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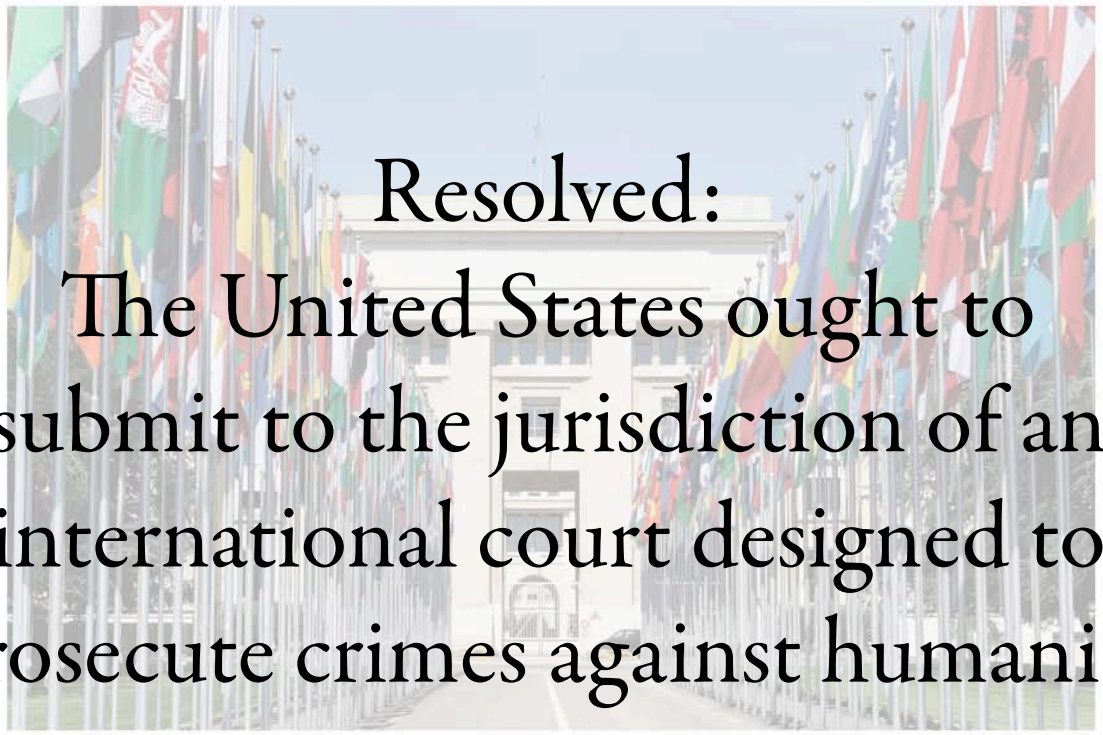

Resolved: The United States ought to submit to the jurisdiction of an international court designed to prosecute crimes against humanity.

Contributors:
Stephen Babb, Mike Bietz, Kyle Fleeger
Rebar Niemi, Ryan Lawrence

Edited by Mike Bietz & Leah Halvorson

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Topic Analysis by Kyle Fleeger

Before I go into what I think are a couple of different academic approaches to the resolution, I will offer some different interpretations of the key terms in the resolution.

1. Submit to the jurisdiction of – The reason I think this phrase can play an interesting role based on different interpretations is that it isn't initially clear whether or not submitting to the jurisdiction of an International Court requires the U.S. to *enforce* the sentence of an I.C. There is some interesting evidence that says that if an International Court ever attempted to try a major U.S. military official or president that the U.S. would refuse any order to turn them over to an international court. If this is true, and an I.C. can lodge allegations of crimes against humanity against the U.S. with no impact to the United States. This interpretation can concede arguments about how the U.S. is obligated to submit to the I.C.C. and focuses the debate more on the results of the U.S. actually being tried in an international court and the potential harms to the U.S. ignoring an international court order to present evidence or personnel they won't be willing to turn over. You can prove that the impacts of the U.S. defying a court with jurisdiction over them outweigh the benefits. Obviously the standard interpretation would be geared toward arguing that by submitting to the jurisdiction of an international court it would include the ability to enforce the laws. If you have ever had to debate whether or not the ability for a body to enforce the rule in question is relevant, you should have some familiarity with this type of debate.
2. An international Court –Obviously there is no specification of a specific international court (of which there are many). As a result, I think there are a few different effective strategies of dealing with this vague rhetoric. First, you can specify a court for the U.S. to join, offer good warrants as to why that court is the best court to debate about, and why it is good to debate a

specific court, rather than theoretical ones. For example, you could argue the International Criminal Court is the international court with the most foreign credibility. Or that the United States has submitted itself to multiple international courts, none with overwhelming international credibility or legitimacy. However, the U.S. refuses to join the I.C.C. because of discrepancies about how much power is bestowed in the Chief Prosecutor. The U.S. thinks it is far too much power, and won't sign the I.C.C. until the treaty granting the chief prosecutor extreme control is changed. So the I.C.C. is the most practically relevant in the status quo, or is the court most in need of debate. So you could specify one of the many courts, with justifications (arguments about why conditional affirmation are good would also be useful). Then outline why that court is either beneficial or harmful to join. The second approach that seems reasonable to take is the opposite approach. You should make arguments about how conditionality and specificity are bad. Then you should read arguments about why a theoretical of an international court is good/preferable. For example, it is better to discuss the resolution in theory because the resolution says the word "designed"… which implies it will be constructed or altered to target specifically crimes against humanity. Because real world international courts conduct trials for offenses other than just crimes against humanity, this court doesn't currently exist and theoretical readings of the resolution are fairer and/or better.

3. Crimes against humanity – In the past, the term "crimes against humanity", had been used to describe specifically genocide. However, times have been changing and enemies have found new ways to commit crimes against humanity less obvious than genocide. I think a smart affirmative take on the resolution would be to try and limit the term to genocide. This would give the affirmative position two advantages. 1. It's very persuasive to be arguing that states shouldn't be allowed to determine the legality of a state sponsored act of violence. 2. It combats a

lot of arguments I expect negatives to be making about how terrorism is a crime against humanity, and it hurts the U.S. fight on terror to turn over jurisdiction to an international court. These arguments could be excluded by the affirmative simply by showing that terrorism is not a crime against humanity. That being said, it seems that today, nations, and non-state actors have new crimes against humanity. Crimes against humanity in the globalized world of today seem to have shifted. Terrorists and non-state actors have found new ways of committing crimes against humanity. For example, Terrorist cells will kidnap civilians and hold them in their barracks, so that when the U.S. bombs a terrorist training facility or barracks, there are huge numbers of civilian casualties. However, defining a crime against humanity is difficult because it's not clear when a crime goes from being against 50 civilians or "humanity". Does killing 50 innocent people mean you commit a crime against humanity? The International Criminal Court, (one of the many topical courts in question) defines crimes against humanity through the Rome Treaty. It states that, ""crimes against humanity "are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings." However, it also explains that these acts must be either part of a government policy, or widespread and condoned by a government or non-state leadership. The bright-line for what makes something a crime against humanity and not just a crime is that the crime has to be government sponsored, or a widespread systemic practice.

These key terms are central to constructing a coherent position on the topic. So now that I have explained a couple of the definitional interpretations, I will go over what I believe some good affirmative and negative positions may look like. Before I go into specific argumentative approaches, I wanted to talk briefly about the way that hegemony can be used on both sides to construct case positions.

Inherent to the notion of International Relations is the concept of Hegemony. Currently in the world, the United States is the hegemonic body (most powerful nation). Many authors (Thayer, Kaplan) write about the importance and role of the United States as the world's police. I think that there is a really strong and easy position to be constructed by both sides around this issue. The affirmative would first argue that U.S. hegemony is bad. There are multiple reasons that you can offer to warrant this claim. 1. U.S. hegemony imposes cultures on others, which is bad. 2. U.S. hegemony creates anti-U.S. sentiment and increases the likelihood of terrorism… etc. Obviously there are more arguments about how the U.S. hegemony is bad, but the responsibility is on you to find them. Once you have proven that U.S hegemony is bad, you make the argument that the United States joining an international court would forfeit U.S. hegemony and that would lead to the impacts above. I think that there are a couple of ways this could structurally be done in a case. First, I think that a framework for a case could easily be constructed to argue the first part of the argument (hegemony bad), and then the contentions could be the different arguments about how submitting to the jurisdiction of an international court would decrease U.S. hegemony which would be offensive reasons to affirm hopefully. Second, if you don't feel comfortable arguing so much in your framework, and don't want to make the hegemony arguments there, I think that two other ways could be used. A) Use decreasing U.S. Hegemony as a criterion and B) Use one contention to establish the bad argument, and a second to prove submitting to an I.C. would decrease hegemony.

An easy to construct argument that would follow the previous argument structurally is for the negative. Instead of making all of the arguments about why U.S. hegemony is bad, argue that U.S. hegemony is good. These arguments vary but are numerous as well. 1. U.S. solves terrorism 2. U.S. is to preventing nuclear war. 3. U.S. is key to stopping international conflict. The above authors write on this side of the debate, whereas the arguments above would deny their claims. Then you actually make the same exact contention arguments as above.

You want to prove that U.S. hegemony is damaged by submission to an international court. The conclusion is the only difference. It is an argument about why submitting to the I.C. would hurt hegemony, but instead of this being a good thing, it would be bad. I think that you can structure these arguments the same way as outlined above.

So now that the hegemony debate has been exhausted, I think there are a couple of other smart ways to approach the topic. The first affirmative idea I think that has merit is to focus the debate on genocide. Above I mentioned that crimes against humanity are argued by a lot of authors to be specifically genocide. This not only has the earlier explained persuasive advantage, but I think the arguments about why states aren't equipped to check genocide are really excellent. A couple of the arguments that I think are particularly good on this issue are: 1. Because genocide is by definition a state sponsored act of violence, it implies that the government condones the violence, which has two implications. A) The government doesn't have an incentive to act against themselves, so they won't, which only makes the genocide worse, and B) The government already has shown no respect for human dignity in that it is sponsoring genocide, so making the U.S. its own check against genocide would only make them better at carry out the genocide. There are obviously a lot of other good arguments about why genocide is bad. An author who writes on this issue is Hannah Arendt. She is an extremely accessible and intelligent writer on the issue of genocide. I think that if an affirmative can win that "crimes against humanity" is genocide, this case becomes really effective and persuasive.

A negative idea that I think is a good approach on the topic although it may be a little out there for more traditional debaters and judges would be explaining how the United States submitting to the jurisdiction of another court is bad because international courts designed to stop crimes against humanity is a benign form of action seeking to eliminate criticism of the United States. This is a smart argument up until this point because if the affirmative is making arguments about

how the U.S. won't look as bad internationally or avoids criticism by joining the court would be turned into harms by arguing that the U.S. attempts to avoid criticism make them more able to carry out atrocities (which are implicit or explicit in a lot of affirmative arguments). From here the negative could prove that international courts don't have any actual ability to prosecute the United States. These arguments appear commonly in the literature on the topic. If you can prove that courts can't or won't prosecute the United States, then joining an international court has no benefit, and puts the atrocities in question outside the view of the American courts and media. Then the negative would need to prove that benign forms of action that seek to silence criticism are bad because they allow the state to construct crimes against humanity while under the guise of fighting against them. I think that this approach would be an interesting critical approach that would turn a lot of affirmative positions against themselves.

I believe that there are a lot of ways to approach this topic, but the best ones will take up interesting interpretations of the key terms, make strong positional arguments, and try to steal as much of your opponents ground as possible. I think stealing your opponents ground is going to be particularly easy on this topic because of the infinite ways to approach the vagueness of the two major key terms. ("crimes against humanity", and "an international court")

When I judge this topic, I hope to not see kids making bad topicality arguments as a result of the vague rhetoric. Instead I hope they will take the opportunity to use clever positional debate to construct their interpretation of how the topic ought to be read. In addition, I hope that because of the obvious ability to argue about hegemony, debaters will find unique arguments about how to affect hegemony. I feel that the debaters who are able to get into more specificity on the contention level because their framework is simple will be taking a much stronger approach to the topic. I look forward to the international relations aspects of this topic, and am excited to see the different ways people think of approaching the topic critically without being ridiculous.

Topic Analysis by Stephen Babb

This topic poses a difficult but fundamental question concerning the relationship between national sovereignty and international law. In other words, where ought U.S. control over its legal affairs begin and end? Are there ever circumstances in which a crime demands external oversight, and are crimes against humanity precisely such a circumstance? This overview will by-pass discussion of definitions and potential interpretations of the resolution in order to focus a primary topic area upon which many arguments may focus: the interests of the United States.

Though this topic area anything but an exhaustive outline of the positions one can take, it should provide a useful example of how many debates will play out. Additionally, this topic area includes issues with significant implications. The resolution calls attention to policies with global scope and serious effects on American lives as well as the well-being of those at risk of being victimized by crimes against humanity. For example, the legitimacy of U.S. power projection or the expansion of global institutions is inextricably linked to how these phenomena affect millions. It is both strategically and academically advantageous to focus on arguments with meaningful impacts—this overview should serve as a start in that direction.

Debaters should be careful not to assume that either the affirmative side or the negative side of the topic inherently benefits the United States. Determining what kinds of foreign policy benefit the U.S. the most will be at the heart of many debates. And, the prior question of whether or not U.S. interests should override a more general belief in the legitimacy or universality of international law will be commonplace as well. We will take up both issues in this section.

Should U.S. interests take precedent over international law?

Negative positions will often challenge the United States' refusal to participate in various international projects as hypocritical. Whether implicit or explicit, this charge of U.S. exceptionalism is grounded in a resentment of our government's unwillingness to play by many of the very same rules it demands other nations follow. Momentarily setting aside the policy question of how best to promote U.S. interests, is it legitimate in the first place for the United States to prioritize those interests over the concerns of other nations or international organizations?

A political outlook that privileges the nation-state arrangement as the fundamental means of organizing and determining public policy may also accept the notion that the United States government must first account for the needs and prosperity of its own citizens before focusing its attention elsewhere. There is no doubt that many analysts who accept this proposition would only accept it to a degree. And, it is precisely this question of degree that comes to the fore when considering the resolution: to what extent should a nation's sovereignty shape its approach to international law? To be sure, international institutions often reflect the best of intentions. One feels cynical or perhaps out of touch when cautioning against any global project that sounds noble enough. After all, the 20th century's "pax Americana" seemed to coincide with globalization as we know it. The global community that emerged during and after the Cold War was distinctly American. Today, however, we observe new and unprecedented kinds of tensions between the international community and the United States. While most of these tensions amount to little more than diplomatic squabble and economic competition, many of our allies and acquaintances fear U.S. unilateralism. Cooperation is all the rage in the emerging "multi-polar" world order. Despite our subversive national origins, going it alone is viewed today in much the same way as any other "anti-social" behavior: as an indication that something is deeply wrong. Is this a reasonable assessment?

The prioritization of U.S. interests should not be confused with isolationism. Quite to the contrary, we have become adept at using international institutions and relationships as vehicles to promote U.S. hegemony worldwide. While there are calls from economic protectionists and others (both liberal and conservative) to roll back our internationalist policies, these calls are made from the margins of American politics. The more salient debate is whether these policies should aim primarily at advancing American interests or supporting a more cosmopolitan agenda that declares the arbitrariness of national borders.

U.S. interests should take precedent over international interests

Three justifications for a selfish foreign policy come to mind:

First, it is a dog-eat-dog world out there. Of course, this is simple way of putting the *realist* paradigm popularized in international relations study and U.S. foreign policy strategy. In contrast to the optimistic prognostications of neo-liberals and the ambitions of neo-conservatives, realists maintain that a careful balance must be struck when it comes to dealing with foreign power. At the end of the day, there is no international government or arbiter with the same kind of jurisdiction and authority as a nation's government. In turn, there is no one to come to the rescue of a country that says and does all of the right things even when they aren't strategically beneficial. From this perspective, saintliness may be suicidal. Those attempting to inject some conception of morality or ethical responsibility into foreign policy forget that such gestures may be taken advantage of by our enemies or competitors. This kind of realist rationale need not eschew moral considerations altogether, but the bottom line priority for the U.S. remains its own security and prosperity.

Second, the United States may need to promote its own interests so that it can viably protect the interests of those outside the U.S. This premise accepts that the U.S. may be morally obligated to do things that aren't to its own advantage

but must nevertheless pursue its own interests aggressively. This variation on the theme that "with great power comes great responsibility" emphasizes the need to first maintain that great power in order to meet those responsibilities. Whether it is disaster relief, peace keeping, or other forms of foreign aid, the federal government faces an endless series of seemingly insurmountable needs. Even if international organizations are increasingly helping to meet those needs, such organizations often succeed or fail on the basis of U.S. financial and logistical support. It would be naïve to expect either unilateral or multilateral aid efforts to remain robust without the requisite resources. Acquiring those resources is anything *but* a charitable endeavor even as it empowers the government to participate in charitable endeavors.

Third, the contractual relationship between U.S. citizens and their government requires that the government do what is in those citizens' best interests. The most straightforward manifestation of this argument is inherited from the "social contract" theories produced by Enlightenment-era political theorists like John Locke or Jean-Jacques Rousseau. But beyond the notion of a "hypothetical contract," there are very real and concrete ways in which the relationship between citizens and state seem to imply a special set of governmental obligations. Socially, there are shared norms and priorities that define the American experience. Politically, the relationship is also unique in a variety of ways. Citizens expect things in return for their taxes, and they express those expectations through various avenues of democratic representation. Perhaps the most unspoken and yet sacrosanct of these expectations is for the American public to access unparalleled opportunities for wealth and security.

U.S. interests should not take precedent over international interests

Responses to these justifications are not difficult to imagine. Chief among them is the belief that the nation-state is a morally arbitrary form of government. That is, there is nothing about where citizens happens to be born or which

bureaucratic agency she pays taxes to that affects the status of that citizen's human rights. Failure to recognize the universality of something like human rights is an all too familiar sign of the 20th century's most inconceivable woes. Whatever the rationale for privileging national interests, doing so comes at the risk of accepting the same logics or mindsets that defend genocidal, expansionist, or otherwise violent policies. Given our recent experiences with American "military adventurism" and other experiences with nationalist movements, the world is especially cautious of any point of view that denies the universal legitimacy of a person's rights. This calls the previous three arguments into question, but it also establishes a foundation for defending international law itself. If human rights know no borders, then why should the laws that defend those human rights?

The previous three arguments may also be grounded in fundamentally erroneous explanations of our political situation, both domestically and abroad. Take the argument about contractual relations, for example. Whatever the special nature of one's relationship with the federal government, there is no way that this relationship comes without major caveats and reservations. The myths of political accountability and democratic citizenship sound fantastic but appear less and less realistic when assessed in practice (due to the corporatization of politics, the increasing autonomy of the executive branch, the incompetence of the legislature, etc.). While U.S. citizens undoubtedly experience greater responsiveness from the U.S. government than any external institution (e.g. the U.N.), it may be absurd to use that responsiveness or political accountability as a barometer for governmental obligation in the first place. If we are, *de facto*, not citizens in any meaningful sense, then perhaps it is our humanity (rather than our citizenship) that should dictate priorities. If others around the globe are at great risk or in dire need, their nation of origin should take a back seat to the gravity of the situation at hand. The interests of the U.S. are not morally distinct from the interests of anyone else, and the extent to which they are politically distinct is illusory.

The branches of international relations theory that promise to be most helpful in responding to realism include cosmopolitanism (which denies the political virtue of the nation state system and the borders imposed thereby) and neo-liberalism (which rejects the zero-sum perspective forwarded by realists in favor of pursuing arrangements that are *mutually* beneficial). Exploring these kinds of theories will help debaters formulate reasons to prefer their standard or weighing calculus in debates about what the United States' appropriate role in the world may be.

Which side of the topic promotes U.S. interests?

Even if U.S. interests become a secondary concern in the debate, they may remain an important set of implications. It is difficult, for example, to deny that the U.S. must pursue its own interests in order to protect the interests of others (though there are very good arguments to be made that the U.S. should not be in such a "savior-like" role to begin with). However a round's impact calculus (or debate on standards) plays out, both debaters may still attempt to show that their respective sides of the topic do a better job of protecting or empowering the United States.

It is better for the U.S. not to submit to the jurisdiction of an international court

Negative debaters will want to focus on the importance of U.S. exceptionalism and the unpredictability of international law. The argument here is *not* that the U.S. must be free to commit crimes against humanity in order to advance its interests. Such a position would be incoherent and probably offensive. There are, however, a couple of ways in which the resolution may be problematic for the United States.

First, though the court is "designed to prosecute crimes against humanity," are we sure that this is all it will be doing? For example, the International Criminal

Court is designed to prosecute crimes against humanity, but it is also designed to prosecute war crimes. If the U.S. fears that an international court may also monitor the handling of military affairs, this could be a significant deterrent to the use of U.S. military to advance either its own national interest *or* the interests of others. Even if the U.S. believes it is at a low risk of actually committing war crimes, it may believe that its tactics could be perceived or labeled as war crimes. Additionally, the mere risk of litigation and public embarrassment associated with such a process could inhibit the United States' ability to use its troops when and where it wishes. Obviously, affirmative debaters could make the argument that this additional check on military action could actually serve U.S. interests more advantageously. Perhaps the average U.S. citizen stands to benefit more from an international check on its military use than it does from the assessments made by its own leaders in the White House and Pentagon. If unchecked use of military might is a formula for trillions of dollars in debt and quagmires around the globe, this becomes a strong affirmative argument. If, on the other hand, the U.S. must be free to use its military without the threat of international legal condemnation, the negative debater has a good shot. This position can take advantage of two key threats to U.S. power: (1) international terrorism and its potential use of weapons of mass destruction; and (2), the security of oil and other key resources that our economy and way of life depend upon. Additionally, this position can persuasively maintain that there is already an adequate system of checks upon our military aggression, as evidenced by the election of a "change" candidate (Obama) and the prevalence of foreign diplomatic pressures. Under this rubric, the prospect of an international court is uniquely problematic insofar as it could deter legitimate action without adding anything of great value.

When investigating the ICC's "Elements of Crime," one finds an extensive list of what might be considered a war crime, including: torture, inhuman treatment, unlawful deportation and transfer, unlawful confinement, attacking civilians or civilian objects, and excessive incidental death, injury, or damage. The complete

list is much longer. In defining the necessary components of these crimes, the law often requires demonstration of intent. Though always a muddy subject, the United States may be especially concerned about subjecting its military to varying interpretations of the law and assessments of particular situations, especially if it fears political pressures exerting themselves on an international court. The conjunction of the law's gray areas and a lack of political and legal accountability to the United States government may make the case for international jurisdiction a dangerous one in the minds of American politicians and analysts.

