contains a long litany of war crime charges in RS Article 8.<sup>67</sup> As the RS Article 8 "threshold" does not rule out prosecution of war crimes that are not "committed as part of a plan or policy or as part of a large-scale commission of war crimes,"<sup>68</sup> the Prosecutor's discretion over war crimes poses a significant concern.

Former Ambassador Scheffer has stated that, "The central issue confronting the United States government with respect to the ICC is the risk that the Court may seek to investigate, obtain custody of, and ultimately prosecute a U.S. service member or U.S. Government official in connection with that individual's official duty."<sup>69</sup> How does the Prosecutor's discretion measure up to such a test? Can the Prosecutor pursue a criminal investigation based on U.S. military operations?

These questions are best analyzed through the prism of RS Article 8(2)(b)(iv). This ICC war crime charge imposes criminal responsibility for:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>70</sup>

A political or overzealous ICC Prosecutor could use this provision to launch a criminal investigation into U.S. military operations that result in "collateral damage," that is the "incidental loss of life or injury to

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1999). ("While it suggests a requirement of a threshold, the words 'in particular' make it clear that that threshold is not absolute.").

<sup>66</sup> Gurulé, *supra* note 43, at 30-31.

<sup>67</sup> See generally Rome Statute, *supra* note 3.

<sup>68</sup> *Id.* art. 8.

<sup>69</sup> David J. Scheffer, *Staying the Course With the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 87 (2002).

<sup>70</sup> Rome Statute, *supra* note 3, art. 8(2)(b)(iv).

civilians or damage to civilian objects.”<sup>71</sup> Accordingly, an analysis of the law supporting RS Article 8(2)(b)(iv) will help elucidate whether a Prosecutor would normally be justified in using this charge as a basis to investigate routine U.S. military operations.

### III. Collateral Damage

The term “collateral damage” cannot be found in either the Hague or Geneva Conventions. Its origins date back to the 1970s. The term emerged from the debate over a Pentagon proposal during the Carter administration to develop the neutron bomb. A misperception arose that the neutron bomb could kill humans but leave surrounding buildings and landscape intact, thus avoiding “collateral damage.”<sup>72</sup> Collateral damage has since gained currency as a short hand phrase to convey the notion of unintended “incidental loss of life or injury to civilians or damage to civilian objects.”<sup>73</sup> The phrase implicitly invokes two central concepts in the law of war: the principles of proportionality and the principle of distinction. While these principles have strong backgrounds in customary law,<sup>74</sup> perhaps the most effective way to

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<sup>71</sup> *Id.*

<sup>72</sup> Carl Cannon, *Collateral Damage, The Question Nagging at the World's Conscience is, What Cost Will Innocent Iraqis Bear?* NAT'L J., Mar. 15, 2003.

<sup>73</sup> See Rome Statute, *supra* note 3, art. 8(b)(iv). The same language is also found in Additional Protocol I of the Geneva Conventions, *infra* note 75.

<sup>74</sup> DOCUMENTS ON THE LAWS OF WAR 9 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

Perhaps the most fundamental customary principle is that the right of belligerents to adopt means of injuring the enemy is not unlimited. This notion, which clearly rests at the foundation of the laws of war, was incorporated in the 1874 Brussels Declaration and the 1880 Oxford Manual, and was formally codified in the 1899 and 1907 Hague Regulations, in Article 35(1) of the 1977 Geneva Protocol I, and in the preambles of both the 1980 Convention on certain conventional weapons and the 1997 Ottawa Convention on anti-personnel mines. Other fundamental customary principles are proportionality and discrimination, derived from the more basic principle that belligerent rights are not unlimited.

*Id.*

analyze them is through their codification in Additional Protocol I of the Geneva Conventions (AP I).<sup>75</sup>

Additional Protocol I (AP I) of the Geneva Conventions attempted to modernize the laws of war from the immediate post-World War II era perspective of the Geneva Conventions of 1949.<sup>76</sup> Part IV of AP I, "The Civilian Population," contains a series of articles designed to provide the civilian population greater protection by providing detailed targeting rules for military personnel.<sup>77</sup> AP I Article 48, "The Basic Rule," codifies the rule of distinction by providing, "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."<sup>78</sup> AP I Article 51 prohibits "indiscriminate attacks."<sup>79</sup> In particular, AP I Article 51(5)(b), a precursor to RS Article 8(2)(b)(iv), defines an indiscriminate attack as: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>80</sup> AP I Article 52(2) defines military objectives as: "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."<sup>81</sup> AP I Article 57 specifies precautions that must be made before an attack and it requires an attack to be "cancelled or suspended" if, among other things, the attack "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in

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<sup>75</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 74, at 422, 422-79.

<sup>76</sup> *Id.* at 419-20.

<sup>77</sup> AP I, *supra* note 75, pt. IV. *See also* DOCUMENTS ON THE LAWS OF WAR, *supra* note 74, at 419-20.

<sup>78</sup> AP I, *supra* note 75, art. 48.

<sup>79</sup> *Id.* art. 51.

<sup>80</sup> *Id.* art. 51(5)(b).

<sup>81</sup> *Id.* art. 52(2).

relation to the concrete and direct military advantage anticipated.”<sup>82</sup> (The criminal consequences of violating one of these articles will be discussed further below.)

Just as collateral damage is not mentioned in AP I, neither is the word “proportionality.” However, applying the articles requires a balancing test comparing the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” against the “concrete and direct military advantage anticipated.” If the collateral damage is “excessive in relation to the concrete and direct military advantage anticipated,” then the attack is prohibited. Conversely, if the “concrete and direct military advantage anticipated” outweighs the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,” then the attack, with its accompanying unintended collateral damage, is authorized. Thus, the proportionality principle recognizes that collateral damage is “legally accepted as it is unintended and perhaps unavoidable.”<sup>83</sup> As a practical

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<sup>82</sup> *Id.* art. 57.

<sup>83</sup> Ove Bring, *International Humanitarian Law After Kosovo: Is Lex Lata Sufficient?*, 78 INT’L L. STUD. 257, 262 (2002). See also *Discussion*, 78 INT’L L. STUD., 211, 215 (2002), where Yoram Dinstein explains:

The issue of collateral damage to civilians is tied in with that of proportionality. The phrase proportionality is often misunderstood. Protocol I does not mention proportionality at all. The only expression used there is “excessive.” The question is whether the injury to civilians or damage to civilian objects is excessive compared to the military advantage anticipated. Many people tend to confuse excessive with extensive. However, injury/damage to non-combatants can be exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance.

*See also* Bring, *supra*, at 262.

The principle of proportionality flows from the prohibition against indiscriminate attacks. In fact, Article 51(5)(b) prohibits an “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Although the term “proportionality” is not used, the text clearly conveys a proportionality message. The principle expressed here is arguably a codification of traditional customary law. In this context the concept of

matter, collateral damage can also occur in a variety of other situations: “in some cases because of human error, in some cases because of a mechanical error in a weapons system and in some cases, the situation on the battlefield is confused enough that people make mistakes.”<sup>84</sup>

From the very outset, the AP I codification of the proportionality principle has generated significant controversy and confusion. First, several states party to AP I made official reservations or understandings concerning the proportionality principle due to “fears that commanders might be subject to accusations of war crimes not based on an understanding of the fact that in war commanders have to take action on the basis of imperfect information.”<sup>85</sup> Italy, for example, made an understanding regarding AP I Articles 51 to 58, making it clear that “the military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.”<sup>86</sup> Italy has also understood the term “military advantage,” found in both AP I Articles 51 and 57, to mean that the military “advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”<sup>87</sup> Other states have adopted Italy’s understandings outright or submitted similar understandings.<sup>88</sup>

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“collateral damage” is always referred to, although that terminology is not used either in the Protocol. The language of Article 51 focuses on what may be called “incidental damage,” a certain amount of which is legally accepted as it is unintended and perhaps unavoidable in the circumstances at the time.

*Id.*

<sup>84</sup> U. S. Dep’t of Defense, News Transcript: Background Briefing on Targeting (Mar. 5, 2003), *at*

[http://www.defenselink.mil/transcripts/2003/t03052003\\_t305targ.html](http://www.defenselink.mil/transcripts/2003/t03052003_t305targ.html) (last visited Feb. 23, 2005) [hereinafter DoD Background Briefing on Targeting].

<sup>85</sup> DOCUMENTS ON THE LAWS OF WAR, *supra* note 74, at 420. In fact, Protocol I “has been the subject of more declarations and reservations than any other agreement on the laws of war.” *Id.*

<sup>86</sup> *Id.* at 507.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 499-512 for a complete listing of all AP I reservations and understandings.

Second, the question whether the proportionality test is customary international law is also controversial.<sup>89</sup> While some question whether the proportionality principle as codified in AP I represents customary international law,<sup>90</sup> others view it as customary, but note that there is a lack of consensus as to what the rules actually mean.<sup>91</sup> Along this line, one analysis is that while the core provisions of the rules are customary, many of the newer AP I additions may not be.<sup>92</sup>

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<sup>89</sup> Judith Gail Gardam, *Proportionality and Force in International Law*, AM. J. INT'L L. 391 (1993). "The extent to which the of Article 51, paragraph 5(b) and Article 57, paragraph 2(a)(iii) and (b) of Protocol I represent the customary position is controversial." *Id.* at 408.

<sup>90</sup> W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 173 (1990). See also Major Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143 (2001) regarding Article 52 and customary international law.

<sup>91</sup> Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148-50 (1999). "Although certain countries, most notably the United States, have failed to ratify the Protocol, they generally concur that its core provisions on discrimination express customary principles of international law." *Id.* at 148. "Thus, while there is general agreement that the Protocol accurately states customary law principles, notable disagreement persists over exactly what those standards are." *Id.* at 150. Additionally, in footnote 24, Schmitt cites "unofficial, but probative statements" of U.S. State Department attorneys to support his contention that the U.S. views the principles generally as customary international law. *Id.* at 148. Regarding the lack of agreement on what AP I means, see also Parks, *supra* note 90, at 174 ("Following more than a decade of research and meetings of international military legal experts who are anxious to implement the language contained in Protocol I to the extent it advances the law of war and the protection of the civilian population, there remains a substantial lack of agreement as to the meaning of the provisions in Protocol I relating to proportionality.").

<sup>92</sup> See Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INT'L L. STUD. 337, 347 (2002). He writes:

While most of Protocol I can undoubtedly be regarded as essentially reflecting customary international law, there are areas where this conclusion is subject to debate for two reasons. First, Protocol I clearly sets forth some new rules. Secondly, the specificity of Protocol I's provisions add new elements to principles that, while well established in customary law, leave margins of discretion . . . if they are given certain interpretations. The scope and impact of these additions is therefore controversial and may be the basis for the hesitations of some States to ratify Protocol I.



A third source of controversy concerning proportionality in AP I is the inherent subjectivity of the balancing test. A Commentary on AP I acknowledged this issue:

The rule of proportionality clearly requires that those who plan or decide upon attack must take into account the effects of the attack on the civilian population in their pre-attack estimate. They must determine whether those effects are excessive in relation to the concrete and direct military advantage anticipated. Obviously the decision will have to be based on a balancing of: (1) the foreseeable extent of incidental or collateral civilian casualties or damage, and (2) the relative importance of the military objective as a target. As both sides of the equation are variables, and as they involve a balancing of different values which are difficult to compare the judgment must be subjective. In the final analysis, however, most decisions on the major political, economic, and social affairs of societies as well as major military decisions rest on the subjective judgment of decision makers based on the weighing of factors which cannot be quantified. The best that can be expected of the decision maker is that he acts honestly and competently. This action must be judged on the basis of facts and circumstances available to him at the time, not on the basis of hindsight. Despite the impossibility of quantifying the factors of the equation, a plain and manifest breach of the rule will be recognizable.<sup>93</sup>

One criticism regarding the subjective nature of the balancing test is that it calls for the balancing of two disparate interests: military objectives and protecting civilians.<sup>94</sup> It is exceedingly challenging to

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*Id.*

<sup>93</sup> MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 310 (1982).

<sup>94</sup> Gardam, *supra* note 89, at 409 ("The key to the dilemma is the subjective nature of assessing proportionality. It requires balancing between two opposing goals: the swift achievement of the military goal with the minimum losses of

assess these interests, balance one against the other, and make a determination that the civilian damage is “excessive” in relation to the military advantage.<sup>95</sup> Therefore, given the subjective nature of the test, parties can reach contrasting conclusions as to how the balance should be struck in particular circumstances.<sup>96</sup>

A fourth criticism of the proportionality test is its vagueness on how to determine a breach. When applied in a criminal law setting, the proportionality test in AP I’s vagueness becomes a clear problem. Recall the last sentence in the Commentary extract above, “Despite the impossibility of quantifying the factors of the equation, a plain and manifest breach of the rule will be recognizable.”<sup>97</sup> This seemingly invokes an “I know it when I see it”<sup>98</sup> standard for discerning violations of the balancing test. Such an approach does not provide advance notice to military personnel on precisely when one’s conduct in a military operation will cross into the realm of prohibited criminal misconduct, especially in situations where applying the balancing test does not yield a clear and easy answer.<sup>99</sup> In this regard, some have questioned whether

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one’s own combatants and the protection of the other party’s civilian population.”).

<sup>95</sup> Julian J.E. Schutte, *The System of Repression of Breaches of Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 177, 191 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991). (“It is virtually impossible to tell *in abstracto* under what circumstances losses are excessive or disproportionate.”). See also Schmitt, *supra* note 91, at 150-51. In describing how difficult it is to assess and balance civilian damage in relation to military advantage, Schmitt states:

When performing proportionality calculations, the actor must not only struggle with issues of inclusiveness (what are the concrete and direct consequences?), but he must also conduct a difficult jurisprudential balancing test. Optimally, balancing tests compare like values. However, proportionality calculations are heterogeneous, because dissimilar value genres—military and humanitarian—are being weighed against each other. How, for example, does one objectively calculate the relative weight of an aircraft, tank, ship, or vantage point in terms of human casualties?

*Id.*

<sup>96</sup> Schmitt, *supra* note 91, at 157.

<sup>97</sup> Bothe et. al., *supra* note 93, at 310.

<sup>98</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

<sup>99</sup> Schmitt, *supra* note 91, at 170.

the test would satisfy the U.S. constitutional test prohibiting criminal statutes that are "void for vagueness."<sup>100</sup>

Yet despite all of the criticism surrounding the proportionality principles, they do provide an analytical framework for military commanders and planners. Using the balancing test and applying the precautionary principles, commanders and planners are required to factor the potential for civilian casualties into the equation before acting. This process ensures that commanders and planners will not engage in what could be viewed as intentional attacks on protected civilians.<sup>101</sup> In this

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The inherent complexity of the principle of discrimination should by now be apparent. At the most basic level, targeting civilians and civilian objects is prohibited. Additionally, there are certain situations in which all reasonable actors would agree on the proportionality balance. No one would suggest, for example, that capturing a single low-ranking soldier would justify the death of hundreds of civilians. Similarly, the military advantage of destroying a command and control center would seldom be outweighed by damage to an uninhabited building. The complexity emerges when one moves from these extremes along the proportionality continuum toward the center. It is here that dissimilar valuation paradigms clash.

*Id.*

<sup>100</sup> Parks, *supra* note 90, at 173. Bolton also addresses the void for vagueness issue as applied to the RS version of the AP I proportionality principles:

It is precisely this risk that has led our Supreme Court to invalidate State and Federal criminal statutes that fail to give adequate notice of exactly what they prohibit under the 'void for vagueness' doctrine. Unfortunately, 'void for vagueness' is a largely American shield for civil liberties... How will these vague phrases be interpreted? Who will advise a President that he is unequivocally safe from the retroactive imposition of criminal liability if he guesses wrong?

Bolton, *supra* note 4, at 190.

<sup>101</sup> Parks, *supra* note 90, at 174. Parks points out how as a result of the proportionality test, military planners will evaluate whether their attacks constitute intentional attacks on civilians:

Proportionality does not establish a separate standard, but serves as a means for determining whether a nation or military commander responsible for planning, deciding upon, or executing a military operation has engaged in the intentional attack of civilians not engaged in the hostilities. . . .

sense, the proportionality principle has been clearly regarded as a part of the customary practice of states. For example, the United States viewed the principle as “a codification of the customary practice of nations” during the Gulf War and applied the proportionality test to the planning and conducting of its own military operations.<sup>102</sup> More recently, William H. Taft, the Legal Advisor to the Secretary of State, stated that since 9/11, U.S. military forces have “assiduously adhered to the traditional rules associated with the use of military force, laid out in the Hague Regulations of 1907 and in customary international law” such as “elements of the Additional Protocols of 1977, including Articles 48 to 52 and Article 57.”<sup>103</sup> Moreover, the proportionality principle can be found in U.S. military manuals and regulations as a standard that must be followed.<sup>104</sup> In some cases, the language used is substantially similar, if not identical, to the language from AP I. For example, Army Field Manual 27-10, the Law of Land Warfare, provides that:

(L)oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore,

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Proportionality as used in this context constitutes acknowledgment of the inevitability of incidental or collateral damage and injury in war.

*Id.*

<sup>102</sup> U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991, app. O, at 611 (Apr., 1992). “Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological sites, to civilian objects.” *Id.* at 611-12.

<sup>103</sup> William H. Taft, IV, *Current Pressures on International Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003).

<sup>104</sup> THEODOR MERON, WAR CRIMES LAW COMES OF AGE 179 (1998) (referring to language in the U.S. Air Force and U.S. Navy Commander Handbooks). In addition, the 2002 *U.S. Army Operational Law Handbook* refers to the incorporation of the proportionality principles into the *Army Field Manual* and states that the United States considers the proportionality principles of AP I as customary international law. U.S. ARMY, OPERATIONAL LAW HANDBOOK (2002).

must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places...but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.<sup>105</sup>

Similarly, Joint Publication 3-60, Joint Doctrine for Targeting, defines collateral damage as: "Unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack."<sup>106</sup>

However, a critical distinction must be made between using the proportionality principles to guide military operations and the criminal consequences stemming from a violation of the proportionality principles. In this regard, an analysis of Article 85 of AP I, "Repression of breaches of the Protocols," reveals that only "willful" violations of AP I Article 57(2)(a)(iii) must be treated in the same manner as a grave breach of the Geneva Conventions.<sup>107</sup> Other violations of AP I do not constitute grave breaches of the Geneva Conventions unless they meet the specific requirements of AP I Article 85.<sup>108</sup> As a result, Article 85 significantly affects a state's responsibility to address violations.

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<sup>105</sup> DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1976), *available at* <http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/CHANGE1.htm> (last visited Feb. 25, 2005) (documenting the above quoted change to paragraph 41).

<sup>106</sup> JOINT STAFF, JOINT PUBLICATION 3-60: JOINT DOCTRINE FOR TARGETING, at p. GL-5 (2002), *available at* [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_60.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf) (last visited Feb. 23, 2005). *See also* DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 1-5 (1976), *cited in* MATTHEW C. WAXMAN, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS (2000), *available at* <http://www.rand.org/publications/MR/MR1175/> (last visited Feb. 23, 2005) (adopting Article 57 from AP I in an almost verbatim manner).

<sup>107</sup> AP I, *supra* note 75, art. 85.

<sup>108</sup> *Id.* Article 85(1), entitled "Repression of Breaches of this Protocol," states, "The provisions of the Conventions relating to the repression of breaches and

AP I Article 85(3)(b) effectively makes a “willful” violation of AP I Article 51(5)(b) a “grave breach” of AP I.<sup>109</sup> While AP I Article 85 refers to the AP I Article 57 definition of an indiscriminate attack, the definition in AP I Article 85 essentially incorporates AP I Article 51(5)(b) with the addition of the willful requirement and the knowledge element discussed below. Also, the same exact language that AP I Article 85(3)(b) adopts from AP I Article 57 is found in AP I Article 51.<sup>110</sup> Since AP I Article 85(1) applies the Geneva Convention “grave breach” provisions to “grave breaches” of AP I, a willful violation of AP I Article 51(5)(b) has the same effective status of a grave breach of the Geneva Convention. Accordingly, the same requirements set forth in Article 146 of the 1949 Geneva Convention IV, for example, would apply.<sup>111</sup> The Geneva Convention thus requires the Contracting Party to

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grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.”

<sup>109</sup> *Id.* Article 85(3)(b) of AP I states:

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of the Protocol, and causing death or serious death or serious injury to body or health: (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilian objects, as defined in Article 57, paragraph 2(a) (iii).

<sup>110</sup> *Id.* art. 51.

