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THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ACCOUNT OF CHALLENGES AND ACHIEVEMENTS, Chapter 29 (Carsten Stahn, ed., Oxford University Press forthcoming 2014)(draft chapter, comments to mike.newton@vanderbilt.edu welcomed)

CHARGING WAR CRIMES: POLICY & PROGNOSIS FROM A MILITARY PERSPECTIVE

Michael A. Newton*

1. Introduction

This chapter highlights the import of the war crimes provisions found in Article 8 of the Rome Statute[1] and describes the correlative considerations related to charging practices for the maturing institution. The expansion of the articulated war crimes in the context of both international armed conflicts (Article 8(2)(b)) and in armed conflicts not of an international character (Article 8(2)(e)) culminated an evolution in the laws and customs of war. At the same time, the text of Article 8 should not be understood either as a rejection of prior practice or an evisceration of the core precepts that were widely accepted prior to 1998. When properly understood and applied in light of the Elements of Crimes, the Court's charging decisions with respect to the war crimes found in Article 8 ought to reflect the paradox that its operative provisions are at once revolutionary yet broadly reflective of the actual practice of warfare. The text of Article 8 in essence baked in a complex commingling of *lex lata* hard law and established state practice, as informed by the much more diffuse expectations and assessments of expert

[1] Rome Statute of the International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998), *entered into force* July 1, 2002, *reprinted in* 37 I.L.M. 999 (hereinafter Rome Statute), Art. 8. The extension of potentially unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons the United States was originally unwilling to go forward with the Rome Statute 'in its present form.' D. J. Scheffer, 'The United States and the International Criminal Court,' (1999) 93 *AJIL* 14, 21. On 31 December 2000, which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. *See* Rome Statute, Art. 125(1) (stipulating that states may accede to the Statute at a later time, but that signature was permissible only until 31 December 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to 'remain engaged in making the ICC an instrument of impartial and effective justice in the years to come,' and reaffirmed America's 'strong support for international accountability'. 'Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000)', 37 *Weekly Comp. Pres. Doc.* 4 (Jan. 8, 2001), *reprinted in Digest of United States Practice in International Law* 2000 (Sally J. Cummins & David P. Stewart, eds) 272, *available at* http://www.state.gov/documents/organization/139599.pdf . Nevertheless, the President's statement made clear that he would 'not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied,' *Ibid.* In its operative paragraph, President Clinton, wrote that

> In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes in existence, it will not only exercise authority over personnel of States that have ratified the treaty, but also claim jurisdiction over personnel of States that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not. Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction.

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practitioners. The intentional integration of hard and soft law within the structure of Article 8 is unique and, it must be noted, ubiquitous in its fabric.

The Rome Statute was designed to largely align criminal norms with actual state practice based in the realities of warfare. As the ICC (the Court) enters a second decade of actuality it faces challenges that continue to foster controversy and drive dramatic change associated with its emerging prerogatives and practices. The sustainability and long term credibility of the Court depends in large measure upon cooperative synergy with domestic jurisdictions, both states party and other states. In particular, the relationship to be forged between the Court and military organizations around the world may well be the fulcrum from which its longer term legitimacy derives. As Albert Einstein observed "In theory, theory and practice are the same. In practice, they are not." Even as Article 8 embodied notable new refinements, the Rome Statute made such sweeping legal advances against a backdrop of pragmatic military practice. This chapter will dissect the structure of the Statute to demonstrate this deliberate intention of Article 8. The logical conclusion is that the carefully constructed Statute will have been effectively abandoned if the Court habitually overrides the permissible discretion of domestic officials by displacing the proper authority of responsible military commanders based on its own preferences or the expediency of political considerations. To be more precise, judicially superimposed preferences would effectively amend the Rome Statute contrary to the intentions of the States Parties. Furthermore, imposing judicial or prosecutorial preferences to the detriment of lawful command latitude in the field would undercut the premise of the admissibility concept in practice.

This chapter discusses the subtleties of the Rome Statute structure insofar as they facilitate a harmonious balance between the prerogatives of responsible military commanders and the vitally important role of the Court in prosecuting perpetrators of war crimes. The charging policies of the Court and its role in strengthening compliance with the fabric of the laws and customs of armed conflict must serve this end irrespective of the nature of the conflict or the identities of the warring parties. Article 21 stipulates that the Court "shall" apply the Elements of Crimes that accompany each and every offense found in Article 8 with the precise evidence that the Prosecutor must prove beyond a reasonable doubt in that order – conduct, consequences, circumstances. To be sure, the *lex specialis* of the Elements of Crimes is reflected in Article 9, which states merely that the Elements "shall assist" the Court. Nevertheless, a holistic understanding of the crimes specified in Article 8 as amplified by the Elements of Crimes is the only pathway towards authoritative implementation of the text. The Judges and Prosecutor cannot minimize the importance of the Elements of Crimes because they represent the consensus agreements of all nations, both States Parties and non-States Parties, dating to June 30, 2000.

As the pattern of cases develops in coming years, the Court would be well served to assess the range of potentially chargeable conduct in light of the optimal synergy between reinforcing military professionalism and the punishment of any perpetrator found to have committed the prohibited *actus reus* when influenced by criminal *mens rea* and under the circumstances prescribed by law. Section 2 of this chapter examines the explicitly permissive aspects of the laws and customs of war, while Section 3 details the conformity of the Rome

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Statute and its constituent Elements of Crimes with that basic framework. Section 4 builds on these foundational principles to identify some of the most important consequences of the design of the Rome Statute. This chapter proffers a series of specific recommendations that should guide prosecutorial discretion in charging decisions as well as the range of judicial decision-making. To wit, Section 4 of this chapter explains how the Court should 1) recognize the principle of the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, 2) understand the implications of the Status of Forces agreements widely employed in international military operations, and 3) respect and reinforce the rationale behind the principles embedded in Article 28.

2. The Underlying Permissiveness of the *Jus in Bello* Regime

Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over. The law of armed conflict (*jus in bello*) is the gold standard separating trained and disciplined professionals from a lawless rabble. It cannot be overemphasized that the laws and customs of warfare balance humanitarian objectives with the perfectly legitimate need to accomplish the mission. The law explicitly embeds the latitude for military commanders and lawyers alike to balance the requirements of the mission against the humanitarian imperative of the law itself. Thus, the gründnorm for the entire scope of the "laws and customs applicable in armed conflicts" (to use the language of Article 8) is to build a careful balance between the ability of practitioners to lawfully accomplish the military mission in a manner that respects to the greatest degree possible the enduring value of humanitarian considerations. Michael Waltzer is entirely correct in the conclusion that belligerent armies are "not entitled to do anything that is or seems to them necessary to win wars. They are subject to a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle."[2] Restraint during the conduct of hostilities helps to preserve the humanity of the war-fighter even as it helps to minimize unavoidable civilian suffering and damage. Conversely, compliance with the legal and moral imperatives for waging war determines the dividing line between pride in one's service and shame that cannot be discarded like a dirty uniform. This subtle need to protect the humanity of the war-fighter was epitomized by a photograph of an American Marine in the middle of the combat zone that appeared during the early phases of the coalition drive to Baghdad in early 2003. The Marine is shown holding up a notarized letter directing him to report at a specific date and time for jury duty, and is grinning at the stark reality that the grinding normality of life in a combat zone might as well be occurring in a parallel universe from the normality of life at home.

This reality provide one of the most foundational and enduring rationales for the body of *jus in bello* as it has developed over the past hundred and fifty years. In his revolutionary code of 1863, Francis Lieber stated this idea as follows: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to

[2] M. Walzer, *Just and Unjust Wars* (NY: Basic Books, 1977) 131.

God."[3] In his classic text Nuremberg and Vietnam: An American Tragedy, Telford Taylor observed that participants in armed conflicts must retain a sense of honor in the midst of horrific warfare by retaining "such respect for the value of life that unnecessary death and destruction will continue to repel them" otherwise "they may lose the sense for that distinction for the rest of their lives."[4] Consequently, every military expert that I know fully supports the early practice of the Court[5] in charging perpetrators for the war crime of "conscripting or enlisting children under the age of fifteen years" into armed forces "or using them to participate actively in hostilities" (Articles 8(2)(b)(xxvi) for international armed conflicts and 8(2)(e)(vii) for non-international conflicts). Warfighters must develop an inculcated climate of discipline to hone combat effectiveness with the result that the force has confidence in the command. The goal is to win the war as quickly as possible with the fewest casualties as possible and the most favorable peace terms that lead to a sustainable peace. This tenet helps explain why the law of occupation has never conveyed a carte blanche authority to an Occupying Power to exercise unlimited discretion over the civilians within the previously hostile territory.[6] As one distinguished scholar[7] observed to me in conversation, Hague law begins with the military mission and tempers the unfettered discretion of war-fighters based upon humanitarian considerations, whilst the body of Geneva law begins with humanitarian principles which are constrained due to the necessities of the military mission. Close examination of the Rome Statute and its constituent elements of crimes reveals that the intent of the drafters was to build upon this baseline of *lex lata* rather than obliterate preexisting legal precepts and to replace them whole cloth with treaty based constraints.