Second, the United States may fear the expansiveness of a term like "crimes against humanity." Even if we assume that the international court in question ignores war crimes (a problematic assumption if we use the ICC as a template for this proposed court), many of the same ambiguities one attributes to war crimes befall definitions of crimes against humanity as well. Let's again take up the question of intent or requisite knowledge. For an action to be considered a crime against humanity, the alleged perpetrators must be aware of and deliberate about the action(s) being taken. Accidental complicity in a crime would not be adequate to find guilt (as is the case with most law's conception of *mens rea*). The ICC's Elements of Crime explains: "These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack." In other words, the perpetrator must know that innocent civilians are under attack and that his or her actions are further said attack, but the perpetrator need *not* be proven to comprehend "all characteristics of the attack or the precise details of the plan or policy of the State or organization." While useful clarification, there

still seems to be considerable ambiguity in terms of just how much a person must know about a the leadership's action/policy in order to be found criminally guilty of complicity in that action/policy. And this is to say nothing of the difficulty in actually determining what a person knew or intended.

Another problem might arise given the ICC's consistent reliance upon the category of "civilian." A number of crimes are only considered crimes insofar as they are directed at non-combatants or otherwise innocent human beings. The nature of 21st century threats may, however, make this category unreliable. This isn't to say there aren't clear cases in which innocent persons are unfairly targeted, but it *is* to say that not all cases are equally clear. Enemies of the United States (and the West more generally) are increasingly non-state actors, meaning that they may not wear uniforms and certainly do not subscribe to the same rules of combat expected of an official military apparatus. Additionally, the networks that sustain international terrorism run through informal connections that have little to do with official office or job description. An otherwise innocent or civilian family may, for example, provide material support to terrorists, give them safe housing, or facilitate communications and planning. In short, it is often difficult to determine where innocence ends and terrorist activity begins. In a world where such judgments often cannot afford the luxury of extensive legal review, the United States certainly doesn't want its hands tied.

One might be thinking: but when is a *crime against humanity* ever an essential tactic in the war against terrorism? Surely, we don't need to commit genocide to protect ourselves. In fact, however, crimes against humanity refer to far more than obvious cases of genocide—genocide is actually treated as its own category apart from "crimes against humanity". Potential crimes with the most relevance to the United States' handling of terrorism include: deportation or forcible transfer of population, imprisonment or other severe deprivation of liberty, torture, persecution, enforced disappearance of persons, and other inhumane acts.

There is nothing patently unreasonable about how either war crimes or crimes against humanity are defined. Indeed, there is nothing about this kind of international law that isn't also true of every other kind of law, including laws in the United States. The bottom line, however, is two-fold: first, as with domestic law, these laws require interpretations and case-by-case assessments to be made; and second, these judgments would be made by organizations with little or no accountability to the United States. The concern, then, is not with the laws in and of themselves, but with the potential for these laws to be used politically or misconstrued (or for situations to be deliberately or accidentally misconstrued). Though we typically accept some measure of imperfection in the execution of laws, this risk takes on an entirely new level of concern when national security is at stake and ultimate authority lies outside of U.S. jurisdiction. A good case may be made that, despite the best of intentions and even predominantly advantageous outcomes, an international court cannot be *relied* upon when national security issues are on the table.

It is better for the U.S. to submit to the jurisdiction of an international court

One of the most talked-about consequences of our excursions into Iraq and Afghanistan is the plummeting in world opinion of the United States and the risk that these actions have actually fueled terrorism in terms of its prevalence, scope, and magnitude. A little bit of research into this position will produce solid empirical and analytical evidence that this is indeed the case. A key question for many debaters will be whether or not this risk outweighs the above scenarios concerning U.S. flexibility in defending its national security.

Global opinion of the United States is important in ways that extend far beyond a popularity contest. Belief in American ideals and in the value of American causes is an integral component to the willingness of other nations to support us via alliances, cooperation, and mutually beneficial economic or political arrangements. This kind of cooperation is also essential to the very same war on

terrorism that negative debaters are likely to discuss. For example, without favorable attitudes toward the United States, government officials, military personnel, and police in a country like Pakistan may be unwilling to assist the United States or subvert its war on terror in other ways (tipping off U.S. targets, accepting bribes, etc.).

And of course, ill will toward the United States is also a factor in recruiting terrorists and inciting attacks. The "backlash argument," as debaters and analysts often describe it, suggests that U.S. policies can become a motivating factor for terrorists in terms of their leadership and lower-level operatives.

Both of these arguments depend upon the belief that specific U.S. policies concretely affect attitudes toward the United States and that these attitudes influence action. Because of psychological nature of these claims, quantifying the extent to which backlash or non-cooperation will occur is difficult. And yet, for reasons that are intuitive, grounded in credible analysis, and born out of recent experiences, these claims are also very difficult to refute. Additionally, the implication is compelling insofar as international cooperation is an especially valuable tool in thwarting terrorists or other threats to national security, perhaps even more valuable than immunity from a wrong-headed international court.

Nevertheless, the difficulty in quantifying opinions and the extent to which actions are grounded in those opinions does provide negative debaters with an important inroad. Specifically, it is difficult to demonstrate that these attitudes wouldn't already exist due to significant culture divergence (resulting primarily in American religions, affinity for Israel, capitalist consumption, or other behaviors deemed licentious by radically fundamentalist Islam). Even if government policies do play a key role, it is questionable one policy concerning international law would have a significant effect on attitudes. One doubts, for example, that rallies recruiting low-level terrorists will spend much time emphasizing the United States' unwilling to submit to an international court. And if it *did* submit to an international court,

this would hardly correct for the damage that has already been done perceptually by a long history of policies and behaviors most anti-American terrorists abhor.

Accordingly, affirmative debaters making this argument must emphasize that failure to submit to an international court reaffirms a widely condemned pattern of hypocritical behavior. It serves as yet another example of U.S. exceptionalism and its insistence on demanding action from others even as it refuses to take the same steps. On the other hand, submitting to the jurisdiction of an international court symbolizes an important step in the right direction. While it may not independently change a lot of minds, it could certainly reaffirm the perception that the United States is headed in a new, more internationalist direction. After all, the Obama election goes a long way in sending this message. Yet, if the Obama administration fails to indeed demonstrate "change" internationally, any chance we have of correcting world opinion is in jeopardy. This means that the U.S. must take advantage of opportunities to "play by the rules" through environmental agreements (e.g. Kyoto) or legal agreements (e.g. the ICC). Also, even if these steps don't radically alter the opinions of those predisposed to hating the United States for cultural/historical reasons, it is sure to elicit greater cooperation from friends and allies.

Finally, there is a good affirmative argument to be made that strengthening the legitimacy of international law via U.S. participation will benefit the United States in the long term. After all, the international law expressed by institutions like the ICC stands more likely to disadvantage the United States competitors and enemies than it does the United States. By offering the U.S. and its allies a sense of legitimacy when condemning rogue practices, conflicts are more likely to be perceived as the "reasonable and civilized world" over and against threats to that way of life. This kind of rhetoric was integral to Tony Blair's defense of the Iraq War but was derailed by U.S. focus on WMD and willingness to act without regard for international support. In short, unilateralism hurts the case for a more

American world, making a short-term sacrifice of political sovereignty essential to long-term projection of American economic and political influence.

Topic Analysis by Rebar Niemi

Introduction

When I was an LD debater I always found topic briefings to be a little dull. Yeah, they gave me interpretations of the topic, and yeah, they gave me authors to look up and arguments to try out, but for some reason I never really found them to be that useful for me. Maybe I was too stubborn (or lazy, or idiosyncratic, or whatever). With that in mind, I wanted to take a more modular approach to writing this topic briefing. Something that you could take little bits and pieces from for many different positions, and something that'll investigate more thoroughly the strategic and framework issues that this topic presents us with. My focus on framework and strategy is most definitely self-interested (I consider those to be my strong points in LD), but hopefully it'll be of help to the reader as well. It will consist of several parts that will focus purely on larger strategic directions one could take the topic in, and various interesting frameworks one could utilize, rather than the minutiae of the actual topic substance, which I'm sure will be covered by far more capable hands than my own.

Framework, AKA, THAT THING AT THE TOP OF THE FLOW

For the uninitiated and deeply involved alike, it's important to consider what framework exactly is. If you're feeling especially gifted or consider yourself above such rudimentary work, feel free to skip to the appropriate following paragraph. Otherwise, we start here. Framework in my mind consists of a few things in no particular order: First, framework defines what is important in the round. This means definitions, values, criteria, resolutional analyses, theory, observations, and any other methods of defining what is important in the round are part of framework. However, this is not an all-inclusive list, and most importantly, this means framework functions as the ballot story for the round. Whether that ballot story is offense linking through the criterion to the value, an a priori way to evaluate the debate, or a discursive method for analyzing the resolution is pretty

irrelevant. Framework itself is only a vague term for the way you articulate why you should win the round when you do what you do in a debate.

Second, framework is a bottleneck. This is a function of it being critical to defining what is important in the round. Essentially, if you control what is important in the round (to use a basic example, justice versus freedom), then it's much easier for you to win the round. I guess this is a broad assertion, but I find it to be generally true since as a debater you're usually more prepared to talk about your arguments than your opponents'. Framework lets you talk about your arguments, which means it controls the issues that are important. A general rule of thumb: win framework in LD and you're generally winning the round.

Third, framework requires a very different mindset in order to win than a normal argument. From the most tricked out TOC-bid leader in the country to the lowliest novic debater, we all need and use framework, but very few people are actually truly good at arguing framework. The people who can win framework at any level and understand its strategic role in the round are generally the best debaters. The reason framework requires a different mindset is because it's a meta-debate: it's a debate about debate. You can't employ the same arguments and you certainly shouldn't be arguing in the same ways. You can't spend all your time on framework because then you won't win the other important issues, but you can't ignore or gloss it over, because at the end of the day, it is the route to the ballot. Keep these points in mind as I articulate some of the different frameworks I think would be useful in terms of this new topic.

The Policymakers' Framework, AKA, TALKIN' BOUT NUCLEAR WAR

Since I now do policy debate, this is probably the first thing that ran through my mind when I saw the topic. Unlike many LD topics, this topic is more grounded in the world of international relations and real-world policy than in any abstract descriptive claims about morality, although there is room enough for that too. This means it is particularly suited to the type of plan-counterplan debate that

happens in policy, and more frequently in LD. Investigating this route to framework, we have to keep a few things in mind: One, we're not going to be dealing with morality except in a very basic cost-benefit calculus sort of way (the purpose of this framework would be to avoid that anyway). Two, we're looking for things that are feasible and realistic in terms of policymaking, so current evidence and nuanced detail are going to win out over broad stroke arguments every time, which makes access to that evidence essential. Three, this framework is simple to explain, but open to a lot of different counter-interpretations and answers, so the debater who chooses to work on a position like this needs to be fully invested in continuing to write and cut answers to arguments they might see against it.

So, what are the justifications for such a framework? The obvious real world analogy for the topic's sneaky non-specific wording is the International Criminal Court (ICC), and the US' acceptance of its jurisdiction, so it seems appropriate to start there. A policy based real world topic interpretation would seem to give us access to all sorts of lovely specific arguments based on real happenings, which would seem to be a road to greater topic education. Additionally, it makes it a lot easier on both sides (affirmative and negative) if we can have one concrete interpretation of what exactly an 'international court designed to prosecute crimes against humanity' is, especially when there seems to be a very clear example of what the topic framers are talking about right in front of us. It certainly prevents outlandish definitions of what such a court would do, and prevents us from getting bogged down in what exactly a crime against humanity is and lets us focus more on whether this current institution prosecutes crimes against humanity in a way that is amenable to the US and whether its design is appropriate to its purpose, which are certainly some of the implicit issues behind the US acceptance (or not) of such an institution. On the other hand, maybe its not the topic's job to investigate this one body, since it clearly wasn't written for the ICC, despite the existence of the ICC, which is a body that exactly fits the topic's description (in point of fact, I've heard this topic called the "ICC topic" by several people, which might point to an unspoken agreement that the topic is

indeed about the ICC. Either way, I wasn't on the topic committee so I'll investigate both possibilities). At the end of the day, it seems that the debater committed to a policy framework for this topic has at the very least many theoretical arguments stemming from the fairness and educational value of simply focusing on the ICC, if not other trickiness.

So, what are the merits of this position, now that we've established that it is indeed viable? Well, one was mentioned in passing already: it gives you access to all the literature on the ICC specifically, instead of just the literature that refers to "international courts" that are hypothetically "designed to prosecute crimes against humanity." This is definitely a big boon, since we all know that a large majority of the topic specific articles on this issue are going to be talking about the ICC specifically, and as debaters many of us will just cut the generic parts of the article, even if the article as a whole refers to the ICC (Remember kids, taking evidence out of context is wrong. Just ask Sam Duby!). In point of fact, if you Google search the terms 'international court, crimes against humanity, jurisdiction' the first result is the Wikipedia page for the ICC, and almost all the results refer to the ICC. So, why not justify our malfeasance and make things easier on everyone by just agreeing that the topic is about the ICC?

The next issue has already been mentioned in passing, that the topic allows for too many shenanigans when it's a generic court rather than the ICC. Who decides how the court is designed? What the specific limits of its jurisdiction are? What a crime against humanity is? How it prosecutes? How it interacts with existing US law? As you can see, this type of nitty-gritty questioning can go on forever. On the one hand, it opens up a lot of options for the negative in terms of attacking generic affirmatives, but on the other hand, it probably doesn't make debates about this very fun. When you deal with the ICC, these types of arguments are vastly less effective, since the policies and attributes of the court are already laid out plain as day. Using this interpretation, where the ICC is what we're talking about is likely the only way you'll want to 'go policy' on this topic,

since its really really really hard to have a policy debate about a non-specific policy.

Such a position requires you as a debater to be able to win that policymaking is indeed preferable to truth testing or other paradigms for evaluating the debate. I'll now go over a few reasons why that's true (note: a more extended dialog on these issues can be found online at victorybriefsdaily.com, and on the forums which they sponsor). In the quick and dirty way you'll need to win these issues in a debate, the arguments you should be generally making fall into three categories. The first would be the comparative benefit of cost-benefit analysis to other moral theories. This is where you can toss in all those yummy utilitarianism good blocks you've been saving up, or where you can make a really simple theoretical argument that goes a little something like this: A. The resolution shouldn't be about true/false. B. The resolution should instead compare the worlds of the aff and neg. C. the impacts of allowing one world to happen over another should be the appropriate decision mechanism. This argument can take many forms, be it purely theoretical, or based on a definition in the resolution. In this case we have the word ought to provide us with this definition. Cambridge International defines ought as "used to show when it is necessary, desirable or advantageous to perform the activity referred to by the following verb" or "used to express something that you expect will happen." So, ought can imply an obligation to act in a particular way, or it can imply the desirability of an action, or it can imply the logical consequence of something. This word gives us many different ways of constructing frameworks, but what interests us right now is the concept of desirability. What is desirable, and how can we articulate it in a debate round? One way is certainly to argue that desirability implies a comparison of two options, and correspondingly, a cost-benefit analysis between those options. This is all you need to begin to construct a perfectly legitimate framework for your plan or counterplan, since it gives you a theoretical interpretation to justify, which I will leave up to you.

But even if you do construct a wicked sweet framework for writing a plan or counterplan, what do you do with it now? How do we condense the topic into this? The easiest answer for the affirmative is to simply argue that the resolution is your 'plan' and that you'll provide reasons for defending it; they just won't fall under the traditional value/criterion model. Other approaches would be to write the resolution in different language, or to add some provision to the resolution that keeps it topical, but that gives you another benefit. Keep in mind that having your plan stray from the text of the resolution is not likely to be a theoretically sound position, and you will be pressed on it. Remember, when you defend a plan, you're defending several specific things: the topicality of your plan, the inherency of your plan, the harms/advantages of your plan, and the solvency of your plan, all bundled up in a plan text. We'll go through these now: topicality is a fancy way for saying "does your plan fit into what the resolution lets affirmatives defend?" If your plan doesn't, it's not topical, and therefore, you don't get to claim it as offense and you probably lose the round. Inherency is whether the plan has already been done in the status quo, as in, is it necessary to do at all. For instance, say your plan advocates the US allowing ICC jurisdiction. If your opponent has evidence from that very morning indicating that the US did just join the ICC jurisdictional net, you're not inherent and your plan has zero offense, and zero chance of being unique as offense. The advantages or harms of a plan are pretty simple. What are the good things that happen when we do the plan? What are the bad things that don't happen? This is the impact debate and the majority of your plan most likely. Solvency is simply how doing the plan text will result in the advantages you describe. Something like WHEN THE US JOINS THE ICC, IT'LL SOLVE WORLD HUNGER [INSERT AUTHOR AND CITE HERE]. The plan text is generally one to two sentences articulating what it is plan does. A basic one would be "Resolved: The US should submit to the jurisdiction of the ICC. All current US laws that do not comply with ICC jurisdiction will be overturned." See how you can build in little clauses that sound like they don't do anything? Yeah, those function as answers to arguments too (in this case, arguments like "US law will conflict with ICC law, so it won't work").

With a basic plan explained, lets move on to the counterplan. Even if you don't choose to run any counterplans this year, you'll likely have to deal with them at some point, since this style of debate is gaining in popularity in LD. A counterplan is quite simply an alternative to the 'plan' of the resolution. It deals with many of the problems of a plan (but it obviously doesn't have to be topical), and relies of having a 'text' much like the plan. In addition to a text, a counterplan has two parts: competition and the net benefit. A sample counterplan text would be something like "The US should instead put pressure on rogue nations to succumb to ICC jurisdiction" or "The US should seek out the perpetrators of crimes against humanity and try them in US court." The primary issue with counterplans (in addition to establishing why exactly they are a good idea both theoretically and in terms of substantive offense) is competition. This is based on the idea that if there's no reason to do the counterplan that can't be done with the plan, then we should just affirm because we could do the counterplan in the affirmative world. Doing the counterplan with the affirmative is called a permutation and allows the affirmative to garner the benefits of both the 'plan' (affirming) and the counterplan. So it's up to the counterplan debater to establish why their advocacy is mutually exclusive with whatever the affirmative wants to do. An example of competition in the context of the second counterplan I listed above (seek out criminals, try them in US court) would be that you can't try these criminals in both US court and ICC court, or that the US would need to explicitly violate the jurisdiction of the ICC in order to capture and try these criminals. The net benefit would be something like US courts are more efficient and better, or the ICC has no enforcement ability, but the US has military, extra-military and paramilitary enforcement mechanisms. With this topic, the number and depth of the counterplan debate should be very interesting, especially because counterplans can be run against any types of cases, not just strict plans. As the negative, you're simply offering an alternative to what the affirmative wants to do, and you're arguing that your alternative is better. If you can't win that the alternative is mutually exclusive (competitive) and preferable to the 1AC, then

you don't win the round. The point of counterplans is to solve the impacts of the 1AC and then do something else too, which is what makes them better. Keep in mind that a counterplan could solve moral or metaphysical impacts like engagement with the Other or Kant's categorical imperative just as easily as it could solve the more real-world and substantive impacts of the 1AC.

Another thing to consider in terms of the counterplan debate are PIC's and topical counterplans. The difference here is important. A PIC is a **P**lan **I**nclusive **C**ounterplan. This means it does the plan and then something else. An example would be "The US should submit to the jurisdiction of the ICC and transfer all enemy combatants from Guantanamo to the ICC for prosecution." There are specific theoretical issues to deal with when you run or encounter a PIC, but this isn't the time or the place for a lengthy theoretical discussion. A topical counterplan simply does something that would fall under the rubric of affirming, but justifies why instead it should be done by negating. This can be accomplished by creating something like a problem with submitting to ICC authority now, or why we should secretly submit to jurisdiction. Again, the theoretical justifications are complicated, but I think this should be talked out a little more than those of PIC's. Take an affirmative case that argues simply the resolution, not the ICC, and argues that we have a moral obligation to respond to crimes against humanity. A topical counterplan would be "submit to ICC jurisdiction" and the competition could be based around the ICC not being in the resolution and how the negative can advocate anything that's not what the affirmative argues. Its net benefit could be something like concrete commitment to an existing entity is better than a theoretical justification of the act, and how the level of atrocities that we're dealing with demands real action, not just abstract moral endorsement. With all counterplans, especially with this topic it's crucial to establish sufficient competition, either through descriptive means (if X prevents Y, than you can't do X and Y) or through normative arguments about the impacts of doing both (X by itself good, X and Y will do something bad).

The most important thing to understand when you face a counterplan is that the permutation is always your best friend. There are many types of permutations, but the most common are the 'do both' permutation (also shortened to a 'perm'). A do both perm just means that you do the affirmative and negative actions, and argues about how they aren't mutually exclusive. Other perms include things like 'do the plan' or 'do the counterplan' which each have their own issues (do the counterplan doesn't make much sense as a perm if the counterplan isn't topical at all, and do the plan doesn't make sense if the plan doesn't solve the counterplan's impacts).

I think it's very obvious that international relations theory is such a deep topic that it justifies all sorts of actions on the part of the US, which makes the counterplan a very viable option as a potential negative strategy. Remember, a short counterplan could be coupled with a stock negative position and attacks on the affirmative case, which would be a very difficult 1NC to respond to for the affirmative, since the negative has taken the debate and engineered it to be on several levels. This type of expansion in the 1NC is an excellent strategy, since it forces the affirmative to divide time and talk about the issues that you want to talk about. Then in the 1NR you can collapse to the issues that were mishandled or not responded to, which is an easy road to the ballot. When dealing with this sort of expansive negative strategy, affirmatives should strive to establish a hierarchy of arguments (use CX or speech time to identify which argument comes first, which is the most important) and then spend time on only the most important issues. Remember, debate is all about establishing and controlling bottlenecks in the round, so that at the end of the day your opponent's arguments don't matter and yours do.

The Moral Framework AKA, THE SLEEP OF THE JUST IS MIGHTY SOUND

Like any LD topic, this one offers several very interesting moral issues to investigate. If a debater chooses to involve themselves in such moral debates, they should keep a few things in mind. First, because these issues can be very

complex and even circular at times, working out efficient ways of explaining your arguments is 100% worth your time. Second, these debates will generally center on the framework debate (through definitions, other interpretations, and most likely through the standards debate), which means if you're not willing to slog out a lengthy criteria debate, you probably should look for ways of creating shortcuts or simply avoid complex moral arguments. Third, these arguments can be among the best and easiest to win, but they require more knowledge and in-the-moment strategy from a debater in order to apply them correctly to what an opponent claims.