<sup>111</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 146, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 74, at 299, 352. Article 146 states:

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,

prosecute or extradite willful violations of AP I Article 51(5)(b). Because of this prosecute or extradite requirement, grave breaches are considered to possess universal jurisdiction.<sup>112</sup>

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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.

<sup>112</sup> M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 115-18 (2001).

With respect to the four Geneva Conventions of 1949, the "grave breaches" are contained in Articles 50, 51, 130, and 147, respectively. With respect to Protocol I, "grave breaches" are contained in Article 85. There are, however, no provisions in these Conventions that specifically refer to universal jurisdiction. One can assume that the penal duty to enforce includes implicitly the right of the State Parties to exercise universal jurisdiction under their national laws.

*Id.* at 116 (citations omitted). Professor Bassiouni further writes:

While no convention dealing with the law of armed conflict contains a specific provision on universal jurisdiction, it is nevertheless valid to assume that the 1949 Geneva Conventions and Protocol I provide a sufficient basis for states to apply universality of jurisdiction to prevent and repress the "grave breaches" of the Conventions. But none of the other conventions dealing with the law of armed conflict contain a provision on universal jurisdiction.

Customary international law as reflected in the practice of states does not, so far, in the judgment of this writer, warrant the conclusion that universal jurisdiction has been applied in national prosecutions. There are a few cases in the practice of states that are relied upon by some scholars to assert the opposite, but such cases are so few and far between that it would be incorrect to conclude that they constitute practice. Nevertheless, it can be argued that customary international law can exist irrespective of state practice if there is strong evidence of *opinio juris*, which is the case with respect to war crimes.

The recognition of universal jurisdiction for war crimes is essentially driven by academics' and experts' writings, which extend the universal reach of war crimes to the

To constitute a grave breach of AP I under AP I Article 85(3), a violation of the proportionality principles must, as stated, be “committed willfully” and, if it is an “indiscriminate attack,” the attack must also be committed with the “*knowledge* that such attack *will cause* excessive loss of life, injury, to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)”<sup>113</sup> (emphasis added). This language contrasts with AP I Articles 51(5)(b) and 57(2)(b) which define indiscriminate attacks as attacks that “*may* be expected to cause” excessive or incidental losses.<sup>114</sup> (Emphasis added.) Consequently, with the additional intent and knowledge requirements, a grave breach of AP I for violating the proportionality principles is practically the same as an intentional attack on the protected civilian population.<sup>115</sup>

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universality of jurisdiction over such crimes. The 1949 Geneva Conventions require state parties to “respect and ensure respect,” while the “grave breaches” provisions of the Conventions and Protocol I require enforcement. This has been interpreted by some not only as giving parties the right to adopt national legislation without universal jurisdiction, but also as creating an obligation to do so.

*Id.* at 117-18 (citations omitted).

<sup>113</sup> AP I, *supra* note 75, art. 85(3).

<sup>114</sup> *Id.* arts. 51(5)(b), 57(2)(b). In comparing a breach of the proportionality principles with a grave breach

[t]here exists, however, one difference. The attack is already illegitimate if it *may be expected* to cause such losses. A high degree of precaution is required. A grave breach on the other hand presupposes more: the knowledge (not only the presumption) that such attack *will cause* excessive losses in kind. In this respect, subpara[graphs] (b) and also (c) (of Article 85(3)) require a higher degree of intention than Art. 57.

See BOTHE ET AL., *supra* note 93, at 516.

<sup>115</sup> Parks, *supra* note 90, at 173.

This leads one to conclude that the concept of proportionality (as it is codified in Protocol I) is not violated unless acts have occurred that are tantamount to the direct attack of the civilian population, a violation of articles 48 and 51(2), or involve wanton negligence that is tantamount to an intentional attack of the civilian population.

*Id.*



The distinction between a grave breach of AP I Article 85 and a non-grave breach of AP I Articles 51 or 57 is significant. On one hand, as noted above, a grave breach is considered an offense of universal jurisdiction that imposes a duty for a state to prosecute or extradite an offender. Conversely, while AP I Article 86(1) requires state parties to “take measures necessary to suppress” non-grave breaches, it “leaves the method for preventing such breaches to the discretion of the parties who may use administrative or disciplinary sanctions as well as penal sanctions.”<sup>116</sup>

The difference between a grave breach and a non-grave breach of AP I may help explain why states that have not ratified AP I, such as the U.S., have generally viewed the proportionality principle as customary international law despite the difficulties in applying the balancing test. Specifically, because states possess the discretion to resolve non-grave breach violations, and they may choose to use a non-criminal method in doing so, they may be less concerned about potential criminal liability for their military personnel for questionable or uncertain violations of the proportionality principles. For example, if a case appears to potentially violate AP I Article 51 or AP I Article 57, but does not rise to the level of an AP I Article 85(3) violation, the state controls the outcome and retains full flexibility. If the violation is debatable, a state can use an administrative approach to resolve the situation (by conducting an investigation, for example).<sup>117</sup> In other

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<sup>116</sup> AP I, *supra* note 75, art. 86(1) (“The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.”). Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in NATIONAL SECURITY LAW 359, 378 (John Norton Moore et al. eds., 1990). See also Schutte, *supra* note 95, at 178 (“Apart from this, each Contracting Party is under the obligation to take the necessary measures for the suppression of all breaches other than grave breaches. Such suppression, however, need not exclusively be effected through the application of criminal law.”).

<sup>117</sup> See Press Release, United States Central Command, Palestine Hotel Investigation Concludes (Aug. 12, 2003), available at [http://www.centcom.mil/CENTCOMNews/News\\_Release.asp?NewsRelease=20030829.txt](http://www.centcom.mil/CENTCOMNews/News_Release.asp?NewsRelease=20030829.txt) (last visited Feb. 23, 2005). The release discusses an incident in Iraq where civilian journalists were unintentionally killed during combat in Baghdad. Below is an excerpt from the press release:

Conclusions: A Company was under heavy enemy attack. The company had positive intelligence that they were

words, because a state does not have to worry about any obligation to extradite or prosecute in a non-grave breach setting, there is less apprehension that another state will second guess the state's military actions and seek extradition.

This is relevant to the present discussion because the Rome Statute effectively adopts the grave breach version of AP I Article 85(3). RS Article 8(2)(b)(iv) prohibits indiscriminate attacks that are launched "intentionally" with the "knowledge that such attack will cause incidental loss of life or injury."<sup>118</sup> The Rome Statute drafters specifically did not include the AP I grave breach offense in a section with the other grave breaches adopted from the Geneva Conventions contained in RS Article 8(a), in part due to the "ongoing uncertainty" of AP I.<sup>119</sup> In addition, the Rome Statute drafters added the word "clearly" to modify "excessive" and the word "overall" to modify "military advantage" so the Article makes it plain that civilian losses must be "clearly excessive in relation to the concrete and direct overall military advantage anticipated." The addition of the word "clearly" reflects a

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under direct observation from an enemy/hunter killer team. The activities on the balcony of the Palestine Hotel were consistent with that of an enemy combatant. They fired a single round in self-defense in full accordance with the Rules of Engagement. The enemy had repeatedly chosen to conduct its combat activities from throughout the civilian areas of Baghdad.

These actions included utilizing the Palestine Hotel and the areas immediately around it as a platform for military operations. Baghdad was a high intensity combat area and some journalists had elected to remain there despite repeated warnings of the extreme danger of doing so. The journalists' death at the Palestine Hotel was a tragedy and the United States has the deepest sympathies for the families of those who were killed.

<sup>118</sup> Rome Statute, *supra* note 3, art. 8(2)(b)(iv).

<sup>119</sup> SCHABAS, *supra* note 3, at 50. ("Unlike the four Conventions which have enjoyed near-universal ratification, Protocol Additional I still enjoys far less unanimity, and its reflection in Article 8 of the Rome Statute testifies to the ongoing uncertainty with respect to its definitions of 'grave breaches.'"). See also KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 139 (2001) ("The reason why Article 8(2)(1) of the ICC Statute is confined to the grave breaches of the 1949 Geneva Conventions only is because AP I has not enjoyed the same universal acceptance as the four Geneva Conventions.").

concern over too easily criminalizing military judgment calls while the word “overall” is consistent with the numerous reservations state parties made to AP I.<sup>120</sup> The elements of the RS Article 8(2)(b)(iv) show how these changes are incorporated:

Article 8(2)(b)(iv) War crime of excessive incidental death, injury, or damage. Elements: (1) The perpetrator launched an attack. (2) The attack was such that it would cause incidental death or injury to civilians or damage to the natural environment and that such death, injury or damage would be of such an extent as to be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated. (3) The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage would be of such an extent as to be *clearly* excessive in relation to the concrete and direct *overall* military advantage

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<sup>120</sup> Didier Pfürter, *Article 8(2)(b)(iv)—Excessive Incidental Death, Injury, or Damage*, in THE INTERNATIONAL CRIMINAL COURT, *supra* note 65, at 147, 148.

These additions resulting from lengthy negotiations prior to the Rome Conference were deemed to be appropriate in view of the fact that the Statute does not merely deal with outlawing certain military conduct, but with the criminalization of individual behavior, which in this case will always be a matter of appreciation under often strenuous circumstances. The term ‘clearly’ is designed to underline that a value judgment within a reasonable margin of appreciation should not be criminalized nor second guessed by the Court from hindsight. The term ‘overall’ was designed to reflect the interpretation given to article 51 of Additional Protocol I in some commentaries as well as by parties to it through interpretative statements.

*Id.* See also Meron, *supra* note 65, at 52, who writes:

[RS Article 8(2)(b)(iv)] requires, for the criminalization of an attack launched in the knowledge that such attack will cause an excessive damage to civilians or to the natural environment, that the attack be “*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.” The words which I italicize indicate departure from Protocol I language and constitute a certain clarification of the Protocol’s principle of proportionality, rather in line with reservations made by several NATO powers.

anticipated. (4) The conduct took place in the context of and was associated with an international armed conflict. (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict. (Emphasis added.)<sup>121</sup>

Additionally, two footnotes were added to the elements to provide further guidance. “Concrete and direct overall military advantage” is defined as the “military advantage that is foreseeable by the perpetrator at the relevant time.”<sup>122</sup> The other footnote clarifies that in proving the knowledge requirement “the requisite information available to the perpetrator at the time” must be considered.<sup>123</sup>

What effect will the adoption of the grave breach version of the proportionality principle coupled with the Rome Statute additions have on RS Article 8(2)(b)(iv)? Will the heightened knowledge and intent requirements dissuade an ICC Prosecutor from pursuing all but the most egregious cases? Before turning to two case studies that serve as a framework to see how these issues have been dealt with previously, let us now review the rise of human rights NGOs and their role in pursuing claims of war crimes in collateral damage cases.

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<sup>121</sup> See Pffirter, *supra* note 120 at 147-48 (citations omitted).

<sup>122</sup> *Id.* at 148 n.36. The footnote provides:

The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

<sup>123</sup> *Id.* at 148 n.37 (“As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgment as described therein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.”).

#### IV. Non-governmental Organizations (NGOs)

NGOs have existed, in some form, for ages. Commentators cite the Catholic Church, labor unions,<sup>124</sup> and the International Committee of the Red Cross as early examples of NGOs.<sup>125</sup> Recently, though, international human rights NGOs have played extremely influential roles in the development and enactment of treaties such as the Ottawa Convention banning Landmines and the Rome Statute. One commentator has called this trend the “new diplomacy.”<sup>126</sup> While some question the NGOs source of legitimacy in this process,<sup>127</sup> the growing power of NGOs in the law of war arena cannot be denied. Moreover, a “wide chasm” between NGOs and the U.S. military has emerged over their respective understandings of the legal obligations regarding collateral damage.<sup>128</sup> Accordingly, this section traces the growth of NGO influence, and the general NGO attitude towards collateral damage standards, to provide the necessary background before analyzing the NGO role in the Kosovo and Iraq military operations.

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<sup>124</sup> Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 25 (1997).

<sup>125</sup> Betina Kuzmarov, *An Uneasy Synergy: The Relationship Between Non-Governmental Organizations and the Criminal Court*, 11 WINDSOR R. OF LEGAL & SOC. ISSUES 7, 22-23 (2001) Non-governmental organizations (NGOs) are

[p]rivate organizations (Associations, Federations, Institutes, Groups) not established by a government or by international agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy individual voting rights. The members of an NGO may be individuals (private citizens) or bodies corporate. Where the organization or membership activity is limited to a specific State, one speaks of a national NGO and where they go beyond an international NGO.

*Id.* at 21-22.

<sup>126</sup> David Davenport, *The New Diplomacy*, POL'Y REV., Dec. 2002, available at <http://www.policyreview.org/dec02/davenport.html> (last visited Feb. 23, 2005).

<sup>127</sup> *Id.* See also Anderson, *infra* note 137 at 112.

<sup>128</sup> See CARR CENTER FOR HUM. RTS. POL'Y, UNDERSTANDING COLLATERAL DAMAGE WORKSHOP 9-12, 23 (June 4-5, 2002), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/WebJuneReport.pdf> (last visited Feb. 23, 2005) [hereinafter WORKSHOP: UNDERSTANDING COLLATERAL DAMAGE].

NGOs have recently emerged as significant participants in the international arena.<sup>129</sup> Instead of focusing exclusively on lobbying domestic governments, NGOs now increasingly seek to wield their influence and power in an international setting.<sup>130</sup> Particularly in the field of human rights and the law of war, NGOs have become more and more important. Over time, NGOs such as Amnesty International (AI) and Human Rights Watch (HRW) have moved from concentrating purely on human rights issues to greater involvement in the law of war.<sup>131</sup> For

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<sup>129</sup> Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169, 187 (2003).

<sup>130</sup> See Spiro, *supra* note 124, at 25.

<sup>131</sup> Rabkin, *supra* note 129, at 186-87.

New advocacy groups like Amnesty International and Human Rights Watch gradually shifted their focus from peacetime safeguards of human rights to the emerging new law of armed conflict. It was, in many ways, an entirely logical progression for such groups. Amnesty International started in London in the 1960s with a narrow focus on denouncing torture, and played a prominent role in the 1970s in mobilizing support for (and by some accounts, even helping to draft specific provisions of) the UN Convention against Torture. It was a short step to advocacy on behalf of restraints in armed conflict, since some of the worst perpetrators of torture were governments engaged in conflicts with guerilla insurgencies.

The New York-based Human Rights Watch, which started in the 1970s as a monitor of human rights abuses in Eastern Europe, expanded in the 1980s to monitor abuses in Latin America and Asia. It found that some of the worst human rights abuses were committed in these latter regions by governments struggling against guerilla insurgencies (most notably in Central America). Since the human rights conventions included special exceptions for threats to public order, Protocol I seemed to be a very valuable instrument for bridging the gap. International humanitarian law was accordingly taken up with enthusiasm by America's Watch in the 1980s as a tool for criticizing the regimes in El Salvador and Guatemala.

Debate over Protocol I, particularly in the United States, helped to draw a new generation of academic specialists to the study of international humanitarian law. What had once been a very narrow, technical specialty of

example, NGOs played a vital role in the creation of both the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction (Ottawa Convention),<sup>132</sup> and the Rome Statute.

NGO participation in the Ottawa Convention and the Rome Statute reflects what one commentator describes as “the new diplomacy.”<sup>133</sup> Traditionally, treaties involving the law of war or arms control have been characterized by a slow, thorough, and deliberate negotiating process designed to achieve a consensus among a large number of states.<sup>134</sup> In contrast, the Ottawa Convention represented a dramatic departure from the traditional paradigm. In the 1990s, state parties of the United Nations Convention on Certain Conventional Weapons, through the established treaty making process, attempted to develop an international treaty placing limits and restrictions on the utilization of antipersonnel landmines.<sup>135</sup> However, international NGOs did not approve of the negotiations’ meticulous pace, nor of the goal of merely restricting the use of landmines (as opposed to the absolute ban that NGOs favored).<sup>136</sup>

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military lawyers emerged in the 1980s as a broader and more intriguing field for international law scholars, many of whom were themselves engaged in public advocacy. The traditional sense that the Geneva Conventions represented a special understanding among professional militaries was increasingly eroded, as humanitarian law came to be seen as no more than a special branch of general human rights law.

*Id.* (citations omitted). Further information about these NGOs, Amnesty International (AI) and Human Rights Watch (HRW), is available on their respective websites, <http://www.amnesty.org/> and <http://www.hrw.org/>.

<sup>132</sup> See The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Ant-Personnel Mines and on Their Destruction, September, 18, 1997, 36 I.L.M. 1507 (entered into force March 1, 1999) [hereinafter The Ottawa Convention].

<sup>133</sup> Davenport, *supra* note 126.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* See also P.J. Simmons, *Learning to Live with NGOs*, FOREIGN POL’Y, Fall 1998, at 82, 90. (“Steeped in a culture that encourages adversarial attitudes to the powers that be, many NGOs seem best suited to confrontation, a characteristic that some U.S. policymakers seized on in noting that the NGO

Accordingly, international NGOs took the lead in pressuring states to adopt a treaty banning the use of land mines. Several NGOs formed an umbrella NGO, the International Campaign to Ban Landmines, which grew to include over 1200 NGOs from all over the world.<sup>137</sup> These NGOs exerted tremendous pressure upon “like-minded” states to agree upon an absolute ban on land mines.<sup>138</sup> A combination of NGO pressure and co-operation with these like-minded states facilitated

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coalition against landmines might have won U.S. support (and hence a stronger treaty) if it had been more patient and willing to compromise.”)

<sup>137</sup> Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J.INT’L L. 91, 104-05 (2000).

[T]he international campaign to ban landmines began entirely—one hesitates to use so strong a word, but in this case it is applicable—as an effort of international NGOs. The initial steps began with the International Committee of the Red Cross (ICRC); its surgeon staff particularly, alarmed at the sharp increase during the 1980s in the number of landmine victim limb amputations, persuaded the ICRC to raise the issue in its diplomatic, legal and public awareness efforts. The ICRC would be the first to admit that its nascent campaign had comparatively minimal visibility until a coalition of international NGOs with concerns about landmines arising from very different standpoints, came together to initiate what later became known as the International Campaign to Ban Landmines (ICBL).

*Id.* (citations omitted).

<sup>138</sup> *Id.* at 107. Professor Anderson writes:

[T]he treaty process represented a new approach to international lawmaking because – largely in response to NGO pressures – once a core of influential governments had endorsed the ban treaty, the negotiating principle was not the usual method of arms control treaty negotiation on the principle of obtaining consensus on each point along the way, no matter how much the treaty had to be watered down or how long it took. Instead, again on account of international NGO pressures, sympathetic governments adopted a new principle of negotiating a treaty among ‘like-minded’ states – in effect, accepting the comprehensiveness of the international NGO position and its refusal to compromise the essentials of the landmines ban.

*Id.* (citation omitted).



creating a treaty that was hastened by the adopting of an artificial deadline.<sup>139</sup> NGOs experienced unprecedented negotiating influence throughout the process as they were actively involved in every aspect of the negotiations.<sup>140</sup> Numerous states even selected international NGO personnel to serve as part of their official convention delegations.<sup>141</sup> The NGO efforts were successful, as the Ottawa Convention entered into force in March 1999.<sup>142</sup> Given the clear-cut success of the Ottawa

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<sup>139</sup> Davenport, *supra* note 126. Canada was one of the primary “like-minded” states, and its foreign minister, Lloyd Axworthy, declared there would be a treaty within 15 months from a preliminary conference.

A core group of states and NGOs highly committed to a specific outcome in a compressed time frame was also a major factor in the success of the new diplomacy. Such a process may seem obvious to a corporate executive or a labor union official, but it is not the way international agreements are generally developed. Since international law is created when individual states cede some of their rights to the whole, those negotiations historically aim for unanimity, or at least a broad consensus. To the NGOs passionately committed to their agenda, however, such a process seemed destined to accept the lowest common denominator. The vision of these treaty proponents was quite different, reflected by the requirement of a two-thirds majority vote, not a consensus. They were prepared to accept less national participation, if necessary, in order to keep the central content of their proposals intact. Their refrain was to press for “a treaty worth having.”

*Id.*

<sup>140</sup> *Id.*

Once relegated to the hallways of official proceedings, the NGOs at the meeting called in Ottawa were front and center, advancing the agenda, drafting proposals, and pressuring the delegates. In a survey of delegates following enactment of the treaty, NGO pressure was cited as the No. 1 factor in states’ decisions to support the ban of land mines.

*Id.*

<sup>141</sup> Anderson, *supra* note 137, at 112.