For our purposes, it is important to realize that each and every specific crime in Article 8 of the Rome Statute (which deals with the range of war crimes committed both in international and in non-international armed conflicts) requires the prosecutor to prove that the charged act was committed "in the context of and associated with" the armed conflict. This element reflects the moral truism that the *lex lata* application of *jus in bello* norms is independent from the overarching *jus ad bellum* norms. All participants in armed conflict are equal before the law. In this way, even the most unlawful act of aggression that marks the onset of armed conflict operates to convey the entire range of rights, benefits, and obligations drawn from the laws and customs of warfare onto every participant in that conflict. The principled application of *jus in bello* concepts by the Court in all types of armed conflict as envisioned in Article 8 has the

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[3] *See Instructions for the Government of Armies of the United States in the Field* (Government Printing Office 1898) (1863), *reprinted in The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* 6, art. 15 (Dietrich Schindler & Jiri Toman eds., 1988)[hereinafter Lieber Code].
[4] T. Taylor, 'War Crimes' in *War, Morality and the Military Profession* 378 (M. Wakin, ed 1986).
[5] http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx
[6] In 2012, the ICRC completed an extensive set of discussions among experts regarding the proper latitude enjoyed by an occupying power during its temporary authority, see Experts Report, Occupation and Other Forms of Administration of Foreign Territory (2012), available at http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/474159/ICRC_expert_meeting_-_occupation.pdf
[7] Charles Garraway

broadest support among professional military forces because the enforcement of the laws and customs of warfare can only enhance a reciprocal recognition of the need for law and its integral relationship to military discipline. The second circumstantial element that is embedded in every Article 8 offense logically follows; the prosecutor need not prove that the perpetrator made any specific legal conclusion about the nature of the conflict. Sufficient evidence of war crimes depends upon showing that "the perpetrator was aware of factual circumstances that established the existence of an armed conflict." In other words, there is a fundamental due process right that convictions only be grounded in the perpetrator's knowledge that the *jus in bello* is applicable and should provide the signposts for acceptable conduct. The factual awareness of the perpetrators that the laws and customs of warfare apply derives from notions of notice and fundamental fairness.

The vitally important point for jurists and practitioners to grasp is that *jus in bello* is properly understood as being permissive by its express terms insofar as it defines the limits of lawful authority rather than operating as an affirmative grant of authority. The permissive nature of the legal regime applicable during armed conflicts is inextricably woven into the very fabric of such conflicts. Whereas the human rights regime restricts lethal force to those circumstances where such force is absolutely necessary as a last resort in order to protect life, *jus in bello* permits such force whenever it is reasonably related to an acceptable military purpose; in the language of Protocol I, whenever such force is tailored to achieve a "concrete and direct military advantage." By contrast, lethal force in armed conflicts is presumed to be permissible whenever reasonably necessary to achieve a military objective absent evidence of some prohibited purpose or unlawful tactic.[8] As early as 1863, this permissiveness was expressed in Article 14 of the Lieber Code as follows: "Military necessity, as understood by modern civilized nations, consists of the necessity of those measure which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[9] The human rights regime requires a statement of affirmative authority while *jus in bello* operates on a permissive basis subject to express limitations. As an additive requirement, lethal force under the human rights paradigm must be proportionate to the immediate context, meaning that the force used is directly proportionate to the risk posed by the individual at the moment force is employed. In the express language of Article 8(b)(2)(b)(iv), *jus in bello* proportionality by definition and accepted state practice will very likely depend upon the broader contextual set of aggregate circumstances, which in turn inform the commander's assessment of the "overall military advantage anticipated."

This permissive *jus in bello* framing empowers those in the vortex of battle to balance the legitimate military needs against larger humanitarian imperatives. Thus, "every single norm" within the laws and customs of armed conflict operates in the memorable framing of Yoram Dinstein as "a parallelogram of forces; it confronts an inveterate tension between the demands of

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[8] Nils Meltzer, *Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restricive Function of Military Necessity*, 9 YEARBOOK OF INT' HUM. L. 109 (2006).
[9] Lieber Code, *supra* note 3, art. 14.

military necessity and humanitarian considerations, working out a compromise formula."[10] To be clear, *jus in bello* is not designed to be infinitely malleable based on the individualized will of combatants. The actions of all participants in armed conflict are constrained by considerations of lawfulness based on their relation to the conflict. The proper balance is intentionally integrated into the law itself. Individual participants cannot lawfully inject an individualized rationalization for ignoring *jus in bello* because doing so might permit some degree of differentiation that would erode the humanitarian objectives of the law itself. In the context of armed conflicts proportionality operates as a single principle with little variation. Otherwise, proportionality and military necessity would become interlinked and unstoppable considerations that "would reduce the entire body of the laws of war to a code of military convenience."[11] Thus, there is no micro-analysis of the particularized circumstances related to the relationship of the relevant actors when applying the *jus in bello* either in the heat of battle or retrospectively in the course of criminal prosecution or disciplinary investigation and/or criminal prosecution. In other words, there can lawfully be no rationalization for failure to comply with the laws and customs of war, hence there is no recognized defense of military necessity unless the act comports with the actor's larger *jus in bello* obligations.

On the other hand, the Court (here I use the collective to refer to jurists, defense counsel, and members of the Office of the Prosecutor) cannot forget for one moment, that although *jus in bello* contains numerous express prohibitions subject to no caveats, combatants properly exercise what the ICRC has labeled a "fairly broad margin of judgment."[12] Therein lies the completely appropriate and distinctive permissiveness of the laws and customs of armed conflict. For example, medical care is due those in military custody only "to the fullest extent practicable and with the least possible delay."[13] Other obligations are often couched in aspirational terms such as "whenever possible"[14] or "as widely as possible."[15] Still more duties are couched in less than strident terms such as "shall endeavor"[16] or the duty to "take all practical precautions."[17] There are also numerous express exceptions permitted for reasons of "imperative military necessity."[18] For the purposes of the war crime in Article 8(2)(b)(iv) of intentionally directing an attack in the knowledge that it would likely inflict disproportionate damage, the most relevant permissive duties incumbent on those who order military strikes require them to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects"[19] and "take all

[10] Y. Dinstein, *The Conduct of Hostilities Under The Law of International Armed Conflict* 5 (2d ed. Cambridge University Press 2010).
[11] L. C. Green, *The Contemporary Law of Armed Conflict* (3d. ed. 2008) 353.
[12] *Commentary on the Additional Protocols of 8 june 1977 to the Geneva Conventions of 12 August* 1949, Art. 57, ¶ 2187 (Sandoz et al, eds 1987).
[13] Protocol I, Article 10(2).
[14] Protocol I, Article 12(4).
[15] Protocol I, Article 83(1).
[16] Protocol I, Article 77(3).
[17] Protocol I, Article 56(3).
[18] Protocol I, Article 55(5).
[19] Protocol I, Article 57(2)(a)(i). The expression "feasible" is variously translated in French as "pratique" (Art. 56), "pratiquement possible" or "possible dans la pratique" (Arts. 57, 58, 78 and 86) and "utile" (Art. 41), which in English also appears as "practical" (Art. 56(3)).

feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[20] Jurists and prosecutors absolutely must realize that the evaluation of the actus reus under Article 8(2)(b)(iv) cannot be made in isolation from these collateral duties of the commander, notwithstanding the fact that they are nowhere specifically referenced in the Rome Statute. Even in that evaluation, it is important to note that the benchmark for what is "feasible" is measured from the reasonable war-fighter's point of view. As a logical extension, "effective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*." (emphasis added)[21] The vital point is that the parallel duties incumbent on the commander are to be drawn from the larger *jus in bello* and need not be restated within the contours of Article 8 itself. The commander's actions "must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation" according to the ICRC.[22]

As the next section will recount in some detail, the text of the Rome Statute implicitly imports all of these permissive aspects of the *jus in bello* regime, even as it expressly adds some additional charging considerations. Within the realm of charging and prosecuting war crimes, then, modern international criminal law expressly preserves broad discretionary authority. Rather than serving as a necessary basis for a positive articulation of lawful force as an exception to the norm, *jus in bello* delineates the outer boundaries of the commander's appropriate discretion. Aharon Barak, of the Israeli Supreme Court summarized this aspect of the *lex specialis* perfectly with respect to the principle of proportionality as embedded in Article 8(2)(b)(iv); his thoughts provide a perfect segue to the considerations of the structure of the crimes articulated in Article 8 and their constituent Elements of Crimes to be detailed in the next section of this chapter:

> The court will ask itself only if a reasonable military commander could have made the decision that was made. If the answer is yes, the court will not override the military commander's security discretion within the security discretion of the court. Judicial review regarding military measures to be taken is within the regular review of reasonableness. True, "military discretion" and "state security" are not magic words that dismiss judicial review. However, the question is not what I would decide under the given circumstances, but rather whether the decision that the military commander made is a decision that a reasonable military commander is permitted to make. In that realm, special weight is to be granted to the military opinion of the official who bear responsibility for security. …Who decides on proportionality? Is it a military decision to

[20] Protocol I, Article 57(2)(a)(ii). The United Kingdom, for example, declared on signing the Protocol that the word "'feasible' means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations [...]". In response to ICRC concerns, this was modified to read as follows: "The United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations".
[21] Protocol I, Article 57(2)(c).
[22] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 75.