The first in road to the morality debate is definitely the word ought. We already covered some standard definitions of this word, but trust me, there are many more. A few good books to check out if you're really into making this a big stick argument is "Ethics: The Science of Oughtness" by Archie J. Bahm, "What Ought I do?: Morality in Kant and Levinas" by Catherine Chalier, and "War and International Justice: A Kantian Perspective" by Brian Orend. These books will identify many more in depth ways of dealing with what exactly ought means, and let me tell you, there are many more authors and ideas worth checking out on this subject. Orend's book in particular is a good choice, since it deals specifically with international justice, but keep in mind it's not necessary to read the whole of every book you check out of the library or buy. Don't buy books unless it's worth it to you in terms of knowledge and evidence, since you can always check them out at a library or through some online sources. Also, many perspectives can be found just by searching things like "ought," "ethics," "morality," "humanitarian crises," and even "genocide" through Google. If you have resources like JSTOR or Project Muse (online journal databases), I recommend that you get familiar with them and use similar search terms in parsing them. Keep in mind that the Stanford Encyclopedia of Philosophy is online and all free, and it might also give you some useful insights on this subject.

I would argue that there will be two main moral interpretations of ought: either it will be used in a loose sense as desirability, which allows you to set up a more specific mechanism through your value and criterion (or whatever), or it will be used in a more strict sense to denote obligation. While this isn't the only way you should expect to see it, past topics indicate that these are the two big dogs in the land of ought. A loose definition of ought has many advantages. It allows you to bring in other ethical and moral concepts like justice and fairness into the picture, and it allows you to explore more nuanced niches of moral argumentation so long as you can set up a proper way of explaining how that makes things desirable. There has been a lot of work done in terms of humanitarian crises like genocide and torture that could be classified crimes against humanity talking about how this type of moral crisis requires a specific and firm response, and how we should fight these evils with whatever resources that are available. Search terms on this topic would include "crimes against humanity," "prosecution," "international crisis," "humanism," "responses to genocide," and so on. These too could be used to formulate a notion of ought to either affirm or negate the topic.

The other way of picturing ought is as implying obligation. Obligation might mean that we have a moral duty to do something in this case no matter what the consequences are (which speaks to a deontological justification for the topic or against it) or that we have to make sure that what we're doing is 100% moral before we commit ourselves to have an obligation. Ought does in some sense indicate that whatever we ought to do is absolutely preferable to the alternative, and I know there have been negative cases formulated for past topics that have used this definition and taken the tricky position that ought indicates a lack of doubt about the morality of something, so if the negative shows even one iota of doubt on the morality of affirming, they should negate. While this argument can be persuasive if properly put together, many judges (including myself) will find it more dishonorable and tricky than other interpretations, but that doesn't mean it's an unwinnable argument. This would be the hard version of ought as obligation. The soft version is that notion of "damn the costs, this is right and we have to do

it!" I call this the soft version since it requires an affirmative based on it to defend much less of their case and the consequences of affirming, but it does set you up for a massive negative block dump of answers to deontology or moral obligations.

I think this topic has two other defining features that would matter in the construction of any moral debate. The first and most important, and what I find to be the substantive crux of the topic, is whether the US should submit itself to multinational or extra-national constraints on action. In this way, I think this topic is even more about international relations than last year's just war topic, and I think the primary divide is advocating realism or a more idealistic look at international relations. While I'm sure some of my contemporaries can explain this divide much more proficiently than I can, I will investigate the strategic possibilities of both sides. Realism (which includes the delightful work of authors like John Mearsheimer and Robert Kagan) argues that international relations requires nations to act in a virtual "fog of war" at all times. Quite simply, we don't know what any other countries or actors are going to do, so we have to be vigilant at all times. I think many realists would argue that submitting to extra-national constraints (like an ICC construct) would impinge our ability to react situationally to crisis and defend ourselves, and in the long run would be a bad choice. I think many negatives will take this tack, and I certainly think it allows the negative access to many argumentative options from different angles and a large body of literature. It especially allows them to throw out a large number of mini-disadvantages/turns on the affirmative case premised around decreased ability to combat things like terrorism and dictatorships. I think this sort of heavily-offensive negative strategy can pay dividends, but I think that its not going to work against everyone, especially the kind of affirmatives that I think smart debaters will write.

The smartest affirmative cases are going to narrow down the resolutional burden of ought into the most exclusive it can be with a nearly impenetrable framework, and then spend the rest of their time ensuring that they meet that burden. This

kind of hyper-positional affirmative is constantly effective because it forces your opponent to operate exclusively on your terms. If they don't respond to your framework, the round becomes an easy enough win, since you should be building in ways to win solely on the extension of the framework. If they do respond to your framework, your case will have enough tricks and potential strategies to maneuver around them. These types of cases are most likely going to require a lot of theoretical and technical work. A case based around the idea of counterbalancing between powers as a prerequisite for justice could be interesting. It would argue that because crimes against humanity affect the human population as a whole, rather than one specific nation, it would be undesirable for any one agent to take the burden of prosecution on themselves. Instead, the ICC (or whatever court) lets us respond to these crimes AS humanity, which is as it should be since they were done against humanity. Another case that I think would be effective on this topic would be a big stick multilateralism good affirmative. All you would need is a piece of evidence that says submitting to ICC jurisdiction (or whatever court it is) would make allies and other countries happy, and then you can claim all sorts of benefits off of international cooperation, from environmental solvency to terrorism to war to democracy to economy to natural disasters to humanitarian efforts.

The Pre-Standards/Non-stock Debate AKA, DO YOU REALLY WANNA HURT ME?

For the debater who recognizes that these days you need some sort of response to a priori/pre-standards arguments/descriptive proofs of the resolution, if not engages in these pursuits themselves, I will briefly cover some issues with the topic. A pre-standards argument (or however it is designated) is an argument that claims to independently prove the resolution true or false, without the help of a large ballot story like a value and criterion. I like to think of these arguments as attempting (and usually failing) to construct consistent and cogent mini-frameworks and arguments that fit under those mini-frameworks.

The difficulty with this topic is the use of the word ought, and the lack of any easily co-optable internal contradictions to be engineered. The word ought is a problem because unless you define ought as being about something other than desirability, say obligation, it makes the topic difficult to prove instantly true and makes the non-existence of certain parts of the topic irrelevant (which is how negatives usually prove the topic false a priori). That means a negative should be including reasons why non-functional or non-existent parts of the topic mean that the topic should be negated. A good example is something like “crimes against humanity don’t exist” or even “humanity doesn’t exist, so no crimes could be committed against it” both of these arguments, no matter how inane, would serve to negate the topic a priori, since they would show why it would be unnecessary and even undesirable to submit to court jurisdiction. Other negative a prioris to employ could be things like “the ICC has no enforceable jurisdiction, enforceable jurisdiction is the prerequisite for actual jurisdiction, we shouldn’t submit.” However, that argument rests on the affirmative defending the ICC rather than an abstract court.

Affirmatives should argue against a prioris and employ the resources of the word ought yet again and by using theory when appropriate. Many of these arguments make little to no sense when thought of in terms of the theory of constructing resolutions, since even if the articles in the resolution are non-functional or non-existent, it is after all a hypothetical constructed for people to debate about, and usually hypothetical debates involve a certain level of leap of trust in order to discuss the issues presented. More importantly, affirmatives have a priori defenses that don’t rely on theory, like the effective and amusing “if things don’t exist, presume affirmative for time skew” or other such trickery.

This topic also allows for many different critical positions on both humanity and international relations. There are of course the works of Michael Hardt and Antonio Negri, which is pretty much all postmodern IR theory, and then disciplines like Feminist IR theory which can be useful for exploring the farer

reaches of the topic. I think cases based around the need to move into a post-state mindset on the affirmative could be one strategic articulation of these ideas. Other cases might focus on the ethical import and nature of the event (crimes against humanity) through authors such as Alain Badiou, which might necessitate different kinds of responses. I think this topic has a pretty open affirmative burden and it would behoove affirmatives to try out a lot of different positions and especially some more complex and critical positions on this topic, since it also gives a lot of leeway to negatives in very much the same way. A critical negative could take directions from nihilism (Nietzsche), to a sort of critical realism (authors like Carl Schmitt advocate essentially unconstrained state power) or even things like international conflict/crimes against humanity good (anybody interested in a masochism neg?). The point is that the options are nigh inexhaustible, and it would be smart to explore them.

Conclusion

With any topic, I think every debater should keep in mind a few things. First, find positions that suit your style of debate and your background knowledge. The more you naturally know your positions, the better you'll be at debating with them. Second, don't exhaust yourself doing research on the substance of the topic. You'll learn plenty about it through debating. It's just as important to construct strategic cases and arguments and think about how arguments should be executed than to become the most well-educated high school debater on US law-ICC jurisdictional conflicts (although that knowledge could become some pretty sweet arguments). Third, always remember, bottlenecks bottlenecks bottlenecks. A good debater creates bottlenecks for their opponents, avoids bottlenecks that are set up against them, and at the end of the debate comes out controlling all relevant issues. Why do three offcases matter if the 1AC standard comes before them, and you're winning offense back to that standard? When you control bottlenecks like that, you can take strategic risks and even undercover large arguments because you know that at the end of the day you'll be the one dictating where the debate goes. I think I've exhausted my ability to ramble at this

point, so I'll send you off to do some debate work dear reader. With any luck, you'll be a champion in no time.

Topic Analysis by Ryan Lawrence

Introduction

This topic analysis will attempt to interrogate different methods of interpreting the resolution and provide compelling reasons for or against using particular framework arguments. Rather than provide a cursory review of particular substantive arguments, which is not very useful in my opinion, I will instead attempt to provide a general strategic review of the topic in order to allow you to better plan your advocacies. I hope that this approach will prove useful and will be a supplement to the other topic analyses herein.

The Resolution at Face Value

Let's start with the resolution itself. I feel that it is rather straightforward compared to a lot of LD resolutions and should not yield too much ambiguity in debate rounds. "The United States" is the actor in the resolution, so the resolution allows us to move beyond a discussion of the validity of organizations such as the ICC in a vacuum, and instead provides flexibility for making more nuanced arguments about a US role in such an organization. Beyond that, this is a mundane part of the resolution – do not run advantages based on China joining the ICC, etc. Keep it topical.

The term "ought" is subject to the same interpretations as in any resolution that uses the term, and the different ways of interpreting "ought" have been thoroughly discussed elsewhere. I think that it is most fair to simply interpret "ought" as "should" and allow your framework/standard to further any ethical arguments that you want to make. In judging rounds on this topic, I have seen the following argument: "Since the resolution says "ought," I only need to prove that the US has an obligation to join, not that it actually should. Therefore, ends-based disadvantages do not matter since they only imply that we should not fulfill the obligation." This argument makes utterly no sense as an extrapolation of the

definition of ought. Nothing about the word ought implies that we are using a means-based approach to ethics or any other specific interpretation that excludes ends-based impacts. Instead, it telescopes specific ethical meaning into the definition in an attempt to set unfair limits upon the arguments that can be made in the round. Basically, do not read too much meaning into the word "ought" – it just establishes that this is a normative question.

Then we get to "…submit to the jurisdiction of…" This is a legal term of art that means to yield to the authority of a court or set of courts (in this case, an international criminal court.) Reading any extra reading into this part of the resolution would seem to result in unpredictable interpretations that are bound to divide ground unfairly in some way, based on whatever hyper-specific interpretation is being used.

The term "…an international criminal court…" implies that we are not talking about any one specific court, such as the ICC, but instead debating a generic, hypothetical court. The discussion of whether or not this is a good interpretation of the resolution will occur below. However, for now, the most straightforward and predictable definition from the text of the resolution is that the affirmative does not need to defend specific problems with the ICC, only disadvantages that would link to just about any international criminal court designed to prosecute crimes against humanity. On the flipside, the affirmative cannot claim advantages or solvency from the ICC unless they can prove that those relevant features of the ICC are inherent to criminal courts and can be reasonably expected to exist in the hypothetical court that the resolution discusses.

The next textual issue is "…designed to prosecute…" which establishes the end that the court is meant to serve. There is a reasonable debate here as to whether this means that the court can only prosecute crimes against humanity, or if that merely needs to be its primary goal and that its other functions are subject to debate as well. For example, the ICC prosecutes not only crimes against

humanity, but also other crimes such as the “crime of aggression.” Does this mean that it is no longer a topical example? The most precise way to interpret this part of the resolutional text is to say that the ICC is still a topical example because it was designed for crimes against humanity, even if it performs other functions. However, one could argue that those other functions do not need to be defended by the affirmative.

The final part of the resolution is “…crimes against humanity” which are defined by the ICC:

> “For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

I use the ICC definition because "crimes against humanity" is a term of art that the ICC provides the most succinct definition for. Beyond knowing what crimes will be prosecuted, this part of the resolution should not end up meaning much.

Taking the resolution on the whole then, the most predictable interpretation according to the text of the resolution can be read as follows: "The US has a normative obligation to allow an (hypothetical) international court to prosecute its citizens for crimes against humanity."

Submitting to a Generic Court or the ICC

Moving beyond a strict textual interpretation of the resolution, there may be compelling reasons to interpret the resolution differently in the areas in which the resolution is vague. The first of these issues is whether "an international court designed to prosecute crimes against humanity" can effectively be interpreted as just the ICC. In order to justify doing so, consider the following arguments:

1) Unless we use the ICC as the context for the resolution, then we lose access to a defined timeframe. Since a hypothetical court does not exist in the status quo, then the US would not be joining the court until some undefined amount of time in the future when the court is established. This guts the uniqueness on any arguments that reference the real world – particular human rights conflicts, international law claims, etc. would all only potentially exist in the world of the affirmative. By debating in the status quo, we gain access to specific uniqueness arguments.
2) The affirmative has a specific organization from which to draw solvency and advantages and the corollary of that is that the negative gains ICC-specific solvency indicts and disadvantages. Removing this ambiguity

creates a clearer round and also prevents both sides from becoming moving targets in regard to what they do and do not have to defend.

3) Debating about real institutions has more educational value and creates a debate that is more relevant to our lives.

On the other side of the debate, a few primary arguments are:

1) A hypothetical court is more textually-supported and as such is more predictable. This would require making arguments as to why the text of the resolution is the best (or the only) source of predictability in the debate round. However, presuming that is done, then one could argue that allowing the affirmative to pivot out of defending a generic court is unpredictable and thus unfair.
2) Any other arguments as to why precision is the best standard, other than predictability.
3) Arguments about how specific implementation questions should be beyond the scope of value debate. I will not iterate those arguments here since they are part of a much bigger discussion than this one. However, they would serve as offense against the above interpretation.

In my mind, it is hard to justify just ignoring the world and debating in a vacuum, so I would encourage debaters to be willing to debate under a status quo interpretation of the resolution. You will *need* to make sure that this part of your framework is strong if you are: 1) Using evidence that references or is based upon studies of the ICC, 2) You are making ends-based arguments that require uniqueness in order to matter, or 3) Your advantages or disadvantages are specific to the inner-workings of the ICC (e.g. procedural flaws in ICC trials.)

To Parametricize or Not Parametricize

While working on this topic at camp, a lot of debaters expressed an interest in using parametrics to run plans on this topic. In general, I feel that most LD resolutions are too vague for fair plan writing (they lack a timeframe, actor,

mandate, etc.) However, this topic seems to be suitable for fair plan writing since the resolutions provides a relatively predictable basis for specific plans. So is it a good idea for you to start exploring crossing policy over into LD? In my opinion, no. Consider the following reasons why:

1) You lack flexibility in plan writing. There is only one international court that you *can* have the US submit to the jurisdiction of, so at that point there is really only one topical plan: "The US will submit to the jurisdiction of the ICC by…" followed by whatever legal changes are necessary in order for that to happen. You do not have access to any smaller cases (e.g. submitting to the jurisdiction of the ICC on a particular issue, such as torture) because, to my knowledge, that is not legally possible; there do not seem to be ICC bylaws that allow partial or issue-based submission. This means that all of the generic disadvantages that link to a standard, non-plan-based affirmation of the resolution will still link to your plan. You do not cut out any slice of ground that the negative would otherwise have access to, and thus gain no strategic benefit.
2) You need to do a lot of work in the 1AC and 1AR to defend your framework. Paramterics is by no means the norm in LD so you cannot just wait until the NC calls you out on it in order to defend your interpretation or you will be well behind in the mind of most judges. Instead, you need to spend a lot of preemptive work in your case simply defending your right to run a plan.
3) The conclusion of the above two arguments is that you put yourself into an unnecessary framework battle and do not get anything in return. At most, you might get access to some more specific policy-level advantages for your case, but I doubt that those are significant enough to overwhelm the time you lose defending your right to run a plan.

On the whole then, I would encourage you to not get overly tricky and just take this resolution straight-up unless you think of a plan that would actually de-link some of the strongest negative arguments. Once again, specific justifications for

and against parametrics are beyond the scope of this analysis and you will need to do that work on your own.

The Role of International Relations

This topic creates the opportunity to engage in a lot of debate over IR theory as a framing device for the round. IR can take two roles in a debate like this: 1) As arguments within a standard to substantiate a certain international obligation, or 2) As internal links to particular impacts that rely upon a specific understanding of the way that IR works. I will first quickly review the three primary theories of international relations and then go on to provide strategic advice for deploying IR arguments in rounds.

The IR Theories

The three primary, modern theories of IR are neorealism, neoliberal institutionalism (NLI), and constructivism. Neorealism, forwarded by authors such as Morgenthau, Waltz, Art, Jervis, and Mearsheimer, suggests that the international system is anarchic in nature and that the prospects for cooperation are dim. It claims that states combat for relative power in order to guarantee physical protection from one another.

Neoliberal Institutionalism concedes the assumption of anarchy and also treats states as atomistic units, but uses game theory in order to attempt to prove that cooperation is actually possible over the long-run. In this way, NLI focuses on absolute, rather than relative, gains. Authors to look at here are Axelrod, Keohane, and Nye.

Constructivism came onto the scene with Wendt's "Anarachy is What States Make of It" which argues that while anarchy may be a structural reality, policy makers and states as a whole may interpret it differently than one another. It seeks to create a compromise between neorealism and NLI.

Further detail about the theories of IR can be found elsewhere (including Wikipedia) and I encourage you to do some research on them since it is useful for other debate topics. I merely wanted to get the less-informed readers up to speed. Do not make the mistake of presuming that a particular theory only works on one side of the topic. Realist arguments can cut both ways, as can just about all framing issues.

IR in Standards

If you are going to frame your standard in terms of international relations, then you are essentially establishing that the United States ought to act according to the prescriptions of a particular IR theory. In doing this, be careful that you do not fall victim to the naturalistic fallacy. IR theories are formulated and discussed as *descriptive* rather than *prescriptive* arguments and you will need to do the analytical work to explain why just because the world is realist, for example, that the US ought to act in a realist way. It may be true that the only way to change international relations is to act *contrary* to its prescriptions. The second caution that I would provide is to be aware of brink problems. Consider the following construction of a neorealist standard: The negative case argues that the IR can be described in realist terms and as such states need to maximize relative power in order to guarantee survival. Can you spot the missing brink? As it turns out, joining the ICC or another international court may not cause enough loss of US power to actually trigger the impact of state destruction. You will need to either prove on the contention level that an international court *significantly* impedes US power to the point of threatening our existence, *OR* you will need to defend realist action on the basis of another, more realistic impact. One example here would be to argue that US needs to be able to *project* power in one or two arenas that the courts would prevent us from actualizing in the affirmative world. This creates a more reasonable brink that you can overcome instead of having non-unique impacts.

IR as Internal Link

The brink issue above suggests that IR arguments instead serve as internal links for other causal claims and this is as true for any argument in the debate round as it is for a standard. For example, you could run an advantage that relies on cooperation theory in order to reach an impact, such as cooperation on an issue apart from international courts. My point here is just to be aware that IR can frame other arguments in the round, not just the standard.

Case Arguments and Strategy

In your research, you will quickly encounter the majority of stock arguments on this topic and so I do not feel that it will be too useful for me to review them here. Instead, here are some strategic concerns to keep in mind.

1) It's All in the Internal Links – The action of this resolution is actually incredibly small. Submitting to the ICC's jurisdiction does not put troops on the ground to stop genocide somewhere. It does not even mean that US citizens get immediately prosecuted, if ever. It does not means that the ICC magically gains credibility through the addition of a single member state. In order to claim ends-based impacts from the action of the resolution, you need to do a lot of work on the internal link level in order to actually get there. Develop multiple arguments for why the US presence enables/detracts from the international court and different internal link stories for what would happen after the US joining. When your opponent lacks explicit, developed internal links, then make sure you call them out on it.
2) Everything is Probabilistic – Following from the first point, since joining the ICC does not actually directly result in a prosecution, you need to prove a propensity for all of your internal links actually happening. Do not just assume that the US, the ICC prosecutor, or other states will just automatically do something once the US is involved.
3) Be Flexible on the Negative – Be prepared to debate either the ICC in particular or a "generic court." In my opinion, it is usually in the negative's interest to have an ICC specific debate, but even if it is not you should not

automatically contest that interpretation. Since most of the disadvantages will still link to a generic court, your time may be better served just running your general arguments instead of the specific ones. Either way, do not be dependent on particular framework arguments in order to access your offense.

4) Control the Credibility Debate – It seems that a lot of the stock arguments on this topic assume that the US will have either a positive or negative impact on the ICC once it submits to its jurisdiction. If you can control this debate, then you can control the direction of a lot of the impacts in the round. Find solid evidence on the extent to which the US could manipulate the ICC and the extent to which US presence adds or detracts from the credibility of international institutions.
5) Do Better Research – Since this topic is largely empirical in nature, you have the opportunity to simply have better, newer evidence than your opponents. Do not get lazy. Do original research and not only will you find new arguments, you will also find better warrants for the arguments you have already thought of.

Conclusion

In the end, I feel that the straightforward nature of this topic will allow for a lot of good, substantive debate without too much necessity for theory arguments on the definition and framework level. If you are willing to interpret the resolution in a fair way, I think that you will find that the time you save on those issues really contributes to the quality of the round as a whole. Good luck on this topic and I hope to judge some of you at the upcoming tournaments!