<sup>142</sup> HUMAN RIGHTS WATCH, LANDMINE MONITOR REPORT: TOWARD A MINE-FREE WORLD (1999), at <http://www.icbl.org/lm/1999/english/exec/> (last visited Feb. 23, 2005). The report notes that

[s]eventy-one nations have ratified the Mine Ban Treaty as of 31 March 1999—more than half the signatories. Article 17 provides that the treaty shall enter into force on the first day of the sixth month after the 40<sup>th</sup> instrument of ratification has

Convention from the NGO perspective, international NGOs sought to replicate the success in other areas.<sup>143</sup> Kenneth Roth, the executive director of Human Rights Watch, viewed the Ottawa Convention as the prototype for future campaigns: “The landmines campaign...can be seen as a model of what is to come...already the focus has shifted forward, with NGOs looking to build similar partnerships with small and medium-sized governments on other causes.”<sup>144</sup>

In many ways, the ICC negotiation process closely resembled that of the Ottawa Convention. In particular, NGOs wielded enormous influence and were instrumental in the Rome Statute’s creation.<sup>145</sup> An

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been officially deposited. Burkina Faso became number forty on 16 September 1998, triggering an entry into force date of 1 March 1999. This is believed to be the fastest entry into force of any major treaty ever.

For more information on the Ottawa Convention, see The International Campaign to Ban Landmines website, at <http://www.icbl.org/>.

<sup>143</sup> Thomas Carothers, *Civil Society*, FOREIGN POL’Y, Winter 1999-2000, at 18, 27. Carothers writes:

The recent success of the International Campaign to Ban Landmines, in which a coalition of NGOs (together with some governments, in particular Canada’s) took on the United States and other powerful states, sparked tremendous interest in the idea of transnational civil society. Activists, scholars, journalists, and others began talking up the phenomenon of advocacy across borders. Global civil society appears a natural extension of the trend toward greater civil society within country. At last count, more than 5,000 transnational NGOs – NGOs based in one country that regularly carry out activities in others – had been identified.

The phenomenon is significant. A confluence of factors—the lowering of political barriers after the end of the cold war, new information and communications technologies, lowered transportation costs, and the spread of democracy—has created a fertile ground for nongovernmental groups to widen their reach and form multicountry links, networks, and coalitions.

*Id.*

<sup>144</sup> Anderson, *supra* note 137, at 110 (quoting Roth, *New Minefields for NGOs: After the War on Landmines, These Organizations Started New Campaigns*, NATION, Apr. 13, 1998, at 22).

<sup>145</sup> Abram Chayes & Ann-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in THE UNITED STATES AND THE INTERNATIONAL

umbrella NGO group, the Coalition for the International Criminal Court (CICC), consolidated the efforts of over 1000 NGOs.<sup>146</sup> The NGOs formed the largest single delegation at the Rome Conference.<sup>147</sup> NGOs such as Human Rights Watch and Amnesty International brought delegations to the Rome Conference that were larger than numerous state party delegations.<sup>148</sup> With their large and formidable presence, NGOs played a pivotal role at the Rome Conference, attaining an unparalleled degree of access into the negotiating process.<sup>149</sup> The NGOs were “central players, involved in setting the agenda, drafting documents and lobbying delegates,” often meeting directly with like-minded state representatives.<sup>150</sup> A list of CICC activities provides a clear demonstration of the extensive and thorough NGO involvement at the Rome Conference:

- Broke into 13 working groups on the 128 articles of the Statute;
- Assisted in the participation of 50-80 NGO experts from developing and transitional countries;
- Convened regional caucuses, including the tri-continental alliance formed by groups from Africa, Latin America and Asia;
- Convened sectoral caucuses (i.e. gender justice, victims, children, faith, peace):
- Issued reports for use by NGOs and governments;
- Translated documents and reports and provided interpretation for NGOs, even some countries;
- Helped organize three news teams from the Inter-press Service, the Advocacy Project and the CICC

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CRIMINAL COURT, *supra* note 2, at 237, 241. “Without the NGO community, the ICC treaty might not have been concluded. Organizations devoted to human rights, women’s rights, humanitarian assistance, social justice, and the eradication or at least the diminution of the myriad forms of oppression, all organized, lobbied, drafted, and negotiated to push governments in their desired direction.” *Id.*

<sup>146</sup> Davenport, *supra* note 126.

<sup>147</sup> William R. Pace, *The Relationship between the International Criminal Court and Non-Governmental Organizations*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 65, at 201.

<sup>148</sup> *Id.* at 202.

<sup>149</sup> BROOMHALL, *supra* note 29, at 73.

<sup>150</sup> Davenport, *supra* note 126.

- Monitor, providing the conference's only two daily newspapers and an on-line bulletin;
- Assisted governments by helping provide experts and interns which were included as members of government delegations;
  - Executed effective co-ordination between Rome and national networks;
  - Held regular briefings for international and regional press;
  - Held daily Coalition General Strategy Sessions;
  - Held weekly meetings with Rome Conference Chair;
  - Held regular meetings with governments and government groups, especially the Like Minded Group of Countries whose membership expanded to 60 nations during the conference.<sup>151</sup>

Another similarity with the Ottawa Process was the adoption of an arbitrary deadline to complete the treaty.<sup>152</sup> This time, only five weeks were allowed, thus making the treaty's adoption a surprise to some.<sup>153</sup> Moreover, the treaty was presented to states as a "take it or leave it proposal" with no room for states to ratify the treaty with reservations or understandings.<sup>154</sup>

The ICC's ratification proved to be another successful example of the "new diplomacy." Mr. William Pace, the Convenor of CICC, acknowledged the influence of the new diplomacy at the ceremony for the new Chief Prosecutor of the ICC:

The Rome Statute and the ICC are premier examples of a new process and model of making international law – in which like-minded nations cutting across all regional groupings, and NGOs from the South and the North and representing many sectors of civil society, have worked

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<sup>151</sup> Pace, *supra* note 147, at 202.

<sup>152</sup> See Davenport, *supra* note 126.

<sup>153</sup> Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 2, at 31, 32.

<sup>154</sup> Davenport, *supra* note 126.

together to achieve an extraordinary treaty and the strengthening of the international legal order.<sup>155</sup>

While the new diplomacy has produced dramatic victories for the international human rights NGO movement, many have questioned the NGOs' legitimacy.<sup>156</sup> The NGOs' growing influence has prompted some to ask, "Who elected these NGOs anyway?"<sup>157</sup> NGOs can be viewed as "special-interest groups" often focused on a narrow agenda.<sup>158</sup> Portraying themselves as representatives of "civil society," in reality the NGOs only represent their members who are typically "international elites."<sup>159</sup> Thus the NGOs are accountable only to their constituents.<sup>160</sup>

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<sup>155</sup> William R. Pace, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 1 (June 16, 2003), at [http://www.icc-cpi.int/library/organs/otp/030616\\_pace.pdf](http://www.icc-cpi.int/library/organs/otp/030616_pace.pdf) (last visited Feb. 23, 2005).

<sup>156</sup> Davenport, *supra* note 126. See also Anderson, *supra* note 137, at 112.

<sup>157</sup> *Id.*

<sup>158</sup> Davenport, *supra* note 126.

<sup>159</sup> Anderson, *supra* note 137, at 118.

International NGOs collectively are not conduits from the "people" or the "masses" or the "world citizenry" from the "bottom up." They are rather, a vehicle for international elites to talk to other international elites about the things—frequently of undeniably critical importance—that international elites care about. The conversation is not vertical, it is horizontal. It has a worthwhile, essential function in making the world—sometimes at least, a better place – but it does not reduce the democratic deficit.

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Put bluntly, the glory of organizations of civil society is not democratic legitimacy, but the ability to be a pressure group. Organizations in civil society do not share a common vision of the good, nor need concern themselves with the common good, in any holistic fashion at all if they choose not to. They have particular issues and particular constituencies. But for that very reason, they are not the voice of democracy and do not convey, at least in real democracies – rather than faux legitimate systems like those of international organizations – democratic legitimacy.

*Id.* See also John M. Powers, *All Talk, No Action From World NGOs*, INSIGHT, Nov. 24, 2003, at [http://www.findarticles.com/cf\\_dle/m1571/2003\\_Nov\\_24/](http://www.findarticles.com/cf_dle/m1571/2003_Nov_24/)

Moreover, the international NGOs have a relatively small constituency and have been characterized as “an undemocratic pressure group, accountable to no one but its own members and donors that wield enormous power and influence.”<sup>161</sup>

A brief look at the World Federalist Movement may be illustrative. The World Federalist Movement (WFM) served as the secretariat for the Coalition for the International Criminal Court.<sup>162</sup> Among all of the NGOs present at the Rome Conference, WFM had the largest delegation, “exceeding even the largest government delegations.”<sup>163</sup> Clearly then, WFM was at the forefront of the NGO movement at the Rome Conference. WFM continues to serve as the CICC secretariat and, thus, will continue to influence the ICC.<sup>164</sup> Yet, what does WFM stand for, and whom does it represent? The WFM web site reveals the organization seeks a form of world government with pacifist and socialist overtones.<sup>165</sup> Moreover, the WFM exhorted the

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110364126/print.jhtml (last visited Feb. 23, 2005) (“[T]he NGO sector tends to be self-appointed, unaccountable and may in no way represent those whose causes it claims to be championing.”).

<sup>160</sup> *Davenport, supra* note 126.

<sup>161</sup> David Reiff, *The Precarious Triumph of Human Rights*, N. Y. TIMES, Aug. 8, 1999. See also Simmons, *supra* note 136, at 83 (“Hailed as the exemplars of grassroots democracy in action, many NGOs are, in fact, decidedly undemocratic and unaccountable to the people they claim to represent. Dedicated to promoting more openness and participation in decision making, they can instead lapse into old-fashioned interest group politics that produces gridlock on a global scale.”).

<sup>162</sup> Pace, *supra* note 147, at 202 n.9.

<sup>163</sup> *Id.*

<sup>164</sup> See *CICC Background*, at <http://www.iccnw.org/introduction/ciccbackground.html> (last visited Sept. 3, 2005).

<sup>165</sup> See WFM Vision, at <http://www.wfm.org/VISION/Vision.html> (last visited Feb. 24, 2005).

We call for an end to the rule of force through a world governed by law, based on strengthened and democratized world institutions. We are inspired by the democratic principles of federalism.

World Federalists support the creation of democratic global structures accountable to the citizens of the world. World federalism calls for the division of international authority among separate agencies, a separation of powers among judicial, executive and parliamentary bodies.

U.S. not to respond with “unilateral” force in self-defense following the September 11, 2001 attacks.<sup>166</sup> Based on its income tax files, WFM collected \$59,915.00 in membership dues in 2001.<sup>167</sup> WFM requires a minimum annual donation of \$30.00 from its members.<sup>168</sup> Therefore, if one assumes that each member contributed the minimum amount, there were less than 2,000 WFM members in the United States in 2001. The membership number decreases further to the extent that members contribute more than \$30.00. Consequently, then, an NGO with a small membership and views that can be safely depicted as outside the political mainstream, at least in the United States, has maintained an extraordinary amount of influence in the ICC.

While the source of NGO legitimacy may be questioned, the power of the international NGO movement cannot be denied. American University law professor Kenneth Anderson summarizes the growth of NGO influence in the law of war arena:

For the past 20 years, the center of gravity in establishing, interpreting and shaping the law of war has gradually shifted away from the military establishments of leading states and their “state practice.” It has even shifted away from the International Red Cross (invested by the Geneva Conventions with special authority) and toward more activist and publicly aggressive N.G.O.’s—

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*Id.* See also WFM Statement of Purpose, at <http://www.wfm.org/VISION/SoP.html> (last visited Sept. 3, 2005) (advocating for “an end to the use and threat of use of military force; . . . equitable participation of all in the global economy and in global decisions which affect their lives; . . . [and] “the emergence of a global ethos and a consciousness of humanity and of every person as a citizen of one world”).

<sup>166</sup> See Statement of the World Federalist Movement in Response to the Terrorist Attacks on September 11, 2001, at [http://www.wfm.org/ACTION/wfmstmt\\_terrorism.html](http://www.wfm.org/ACTION/wfmstmt_terrorism.html) (last visited Feb 24, 2005) (“However, WFM urges the United States government to resist calls to engage in massive, unilateral military strikes against countries where terrorists are suspected to reside.”).

<sup>167</sup> See WORLD FEDERALIST MOVEMENT, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2001), at <http://www.guidestar.org/FinDocuments/2001/133/823/2001-133823538-1-9.pdf> (last visited Sept. 6, 2005) (listing, *inter alia*, membership dues collected).

<sup>168</sup> See Join WFM, at [http://www.wfm.org/ABOUT\\_WFM/memberinfo.html](http://www.wfm.org/ABOUT_WFM/memberinfo.html) (last visited Feb. 24, 2005).

including the ad hoc coalitions that produced the Ottawa Treaty, banning land mines, and the new International Criminal Court.<sup>169</sup>

Consequently, given the growing authority of NGOs in the law of war, the NGOs' views regarding collateral damage are clearly significant.

Commentators have characterized the NGO approach to collateral damage as "absolutist" and "utopian," involving a "zero tolerance" attitude towards unintended civilian casualties in combat.<sup>170</sup> These attitudes are potentially at odds with the legal framework surrounding collateral damage. In an effort to bridge the gap between the NGO and military positions on the legal principles concerning collateral damage, Harvard University's John F. Kennedy School of Government's Carr Center for Human Rights Policy held a workshop in 2002 titled "Understanding Collateral Damage."<sup>171</sup> The workshop brought together distinguished NGO representatives and senior military officers. The workshop highlighted the "large, and in some important respects, widening gap between the views of the human rights and the U.S. military on the practical meaning of international humanitarian law."<sup>172</sup> In particular, one NGO participant gave credence to the belief that many NGOs possess zero tolerance for civilian casualties: "As one participant explained, the idea that a military strike can result in civilian deaths but not constitute a legal violation 'doesn't resonate particularly

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<sup>169</sup> Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES, Apr. 13, 2003, §6 (Magazine) at 38, 43.

<sup>170</sup> *Id.* at 43 ("More broadly in recent years, the N.G.O.'s have been promoting an ever more utopian law of war, in keeping with absolutist human rights ideology."). See also Daphne Eviatar, *Civilian Toll: A Moral and Legal Bog*, N.Y. TIMES, Mar. 22, 2003, § D, at 7 ("The human rights community is absolutist at its core," said Sarah Sewall, program director at the Carr Center and former deputy assistant secretary of defense for peacekeeping and humanitarian assistance in the Clinton administration. . . . She added, 'It's inherently more complex than the human rights community approaches it.'"); David B. Rivken Jr. & Lee A. Casey, *That's Why They Call It War*, WASH. POST, Mar. 16, 2003, at B04.("[International human rights] NGOs suggest that U.S. armed forces, precisely because they have better weapons, should be held to a higher standard than less advanced militaries. This would apply particularly to the question of civilian casualties, or 'collateral damage,' where a rule of near zero tolerance is promoted.").

<sup>171</sup> WORKSHOP: UNDERSTANDING COLLATERAL DAMAGE, *supra* note 128.

<sup>172</sup> *Id.* at 9.



well with our constituents.”<sup>173</sup> Moreover, the workshop revealed that some NGOs are uncomfortable with core military principles involved in the proportionality analysis such as military advantage.<sup>174</sup> These attitudes caused concern among the military representatives at the workshop, who believed NGOs often confuse or conflate policy objectives (absolutely minimizing collateral damage) with legal obligations (as discussed above, collateral damage is permitted as long as it is not excessive in relation to “the concrete and direct military advantage anticipated”).<sup>175</sup>

To summarize, it is clear that NGO influence in the law of war has grown substantially within recent years. NGOs have been the leaders in creating the International Criminal Court and many hold a view regarding collateral damage that is potentially at odds with that of the U.S. military. Let us now turn to two case studies that illustrate both the U.S. military position and practice regarding collateral damage and the critical NGO response.

## V. Case Studies

In both the Kosovo and Iraq military operations, the U.S. military made great efforts to minimize collateral damage. Nonetheless, NGOs criticized these efforts and some filed war crimes allegations either with an international prosecutor (Kosovo) or a national prosecutor (Iraq). The article uses these military operations as case studies in order to preview some of the issues the ICC Prosecutor will face. Each case

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<sup>173</sup> *Id.* at 16.

<sup>174</sup> *Id.* at 9, 24. “Many representatives of human rights groups expressed a fundamental unease with their ability to interpret or define certain military concepts in international humanitarian law (IHL). . . . For example, some feel ill equipped to define ‘military advantage,’ a concept with central relevance to many other aspects of IHL.” *Id.* at 9. “The human rights community, with a few exceptions, claims the right to criticize military operations without assuming a commensurate obligation to acquire military expertise.” *Id.* at 24. Ms. Dinah PoKempner, the General Counsel for HRW, in discussing the AP I proportionality principle, wrote: “This is one of the bedrock limitations on the ways and means of waging war, yet the terms of its formulation render it opaque. Certainly most human rights advocates find themselves ill-equipped to evaluate issues of military advantage, however direct and concrete.” See Dinah PoKempner, *Collateral Damage: Assessing Violations from the Outside 1*, at [http://www.ksg.harvard.edu/cchrp/Use%20of%20Force/June%202002/PoKempner\\_final.pdf](http://www.ksg.harvard.edu/cchrp/Use%20of%20Force/June%202002/PoKempner_final.pdf) (last visited Feb. 24, 2005).

<sup>175</sup> *Id.*

study will review the U.S.'s endeavors to reduce collateral damage, the NGO response, and how the NGO complaints were resolved.

### A. Kosovo

From March to June 1999, the United States, as part of a campaign with its NATO allies, began Operation Allied Force (OAF), an air campaign designed to stop egregious Serbian violence in Kosovo.<sup>176</sup> The 78-day campaign succeeded not only by forcing Slobadan Milošević's Serbian forces from Kosovo, but also by setting the stage for the return of refugees, and deploying a peacekeeping force in Kosovo.<sup>177</sup> Minimizing collateral damage formed a major feature of the campaign and the Department of Defense characterized the campaign as "the most precise military operation ever conducted," stating, "No military operation of such size has ever inflicted less damage on unintended targets."<sup>178</sup> Altogether, approximately 500 civilian deaths resulted from 38,400 sorties that released 23,614 air munitions.<sup>179</sup>

General Wesley Clark, the U.S. commander of OAF, emphasized the importance of minimizing collateral damage, stating that the need to prevent civilian casualties was the "most pressing drumbeat of the campaign."<sup>180</sup> OAF sought to minimize collateral damage through reserving target approval to the highest military and political authorities in situations involving potentially high collateral damage, ensuring the legal review of targets at numerous levels of command, heavily relying upon precision munitions, adopting stringent rules of engagement (ROE), and adjusting the ROE following incidents of collateral damage.

General Clark describes the thorough target reviewing process followed throughout the campaign:

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<sup>176</sup> See U.S. DEP'T OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT 1 (Jan. 31, 2000), available at <http://www.defenselink.mil/pubs/kaar02072000.pdf> (last visited Feb. 24, 2005) [hereinafter Kosovo AAR].

<sup>177</sup> *Id.* at xiii.

<sup>178</sup> *Id.*

<sup>179</sup> THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR, 39 I.L.M. 1257, 1272 (June 8, 2000), available at <http://un.org/icty/pressreal/nato061300.htm> (last visited Feb. 24, 2005) [Hereinafter ICTY Final Report].

<sup>180</sup> GENERAL WESLEY K. CLARK, WAGING MODERN WAR, BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 434 (2001).

(W)e would need a complete analysis of each individual target – location, military impact, possible collateral damages, risks if the weapon missed the target, and so forth. This analysis had to be repeated for different types of weapons, in search of the specific type of weapon and warhead size that would destroy the target and have the least adverse impact elsewhere. And this had to be done to my satisfaction, then sent to Washington where it underwent additional levels of legal and military review and finally ended up on President Clinton's desk for his approval.<sup>181</sup>

Throughout the campaign, military lawyers were fully integrated into the targeting process and ensured that targets were reviewed in accordance with the law of war.<sup>182</sup> The analysis of collateral damage

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<sup>181</sup> *Id.* at 201. See also Kosovo AAR, *supra* note 176, at xx.

During the course of the campaign, NATO developed mechanisms for delegating target approval authority to military commanders. For selected categories of targets—for example, targets in downtown Belgrade, in Montenegro, or targets likely to involve high collateral damage—NATO reserved approval for higher political authorities. NATO leaders used this mechanism to ensure that member nations were fully cognizant of particularly sensitive military operations, and thereby, to help sustain the unity of the alliance.