> be left to the reasonable application of the military, or a legal decision within the purview of the judiciary? Our answer is that the proportionality of military means used to fight terror is a legal question to be left to the judiciary. … Proportionality is not an exact science; at times there are a number of ways to fulfill its conditions so that a zone of proportionality is created; it is the boundaries of that zone that the court guards.[23]

3. Understanding the Underlying Structure of Article 8

3.1. The Authoritative Backdrop of *Jus in Bello*

The structure of Article 8 and its accompanying Elements of Crimes was intentionally designed to comport with the historical understandings embedded in established *jus in bello*. To this end, practitioners in the Court make charging decisions as informed by three time-tested considerations that mandate the unique nature of the *jus in bello* regime. In the first place, *jus in bello* is only properly applied depending on the larger context of armed conflict. This is at the heart of the ICJ characterization of the laws and customs of warfare as *lex specialis*. In other words, the precepts that flow from the laws and customs of warfare provide the evaluative basis for all actions undertaken when that body of law is applicable. The main question, then, does not deal with the particularities of the relationship between actors, but with the hierarchy of the choice of law rules. That is why it is intellectually indefensible to limit the use of force in a particular combat engagement to the degree of force used by the enemy. Secondly, *jus in bello* was not designed nor intended to generate symmetry between the warring parties or to artificially inject equity within into the midst of armed conflict. The asymmetric nature of modern conflicts does not require a wholly new *jus in bello* proportionality application because the law itself contemplates a disparity of combat power and in no way mandates some form of equity as in other areas of international law. Finally, as noted above, the fundamentally permissive nature of *jus in bello* simultaneously empowers and obligates war-fighters to operate within a zone of reasonable discretion in order to achieve the essential purposes of jus in bello. The court does not superimpose its own discretion so much as the judicial process ensures that the zone of authority is enforced appropriately.

This framework of established *jus in bello* drawn from both specific treaty principles and the larger context of state practice is repeatedly referenced in the Rome Statute as "the laws and customs of war applicable in armed conflict … within the established framework of international law." Practitioners must recall that this same breadth of application is specifically made in both "international armed conflict" (Article 8(2)(b)) and "armed conflict not of an international character" (Article 8(2)(e)). Even this framing follows the categorization of conflicts established in the Geneva Conventions of 1949 because it replicates the odd but long accepted formulation of Common Article 3, which of course is included verbatim in the Rome Statute as Article 8(2)(c). Indeed, it is worth recalling that many of the specific crimes found in Article 8 draw from the text of existing treaties while some are *sui generis*. Thus, Article 21(1)(b) is logically

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[23] Aharon Barak, President (ret'd) Supreme Court of Israel, Address at the Jim Shasha Center of Strategic Studies of the Federmann School for Public Policy and Government of the Hebrew University of Jerusalem, (Dec. 18, 2007).

consistent and entirely predictable when it expressly mandates the Court to apply "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict." When the *lex specialis* law of armed conflict is applicable, as it must of necessity be in the context of any prosecution under Article 8, persons who violate its precepts are individually responsible for each and every violation and accordingly liable for punishment in the appropriate criminal forum. The authority of the Court extends only insofar as its decision-making remains consonant to the larger context of the *lex specialis* because the laws and customs of armed conflict provide the determinative criteria for decision-making.

Furthermore, Article 22(2) mandates that the principle of strict construction is specifically included in the Court's interpretation of the substantive offenses of Article 8. The text reads as follows: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." This subparagraph is notable for its inclusion in the Rome Statute as an innovation over preexisting tribunal models. This canon of strict construction operates to the benefit of an accused insofar as ambiguity is to be resolved in such a manner as to prevent the imposition of criminal liability where there is doubt about the appropriate meaning of a particular provision of Article 8. The principle of *in dubio pro reo* operates to protect fundamental due process on its face.[24] However, for our purposes, it is important because it implicitly draws upon and implements the broader framework of treaty law and state practice with respect to the conduct of hostilities. In fact, the strict constructionist principle of Article 22(2) could be read as one of the most express limitations on the overarching authority of the Court because the body of war crimes law is widely developed both in theory and practice. This requirement is the only concrete attempt in the Statute to limit the Court's interpretive authority, and therefore it implicitly incorporates the authoritative backdrop of the agreed upon principles of the laws can customs of warfare.

Finally, and most subtly, the delegates negotiating the Elements of Crimes expressly sought to preserve the interpretive force for the agreed upon *jus in bello*. The Elements of Crimes were originally proposed by the United States on the basis that the principle of legality required international agreement over the scope of the substantive crimes described in the Rome Statute. Delegations in Rome initially opposed the proposal on the basis that agreements would be difficult to develop between common and civil law understandings of the relevant international law, but also on the basis that the effort to achieve such agreement might well entail delay in the entry into force for the Rome Statute. However, as previously noted, on June 30, 2000, all nations reached consensus on the authoritative elements for every specific crime listed in Articles 6, 7, and 8. This is particularly important in the macro because it included delegations from major non-States Party to include the United States, China, and Russia. The Elements also provide a vitally important template in the official languages of the United Nations that can readily be exported for adoption and emulation in the domestic systems of any nation. The world

[24] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 410.

may yet see Arabic judges importing the Arabic text of the ICC Elements into a sui generis tribunal created to adjudicate the egregious crimes committed in the Syrian civil war, for example.

For the purposes of properly charging offenses under Article 8, the full text of the General Introduction to the Elements of Crimes is critically relevant. The General Introduction, known as the chapeau language, was the fulcrum upon which overall consensus emerged. The Elements truly are revolutionary in the sense that all states now share a common touchstone to dissect the *actus reus*, *mens rea*, and requisite circumstances for every offense included in the Rome Statute. For the purposes of charging war crimes, Paragraph 6 of the General chapeau is particularly relevant. It reads as follows: The requirement of "unlawfulness" found in the Statute or in other parts of international law, *in particular international humanitarian law*, is generally not specified in the elements of crimes (emphasis added). Read in conjunction with Article 30, this provision means that substantive crimes found in Article 8 can only be established when there is evidence beyond a reasonable doubt that the perpetrator intentionally (Article 30) and unlawfully (Article 8 General Introduction, chapeau language) committed the relevant *actus reus*. Thus, there can be no doubt whatsoever that the provisions of Article 8 build upon the larger context of the established *jus in bello* rather than attempting to replace the welter of laws and customs with an *ad hoc* system that might be termed "Frankenlaw." Article 8 buttressed the established framework of *jus in bello* rather than obliterating its normative force

3.2. Specific Textual Incorporation into Article 8

Given the truism that the war crimes enunciated in Article 8 largely represent an outgrowth from the preexisting body of humanitarian law, they are riddled with references to that body of law. In some areas, the relationship is simply that the offenses from previous treaty law are included whole cloth. Article 8(2)(a) thus consolidates the substantive grave breaches drawn from the respective Geneva Conventions[25] The text is logically consistent in that it embeds the established legal principles drawn from the Conventions into the structure of the crimes and elements. For example, victims of any offense under Article 8(2)(a) must be "protected persons" within the meaning of one or more of the Geneva Conventions, though that legal term of art is nowhere explained in the Rome Statute. Article 8(2)(b)(xxii) correspondingly prohibits the use of "protected persons as human shields" to "favour (sic) or impede military operations." Similarly, the grave breach of "Extensive destruction and appropriation of property not justified

[25] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, art. 47 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, art. 48 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316, art. 127 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, art. 144.

by military necessity and carried out wantonly and unlawfully" (Article 8(2)(a)(iv)) may only be committed against property protected under one or more of the Geneva Conventions. As noted above, the text of Article 8(2)(c) reproduces the language of Article 3 that is replicated in each of the four Geneva Conventions of 1949. All of these criminal provisions draw their lifeblood from the practice of states and the accumulated understandings from established understandings of the 1949 Geneva Conventions, to include the specific understandings of Common Article 3.

In a slightly more tangential reference to underlying *jus in bello* precepts, the fabric of Article 8 offenses also contains an abundance of obvious references to the underlying body of humanitarian law. Apart from the textual reference to military necessity in the grave breach provision of Article 8(2)(a)(iv), the concept is repeatedly referenced in elements for other offenses committed during both international and non-international armed conflicts. Military necessity, for example, is specifically included in the textual requirements for proving the war crime in Article 8(2)(b)(viii) of displacing the civilian population because the elements require that the perpetrator's order "was not justified by the security of the civilians involved or by military necessity." Similarly, the Article 8(2)(b)(v) war crime of attacking undefended places cannot be established in the absence of evidence that the "towns, villages, dwellings, or buildings did not constitute military objectives." The legally defined term of art "military objective" is also included in the elements of the war crime of attacking civilian objects in both international (Article 8(2)(b)(ii) and Article 8(2)(b)(ix)) and non-international armed conflicts (Article 8(2)(e)(iv). Finally, the *jus in bello* concept of "*hors de combat*" is embedded in all of the offenses under Article 8(2)(c) without any additional clarification or explanation. These obvious references to established legal precepts under preexisting *jus in bello* make reference to that body of law an essential predicate to any authoritative interpretive decisions with respect to those offenses either in charging or judicial decision-making in the Court.