General information about the ICC

INTENTION OF THE ICC

Susana SaCouto & Katherine Cleary, Article: The Gravity Threshold of the International Criminal Court. American University International Law Review. 2008

The Rome Statute, which established the world's first permanent International Criminal Court ("ICC"), leaves no doubt that the ICC is intended to prosecute only "the most serious crimes of international concern." 3 This language appears in the Preamble to the Statute, 4 as well as in Article 1. 5 Similarly, Article 5 provides that the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." 6 Finally, the Rome Statute imposes a "gravity threshold" on the admissibility of cases coming before the ICC. Specifically, Article 17(1)(d) provides that the Court "shall determine that a case is inadmissible where," inter alia, the "case is not of sufficient gravity to justify further action by the Court." 7 This provision is reinforced by Articles 53(1) and (2), which state that, in determining whether there is a "reasonable basis" to proceed with an investigation or a prosecution, the Prosecutor shall consider, inter alia, "the gravity of the crime." 8

THE ICC HAS A LIMITED SCOPE

Susana SaCouto & Katherine Cleary, Article: The Gravity Threshold of the International Criminal Court. American University International Law Review. 2008

The idea of including a provision along the lines of Article 17(1)(d) in the statute of the International Criminal Court was first discussed as early as 1992. Specifically, the concept arose in debates regarding the appropriate subject matter jurisdiction of the proposed Court, which was initially much broader than that granted to the ICC in the final Rome Statute, leading to concern that the Court could become over-burdened. The drafters therefore added a provision to the Statute intended to provide the Court with discretion to decline the exercise of jurisdiction on grounds of insufficient gravity. The idea that the Court should have discretion to decline jurisdiction was also seen as an important method by which the Court could manage its case load according to available resources. Thus, even though the subject-matter jurisdiction of the ICC was ultimately limited to "core" international crimes, the "gravity threshold" was maintained in the final draft of the Rome Statute.

CRITERIA THE PROSECUTOR USES IN TAKING ICC CASES

Susana SaCouto & Katherine Cleary, Article: The Gravity Threshold of the International Criminal Court. American University International Law Review. 2008

As suggested above, the Prosecutor of the ICC has treated gravity not only as a hurdle to satisfying the admissibility of a situation or a case, 36 but also as "one of the most important criteria for selection of [the OTP's] situations and cases." 37 In terms of the criteria considered by the Prosecutor in analyzing the gravity of a situation or case, statements by the OTP have pointed to one or more of the following factors, some of which appear to overlap:

[] the number of persons killed;

[] the number of victims, particularly in the case of crimes against "physical integrity," such as willful killing or rape;

[] the severity of the crimes;

[] the scale of the crimes

[] the systematicity of the crimes;

[] the nature of the crimes;

[] the manner in which those crimes were committed; and

[] the impact of the crimes. 38

In addition, the Prosecutor has made clear that, given the "global character of the ICC, its statutory provisions and logistical constraints," the OTP will generally "focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes." 39 Thus, as stated in a 2003 [*826] policy paper released by the OTP, 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." 40 Nevertheless, in announcing his policy, the Prosecutor was careful to acknowledge that "in some cases, the focus of an investigation by the [OTP] may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case." 41

THE BIRTH OF THE ICC HAS A LONG HISTORY

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

The International Criminal Court is the first permanent judicial body that seeks universal participation by nations in its objective to bring leading perpetrators of genocide, crimes against humanity, serious war crimes, and aggression, together known as "atrocity crimes," 8 to justice. During the last fifteen years, international courts have advanced international criminal justice in regional contexts and within the narrow jurisdictional mandates of the International Criminal Tribunals for the former Yugoslavia (ICTY) 9 and Rwanda (ICTR), 10 the Special Court for Sierra Leone, 11 the Extraordinary [*988] Chambers in the Courts of Cambodia, 12 and war crimes courts in Bosnia-Herzegovina, 13 Kosovo, 14 and Timor-Leste. 15 While those tribunals were [*989] evolving, the international community embraced the idea of a permanent criminal court that in most respects would obviate the need for the time-consuming and costly creation of specialized international or hybrid (part national, part international) courts for individual atrocity situations as they erupt anywhere in the world. Although the United Nations Security Council had created and empowered the ICTY and ICTR under the U.N. Charter's Chapter VII enforcement authority, 16 the only way a permanent court with broad jurisdiction would be established was through the treaty process whereby sovereign nations consented to the investigation and prosecution, under certain circumstances, of their own nationals before a global court of criminal law. Because criminal prosecutions are traditionally a national prerogative, this would be no easy task to accomplish on an international platform.

But after years of work by the U.N. International Law Commission 17 and further drafting and intensive negotiations among governments under U.N. auspices, 18 the text of the Rome Statute of the International Criminal Court was approved on July 17, 1998. 19 The U.S. delegation to the U.N. talks contributed significantly to

the provisions of the Rome Statute, [*990] including its due process requirements, and it was the hope of the Clinton Administration to join consensus on the final text in Rome. 20 But a few major issues were not satisfactorily addressed, 21 and the U.S. delegation was instructed by Washington to vote against the final text, becoming one of very few nations to do so. 22 Nonetheless, over the next two years the United States actively participated in further negotiations on the Rules of Procedure and Evidence and the Elements of Crime for the ICC. 23 Both of these documents, upon which the U.S. delegation had insisted in Rome and to which the delegation had made major contributions, such as preparing the first draft of the Elements of Crimes and leading negotiations thereafter, 24 were adopted by consensus, joined by the United States, in June 2000. 25

MOST ALLIES OF THE US ARE MEMBERS OF THE ICC

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

As of October 1, 2008, there will be 108 State Parties to the Rome Statute. 31 These include almost every major ally of the United States, many nations that are considered friends, and none that are characterized as evil, Communist, or adversarial. They consist of all but one of the European Union nations, Canada, Mexico, most of Latin America and the Caribbean, a majority of African countries, and sixteen Asia-Pacific nations, including Australia, Japan, and the Republic of Korea. 32 The ICC has accepted four atrocity crimes situations for investigation and prosecution and issued indictments in most of them: the Democratic Republic of the Congo, [*992] regarding which arrests have been made and pre-trial proceedings are underway, 33 Uganda, 34 the Central African Republic, 35 and Darfur. 36

THE ICC HAS PRECONDITIONS TO BEGIN AN INVESTIGATION

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

The ICC is not a court of universal jurisdiction that can prosecute anyone who has committed an atrocity crime anywhere in the world. 50 There are usually certain preconditions to personal jurisdiction: the individual charged with atrocity crimes must be a national of a State Party to the ICC, or the territory on which the crime was committed must belong to a State Party to the ICC. 51 If the Security Council refers the situation to the ICC, however, these preconditions do not apply: a national of a non-party State may be prosecuted, and the crimes need not be committed on the territory of a State Party. Finally, a non-party State may file a declaration with the ICC inviting it to investigate a situation in which the crimes occurred in its territory or one or more of its nationals are suspected of having perpetrated such crimes. 52

DEFINITION OF CRIMES AGAINST HUMANITY

DR. DAVID L. NERSESSIAN, ARTICLE: COMPARATIVE APPROACHES TO PUNISHING HATE: THE INTERSECTION OF GENOCIDE AND CRIMES AGAINST HUMANITY, Stanford Journal of International Law, Summer, 2007

All civilized nations protect a baseline of human dignity by criminalizing serious offenses against person and property. Most domestic and international crimes thus "are in some sense or other offences against "humanity.'" 15 But there is a clear distinction between normative ideals and the substantive definition of crimes as a matter of law. The emphasis here is upon the latter.

Since a variety of legal conceptions of crimes against humanity exist, it is helpful to anchor the analysis of the offense with a brief history of its origins. The Nuremberg trials following World War II 16 were the first instance where "crimes against humanity" were defined and applied in an international instrument providing criminal sanctions. 17 The International Military Tribunal (IMT) had jurisdiction over four offenses: (1) conspiracy to wage aggressive war; (2) crimes against peace; (3) crimes against humanity; and (4) war crimes. 18 The IMT's Charter addressed atrocities against civilians in two ways. In occupied territories, they were war crimes. 19 All other civilian populations (including Germany's own) were covered by crimes against humanity. 20 Crimes against humanity in the IMT Charter thus were close conceptually to war crimes, the key difference being the nationality of the victims. 21

Despite this historic link, war crimes will be discussed here only in passing. War crimes differentiate from ordinary offenses against person and property by specifying detailed victim classifications and requiring crimes against those victims to be committed within the larger context of armed conflict. 22 Together with crimes against humanity and genocide, war crimes are one of the four "core crimes" under international criminal law (the fourth being aggression or crimes against peace). 23 Nevertheless, their principal focus is upon the permissible methods of warfare (jus in bello). They differ substantially in character from

crimes like persecution and genocide, which are predicated upon some form of unlawful discrimination.

[*227] The IMT Charter designated two categories of crimes against humanity. The "murder-type" encompassed mass atrocities against civilians, while the "persecution-type" covered extreme discrimination against civilians and military personnel:

Crimes Against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. 24

ACTS CONSIDERED CRIMES AGAINST HUMANITY

DR. DAVID L. NERSESSIAN, ARTICLE: COMPARATIVE APPROACHES TO PUNISHING HATE: THE INTERSECTION OF GENOCIDE AND CRIMES AGAINST HUMANITY, Stanford Journal of International Law, Summer, 2007

Crimes against humanity are ordinary criminal acts committed within a wider criminal context. The prohibited act in question (murder, rape, mistreatment, etc.) must form part of the larger attack on the civilian population. Isolated offenses are not crimes against humanity. 98 But as long as it is part and parcel of the wider attack, even a single prohibited act will suffice. 99

There is significant geographic and temporal flexibility in determining whether a particular offense forms part of the larger attack. It includes offenses committed before and after the main attack and even crimes occurring in a different region, as long as they cannot reasonably be characterized as isolated events. 100 The underlying conduct amounting to crimes against humanity under customary international law, which is identical in the ICTY and ICTR Statutes, 101 appears to have been drawn verbatim from CC10. 102 The listing of prohibited acts was significantly expanded in the ICC Statute, 103 which also widened the types of groups covered by persecution. 104 At present, the authoritative list (derived from the ICC Statute 105 and ICTY and ICTR jurisprudence) includes:

- Murder; 106
- Extermination; 107
- Enslavement; 108
- Deportation or forcible transfer; 109
- Imprisonment or severe deprivation of liberty; 110
- Torture; 111
- Sexual violence (including rape, 112 sexual slavery, 113 enforced prostitution, 114 forced pregnancy, 115 enforced sterilization, 116 and other acts of "comparable gravity");
- Persecution; 117

- Enforced Disappearance; 118
- Apartheid; 119 and
- Other inhumane acts of similar character and gravity. 120

THERE IS SIMILARITY BETWEEN GENOCIDE AND CRIMES AGAINST HUMANITY

DR. DAVID L. NERSESSIAN, ARTICLE: COMPARATIVE APPROACHES TO PUNISHING HATE: THE INTERSECTION OF GENOCIDE AND CRIMES AGAINST HUMANITY, Stanford Journal of International Law, Summer, 2007

Genocide and crimes against humanity both emerged in response to Nazi atrocities during World War II. As noted above, genocide initially was conceived as a type of crime against humanity. It sometimes still is so-described, 202 although "obvious distinctions ... [make] the relationship awkward." 203 Nevertheless, "genocide and crimes against humanity always overlapped, in that genocide was born of the persecution part of the already heinous category of crimes against humanity and was established as the most heinous of the heinous." 204 Professor Cassese notes that genocide and crimes against humanity:

share at least three elements: (i) they encompass very serious offenses that shock our sense of humanity in that they constitute attacks on the most fundamental aspects of human dignity; (ii) they do not constitute isolated events but are instead normally part of a larger context, either because they are large-scale and massive infringements of human dignity or because they are linked to a broader practice of misconduct; and (iii) although they need not be perpetrated by State officials or by officials of entities such as insurgents, they are usually carried out with the complicity, connivance or at least the toleration of the authorities. 205

Assuming that the chapeau elements of crimes against humanity are established, there often will be an overlap with genocide. 206 The underlying acts constituting genocide (killing, maiming, etc.) also qualify as "murder" type crimes against humanity. Genocide in many cases also constitutes persecution, assuming that: (i) the underlying acts constituting genocide per se discriminate in fact; and (ii) that the mens rea of genocide (to destroy the [*247] group) per se constitutes

intent to discriminate on prohibited grounds against individual members of that group (i.e., based on their membership in the group). 207

THE MEANING OF "HUMANITY" IS SOMETIMES CONFUSED

DR. DAVID L. NERSESSIAN, ARTICLE: COMPARATIVE APPROACHES TO PUNISHING HATE: THE INTERSECTION OF GENOCIDE AND CRIMES AGAINST HUMANITY, Stanford Journal of International Law, Summer, 2007

Popular conceptions of crimes against humanity have created some confusion over the nature of the offense. This is because "humanity" in this context has two potential meanings: (1) a common quality or standard of [*259] behavior; or (2) the human race as a whole. 286 The first view holds that crimes against humanity respond to the transgression of a legal standard common to civilized peoples. 287 In this sense, the offense describes an offender's conduct, rather than the identity of the victim. The second view posits humanity itself as a victim. The ICTR and the ICTY, for example, have addressed individual culpability but further declared that:

Crimes against humanity ... transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity. 288

Because of their heinousness and magnitude [crimes against humanity] constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location. 289

IT IS PREFERABLE TO ACCEPT THAT A CRIME AGAINST HUMANITY IS SOMETHING THAT IS SPECIFIC

DR. DAVID L. NERSESSIAN, ARTICLE: COMPARATIVE APPROACHES TO PUNISHING HATE: THE INTERSECTION OF GENOCIDE AND CRIMES AGAINST HUMANITY, Stanford Journal of International Law, Summer, 2007

The first conception, that crimes against humanity transgress baseline human dignity common to all nations, is preferable. The notion of "humanity" as a victim is more rhetorical flourish than legal substance. 290 As horrible as atrocities in Yugoslavia and Rwanda were, it is doubtful that people in Central China or New York (equal members of "humanity") were legitimate "victims" of those tragedies. Exactly the opposite is true. It is demeaning to suggest that a woman who lost her husband and sons in Srebrenica and was herself raped somehow is on equal footing with a London resident who read about Serbian atrocities in the newspaper.

Crimes against humanity thus are not properly characterized as attacks on collectives qua collectives. Rather, they are attacks on individuals under large scale or systematic circumstances. 291 Unlike genocide, the offender need not have any conception of a particular "group" as his victim. Indeed, crimes against humanity can be committed specifically to prevent groups from forming in the first place:

Crimes against humanity do not necessarily involve offenses against or persecutions of groups ... . It is not necessary [*260] that the wronged person belong to an organized or well-defined group. In fact, it was the aim of such measures as, for instance, the hanging of a person for a trifling remark about the war, to prevent the formation of groups of dissenters against the continuation of the aggressive war. 292

Constitutional Issues

AMERICANS TRIED UNDER THE ROME STATUTE MAY NOT HAVE CONSTITUTIONAL PROTECTIONS

Lauren Fielder Redman, ARTICLE: UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT:TOWARD THE FEDERALISM OF FREE NATIONS, Journal of Transnational Law & Policy, Fall, 2007

One of the most proclaimed criticisms of the ICC is that the Rome Statute "does not adequately embody the type of due process rights that American nationals would be entitled to receive under U.S. law and the U.S. Constitution." 27 Under the Rome Statute, the possibility exists for a U.S. citizen to be tried by the ICC for a crime that is an offense in the United States without the "full and undiluted guarantees of the Bill of Rights." 28 Despite the fact that there are procedural protections for accused criminals in the Rome Statute, the ICC's detractors point out that the protections in the Bill of Rights and the Rome Statute do not mirror each other. 29

THE ICC WOULD PROTECT CONSTITUTIONAL RIGHTS

Megan E. Lantto, NOTE: THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A PERMANENT DIVIDE? Suffolk Transnational Law Review, Summer, 2008

The United States claims to be afraid that the ICC, in its prosecutions, will not protect the constitutional rights of American citizens, nor has any obligation to do so. 131 However, this fear is facially without merit, for the Rome Statute contains essentially every constitutional protection to which a citizen of the United States is entitled. 132 A comparison of every constitutional provision with every ICC provision is completely unnecessary, because a list of the rights bestowed upon individuals under the ICC reveals that the fears of the United States are groundless. 133 Individuals under ICC jurisdiction are presumed innocent until proven guilty, are entitled to a speedy and public [*645] trial, are given access to assistance of counsel, possess the right against self incrimination, have the right to a written statement of charges against them, can cross-examine adverse witnesses, can call their own witnesses, have a right against double jeopardy, cannot be searched or seized without warrant, possess the right to be present at their trial and can exclude any evidence that is proven to have been obtained illegally. 134 The only major difference between the rights awarded to criminal defendants in the United States and those given to defendants under the ICC is that under the ICC, there is a Trial Chamber composed of judges who decide guilt or innocence by a majority, as opposed to the unanimity of U.S. jury trials. 135 However, as was discussed above in Part II, if the United States were to ratify the Rome Statute, they could exert enormous influence over the election of the ICC judges. 136

RATIFICATION OF THE ICC MIGHT VIOLATE THE CONSTITUTION

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

In the event that the United States considers ratifying the Rome Statute of the International Criminal Court (ICC), concerns will be raised regarding whether such ratification and U.S. participation in the ICC would comply with the U.S. Constitution. A primary issue is whether such ratification would violate Article III, Section 1 of the Constitution regarding the judicial power of the United States. The authors argue that ratification following adoption of implementing legislation would not violate Article III, Section 1. The ratification strategy proposed in this Article would be grounded in the Article II, Section 2 treaty power and the Article 1, Section 8, Clause 10 Define and Punish Clause of the Constitution, and include amendments to the federal criminal code and military code to ensure the ability of U.S. courts to investigate and prosecute the atrocity crimes comprising the subject matter jurisdiction of the Rome Statute. The Article confirms that fundamental due process rights are protected by the Rome Statute and its Rules of Procedure and Evidence, and that the absence of jury trials before the ICC does not violate the Constitution. Nonetheless, the complementarity regime of the Rome Statute enables the United States to prosecute any American citizen or other individual within its jurisdiction before a jury and in accordance with the full range of due process rights guaranteed by the Constitution and American jurisprudence. The United States would not be barred by the Constitution from agreeing to the Rome Statute's prohibition of head of state or other high-level immunity from prosecution before the ICC. The authors propose a ratification strategy [*984] that includes adoption of declarations, understandings, and provisos to clarify American adherence to its Constitution as a State Party to the Rome Statute.

US CITIZENS WOULD LOSE CONSTITUTIONAL PROTECTION IF INVESTIGATED AND PROSECUTED BY THE ICC

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

A good example would be the crime against humanity of persecution, 102 which covers what is commonly described as "ethnic cleansing." 103 There is no basis in U.S. law to prosecute the crime of persecution, which encompasses ethnic cleansing, as a crime against [*1004] humanity with all of the accompanying elements pertaining to magnitude and planning. 104 ICC judges could determine that despite a U.S. willingness to investigate certain actions by a U.S. national, U.S. law does not criminalize such conduct. Indeed, U.S. law may not even provide jurisdiction over the U.S. national who commits such an atrocity crime on foreign territory. While efforts may be made by a U.S. Attorney to prosecute the crime of murder or another common crime found in Title 18, such efforts may be viewed by the ICC judges as insufficient to address the actual crime in question. The definition and elements of the crime against humanity of persecution simply do not exist in the U.S. Code.

Without the ability to exercise jurisdiction over any atrocity crimes allegedly committed by U.S. nationals anywhere in the world, the United States would forfeit its privilege to apply all U.S. constitutional due process protections, including the right to trial by jury, for the benefit of U.S. nationals sought by the ICC for the commission of crimes that are not codified in U.S. Code Titles 10 and 18. This is an issue of great importance whether or not the United States ratifies the Rome Statute.

AMERICANS WOULD LOSE A TRIAL BY JURY

Lauren Fielder Redman, ARTICLE: UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT:TOWARD THE FEDERALISM OF FREE NATIONS, Journal of Transnational Law & Policy, Fall, 2007

In the opinion of the United States, the ICC's largest incompatibility with the Constitution is its failure to provide a trial by jury, using a three judge panel instead. 30 This objection cannot be dismissed lightly, because the right to trial by jury "is among the [*42] most important rights guaranteed by the Constitution." 31 In fact, it is the only due process right that was incorporated into the original six articles of the United States Constitution. 32 Its importance in the American criminal justice system goes far beyond an information gathering mechanism; indeed, it is believed to be a "fundamental and necessary check on the use and abuse of governmental power." 33

JOINING THE ICC MAY LEAD TO VIOLATIONS OF ARTICLE III, SECTION I OF THE CONSTITUTION

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

The International Criminal Court prosecutes international crimes of the most significant character - genocide, crimes against humanity, war crimes and, potentially, aggression - and only when committed on scales of magnitude, substantiality, and often transnational character typically not found in domestic cases. 105 The reality of the ICC's subject matter [*1005] jurisdiction over atrocity crimes has a critical bearing on whether U.S. ratification of the Rome Statute would violate Article III, Section 1 of the Constitution which provides, in relevant part: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish." 106

The Rome Statute has established an international criminal court which the United States, if it were to become a State Party, would be obligated to help pay for, 107 cooperate with, 108 elect judges and the Prosecutor to apply justice at, 109 and, in certain circumstances, allow for the prosecution of U.S. citizens before, the ICC. 110 The judicial power of the ICC, however, is not that of the United States. It is the power of an independent international criminal court, an international organization with "international legal personality" 111 and bound to no government's direction or control, 112 established by treaty among the sovereign nations of the world for a distinctly international purpose. If the United States were to ratify the treaty establishing the ICC, it would be an exercise of the Article II treaty power 113 to build a uniquely-conceived international court and not an exercise of the Article III, Section 1 power to establish a domestic court.

IF THE ICC IS NOT AN EXTENSION OF US LAW, THEN IT CAN BE CONSTITUTIONAL

Lieutenant Brett W. Johnson, JAGC, USNR, ARTICLE: The Future Constitutional Battle If the United States Ratifies the International Criminal Court Treaty. Journal of International and Comparative Law. Spring, 2003

Before the issue of the ICC's constitutionality is discussed, it must be determined whether the ICC "is best viewed as an instrumentality of the United States or as a foreign entity." 207 Paul Marquardt, a noted commentator 208 on the constitutionality of the ICC, argues the ICC is not an extension of the United States government, especially since the ICC will operate under its own laws and protocols from the authority of the entire international community. 209 If the ICC is not considered an extension of the United States, but rather a separate foreign entity, the institutional and possibly the protection concerns of the Constitution are diminished.