*Id.*

<sup>182</sup> See Tony Montgomery, *Legal Perspective from the EUCOM Targeting Cell*, 78 INT'L L. STUD. 189 (2002). Lieutenant Colonel Montgomery served on the European Command (EUCOM) staff during Operation Allied Force as the Deputy Staff Judge Advocate and Chief, Operational Law during Operation Allied Force, and here provides a detailed analysis of the extensive operational and legal analysis used for each target. He writes: "Of the nearly 2000 fixed targets that were reviewed, each received an independent evaluation within the requirements of the law of war. Is the target a military objective? What military value or advantage is gained from destroying this target? Are we being proportional? Are there any issues with distinction/discrimination?" *Id.* at 195. See also Frederic de Mulinen, *Distinction between Military and Civilian Objects*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 103, 123 (Christian Tomuschat ed., 2002).

“quickly became central to much of the targeting process.”<sup>183</sup> Operational planners used sophisticated computer simulation programs to engage in a “four tier analysis” in an effort to completely capture the potential amount of collateral damage in a given target.<sup>184</sup> Military and civilian lawyers reviewed targets at the Combatant Command level (European Command), for the Chairman of the Joint Chiefs of Staff, and for the Secretary of Defense.<sup>185</sup> The National Security Counsel provided

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The air campaign entailed an unprecedented review of targeting with military, political and legal reviews. Legal officers advising on operational law matters at each major command headquarters, at NATO and in national commands were involved in the targeting decisions. Attack of dual-use facilities had to be approved at the highest level. The approval of a target also included approval of ammunition to be used. Wherever necessary, the appropriate choice of precision guided ammunition was prescribed to avoid damaging the civilian surroundings of the selected military targets. Precautions relating to the targets themselves were intended to minimize loss and damage on the civilian side, e.g. destruction of part of a large building used for military purposes, cutting off power or communications lines in such a way that restoration could be rapidly achieved after the end of the air strikes.

*Id.* (internal citation omitted).

<sup>183</sup> See Montgomery, *supra* note 182, at 193.

<sup>184</sup> Harvey Dalton, *Commentary*, 78 INT’L L. STUD. 199, 201 (2002).

The four-tier analysis tried to estimate the damage by fragmentary blast, skin piercing fragments from the blast, window breakage (because that could create a lot of damage and incidental injury), building collapse (the possibility of building collapse or which buildings would be expected to collapse), and eardrum rupture, which obviously causes civilian injuries. Those were the four types of injuries that were modeled and simulated by computer with each type of weapon that was considered as a possible weapon to be employed. This made a lot of difference. It was all visualized, displayed, and we could actually determine to a reasonable degree the extent of the collateral damage.

*Id.*

<sup>185</sup> Kosovo AAR, *supra* note 176, at 24.

additional legal reviews for targets that were forwarded to President Clinton for approval.<sup>186</sup>

Moreover, rules of engagement were crafted to be “strict” to further reduce the possibilities of civilian casualties.<sup>187</sup> A number of attacks on previously approved targets were called off to avoid potential collateral damage when the pilot could not make a positive identification of the target.<sup>188</sup> Following incidents of unintended collateral damage, the NATO leadership placed even more restrictions upon the campaign, even at the expense of their military efforts.<sup>189</sup>

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<sup>186</sup> James E. Baker, *Judging Kosovo: The Legal Process, the Law of Armed Conflict, and the Commander in Chief*, Address to the U.S. Naval War College, in 78 INT'L L. STUD. 7 (2002).

<sup>187</sup> MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 101 (2000).

Because of these legal constraints, the pilot's rules of engagement were strict, “as strict as I have seen in twenty-seven years,” in the opinion of General Chuck Wald who helped coordinate the approval of targets with the Joint Chiefs in the Pentagon. Pilots could only fire on visual recognition of a target—which meant that bad weather forced many sortie cancellations—and they had to radio in to the air war headquarters at Vicenza for a final approval when they saw a target of opportunity.

*Id.*

<sup>188</sup> BENJAMIM S. LAMBETH, *NATO'S AIR WAR FOR KOSOVO, A STRATEGIC AND OPERATIONAL ASSESSMENT* 139-140 (2001), available at <http://www.rand.org/publications/MR/MR1365/> (last visited Feb. 24, 2005). Similarly, there were “reported instances in which precision munitions in the process of guiding were deliberately steered away from targets at the last minute to avoid harming civilians who had not been seen in the target area until after weapon release.” *Id.* at 142 (citation omitted).

<sup>189</sup> Lieutenant General Michael Short USAF (Ret.), *Operation Allied Force from the Perspective of the NATO Air Commander*, Address to the U.S. Naval War College, in 78 INT'L L. STUD. 17 (2002). Lieutenant General Michael Short, the NATO Air Commander during the Kosovo campaign, described the political reaction following a bridge bombing that resulted in unintended civilian casualties in May, 1999:

As a result of that incident, this was the guidance I got from the very highest levels of the NATO military political leadership: you will no longer bomb bridges in daylight, you will no longer bomb bridges on market days, on holidays or on weekends. In fact, you will only bomb bridges between ten o'clock at night and three o'clock in the morning in order to

To be sure, it was not a perfect operation by any means. NATO recognized that “mistakes did occur during the bombing campaign; errors of judgment may have also occurred.”<sup>190</sup> However, of the civilian deaths, over 60% resulted from only 12 incidents in a campaign of 10,484 attack sorties.<sup>191</sup> Despite these efforts, some NGOs still suggested the NATO campaign was guilty of war crimes.

NGOs such as HRW and AI wrote critical reports on the NATO campaign. The AI report, “‘Collateral Damage’ or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force,” was particularly disparaging.<sup>192</sup> AI stated that “NATO forces violated the laws of war leading to cases of unlawful killing of civilians” and that “Civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war during Operation Allied Force.”<sup>193</sup> The AI report seemingly implied that collateral damage by itself violated the law of war, thus reflecting a zero tolerance policy towards collateral damage:

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ensure that we do not kill civilians crossing those bridges...The restrictions that were placed on the young men and women who were going in harm's way every day were extraordinary--- losing all sight of what effect we were trying to achieve. In fact, we got to the point that during the last ten days of the war I was instructed to attack only those targets that had a potential for low collateral damage.

*Id.* See also CLARK, *supra* note 180, at 444. (“By the end of May, NATO was under sustained and intense pressure to avoid collateral damages. We simply eliminated targets from our list and pared down the impact of the campaign. The weight of public opinion was doing to us what the Serb air defense system had failed to do: limit our strikes.”).

<sup>190</sup> ICTY Final Report, *supra* note 179, ¶ 90, at 1283.

<sup>191</sup> De Mulinen, *supra* note 182, at 124.

<sup>192</sup> AMNESTY INT’L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA; “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000), at [http://www.amnesty.org/ailib/intcam/kosovo/docs/nato\\_all.pdf](http://www.amnesty.org/ailib/intcam/kosovo/docs/nato_all.pdf) (last visited Mar. 1, 2005) [hereinafter AI KOSOVO REPORT].

<sup>193</sup> Press Release, Amnesty Int’l, NATO violations of the laws of war during Operation Allied Force must be investigated (July 6, 2000), at <http://web.amnesty.org/library/index/engneur700252000> (last visited Mar. 1, 2005).

Yet despite the safeguards against civilian casualties that NATO said were in place, incidents continued to be reported in which large numbers of civilians were killed. In some cases, NATO admitted that it made mistakes, but always said that it had not intentionally targeted civilians. It attributed some mistakes to faulty intelligence; others it blamed variously on bad weather and poor visibility, faulty weapons which had missed their targets, mistakes by pilots in deciding whether vehicles were military or civilian in nature, and the use of human shields by the FRY authorities to create civilian casualties when facilities were bombed.<sup>194</sup>

As discussed above, the reasons NATO provided for collateral damage incidents were legitimate explanations for collateral damage. Nonetheless, another statement from the AI report also reflects the presumption that war crimes resulted from collateral damage: “AI believes that – *whatever their intentions* – NATO forces did commit serious violations of the laws of war leading in a number of cases to the unlawful killings of civilians.”<sup>195</sup> This statement completely ignores the elements of intent and knowledge that are central to proving a war crime under the proportionality principle as incorporated in AP I.

In addition to the HRW and AI reports, numerous NGOs and individuals filed complaints with the Office of the Prosecutor (OTP) for the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>196</sup> The UN Security Council established the ICTY in 1993 through United Nations Security Council Resolution 808.<sup>197</sup> Although the Security

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<sup>194</sup> AI KOSOVO REPORT, *supra* note 192, at 26.

<sup>195</sup> *Id.* at 2 (emphasis added).

<sup>196</sup> Aaron Schwabach, *NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, 9 TUL. J. INT'L & COMP. L. 167, 169 (2001).

<sup>197</sup> See The Statute of the International Tribunal For the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 3217<sup>th</sup> mtg., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1192 [hereinafter Statute of the ICTY]. See also *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, at ¶ 1, U.N. Doc. S/25704 (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993), *available at* <http://www.un.org/icty/basic/statut/S25704.htm> (last visited Mar. 1, 2005). The Statute itself was adopted on May 25, 1993 through UN Security Council

Council created the tribunal to address war crimes that occurred during the Bosnian conflicts, Article 1 of the Statute of the International Tribunal was broad enough to cover allegations against NATO forces for any acts “committed in the territory of the former Yugoslavia.”<sup>198</sup> ICTY Article 18 enabled the ICTY Prosecutor to start investigations based on “information obtained from any source,” including NGOs.<sup>199</sup> ICTY Article 3 covered “Violations of the laws or customs of war” as a crime under the ICTY.<sup>200</sup> While the text of Article 3 is clearly based on the Hague Conventions, an early ICTY case established that the Article essentially incorporated the Geneva Conventions and AP I.<sup>201</sup>

Louise Arbour, the ICTY Prosecutor at the time, decided to investigate all of the allegations against NATO in May 1999.<sup>202</sup> Arbour

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Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 I.L.M. 1159 (1993).

<sup>198</sup> Statute of The ICTY, *supra* note 197, art. 1. (“The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”).

<sup>199</sup> *Id.* art. 18, ¶ 1. (“The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”).

<sup>200</sup> *Id.* art. 3.

<sup>201</sup> AI KOSOVO REPORT, *supra* note 192, at 13-14 (citing the ICTY Tadić opinion). “[I]t is understood that the ‘laws and customs of war’ referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.” Case IT-94-I-AR72, Prosecutor v. Tadić, ¶ 88 (Appeals Chamber Oct. 2, 1995).

<sup>202</sup> Press Release, ICTY Office of the Prosecutor, Prosecutor’s Report on the NATO Bombing Campaign (June 13, 2000) [hereinafter ICTY OTP Press Release], at <http://www.un.org./icty/pressreal/p510-e.htm> (last visited Mar. 1, 2005). The press release specifically cited the influence of NGOs: “In addition, a number of reports and commentaries on the bombing campaign have been published by human rights organizations and others, including the recent Amnesty International Report.” *Id.* Moreover, in the ICTY Final Report recommendations, the committee emphasized not only its reliance on HRW, but also on HRW’s endorsement of the reports of NATO’s opponent: “The committee has also assigned substantial weight to factual assertions made by



established a working group within the Office of the Prosecutor (OTP) to examine the claims.<sup>203</sup> Almost a year later, the new ICTY Prosecutor, Carla Del Ponte reported her conclusions to the UN Security Council:

Although some mistakes were made by NATO, I am very satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the bombing campaign. I am now able to announce my conclusion, following a full consideration of my team's assessment of all complaints and allegations, that there is no basis for opening an investigation into any of those allegations or other incidents related to the NATO bombing.<sup>204</sup>

Del Ponte went beyond announcing her conclusions and even authorized releasing the ICTY Prosecutor's committee report.<sup>205</sup>

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Human Rights Watch as it investigators did spend a limited amount of time on the ground in the FRY. Further, the committee has noted that Human Rights Watch found the two volume compilation of the FRY Ministry of Foreign Affairs entitled NATO Crimes in Yugoslavia generally reliable and the committee has tended to rely on the casualty figures for specific incident in this compilation." ICTY Final Report, *supra* note 179, ¶ 90, 39 I.L.M. at 1282-83.

<sup>203</sup> ICTY OTP Press Release, *supra* note 202.

<sup>204</sup> Barbara Crossette, *U.N. War Crimes Prosecutor Declines to Investigate NATO*, N.Y. TIMES, June 3, 2000, at A4.

<sup>205</sup> ICTY OTP Press Release, *supra* note 202. Regarding the release of this report:

It is not the Prosecutor's normal policy to make public the details about investigations or allegations received but not investigated. Standard practice is to comment only about indictments that have been made public. Even then, any comment by the Prosecutor outside the courtroom must be extremely limited. The Prosecutor considers that individuals against whom allegations are made should, under normal circumstances, be entitled to the presumption of innocence. The good reputation of innocent persons would undoubtedly be damaged by public disclosure that they are being investigated for serious crimes. For this reason, in the absence of any indictment, which would provide an opportunity for such persons to defend their name, it is not proper to divulge details of who may be under investigation by the Prosecutor. The NATO air campaign, however, does not raise such

The committee titled its report the “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia” (ICTY Final Report). The committee acknowledged that it had relied upon both the AI and HRW reports, as well as “various documents submitted by Human Rights Watch.”<sup>206</sup> In the ICTY Final Report, the committee determined that based on the low number of civilian casualties in the campaign (approximately 500 civilian deaths resulting from 38,400 sorties that released 23,614 air munitions), NATO did not conduct “a campaign aimed at causing substantial civilian casualties.”<sup>207</sup> Moreover, the committee concluded that generally, “in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.”<sup>208</sup> The committee scrutinized the five incidents it viewed as the most “problematic” in greater detail but ultimately concluded that none of them warranted further investigation.<sup>209</sup>

Although the committee relied on the ICTY Statute’s Article 3 offense of unlawful attack, the committee used the AP I proportionality principle throughout the report to guide its analysis.<sup>210</sup> The report demonstrates some of the issues that the ICC Prosecutor will confront if he pursues a similar investigation. For example, the committee acknowledged the inherent difficulty in applying the proportionality balancing test:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the

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considerations and there has been much public debate about the allegations. The Prosecutor considers that in this situation, quite unforeseen when the Tribunal came into existence, she should take the unusual step of making her reasoning public.

*Id.*

<sup>206</sup> ICTY Final Report, *supra* note 179 at 1259. Moreover, in “attempting to assess what happened on the ground, the committee relied upon the Human Rights Watch Report entitled *Civilian Deaths in the NATO Air Campaign*.” *Id.*

<sup>207</sup> *Id.* at 1272.

<sup>208</sup> *Id.* at 1273.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1265.

legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.<sup>211</sup>

Moreover, the committee fully recognized that analyzing collateral damage is not an easy process:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with differing doctrinal backgrounds and differing degrees of combat experience would agree in close cases.<sup>212</sup>

Perhaps as a response to the AI report, the Final Report pointed out that simply establishing the fact that civilian deaths have occurred does not unequivocally lead to the presumption that war crimes have taken place and that there are numerous reasons why unintended civilian deaths are not necessarily unlawful: "Much of the material submitted to the OTP consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed."<sup>213</sup> The committee report further explained that:

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<sup>211</sup> *Id.* at 1271.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons. Despite an obligation to avoid locating military objectives within or near densely populated areas, to remove civilians from the vicinity of military objectives, and to protect civilians from the dangers of military operations, very little prevention may be feasible in many cases.”<sup>214</sup>

The five incidents the OTP committee scrutinized highlight some of the common factual scenarios where collateral damage can occur. Thus, they are worth reviewing in some detail as they depict the operational setting that must always be considered when analyzing collateral damage incidents. In one case, NATO air personnel attempted to destroy a railway bridge used to supply Serb forces in Kosovo.<sup>215</sup> The committee could not determine whether the pilot or the weapons system officer (WSO) controlled the release of the munitions aimed at the bridge. A train appeared on the bridge when it was too late to direct the laser guided bomb away from the train. Unfortunately, at least ten civilians were killed.<sup>216</sup> As the bomb did not destroy the bridge, either the pilot or the WSO tried to reengage the bridge at a point away from the train. Unexpectedly, the train “slid forward as a result of the original impact and parts of the train were also hit by the second bomb.”<sup>217</sup>

The committee found that the bridge constituted a valid military objective and that the NATO personnel did not intentionally target the train. The committee recognized the inherent operational difficulty for both the pilot and the WSO:

Either person would have been traveling in a high speed aircraft and likely performing several tasks simultaneously, including endeavoring to keep the aircraft in the air and safe from surrounding threats in a combat environment...the person controlling the bombs

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1273-75.

<sup>216</sup> *Id.* at 1273.

<sup>217</sup> *Id.* at 1273-75.

still had a very short period of time, less than 7 or 8 seconds in all probability to react.<sup>218</sup>

Although the committee was divided on “whether there was an element of recklessness” regarding the second bomb, the committee recommended no investigation by the ICTY OTP.<sup>219</sup>

Two incidents dealt with collateral damage resulting from the fog of war. In one case, NATO pilots mistakenly believed that a convoy of civilian refugees contained Serbian military forces instead.<sup>220</sup> The mistake arose from reports of Serb forces burning Kosovar Albanian towns.<sup>221</sup> Following these reports, NATO pilots were sent to the Djakovica area to attack the responsible Serb armed forces. NATO forces dropped several bombs on what appeared to be Serbian military convoys.<sup>222</sup> However, the convoys were actually carrying civilian refugees, and 70-75 people died from the attacks.<sup>223</sup> The NATO F-16 pilots stopped the attacks immediately after learning that the convoys were civilian.<sup>224</sup>

While the committee determined that there was no intent to attack the civilians and that the incident did not warrant an OTP investigation, the report was somewhat critical of NATO's practice of flying at 15,000 feet to evade Serb air defense artillery:

While there is nothing unlawful about operating at a height above Yugoslav air defenses, it is difficult for any aircrew operating an aircraft flying at several hundred miles an hour and at a substantial height to distinguish between military and civilian vehicles in a convoy. In this case, most of the attacking aircraft were F-16s with a crew of one person to fly the aircraft and identify the target... [T]his incident is one where it appears the aircrews could have benefited from lower altitude scrutiny of the target at an early stage...<sup>225</sup>

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<sup>218</sup> *Id.* at 1274.

<sup>219</sup> *Id.* at 1275.

<sup>220</sup> *Id.* at 1275-77.

<sup>221</sup> *Id.* at 1275.

<sup>222</sup> *Id.* at 1275-76.

<sup>223</sup> *Id.* at 1275.

<sup>224</sup> *Id.* at 1276.

<sup>225</sup> *Id.* at 1276-77.

In another case, NATO pilots had military intelligence indicating that Serb military forces were based in the village of Korisa.<sup>226</sup> Pilots identified “military revetments” and recognizable profiles of military vehicles during a night operation. However, civilians were also present, and 87 people died as a result of the attacks.<sup>227</sup> The committee did acknowledge that “displaced Kosovar civilians were forcibly concentrated within a military camp in the village of Korisa as human shields and that the Yugoslav military forces may thus be at least partially responsible for the deaths there.”<sup>228</sup> Nonetheless, while the committee recommended no OTP investigation, it did so partly out of a belief that the “available information concerning this information is in conflict.”<sup>229</sup>

Faulty intelligence was the cause of another collateral damage incident. A NATO aircraft destroyed the Chinese Embassy in Belgrade under the incorrect assumption that the embassy was actually the Yugoslav Federal Directorate for Supply and Procurement.<sup>230</sup> Due to the

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<sup>226</sup> *Id.* at 1281-82.

<sup>227</sup> *Id.* at 1281.

<sup>228</sup> *Id.* at 1282.

<sup>229</sup> *Id.*

<sup>230</sup> CLARK, *supra* note 180, at 291. General Clark describes the targeting analysis in this case:

[W]e received the completed target sheets for several more targets, including the headquarters for the Federal Directorate of Supply and Procurement in Belgrade. According to the target sheet, this agency was responsible for the coordination of arms trafficking. I looked at it and saw what looked like a three-story building with long rows of warehouse-like structures behind it. It was the same once-over I gave all the targets in my review—I was principally checking the risks of civilian casualties if we went ahead, and the proximity of any other significant structures. Along with the targets, we also maintained a comprehensive “no-strike” list, which we used to avoid strikes that might damage churches, hospitals, schools, embassies, and so forth. As I looked at this target, number 493, it seemed significant in isolating Serbia from arms imports.