Even the extensive reliance of legally specific terminology defined outside the boundaries of the Rome Statute does not exhaust the textual basis for reference by jurists and counsel to the underlying body of established *jus in bello*. In addition to the express and obvious references, there is a third layer of Article 8 provisions with oblique reliance on preexisting legal precepts. Article 51(3) of Additional Protocol I in 1977,[26] for example, provides that civilians "shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." The concept of civilians under *jus in bello* stands in contradistinction to the rights and duties that inhere to lawful combatants. The war crime of "making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as the distinctive emblems of the Red Cross, resulting in death or serious personal injury" (Article 8(2)(b)(vii)) requires proof that the perpetrator "made such use for combatant purposes in a manner prohibited under the international law of armed conflict." The elements make clear that the perpetrator "knew or should have known of the prohibited nature of such use" at the time of the *actus reus*. These offenses are not replicated in the Article 8(2)(e) language applicable to non-international armed conflicts because the concept of combatancy is

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[26] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 23, art. 10(2) [hereinafter Protocol I].

an oxymoron during armed conflicts of a non-international nature. By contrast, the war crimes provisions of the Rome Statute extended the Article 51, Protocol I, baseline protection for civilians to criminalize "intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities" in the context of all armed conflicts, both international (Article 8(2)(b)(i)) and non-international (Article 8(2)(e)(i)). The legal concept of direct participation is deeply rooted in current international law, yet its scope remains highly controversial. For example, in Part IX of its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, The International Committee of the Red Cross inserted an entire section addressing restraints on the lawful use of lethal force during armed conflicts. The ICRC text postulated that the "kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[27] This is the narrowest reading of the concept of necessity in military operations in the sense that necessity is a literal term drawn in the narrowest tactical terms.

Given the fact that there is no black letter law (*lex lata*) to support that assertion, the ICRC Interpretive Guidance relied on its assertion of moral authority (*lex ferenda*) and indirect application of the protections that are universally accepted as applying to persons who are not clearly combatants, in particular employing an expansive notion of the principle of necessity. According to this view, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situation, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.[28] To be clear, prior to the ICRC position in Part IX, there was no affirmative statement of this principle in any authoritative text, and the Interpretive Guidance did not carry with it the force of state consensus at the time of its promulgation. It is therefore *lex ferenda* rather than accepted *lex lata*. Part IX is highly controversial at the time of this writing, particularly insofar as the ICRC sought to cast its position in terms of preexisting customary international norms.[29] Military practitioners have sharply objected to this commingling of the non-derogable right to life derived from human rights norms with the notion of military necessity and lawful targeting inherent in the *jus in bello*. Experienced military practitioners argue that the ICRC created a precept that embeds the right to capture in *jus in bello* thereby concluding that "the ICRC has

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[27] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 77.

[28] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 82.

[29] John B. Bellinger, III and William J. Haynes II, A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law, 89 *Int. Rev. Red Cross No*. 866, June 2007, p. 443. Jann K. Kleffner, *Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?*, 45 ISRAEL L. REV. 35 (2012); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL'Y 769, 828 (2010); Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L. Q. 180, 192 (2010).

lost sight of its role as trusted advisor and has assumed the position of international legislator."[30] In the words of one expert that participated in several years of meetings that preceded the Interpretive Guidance "Recommendation IX deals with a matter that the experts were not asked to decide, it was raised late in the expert process, was strongly objected to by a substantial number of the experts present, was not fully discussed and so should not, in my opinion, have been included in the document."[31]

For our purposes, the oblique reference to "direct participation" imports a great deal of controversy and international debate into the fabric of the Rome Statute. It stands alongside other oblique references such as Article 8(2)(b)(vi) which rely upon the concept of combatancy and its limitations without explanation or specific reference to a particular provision of law. Similarly, the war crime of treacherously wounding or killing (Article (8)(2)(b)(xi)) relies upon the premise that perpetrator "invited the confidence or belief of one or more persons that they were entitled to or were obliged to accord, protection under rules of international law applicable in armed conflict." As one final example, *inter alia*, of the oblique reliance on established principles, the structure of war crime of destroying or seizing the enemy's property (Articles 8(2)(b)(xiii) and 8(2)(e)(xiii) require proof that "the property was protected from that destruction or seizure under the international law of armed conflict." Practitioners in the Court must realize that for all its sophistication and for all of its noble intentions, the Rome Statute simply cannot be implemented as a self-standing island of international law principles isolated from the larger definitional underpinnings of *jus in bello*.

3.3. The Consensus Compromises Negotiated by States

In addition the express importation of the laws and customs of warfare and the textual reliance on its precepts that is integrated into the Rome Statute, there are a number of areas where delegates exploited common understandings as an essential step to gaining consensus on the crimes and their accompanying elements. For example, Article 23 of the 1899 Hague II Convention stated that it was forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." [32] The Rome Statute copied that same language in Articles 8(2)(b)(xiii) and 8(2)(e)(xii)(respectively applicable during international and non-international armed conflicts). Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a higher subjective threshold by which to second-guess military operations.[33] They proposed a verbal formula for the Elements of Crimes that any

[30] Richard S. Taylor, *The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?*, THE ARMY LAWYER 103, 104 (June 2011).

[31] A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, 48 MIL. L. & L. OF WAR REV. 143, 158 (2009).

[32] M. A. Newton, 'Modern Military Necessity: The Role & Relevance of Military Lawyers', 12 *Roger Williams U. L. Rev.* 877, 896 (2007).

[33] M. A. Newton, 'Humanitarian Protection in Future Wars', *in* 8 *International Peacekeeping: The Yearbook of International Peace Operations* (Harvey Langholtz et al. eds., 2004) 349, 358.

seizure of civilian property would be valid only if based on "imperative military necessity."[34] As noted above, there is not a shred of evidence in the *traveaux* of the Rome Statute that its drafters intended to alter the preexisting fabric of the laws and customs of war.[35] Introducing a tiered gradation of military necessity as proposed would have built a doubly high wall that would have had a paralyzing effect on military operations. A double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law.

From the military practitioners' perspective, requiring "imperative military necessity" as a necessary condition for otherwise permissible actions would have introduced a wholly subjective and unworkable formulation that would foreseeably have exposed military commanders to after the fact personal criminal liability for their good faith judgments. The ultimate formulation in the Elements of Crimes translated the poetic but impractical 1899 phrase into the simple modern formulation "military necessity" that every commander and military attorney understands. The important point for our purposes is that the twin concepts of military necessity and feasibility preserve *jus in bello* as a practicable body of law that balances humanitarian and military considerations, at least when applied by reasonable, well-intentioned, and well trained forces.[36] The delegates leveraged established practice and common military understanding as the cornerstone of diplomatic consensus. In like manner, the war crime of "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within our outside this territory" (Article 8(2)(b)(viii)) presented delegates with a contentious and time consuming dilemma. The ultimate consensus was built upon what became footnote 44 in the Elements of Crimes. This footnote was more difficult to achieve than perhaps any other single aspect of the elements, yet its formulation is deceptively simplistic. The text of (famous) footnote 44 provides that "The term "transfer" needs to be interpreted in accordance with the relevant provisions of international humanitarian law."

In other words, the Court is simply not free to disregard existing interpretations or understandings of the body of law that developed in the implementation of Article 49 of the Fourth Geneva Convention. To be more precise, the Court *could* embark on an exercise of judicial creativity, but that is vastly a different proposition than arguing that it should engage in an ambitious teleology on its own authority. Such efforts, whether centered among jurists or counsel, would depart from the clearly permissible limits of the Rome Statute and its accompanying Elements of Crimes. Indeed, overly teleological experimentation would contravene the mandate of Article 21, which states that the Court "shall" rely upon the text of the

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[34] Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* 249 (Cambridge University Press 2003) 249.

[35] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 240-41(noting that the provisions of the Rome Statute referencing military necessity were "quickly agreed to at the Rome Conference" and that the concept may be invoked only when the laws of armed conflict provide so and only to the extent provided by that body of law).

[36] *See* M. A. Newton, 'The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead', 41 *Virginia Journal of International Law* 204, 211–212 (2000).

Statute, the constituent Elements as modified "where appropriate" by "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict." Simply put, the Court cannot create norms in its unfettered discretion or nor should it disregard *lex lata* at its convenience.