OTHER DUE PROCESS RIGHTS ISSUES ALSO EXIST UNDER THE ROME STATUTE

Lauren Fielder Redman, ARTICLE: UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT:TOWARD THE FEDERALISM OF FREE NATIONS, Journal of Transnational Law & Policy, Fall, 2007

There are several other due process protections that are missing or inadequate in the Rome Statute. In addition to having the right to trial by jury, the U.S. Constitution mandates that a defendant have a speedy, public trial. 34 This trial must be held in the state where the crime was committed. 35 Although the Rome Statute provides for the accused to be entitled to a public hearing without inexcusable delay, 36 there is no firm definition of what constitutes inexcusable delay. 37 The ICTY, which served as a model for the ICC, has given some indication that five years in custody awaiting trial might not be undue delay. 38 In contrast, the United States law makes plain what is unacceptable delay. In the U.S., the defendant has the right to be brought to trial within seventy days of indictment. 39

Further, the Rome Statute, while providing a watered down version of the exclusionary rule, does not protect accused persons against unreasonable searches and seizures. 40 Also of concern is the fact that the Rome Statute lacks a provision giving accused persons the right to confront and cross-examine witnesses, the [*43] right to know the identity of hostile witnesses and the right to exclude hearsay evidence. 41 Finally, convicted persons under the ICC are not protected against double jeopardy-a Fifth Amendment protection-since the Prosecutor can appeal an acquittal verdict. 42

THE ICC COULD POTENTIALLY VIOLATE THE CONSTITUTION

Lieutenant Brett W. Johnson, JAGC, USNR, ARTICLE: The Future Constitutional Battle If the United States Ratifies the International Criminal Court Treaty. Journal of International and Comparative Law. Spring, 2003

A further problem is that if the United States ratified the ICC treaty, Congress would be creating a court that potentially could try United States citizens for acts that are crimes under both international and domestic United States law. 274 One of the top human rights counsel in the United States, who is in favor of United States ratification of the ICC treaty, despite the constitutional issues, admits that "the ICC can properly be considered an extension of the state's own domestic jurisdiction." 275 Thus, in her view, if approved by Congress and signed by the President, the ICC would be considered a court inferior to the Supreme Court, whether or not it the ICC would be considered an Article III court. 276 Of note, this concept is not addressed in the ICC treaty, and the final authority in regards to ICC cases is the Appeals Chamber of the ICC. 277

COULD VIOLATE ARTICLE II OF THE CONSTITUTION

Lieutenant Brett W. Johnson, JAGC, USNR, ARTICLE: The Future Constitutional Battle If the United States Ratifies the International Criminal Court Treaty. Journal of International and Comparative Law. Spring, 2003

Under Article II of the United States, the executive branch of the government has three powers that would come into conflict with the ICC structure. First, the structure would conflict with the executive power to negotiate treaties; second, the powers enumerated as Commander-In-Chief; and third, the pardon powers. Although, for the United States to become a member of the ICC, the President is obligated to sign the treaty, which was done by President Clinton before he left office, the Supreme Court has held that the President is unable to surrender any executive authority. 326 An argument that a federal court should bar an accused's surrender to the ICC would be that the President has abandoned his constitutional duties under Article II.

COULD VIOLATE THE POWER OF THE COMMANDER-IN-CHIEF

Lieutenant Brett W. Johnson, JAGC, USNR, ARTICLE: The Future Constitutional Battle If the United States Ratifies the International Criminal Court Treaty. Journal of International and Comparative Law. Spring, 2003

The United States Constitution provides for the power over the United States military to be held, principally, by the executive branch. 356 As Commander-In-Chief, the President has vast authority to respond to attacks against the United States. 357 In responding to attacks, the President will be granted absolute immunity for any official acts taken within that authority. 358 In Nixon v. Fitzgerald, Justice Powell stated for the Court that alternative checks, such as impeachment and congressional scrutiny, would provide adequate assurances the President was not "above the law." 359 Since, in our scenario, the Vice-President was Acting President under the Twenty-Fifth Amendment, the Vice-President would also be entitled to this absolute immunity. 360 Since the immunity has its foundation in the separation of powers, a treaty could not contravene it. (However, it is noteworthy that, if the Vice-President was impeached for the acts stated in the scenario, the Vice-President would then be liable and subject to indictment.) 361

The ICC treaty would undermine this presidential immunity. Article 27 of the ICC Statute clearly states that immunities, whether under international or national law, is not a bar for the jurisdiction of the ICC. 362 Thus, the Ad Hoc Tribunals have set the standard for this elimination of immunities when it requested the surrender of ex-President Soloban Milosevic from the Former Yugoslavia. 363 This same approach could be applied in the case of the Vice-President's scenario, and a claim of absolute immunity would not be a viable defense to an assertion of jurisdiction by the ICC. Thus, since the Vice-President would not have this defense, a serious issue of constitutionality of the ICC treaty, which constrains the powers and immunities of the United States executive branch, would be raised.

COULD VIOLATE PARDON POWER OF THE PRESIDENT

Lieutenant Brett W. Johnson, JAGC, USNR, ARTICLE: The Future Constitutional Battle If the United States Ratifies the International Criminal Court Treaty. Journal of International and Comparative Law. Spring, 2003

The United States Constitution provides for the President to have "the power to grant reprieves and pardons for offenses against the United States." 371 Although the concept of presidential pardon is not specifically discussed within the ICC treaty, 372 it is clear the subject matter of the ICC includes acts that are crimes under United States law. 373 Thus, an interpretation of Article 27 would show such a pardon irrelevant in the eyes of the ICC, even when the subject matter is within the scope of the United States judiciary. 374 So, for example, in the case of the Vice-President scenario, under the ICC, the fact that he was pardoned by the President would be irrelevant and not bar prosecution by the ICC.

THE ICC WAS NEVER MEANT TO PROSECUTE CRIMES THAT WOULD NORMALLY BE PROSECUTED BY DOMESTIC COURTS

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

The ICC was neither conceived nor established for the purpose of "emasculating constitutional courts." The subject matter jurisdiction embodied in the Rome Statute consists exclusively of international crimes, only some of which are codified in U.S. law. 117 These are crimes of concern to the entire international community, striking at the heart of humankind. Much of the subject matter jurisdiction in the Rome Statute, particularly crimes against humanity and some war crimes, does not exist in federal criminal law and even in U.S. military law, so there would be no transfer of jurisdiction of existing Article III power with respect to those crimes if the United States were to ratify the Rome Statute. 118 Those atrocity crimes of ICC jurisdiction which currently can be prosecuted in U.S. courts, such as genocide 119 and some war crimes, 120 nonetheless constitute international crimes of the most profound character. The complementarity principle of the Rome Statute, discussed above, preserves the Article III courts' existing jurisdiction over these crimes, but also recognizes an alternative forum - one that is essentially inferior because of the complementarity principle - for adjudicating these crimes in the event U.S. prosecutors and courts fail to act or act so corruptly as to conduct sham trial proceedings. By virtue of ratifying the Rome Statute, the United States would consent to alternative jurisdiction to adjudicate a particular case by the treaty-based ICC. If and when Congress amends U.S. Code Titles 10 and 18 to fully embrace the atrocity crimes of the Rome Statute, such crimes would remain international crimes that are the sole focus of the ICC as an alternative and, for all intents and purposes, secondary forum to U.S. prosecution.

THE US HAS OFTEN USED TREATIES THAT WOULD GIVE FOREIGN COURTS JURISDICTION OVER US NATIONALS

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

The United States has regularly used the treaty power to permit foreign sovereigns to exercise criminal jurisdiction over American citizens who serve in the Armed Forces abroad. 148 A sovereign nation generally has jurisdiction over the crimes committed within its territory. 149 A longstanding rule of war, however, is that occupying troops are exempt from the criminal jurisdiction of the enemy country. 150 The Supreme Court, in Dow v. Johnson, explained that it would be singularly absurd to permit an officer or soldier of an invading army to be tried by his enemy. 151 Following World War II, U.S. troops occupied or were stationed in certain countries with the host country's consent. 152 Because such a host country was no longer an active enemy, the reasoning in providing such occupying or stationed forces immunity from jurisdiction did not apply. It became necessary and desirable for jurisdiction over such troops to be negotiated [*1013] and established in a Status of Forces Agreement (SOFA). 153 For example, the United States and other members of the North Atlantic Treaty Organization entered into a SOFA 154 which has served as a model for SOFAs with other countries. 155 There are no less than seventy-five SOFAs (including "status of military personnel" and "status of military and civilian personnel" agreements) to which the United States is a party, 156 in addition to the NATO SOFA, which has twenty-five State members in addition to the United States. 157

THESE COURTS HAVE BEEN FOUND TO BE CONSTITUTIONAL

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

Various SOFAs and SOFA-like treaties have been held to be constitutional by U.S. courts. 162 The leading case on this issue is Wilson v. [*1014] Girard, where the Supreme Court denied a habeas corpus petition of a serviceman indicted by Japan for causing death by wounding. 163 Serviceman Girard shot an empty case at a Japanese woman gathering spent ammunition cartridges and killed her. 164 The United States and Japan had in place a Security Treaty whereby the United States had jurisdiction over its service members who committed offenses arising out of their official duties. 165 Japan argued that Girard's action was not in the scope of his duties, but the United States waived jurisdiction nevertheless. 166 The Supreme Court held that there was no constitutional or statutory bar to the United States waiving jurisdiction that was original to Japan and which Japan had given to the United States pursuant to the agreement. 167

THE US GOVERNMENT WOULD STILL BE ABLE TO PROVIDE CONSTITUTIONAL PROTECTIONS FOR US CITIZENS BEING TRIED

Megan E. Lantto, NOTE: THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A PERMANENT DIVIDE? Suffolk Transnational Law Review, Summer, 2008

The United States remained convinced that the ICC would strip Americans of their constitutional rights despite the safeguards in place in the Statute to protect against precisely that threat, as well as strong foreign support for the ICC. 34 The complementarity principle, captured in Articles 17, 18, and 19 of the Rome Statute, was one of the major U.S contributions to the text of the Statute, and requires that the ICC defer to national legal systems that are willing and able to participate. 35 It is highly unlikely that in such a situation the United States would fail to meet the ICC's requirements for prosecuting its own citizens. 36 The United States also has the ability to protect U.S. citizens by negotiating and executing Article 98 agreements, a right it has ardently utilized. 37 The Rome Statute also allows for extensive intervention and oversight by the U.N. Security Council, of which the United States is a powerful member, and depending on the ability of the United States to convince other nations to vote with them, possesses the power to halt investigations [*628] by the ICC. 38 Additionally, the threshold for the prosecution of crimes under the Statute is high, so that the possibility of U.S. citizens being prosecuted for them is comparatively low. 39 Lastly, and quite possibly the point most fervently denied by the United States, the Statute does provide numerous due process guarantees to individuals being investigated by the ICC. 40

THE ICC WOULD VIOLATE THE RIGHT TO A JURY TRIAL

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

Any defendant coming before the ICC appears before a chamber of judges and not before a jury. 267 Nothing in the U.S. Constitution requires a foreign or international court located outside of the United States to hold its criminal trials before juries of common law character, as opposed to the far more prevalent means of trial before judges that is found in most of the [*1034] world's civil law legal systems. 268 But the Constitution's provisions on jury trials present a considerable challenge to any prospective U.S. ratification of the Rome Statute.

The Constitution requires in Article III, Section 2 that, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." 269 The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... ." 270 The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ... ." 271 The Article III, Section 2 requirement and the Fifth and Sixth Amendments contain the most serious, and also the most sweeping, invocations regarding the right to trial by jury.

Realism v. Transnationalism

REALISM SAYS THAT NATIONAL INTEREST, NOT RULES, GUIDE ACTION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Realism suggests that foreign policy is driven by national interest, not legal rules, and that power relationships, not legal institutions, determine state behavior. 19 Realism has five major premises. 20 First, states are the primary actors in international affairs, and each state's survival depends primarily on its own efforts to maintain its security. 21 Second, due to the anarchical nature of the international system, states are preoccupied with power and security and as a result compete, rather than cooperate, for power and resources. 22 Third, states are rational actors who seek to maximize their power and, fourth, are sensitive to relative erosions of their position and capabilities in comparison to other nations. 23 Finally, realism states that international laws and organizations do little to affect the overall likelihood of cooperation. 24

STATES ARE THE PRIMARY ACTOR

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

First, realism holds that states are the major actors in international relations. 25 There is no authority or sovereignty above the level of the state, 26 and state sovereignty allows each nation to pursue its own objectives and interests independent of the welfare of others. 27 Under realism, as noted by Charles De Visscher, a former President of the International Court of Justice, the state is "an end in itself, is free of any moral rein; it seeks unlimited power and answers to no one for what it does." 28

THE INTERNATIONAL ARENA IS ANARCHIC

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Second, realism presumes that the international system is anarchical, lacking a central authority capable of preventing the use of force. 29 Wars [*119] occur because there is nothing to prevent them, 30 and states that do not protect their security or vital interests risks being victimized by aggressors. 31 Every state has the offensive capability to harm or destroy others, and accordingly, states can never be certain of others' intentions. 32 As stated by Kenneth Waltz, "In the absence of a supreme authority, there is then constant possibility that conflicts will be settled by force." 33 The intentions of other states can rapidly change from benign to hostile, so while alliances do occur, states cannot assume the loyalties of their allies. 34 Faced with potential adversaries on all sides and unable to depend on others to guarantee their continued existence, each state's survival depends solely on its own efforts to preserve its security. 35

STATES ONLY ENTER COOPERATIVE AGREEMENTS TO MAXIMIZE GAINS

John Mearsheimer. The Tragedy of Great Power Politics (New York: Norton, 2001): 29-54

Because great powers cared deeply about the balance of power, their thinking focuses on relative gains when they consider cooperating with other states. For sure, each state tries to maximize its absolute gains; still, it is more important for a state to make sure that it does no worse, and perhaps better, than the other state in any agreement. Cooperation is more difficult to achieve, however, when states are attuned to relative gains rather than absolute gains. This is because states concerned about absolute gains have to make sure that if the pie is expanding, they are getting at least some portion of the increase, whereas states that worry about relative gains must pay careful attention to how the pie is divided, which complicated cooperative efforts. Concerns about cheating also hinder cooperation. Great powers are often reluctant to enter into cooperative agreements for fear that the other side will cheat on the agreement and gain a significant advantage. This concern is especially acute in the military realm, causing a 'special peril of defection,' because the nature of military weaponry allows for rapid shifts in the balance of power. Such development could create a window of opportunity for the state that cheats to inflict a decisive defeat on its victim.

STATES ARE PRIMARILY CONCERNED WITH POWER AND SECURITY

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Third, in the theory of realism, states are preoccupied with power and security, and are predisposed towards conflict and competition. 36 International politics is a "ruthless and dangerous business," 37 and power is the means by which states guarantee their survival. The more strength a state has in relation to its rivals, the less likely it will be attacked. 38 Accordingly, each state attempts to maximize its power, either absolutely or in relation to neighbors and rivals. As this usually comes at the expense of other states, each is constantly looking to either gain an advantage or prevent others from gaining an advantage over them. 39 [*120] Accordingly, interstate security competition is constant, with little likelihood of long-term tranquility. 40 When international peace or stability occurs, it is the result of a balance of power - between nations that have banded together to protect themselves from aggressors or to prevent one nation from imposing its will upon the rest. 41

STATES MAINLY CONCERNED WITH THEMSELVES

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Fourth, realism maintains that states are "rational egoists" that are sensitive to costs, and determine their actions in light of their own interests, not that of others. 42 They are aware of their environment and think strategically about how to survive and prosper in it in relation to other states. 43 States are acutely aware of erosions in their relative capabilities, which they rely upon to maintain their security and independence in a system often prone to violence. 44 They "do not subordinate their interests to the interests of other states or to those of the so-called international community," 45 and pursue other goals - such as economic well being - only so long as they do not interfere with their security interests. 46

INTERNATIONAL NORMS AND INSTITUTIONS HAVE ONLY MARGINAL EFFECT ON STATE ACTION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

[*121] Finally, realists assert that international norms and institutions only marginally affect the prospects for cooperation. 47 In their constant competition for power and security, states often fail to cooperate even when they have common interests. 48 Where states do enter into cooperative agreements, fears of cheating and exploitation limit their ability to commit fully. 49 Each participant measures its gains in comparison to those of its partners to insure that the other is not benefiting disproportionately, and may abandon the effort or limit its involvement if potential rivals are receiving benefits far in excess of its own. 50 Fear of cheating becomes more acute as the size of the joint effort grows; as the number of participants increases, so do the cost of monitoring and enforcement, leading to a greater chance of free-riding. 51 This sensitivity to relative gains is heightened if the partner state is a long-term adversary, if the gain is in military rather than economic power, or if the home state's power is already in decline. 52 While fear and uncertainty about cheating and exploitation do not eliminate the chance of cooperation, long-term alliances are "sometimes difficult to achieve and always difficult to sustain." 53

STATES OUGHT TO ACT IN THEIR SELF-INTEREST

Stephen A. Kocs (Prof at College of the Holy Cross), International Studies Quarterly, Vol. 38, No. 4. (Dec., 1994), pp. 535-556.

To neorealists, the most fundamental characteristic of the international system is that it is an anarchy-a realm in which multiple independent actors, rather than a single central authority, control the principal instruments of military coercion. Neorealists view anarchy as producing far-reaching consequences for the behavior of states. Because states under anarchy decide for themselves whether and when to use force, they argue, the fact of'anarchy means that states are continuously insecure. Each state must allow for the possibility that other states may use their military capabilities to damage or destroy it (Waltz, 1979:102; Grieco, 1990:28-29; Art and Jervis, 1992:2). The international realm thus resembles a Hobbesian state of nature, where each state's survival depends on its own efforts. Given anarchy, states must base their strategic behavior on the capabilities, not the intentions, of other states. They must begin from the assumption that other states' capabilities may someday be used against them. Neorealists deny that an anarchic international system can produce security for all states simultaneously. Since states may decide to use force at any time, the measures each state takes to reinforce its own security are precisely those that endanger others (Waltz, 1979:64). This being the case, states are driven to expand their own capabilities in the system while trying to limit the relative gains of other states (Mearsheimer, 1990: 12; Zakaria, 1992: 194). Failure to behave in this way may jeopardize a state's vital interests or even its existence (Gilpin, 1981:86-88). Thus, concludes Grieco, "the fundamental goal of states in any relationship is to prevent others from achieving advances in their relative capabilities."

REALISTS POINT TO HISTORY TO PROVE THEIR THESIS

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Realists note that there is a long historical record of states working to shift the balance of power in their favor, and argue that this proves the predictive power of their theory. For example, realists point to Japan from 1868 to 1945, the Soviet Union from 1917 to 1991, and Germany from 1862 to 1870, and again from 1900 to 1945, as textbook cases for realist state behavior. 54 In each of these cases, Japan, Germany, and the [*122] Soviet Union feared foreign invasion or the encroaching power of potential adversaries into their spheres of influence. 55 Accordingly, each defined its national policy primarily in relation to its security needs, and aggressively sought to prevent victimization by preemptively increasing its power relative to other states. 56 Realists also point to the nuclear arms race between the Soviet Union and the United States as a good example of states positioning for superiority in security and power. Both the US and USSR devoted considerable resources to gaining a nuclear advantage over the other. 57 Both sides in this arms race were uncertain of the other's motives and intentions, and were acutely sensitive to erosions in their numerical or technological superiority. 58

TRANSNATIONALISM BELIEVES THAT HUMANS ARE INHERENTLY GOOD AND STATES CAN BE GUIDED BY LAW

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

The philosophy of transnationalism, in contrast, suggests that the behavior of states in international relations should reflect more than just the states' short-term calculations of interest. Transnationalism is optimistic about human nature and the potential for mutual aid and collaboration, and it holds that human concern for the welfare of others and cooperative action by states make possible international peace and stability. 59 Transnationalists argue that great powers should no longer view each other as competitors and potential military rivals, but instead as a family of nations, an "international community." 60 Cooperation, transnationalists argue, is emerging as the defining characteristic of international relations, with states less likely to compete for security or engage in war [*123] as global economic and political interdependence increases. 61 Where conflict does occur, it is not due to evil intent, but rather to bad institutions and structural arrangements that encourage some states to behave selfishly. 62 Accordingly, transnationalists believe that war is not inevitable and its frequency can be reduced by improving international institutions and governance, primarily by encouraging free trade and the spread of democratic values. 63

TRANSNATIONALISTS BELIEVE INTERNATIONAL LAW IS BINDING

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Transnationalists assert that states have binding legal obligations under international law, rules that derive their authority from a moral community of shared values. Over time, transnationalists insist, these laws will strengthen into a Wilsonian international system dedicated to the pursuit of peace, and built on justice, democracy, and respect for human rights. 64 This is not a world government, but instead a Kantian rule-based international society composed of liberal, sovereign states, in which transnational cooperation creates mutuality of interest across national lines. 65 International law, even if imperfect, offers opportunities to, in the words of Hersch Lauterpacht, "enhance the stability of international peace, ... protect ... the rights of man, and ... reduce the evils and abuses of national power." 66

TRANSNATIONALISTS BELIEVE THAT ECONOMIC AND POLITICAL INTERCONNECTEDNESS MAKE STATES MORE LIKELY TO FOLLOW INTERNATIONAL LAW

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Transnationalists, like realists, believe that states are important actors in the international system, but argue that increasing economic and political interdependence has decreased their ability to control their own destinies. 67 With the spread of globalization, international, non-governmental institutions such as the United Nations (UN) or the World Trade Organization (WTO) are playing an increasing role in facilitating inter-state cooperation, promoting the evolution of accepted norms, rules, and decision-making procedures between states. These institutions make cooperation more beneficial in the long-term than competition, reducing the overall chance of war. 68 As the number of international issues regulated by these institutions has increased over time - including human rights, [*124] arms control, international economics, and international environmental issues - national sovereignty has yielded control over matters that once were exclusively within the jurisdiction of states. 69

STATES WILL FOLLOW INTERNATIONAL NORMS OUT OF A FEELING OF OBLIGATION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

The first and most important principle of internationalism is that states have binding legal and moral obligations codified in international law. 80 While it is not law in the traditional domestic sense, international law is binding because it is based on shared norms and "specific, substantive legal commitments ... contained in treaties and other formal agreements to which [they] have given their explicit consent." 81 States follow customary [*126] international norms out of a sense of opinio juris, a sense of legal and moral obligation, 82 or because they have given their consent to be bound through international treaties or conventions, known as pacta sunt servanda. 83

WE ARE PART OF A MORAL INTERNATIONAL COMMUNITY

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Transnationalists' faith in the authority of international law is also based in part on conceptions of an international "moral community." 84 Akin to the civitas maxima in Roman jurisprudence, transnationalists believe in a larger body politic, an intangible international whole from which emerges a collective social bond that contains "duties that transcend[] the interests of the singular." 85 Law is more than a force that binds states; it is an expression of basic values shared by all, such as [*127] human rights, democracy, and justice. 86 Law as enacted by states in an international community becomes a realization of those values and exerts a normative pull on state behavior, bringing them into compliance with accepted norms. 87 As stated by Anne-Marie Slaughter Burley, former President of the American Society of International Law, "in a genuine community bound together by common values, 'the law' can be identified as the authoritative expression of those values." 88

