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Enforcing the Law

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The focus of this panel, as well as that of most panels in this conference, is on the *jus in bello*, the law regulating the way armed force is applied. It is perhaps worth noting parenthetically, however, that participants at the Dumbarton Oaks and San Francisco conferences determined that, unlike the Covenant of the League of Nations, the United Nations Charter should outlaw war.² As the major hostilities phase of the conflict in Iraq dramatically demonstrates, we are a long way from achieving the goal of the founders of the United Nations. Indeed, it is highly unlikely that we shall ever reach the goal of outlawing armed conflict. Nonetheless, as recent events also demonstrate, there is an overriding need for people of good will to recommit themselves to the pursuit of this goal.

During this conference most of the discussion and debate has revolved around four international armed conflicts of the 1990s and the early 2000s: the Gulf War, Kosovo, Afghanistan, and Iraq. But it is important to remember that international armed conflict is not the primary kind of armed conflict today, but rather it is internal or civil wars. In the main, these wars are being fought with no concern for the *jus in bello* and are largely ignored by the great powers. This is especially the case in Africa. A major reason for the failure to deal effectively with these wars is lack of political will. But it appears clear as well that the *jus in bello* applicable to internal wars—Common Article 3 of the Geneva Conventions of 1949 and Protocol II—is inadequate; yet efforts to improve this law are strongly resisted.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Jean-Philippe Lavoyer suggests in his paper that the *jus in bello* we currently have is not the major problem but the failure to implement it in good faith. This seems clear, but as the debates at this conference have clearly shown, there are at the least major differences as to interpretation of the existing rules, even among the leading experts of Western developed States, much less on a worldwide basis. Ideally these ambiguities would be resolved by international negotiations to revise the existing law. However, as Dr. Lavoyer also notes in his paper, the risk of this route is that it might open Pandora's box and result in a much less rather than a more satisfactory *jus in bello*. This is also a problem with the *jus ad bellum*, the law of resort to the use of force, and efforts to revise the UN Charter. There are now 191 member States of the United Nations, and more and more of them, especially those from the so-called "third-world," are demanding to be heard.³

Under a rule of law paradigm,⁴ courts would play a major role in resolving ambiguities in the law of armed conflict and in prosecuting and punishing the perpetrators of war crimes.⁵ Courts have usually not played such a role, but this may be changing. As Ambassador Alan Baker reported in his presentation, Israel's application and enforcement of the law of armed conflict is supervised by its supreme court. In his presentation, Colonel Charles Garraway noted that, especially in Europe, there is an overlap between international human rights law and the law of armed conflict. This overlap was dramatically demonstrated by the claim brought before the European Court of Human Rights by several Yugoslav nationals that various North Atlantic Treaty Organization countries had violated the European Convention on Human Rights and Fundamental Freedoms (European Convention) by their 1999 intervention in Kosovo. The European Court never reached the merits of the challenge because it decided that the applicants did not come within the jurisdiction of the respondent States for purposes of Article 1 of the European Convention, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."⁶ Nonetheless, the stage had been set for possible future challenges to the use of armed force based on international human rights law. As suggested by Colonel Garraway, at the least, there would seem to be considerable need to ensure that international human rights law and the law of armed conflict are compatible.

At this writing there are in existence three international criminal tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). Although both the ICTY and the ICTR have had their share of criticism, it is generally agreed that the two tribunals, especially the ICTY, have played a significant role in interpreting and applying the law of armed conflict. Moreover,

while the International Criminal Court has not yet started any proceedings, it may well do likewise, especially with respect to the *jus in bello* of internal wars. According to media reports, the ICC's first cases are likely to arise from situations in the Congo and other conflicts in Africa.

Also, as Professor Adam Roberts suggested during this conference, the ICC may stimulate national law enforcement authorities and courts to do a better job of enforcing the law of armed conflict. The failure to prosecute such crimes as genocide, war crimes and crimes against humanity at the national level has often been cited as a primary reason for establishing the International Criminal Court.