The interpretive structure of Article 8(2)(b)(iv) deserves special commentary in closing Section 3 of this chapter because it represents one of the most important aspects of the modernization enshrined in the Rome Statute even as it exemplifies the limits of Court creationism. In his seminal work War and Law Since 1945, Geoffrey Best pointed out that "proportionality is certainly an awkward word. It is a pity that such indispensable and noble words as proportionality and humanitarian(ism) are in themselves so lumbering, unattractive and inexpressive."[37] Proportionality is, nevertheless, a deeply embedded and indispensable aspect of decision-making during war or armed conflict for many decades. Although the textual incarnations of proportionality came after more than a century of development within the field that gap should not be attributed to unfamiliarity with the basic precepts of the precautions expected to be taken by attackers and defenders alike. The developmentally delayed formulation of the treaty language was "because it was thought to be too slippery and in its potential implications embarrassing to commit to a set form of words."[38] The Rome Statute describes proportionality in a manner consistent with modern State practice following the adoption of Protocol I as:

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

In addition, the Elements of Crimes (adopted by consensus as mentioned above) included a key footnote that reads as follows:

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

The inclusion of a proportionality requirement to mark off a specific war crime under the Rome Statute is significant for two reasons. In the first place, delegates omitted the consequence element required for conviction of a grave breach under Protocol I. The criminal act is

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[37] Geoffrey Best, *War and Law Since 1945* (Oxford University Press 1994) 324.
[38] *Ibid*, at 323.

committed simply by the deliberate initiation of an attack, provided that the prosecutor can produce evidence sufficient for the finder of fact to infer that the perpetrator believed that the attack would cause an anticipated disproportionate result. The *actual* result is not necessarily relevant. Unlike the grave breach formulation found in Protocol I, the criminal offense in the Rome Statute is completed based on the intentional initiation of a disproportionate attack. The highest possible *mens rea* standard implicitly concedes that some foreseeable civilian casualties are lawful. Thus, the Rome Statute standard strongly mitigates against the inference of a criminal intent just based on evidence sufficient to show that the commander might have had knowledge that a particular attack might cause some level of damage to civilians or their property.

In addition, the explicit footnote in the Elements stipulates that the perpetrator's knowledge of the foreseeably disproportionate effects of an attack requires an explicit value judgment. Nevertheless, the standard for any *post hoc* assessment of the action taken by an alleged perpetrator is clear: "An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time." In effect, the text of Article 8(2)(b)(iv) (the crime of disproportionate attack) widens the scope of the military advantage that can be considered in the proportionality analysis (through inclusion of the word overall) and narrows what level of collateral damage is considered excessive (by specifying that the damage needs to be *clearly* excessive to generate criminal liability). These revisions to the treaty terminology employed by the drafters of Protocol I could be discounted as a *sui generis* necessity based on diplomatic convenience. But this assumption would be inaccurate.

In fact, the text of the Rome Statute reflects the broadly accepted view of State practice. To be more precise, the text of the Rome Statute, as understood in light of the Elements footnote adopted by consensus, accurately embodies preexisting customary international law. This is true in two equally important dimensions. In the first place, the governments of the United Kingdom, the Netherlands, Spain, Italy, Australia, Belgium, New Zealand, Germany, and Canada each published a virtually identical reservation with respect to Articles 51 and 57 as they acceded to Protocol I.[39] The overwhelming weight of the reservations made clear that state practice did not intend to put the warfighter into a straightjacket of rigid orthodoxy. The New Zealand reservation for example (virtually identical to those of other states listed above) reads as follows:

> In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, the Government of New Zealand understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations, including the security of attacking forces. It is further the understanding of the Government of New Zealand that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona

[39] The numerous texts of state declarations expressing similar views using almost identical language is at < http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>

> fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

Secondly, in reaching the legally defensible assessment of proportionality, the perspective of the commander (or warfighting decision maker) is entitled to deference based on the subjective perspective reservation prevailing at the time. The Italian declaration with respect to Protocol I states that in "relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time." This understanding is replicated in a number of other State pronouncements. Another reservation from the government of Austria declares that "Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative." The language of the United Kingdom Law of War Manual summarizes the state of the law which was captured in the prohibition of Article 8(2)(b)(iv) as it should be understood in light of the Elements of Crimes,[40]

> The military advantage anticipated from the attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The point of this is that an attack may involve a number of co-ordinated actions, some of which might cause more incidental damage than others. In assessing whether the proportionality rule has been violated, the effect of the whole attack must be considered. That does not, however, mean that an entirely gratuitous and unnecessary action within the attack as a whole would be condoned. Generally speaking, when considering the responsibility of a commander at any level, it is necessary to look at the part of the attack for which he was responsible in the context of the attack as a whole and in the light of the circumstances prevailing at the time the decision to attack was made.

The point of these cumulative examples ought to be clear as this Chapter moves into Section 4. The text and intent of Article 8 can only be appropriately understood and applied against the realism of state practice and the larger intent of states that conduct hostilities. Phrased another way, if the Court of the future seeks to charge war crimes by ignoring the established body of *jus in bello*, that effort would contravene the structure of the Statute, and would predictably lead to a loss of legitimacy for the institution.

4. Interrelationship of the Court with Operational Realities

This chapter concludes with three specific recommendations for charging war crimes that must be preserved as the Court enters its second decade of practice. Section 4 builds on these foundational principles to identify some of the most important consequences of the design of the Rome Statute. Prosecutorial discretion in charging decisions as well as the range of judicial decision-making should always recognize the principle of the jurisdictional floor for war crimes

[40] *The Joint Service Manual of the Law of Armed Conflict*, ¶ 5.33.5 (2004).

charging that is embedded in the Rome Statute, understand the implications of the Status of Forces agreements widely employed in international military operations, and reinforce the rationale behind the principles embedded in Article 28.

4.1. Preserving the Jurisdictional Floor of War Crimes Charging

The lengthy recitation of examples in Section 3 aptly demonstrate the manner by which the larger *lex lata* of the laws and customs of armed conflict are embedded into the Rome Statute. On one level, this reliance provides firm foundations for establishing liability because perpetrators simply are not at liberty to inject their own subjective preferences or rationalizations for the commission of war crimes into the law. As only one of many possible examples, consider the case of the U.S. Marines that killed 24 unarmed Iraqi civilians in the village of Haditha by entering their homes following the death of one Marine from an improvised explosive device. What should have been a swift arc of investigative efficiency became bogged down with rationalizations and red tape that only shifted after the shock of public revelation and recrimination.

The official investigation documented a command culture that devalued the lives of Iraqi civilians, which both contributed to the incident and made the follow-up a low priority. In the official terminology of investigation conducted by General Bargewell: “All levels of command tended to view civilian casualties, even in significant numbers, as routine and as a natural and intended result of insurgent tactics.”[41] The pervasive attitude that all Iraqis were either the enemy or supporters of the enemy, removed the incentive for individual Marines to follow applicable Rules of Engagement that mandate ceaseless efforts to distinguish between combatants and noncombatants. One U.S. Marine, SSgt Frank Wuterich (who entered a plea of guilty at his court-martial but was sentenced to only 90 days confinement, which was not served pursuant to a pre-trial agreement, reduction to the lowest enlisted rank, and forfeiture of $984.06 per month for three months) remarked that “As for the PID (Positive Identification of civilians versus combatants as required in the Rules of Engagement), we didn’t want my Marines to check if they had weapons first. We told them to shoot first and deal with it later.”[42] His conviction resulted from the issuance of the unlawful order, which violated the Rules of Engagement and in legal terms violated the principle of distinction. In practice, the *lex lata* applicable to armed conflict

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[41] *U.S. Dep’t of the Army, Major General Eldon A. Bargewell, Investigation*, ’Simple Failures’ and ‘Disastrous Results’p. 18 (June 15, 2006), *25.* The first investigation under US Army Major General Eldon Bargewell was notable for the simple fact that a well-regarded Army General was charged with investigating allegations of Marine misconduct. The official investigation resulted in the removal of Lieutenant Colonel Jeffrey Chessani, the commanding officer, and the company commander, Captain Luke McConnell along with another commander, Captain James Kimber, from their duties, along with subsequent courts-martial for key Marines. General Bargewell concluded that: “Statements made by the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to get ‘the job done’ no matter what it takes. These comments had the potential to desensitize the Marines to concern for the Iraqi populace and portray them all as the enemy even if they are noncombatants.” This excerpt is from Army Major General Eldon A. Bargewell’s report, *Washington Post*, April 21, 2007.

[42] Sworn Statement of SSgt Frank D. Wuterich (taken Feb. 21, 2001).

embeds principles of military necessity, discretion, and concepts of reasonableness liberally at the precise points of friction within the law where they are relevant to the actual conduct of military operations. Thus, perpetrators cannot subjectively inject those concepts at their own convenience because they are already baked into the structure of the laws and customs where relevant.

Conversely, the Court is bound by the same normative structure. In other words, because the laws and customs of armed conflict are deeply suffused into the structure of the Rome Statute, prosecutorial discretion and judicial decision-making must respect those barriers. This truism has profound implications for the future of the Court. The Court should carefully analyze the specific facts and evidence in light of the applicable principles drawn from the larger *lex lata* of armed conflict as an essential part of preliminary investigations **prior** to actual charging decisions. Phrased another way, the *lex lata* of the laws and customs of armed conflict are so deeply integrated into the structure of the actual crimes found in Article 8 and the constituent elements as to provide the jurisdictional floor that ought to guide Court practitioners seeking to apply those precepts in good faith.