*Id.*

clear mistaken identity of the target, the committee again recommended no investigation by the OTP.<sup>231</sup>

Finally, the committee reviewed the targeting of a Serbian TV and Radio Station (RTS) in Belgrade.<sup>232</sup> NATO air forces attacked the RTS building in an effort to break up the Serb command and control system. The attack succeeded in destroying the RTS facilities, and ten to seventeen people inside the building died in the attack.<sup>233</sup>

Here, the committee's analysis focused on the validity of the RTS building as a military objective under Article 52 of AP I. There was no disputing NATO's intent in targeting the building; rather, the question was whether NATO was legally authorized in targeting the building in the first place. The committee questioned the legitimacy of the RTS building as a target. Specifically, the committee found that "if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law."<sup>234</sup> As the committee also referred to NATO perhaps having a more acceptable objective "of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milošević in power," it did not make a specific finding that the RTS was an illegitimate target.<sup>235</sup> Even so, the committee did not fully resolve the issue of whether the RTS was a valid military objective as the committee ultimately stated, "Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate" (emphasis added).<sup>236</sup> Consequently, the committee recommended no investigation by the OTP.<sup>237</sup>

The committee's final recommendations were somewhat ambivalent. Although the committee did not recommend OTP investigation for any of the collateral damage incidents, the conclusion was hardly a ringing endorsement of NATO's conduct:

NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have

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<sup>231</sup> ICTY Report, *supra* note 179, at 1280-81.

<sup>232</sup> *Id.* at 1277-80.

<sup>233</sup> *Id.* at 1277.

<sup>234</sup> *Id.* at 1278.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1279.

<sup>237</sup> *Id.* at 1277-80.

occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses.<sup>238</sup>

In the end, the U.S. was not pleased with the outcome. The U.S. government protested the investigation itself as a White House spokesman stated, "NATO undertook extraordinary efforts to restrict collateral damage . . . . Any inquiry into the conduct of its pilots would be completely unjustified."<sup>239</sup> Judith A. Miller, who served as General Counsel for the Department of Defense during Operation Allied Force, appreciated the committee report's conclusion. However, she believed that:

[T]he manner in which the committee reached its conclusions is deeply disturbing. To have twenty-twenty hindsight scrutiny, done at leisure, of decisions and determinations made in the fog of war, often under instantaneous time constraints and life-threatening conditions by military commanders, pilots, soldiers and airmen, based on allegations by those who do not hold Western nations in very high regard, is a chilling and frightening prospect. I fear that the reservations of the United States with respect to the International Criminal Court are well-founded, based on the aftermath of the Kosovo conflict.<sup>240</sup>

Similarly, Lieutenant General Michael C. Short, who served as the air commander during OAF, commented on the Djakovica incident:

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<sup>238</sup> *Id.* at 1283.

<sup>239</sup> Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at A6.

<sup>240</sup> Judith A. Miller, *Commentary*, 78 INT'L L. STUD. 107, 111-12 (2002).



As for the convoy that we struck early in the operations against the third army in Kosovo, I reviewed the tape five times before it became clear to me that those were indeed tractors hauling wagons as opposed to eighteen-wheel military vehicles. The young man that dropped those bombs was flying at 450 miles an hour in bad weather and he was being shot at. He had one chance to make identification and he made a mistake. That was not a war crime. He had no intent to kill people he was not supposed to kill. He made a mistake.<sup>241</sup>

Finally, the NGO campaign against NATO had the effect of essentially asserting a moral equivalency between NATO's acts with Milošević's Serbian forces' heinous attacks on civilians. NATO Secretary General George Robertson responded by stating, "I regret that NATO's action caused even a single civilian death, but these unintended incidents in no way compare to the systematic, unspeakable violence inflicted on civilians by Milosevic's troops and paramilitary forces."<sup>242</sup>

## B. Iraq

*International law draws a clear distinction between civilians and combatants. The principle that civilians must be protected lies at the heart of [the] international law of armed conflict.*—U.S. Secretary of Defense Donald Rumsfeld<sup>243</sup>

After efforts to force Iraq to comply with numerous U.N. Security Resolutions proved to be unsuccessful, U.S. and coalition partners began Operation Iraqi Freedom (OIF) on March 19, 2003.<sup>244</sup> A

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<sup>241</sup> Short, *supra* note 189, at 21.

<sup>242</sup> SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 463 (2002).

<sup>243</sup> DoD Background Briefing on Targeting, *supra* note 84.

<sup>244</sup> See President Bush's statements from March 17 and 19, 2003, at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (last visited Mar. 1, 2005) and at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (last visited Mar. 1, 2005). For a legal justification of Operation Iraqi Freedom, see William H. Taft IV and Todd F. Buchwald, *Preemption, Iraq and International*

campaign of only 22 days succeeded in ending Saddam Hussein's regime and occupying all of Iraq's territory.<sup>245</sup>

Just as in the Kosovo campaign, the U.S. and its coalition partners went to extraordinary lengths to minimize collateral damage during Operation Iraqi Freedom (OIF). A careful and thorough review of targets, improvements in technology, restrictions on target approval in cases potentially involving significant collateral damage, and full participation by military lawyers in the planning and operational phases of the campaign all contributed to a strong effort to reduce and minimize collateral damage.

Shortly before the war began, the U.S. Department of Defense presented an extensive background briefing on the planning measures taken to attack "legitimate military targets while sparing no effort to protect innocent civilians."<sup>246</sup> The briefing described the targeting process that would be used in OIF. Military planners would identify military targets, choose aim points on the target in computer simulation models, and then assess the potential collateral damage.<sup>247</sup> If the potential collateral damage appeared to be high, the planner would take steps to mitigate and reduce collateral damage.<sup>248</sup> For example, smaller weapons could be used or the fusing of the munitions could be changed. The aim point or azimuth could be adjusted to lessen the impact on the target. The time of the attack could be selected to minimize collateral damage. Attacks could occur at night so civilian non-combatants would not be present, particularly with dual use facilities - legitimate military targets with a civilian function. Moreover, "early warning" through the use of different forms of communication to the civilian population was another means to reduce collateral damage. Finally, "no strike lists" were prepared to ensure Coalition forces did not target protected facilities such as mosques, hospitals, and schools.<sup>249</sup>

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*Law*, 97 AM. J. INT'L. L. 557 (2003). See more generally *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L. L. 553-642 (2003) for a collection of articles outlining the legal arguments for and against Operation Iraqi Freedom.

<sup>245</sup> John Keegan, *Brilliant Coalition Operation To Topple the Regime*, DAILY TELEGRAPH (London), Mar. 19, 2004, at 14.

<sup>246</sup> DoD Background Briefing on Targeting, *supra* note 84.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

Technology improvements further enhanced efforts to minimize collateral damage. The use of precision guided munitions substantially increased from Operation Allied Force in Kosovo.<sup>250</sup> A Department of Defense official predicted that close to 90% of the munitions used in situations where potential collateral damage would be a significant concern would be precision guided munitions.<sup>251</sup> The development of the Predator, an unmanned aircraft, helped supply more accurate intelligence by providing live video footage that could show how many civilian non-combatants were near a particular military target.<sup>252</sup> A new computer program, the FAST-CD, Fast Assessment Strike Tool – Collateral Damage, also known more informally as “bugsplat,” made a more sophisticated and precise estimate of the potential collateral damage associated with a given target.<sup>253</sup> The program was viewed as a “significant advance” in analyzing potential collateral damage.<sup>254</sup>

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<sup>250</sup> Nick Cook, *Effect-Based Air Operations- Cause and Effect*, JANE'S DEF. WKLY., June 17, 2003. (“During ‘Desert Storm,’ 7.7% of weapons dropped were precision munitions. In Operation ‘Allied Force’ against Serbia in 1999 it was 40%. During Operation ‘Enduring Freedom’ the figure rose again to 60.4%. In ‘Iraqi Freedom,’ official statistics will show an even higher level of PGMs dropped.”).

<sup>251</sup> DoD Background Briefing on Targeting, *supra* note 84.

<sup>252</sup> Tom Bowman, *U.S. Aims to Curtail Civilian Casualties; Minimizing Such Harm Part of Plans for Iraq War*, BALT. SUN, Mar. 5, 2003, at 1A. The program’s unofficial name was derived from the impression it projected on the computer screen, which resembled that of a bug hitting a windshield.

<sup>253</sup> Bradley Graham, *Military Turns To Software To Cut Civilian Casualties*, WASH. POST, Feb. 21, 2003, at A18.

<sup>254</sup> *Id.* (quoting Brigadier General Kelvin R. Coppock, director of intelligence for the Air Combat Command). The article noted:

As outlined by officials here, the targeting process normally begins as senior commanders translate the overall goals of the president and secretary of defense into military objectives. Weaponing teams then designate viable targets, drawing on vast, detailed descriptions of enemy facilities stored in the MIDB: the Modernized Integrated Data Base. Eventually, agreement is reached on a master attack lane, which is parceled into daily air tasking orders that assign specific targets to specific aircraft.

Collateral damage assessments come into play when the attack plan is being drawn up. Each potential target is examined for proximity to civilians or civilian property, which is where Bugsplat is intended to help. To lessen potential

In OIF, Secretary Rumsfeld reserved the authority to approve individual attacks that could result in 30 or more unintended civilian casualties.<sup>255</sup> Moreover, on numerous occasions U.S. pilots had to obtain permission from the Central Command Commander, General Tommy Franks, in other cases potentially involving less collateral damage. Even though many of these targets were of significant military value, up to one quarter of them were cancelled by General Franks or his subordinates at the Combined Air Operations Center.<sup>256</sup>

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collateral damage, targeting specialists can try substituting a smaller weapon or one with a delayed fuse that lets a bomb penetrate first and then detonate. Changing the type of aircraft and its angle of attack can make a difference . . . .

<sup>255</sup> Bradley Graham, *U.S. Moved Early for Air Supremacy, Airstrikes on Iraqi Defenses Began Long Before Invasion, General Says*, WASH. POST, July 20, 2003, at A26. Lt. Gen. T. Michael “Buzz” Moseley “revealed that the decision to bomb targets in Iraq that military planners had estimated could result in the deaths of 30 or more noncombatants had been reserved for Defense Secretary Donald H. Rumsfeld. About 40 or 50 targets fell in this category, including broadcast facilities in Baghdad and some government ministry buildings.” *Id.* During the war, Lt. Gen. Moseley, who served as the Combined Air Component Commander, stressed the importance of minimizing collateral damage: “At the core of Moseley’s planning [was] a firm commitment to avoiding loss of innocent lives. ‘We are taking extraordinary measures to prevent noncombatant casualties,’” said Moseley. Douglas H. Stutz, *CFACC Provides Guidance for Coalition Air Campaign*, Apr. 15 2003, at <http://www.af.mil/news/story.asp?storyID=41503985> (last visited Mar. 1, 2005). Lt. Gen. Mosley also stated:

With our ability to control the skies, we use our command and control system to assess every proposed action and we conduct all operations with great discipline and proportionality. We know that Saddam has positioned his air defenses around Baghdad near hospitals, schools, and mosques . . . . That makes it very complicated, because we are very disciplined and proportional about the application of force and we take collateral damage and the needless loss of life or putting civilians at risk very seriously. It will be a definite challenge, but we are certainly up to the task.

*Id.*

<sup>256</sup> See Richard J. Newman, *Not By The Playbook, How the war plan deviates from traditional doctrine*, US NEWS & WORLD REP. Apr. 7, 2003, at 27. He writes:

Just as in OAF, during OIF military lawyers were closely involved with legal issues associated with the planning for and executing of the war in order to ensure compliance with the laws of war. Before the war, Central Command judge advocates provided legal reviews for the preparation of the overall operational plan and the targeting plan, as well as the OIF rules of engagement.<sup>257</sup> During the war, judge advocates

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But there have been many sorties—often involving “high value” targets—in which the pilot must radio back to the combined air operations center, or CAOC, in Saudi Arabia for permission to launch attacks that could cause “collateral damage” to buildings or civilians. In some of those cases the risk is so high that the Central Command chief, Gen. Tommy Franks, must make the call. The result? About a quarter of the strikes referred back to the CAOC have been scrapped. U.S. officials say that shows how determined Franks and his staff are to protect Iraqi civilians.

See also Eric Schmitt, *A Nation At War, Civilians: Rumsfeld Says Important Targets Have Been Avoided*, N.Y. TIMES, Mar. 24, 2003, §B, 12, who also writes:

Senior American commanders have avoided bombing as many as three dozen high-priority Iraqi targets for fear of civilian casualties, making it harder to achieve some of the air campaign's important goals, military officials said today.

These targets, mostly in Baghdad, include the Iraqi Ministry of Defense, television and communications facilities that allow the Iraqi regime to stay on the airwaves, and the Rashid Hotel, which American intelligence analysts say has a secret underground communications bunker, the officials said.

<sup>257</sup> Captain M. Scott Holcomb, *View from the Legal Frontlines*, 4 CHI J. INT'L L. 561, 564-68 (2003). Captain Holcomb served as an Army judge advocate with the Coalition Forces Land Component Command (CFFLC) in Camp Doha, Kuwait during OIF. He observed that during the planning for OIF it was envisioned that

Coalition forces would seek to prevent as much collateral damage as possible to minimize the loss of life and preserve critical infrastructure that would be needed to distribute humanitarian aid and jump-start the post-regime government and economy. . . . It is unlikely that military planners have ever dedicated as much time, thought, and energy to winning a war while causing the absolute minimal amount of damage to the enemy, including their army, as coalition forces did during OIF.

at all levels of command advised commanders on targeting issues.<sup>258</sup> An ABC news release provides an illustrative example of how U.S. Army judge advocates in Iraq provided legal advice on targeting issues, in an effort to avoid collateral damage:

When the 3<sup>rd</sup> Infantry Division was facing artillery fire from the direction of a school soccer field in southern

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*Id.* at 564. Captain Holcomb and his colleagues reviewed the campaign targeting plan early in the process:

We wanted to ensure that the target nominations were consistent with the campaign plan as well as with the law of war. We reviewed the targets with an eye towards preserving infrastructure, especially the bridges and roads that, while potentially valid military targets, would be vital to the delivery of humanitarian assistance goods to the Iraqi people.

*Id.* at 568. Moreover, Captain Holcomb and his colleagues played a significant role in the drafting and implementation of rules of engagement for OIF:

[T]he ROE for OIF were the result of months of an inclusive process of collaboration, refinement, and testing. . . . In a deliberate, thorough process, CENTCOM sought and accepted input from subordinate commands to ensure that the ROE accomplished the commander's intent to defeat the enemy while preserving critical infrastructure. The ROE were then tested and validated during numerous exercises from November 2002 until February 2003. Once the ROE were approved, attorneys took the lead on preparing training briefs and ROE pocket cards that serve as a reference and training aid for soldiers in the field.

*Id.* at 565.

<sup>258</sup> *Id.* at 568.

During combat operations, attorneys reviewed targets at all command levels on the battlefield. At CFLCC, we reviewed every pre-planned strike and time-sensitive target, and we never had to raise an objection regarding a target's legitimacy. We did, however, raise numerous concerns about collateral damage, and some targets were removed from the nomination list. The judge advocate's role is to provide advice, but the commander makes the decision. The commander must determine if a strike is proportional, which requires that the anticipated loss of life and damage incidental to the attacks is not excessive in relation to the concrete and direct military advantage expected to be gained.

*Id.*

Iraq, Col. Lyle Cayce had to make a quick battlefield decision- not a military one, but a legal one. Cayce and 16 others...are Army lawyers tasked with sorting through the rules and regulations of war to make sure they're properly carried out on the battlefield.

....

"Under international law, the rules are very simple," Cayce told ABCNEWS' [Ted] Koppel. "A school is a protected place. But by placing the artillery piece in the school or next to the school . . . the enemy has kind of taken away the protected status of that place."

After analyzing the situation and deciding what kind of weapon might cause the least collateral damage, Cayce gave his assessment to the 3<sup>rd</sup> Infantry commanders. The commanders then called upon the Air Force, which used a precision-guided missile to take out the artillery, while minimizing damage to the school.<sup>259</sup>

Inevitably, though, in a campaign of the magnitude of OIF, unintended civilian casualties occurred. Estimates varied as to how many of the casualties were the result of coalition operations.<sup>260</sup> Part of the problem was determining how many Iraqi deaths were Iraqi soldiers or how many Iraqi deaths were attributable to Iraqi military actions, i.e. collateral damage resulting from Iraqi operations. Iraqi violations of the laws of war may also have contributed to the total.<sup>261</sup>

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<sup>259</sup> Ted Koppel & Amanda Onion, *Fighting by the Rules, The Conventions of Conflict Require Careful Military Planning*, Mar. 28, 2003 at [http://abcnews.go.com/sections/world/Primetime/iraq\\_rulesofwar030328.html](http://abcnews.go.com/sections/world/Primetime/iraq_rulesofwar030328.html) (last visited Oct. 5, 2004) (on file with Review).

<sup>260</sup> Laura King, *Baghdad's Death Toll Assessed*, L.A. TIMES, May 18, 2003, at 1; Niko Price, *Civilian Death Toll 3,240 in Iraq War*, DESERT MORNING NEWS (Salt Lake City), June 11, 2003, at A1.

<sup>261</sup> Koppel & Onion, *supra* note 259. See also Max Boot, *The New American Way of War*, FOREIGN AFF., July-Aug. 2003, at 41.

Saddam's regime sought to take advantage of U.S. sensitivities by locating military installations among schools, hospitals, and mosques. But even with such dire provocations, U.S. forces still took great care to spare civilians. . . . Ground forces also did their best to avoid killing civilians, even though Saddam's thugs used human shields in blatant violation of the laws of war. Even though U.S. Army doctrine favors

While some human rights NGO representatives critiqued the coalition's adherence to the laws of war in measured tones, if not praise, other NGOs viewed the unintended casualties and collateral damage as war crimes and demanded action.<sup>262</sup> For example, an international coalition of NGOs served notice on both President Bush and United Kingdom Prime Minister Tony Blair that they would be investigated and possibly prosecuted for war crimes. This notice occurred nearly two

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nighttime operations, the 101st Airborne Division operated mainly during the daytime—because, as one of its brigade commanders put it, “You can much more easily discern civilians during the daytime.” No one knows how many civilians were killed in the second Gulf War, but even Saddam's regime, which had an obvious interest in exaggerating the figures, claimed the total was no more than 1,254 as of April 3—a remarkably low number considering the savagery of the fighting.

*Id.* at 53.

<sup>262</sup> King, *supra* note 260. William Arkin, an HRW military consultant in 2000-2001, said, “If the worst single incident of civilian collateral damage in this war from airstrikes is the market bombing (in Baghdad), where 50 or so civilians died, you can get a sense of the advancement that has occurred as a result of a greater percentage of precision-guided weapons being used by air forces.” *Id.* (quoting Arkin). “I think it is more than just rhetoric this time,” said Steve Goose, director of the arms division of Human Rights Watch, which has been critical of military offenses around the world for a perceived callousness toward civilians. “The strides in technology and the increased sensitivity to avoiding civilian casualties have been great.” Steve Miller, *Surgical Strikes Designed to Reduce Casualties*, WASH. TIMES, Mar. 22, 2003, at A4. HRW's report on the Iraqi conflict acknowledged Iraqi violations of the laws of war and the steps the United States took to prevent civilian casualties: “The investigation showed that Iraqi forces committed a number of violations international humanitarian law, which may have led to significant civilian casualties. . . . U.S.-led Coalition forces took precautions to spare civilians, and for the most part, made efforts to uphold their legal obligations.” HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (2003), available at [http://www.hrw.org/reports/2003/usa1203/3.htm#\\_Toc57442227](http://www.hrw.org/reports/2003/usa1203/3.htm#_Toc57442227) (last visited Mar. 1, 2005). While the report was critical of some U.S. practices, it did not recommend any sort of war crimes prosecutions for U.S. forces.



months *before* the war started and stressed using collateral damage as the basis for a war crimes charge.<sup>263</sup>

One of this NGO movement's leaders compared coalition leaders to Slobodan Milošević if they did not "ensure that all force used [would be] targeted, discriminate, proportionate and necessary,"<sup>264</sup> while another accused coalition governments of "planning to commit nothing short of mass murder."<sup>265</sup>

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<sup>263</sup> See Press Release, The Center for Constitutional Rights, Law Professors and NGO's Warn President Bush of Legal Consequences of Iraq War (Jan. 24, 2002) at <http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=Jrk3y3IFCi&Content=179> (last visited Mar. 1, 2005). The letter discussed the possibility of using collateral damage as the basis for war crimes charges and concluded:

Accordingly, we are committed to ensuring the accountability of those persons found responsible for such crimes against humanity and war crimes in this war. To this end, together with non-governmental organizations here in the U.S. and the U.K., we will seek to pursue prosecutions of persons responsible for such crimes with the Prosecutor to ICC, where they are nationals of state party to the statute. For non-party states, like the U.S., we will petition the Security Council to refer the matter to the Prosecutor under the Statute of the ICC and actively pursue all other avenues of bringing them to account.