INTERNATIONALISM BELIEVES IN COOPERATION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Third, transnationalists have greater optimism for interstate cooperation than realists, and believe that international institutions facilitate interstate cooperation, reducing the overall likelihood of war. 89 By creating an environment where cooperation is more beneficial than competition, international institutions and law can help states work together to achieve mutually beneficial outcomes and overcome suspicions and obstacles. 90 These institutions help states to abstain from short-term power maximizing behavior by creating an institutional framework that sets norms of state behavior, reduces verification costs, creates iterativeness, and facilitates the identification and punishment of cheaters. 91

BELIEVE THAT STATES ARE BECOMING LESS IMPORTANT WITH THE RISE OF NON-STATE ACTORS

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Fourth, transnationalists favor the continued erosion of the sovereignty of the state in favor of non-state actors. They have applauded the rapid expansion of the role of international legal regimes since the end of the Cold War, and their increasing encroachment on issues previously viewed as the exclusive domain of the state. 92 Transnationalists argue that these international institutions are in the best position to manage the interactions of states and address global problems - such as climate change, poverty, and diseases such as AIDS and avian influenza - that are beyond the capacity of any one state to resolve. 93

INTERNATIONALISTS DON'T BELIEVE THE USE OF FORCE IS NECESSARILY EFFECTIVE

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

[*128] Fifth, transnationalists have an abiding skepticism of the utility of force as a tool in international relations. In sharp contrast to realists, who argue that violence is inevitable due to the anarchical nature of the international system, transnationalists argue that international instruments such as the UN Charter have created a system of international laws and norms that discourages aggression between states. 94 Through consensual compliance with international treaties such as the Kellogg-Briand Pact and the UN Charter, states have willingly accepted a customary "norm of illegality" for wars waged outside of self-defense, prohibiting force as an instrument of national policy. 95 As international jurist and scholar Antonio Cassesse stated, "peace became the supreme goal of the world community and States decided to agree upon serious and sweeping self-limitations of their sovereign prerogatives in the form of the mutual obligation to refrain from using or threatening force." 96

STATES ARE LESS LIKELY TO USE VIOLENCE WITH GROWING DEMOCRATIZATION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Finally, transnationalists assert that increasing democratization and high levels of economic interdependence among states reduce the likelihood of violence. 97 It is a transnationalist truism that democracies seldom, if ever, go to war against each other. 98 Accordingly, they argue that long-term international stability is most likely to occur under a liberal economic order that facilitates free and equitable economic exchanges between states. 99 Greater international prosperity and democratization reduces the number of revisionist states unhappy with their lot, while increased economic interdependence makes war less profitable by disrupting the enriching network of interdependence. 100

REALISTS REJECT THE NOTION OF A TRANSNATIONAL JURISDICTION

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

One of the most vocal criticisms of the moral aspects of transnationalism came from George F. Kennan, the chief architect of the US containment policy during the Cold War and one of the most influential figures in American diplomacy during that period. In a 1951 lecture, he charged that the "legalistic-moralistic approach to international problems" constituted the "most serious fault" in past US foreign policy. 213 Deriding as misguided the "belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints," 214 Kennan argued that such an approach is not suited for dealing with revisionist states, and questioned the propriety of limiting international behavior to the confines of domestic morality:

The idea of the subordination of a large number of states to an international juridical regime, limiting their possibilities for aggression and injury to other states, implies that these are all states like our own, reasonably content with their international borders and status[which has] generally been true only of a portion of international society ... . [But] there is a greater deficiency ... that is the inevitable association of legalistic ideas with moralistic ones: the carrying over into the affairs of states of the concepts of right and wrong, the assumption that state behavior is a fit subject for moral judgment. 215

STATES' SOVEREIGNTY MUST BE RESPECTED AS A DEMOCRATIC CHECK IN THE INTERNATIONAL ARENA

International Institutions: Can Interdependence Work? Robert O. Keohane, Foreign Policy, No. 110, Special Edition: Frontiers of Knowledge. (Spring, 1998), pp. 82-96+194.

The issue here is not one of state sovereignty. Economic interdependence and its regulation have altered notions of sovereignty: Few states can still demand to be completely independent of external authority over legal practices within their territories. The best most states can hope for is to be able to use their sovereign authority as a bargaining tool to assure that others also have to abide by common rules and practices. Given these changes, the issue here is who has influence over the sorts of bargains that are struck? Democratic theory gives pride of place to the public role in deciding on the distributional and value tradeoffs inherent in legislation and regulation. But the practices of international institutions place that privilege in the hands of the elites of national governments and of international organizations.

REALISTS BELIEVE CREATING INTERNATIONAL LAWS IS POINTLESS

Nathan A. Canestaro, ARTICLE: REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY, Boston University International Journal of Law, Spring 2007

Kennan, along with other prominent scholars, such as former Supreme Court Justice Oliver Wendell Holmes, believed that codes of conduct for state behavior should reflect the actual behavior of states, rather than play a normative role in suggesting how they should behave. 216 Realists argue that international law has evolved into an unrealistic ideological code that is unconnected to the actual practice of statecraft. "The received rules of international law," argues Michael Glennon, "neither describe accurately what nations do nor predict reliably what they will do, nor prescribe intelligently what they should do." 217

General Affirmative Evidence

INTERNATIONAL LAW IS A NORM

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Globalization, a phenomenon that can be described as interconnectivity between regions, peoples, ethnic, social, cultural, and commercial interests across the globe, has affected different legal fields, including international law. 1 Reshaped by the potent forces of globalization, [*214] international law has transformed itself from a set of legal rules governing inter-state relations, to a complex web of transnational documents, providing a normative framework for all sorts of different actors on the international legal scene. 2 Phenomena that used to belong to domestic realms are now examined and monitored through the international legal lens. 3 Our planet is "shrinking" because issues such as the environment, nuclear weapons, disease, and terrorism have become of global concern, and are thus measured by international law parameters. 4 Domestic law has lost its omnipotent, "sovereign" power and is now supplemented, corrected, and watched over by international law. 5 Thus, international law has undergone an evolutionary process over recent decades, transforming itself from an instrument of inter-state conflict resolution, to a powerful global tool, present in everyday life and influential in many state actors' and non-state entities' decisions and policies.

INTERNATIONAL LAW IS CONCERNED WITH BOTH INTRASTATE AND INTERSTATE POLICIES

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

International law, as studied through a traditional framework, included two types of normative systems: one promulgated by states themselves for their domestic relations, and the other promulgated among states for inter-state relations. 6 Throughout the twentieth century, [*215] such a formal view of international law became inadequate. For one, the creation of individually enforceable norms in the field of international human rights transformed individuals into international law players. 7 Moreover, nongovernmental organizations (NGOs) came to play a prominent role on the international legal scene, as did various regional organizations, institutions, and judicial bodies. 8 The proliferation of actors in international law contributed to a proliferation of international legal norms. 9 Moreover, even classic legal actors, such as courts, changed their role in light of this modernization of international law. 10 For example, judges today seem more willing to "apply in-dialogue, international norms transnationally, to engage in a transnational judicial and even to adopt conceptions of universal jurisdiction." 11

THE ICC PROTECTS AMERICAN LIVES

Roth, Ken [executive director of Human Rights Watch] Towards an International Criminal Court? Council on Foreign Relations Press (July 1999) pp 319.

The International Criminal Court is also in America's interest because it can help save the lives of our soldiers. In recent years, the most common reason for deploying American troops overseas has been to stop precisely the kind of slaughter and bloodshed that the court is designed to prevent. When genocide strikes, when crimes against humanity spread, when war crimes are committed, the United States, as the world's most powerful nation, has rightfully felt a duty to do what it can to stop the killing. Knowing the danger of these missions, knowing the risks that our brave young soldiers must run, we nonetheless have resolved as a nation to stand with victims against their tormentors. By helping to deter tomorrow's tyrants, the International Criminal Court [a court] will reduce the necessity of deploying American soldiers to stop their slaughter. That will mean fewer dangerous assignments for our armed forces and fewer young American lives at risk.

ICC AVERTS NEEDLESS LOSS OF LIFE

C Roth, Ken [executive director of Human Rights Watch] Towards an International Criminal Court? Council on Foreign Relations Press (July 1999) pp 19.

The International Criminal Court offers great promise as a deterrent because it targets not an entire people, the way broad trade sanctions do; not frontline conscripts, the way military intervention often does; but the tyrant who is ordering and directing the killing. Some tyrants might still not be deterred. But even if the court prevents only an occasional genocide, it is worth it. Even if it avoids the need to deploy American troops on dangerous assignment overseas only sometimes, we have a duty to support it. For the benefit of humankind, for the security of our nation, and for the safety of our troops, we should join this historic institution.

NON-STATE ACTORS ARE IMPORTANT IN INTERNATIONAL LAW
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Traditionally, international law involved state actors and inter-state relations. 18 Individuals, organizations, regional bodies, non-governmental institutions, and the like were left outside the reach of international law. 19 The United Nations (U.N.) was a forum open exclusively to state parties. The International Court of Justice (ICJ), as well as its predecessor, the Permanent Court of International Justice (PCIJ), were reserved for state grievances. 20 It was inconceivable that an individual would come before such tribunals, or that international law would govern anything but relations among state parties. 21

Today, the converse is true. 22 International law, in its transformed or globalized version, governs all sorts of relations, including those implicating states, regional bodies, NGOs, trade organizations, commercial actors, and private individuals. 23 It spreads into legal fields such as environmental law, labor law, trade regulations, antitrust, health, and insurance law. 24 Non-state actors play increasingly important roles in [*217] such fields, including regional organizations, specialized bodies such as trade organizations, NGOs, and private individuals. 25

Regional organizations play dominant roles within their jurisdictions." The North American Free Trade Agreement (NAFTA) is such a prominent regional power that it acts as a sovereign in matters of trade within the continent. 26 In Europe, the European Union (EU) undertakes a sovereign role in matters such as labor law, consumer regulations, antitrust, and environmental law. 27 Moreover, NGOs play a hugely important role on the international scene. They challenge traditional models of state sovereignty with regard to different areas of law, and in particular human rights norms; they formulate global standards of corporate behavior; and they generally claim to represent some sort of a global interest. 28 Another example, the World Trade Organization (WTO), dictates the terms of global trade

by creating norms, establishing an entirely new jurisdiction to handle disputes, and tying state and non-state interest in a global web of trade relationships embodied in the organization's structure and processes. 29 Finally, private individuals exercise increasing influence in the international legal field. 30 Private parties [*218] can now enter into investment treaties with state parties; moreover, they can sue state parties in specific tribunals for breaches of such investment relations. 31 Private parties can also rely on international law to obtain certain guarantees, particularly in the field of human rights, and they can sue state parties for violations of such international standards. 32

INTERNATIONAL NORMS REGULATE MANY TYPES OF STATE AND NON-STATE ACTORS
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

International law today encompasses many different norms. 34 These include: multiple conventions and treaties in several of areas of law; a significant number of customary norms ranging from fields such as human rights to foreign direct investment, a vast number of international legal decisions stemming from various international tribunals; numerous international legal doctrines emanating from scholars and publicists writing in a broad range of fields; and soft law instruments [*219] such as codes of conduct, gentlemen's agreements, and governmental statements. 35

Such a proliferation of international legal norms stems from several factors. First, the latter half of the twentieth century has witnessed an increase in the number of international legal bodies--organizations, institutions, conferences, and tribunals--which all, as one of their roles, draft and issue international law instruments. 36 Second, also over the course of the last century, international law has expanded into a variety of fields that were traditionally left to state sovereign reign. 37 There are now more international laws and regulations in health law, consumer law, labor law, and antitrust law. 38 Third, and most important, international law now plays a different role in today's globalized world. While a century ago, international law was only meant to govern relations among states, this is no longer true. 39 International law aims to influence a variety of state and non-state actors in many different legal fields and along different normative axes. 40 It influences national legislative bodies, 41 supreme judicial organs, 42 individual expectations, 43 diplomatic [*220] concerns, foreign policy issues, and a vast number of domestic legal areas on a substantive level.

INTERNATIONAL NORMS ARE NECESSARY TO PREVENT FRICTION BETWEEN BOTH STATE AND NONSTATE ACTORS

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

It may be true that the proliferation of legal norms itself contributed to the perception that international law is inherently present across such different legal spheres. It may conversely be said that it is actually the higher level of interaction among state and non-state parties in recent decades has caused this very same proliferation of international legal rules. In other words, the more states and non-state actors interact, the more friction they create and the more law they need to resolve their differences. Similarly, global interaction also induces parties to negotiate to prevent friction and future disputes, thereby contributing to the proliferation of international legal norms.

US EXCEPTIONALISM IS BAD

Harold Hongju Koh "On American Exceptionalism" Stanford Law Review May, 2003. Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001.

For now, we should recognize at least four problems with double standards. The first is that, when the United States promotes double standards, it invariably ends up not on the higher rung, but on the lower rung with horrid bedfellows - for example, with such countries as Iran, Nigeria, and Saudi Arabia, the only other countries that have not in practice either abolished or declared a moratorium upon the imposition of the death penalty on juvenile offenders. This appearance of hypocrisy undercuts America's ability to pursue an affirmative human rights agenda. Worse yet, by espousing the double standard, the United States often finds itself co-opted into either condoning or defending other countries' human rights abuses, even when it previously criticized them (as has happened, for example, with the United States critique of military tribunals in Peru, Russia's war on Chechen 'terrorists,' or China's crackdown on Uighur Muslims). Third, the perception that the United States applies one standard to the world and another to itself sharply weakens America's claim to lead globally through moral authority. This diminishes U.S. power to persuade through principle, a critical element of American "soft power." Fourth, and perhaps most important, by opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves, not just modifying them to suit America's purposes. The irony, of course, is that, by doing so, the United States disempowers itself from invoking those rules, at precisely the moment when it needs those rules to serve its own national purposes.

INTERNATIONAL LEGAL ORGANIZATIONS HAVE A LONG HISTORY OF IMPORTANCE
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

International law has not only witnessed a proliferation of legal norms, but also an expansion in the number of international legal organizations. 44 At the end of World War I, the victorious states created the League of Nations, a body charged with preventing of another bloody war and the U.N.'s predecessor organization. 45 At the same time, states realized that an international arbitrator may be needed in other substantive areas, such as health, labor, or communications law. 46 In other words, states seemed to realize that if they achieved coordination in substantive areas of law, they would then be less likely to engage in violent conflict in general. 47 Thus, the League of Nations was outfitted with special offices, such as the International Telecommunication Union and the International Labour Office, charged with the task of studying and promoting international cooperation on various issues of international interest. 48 Along the same lines, the PCIJ was created, leading at least some to believe that the peaceful settlement of disputes through international law was possible. 49 Although these developments [*221] proved inefficient in preventing World War II, they at least geared states toward joint organizational efforts as a method of preventing conflict. 50

INTERNATIONAL LEGAL ORGANIZATIONS WORK CREATE ECONOMIC POLICY

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Embracing the post-World War I notions of preventing conflict by transferring substantive decision-making in different areas to international bodies, international actors engaged in negotiation to create international monetary, trade, economic, insurance, investment, and other types of organizations. 54 Thus, a multitude of international organizations were created in the latter half of the twentieth century, including the International Monetary Fund, the WTO, the World Bank, the International Center for the Settlement of Insurance Disputes (ICSID), and the World Intellectual Property Organization (WIPO). 55 Similarly, states within the same regions acted to create regional organizations charged with similar objectives. 56 The Organization for Security and Cooperation in Europe, the Association of Southeast Asian [*222] Nations, the Organization of American States, and the Organization of African Unity are examples of such regional bodies. 57

U.S. ACTION EMPIRICALLY GOES DOMESTICALLY UNCHECKED

David P. Forsythe (Professor of Political Science at the University of Nebraska–Lincoln). The United States and International Criminal Justice. HUMAN RIGHTS QUARTERLY. Volume 24, Number 4, November 2002. p. 985

Even if one assumes that we will not again see US behavior similar to that which occurred after the 1968 My Lai massacre in Vietnam, when the military first attempted to cover-up rather than investigate events,33 US legal exposure under the ICC cannot be ruled out. Historically speaking, US choice of targets and weapons in military operations is not beyond reasoned critique. There are former judges of the ICTY who believe Carla del Ponte was in error in not pursuing an investigation of NATO bombing policies in Yugoslavia in 1999.34 No US authority has taken up the question of US military attacks on a pharmaceutical plant in the Sudan in 1998. There has been no public inquiry into civilian deaths during the US invasion of Panama in 1989. No domestic authority in the US would relish undertaking an objective review of the US choice of targets and weapons in Afghanistan during 2001, nor did any do so regarding Yugoslavia in 1999. Serious questions by independent legal scholars have been raised regarding NATO bombing of TV stations, electrical grids important to the civilian population, and dual use installations like bridges in Yugoslavia in 1999.35 Yet there has been no independent domestic investigation.

INTERNATIONAL LAW HAS WORKED TO INCLUDE HUMAN RIGHTS PROTECTION
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

It seems logical that the recent higher level of international interaction would produce more friction. To resolve disputes and allocate international responsibility, international law has developed and expanded its traditional notion of jurisdiction. 59 Historically, jurisdiction was conceived as the sovereign's power within a defined territory to impose and enforce its laws on its subjects and in its judicial organs. 60 Today, however, jurisdiction in international law is mostly extra-territorial. 61

First, the development of human rights norms has contributed to the idea that some crimes are so heinous that any nation in the world, acting on behalf of the entire international community, can punish an offender. 62 The concept of universal jurisdiction was thus born, defined as the power of any state to punish offenders of universal crimes, such as piracy, war crimes, slave trade, or genocide, without requiring any [*223] territorial or substantive links to the prosecuting forum. 63 Adolf Eichmann, for example, a German citizen living in Argentina, was tried in Israel, under the theory of universal jurisdiction, for crimes against humanity that he committed during World War II in Germany, before Israel even became a state. 64 General Augusto Pinochet was indicted in Spain on charges of crimes against humanity for acts committed against Spanish victims during his dictatorship of Chile. 65 Hissein Habre, who ruled Chad in the 1980s, was recently subject to an international arrest warrant in Belgium, under Belgium's universal jurisdiction law. 66

INTERNATIONAL LAW HAS CREATED NEW HUMAN RIGHTS NORMS

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The evolution of international law has created many new human rights norms. 80 Throughout the twentieth century, several human rights conventions have been negotiated, and many customary human rights norms have emerged. 81 These new human rights norms are significant not only because of their expanded number, but also because of their evolutionary nature. Because international law is no longer limited to governing purely state relations, but also encompasses the relationship of non-state actors vis-a-vis states, a different set of norms has emerged to cover these new relations. 82

THE TORTURE CONVENTION IS AN EXAMPLE OF ORGANIZATIONS CREATING HUMAN RIGHTS NORMS

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

For example, the prohibition on torture arising out of the 1984 Torture Convention 83 and other treaties and international customary norms, 84 necessarily implies several things. Parties to the Torture Convention [*227] may not institute torture as an official governmental policy in their international relations with other states. 85 Moreover, states may not treat individuals in ways that amount to torture, even when such individuals are their own citizens. 86 Officials of one state may even attempt to prosecute officials of another state for acts that constitute torture. 87

As the Torture Convention illustrates, these new types of international human rights norms differ from other, more traditional types of international norms. 88 Under traditional international law norms, State A may not do certain things to State B, State C, or any other State. Conversely, States B, C, or any other state may not do the same thing to State A. States A, B, and C, however, may do whatever they wish within their own borders. New human rights norms vary strikingly from this traditional model. For one, they are not limited to the regulation of the behavior of State A vis-a-vis other states; rather, they are able to regulate what State A does to its own citizens and residents within its borders, as well as requiring State A to justify its behavior before States B and C, at [*228] the risk of seeing its leaders indicted for violations of such human rights norms in States B and C. 89

NEW HUMAN RIGHTS NORMS REQUIRE NOT ONLY STATES REFRAIN FROM DOING HARM, BUT ALSO COOPERATING WITH EXTRADITION OF OFFENDERS

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

These new types of human rights norms are coupled with other changes in international law in a manner that strengthens their role in state behavior. 90 As mentioned above, states traditionally exercised their jurisdictional powers territorially. 91 The evolutionary trend of international law has led states to rely more and more on extra-territorial jurisdiction. 92 Such a powerful application of state judicial powers has been particularly important in the human rights field. New human rights norms are often accompanied by the notion of universal jurisdiction, meaning they can be enforced by any state, anywhere in the world, against any offenders. The Torture Convention has a provision providing for universal jurisdiction for possible prosecutions of offenders. 93 New human rights norms sometimes go beyond simply prohibiting states from doing something; some impose certain duties on states, such as the duty to either prosecute or extradite offenders. 94

International rights norms give individuals recourse for human rights violations

The evolutionary version of international law attempts to play a similar role by creating important human rights norms that function somewhat like domestic law. New human rights norms require sovereigns, as well as individuals, to refrain from engaging in certain types of behavior, and as a corollary, to perform certain actions. 100 For example, a sovereign may not condone torture as an official state practice; if it finds out that someone in its territory has engaged in torture, it must punish such groups or individuals accordingly. 101 Because new human rights norms sometimes create judicially enforceable private rights, 102 individuals can seek redress from domestic or international judicial bodies for violations thereof, either by other individuals or by their own sovereign. 103 The latter idea--that one may sue their own sovereign for violations of supra-national

norms that transcend and limit the sovereign's [*231] powers--is particularly revolutionary and had no place in traditional international law. 104

STATES CANNOT HIDE BEHIND SOVEREIGNTY IN THEIR HUMAN RIGHTS VIOLATIONS
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Globalized international law has imposed so-called "vertical constraints" on states, whereby external human rights norms are imposed on states "by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention." 107 A direct result of this phenomenon is that a sovereign state must now answer not only to its own nationals, but also to the international community as a whole. 108 A state may no longer reject a norm based on a claim of exclusive sovereignty, as such a notion no longer exists. 109 Sovereignty will no longer operate as an excuse for violations of human rights norms against slavery, genocide, torture, or arbitrary confiscation of property. Moreover, human rights norms have evolved to encompass claims of indigenous populations, special needs of the disabled, health care, and education. 110

THE REQUIREMENT TO PROTECT OUTWEIGHS THE OBLIGATION TO NON-INTERVENTION
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