The *lex lata* of the laws and customs of armed conflict provides the jurisdictional floor for war crimes charging that is embedded in the very fabric of the Rome Statute. As a result, the obligatory duty to initiate an investigation under Article 53(1) is tempered by the caveat that the Prosecutor may decline investigation after "having evaluated the information made available to him or her" and concluding that there is "no reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed." The notion of a jurisdictional floor for Article 8 is a vitally important, but frequently overlooked dimension of its intended functionality. If the established *jus in bello* provides a reasonable basis for inferring that the *actus reus* alleged against a particular perpetrator was permissible (hence lawful under the impetus of the chapeau language) it cannot have been criminal within the meaning of the Statute. Other variations of this theme that could arise in other cases could center on the accepted definitions of a military objective, or of the scope of protected persons, or of the concept of direct participation in hostilities, or a host of other principles. In circumstances where the conduct arguably complied with the established *lex lata*, there would accordingly be no reasonable basis for concluding that a crime within the jurisdiction of the Court occurred. It follows that the Prosecutor should be extremely conscious of the moral and legal imperative to recognize and respect this jurisdictional floor in advance of charging decisions.

Even if the Prosecutor is inclined to ignore established *lex lata* in favor of a firm policy of aggressive charging, there are strong pragmatic reasons for respecting the jurisdictional floor. Article 54(1)(a) requires the Prosecutor to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and in doing so, investigate incriminating and exonerating circumstances equally." Such exonerating circumstances would have to include the information reasonably available to the perpetrator, the operational context for a particular discretionary decision, and an array of factual considerations that might have affected the operational decisions during a military campaign.

Evidence of good faith application of the laws and customs of war or of wholly appropriate exercises of circumstantial discretion permissible under the *lex lata* would fall within this obligatory investigative scope. To reiterate, if the perpetrator indeed committed the *actus reus* of a particular offense, but did so under circumstances authorized by the laws and customs of armed conflict, the jurisdictional floor for charging was not met. Following the investigation required by Article 54, if the prosecutor establishes a factual or legal basis for concluding that the conduct was in fact permissible, then that information ought to promptly be disclosed to the Court and to defense counsel and any pending charges ought to be dismissed. Far better to undertake a careful factual and legal inquiry **prior** to charging in order to preserve Court resources and to enhance overall legitimacy.

Secondly, faced with evidence of a good faith application of *jus in bello*, the Pre-Trial Chamber would likely decline to issue an arrest warrant under Article 58(1)(a) on the basis of doubt whether there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” In any event, it is predictable that uncertainty over the actual legality of the *actus reus* would lead the Pre-Trial Chamber to decline confirmation of charges based on the conclusion that there is not “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” The hearing envisioned in Article 61 (Confirmation of charges before trial) is adversarial in nature, and the Prosecutor should carefully assess the actual charges in the light of all available information and a critical analysis of the evidence in light of the established *lex lata* prior to seeking confirmation of charges. Most military practitioners would strongly support the pursuit of accountability against those whose conduct violated applicable professional norms; they would, nevertheless urge the Prosecutor and Pre-Trial Chambers to be extremely diligent in correctly applying the precepts found in *jus in bello* and embedded in the Statute in order to prevent inappropriate chilling effects on the lawful conduct of hostilities.

4.2. Status of Forces agreements

In a related jurisdictional consideration, the Court should develop a firm policy with respect to the international agreements that accompany almost any military deployment. Military practitioners around the world would appreciate the predictability in planning and conducting operations that would accompany a stated Court policy *vis-à-vis* status of forces agreements that are ubiquitous aspects of armed conflicts or peacetime deployments. At the international level, United Nations Security Council Resolution 1973[43] empowered nation states to “use all necessary means” to protect civilians inside Libya and to enforce the no-fly zone over Libyan territory. This Chapter VII Security Council decision was implemented in the shadow of its prior grant of jurisdiction to the Court over the situation in Libya by virtue of Resolution 1970. The Security Council followed widespread state practice by specifying a formula for jurisdictional allocation over potential war crimes. Paragraph 6 of Resolution 1970 specified that “nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the

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[43] http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)

exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State." Military prosecutors would vehemently object to any attempt to characterize this provision as a grant of impunity for war crimes as it merely serves to preserve the fully panoply of prosecutorial prerogatives to the sending state.

In light of the fact that the Court's juridical authority over the situation in Libya originated in the Article 13(b) authority of the Security Council, there was no doubt expressed in international circles that the grant of exclusive jurisdiction to the nationals of non-States Party violated international law in general or obviated the object and purpose of the Rome Statute in particular. The extension of Court based jurisdiction operates irrespective of state consent in a particular case of against a particular perpetrator or even an express waiver of jurisdiction by virtue of that State's prior ratification of the Rome Statute. With respect to the situation in Libya, the jurisdictional allocation is uncontroversial and universally accepted. It must also be clearly understood that the limitation of Court jurisdiction in the Libya situation has no bearing whatever on other existing grounds for national jurisdiction derived from other sources, such as universal jurisdiction based on violations of the grave breach provisions of the Geneva Conventions.

However, in the interests of intellectual consistency and operational predictability, the Court should specifically promulgate policy guidance with respect to the treaty based allocation of jurisdiction that is a normal corollary to military deployments. Even if the *actus reus* of a particular offense might have been committed, the Court must make a legally defensible, completely objective assessment that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" as required by Article 58(1)(a). Under the tenets of Article 12, personal jurisdiction attaches only on the basis of territoriality or nationality; the Court has no treaty basis under the Rome Statute for claiming a universal scope of punitive authority over all potential perpetrators in all circumstances. The nationals of State Parties and non- State Parties are dissimilar in that citizens of states subjected to treaty based duties to comply with the Rome Statute may be subject to nationality based jurisdiction in the Court even when the receiving state had no basis for asserting territorial jurisdiction. In the author's view, any State Party to the treaty may transfer *its own* claim to territorial jurisdiction to the Court, or to any other entity, as a matter of its own sovereign prerogatives. There is nothing in international law that prohibits a sovereign state from transferring its own jurisdictional right to any other entity irrespective of the consent of a third party state that might have an equally colorable claim to jurisdiction. Any state can transfer rights it possesses to any other entity in the absence of an express prohibition limiting such transfer of rights. Indeed, as a normal operating principle, in such instances where two states exercise concurrent jurisdiction, transfer of authority from the State Party to the Court does not vitiate the jurisdiction of the non-State Party insofar as jurisdiction still exists on the national level; but as a practical matter the concurrent jurisdiction of the non-State Party is displaced by the sovereign act of the State Party. The competing jurisdictional claims would then become a political rather than a legal matter

Logically then, the act of transferring territorial jurisdiction over a state that is not party to the Rome Statute can be done perfectly consistent with the Vienna Convention on the Law of Treaties *if the territorial state has a colorable claim to jurisdiction at the time of the alleged war crime*. In this sense, the territorial state would be transferring its own authority in the same manner that the co-owner of a house could choose to sell or to transfer his/her property right without the consent of the other co-owner. On the other hand, if the territorial state did not in fact have a legally cognizable claim (*i.e* possessory interest) to territorial jurisdiction at the time of the alleged offense/s then it had no power to transfer jurisdictional authority that it didn't possess. In practice, almost every military operation is accompanied by a specific bilateral treaty, or at the very least by an exchange of diplomatic notes, that limits the exercise of territorial jurisdiction for the purposes of the armed conflict or military deployment. As an example of a frequently encountered provision, Afghanistan relinquished any claim to criminal jurisdiction over the nationals of the United States by accepting that they are "accorded status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961." Such status [termed A&T P&I by military practitioners] is just one notch below full diplomatic immunity enjoyed by the Ambassador upon delivery of his full powers instrument to the sovereign government. In other words, the basic law of the Vienna Convention is absolutely clear that persons enjoying A&T P&I status are fully immune from host nation criminal law for all purposes at all times, and subject to limited civil immunity for acts undertaken in their official capacity. Thus, from December 12, 2002, the United States had exclusive jurisdiction over any U.S. national alleged to have committed any cognizable criminal offense within Afghanistan.

The voluntary surrender of territorial jurisdiction in the context of military operations is distinct from other agreements that purport to limit the transfer of any persons to the Court as envisioned in Article 98(2). A state party that has no existing basis for exercising territorial jurisdiction simply has no legal basis for undermining the exclusive personal jurisdiction possessed by another nation. In other words, if the State Party had no jurisdiction over crimes committed on its territory by virtue of having ceded such exclusive jurisdiction to another state, there would be no basis under the Rome Statute to transfer jurisdictional authority that it did not possess at the time. Thus, the State Party could not transfer territorial jurisdiction over the class of persons that it had already relinquished by its own sovereign authority despite the language of Article 12 that ostensibly grants such jurisdiction to the Court. In time, the Assembly of States Parties could amend Article 12 to specifically prohibit States Parties from entering into any agreement that curtails territorial jurisdiction that would otherwise be within the Court's purview. One thing is clear, in the absence of a Chapter VII Security Council Resolution that would override the discretion of sovereign states by virtue of Article 12(7) of the U.N. Charter, the Court has no articulable basis for asserting an independent claim to jurisdiction outside the scope of the Rome Statute. Court authority derives from the consent of sovereign states, and a State Party is not at liberty to disregard its grant of exclusive jurisdiction to another state absent a waiver of jurisdiction by that state. Thus, it follows that for the purposes of military deployments in which states routinely allocate exclusive jurisdiction over criminal acts, the Court cannot unilaterally assert that "there are reasonable grounds to believe that a person has

committed a crime within the jurisdiction of the Court" unless there is in fact a valid basis for such jurisdiction. Clarifying the scope of Court authority in the face of such frequently utilized treaty obligations would certainly enhance the efficiency of investigations and perhaps garner additional investigative support from military authorities, even as it would preserve the Court's overall credibility and legitimacy.