Letter from the Center for Constitutional Rights to George Bush, President of the United States, and Donald Rumsfeld, Secretary of Defense (Jan. 24, 2002), available at [http://www.ccr-ny.org/v2/newsroom/docs/letter\\_to\\_georgebush.pdf](http://www.ccr-ny.org/v2/newsroom/docs/letter_to_georgebush.pdf) (last visited Mar. 1, 2005). The CCR web site also includes much anti-Iraq war information. See <http://www.ccr-ny.org/v2/home.asp> (last visited Mar. 1, 2005).

<sup>264</sup> Press Release, Public Interest Lawyers, Blair, Hoon and Straw to be investigated for War Crimes! (Jan. 23, 2003), at <http://www.publicinterestlawyers.co.uk/legaldocs/WCPRESSRELEASE23.1.03.doc> (last visited Mar. 1, 2005) (quoting Phil Shiner, an attorney with the NGO Public Interest Lawyers, as saying, "The UK Government must ensure that all force used is targeted, discriminate, proportionate and necessary, otherwise its leaders face a similar fate to that of Milosovic [sic].").

<sup>265</sup> *Id.* (quoting Michael Mandel of the NGO Lawyers Against the War (Canada). The quote of Michael Mandel, in its entirety, reads:

Our governments are planning to commit nothing short of mass murder. They are planning to kill Iraqi civilians without any lawful justification or excuse. That's a crime in England and in Canada and under international law. No one is above the law, not even Prime Ministers. If they do this terrible

However, it was Jan Fermon, a Belgian attorney, with the NGO “Stop USA Coalition- Stop the United States of Aggression” (StopUSA), who successfully filed charges of alleged US war crimes in OIF with a national court in Belgium. StopUSA’s own literature indicates that the NGO was formed in September 2002 “to prepare the mobilization against the war in Iraq.”<sup>266</sup> The NGO also “aims at global war politics of the US” so the NGO desired to continue its protest activities beyond the war.<sup>267</sup> StopUSA viewed the war crimes charge against OIF Commander U.S. General Tommy Franks as a means to continue its protest against the war, to create more regional and international support for its NGO, and to serve as a fundraiser for the NGO.<sup>268</sup>

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thing, we are going to see to it they are personally brought to justice. We are going to prosecute each and every one of them for each and every crime they commit.

<sup>266</sup> *Complaint Against General Franks*, NEWSL. (Stop USA, Belgium), June 2003, at

<http://www.stopusa.be/franks/franks.php?theme=Telex&langue=3&Id=22299> (last visited Mar. 1, 2005).

<sup>267</sup> *Id.* (“In Belgium the coordination STOP USA unites dozens of organizations on an anti-imperialist platform . . .”).

<sup>268</sup> *Id.* Stop USA’s June 2003 newsletter, *Complaint against General Franks*, states:

Dozens of millions of people have been demonstrating against this war. Current action is a way of continuing that struggle, to fight against impunity, and to prepare for a broader movement, which is better capable of resisting against future wars. . . .

. . . .

Also it seems necessary to us to organise [sic] on a European level a coordination of all powers, groups, committees and fronts of anti-imperialist inspiration within the peace movement...Current action against Franks is a good starting point and an instrument which can be used by committees and groups with various inspiration. It can be of great use for the development of a such [sic] movement, together and on an international scale.

*Id.* In a subsequent newsletter, Stop USA spoke of its “intensive campaign to collect financial support” and provided bank account information for more contributions, even after the case had been dismissed. *Newsletter 2*, NEWSL. (Stop USA, Belgium), at

<http://www.stopusa.be/franks/franks.php?theme=Telex&langue=3&Id=22301> (last visited Mar. 1, 2005).

A review of the history of the Belgian law is necessary to place the Stop USA/Fermon allegations in context. In 1993, Belgium amended its national criminal code to allow its courts to prosecute violations of the 1949 Geneva Conventions and Additional Protocols I and II no matter where the violations occurred.<sup>269</sup> In 1999, at the urging of human rights NGOs, Belgium further amended the law to authorize prosecutions for crimes against humanity and genocide.<sup>270</sup> The law, formally known as the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, provides: "The Belgian courts shall be competent to deal with breaches provided in the present Act, irrespective of where such breaches have been committed."<sup>271</sup> As the Act incorporated AP I, it contained a provision covering collateral damage incidents:

The grave breaches listed below . . . constitute crimes under international law and be punishable in accordance with the provisions of the present Act:

-launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of the attack whose harmful effects, even where proportionate to the military advantage anticipated,

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<sup>269</sup> Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 113 (2003).

<sup>270</sup> Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003).

<sup>271</sup> Stefaan Smis & Kim Van der Borgh, *Introduction to Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M. 918, 924 (1999). The Belgian act was so sweeping that it authorized prosecution of the specified crimes "regardless of the place of the commission of the crime, the presence of the perpetrator on Belgian territory, the nationality of the perpetrator or the victim or the time the crime was committed." See Stefaan Smis & Kim Van der Borgh, *Belgian Law Concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives*, ASIL INSIGHTS, July 2003, at <http://www.asil.org/insights/insigh112.htm> (last visited Mar. 1, 2005). Moreover, under the Belgian law, the claimant "did not have to be a Belgian national or reside in Belgium." *Id.*

would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.<sup>272</sup>

Human rights NGOs extolled the Act.<sup>273</sup> Given the Act's far-reaching universal jurisdiction, numerous claims were filed against acting heads of state around the world alleging various violations.<sup>274</sup> Altogether, over forty separate allegations were made, yet only one case was successfully prosecuted.<sup>275</sup>

However, in response to an adverse opinion from the International Court of Justice on the legality of prosecuting an acting foreign minister,<sup>276</sup> and amidst growing concerns over the politicization

<sup>272</sup> Smis & Van der Borght, *Introduction to Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, *supra* note 271, at 922.

<sup>273</sup> Smis & Van der Borght, *Belgian Law Concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives*, *supra* note 271.

<sup>274</sup> Press Release, Human Rights Watch, Belgium: Anti-Atrocity Law Limited, But Case Against ex-Chad Dictator Can Move Forward (Apr. 5 2003), at <http://www.hrw.org/press/2003/04/belgium040503.htm> (last visited Mar. 1, 2005). The press release lists the following heads of state:

Mauritanian President Maaouya ould Sid'Ahmed Taya, Iraqi President Saddam Hussein, Israeli Prime Minister Ariel Sharon, Ivory Coast President Laurent Gbagbo, Rwandan President Pal Kagame, Cuban President Fidel Castro, Central African Republic President Ange-Felix Patasse, Pebulic of Congo President, Denis Sasou Nguesso, Palestinian Authority President Yassir Arafat, former Chadian President Hissene Habre, former Chilean President Gen. Augusto Pinochet, former Iranian president Hashemi Rafsanjani, former Moroccan interior minister Driss Basri, [and] former Foreign Minister Abdoulaye Yerodia Ndombasi of the Democratic Republic of the Congo . . . .

<sup>275</sup> Smis & Van der Borght, *Belgian Law Concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives*, *supra* note 271.

<sup>276</sup> Stefan Smis & Kim Van Der Borght, *Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (As amended by the law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 740, 743 (2003). The Democratic Republic of Congo (DRC)

of the Act, the Belgian government modified the Act's provisions.<sup>277</sup> Under an April 23, 2003 amendment, the Act retained universal jurisdiction, but it required the allegations to be furnished to the federal prosecutor for disposition if the allegations contained no ties or connections to Belgium.<sup>278</sup> If the claims had no nexus to Belgium, then the prosecutor had the discretion to pursue the case.<sup>279</sup>

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challenged a Belgian arrest warrant issued against the acting DRC Minister of Foreign Affairs. The DRC asked the International Court of Justice to review the case. The ICJ found that the Belgian act impermissibly contravened diplomatic immunity. See Sammons, *supra* note 269, at 141-42. See also Mark Summers, *The International Court of Justice's Decision in Congo v. Belgium: How has it affected the development of a principle of universal jurisdiction that would obligate all states to prosecute war criminals?*, 21 B.U. INT'L L.J. 63 (2003).

<sup>277</sup> Smis & Van der Borght, *supra* note 276 at 744.

<sup>278</sup> *Belgium's Amendment to the law of June 15, 1993 (as amended by the law of February 10, 1999) Concerning the punishment of grave breaches of humanitarian law*, 42 I.L.M. 749, 755 (2003).

<sup>279</sup> See Article 5 of the amendment, amending Article 7, Section 1 to read as follows:

Article 7 §1: Except in the event of abstention from jurisdiction as provide in one of the situations set forth in the following paragraphs, Belgian courts shall have jurisdiction over the violations provided by the present law, independently of where they have been committed and even if the alleged offender is not located within Belgium.

The criminal action will nonetheless be subject to the request of the federal prosecutor if:

1. the violation was not committed on Belgian territory
2. the alleged offender is not Belgian
3. the alleged offender is not located within Belgian territory
4. the victim is not Belgian or has not resided in Belgium for at least three years

Once seized with an application under paragraph 2, the federal prosecutor will request that the magistrate judge investigate the complaint unless:

1. the complaint is manifestly unfounded; or
2. the facts presented do not correspond to a definition of an offense under the present law; or

A spokesperson for the Belgian Foreign Minister viewed the amendment as “a good thing for diplomatic relations . . . . The law was originally passed based on good intentions but was abused for political reasons.”<sup>280</sup>

Nevertheless, while the Belgian government was moving to amend the law, and on the eve of Operation Iraqi Freedom, Raymond Coumont, president of another antiwar NGO, Meeting for Peace, filed another complaint in Belgium against former President George Herbert Walker Bush, former Secretary of Defense Richard Cheney, former Chairman of the Joint Chiefs of Staff Colin Powell, and retired General H. Norman Schwarzkopf, commander of U.S. forces during the 1990-1991 Gulf War.<sup>281</sup> The complaint alleged war crimes for a bombing during the first Gulf War that resulted in civilian casualties.<sup>282</sup> Mr. Coumont, speaking on behalf of the Iraqi civilians whom he filed the claim with, stated:

The objective of the Iraqi families, who together lost four or five children in that bombing, was to bring up the question of responsibility for their losses . . . .

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3. a criminal action cannot proceed under this application; or
  4. in the concrete circumstances of the matter, it results that, in the interest of administration of justice and in respect of Belgium’s international obligations, this matter should be brought either before international tribunals, or before a tribunal in the place where the acts were committed, or before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair.

*Id.* at 755-56 (unofficial English translation).

<sup>280</sup> Malvina Halberstam, *Belgium’s Universal jurisdiction law: vindication of international justice or pursuit of politics?*, 25 CARDOZO L. REV. 247, 251-52 (2003).

<sup>281</sup> Richard Bernstein, *Belgium Rethinks its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, at A8. Mr. Coumont’s antiwar NGO movement credentials are also evidenced by his name appearing on an “International Peace Appeal” posted on the Stop USA internet site. See Stop USA, International Peace Appeal, at <http://www.irak.be/ned/kalender/signatoriesIPA.htm> (last visited Mar. 1, 2005).

<sup>282</sup> Bernstein, *supra* note 281, at A8.

They also knew from their own experience that it is simply not true that precision weapons prevent civilian deaths . . . . And when they learned that President Bush had decided to go to war against Iraq, they felt that it was the moment to present their case.<sup>283</sup>

The clear political motivation behind filing a complaint for alleged war crimes (occurring twelve years earlier) in the first Gulf War days before the start of another war involving Iraq seemed to be the final impetus for the Belgian government. Didier Seeuws, a spokesperson for the Belgian Foreign Ministry stated, "This case proved that there is something wrong with the genocide law. The government wants to change the law."<sup>284</sup>

Consequently, the Belgian government was not pleased when Jan Fermon filed his complaint against General Tommy Franks on May 14, 2003.<sup>285</sup> The complaint focused on civilian deaths resulting from OIF operations, and charged they were war crimes under the Belgian law's version of AP I's prohibition on indiscriminate attacks.<sup>286</sup> The Belgian government, acting under the new amendments, forwarded the complaint to the U.S.<sup>287</sup> This move did not entirely satisfy the U.S.<sup>288</sup>

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> Philippe Siuberski, *US Iraq commander accused of war crimes in Belgium*, AGENCE FR. PRESSE, May 14, 2003, available at 2003 WL 2802632 ("'It's an abuse of the law,' Foreign Minister Louis Michel said, according to his spokesman. 'The United States is a democracy and I don't see why this lawsuit has not been introduced in that country,' Michel said. 'Belgium has no pretensions to judge the United States.'").

<sup>286</sup> Complaint filed against General Tommy Franks et al., available at [http://www.stopusa.be/franks/plainte\\_en.htm](http://www.stopusa.be/franks/plainte_en.htm) (last visited Mar. 1, 2005). Mr. Fermon filed the charges against General Franks in light of the International Court of Justice opinion discussed above. See Jeffrey T. Kuhner, *Iraqis Target Gen. Franks for War Crimes Trial in Belgium*, WASH. TIMES, Apr. 28, 2003, at A1, available at 2003 WL7710253 ("Mr. Fermon said that because under international law President Bush and Secretary of State Colin L. Powell cannot be prosecuted for war crimes while they are in office, the complaint will target Gen. Franks and other U.S. military officials.").

<sup>287</sup> *US offers only faint praise for Belgian move on Franks lawsuit*, AGENCE FR. PRESSE, May 21, 2003.

<sup>288</sup> *Id.*

The matter came to a head at a North Atlantic Treaty Organization (NATO) meeting at NATO headquarters in Brussels, Belgium. U.S. Secretary of Defense Donald Rumsfeld strongly emphasized the U.S. concerns about the two pending Belgian cases against U.S. personnel:

The suits are absurd. Indeed, I would submit that there is no general in history who has gone to greater lengths than General Franks and his superb team to avoid civilian casualties. I am told that the suit against General Franks was effectively invited by a Belgian law that claims to give Belgian courts powers to try the citizens of any nation for war crimes. The United States rejects the presumed authority of Belgian courts to try General Franks, Colonel McCoy, Vice President Cheney, Secretary Powell and General Schwarzkopf, as well as former President Bush.

I will leave it to the lawyers to debate the legalities. I am not a lawyer. But the point is this. By passing this law, Belgium has turned its legal system into a platform for divisive, politicized lawsuits against her NATO allies.<sup>289</sup>

Moreover, Secretary Rumsfeld warned the Belgian government about the consequences of the law: the ongoing criminal actions, and the potential

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The United States on Wednesday expressed little satisfaction with the Belgian government's decision to pass on a lawsuit accusing the US military commander in Iraq of war crimes.

The State Department said the move, an attempt by Brussels to quash the suit, was positive but stressed Washington would not be happy until the law under which the case was filed was radically altered or eliminated.

*Id.*

<sup>289</sup> U.S. Dep't of Defense, News Transcript: Secretary of Defense Rumsfeld at NATO Headquarters (June 12, 2003), *at* <http://www.defenselink.mil/transcripts/2003/tr20030612-secdef0271.htm> (last visited Mar. 1, 2005).



for future criminal actions, against U.S. officials in the Belgium legal system threatened the viability of Belgium as a NATO host. Along those lines, Secretary Rumsfeld announced that the U.S. would suspend the funding of a new NATO headquarters building.<sup>290</sup>

In the midst of this controversy, the Belgian government forwarded three new sets of war crimes complaints filed against U.S. officials for alleged war crimes in Afghanistan and Iraq.<sup>291</sup> In an effort to finally resolve the matter, Belgian Prime Minister Guy Verhofstadt quickly announced the government's intent to further restrict the Act and end the "systematic abuse by people and organizations with a political

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<sup>290</sup> *Id.* Secretary Rumsfeld stated:

Belgium needs to realize that there are consequences to its actions. This law calls into serious question whether NATO can continue to hold meetings in Belgium and whether senior U.S. officials, military and civilian, will be able to continue to visit international organizations in Belgium. . . .

If the civilian and military leaders of member states can not come to Belgium without fear of harassment by Belgian courts entertaining spurious charges by politicized prosecutors, then it calls into question Belgium's attitude about its responsibilities as a host nation for NATO and Allied forces. . . . Certainly until this matter is resolved we will have to oppose any further spending for construction for a new NATO headquarters here in Brussels until we know with certainty that Belgium intends to be a hospitable place for NATO to conduct its business, as it has been over so many years.

*Id.* This suspended \$350 million in U.S. funds authorized for the NATO headquarters. Ambrose Evans-Pritchard, *Belgium Restricts War Crimes Law*, DAILY TELEGRAPH (London), June 24, 2003, at 14, available at 2003 WL 57777169.

<sup>291</sup> Paul Ames, *Belgium Rejects War Crime Claim vs. Bush*, Associated Press, June 19, 2003, at 2003 WL 57822891. Belgian officials stated that "the complaints were filed separately by disgruntled people from Germany, Switzerland and Belgium and concerned the wars in Iraq and Afghanistan." *Id.* Three complaints were filed, one against President Bush, Prime Minister Blair, Secretary Rumsfeld, Secretary Powell, and General Franks for Iraq allegations, one against only Secretary Powell, and a third against President Bush, Secretary Rumsfeld, Attorney General John Ashcroft, National Security Advisor Condoleeza Rice, and Deputy Defense Secretary Paul Wolfowitz for allegations from Iraq and Afghanistan. *Id.*

agenda”<sup>292</sup> and a “manifestly abusive political use” of the Act.<sup>293</sup> The new amendments strictly limited jurisdiction under the Act for crimes occurring beyond Belgium’s borders to those where either the victim or defendant is a Belgian citizen or resident.<sup>294</sup> After the changes, all pending cases against U.S. officials or former officials were ultimately dismissed.<sup>295</sup>

HRW advocacy director Reed Brody, who had constantly encouraged other NGOs to use the Belgian law more judiciously, summarized the Act’s downfall: “People who really needed this law shuddered as one high profile case after another was launched. . . . The law was abused. The case against Franks was brought by antiwar people looking to make a statement.”<sup>296</sup>

## VI. Analysis

What can the ICC Prosecutor learn from the Kosovo and Iraq/Belgium case studies? These case studies show that NGOs will look for prosecutorial/judicial forums to make their cases against U.S. senior civilian or military personnel. The case studies also provide examples of the different approaches the ICC Prosecutor can take in addressing future claims of collateral damage as a war crime. After reviewing how NGOs can use the Rome Statute provisions to present their claims to the ICC, this section analyzes the two different approaches, exemplified in the case studies, that the ICC Prosecutor may choose to take or not take in response to NGO allegations of collateral damage as a war crime.

To begin, NGOs will have the ability under RS Article 15 to submit information to the Prosecutor for him or her to assess if there is a “reasonable basis to proceed.”<sup>297</sup> While this is very similar to Article

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<sup>292</sup> Raf Casert, *New Belgian Government Pledges More Amendments War Crimes Legislation*, Associated Press Newswires, July 8, 2003 (quoting a Belgian government statement).

<sup>293</sup> Ratner, *supra* 270, at 891.

<sup>294</sup> *Id.*

<sup>295</sup> Raf Casert, *Belgian court dismisses charges of US war crimes*, BOSTON GLOBE, Sept. 25, 2003. See also *Belgian Court Throws Out War Crimes Case Against US General Franks*, AGENCE FR. PRESSE, Sept. 23, 2003, available at 2003 WL 71320955; Constant Brand, *War Crimes Complaint Against Franks Tossed*, MIAMI HERALD, Jan. 14, 2004 (referring to the Belgian High Court affirming a lower court’s dismissals of General Franks’ case and other cases).

<sup>296</sup> Lynda Hurst, *Belgium Reins in War-crime Law*, TORONTO STAR, June 29, 2003, at F04 (quoting Reed Brody).

<sup>297</sup> See Rome Statute, *supra* note 3, art. 15.

18(1) of the ICTY Statute, the potential influence of the NGOs will be even greater in the ICC due to the differences between the missions of the two courts. For example, the ICTY's mandate was limited to a discrete geographical area and, as a practical matter, the ICTY could not possibly pursue every atrocity that occurred in the Former Yugoslavia.<sup>298</sup> Conversely, the ICC Prosecutor has a worldwide portfolio. In this sense, it resembles the Belgian Act in its early stages where any NGO could submit a claim.