An influential report issued in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS) supports this revolutionary view of human rights norms that operate as a vertical constraint on state sovereignty. 112 The ICISS report, entitled "The Responsibility to Protect," highlighted the need to update the U.N. Charter to incorporate this new understanding of state sovereignty. 113 The report noted a shift from the traditional concept of "sovereignty as control" toward "sovereignty as responsibility in both internal functions and external duties." 114 According to the ICISS Report, if a population is suffering and its state is unwilling or unable to halt the suffering, then the principle of non-intervention yields to the international responsibility to protect. 115 The revolutionary version of human rights law, imposed on states through the general evolutionary trend in international law, has imposed additional restrictions on states, thereby eroding the traditional notion of exclusive state sovereignty. 116

INTERNATIONAL RIGHTS NORMS HAS CREATED INTERNATIONAL LAWS
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

The evolutionary movement in the international legal field has exercised tremendous influence in the area of international criminal law. The field itself is less revolutionary than international human rights law, as the idea of individual international responsibility for criminal acts was accepted several centuries ago. 117 Early on, states recognized piracy as the first international crime, and sought to punish individuals who engaged in piracy, irrespective of such individuals' state affiliation. 118 Moreover, states held trials for war crimes as early as the fifteenth century, and enacted various legal codes prohibiting war [*233] crimes in subsequent years. 119 During the nineteenth century, states negotiated several treaties criminalizing trading in slaves, an act committed by individuals, not states. 120

With the rise of human rights norms, the field of international criminal law came to encompass additional international violations having to do with attacks on human dignity. 121 Atrocities committed in civil wars became criminalized on an international level. 122 To this end, throughout the 1990s, the linkage of human rights protection with international criminal responsibility contributed to the creation of several international criminal courts charged with prosecuting individuals accused of specific crimes. 123 Moreover, specific criminal offenses have been affirmatively recognized as contrary to international law, and as providing substantive jurisdiction for prosecution in one of the newly created international criminal tribunals. 124 The globalization forces behind the transformation of international law exercised an expansive influence on the field of international criminal law by broadening its horizons and enlarging the idea of global accountability for heinous individual crimes. 125

TRADITIONALLY, ISSUES OF HUMAN RIGHTS WERE DEALT WITH DOMESTICALLY
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Although the jurisdictional mandates of these tribunals were strictly limited temporally, territorially, and substantively, 131 they nonetheless represent a giant step toward solidifying the idea of individual international criminal responsibility, born in Nuremberg but put aside during the second half of the twentieth century. 132 Under the traditional [*235] notion of international law, most types of individual criminal responsibility would be handled domestically under domestic law. 133 For example, suppose a Canadian was murdered by a Swedish killer. 134 Historically, the only recourse for the family of the Canadian victim was to ask the Canadian government to issue a diplomatic protest to the Swedish government. 135 Moreover, if a military dictator from a given country decided to exterminate a minority group, such acts would be seen as matters of purely domestic jurisdiction. 136 In other words, the concerned state could, if it chose to do so, prosecute the military leader domestically. Practically speaking, such prosecutions never took place while the offending leader was still in power, and very rarely took place even after a change of regimes for a variety of reasons, including: fears of regional instability; lack of democracy in the new regime; need for national reconciliation; and lack of recognition of international criminal norms. 137

COMPLIANCE WITH INTERNATIONAL NORMS CREATES A DISCOURSE WHERE STATE ABUSE CAN BE CHECKED

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

It may be difficult to call such state compliance with international law "willing" when any noncompliance may result in serious sanctions, and when the "willingness" may in fact stem from fear of sanctions and consequences. This Article argues, however, that the repetition of compliance with international law, although caused at first by a threat of sanctions, may ultimately result in a new norm or custom of state behavior, whereby states would truly obey international law from a sense of legal obligation and from a tradition of long-standing and uniform practice of doing so.

For example, after the terrorist attacks on the United States on September 11, 2001, the Bush administration chose to detain so-called enemy combatants at the Guantanamo military base in Cuba. 196 Under [*246] a traditional version of international law, the United States would be concerned only about the impact this detention had on the parent state of the detainees. 197 Other than those states, the United States would evidently be free to treat the detainees as it wished, within the purview of its domestic law. 198 The globalization movement that has transformed international law brings a major change in the above analysis.

First, the United States must now consider not only relevant state actors, but also a number of non-state and supra-state actors. In addition to concerns raised by the home states of detained individuals, the United States has received a vast number of complaints about the Guantanamo detention facility from a variety of NGOs, regional state organizations, and human rights protection bodies. 199 Moreover, the United States can no longer consider only whether the detention program is legal under its domestic law; it must also consider all relevant international conventions to which it is a member. 200 Thus, the United States

could very well interpret the detention program as legal under its Constitution and Bill of Rights, but the same conclusion may not hold true under the four Geneva Conventions, the Hague Conventions, or the Torture Convention. To complicate things further, the evolutionary process of international law has elevated certain legal principles to the status of customary norms, which bind all states in a conclusory manner without room for derogations or reservations, even if states are not parties to specific treaties codifying the legal norms. 201 Thus, if U.S. treatment of Guantanamo detainees were to violate a customary norm [*247] of international law, such treatment would be a violation of international law, although legal under domestic law.

Finally, the United States must both consider the effect of its actions on the proliferating number of relevant actors impacted by its behavior and the implicated legal norms, as well as account for a number of jurisdictions that may choose to challenge the United States as a country, or some of its leaders, if U.S. behavior becomes so offensive as to warrant judicial proceedings. States may assert grievances against the United States in the ICJ, a traditional form of state-to-state complaint procedure. 202 Additionally, state and non-state actors may complain about the United States to committees or judicial bodies set up under various international conventions, regional organizations, or other human rights protection mechanisms. 203 Such state and non-state actors may directly target top U.S. political leaders through criminal complaints brought in foreign domestic courts, 204 or even international courts, under their expansive jurisdiction statutes. 205 Thus, in light of all the legal challenges such a program may face on the international level, this Article argues that a country like the United States should at least think twice before instituting such a program as Guantanamo.

In the specific case of the United States, international law has not necessarily changed the Guantanamo policy at stake. International law has however, certainly provoked a vigorous public debate at both the international and national levels concerning the legality of the policy. 206 The existence of such a debate

signals the erosion of state sovereignty [*248] brought about by the evolutionary process that has been transforming international law. This erosion of state sovereignty translates itself into a heightened level of compliance with international law. Although compliance might be a direct product of a pragmatic calculus, whereby states realize it may be strategically advantageous for them to obey an international rule, this Article argues that it nonetheless signals a phenomenon of willing legal obedience. Continuous repetition of willing state compliance with international law may instill a profound sense of legal obligation in states' behavior in the years to come.

INTERNATIONAL NORMS CREATE COMPLIANCE

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Additionally, states seem more willing to rely on international law on a diplomatic level. In their international relations, states like to have the international law "crutch" and be able to pronounce the legality of their actions under international law. Because international law now touches on so many legal areas, states seem to rely on it in many more aspects of their diplomacy. International law experts have taken up predominant positions in governments, and virtually every foreign policy or diplomacy decision is scrutinized for its coherence under international law. 218

For example, when NATO countries decided to launch air strikes on the territory of the former Yugoslavia because of then-President Milosevic's oppressive rule of the province of Kosovo, they sought U.N. Security Council approval for their use of force. 219 Even when the U.N. fell short of approving such use of force, NATO countries still sought to justify their actions on the ground of international necessity, 220 although, [*251] arguably, NATO members were acting within their jurisdiction and had at least regional authority to act. 221 This signifies that international law truly matters, and that powerful organizations like NATO would rather comply with international law, taking action that is not authorized internationally only when deemed truly necessary. For example, the U.S. government sought U.N. Security Council approval for both Gulf Wars, even though the United States had the military capacity to act unilaterally and had invoked self-defense grounds, which would have justified the use of force without Security Council approval. 222 It can be argued that the United States sought U.N. affirmation for strategic or diplomatic reasons, but it can be equally argued that part of the affirmation process included a belief in the necessity of compliance with international law.

INDIVIDUALS FEEL LIKE THEY HAVE MORE RECOURSE UNDER INTERNATIONAL LAW
MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Individuals today expect more protection from international law. Because international law has become omni-present in everyday life, individuals can find a protectionist international legal norm in almost every aspect of their lives. For example, international human rights norms protect the individual from undue state interference with basic rights, such as the rights to be free of torture, to have one's human dignity respected, to have counsel appointed, to vote, and to receive a general education. 225 International labor laws protect individual workers and place limits on the rights of their employers. 226 International environmental laws provide the individual with a healthy living environment. 227 International tax laws ensure that individuals do not have to pay their taxes multiple times if they are involved in international transactions. 228

[*253] Such a protectionist structure directly affects individuals by providing a shield, a web of rules and regulations that ensure individuals are not unnecessarily burdened by the state. Unsurprisingly, individual expectations have changed. Individuals no longer believe in absolute state sovereignty. Individuals today can easily consult international law on many different aspects of their lives. When faced with a question of state powers--e.g., can my state do this to me?--individuals are likely to look to international law as a shield and to invoke international legal norms to curb state behavior. 229 Most importantly, individuals are likely to invoke specific international legal norms as bestowing certain rights on them, and as taking away such rights from their home states. 230

THE ICC WOULD STEP IN WHEN US COURTS FAIL

DAVID SCHEFFER* & ASHLEY COX, CRIMINAL LAW: THE CONSTITUTIONALITY OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Journal of Criminal Law & Criminology, Spring, 2008

Whether or not the United States ultimately joins the ICC, if a case involving a U.S. citizen or an individual falling within U.S. jurisdiction ultimately were to be investigated and prosecuted before the ICC, that would be a signal of failure or abandonment of complementarity by the United States and its forfeited opportunity to conduct a strictly national investigation and prosecution. If the United States were to become a State Party to the Rome Statute, then a voluntary decision by the U.S. government to deprive a national of a U.S. trial under U.S. law by refusing to investigate and, if merited, prosecute the person in U.S. courts would not be inconsequential to any federal judicial review of an individual's claim (say, as a U.S. citizen) that he or she should not be transferred to the ICC in the absence of a U.S. investigation. However unlikely it may seem, a similar claim could be made if the United States as a non-party State were to act in such a manner and nonetheless plan to transfer a U.S. citizen to the ICC.

GLOBALIZATION REQUIRES INTERNATIONAL REGULATIONS

Larry Cata Backer "MULTINATIONAL CORPORATIONS, TRANSNATIONAL LAW: THE UNITED NATIONS' NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AS A HARBINGER OF CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL LAW" Columbia Human Rights Law Review Winter, 2006

Patterns of globalization emerging after the 1970s seriously challenged the traditional state-centered understanding of corporate regulation. Globalization is commonly understood as an economic, open markets driven movement. The movement is grounded in the belief that growth, prosperity and the greatest good for humanity is possible only through the construction of a tightly integrated global economy founded on trade liberalization, privatization, and macro-stability (only from which micro-stability and individual wealth maximization would be possible).

The movement is essentially transnational - it can work only if all states (and private economic interests) embrace these objectives as a matter of legislative policy and behavior norms. At the same time, and to some extent, globalization also embraces the structural status quo - especially with respect to the constitution and regulation of private amalgamations of economic power. 87 Questions of the relationship of these economic actors to their various constituencies - shareholders, creditors, customers and the like - are left to domestic regulation. [*309] The determination of the appropriate law to apply to resolve questions of liability is also left to private law, the law of conflicts. Yet, this sort of local regulation is acceptable in the context of economic globalization only if it does not deviate from globalization's core norms centered on markets, contract, and private activity.

GLOBALIZATION MAKES CORPORATE ACCOUNTABILITY DIFFICULT

Larry Cata Backer* "MULTINATIONAL CORPORATIONS, TRANSNATIONAL LAW: THE UNITED NATIONS' NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AS A HARBINGER OF CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL LAW" Columbia Human Rights Law Review Winter, 2006

But the globalization of private markets through public regulation has produced a measure of tension, if not contradiction. Thus, for example, it has become common to hear arguments suggesting that multinational corporations can allocate risk within their global operations in a way that may make it harder for any one jurisdiction to provide effective remedies to its citizens in accordance with its own political tastes. Also common are arguments that suggest that global economic enterprises use national borders to effectively partition their enterprise assets, passing risk unfairly onto third parties - customers, employees, trade creditors, and others unlikely to be able to protect themselves in the new global private market economy. As a result, the perception grew that states were losing the power to shape the character of corporate responsibility to their own liking, 89 and that the institutionalization of systems of economic transactions produced by globalization tended to favor only foreign owners while allocating all risk domestically, with little effective prospect of redress. 90

GLOBALIZATION HAS GENERATED DEMAND FOR INTERNATIONAL REGULATIONS

Larry Cata Backer* "MULTINATIONAL CORPORATIONS, TRANSNATIONAL LAW: THE UNITED NATIONS' NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AS A HARBINGER OF CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL LAW" Columbia Human Rights Law Review Winter, 2006

The composition of this new layer of debate on corporate social responsibility is complex. It is made up of a variety of differing national understandings of the necessary relationship between entities (like corporations) and their chartering jurisdictions. States chartering the most economically powerful entities tend to resist any form of transnational interference other than the maintenance of open and transparent markets. Other states are more amenable to a larger amount of international or transnational regulation. Also important to the mix, especially among developing states, is the social, cultural, and economic development of the chartering jurisdiction, as well as their peculiar histories as host states to economic entities chartered elsewhere. 96 Pressure for regulation at a supra-national level came from virtually every state, but their respective motivations were very different. 97

[*312] First, developed nations feared competitive threats from each other. In the 1960s, the Europeans feared swamping by American companies. In the 1970s, the U.S. feared competitive threats to the domestic market by European and Japanese (and now Chinese) goods. 98 From the 1970s, the Japanese feared the effects of trade liberalization on its domestic economy as well as on its trade surplus. 99 Also since the 1970s, sectors of the American political establishment feared the power of TNCs to exploit global labor and resource markets to move operations (and jobs) out of the United States. 100

Second, developing nations feared that the continuing economic influence of the old colonial powers would give rise to economic imperialism through TNCs. 101 TNCs are widely believed to [*313] have a history of "intervening in or subverting

the political processes of host states by contributing directly to political campaigns; bribing local government officials or co-opting local elites." 102 TNCs also have the capacity, "through their domination of the world's media," to "significantly limit states' rights to determine their own socio-cultural fates." 103 In addition, developing nations regard TNCs as impeding their ability to foster the growth of domestic economies. 104 These states had well-developed economic and political agendas, with their genesis in the early work of the United Nations' economic development agencies. The goal of these agendas was to seek regulation of TNCs for the purpose of using TNCs as instruments of development and wealth transfer from the old metropolitan centers to the developing world. 105

Third, starting with the involvement of TNCs in the overthrow of Chile's Marxist government (in league with the U.S. government) in the early 1970s, there were a series of highly publicized misadventures by TNCs involving corruption and interference in local politics. 106 The popular media began to view [*314] TNCs as creatures worthy of suspicion and regulation. 107 A working document produced by the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities declared that TNCs "are frequently, if not always, behind massive human rights violations; in the same spirit, the States that benefit from their activities pass legislation in their favour, protecting them to the detriment of the people and their rights... . Moreover, certain [TNCs] encourage States to violate their people's rights." 108

Fourth, starting in the 1960s, academic interest in TNCs began to grow, resulting in the treatment of TNCs as something different or potentially different from domestic economic enterprises, irrespective of the form of their legal organization. 109 International institutions have contributed in significant ways to the fostering of this academic interest, and to harnessing it as well. Thus, for example, the U.N. Conference on Trade and Development ("UNCTAD") has been gathering data on TNCs for a number of [*315] years. 110 International

organizations have also sponsored academic journals in which work on TNCs can be published and disseminated. The academic journal Transnational Corporations, formerly The CTC Reporter, has been published under the auspices of the United Nations since the 1970s. 111

Fifth, academics and segments of global culture embraced "Marxist" and other "progressive" ideologies which were, at their heart, anti-capitalist/consumerist and which saw the TNC as the latest stage in the march toward monopoly capitalism or as the vanguard of capitalist consumerism. 112 These movements were not necessarily coordinated, nor did they necessarily pursue common goals. 113 Each, however, saw in the multinational corporation the [*316] great example, symptom, or cause of some or all of the great maladies affecting the world. 114 Moreover, the so-called neo-liberal model was not merely questioned by the far left; its basic assumptions and methods, especially in connection with globalization through private amalgamations of economic power, were also questioned by high-status Western academics. 115 In particular, Western academics began to question the artificiality of the separation of the economic and social roles of corporations in the context of a developing international normative framework of human rights. 116 These approaches are reflected in the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which influenced much of the Norms: "Today's economic and financial systems are organized in such a way as to act as pumps that suck up the output of the labour of the toiling masses and transfer it, in the form of wealth and power, to a privileged minority." 117

Sixth, internationalization of the corporate governance debate provided both a firmer foundation and a broader context for the social responsibility dispute that had been traditionally confined to a purely national audience. 118 Arguments for the expansion of notions of stakeholders, for a more pronounced social role for corporations, and for a public law orientation for the regulation of corporations, tended to find a more receptive audience across national borders than within

them and among communities of [*317] transnational civil society actors rather than across communities of national civil society actors.

Seventh, the 1990s especially saw an intensification of structuralism and institutionalism in the creation of a universally applicable set of global legal norms centered on the United Nations and its agencies. 119 The intense concentration on the "phenomenon" referred to as "globalization" provided a context of "crisis" 120 in which these approaches could both be legitimated. Globalization of regulation has taken three forms. In one form, it appears as attempts to control global economic activity through a reliance on markets and market liberalization, leaving it to the states to impose non-trade threatening regulation of economic activity within their borders (the neo-classic or liberal model). 121 In another form, globalization of [*318] regulation appears as attempts to provide voluntary guidelines for corporate conduct and governance standards by national, supra-national, and international bodies (the moral restraint model). 122 This form of "volunteerism" has been criticized by developing countries as lacking input from representatives of developing states. Though crafted by developed countries as voluntary standards, such volunteerism is binding in fact for developing states. 123 Last, this [*319] regulatory globalization takes the form of attempts to control global economic activity through direct and indirect international regulation (the control model). 124

General Negative Evidence

IF THE US JOINS THE ICC IT WILL BE USED TO UNDERMINE US SECURITY GOALS

W. Chadwick Austin and Antony Barone Kolenc. Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare. Vanderbilt Journal of Transnational Law. 39 Vand. J. Transnat'l L. 291. March, 2006. pg. 312. W. Chadwick Austin, Associate Professor, United States Air Force Academy, is also a Lieutenant Commander in the U.S. Navy Reserves (J.D., University of Cincinnati College of Law). Antony Barone Kolenc, Assistant Professor, United States Air Force Academy, is also an active-duty Major in the U.S. Air Force (J.D., University of Florida College of Law).

If, however, it endures this preliminary time of trial - especially if the United States changes course and [*311] throws its full backing behind the court n109 - it will evolve into a formidable force. At that time, non-state actors seeking to use judicial institutions as a means of "law-fare" against the United States may find the ICC an attractive target to manipulate. Adversaries of the United States could potentially use three asymmetric tactics to exploit the ICC: (1) misusing the Court's investigative processes, (2) filing questionable or fraudulent complaints for the Court to investigate, and (3) employing mass media in ICC cases to intensify international pressure against the United States. Future asymmetric warriors could coordinate these tactics as part of a larger strategy to put the United States on the defensive and dampen its international war on terror.

SAFEGUARDS MADE TO PROTECT AGAINST ABUSE ARE INADEQUATE

W. Chadwick Austin and Antony Barone Kolenc. Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare. Vanderbilt Journal of Transnational Law. 39 Vand. J. Transnat'l L. 291. March, 2006. pg. 318-19. W. Chadwick Austin, Associate Professor, United States Air Force Academy, is also a Lieutenant Commander in the U.S. Navy Reserves (J.D., University of Cincinnati College of Law). Antony Barone Kolenc, Assistant Professor, United States Air Force Academy, is also an active-duty Major in the U.S. Air Force (J.D., University of Florida College of Law).

Supporters of the Court often cite procedural safeguards that would thwart the efforts of a politicized Chief Prosecutor, implying that U.S. concerns are "much ado about nothing." n147 For instance, in exercising the proprio motu investigation power, the Chief Prosecutor must submit all supporting data that a crime has been committed to a Pre-Trial Chamber of the Court. n148 This chamber, composed of three judges of the Court, n149 must decide by majority vote whether it will authorize the investigation by finding a "reasonable basis" to proceed. This n150 standard, however, is low for the judges as it is for the Chief Prosecutor. Supporters also cite the requirement that the Chief Prosecutor and judges be of high moral character and possess integrity. n151 Yet these same qualities - coupled with a view of international law that contradicts U.S. standards - could result in a bold and courageous ICC that reaches very different conclusions than U.S. courts. n152 Moreover, for the purposes of asymmetric warfare, the desired objective may be achieved even if the judges eventually decide not to authorize a formal investigation. n153 In the final analysis, the statutory obligation of the Chief Prosecutor to "pre-investigate" may be the aspect of the system most prone to abuse.

Asymmetrical warfare carried out by our enemies requires the use of non-traditional forms of retaliation. The negative can use this strategy to explain how, because of US military superiority, enemies rely on asymmetrical warfare (WMD, dressing in civilian clothing, hiding in protected shelters). In response to this, the US must be able to use tactics that may violate international law in order to secure an area and protect soldiers.

TODAY'S WARFARE RELY MUCH MORE ON TECHNOLOGY THAN MANEUVERING TACTICS
MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

The technological edge enjoyed by the United States and other advanced militaries is sometimes misunderstood. In wars of the last century, range, precision, and mobility were the dominant media of technological asymmetry, a reflection of the linear construct of the battlefield. With forces facing each other across a FEBA (forward edge of the battle area), the immediate objective of warfare was to weaken the enemy sufficiently to allow one's own forces to seize territory. You wore the enemy down through attrition warfare, the serial destruction of its military. Being able to shoot farther with greater accuracy than the other side was obviously useful in conducting attrition warfare. So was greater mobility, because it allowed your forces to avoid the enemy's assaults and strike at its weaker flanks.

Today, battlefields are multi-dimensional, i.e., technology has evolved to the point where the concept of a line marking the heart of the battle (with combat fading the greater the distance from that line) no longer makes sense. There may be ground forces facing each other, but the conflict is everywhere. Consider Operation Iraqi Freedom (OIF). During the campaign, there was literally no point within Iraq untouchable by Coalition forces. Indeed, the first blow of the war was not the crossing of the Iraqi border by an invasion force, but rather an attack by Tomahawk cruise missiles and F-117s designed to kill Saddam Hussein.