4.3. Protecting the Precepts of Command Responsibility

Commanders throughout history recognized that the humanizing influence of the norms for conducting conflict is a vital dimension of a combat effective unit that should not be ignored or devalued. An effective commander issues plans and guidance prior to the onset of operations, and sets a command climate of professionalism in which he or she empowers subordinates as the conflict unfolds.[44] The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, fatigue, factual uncertainty, moral ambiguity, and horrific violence conducted under the dual impulses of surging adrenaline and inculcated training.[45] The historical grounding of the laws and customs of war as deriving from the unyielding demands of military discipline under the authority of the commander or king explains why the legal status of lawful combatant was reserved for the armed forces fighting for a State or to paramilitary forces incorporated into those armed forces.[46] In other words, Cicero was simply incorrect when he postulated that law was

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[44] *Commentary to Protocol* I, Art 87, ¶ 3550, available at http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument ("Undoubtedly the development of a battle may not permit a commander to exercise control over his troops all the time; but in this case he must impose discipline to a sufficient degree, to enforce compliance with the rules of the Conventions and the Protocol, even when he may momentarily lose sight of his troops.")

[45] *See The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* vii (Dietrich Schindler & Jiri Toman eds., 1988).

[46] This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. ("[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war"). The Hague Regulations embodied this legal regime as follows:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

For a side by side comparison of the evolution from the 1899 language to the 1907 multilateral text, *see* J.B. SCOTT (ED.), THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, . 100-27 (1918). It

silent during war; or in the best possible light, his opinion betrayed an inaccurate appreciation for the dynamics of waging war. In fact, Seneca, also writing in the Roman period, called for significant restraint especially during times of armed conflict in his essays "On Anger" and "On Mercy."[47]

Even in the face of the powerful psychological tendencies that are the *sine qua non* of combat, the principles of the law of armed conflict became an embedded aspect of military professionalism. The *jus in bello* obligates an individualized consideration of the propriety of each and every military action against the backdrop of the established normative framework discussed above. Writing in 1625, Hugo Grotius documented the Roman practice that "it is not right for one who is not a soldier to fight with an enemy" because "one who had fought an enemy outside the ranks and without the command of the general was understood to have disobeyed orders," which offense "should be punished with death."[48] Grotius explained the necessity for such rigid discipline as follows: "The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned, or, with the increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided." Military doctrine admonishes that leaders must focus "on the impropriety of the motives of vengeance, cruelty, and hatred. Once the enemy is viewed as something less than human, atrocities are more likely to occur A generalized hatred toward the enemy leads too quickly to events like those at Beirut or My Lai. In light of this awareness, General David Petraeus wrote[49] to "Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq":

> Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. This strategy has shown results in recent months. Al Qa'ida's indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it.

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should be noted, though, that there is a difference between the way the term 'combatant' was used in the law of the Hague Convention and the way it is used today in the law of Additional Protocol I.

[47] Seneca, *On Anger*, in SENECA: MORAL AND POLITICAL ESSAYS 97-98 (John M. Cooper and J.F. Procope, eds., 1995); and *On Mercy*, pp. 132-134. Also see NANCY SHERMAN, STOIC WARRIORS (2005); Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 8 (2005).

[48] HUGO GROTIUS, THE LAW OF WAR AND PEACE Bk. III, Ch. XVIII, p. 788-789 (Francis W. Kelsey trans., Oxford Clarendon Press 1925) (1625). In this respect, Grotius is consistent with Cicero who conditioned his Just War rationale in part on the identity of the participants by declaring that only the state could properly conduct warfare and that a "soldier not inducted by oath could not legally serve." Roland H. Bainton, CHRISTIAN ATTITUDES TOWARDS WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL REEXAMINATION 41(Abingdon Press, Nashville 1960).

[49] *See, e.g.*, Letter from Gen. David H. Petraeus, Commanding Officer of Multi-National Force-Iraq, to Multi-National Force-Iraq (May 10, 2007)(copy on file with author).

The commander is responsible both for decision-making needed to employ a disciplined force and for the sustained combat readiness and training of those whom he or she is privileged to lead. As famed historian S.L.A. Marshall noted, "when an officer winks at any depredation by his men, it is no different than if he had committed the act."[50] The implicit permission given by a present authority figure by acquiescence and silent approbation has been labeled "atrocity by connivance."[51] This principle extends to command at all levels, and in all contexts and applies without limitation to commanders who assume control of organizations by conventional means or after the death or incapacitation of a previous leader. Each individual military actor remains an autonomous moral figure with personal responsibility. This explains the bright line principle that there is no defense of superior orders in response to allegations of war crimes.[52] At the same time, commanders have the most at stake in the success of the mission both personally and professionally. "To command" is an active verb. The independent emergence of the principle that the commander's orders operate with the force of law to limit the application of violence in widely disparate cultures and historical periods suggests that it is more than just a legal technicality, but instead is fundamental to the nature of warfare itself. Of course, the commander does not always speak with the authority of law behind him or her. But the best commanders are those that convey the proper sense of the restraints of established *jus in bello* for all of those who serve under them. The bedrock of military professionalism that is inherent and indistinguishable from the exercise of effective control over military operations explains the necessity for Article 28 in the Rome Statute.

4.3.1. The Limits of Co-Perpetratorship

Despite the sweeping inclusion of groundbreaking provisions related to command and superior responsibility in Article 28 of the Rome Statute, both the Prosecutor and Pre-Trial Chambers have displayed a remarkable reticence to charge Article 28 as a mode of liability in early cases. In *Lubanga*, Pre-Trial Chamber I found that there are reasonable grounds to believe that the perpetrator founded the military organization and served as its Commander-in-Chief throughout the relevant time period. Remarkably, the provision of the Rome Statute applying the precepts of command responsibility was avoided both by the Prosecution and the Pre-Trial Chamber despite its patent applicability.[53] In lieu of extending the principles of command

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[50] Gen. S.L.A. Marshall, *The Officer as Leader* (1966) 274.

[51] M. Osiel, *Obeying Orders* (1999) 189.

[52] Report of the International Law Commission Covering its Second Session, June 5–July 29, 1950, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316, *reprinted in* The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents, at 1265–66 (Dietrich Schindler & Jiri Toman eds., 1988).

[53] W. A. Schabas, *An Introduction to the International Criminal Court* (2007), 212-213.
See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008, paras. 477-518; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-14-tENG, para. 78 (incorporating Claus Roxin's interpretation of the Eichmann judgement into international jurisprudence and eschewing traditional principles of command responsibility); *Situation in Uganda,* Warrant of Arrest for Joseph Kony Issued on 8th July 2005 as Amended on 27th September 2005, Case No. ICC-02/04-01/05-53, 27 September 2005, available at http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF (adopting the same theory of liability).

accountability onto a non-traditional, non-linear battlefield in which the commanders utilized fluid mechanisms of control in the midst of rapidly evolving operations, the Pre-Trial Chamber resorted to a theory of individual responsibility known as 'co-perpetratorship.' Similarly, Pre-Trial Chamber I found that as the President and Commander-in Chief Omar Al Bashir 'played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation' of the massive campaign of criminality against civilians in Darfur, but issued the warrant only on the basis that he acted as an 'indirect perpetrator' (or, in the alternative, an 'indirect co-perpetrator') within the meaning of Article 25(3)(a) of the Rome Statute.[54] Despite evidence that heIn part, the

In the early cases, the Prosecutor and Pre-Trial Chambers strained to avoid invocation of the precepts of command in favor of resuscitating an outmoded and arcane theory. By extrapolating Roxin's organizational analysis drawn from the 1962 trial of Adolf Eichmann, the ICC generated a wholly new category of individual responsibility in which both superiors and subordinates in military organizations are held responsible as co-perpetrators, acting through an organizational apparatus.[55] These developments are even more notable given the rejection of the theory by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on the basis that 'co-perpetratorship' as promulgated by the ICTY Trial Chamber did "not have support in customary international law or in the settled jurisprudence of this Tribunal."[56] Moreover, the Roxin theory was built on the assumption of a "rigidly formal bureaucracy" patterned on the model of the Prussian organizational model in which authority is channeled into defined hierarchical structures in which compliance is assured based on uniformity of expectations and goals.[57]

The irony of the ICC approach is that the ICC has grafted Roxin's theory into a non-linear battlefield in which non-state actors operate in precisely the opposite manner as a westernized military hierarchy. Secondly, and perhaps more ominously, the ill-fated marriage may help ensure acquittal of the perpetrators almost by definition because defense counsel need only demonstrate a lack of power "to replace sullen juniors with more enthusiastic drones."[58] The important point is that the ICC is artificially injecting its own view of the law rather than sustaining strict fidelity to the intent of states parties. Such an approach even in cases where the evidence would otherwise support a finding of effective control is a major shift from the precepts

[54] See *Prosecutor v. Omar Ahmad Al Bashir,* Warrant of Arrest, Case No. ICC-02/05-01/09, 4 March 2009, available at http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf (Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the 'apparatus' of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan).
[55] See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06, 29 January 2007, paras. 327-67, available at http://www2.icc-cpi.int/iccdocs/doc/doc266175.PDF.
[56] *Prosecutor v. Milomir Stakic*, Judgment, Case No. IT-97-24-A, 22 March 2006, para. 62.
[57] Mark Osiel, *Making Sense of Mass Atrocity* (2009), 100.
[58] *Ibid*., at. 101.

of individual responsibility that embodies a regrettable "recollectivation of responsibility"[59] because of the broader conception of the entire military organization as a unified criminal activity.