Given the significant influence exerted by NGOs in lobbying for an independent ICC Prosecutor, it stands to reason that NGOs will seek to influence the Prosecutor's case selection through RS Article 15(2).<sup>299</sup> If a sufficiently high number of civilian casualties result as collateral damage in a future U.S. military operation, NGOs may submit this information to the Prosecutor in the same manner that similar reports were submitted to the OTP alleging NATO war crimes in Kosovo and to the Belgian prosecutor alleging U.S. war crimes in Iraq. Indeed, the Jan Fermon/StopUSA movement originally wanted to file their complaint with the ICC, but they could not, as the U.S. is not an ICC member.<sup>300</sup> Moreover, notwithstanding the lack of jurisdiction, the ICC Prosecutor has already received a number of complaints alleging U.S. war crimes in Iraq.<sup>301</sup> Consequently, the ICC Prosecutor will have to make some early

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<sup>298</sup> RATNER & ABRAMS, *supra* note 16, at 199.

<sup>299</sup> Rome Statute, *supra* note 3, art. 15(2) (permitting the ICC Prosecutor to "seek additional information from . . . non-governmental organizations . . .").

<sup>300</sup> Kuhner, *supra* note 286 ("The plaintiffs sought to file the complaint with the recently inaugurated ICC, but 'since the United States did not ratify the treaty to join the institution, [the plaintiffs] felt compelled to go to a court in Belgium' . . .").

<sup>301</sup> See *Court Rejects Anti-U.S. Petitions*, WASH. TIMES, July 17, 2003. The article reported that

The new International Criminal Court yesterday rejected more than 100 requests to investigate complaints about the U.S. led war in Iraq, saying it had no jurisdiction to act on these claims.

"We have received communications about acts allegedly perpetrated by U.S. troops in Iraq but we are not mandated to prosecute such acts since neither Iraq nor the United States is a state party to the court," ICC Chief Prosecutor Luis Moreno-Ocampo said.

*Id.*

policy decisions regarding how he or she intends to handle these types of cases.

The ICC Prosecutor, Mr. Luis Moreno-Ocampo, should therefore carefully consider the implications of the Kosovo report and the Belgian cases. Unfortunately but inevitably, the issue of civilian collateral damage in a military operation will arise again. The ICC Prosecutor will need to decide how to respond. Based on the two case studies evaluated above, two paths come to mind. The ICC Prosecutor could use the occurrence of collateral damage to test his powers and fully investigate under RS Article 8(2)(b)(iv). This course of action resembles the Belgian scenario. Alternatively, as in the Kosovo case, the ICC Prosecutor could also make a reasoned judgment to refrain from investigating alleged violations under RS Article 8(2)(b)(iv). Let us review how these two paths could unfold under the Rome Statute.

If the ICC Prosecutor wanted to fully test his powers in a collateral damage scenario, the Prosecutor could first pursue an investigation under RS Article 15(1) and gather information from friendly NGOs under RS Article 15(2).<sup>302</sup> Emulating the NGOs in the Kosovo and Belgian complaints, the Prosecutor could make the argument that a certain number of civilian deaths resulting from collateral damage incidents is, by itself, enough to establish a “reasonable basis” to proceed. The Prosecutor could argue that the “reasonable basis” test is a low threshold to meet. First, though, the Prosecutor would have to notify the state involved under RS Article 18(1).<sup>303</sup> If the state decided to investigate the case itself, it could trigger the complementarity process by notifying the Court under RS Article 18(2), after which the Prosecutor would have to defer to the state.<sup>304</sup> However, the Prosecutor could review his or her deferral to the state under RS Article 18(3) “at any time when there has been a significant change of circumstances based on the state’s unwillingness or inability genuinely to carry out the investigation.”<sup>305</sup> As discussed earlier, if two out of three members of the Pre-Trial Chamber rule in favor of the Prosecutor, he or she would be able to proceed.

In addition, if a state did elect to conduct an administrative investigation, and that state determined there was no criminal intent under RS Article 8(2)(b)(iv), a Prosecutor that wished to politicize the

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<sup>302</sup> Rome Statute, *supra* note 3.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* art. 18(2).

<sup>305</sup> *Id.* art. 18(3).

process could test how the Court would rule on RS Article 17(1)(b). RS Article 17(1)(b) makes a case inadmissible if: "The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."<sup>306</sup> On its face, this provision would seem to enable a state to investigate and decide not to prosecute, but the Prosecutor could nonetheless try to make the case that the State is unwilling to genuinely prosecute.

Although many NGOs may wish to see the ICC Prosecutor fully execute this course of action, it is a path fraught with risk for the ICC Prosecutor.<sup>307</sup> The ICC is a new international organization trying to establish its credibility and legitimacy; it is hindered by the lack of a police force and an incarceration mechanism.<sup>308</sup> The ICC also has no

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<sup>306</sup> *Id.* art. 17(1)(b).

<sup>307</sup> CHRISTOPHER KEITH HALL, SUGGESTIONS CONCERNING INTERNATIONAL CRIMINAL COURT PROSECUTORIAL POLICY AND STRATEGY AND EXTERNAL RELATIONS 12 (2003), at <http://www.icc-cpi.int/library/organs/otp/hall.pdf> (last visited Mar. 1, 2005) ("The Prosecutor will face enormous pressures from the general public, the press, some national non-governmental organizations and some victims to investigate and prosecute every crime within the jurisdiction of the Court and many that are not within the jurisdiction of the Court.").

<sup>308</sup> Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT'L L.J. 621, 625 (2003).

The ICC, as currently structured, has no police force to assist it with finding, arresting, and securing potential suspects. Rather, the Rome Statute preserves, with limited exception, the deficient approach currently utilized by both the ICTY and the International Criminal Tribunal for Rwanda (ICTR), whereby arrests are made by 'cooperating states' or NATO forces. A second major deficiency in the ICC's current formulation is the lack of any international or regional system for incarceration purposes. The Rome Statute clearly indicates, and indeed limits, the possible penalties of conviction to terms of imprisonment. Yet, oddly enough, the Rome Statute does not provide for a permanent facility where ICC convicts will be housed. Instead, the Rome Statute maintains the status quo used unsuccessfully by both the ICTY and ICTR, which relies upon "willing states" to provide prison facilities on an 'as needed' or "as desired" basis.

*Id.* at 625-26 (citations omitted).

ability to “seize evidentiary material, execute arrests, make searches or compel witnesses to give testimony without the co-operation of national authorities.”<sup>309</sup> As a result, the ICC Prosecutor must take into account how likely it is that a state will cooperate with his investigation against that state’s citizens.<sup>310</sup>

In this regard, it is highly likely that the U.S. will strongly oppose any efforts by the ICC Prosecutor to investigate or prosecute U.S. military or civilian personnel. In the Belgian cases, the U.S. made it clear through official channels that it strongly protested Belgian jurisdiction. The U.S. also used its available leverage (suspending NATO headquarters funding and questioning the continued viability of Belgium as a host for NATO) in a successful effort to convince Belgium to change the Act. Indeed, John Bolton, the U.S. Under Secretary for Arms Control and International Security, specifically cites the Belgian cases as a basis for believing “our concerns about politically motivated prosecutions against U.S. personnel are not just hypothetical.”<sup>311</sup>

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<sup>309</sup> Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 88 (2004).

<sup>310</sup> *Id.* (“The overall effectiveness of the Prosecutor depends on his ability to compel states to co-operate and comply with his decisions. . . . Due to these limitations, the Prosecutor, as the principle organ of investigation, will need to consider the likelihood of state co-operation when deciding whether to initiate an investigation.”).

<sup>311</sup> John R. Bolton, Remarks at the American Enterprise Institute Washington, DC (Nov. 3, 2003), at <http://www.state.gov/t/us/rm/25818.htm> (last visited Mar. 1, 2005). Under Secretary Bolton stated:

Our concerns about politically motivated charges against U.S. persons are not just hypothetical. Recently in Belgium, allegations of war crimes were brought against the President, the Vice President, the Secretaries of State and Defense, and former President Bush under that country’s notorious and far-reaching universal competence statute. That problem was brought closer to home when senior Belgian officials themselves were charged under the statute, and the law was subsequently amended to limit its scope. Without sufficient protection against such frivolous charges, responsible officials may be deterred from carrying out a wide range of legitimate functions across the spectrum, from actions integral to our national defense to peacekeeping missions or interventions in humanitarian crises or civil wars. . . .

*Id.*

Moreover, the U.S. government has already taken every available step to protect its personnel from ICC jurisdiction. In doing so, the U.S. has relied upon provisions of the Rome Statute as well as domestic legislation. The U.S. National Security Strategy summarizes this strategy:

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials.<sup>312</sup>

Specifically, the U.S. has negotiated a series of bilateral agreements under Article 98 of the Rome Statute.<sup>313</sup> In these agreements, other nations pledge not to turn over U.S. personnel to the ICC.<sup>314</sup> This

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<sup>312</sup> THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 34, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Mar. 1, 2005). This publication is also available at <http://www.whitehouse.gov/nsc/nss.html> (last visited Mar. 1, 2005).

<sup>313</sup> See Rome Statute, *supra* note 3, art. 98. Within Article 98, which is entitled "Cooperation with respect to waiver of immunity and consent to surrender," Article 98(2) provides:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

<sup>314</sup> See Press Statement, U.S. Dep't of State, Eritrea Signs Article 98 Agreement (July 13, 2004), at <http://www.state.gov/r/pa/prs/ps/2004/34347.htm> (last visited

protects U.S. personnel stationed abroad from potential ICC prosecution while the U.S. personnel are in countries that have signed Article 98 agreements. The U.S. has been instrumental in obtaining passage of U.N. Security Council Resolutions that protect U.S. personnel serving in U.N. “established or authorized” missions from ICC jurisdiction for 12 month periods under the authority of RS Article 16.<sup>315</sup> Finally, the

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Mar. 1, 2005) (noting that as of July, 2004, 92 nations had signed Article 98 agreements with the U.S.).

<sup>315</sup> See, e.g., Colum Lynch, *U.N. Extends U.S. Peacekeepers’ Immunity*, WASH. POST, June 13, 2003, available at WL 56497382.

Confronted with the threat to shut down U.N. peacekeeping missions, the Security Council agreed unanimously last July to adopt a resolution that places Americans beyond the reach of the [ICC], which came into being on July 1, 2002. The resolution bars states from investigating and prosecuting individuals from governments that have not ratified the Rome Statute establishing the court.

*Id.* But see Jonathan Wald & Liz Neisloss, *U.S. Ends War Crimes Exemption Bid*, CNN.Com, June 24, 2004, at <http://www.cnn.com/2004/LAW/06/24/us.war.crimes.court/index.html> (last visited Mar. 1, 2005) (reporting that United States efforts to renew U.N. Security Council Resolution were unsuccessful). See also *United Nations Peacekeeping*, S.C. Res. 1487, U.N. SCOR, 4772nd mtg., U.N. Doc. S/RES/1487 (June 12, 2003), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement> (last visited Mar. 1, 2005). The 2003 Security Council resolution states, in pertinent part:

[The Security Council] *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise . . . .

See also Rome Statute, *supra* note 3, art. 16. Article 16, entitled “Deferral of investigation or prosecution,” provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has



American Servicemembers Protection Act of 2002, *inter alia*, prohibits cooperation with the ICC, prohibits U.S. military assistance to state parties of the ICC under certain circumstances, and provides the President authority to “use all means necessary and appropriate to bring about the release” of any U.S. persons “detained or imprisoned, by or on behalf of,” the ICC.<sup>316</sup> Given all of these protective measures, there can be no doubt that the U.S. will take whatever actions it must to thwart an ICC Prosecutor investigation over alleged U.S. violations of RS Article 8(2)(b)(iv).

But if the ICC Prosecutor pursues such an investigation, his chances of success are negligible given the foreseeable lack of cooperation by the U.S. and the absence of any real enforcement powers by the ICC. One commentator viewed this scenario as leading to the ICC’s “political destruction.”<sup>317</sup> Another commentator has warned of the

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requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>316</sup> American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, §§ 2004, 2007-08, 116 Stat. 899, 902-03, 905-06 (2002) (codified as 22 U.S.C.A. §§ 7423, 7426-7427 (2002)), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ206.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ206.107.pdf) (last visited Mar. 1, 2005).

<sup>317</sup> Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1655 (2003). Professor Danner writes:

If the ICC prosecutor chooses to pursue a vendetta against the United States, there is no doubt he will have the opportunity to do so under the letter – if not the spirit – of the Rome Statute, given the extent of U.S. military actions abroad. Unless he has plausible charges to bring, however, the prosecutor will be unable to make significant progress in his investigation and will likely precipitate the political destruction of the court. At present, the court gets its strength from its claim of providing an impartial forum for international prosecutions. If the court appears blatantly partial, then it loses its only real source of power: its moral authority. The United States would undoubtedly win any battle it wages against a zealous prosecutor fired by anti-American sentiment, but the appearance of such a figure would likely spell disaster for the ICC.

*Id.* at 1655.

ICC committing “a form of suicide” if the Prosecutor pursues an overly political investigation “in disregard of state interests.”<sup>318</sup>

On the other hand, the Prosecutor could avoid this potentially catastrophic outcome by taking a different path. The Prosecutor could decide that cases based entirely on charges of incidental collateral damage should not generally be prosecuted in the ICC. If made by the Prosecutor, this decision would track the ICTY Prosecutor’s conclusion in the Kosovo case. However, in such an instance, the ICC Prosecutor should learn from the ICTY Prosecutor’s mistakes, and not publicly disclose any internal reports that address in meticulous detail why specific allegations did not warrant prosecution. Recall the remarks quoted above from Ms. Judith Miller, the U.S. Department of Defense General Counsel, on the impact of the ICTY report. While the ICTY Prosecutor’s conclusion and statements were not critical in any way of U.S. and NATO forces, the ICTY Prosecutor committee’s report delved into operational details in such a dissecting manner that the report was critical, at least implicitly, of NATO targeting decisions, NATO rules of engagement, and the conduct of NATO pilots in combat. Furthermore, when the ICTY Prosecutor publicly released the investigation report, it conveyed the notion that there was something wrong or improper with the conduct of U.S./NATO forces and also created the impression that there was a “moral equivalence” between U.S./NATO forces and those of Slobadan Milošević. When you have forces that are abiding by the law of war in good faith, unintended incidental injuries or damage are simply not the moral equivalent of more egregious war crimes and should not be treated as such.<sup>319</sup>

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<sup>318</sup> Brubacher, *supra* note 309.

On the other hand, were the Prosecutor to exercise his ability to launch investigations in disregard of state interests, the Prosecutor will expose the Court to the danger of being marginalized in the international system, setting a damaging precedent for future attempts to enforce humanitarian norms.

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To ignore the political realities would subject the Court to a form of suicide in so far as it would become marginalized in its relations with states and, ultimately, in its ability to enforce international justice.

*Id.* at 93-94 (citations omitted).

<sup>319</sup> See Anderson, *supra* note 169, who writes:

Legal culpability cannot be determined simply by looking at the level of damage and the death and injury caused. There is

Instead, the ICC Prosecutor could simply quietly dismiss or not act upon communications from NGOs dealing with collateral damage claims. However, this would simply be postponing the issue. It also would encourage NGOs to continue to bring these claims following any U.S. military action. An attorney for HRW discussed the implications of RS Article 8(2)(b)(iv) from an NGO perspective:

[E]ven if the Prosecutor of the International Criminal Court leaves this crime untouched for a while to avoid deepening the hostility of the United States towards the court, its simple existence on the books will impel governments to analyze standards more carefully and will encourage nongovernmental organizations (NGOs) to take on its analysis.<sup>320</sup>

Consequently, to avoid having the volatile issue of collateral damage investigations looming indefinitely, the ICC Prosecutor should promulgate a policy statement indicating that he normally will not investigate allegations of collateral damage.<sup>321</sup> The statement could be

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no moral equivalence between stray missiles aimed in good faith, using the best technology available, and deliberate violation of the categorical rules of war, like using human shields, shelling civilians to prevent them from fleeing Basra and rape or summary execution of prisoners. There can be no element of judgment, or weighing of costs and benefits, in deciding whether or not to target civilians or take them hostage; it is always wrong.

*Id.*

<sup>320</sup> PoKempner, *supra* note 174.

<sup>321</sup> Other commentators have already proposed, in more general terms, setting guidelines for the ICC Prosecutor. *See, e.g.,* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 541-50 (2003). She believes the ICC Prosecutor should

adopt prosecutorial guidelines. The guidelines should provide information about the factors that the Prosecutor will consider, and those he will not consider, when making his discretionary decisions, particularly with regard to investigating, screening, charging, and admissibility decisions, where his discretion is at its apogee. The guidelines should also include explanatory

as simple as this: “The ICC Prosecutor will not normally investigate allegations under Article 8(2)(b)(iv) if the armed forces involved made a sincere and good faith effort to comply with the laws of war during the conflict from which the complaint arose.” In implementing this policy, the Prosecutor should insist that NGOs articulate precisely why they believe a specific case of collateral damage amounts to a violation of Article 8(2)(b)(iv).

Patricia Wald, a judge on the ICTY from 1999-2001 and a self-acknowledged ICC supporter, recently endorsed this proposal in theory and addressed the rationale behind it. She noted the concern that the ICC Prosecutor may target senior U.S. civilian and military leaders for “crimes based upon their strategic wartime decisions” and the critique of the ICC that:

leaders on the front line who must make on-the-spot decisions as to what is a military or civilian target or whether an assault on a particular target will cause extreme collateral damage, disproportionate to its military benefits so as to bring it within the definition of a war crime, should not have their judgments second-

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comments, which will further delineate how the Prosecutor will consider the enumerated factors.

*Id. See also* MCDONALD & HAVEMAN, *supra* note 56, at 3.

Considering that the work of the Court, and the work of the Prosecutor in particular, will be the subject of extensive public scrutiny, and that perceptions of the Prosecutor’s work and how his mandate is executed are as important as facts, particularly in the early phase of the Court’s work, the need for ‘objectifying’ or pinning down the largely subjective criteria articulated in Article 53(1) seems obvious.

To avoid fuelling any already existing perceptions of the ICC as a political court, to minimize [sic] any accusations of bias, and to increase transparency and boost the credibility of the Court as a strictly judicial institution, it is necessary to identify the guiding principles underpinning the exercise of prosecutorial discretion and to identifying criteria which can be applied in each instance in order to determine whether the conditions of Article 53(1) have been fulfilled.

*Id.*

guessed by hostile judges at the risk of incurring long terms of imprisonment.<sup>322</sup>

She suggested addressing this concern through a:

special process for dealing with charges based on strategic military judgment calls. The Prosecutor might issue a policy statement, setting out the circumstances under which this kind of case would be brought. Such transparency might ward off unreasonable or even sincere fears of prosecutions motivated by political revenge or national envy. He might even consider publicly stating his rationale for refusing to investigate these kinds of allegations in a few high-profile cases.<sup>323</sup>

This proposal to generally refrain from prosecuting collateral damage claims and to articulate this through a policy statement can be justified on several grounds. First, it greatly reduces the possibility of the ICC being turned into a political platform for NGO protests against U.S. policies and actions. Because Article 8(2)(b)(iv) is an offense that can easily be alleged, it lends itself to politicized allegations. The Belgian cases clearly demonstrated how some NGOs have no qualms about making formal war crimes allegations as a means to promote their own efforts in protesting the war itself. As discussed above, already the ICC Prosecutor has received numerous complaints over matter it has no jurisdiction over, including many “protest letters.”<sup>324</sup> Numerous complaints have been filed with the ICC about U.S. actions in Iraq, even though neither Iraq nor the U.S. is a party to the ICC.<sup>325</sup> The ICC could

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<sup>322</sup> Patricia M. Wald, Judge, *Is the United States' Opposition to the ICC Intractable?*, 2 J. INT'L CRIM. JUST. 19, 23-24 (2004).

<sup>323</sup> *Id.* at 24.

<sup>324</sup> Since July 2002, of the 499 communications received by the ICC Prosecutor, 424 are protests. See Press Release, The Prosecutor of the International Criminal Court, Prosecutor Will Comment on Communications Received (July 15, 2003), at [http://www.icc-cpi.int/library/press/mediaalert/pids008\\_2003-en1.doc](http://www.icc-cpi.int/library/press/mediaalert/pids008_2003-en1.doc) (last visited Mar. 1, 2005). See also *Court Rejects Anti-U.S. Petitions*, *supra* note 301.