THE TECHNOLOGY GAP IS WIDENING BETWEEN HAVES AND HAVE-NOTS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

In this environment, an ability to rapidly gather, process, and react to information about an opponent, while hindering the enemy's efforts to do the same, is even more determinative than range, precision, and mobility. Using networked C4ISR unavailable to the other side, friendly forces seek to "get inside the enemy's observe-orient-decide-act (OODA) loop." 17 In other words, acting more quickly than the enemy forces him to become purely reactive, thereby allowing you to control the flow, pace, and direction of battle. Eventually he becomes so disoriented that paralysis ensues. In this style of warfare, the technological edge that matters most is C4ISR--and it is in C4ISR that the gap between the technological "haves" and "have-nots" is widest . . . and still growing.

WHEN WEAKER ENEMY NATIONS RELY ON TECHNOLOGY, THEIR COMMUNICATIONS ARE GENERALLY JAMMED BY US TECHNOLOGY

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Operating inside an opponent's OODA loop requires: the ability to locate and accurately identify enemy forces quickly and reliably; weapon systems that are immediately available; sufficient command and control assets to monitor and direct fast-paced, changing engagements; and the capacity to conduct reliable battle damage assessment to determine if restrike is needed. Slowing the enemy's reaction time and blocking or distorting enemy information further enhances the effects of your own operations.

Modern technology fills these requirements. Today, the battlefield has become phenomenally transparent to those fielding advanced ISR assets. No longer are the obstacles that traditionally masked enemy activity--such as night, poor weather, range, terrain, and intelligence processing and distribution times--insurmountable. Moreover, today's advanced militaries draw on information from an amazing array of sources: geospatial intelligence (GEOINT); human intelligence (HUMINT); signals intelligence (SIGINT); measurement and signature intelligence (MASINT); open-source intelligence (OSINT); technical intelligence (TECHINT); and counterintelligence (CI). 18 This multi-source data can be fused and disseminated with such extraordinary speed that U.S. air forces have developed a methodology (Time Sensitive Targeting, or TST) to specifically leverage the narrowing sensor-to-shooter window.

THE UNITED STATES HAS A LARGE AIRCRAFT ADVANTAGE AS WELL

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Combat aircraft ranging from the F-16 to the B-52 now often launch without a set target, relying instead on the systems described above to feed data to powerful command and control assets that in turn vector them to the attack. They can fly and strike at night and during poor weather, 23 loiter for extended periods (especially when tankers are available), and in many cases fire their weapons from beyond the threat envelope of enemy defences. 24 Precision systems dramatically increase the probability of damage (Pd) resulting from such attacks. 25 Today, modern weaponry has a circular error probable (CEP) measured in feet, tens of feet at worst. 26 The fielding of the JDAM is making precision weaponry widely available. 27

Further, as attack aircraft penetrate heavily defended enemy territory, high-tech jamming, escort, and wild weasel aircraft effectively neutralize enemy defences. 28 The Operation Iraqi Freedom air campaign illustrates the value of defence suppression missions. Although flying 20,733 fighter/bomber sorties over territory with degraded, albeit still potent air defences, the Coalition lost only one aircraft to hostile fire, an A-10 Warthog. 29 Airframes such as cruise missiles, UAVs, and stealth aircraft limit the need for defense suppression, thereby freeing up aircraft that would otherwise perform such missions to conduct attacks themselves.

TO COUNTER THE TECHNOLOGY ADVANTAGE OF THE US, ENEMIES RESORT TO ASYMMETRICAL TACTICS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

On the other hand, forces that are technologically disadvantaged have two basic problems--how to survive and how to effectively engage the enemy. Dealing first with the former, it is self-evident that the best way to survive is to frustrate the enemy's ability to locate and identify you. Many lawful techniques for doing so exist: encrypting transmissions, camouflage, ruses, manoeuvrability, jamming, meaconing, forcing the fight into a more advantageous environment such as an urban area, and so forth. 41

The problem is that IHL is premised on a rough balance between humanitarian concerns and military necessity. States are generally only willing to accept those humanitarian limitations on their [*14] conduct of hostilities that neither enfeeble them militarily nor give their opponents a measurable advantage. When that balance is thrown off-kilter, as occurs when forces are asymmetrically equipped and capable, it is only natural that the weaker side seeks to compensate for the imbalance.

One way it often accomplishes this is by making it difficult to distinguish its forces from the civilian population. 42 Doing so turns the IHL principle of distinction on its head by incentivizing its violation. Set forth in Article 48 of the 1977 Protocol Additional I, and clearly customary in nature, the principle provides that "[i]n 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." 43 The general principle is implemented through specific prohibitions on attacking civilians, civilian objects, and specially protected individuals and objects, such as those who are hors de combat and medical facilities. 44

IRAQI FORCES IMPLEMENT ASYMMETRICAL TACTICS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

The asymmetrically disadvantaged party either feigns protected status or uses proximity to protected individuals and objects to deter attacks. Facing a technologically dominant adversary, the Iraqi military (and others fighting alongside them) systematically resorted to these techniques. They had learned early in the conflict that meeting the Coalition forces in classic force-on-force action was nearly suicidal. Such tactics are an unfortunate, but logical, consequence of the Coalition's ability to kill them almost at will once they had been located and identified.

ENEMY COMBATANTS WILL DRESS IN CIVILIAN CLOTHING

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

During OIF, Iraqi regular and irregular forces repeatedly donned civilian clothes when Coalition forces might have otherwise identified them. 47 This practice flies in the face of the distinction principle's underlying goal of facilitating the recognition of civilians. 48 Undoubtedly, the practice weakens respect for the principle of distinction, thereby endangering civilians. Yet, despite Protocol Additional I's pronouncement in Article 44.3 that "combatants are [*16] obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," failure to do so is not a violation of IHL. Instead, military personnel who wear civilian clothes merely lose lawful combatant status and its associated benefits. 49 An explanation of this oft-confused point is in order.

Members of the armed forces enjoy combatant status under Article 4A (1) of the Third Geneva Convention. 50 Implicit as criteria for combatant status are the four cumulative conditions set forth in Article 4A (2), including "having a fixed distinctive sign recognizable at a distance." 51 The most common "distinctive sign" is a uniform. Protocol [*17] Additional I relaxes the uniform criterion somewhat, but because certain States, especially the United States, strongly object to this relaxation, it cannot be said to be customary law. 52

The loss of combatant status through non-compliance with the uniform condition has two consequences. Those captured forfeit prisoner of war (POW) status and its protections. 53 Further, because military personnel in civilian clothes do not qualify for combatant status, they enjoy no combatant immunity for using force against the enemy. Attacking the enemy is not a war crime, but it may amount to a criminal offence (e.g., attempted murder) under the national law of the capturing Party. Absent combatant immunity, any State with subject matter and personal jurisdiction may subject the non-uniformed soldier to domestic

prosecution based on his or her combat actions, including attacking enemy combatants. 54

ENEMY COMBATANTS WILL EMPLOY HUMAN SHIELDING TO NEUTRALIZE TECHNOLOGICAL ADVANTAGES

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Another technique commonly employed in Iraq to offset asymmetrical technological disadvantage is the use of civilians and civilian objects as shields. 55 In military jargon, such tactics are labelled "counter-targeting." 56

Iraqi forces, especially the paramilitary Fedayeen, passively and actively exploited human shields to deter attacks. In the former case, they based themselves in locations where civilians were present; in the latter, they forcibly used civilians, including women and children, to physically shield their operations. 57

Whether passive or active, human shielding expressly violates IHL. Article 51(7) of Protocol Additional I prohibits the use of "[t]he presence or movements of the civilian population or individual civilians ... to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations." 58 The widespread condemnation that inevitably ensues whenever shields are used evidences the norm's customary character. 59

Mere presence of human shields does not prevent an attack (as a matter of law) unless it would otherwise violate the proportionality principle by causing incidental injury or collateral damage excessive in relation to the concrete and direct military advantage accruing to the attacker. There have been suggestions that involuntary shields should [*19] not be included in the calculation of incidental injury, lest lawbreakers benefit from their misconduct. 60 However, Article 51.8 of Protocol Additional I rejects this contention: "Any violation of these prohibitions [includes the prohibition on shielding] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . ." In other words, civilians never lose their IHL protection because of

a belligerent's actions, but may chose to forfeit it by directly participating in hostilities. 61 Although IHL seeks to balance humanitarian concerns with military necessity, it was never intended to ensure a "fair fight" between belligerents. 62

Human shielding is unlawful only when involuntary. Voluntary shields forfeit the protection they are entitled to as civilians by "directly participating" in hostilities. 63 As noted in Article 51.3 of Protocol Additional I, "[c]ivilians shall enjoy the protection afforded by this [*20] Section, unless and for such time as they take a direct part in hostilities." 64 Since they may therefore be attacked, they can shield nothing as a matter of law. 65

Civilian objects may also be utilized to neutralize enemy technological advantages, through operation of law (proportionality principle), because policy concerns preclude attack, or simply as hiding places. For instance, Iraqi forces frequently placed military equipment and troops in or near civilian buildings (e.g., schools). They also used specially protected objects, such as medical and religious buildings and cultural property, as bases for military operations or supply depots. 66

ENEMY COMBATANTS WILL HIDE IN PROTECTED AREAS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

An additional way technologically inferior forces avoid attack is through misuse of specially protected objects. Human Rights Watch (HRW) documented many such incidents during hostilities in Iraq. For instance, Off Target, HRW's report on the conflict, cited Fedayeen use of al-Nasiriyya Surgical Hospital, the Baghdad Red Crescent Maternity Hospital, the Imam Ali mosque in al-Najaf, and the Abu Hanifa mosque. The Iman Ali mosque is the holiest site in Iraq for Shia Muslims, whereas the Abu Hanifa mosque is an important shrine for Sunnis. 69

ENEMIES OF THE US VIOLATE INTERNATIONAL HUMANITARIAN LAW IN COMBAT
MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

These actions were clearly unlawful. The First Geneva Convention provides that "[t]he responsible authorities shall ensure that ... medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety." 70 Protocol Additional I, Article 12.4, expresses the prohibition even more bluntly: "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack." Article 53(b) sets forth a similar prohibition for "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples." 71 Both of the mosques cited by HRW meet the special significance criterion.

Unlawful tactics such as those described supra do not entirely neutralize a foe's technological superiority. The IHL provisions extending special protection to medical, religious, and cultural facilities include clauses removing protection upon misuse. 72 More generally, civilian objects may become military objectives because of their militarily significant location, through use for [*22] military actions, or when the enemy's intended future purpose for an object is military in nature. 73

Even if the technologically weaker party can manage to avoid being attacked, at some point it must take offensive action against its enemy if it hopes to prevail. Guerrilla warfare is a classic response to this requirement. Increasingly, especially as the capabilities gap widens, so too are violations of IHL.
With advanced technology, it is becoming ever more difficult to get close enough to the enemy to mount an attack, let alone survive one. Perfidy, i.e., "killing or wounding treacherously individuals belonging to the hostile nation or army," 74 has become a common tactic for doing so. The precise parameters of perfidy are unclear. The 1907 Hague IV Regulations reference "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as

well as distinctive badges of the Geneva Convention," 75 a prohibition that is now unquestionably customary. 76 Article 37.1 of Protocol Additional I is perfidy's most recent codification: "It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy."

Protocol Additional I proffers feigning civilian, non-combatant status as an example of perfidy. 77 Thus, when combatants don civilian clothing for the express purpose of attacking the enemy, they arguably violate the IHL prohibition on perfidy. Although disagreement exists over the prohibition's alleged customary character, 78 the weight of [*23] authority suggests it is customary. The ICRC's Customary International Humanitarian Law Study includes it as a customary norm and the IHL manuals of many countries, including those of the United States, 79 characterize such actions as perfidious. The San Remo Manual on International Law Applicable to Conflicts at Sea does likewise. 80 Finally, according to the Official Record of the Diplomatic Conference that adopted Protocol Additional I, the Committee that drafted the article on perfidy "decided to limit itself to a brief list of particularly clear examples. Examples that were debatable or involved borderline cases were avoided." 81

ENEMY COMBATANTS WILL FEIGN SURRENDER AND ATTACK, WHICH VIOLATES INTERNATIONAL HUMANITARIAN LAW

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

An unquestionably perfidious tactic is feigned surrender. Again, feigning surrender allows one to get close enough to attack the enemy, thereby compensating for the technological edge that would otherwise preclude attack. Feigning surrender to ambush Coalition forces was a recurring pattern of Iraqi behaviour during OIF. 82

Article 37.1(a) of Additional Protocol I cites "the feigning of an intent to negotiate under a flag of truce or surrender" as an example of perfidy when carried out with the objective of capturing, injuring, or killing the enemy. A flag is not the sole means of communicating intent to surrender; any technique that so informs the enemy suffices. Surrendering forces are hors de combat and entitled to immunity from attack. 83 The Customary International Law Study includes the ban on perfidious surrender as a customary IHL norm. 84

ENEMY COMBATANTS USE FAKE PROTECTIVE EMBLEMS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Another tactic for countering technological strength on the battlefield is misuse of protective emblems. During the recent conflict, Iraqi regular and irregular forces used marked ambulances to reach the battlefield, serve as scout vehicles, and attack Coalition forces. Additionally, the Ba'ath Party building in Basra was marked with the [*24] ICRC emblem. Party buildings were often employed as supply depots for military equipment and rallying points for militia. 85 As noted supra, Iraqi forces also conducted military operations from medical facilities.

Displaying the distinctive emblems of medical and religious personnel, transports, and units, or the personnel, property, and activities of the International Movement of the Red Cross and Red Crescent, for other than their intended purposes, is unlawful under IHL. 86 The misuse need not be intended to help capture, injure, or kill an opponent. This prohibition is one of the longest standing in IHL, appearing in the 1863 Lieber Code; 1899 and 1907 Hague Regulations; 1906, 1929, and 1949 Geneva Conventions; Protocol Additional I; and the military manuals of many nations. 87 It is self-evidently customary in nature today. 88 When the purpose of the misuse goes beyond merely "hiding" from the enemy to the use of the emblem to treacherously attack, the separate violation of perfidy occurs. 89

ENEMY COMBATANTS RESORT TO SUICIDE BOMBINGS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Suicide bombing is an asymmetrical technique to which the disadvantaged side increasingly resorts. Such attacks are seldom isolated acts by religious or other fanatics. On the contrary, most suicide bombings are tied to an organized political or military campaign, usually one designed to "compel modem democracies to withdraw military forces from territory that the terrorists consider to be their homeland." 90

Suicide bombing is not unlawful per se. The case of Japanese Kamikaze's during the World War II illustrates the point that lawful combatants can conduct suicide attacks against enemy combatants consistent with the principle of distinction.

However, the technique is unlawful as perfidious if conducted by combatants out of uniform (see discussion supra). More typically, [*25] though, civilians (unlawful combatants) carry out suicide attacks. 91 If they intentionally use their civilian appearance to enable them to get close enough to their target to detonate themselves, they have acted perfidiously. On the other hand, if that is not their intent, then they will have "directly participated" in hostilities, but not have violated IHL. Rather, as with combatants that wear civilian clothes, the consequences of their actions are that they lose civilian immunity from attack (i.e., they may lawfully be targeted) and may be prosecuted under the domestic law of any State with subject matter and personal jurisdiction. 92

WEAKER STATES WILL RESORT TO CIVILIAN ATTACKS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Most frequently, attacks directly against protected objects and individuals are designed to strike at the key center of gravity for democracies--its population. The attackers hope to alter the [*26] democracy's cost-benefit calculations enough to achieve their aims without having to defeat their enemy's superior military. The attacks of September 11th, although conducted outside the context of an armed conflict to which IHL applied, are the paradigmatic examples of this dynamic. All such actions are a direct violation of the customary law norms codified in Articles 51.2 and 52.1 of Protocol Additional I. 95 Sadly, they are a logical reaction to asymmetry on the battlefield.

ISSUES OF PROPORTIONALITY ARE INTERPRETED DIFFERENTLY IN ASYMMETRICAL SITUATIONS

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

Application of the proportionality principle might also be affected. Ultimately, no objective means of valuing either incidental injury/collateral damage or military advantage exists. 106 Instead, it is the subjective perspective of the party carrying out the proportionality assessment that matters. A weaker party is likely to assess the military advantage accruing from its own attack as high. This is because when one chronically suffers defeats, any success looms large. Consider the opening days of the war in Iraq. Every downing of a Coalition helicopter or destruction of an armoured fighting vehicle was celebrated as a great victory. By contrast, Coalition forces almost effortlessly destroyed every Iraqi military vehicle (their air force never took off out of fear of immediate destruction) that dared challenge them. In such an environment, it is only natural that dissimilarly placed parties apply the proportionality principle dissimilarly.

The same dynamic applies to the other side of the calculation. To a belligerent facing military defeat, enemy civilian casualties are unlikely to have the weight they would to one assured of victory. The latter, for instance, will be far more concerned about public perceptions of its actions than the former. Coalition efforts to avoid causing collateral damage and incidental injury during OIF are illustrative. Of course, proportionality is always a contextual determination, but [*29] concerns about enemy civilian suffering inevitably erode the closer to defeat one comes.

WEAKER STATES MAY RESORT TO WMD

MICHAEL N. SCHMITT, ARTICLE: ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW, The Air Force Law Review 2008

A more frightening prospect is an asymmetrically disadvantaged belligerent turning to weapons of mass destruction (WMD). 98 In the [*27] case of nuclear weapons, use for State survival is probably lawful per se (assuming compliance with the proportionality principle and precautions in attack requirements). 99 Yet, nuclear weapons might also be employed as a conflict's opening salvo against an asymmetrically advantaged opponent in the hope that the blow would be so devastating the adversary would surrender or otherwise accede to the objectives of the attacker. The controversy over North Korea's efforts to enhance its nuclear delivery capability is an apt illustration of how asymmetry can propel a weak State to think of nuclear weapons as compensatory in nature. 100 The legality of use for other than survival purposes is unsettled. 101

One nefarious possibility is that weaker States will fall back on chemical or biological weapons to compensate for the enemy's military wherewithal. Both are easier to surreptitiously develop, hide, and employ than nuclear weapons, and the source of a chemical or biological attack would be more difficult to ascertain. Any use would be unlawful. In the first place, even if directed against military objects, the effects of their use would probably be difficult to control, thereby violating the prohibition on the use of indiscriminate weapons. 102 Second, the most likely scenario is use against the civilian population because it would produce the greatest effect on the enemy's willingness to continue. This would violate the prohibition on attacking civilians and civilian objects. Third, use of biological and chemical weapons would violate express prohibitions for States Party to the 1925 Gas Protocol, 1972 Biological Weapons Convention, and 1993 Chemical [*28] Weapons Convention. 103 These proscriptions arguably extend even to non-party states, at least to the extent they represent customary law. 104

THE ICC WOULD UNDERMINE THE SECURITY COUNCIL

Lauren Fielder Redman, ARTICLE: UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT:TOWARD THE FEDERALISM OF FREE NATIONS, Journal of Transnational Law & Policy, Fall, 2007

The Charter of the United Nations assigns primary responsibility for maintenance of international peace and security to the U.N. Security Council. 60 Because the ICC also deals in matters that affect international peace and security, and the U.N. Charter's obligations were designed to prevail over other international agreements, 61 the United States believes that the ICC displaces the role of the Security Council. 62 According to this position, the role of the Security Council may be usurped by withholding from individual [*46] permanent members of the Security Council the right to veto a prosecution by the ICC. 63 This may have been the intention of some states parties to the Rome Statute. 64 The danger as seen through the lens of the United States is that this undermining of the role of the Security Council has the potential to "transform fundamental international relations" in a way that is detrimental to international peace and security. 65

HUMAN RIGHTS NORMS STRONGLY VIOLATE STATE SOVEREIGNTY

MILENA STERIO, Boston College International and Comparative Law Review, Spring, 2008

Because of their powerful reach and impact on state behavior, new human rights norms impose severe limitations on state sovereignty. 96 They dictate that State A may no longer act however it wishes within its own borders--contrary to centuries of customary international law. Precisely because the globalized version of international law takes into account individual interests, it affords individuals more protection from state intrusion into their affairs by limiting state sovereign powers.

SUBMITTING MAY CAUSE THE US TO BE LESS EFFECTIVE IN PEACEKEEPING MISSIONS

Lauren Fielder Redman, ARTICLE: UNITED STATES IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT:TOWARD THE FEDERALISM OF FREE NATIONS, Journal of Transnational Law & Policy, Fall, 2007

The central sovereignty argument of the United States is that no entity other than its own government should influence how or when it will undertake its interests or defend itself. 43 The United States is the biggest peacekeeper in the world, safeguarding its national security and defending its allies and friends. 44 There is no other state that consistently deploys hundreds of thousands of soldiers around the world. 45 Indeed, "America is expected to intervene in humanitarian crises." 46 This places the United States in a uniquely precarious position with respect to the ICC. Marcella David conducted a study in which she examined how recent American peacekeeping missions would have been impacted had the Rome Statute been in force at the time they were conducted. 47 She studied American interventions in Iraq, Bosnia and Sudan and noted that the United States could have been exposed to charges of war crimes and/or crimes of aggression in all three situations. 48 This problem is exacerbated by the treaty framework [*44] which enables internal conflicts-often the type of conflict with the worst humanitarian crises-to escape the jurisdiction of the court, while subjecting peacekeepers to the court's jurisdiction. 49 Therefore,

it might be argued that the Rome Treaty combines the worst of both worlds. Reaching the most egregious violations of fundamental human rights-those occurring in internal armed conflicts-still requires Security Council involvement . . . but it does not require Security Council involvement to put even non-party peacekeepers at risk . . . whereby U.S. armed forces operating overseas could conceivably be prosecuted by the ICC even if the United States has not agreed to be bound by the treaty. 50

WITHOUT THE US, THE ICC WOULD LACK LEGITIMACY

Megan E. Lantto, NOTE: THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A PERMANENT DIVIDE? Suffolk Transnational Law Review, Summer, 2008

Without U.S. participation, the ICC will not only lack the support of the most powerful nation on the planet, it will lack the legitimacy in international politics that the United States could grant with its predominant role in the international arena, and history of being the most vocal proponent for human rights within the last century. 90 Even the mere presence and existence of an international court with strong backing from powerful nations could serve to deter future human rights abuses. 91 Additionally, if the ICC is to prosecute and punish those crimes that [*639] are the most egregious of human behavior, the only way it can be effective in doing so is to be supported by the whole of the international community. 92 An ineffective international court, one which could only espouse empty threats of prosecution, would be exactly the same as no court at all. 93 The international community has tried for decades to establish a court that could successfully prosecute the most heinous violations of human rights, but without broad backing from influential and wealthy nations, its efforts have consistently come up short. 94 An effective international court would promote cooperation among nations in the prosecution of human rights violations and has the possibility to be the policing force that developing and impoverished nations rife with internal warfare so desperately need. 95