The current ICC approach is likely to prove irreducibly flawed in the end because any organization united under the authority of a superior will, by definition, exist with a common purpose. That is the very essence of authority and command. Overreliance of co-perpetratorship as the defining form of liability within military and para-military organizations would come dangerously close to strict liability for any perpetrator in a position of effective control, however briefly. In the abstract, the law is clear that superiors cannot be convicted on the basis of strict liability by virtue of their position alone.[60] The decision to confirm charges against warlords in the Democratic Republic of Congo on the basis of "indirect co-perpetrorship" appeared to demonstrate strong disinclination to rely on the core precepts of Article 28.[61] The pathway chosen by the ICC endangers the foundations of individual responsibility because superimposing an extended version of joint responsibility onto a non-state organizational structure leads inexorably to a system of strict liability.

Though *ad hoc* readjustments of the theories of individual responsibility may provide a result oriented mechanism for affixing criminal responsibility, they fail to understand the essence of the criminality at issue for all fighting organizations – that it is the fielding of the fighting organization without the proper safeguards that is the root of the criminal behavior. International law places a heightened responsibility on commanders who field a fighting organization on the basis of their authoritative control of the application of violence. This principle in turn requires that accountability ensue for commanders who fail to exercise appropriate control over the operations of their subordinates on the basis of their inherent duties as commanders. Any military or para-military organization seeks to use 'deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives.'[62] Indeed, the 'first basic need for an insurgent who aims at more than simply making trouble is an attractive cause' which permits supporters to be recruited and over time gives the insurgent 'a formidable,

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[59] See M. Sassoli, *Transnational Armed Groups and International Humanitarian Law* (2006), p. 36 (Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 6) (noting that a policy of imputing criminal responsibility to every member of the organization by virtue of membership in an organization that participates in crimes creates a disincentive to compliance with international humanitarian law that 'should be avoided'. Sassoli points out that it 'remains of utmost importance to be able to reward the armed group member who respects IHL in order to increase our ability to encourage compliance with IHL and, thus, protect victims').

[60] *Prosecutor v. Laurent Semanza,* Judgment and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 404, available at http://69.94.11.53/ENGLISH/cases/Semanza/judgement/1.htm ('Criminal liability based on superior responsibility will not attach on the basis of strict liability simply because an individual is in a chain of command with authority over a given geographic area. While the individual's position in the command hierarchy is considered a significant indicator that the superior knew or had reason to know about the actions of his subordinates, knowledge will not be presumed from the status alone').

[61] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chuiu*, Decision on the Confirmation of Charges, ICC-01-04-01-07-257 (ICC Pre-Trial Chamber I, 30 September 2008).

[62] M. Howard, 'Temperamenta Belli: Can War Be Controlled?,' in M. Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979), 3.

if intangible, asset that he can progressively transform into concrete strength.'[63] Thus, a 'highly articulated structure of control' is necessary to prevent purposeless and indiscriminate violence that detracts from the larger purpose of the conflict.[64]

To date, the trajectory of the Court's practice risks undermining the law of command responsibility based on the predilection of jurists. A commander, by definition, exercises operational control at the risk of personal criminal liability for the actions of subordinates. The precepts of command responsibility embedded in the Rome Statute represent the culmination of a long developmental arc supported by centuries of pragmatic professional military practice. Article 28 cannot be considered as a secondary or subordinate form of liability because its precepts are too central to the foundation of military professionalism. Command responsibility logically would have provided the strongest basis of responsibility for use by an emerging supranational institution focused on fidelity to its constitutive authorities. Though they would certainly support the independence and judicial authority of Court officials, the drafters of the Rome Statue surely did not foresee such an evisceration of the important principles of Article 28. By reducing the utility of the cornerstone concept of command responsibility that developed to constrain the application of violence during conflicts the Court risks its own effectiveness as an institutional inhibitor of atrocities conducted by the participants in future armed conflicts.

4.3.2. Properly applying the Article 28 Standard

Given the historical context and vitally important role of command authority explained above, military practitioners would almost certainly be in strong concurrence that the phrase "knew or should have known" is an essential and non-transferrable tenet of command. Any person that claims to be in effective control of a military force of any size in the context of any imaginable combat operations should be subject to the "knew or should have known standard of established *jus in bello*. The charges against Jean-Pierre Bemba were confirmed by Pre-Trial Chamber II on the basis of actual knowledge that forces under his effective control were committing or about to commit war crimes and crimes against humanity.[65] After the Prosecution closed its case on March 20, 2012 and the Defense opened its case in August of that year, the Trial Chamber notified the parties that it reserved the right to amend the characterization of the Article 28 liability to consider whether the perpetrator could also be accountable under the

[63] D. Galula, *Counterinsurgency Warfare: Theory and Practice* (2006), 12.
The first basic need for an insurgent who aims at more than simply making trouble is an attractive cause, particularly in view of the risks involved and in view of the fact that the early supporters and the active supporters – not necessarily the same- have to be recruited by persuasion. With a cause, the insurgent has a formidable, if intangible, asset that he can progressively transform into concrete strength.
[64] *Ibid.*
[65] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424 (ICC Pre-Trial Chamber II, 15 June 2009).

alternative ground that he "should have known" that forces under his effective control were committing or about to commit violations.[66]

In the interest of equality of arms, the Chamber made clear that its right to recharacterize the basis of liability under Court Regulation 55 was contingent hearing all of the available evidence and following the submissions of the Prosecution and Defense. At the time of this writing, the Bemba trial is ongoing and there will likely be no definitive resolution of the basis for individual responsibility or the lack thereof until a trial judgment is issued. Setting aside the arguments postulated by the defense and prosecution teams, and acknowledging the uncertainty of predicting pending litigation, military practitioners would be little troubled to see a conflation of the distinct formulations of *mens rea*. That is one reason why the elements for the war crime of conscripting child soldiers contain an express element that the commander either "knew or should have known" the age of the victims. For a responsible military commander there simply is no distinction between a standard requiring actual knowledge and a broader "should have known standard." Regardless of the mode of liability eventually accepted, military professionals would value the reinforcement of the professional ethos of commandership.

5. Conclusions

Casual readers of this chapter (and perhaps the editors of this volume) may be surprised at its length, or the breadth of issues related to properly charging crimes within the purview of Article 8. *Jus in bello* norms are best preserved when they are understood to be an integral dimension of the mission. For example, the proportionality principle found in Article 8(2)(b)(iv) becomes an embedded aspect of war-fighting on both the horizontal level (by linking disparate units and national contingents) and on the vertical (by binding the strategic, operational, and tactical goals of a military operation). The ICRC categorically maintains that State practice has proven the principle of proportionality to be a norm of customary law applicable in both international and non-international armed conflicts.[67] This remains true despite the omission of a parallel principle in Article 8(2)(e). Accomplishing the mission is a nonnegotiable necessity which in turn breeds a military culture that prizes the selfless pursuit of duty. Correctly applying the precepts of proportionality should seldom if ever force good faith war-fighters into an absolute choice. The Israeli Supreme Court summarized this notion by noting that the authority of military commanders "must be properly balanced against the rights, needs, and interests of the

[66] *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision giving notice to the parties and participant that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, Case No. ICC-01/05-01/08-2324 (ICC Trial Chamber III, 21 September 2012).

[67] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary international humanitarian law* Vol 1: Rules, Rule 14, 46ff (2005)("Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.")

local population: the law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other."[68]

As it expands upon its jurisprudence and practice with respect to the investigation and charging of Article 8 offenses, the Court should remain mindful of Shakespeare's admonition in King Lear that "Striving to better, oft we mar what's well."[69] The Court would advance the cause of justice and reinforce established professional military ethos by accepting the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, understanding the implications of the Status of Forces agreements widely employed in international military operations and promulgating clear guidance to states and military planners around the world, and by upholding the historic principles embedded in Article 28. Thus, the Court can serve an irreplaceable role in reinforcing the larger *jus in bello* context rather than ravaging the laws and customs of war by creating an artificial set of parallel jurisprudential applications.

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[68] Beit Sourak Village Council v. the Government of Israel, [2004] HCJ 2056/04, ¶34 <http:elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm>(*quoting* Yoram Dinstein Legislative Authority in the Administered Territories, 2 lyunei Mishpat (1973) 505, 509)
[69] William Shakespeare, *King Lear*, act.1, sc. 4.