<sup>325</sup> Press Release, The Prosecutor of the International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC (July 16,

gain some institutional credibility by distancing itself from many of these NGO claims.<sup>326</sup> Advocates for NGOs may view this proposal as a capitulation to the U.S., but such a proposal merely asserts the ICC Prosecutor's intent regarding one offense out of the litany of war crimes in the Prosecutor's arsenal. Indeed, there may even be support for this proposal in some NGO quarters, as such a proposal could help assuage the U.S. government's opposition to the ICC and provide the ICC the room it needs to develop.<sup>327</sup> Along these lines, Christopher Keith Hall, the Head of the International Justice Programme, Amnesty International urges the ICC Prosecutor emphasize his "prosecutor's strategy" in a manner comparable to the proposal suggested above.<sup>328</sup>

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2003), at [http://www.icc-cpi.int/library/press/mediaalert/16\\_july\\_\\_english.pdf](http://www.icc-cpi.int/library/press/mediaalert/16_july__english.pdf) (last visited Mar. 1, 2005).

<sup>326</sup> Danner, *supra* note 321, at 534.

In the case of the ICC, NGOs will likely push the Prosecutor to act aggressively, even—or especially, perhaps—in politically sensitive cases. . . . The danger is that NGOs will try to force the Prosecutor's hand in cases where he considers it imprudent to venture, at least at that time. Sophisticated NGOs can no doubt perceive the danger of overreaching by the ICC and might choose not to push such politically explosive cases. Given the number of NGOs, however, and the diversity of viewpoints within the NGO community, NGOs are unlikely to be completely self-restraining. As Richard Dicker of Human Rights Watch has observed, "[T]here is no one controlling the on/off switch to the Office of the Prosecutor."

It would be naïve, however, to discount the danger of excessive NGO involvement or influence on prosecutorial decision making. Critics of the ICC routinely charge that the Prosecutor will be dominated by NGOs. Just as the Prosecutor must firmly maintain his independence from states, he must also distance himself from NGOs.

*Id.* (citations omitted).

<sup>327</sup> Brubacher, *supra* note 309, at 93 ("As stated by Amnesty International, an ineffectual ICC is worse than having no ICC at all.")

<sup>328</sup> See Hall, *supra* note 307, at 41.

For example, instead of saying, as some defenders of the Court now do, that no US national will ever come before the Court, it would be better to emphasize the Prosecutor's prosecution strategy, so that the general public will quickly draw its own conclusions that unless the USA plans to commit

Second, the ICC Prosecutor would be justified in making a policy statement to generally refrain from prosecuting collateral damage crimes under RS Article 8(2)(b)(iv) on the grounds that such offenses are extremely difficult to prove. Given the high levels of knowledge and intent required by RS Article 8(2)(b)(iv), coupled with the additional requirement that the loss must be “clearly excessive” in relation to the military gain, the ICC Prosecutor will find it exceedingly difficult to prosecute this crime successfully. Recall that, as discussed earlier, the grave breach version that the Rome Statute adopts is practically comparable to proving a direct attack on civilians or civilian objects. By following a policy of generally not pursuing this charge, the Prosecutor can reduce the potential need for the Court to engage in difficult and subjective proportionality balancing test determinations. Thus, by not venturing into this thicket, the Court preserves its legitimacy. In contrast, if forced to address these questions, the court essentially puts itself in a situation where it could be compelled to second-guess military targeting decisions approved at the highest level of a state.

The difficulty of collateral damage cases for prosecutors and judges is compounded by the dearth of case law in this area. Historically, war crimes tribunals have not prosecuted charges based on allegations of excessive collateral damage.<sup>329</sup> Indeed, W.J. Fenrick, the Senior Legal Adviser, ICTY- Office of The Prosecutor, stated, “No tribunal to date has ever explicitly determined in a well articulated manner in a close case that disproportionate damage was caused during an attack on a military objective.”<sup>330</sup> While the ICTY has prosecuted five cases of unlawful attack, an offense that is based on AP I Article 51 and is similar to RS Article 8(2)(b)(iv), the ICTY charge has a lower

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genocide, crimes against humanity or war crimes on a considerable scale, US nationals are likely to be investigated and prosecuted for such crimes only in national courts.

*Id.*

<sup>329</sup> W.J. FENRICK, CRIMES IN COMBAT: THE RELATIONSHIP BETWEEN CRIMES AGAINST HUMANITY AND WAR CRIMES (2004), at <http://www.icc-cpi.int/library/organs/otp/Fenrick.pdf> (last visited Mar. 25, 2005) (“[T]he ICC may, of course, simply adopt the approach taken by most tribunals in the past, including those which adjudicated the post World War II war crimes cases, and ignore offences committed in combat.”).

<sup>330</sup> *Id.* at 8. See also Wald, *supra* note 322, at 24 (“[I]t does not appear that any high-ranking military or civic leaders have been brought to trial before any of the existing international courts on borderline judgment calls.”).

threshold of proof.<sup>331</sup> Additionally, the ICTY cases are not entirely apposite to the typical case of unintended collateral damage. The ICTY cases involved allegations such as massacres of civilians in a small town and deliberate sniper attacks on civilians in Sarajevo.<sup>332</sup> For example, in the Galic case, the unlawful attack charge was dismissed as it was cumulative with the charge of terror that General Galic was found guilty of, i.e., for the murder of hundreds of civilians who were targeted in broad daylight under conditions where it was clear they were not engaging in any military activities.<sup>333</sup> Therefore, the ICTY jurisprudence

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<sup>331</sup> FENRICK, *supra* note 329, at 9-10.

In your cases before the ICC, of course, the analogous offences to out unlawful attack offences would (include)...Art 8(2)(b)(iv). . . . These offences and their related elements are not precisely the same as ours. In particular: (a) the mental element differs – ours, derived from the APs is “wilful”, yours is “intentional”, . . . (c) your proportionality standard “clearly excessive in relation to the concrete and direct overall military advantage anticipated” appears to be higher than ours which omits the underlined words . . . .

*Id.*

<sup>332</sup> *Id.* at 4-5.

The ICTY-OTP has prosecuted unlawful attack charges in five cases to date. Trial judgments have been rendered in *Balskić*, *Kordić/Cerkez*, and *Galić*. Trials are currently underway in *Strugar* and in *Milošević*. *Balskić* and *Kordić/Cerkez* were trials involving Bosnian-Croat accused and incidents in the Lasva River Valley in Bosnia, in particular the Ahmici massacre in which many of the inhabitants of a small Bosnian village were killed when it was overrun by Bosnian-Croat forces. *Galić* was the commander of Bosnian-Serb forces involved in a protracted shelling and sniping campaign against the inhabitants of Sarajevo. *Strugar* was the commander of Yugoslav National Army Forces engaged in what the prosecution alleges was the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991. *Milosević* is charged with a wide responsibility for a wide range of offences including offences related to what happened in Sarajevo and in Dubrovnik.

*Id.* The actual opinions may be found at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Sept. 3, 2005).

<sup>333</sup> See FENRICK, *supra* note 329, at 4-5 (expressing the opinion that the Galic case is “by far the most elaborate and thoughtful judicial decision ever rendered



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in connection with unlawful attacks.”). *But see* Tejal Jesrani, *Updates from the International Criminal Courts*, 11 HUM. RTS. BR. 61 (2004). Jesrani reviews the Galić case in a manner that makes clear how egregious Galić’s criminal misconduct was:

During the period covered in the indictment, General Galic was a commander of the Sarajevo Romanija Corps (SRK), a branch of the Army of Republika Srpska (VRS), which was embroiled in armed conflict with the Army of Bosnia-Herzegovina (ABiH). The Prosecution alleged that Galic was criminally responsible for a campaign of sniping and shelling attacks on civilians in the parts of Sarajevo controlled by ABiH with the primary purpose of inflicting terror. The Prosecution claimed that this campaign resulted in a large number of deaths and injuries to civilians. The Defense contested the allegations, claiming that the civilian casualties were collateral to legitimate military activity and resulted from the targeting errors and stray bullets of both warring factions.

The Trial Chamber heard the testimony of 171 witnesses and viewed a large number of visual exhibits. The group of witnesses included victims of the attacks, international military personnel stationed in Sarajevo, and members of the armed forces of both parties to the conflict. The majority found that civilians in Sarajevo were attacked generally during the day and that the attacks were not in response to any military threat. In addition, the majority determined that the attackers could easily tell that their victims were engaged in everyday civilian activities. These findings fulfilled the requirements for the chapeau elements of violations of the laws of war. In addition, the majority found that hundreds of civilians were killed and thousands were injured in these attacks in the two-year period covered in the indictment. Although Judge Nieto-Navia authored a lone dissent, the majority found that the attacks were part of a widespread and systematic campaign against civilians, fulfilling the chapeau requirements for crimes against humanity. In essence, the majority found that the SRK forces were guilty of each of the crimes alleged in the indictment and stated that it only had to rule on General Galic’s responsibility in those crimes.

The majority found General Galic guilty of the crime of terror and dismissed the charges of attacks of civilians as violations of the laws of war. Both of these crimes are prohibited by Article 51 of Additional Protocol I to the

does not add a great deal to the paucity of case law on collateral damage war crimes prosecution and thus, will not assist the ICC Prosecutor in resolving less egregious cases.

A third rationale for the ICC policy statement proposed above is that such a policy would keep with the Rome Statute's spirit. The "in particular" threshold of RS Article 8 would be most appropriate in this setting. When a state makes a good faith and conscientious effort to comply with the laws of war, but unintended collateral damage results nonetheless, clearly there is not a state organized "plan or policy" to commit war crimes, nor is there "a large scale commission" of war crimes. As a result, an ICC Prosecutor should be mindful of the "in particular" language in RS Article 8 and exercise his or her discretion not to prosecute. Likewise, a policy statement clarifying the Prosecutors intent not to prosecute these types of crimes would add meaning to the "gravity" requirements in RS Article 17 and RS Article 53.

On the other hand, an argument against such a policy statement by the ICC prosecutor may be that it would eliminate the ICC's influence to potentially deter collateral damage. However, recent U.S. history has shown that civilian casualties often cause a decrease in public support for the particular operation.<sup>334</sup> This, in and of itself, is a strong incentive to minimize civilian casualties. Additionally, the Kosovo and Iraq operations revealed a strong commitment to minimizing civilian casualties as well. Given these factors, any deterrent effect the ICC has on reducing unintended collateral damage is remote and speculative at best.

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Geneva Conventions of 1949 and were read into the ICTY Statute under the expansive capability of Article 3. The majority noted that this was the first time it had to pronounce on the material and mental elements of the crime of terror. The crime of terror has the same legal elements as the crime of attack on civilians, plus an additional mental element requiring that the main purpose of the act be to spread terror among the civilian population. Since the law on cumulative convictions prohibits multiple convictions under different articles of the statute for the same facts, and favors a conviction under the more specific provision, the majority dismissed the charges of attacks on civilian populations and upheld the conviction of terror as a violation of the laws of war.

<sup>334</sup> IGNATIEFF, *supra* note 187, at 192-93 (citing the negative effect on public support for U.S. operations following civilian casualties in Iraq and Serbia).

Fourth, the ICC Prosecutor would be justified to adopt a policy of generally not pursuing collateral damage cases because such a policy could help to slowly build a comfort level with the ICC in the U.S. Most of the arguments against the ICC are ultimately premised on the possibility that the Prosecutor may pursue politically motivated investigations against the U.S., particularly against high-level military and civilian officials. Indeed, Undersecretary Bolton has stressed this theme:

Our concern goes beyond the possibility that the Prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values by allegedly committing a war crime. Our principal concern is for our country's top civilian and military leaders, those responsible for our defense and foreign policy. They are the ones potentially at risk at the hands of the ICC's politically unaccountable Prosecutor, as part of an agenda to restrain American discretion, even when our actions are legitimated by the operation of our own constitutional system.<sup>335</sup>

Because collateral damage incidents are bound to arise in any significant military operation, the U.S. concern about politicized prosecutions or investigations at the ICC is a valid one. If the ICC Prosecutor focuses on major human rights atrocities, though, the ICC may gradually dispel some of the major U.S. concerns with the Court. If it becomes clear that the ICC does not intend to investigate and review each and every U.S. operational decision that results in unintended civilian casualties, then attitudes towards the ICC may change over time.

Thus, another part of increasing the U.S. comfort level with the ICC may require the Prosecutor to recognize the difference between prosecuting military personnel for incidents of unintentional collateral damage and prosecuting military personnel for intentional criminal conduct conducted in contrast to a state's military policy. Although the U.S. concern with the ICC is based on the need to protect U.S. service members abroad from politicized prosecutions, the U.S. appears to have

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<sup>335</sup> John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (Nov. 14, 2002), at <http://www.state.gov/t/us/rm/15158.htm> (last visited Sept. 3, 2005). See also Scheffer, *supra* note 69.

the greater fear that the court will undermine senior U.S. military and civilian officials.<sup>336</sup> This is because it would be very difficult for the ICC Prosecutor to assert, in good faith under RS Article 17, that the U.S. has not acted “independently or impartially” following the prosecution of a U.S. service member for intentional criminal acts of misconduct during a military operation and the ICC Prosecutor would thus be bound to defer to the U.S. prosecution.<sup>337</sup> A concrete example of this in the context of our case studies is how many of the perpetrators of detainee abuse at the Abu Ghraib prison in Iraq have been or will be prosecuted by the U.S. military under the Uniform Code of Military Justice.<sup>338</sup> Similarly, in the

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<sup>336</sup> See Sadat & Carden, *supra* note 5, at 593.

<sup>337</sup> *Id.*

The current government continues to emphasize the need to protect U.S. soldiers stationed or sent abroad from frivolous or politically motivated prosecutions in the ICC. Pursuant to the principle of complementarity, however, there is very little actual likelihood of such an occurrence because the United States already conducts investigations in cases where serious and credible allegations of war crimes have been made . . . . Perhaps, then, the real issue is not U.S. soldiers, but the Court's potential effect on senior civilian and military leaders whose overall policies could theoretically be subject to judicial review if war crimes allegations ensue.

*Id.* (citations omitted).

<sup>338</sup> Jim Garamone, *Rumsfeld Pledges to Take All Actions Needed at Abu Ghraib*, American Forces Press Service, May 4, 2004, available at [http://www.defenselink.mil/news/May2004/n05042004\\_200405045.html](http://www.defenselink.mil/news/May2004/n05042004_200405045.html) (last visited Mar. 25, 2005). In a stark comparison to his remarks about the Belgian cases, Secretary Rumsfeld spoke strongly about the imperative need to take disciplinary action against the soldiers who abused Iraqi detainees at the Abu Ghraib prison:

The Defense Department will take all actions necessary to find out what happened at Abu Ghraib prison in Iraq and see that the appropriate actions are taken, the department's top civilian leader said today.

Defense Secretary Donald H. Rumsfeld said the matter of alleged abuse of prisoners in the prison by U.S. military personnel will be pursued properly under the Uniform Code of Military Justice. “The actions of the soldiers in those photographs are totally unacceptable and un-American,” Rumsfeld said during a Pentagon news conference. Any who

peace keeping operations in Kosovo following OAF, Staff Sergeant Frank Rhongi was prosecuted by the U.S. military for brutally sexually assaulting and murdering an eleven year old local girl and received a

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engaged in such actions let down their comrades who serve honorably each day, and they let down their country.”

Rumsfeld said the actions of the prison guards at the facility were an exception, and the vast majority of service members serve the United States with honor. “They uphold the values of our country as they battle enemies that show little compassion or respect for innocent human life,” he said.

The photographs taken by participants and now broadcast around the world show American service members abusing and degrading Iraqi detainees. Rumsfeld said the actions of those few American service members “damaged” the fragile trust the United States is trying to build with the people of Iraq.

“The images that we have seen that include U.S. forces are deeply disturbing—both because of the fundamental unacceptability of what they depicted, and because the actions of U.S. military personnel in those photos do not in any way represent the values of our country or the armed forces” Rumsfeld said.

Rumsfeld stressed that the U.S. military took immediate action upon receiving the accusations. A soldier in the unit was disturbed by what he had witnessed and reported it through the chain of command Jan. 13. On Jan. 14, special agents with the Army Criminal Investigation Command were on the case.

*Id.* See also Jim Garamone, *Military Accuses Six of Abusing Detainees in Iraq*, American Forces Press Service, Mar. 20, 2004, available at [http://www.defenselink.mil/news/Mar2004/n03202004\\_200403203.html](http://www.defenselink.mil/news/Mar2004/n03202004_200403203.html) (last visited Mar. 25, 2005); American Forces Press Service, *Soldier Sentenced to One-Year Confinement*, May 20, 2004, available at [http://www.defenselink.mil/news/May2004/n05202004\\_200405201.html](http://www.defenselink.mil/news/May2004/n05202004_200405201.html) (last visited Mar. 25, 2005) (“As part of a pre-trial agreement, Sivits pleaded guilty to one count of conspiracy to maltreat detainees, two counts of maltreatment of detainees and one count of dereliction of duty, according to Central Command officials.”); THE UNITED STATES, UNIFORM CODE OF MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL IV (2002), available at <http://www.jag.navy.mil/documents/mcm2000.pdf> (last visited Sept. 3, 2005). The Punitive Articles of the UCMJ contain many criminal charges that can cover the same type of criminal misconduct covered by Rome Statute offenses.

dishonorable discharge and confinement to life without parole.<sup>339</sup> In these situations, the individuals involved committed crimes that did not in any way represent U.S. government policy, while they could be considered war crimes under the Rome Statute. Conversely, allegations of war crimes for unintentional collateral damage resulting from the act of planning or executing a military mission do, in fact, directly impinge on U.S. foreign policy interests. Therefore, by essentially setting these types of politicized allegations to the side through the use of the proposed prosecutorial guidelines, the ICC Prosecutor can signal to the U.S. that their greatest concerns with the ICC are unwarranted.

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<sup>339</sup> U.S. v. Rhongi, 60 M.J. 83 (C.A.A.F).

Appellant was deployed with the 82d Airborne Division in Kosovo on January 13, 2000, when he committed the crimes that resulted in his sentence to LWOP. As aptly described by the government, Appellant ‘took advantage of the trust, respect, and kindness’ that eleven-year-old Merita Shabiu showed to American soldiers. “Appellant led her to a dark and deserted, filthy, trash-strewn basement where he indecently assaulted, forcibly anally sodomized, and murdered with premeditation, this innocent child victim.”

As a result of these brutal acts, Appellant pled guilty to and was found guilty of premeditated murder, indecent acts with a child under 16 years of age, and forcible sodomy of a child under 16 years of age, in violation of Articles 118, 134, and 125 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. §§ 918, 934, 925 (2000). Appellant agreed to plead guilty under a pretrial agreement that provided for a non-capital referral.

*Id. at 84.* While Rhongi’s criminal acts took place before the ICC became operational, the case is an example of the U.S. military prosecuting an individual deployed outside of the United States during a military operation.

## VII. Conclusion

While political considerations will be inescapable, the choices that are made in the early stages, and the reasons behind those choices, will set the tone for years to come and will strongly influence public perceptions of the Court and what it is for. It is therefore of critical importance that the OTP gives long and hard thought to the issue of prosecutorial discretion and how it should be exercised.<sup>340</sup>

While one can analyze the powers of the ICC Prosecutor by reviewing the Rome Statute and the Rome Conference organization, the actual practice of the Prosecutor and the Court will ultimately shape the contours of the Rome Statute and determine the meaning of many of its provisions. Many of the checks on the Prosecutor's powers are of a precatory nature; they provide guidance that the Prosecutor is free to disregard if he or she chooses to do so. Thus, much will depend on the actions of the Prosecutor. The Prosecutor has a unique opportunity, through his or her actions, to shape international opinion of the ICC. By aggressively pursuing U.S. military operations that involve unintended collateral damage, the Prosecutor will play into the hands of the ICC's strongest critics. The Prosecutor will confirm their suspicions that the Prosecutor will seek to "criminalize good faith debates in military doctrine" and become "a self propelled auditor of American military operations."<sup>341</sup>

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<sup>340</sup> MCDONALD & HAVEMAN, *supra* note 56.

<sup>341</sup> Ruth Wedgwood, *The United States and the International Criminal Court, The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 194, 198 (2001).

On the other hand, if the Prosecutor concentrates specifically on the “most serious crimes of international concern,” and performs in an objective, non-partisan manner, the Prosecutor’s performance may provide the strongest rebuttal to ICC critics.<sup>342</sup> How the Prosecutor handles the first allegation of collateral damage will go a long way in revealing which path the Prosecutor will follow.

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<sup>342</sup> Wald, *supra* note 322, at 22. (“Many ICC supporters in the United States-myself included-believe that the most formidable weapon against ICC critics will be the track record of the Court itself in its first several years.”).