Belgium has recently learned how difficult it can be for a national legal system to prosecute these crimes. Belgium had legislation⁷ so wide-ranging in scope that it resulted in Belgian courts being flooded with cases based on universal jurisdiction and the Belgian government being involved in heated international controversies. One of these controversies, over a Belgian arrest warrant issued for the foreign minister of the Congo, resulted in a ruling by the International Court of Justice that Belgium had violated international law because the foreign minister enjoyed immunity from judicial process.⁸ As a result of this ruling, Belgium had to drop prosecutions of officials such as Israel's Prime Minister Ariel Sharon, who had been the object of a criminal complaint for war crimes filed by survivors of the 1982 massacres at the Sabra and Shatila refugee camps in Beirut, Lebanon. In the Sharon case, however, Belgium's highest court ruled that Sharon could be tried for war crimes after he leaves office and that his co-defendant, Amos Yaron, the former Israeli Army chief of staff, could be tried before Belgian courts.⁹ Later, as the US war in Iraq was getting under way, representatives of seven Iraqi families who claimed they had lost loved ones in the 1991 Gulf War, filed a criminal complaint naming former US President George H.W. Bush, as well as Secretary of State Colin Powell (Chairman of the Joint Chiefs of Staff in 1991), Vice-President Dick Cheney (Secretary of Defense in 1991) and Norman Schwarzkopf, the general in charge of US forces during Operation Desert Storm.¹⁰ This apparently was the last straw, and resulted in such strong protest from the United States that Belgium modified its legislation to allow cases to be brought only if the victim or suspect is a Belgian citizen or long-term resident at the time of the alleged crime. The revised law also guarantees diplomatic immunity for world leaders and other government officials visiting Belgium.¹¹

Recently, an important alternative to prosecution before an international criminal tribunal or a national court has begun to emerge, the so-called "hybrid court." In Kosovo, East Timor, and Sierra Leone, the United Nations has established hybrid courts, consisting of international and national elements, to prosecute atrocities committed in these regions. Also, on May 13, 2003, after long and tortuous

negotiations, the UN General Assembly approved an agreement with the government of Cambodia to establish a hybrid court to prosecute some of the perpetrators of the crimes committed by the Khmer Rouge during the mid-to-late 1970s.¹²

Although these hybrid courts have taken a variety of forms, perhaps the archetype is the hybrid court for Sierra Leone.¹³ Under the court's statute, there is a three judge trial chamber and a five judge appellate chamber. The government of Sierra Leone appoints one judge to the trial chamber and the UN secretary-general appoints two. The appellate chamber has two judges picked by the government of Sierra Leone and three selected by the secretary-general. Further, after consultation with the government of Sierra Leone, the secretary-general appoints the prosecutor and registrar. The court has jurisdiction over serious violations of the law of armed conflict as well as certain crimes committed since November 30, 1996 under the national law of Sierra Leone. The judges of the court as well as its prosecutor (an American national) and its registrar (a British national) have been selected, and accused persons have been brought before the court. The court has also indicted Charles Taylor, at the time the president of Liberia but now enjoying asylum in Nigeria.

The arrangements for the hybrid court for Cambodia contrast sharply with those for Sierra Leone and reflect five years of difficult negotiations between the United Nations and the Cambodian government. Under the agreement approved by the General Assembly in May 2003, Extraordinary Chambers will be established in Cambodian courts under Cambodian law but will have subject matter jurisdiction over several offenses defined under international law as well as certain offenses proscribed by Cambodian law when committed between April 16, 1975 and January 6, 1979. In the two-tier system of the Extraordinary Chambers, a majority of the judges must be Cambodian while the remaining judges are to be appointed by the Cambodian government based upon nominations by the Secretary-General. The vote of at least one UN-nominated judge is required for a judgment of guilt.¹⁴ It remains to be seen whether these arrangements will be both effective and just.

The hybrid courts in Kosovo and East Timor present still another model of adjudication. Under a UN Security Council resolution adopted at the conclusion of the 1999 conflict between the North Atlantic Treaty Organization and Yugoslavia,¹⁵ Kosovo has been governed by the United Nations Mission in Kosovo (UNMIK), and this arrangement will continue until Kosovo's final status is determined. As the interim authority, UNMIK has established local courts that prosecute both ordinary offenses and certain violations of the law of armed conflict. Foreign lawyers have been appointed as prosecutors, and a majority of the judges are foreign nationals.

Shortly after the people of East Timor voted for independence from Indonesia in August 1999, the United Nations Transitional Administration in East

Timor (UNTAET) began its administration of East Timor, which lasted until the territory became an independent State on May 20, 2002.¹⁶ During this time UNTAET established a hybrid court system in East Timor. An UNTAET regulation adopted in March 2000 created special panels of the District Court of Dili (the capital of East Timor) and granted them exclusive jurisdiction over three international crimes—genocide, war crimes and crimes against humanity—as well as crimes of torture, murder, and crimes of sexual violence when committed between January 1, 1999 and October 25, 1999. In 2001 ten defendants were convicted of crimes against humanity.

After its independence, the United Nations established a Mission of Support in East Timor (UNMISSET) to assist the new nation for two years. As UNTAET had previously, UNMISSET administered the Serious Crimes Unit of the East Timorese judicial system.

In the aftermath of the US-led forces' attack on Iraq, there has been substantial debate about how to bring to justice, to the extent possible, the 55 most-wanted, as well as other high ranking officials, of the Saddam Hussein regime. The US government has expressed its preference for prosecutions in reconstituted Iraqi courts, operating with foreign assistance.¹⁷ Many commentators, including leading human rights organizations, have called for the establishment of either an international or hybrid court established under UN auspices, arguing that, after decades of subservience to Ba'ath Party rule, Iraqi courts are not capable of dispensing impartial justice.¹⁸ Other commentators, including this writer, have supported the US position on the ground, among others, that the creation of an impartial and professionally competent judiciary in Iraq is not a mission impossible and that, in any event, the ultimate decision on the kind of tribunal or tribunals to try the leaders of the Hussein regime should be made by the new government of Iraq.¹⁹ As of this writing no final decision has been made on this issue. The US government has indicated that it plans to prosecute Iraqis in US military tribunals for war crimes committed against US forces during the 2003 Iraq war, and perhaps also for war crimes against Americans committed during the 1991 Persian Gulf War.

A primary issue arising out of the "war on terrorism" is the appropriate legal regime to apply to efforts to control terrorism after the horrific events of September 11, 2001. Prior to September 11 international terrorism had been treated primarily as a criminal law matter. Under this regime the perpetrators of terrorist crimes were prosecuted as common criminals in the civilian courts. After September 11 the situation is much less clear, as the debate over the proposed use of military commissions for prosecuting Taliban and Al Qaeda members detained at Guantanamo Bay, Cuba demonstrates. The case against Zacarias Moussaoui, a

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confessed member of al Qaeda and the only person so far charged in a US court with conspiring in the terrorist attacks of September 11, is especially salient. Because the US government refused to allow Moussaoui to interview captured members of al Qaeda who might provide useful information for his defense on the ground that it would endanger national security, a federal district court judge has ruled that the government cannot seek the death penalty against him and that prosecutors would be barred at trial from trying to link him in any way to the September 11 attacks. Although the government has appealed this ruling, there is speculation at this writing that, if it loses the appeal, the government may transfer Moussaoui to a military commission, possibly at the US military base in Guantanamo Bay.²⁰

Should such a transfer occur, it would likely be met with a firestorm of protest, “given the obvious implication that civilian courts—because of the procedural rights they provide to criminal defendants—are no longer capable of dealing with defendants accused of terrorism.”²¹

Notes

1. John Murphy is a Professor of Law at Villanova University School of Law.
2. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620 (1984).
3. An example of the kind of problems that the increasing assertiveness of developing countries can cause is the collapse of the “Doha round” trade negotiations at Cancun, Mexico, due in no small part to the resistance of the developing countries to demands by the United States and the European Union that the negotiations add foreign investment, competition, and transparency to their agenda.
4. For an excellent discussion of the rule of law in the US constitutional order, see Richard H. Fallon, *The “Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REVIEW 1 (1997). For a skeptical view, see Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE LAW JOURNAL 561 (1977).
5. The United States and other countries have traditionally employed military commissions during times of war to try violations of the law of armed conflict. However, President George W. Bush’s Military Order of November 13, 2001 -Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), asserting the authority to use military commissions to try members of al Qaeda and other persons involved in acts of international terrorism against the United States, unleashed a storm of protest. Many of the protests contended that such trials should take place in US courts rather than in military commissions, especially in light of the severely limited due process rights contained in the President’s order. See e.g., Harold Hongju Koh, *The Case Against Military Commissions*, 26 AMERICAN JOURNAL OF INTERNATIONAL LAW 337 (2002). For a general discussion and debate on this issue, see Daryl A. Mundis, *Agora: Military Commissions*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 320 (2002). Although the US Department of Defense subsequently issued regulations substantially augmenting due process rights of an accused, Military Commission Order No. 1 (Department of Defense Mar. 21, 2002), at <http://defenselink.Mil/news/mar2002/d200020321ord.Pdf>, many critics still found the protections to be inadequate. See e.g., Laura A.

- Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 SOUTHERN CALIFORNIA LAW REVIEW 1407 (2002). Foreign governments reportedly were unwilling to extradite terror suspects to the United States unless they received assurances that they would be tried before civilian courts. See Sam Dillon and Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, NEW YORK TIMES, Nov. 24, 2001, at A1, col. 1.
6. See Bankovic et al. V. Belgium et al., No 52207/99 (Eur. Ct. H.R. 12, Dec. 2001) (Grand Chamber).
 7. Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Act of June 16, 1993), reproduced in 38 INTERNATIONAL LEGAL MATERIALS 918 (1999).
 8. See Arrest Warrant of 11 April 2000 (Congo v. Belg.) (I.C.J. Feb. 14, 2002), reprinted in 41 INTERNATIONAL LEGAL MATERIALS 536 (2002).
 9. See Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, NEW YORK TIMES, Feb.13, 2003, at A12, col. 1.
 10. See Dan Bilefsky, *Bushes on Trial in Belgium? It is Unlikely, but Brussels Still Worries*, WALL STREET JOURNAL, Mar. 28, 2003, at A11, col. 3.
 11. See *Belgium Scales Back Its War Crimes Law Under US Pressure*, NEW YORK TIMES, Aug. 2, 2003, at A6, col. 1.
 12. Press Release, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, UN Doc. GA/10135 (May 13, 2003).
 13. For discussion and analysis of the Sierra Leone tribunal, see e.g., Celina Schocken, *The Special Court for Sierra Leone*, 20 BERKELEY JOURNAL OF INTERNATIONAL LAW 436 (2002).
 14. Details of the arrangement are set forth in Report of the Secretary-General on Khmer Rouge Trials, UN Doc. A/57/769 (Mar. 31, 2003).
 15. S.C. Res. 1244, UN Doc.S/RES/1244 (1999).
 16. This account of the establishment of the hybrid court system in East Timor is based largely on LOUIS HENKIN ET AL., HUMAN RIGHTS: 2003 SUPPLEMENT 91.
 17. See *No Nuremberg: America says Iraq should try its own thugs*, THE ECONOMIST, Apr. 12, 2003, at 28.
 18. See e.g., Human Rights Watch, Letter to US Regarding the Creation of a Criminal Tribunal for Iraq (Apr. 15, 2003), available at <http://www.hrw.org/press/2003/04iraqtribunal041503ltr.htm>.
 19. For my views, see John F. Murphy, *Administering Justice in Iraq: Considerations*, THE LEGAL INTELLIGENCER, May 12, 2003, at 7. Compare Jose' E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE JOURNAL OF INTERNATIONAL LAW 365, 460 (1999) (arguing that "local criminal processes may make valuable contributions to the preservation of collective memory, victim mollification, and the national and international rule of law" and that "absent local prosecutions, mass violence may reemerge" in a country recently scourged by mass atrocity).
 20. See Philip Sheldon, *Government Lawyers Fear 9/11 Ruling Threatens Al Qaeda Cases*, NEW YORK TIMES, Oct. 4, 2003, at A11, col. 3.
 21. *Id.*