

Introduction to International Law

Final Exam

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First and foremost, the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) symbolizes a clear improvement over earlier agreements and norms pertaining to security, economic and environmental issues in the context of the world's seas. UNCLOS is not necessarily an improvement in all details over its predecessors but above all under the aspect of codification of international law. Had the earlier arrangements still left many contentious issues entirely open, leaving much room to conflicting interpretations of common law, UNCLOS sets clear standards and definitions in most areas, thus providing states and international courts and arbitration entities with a clearer guideline for policy-making and adjudication.

In examining the convention closer, however, we will see that beyond this instrumental value that UNCLOS possesses for the advancement of the process of giving international relations a firmer legal basis, it has not been able to find a satisfactory solution on all issues. Quarrels over fishery rights in the North Atlantic during the 1990s, for instance, have shown that conflict can and does still arise over issues on rights and prerogatives on the seas. While a document of international law can hardly be expected to bring universal happiness and salvation, we will see on various aspects that the balance it knew to strike was a generally beneficial one for the common use of the world's seas for their different purposes. Of the three principal areas of contention: security, economic and environment, it is in the economic realm that, maybe predictably so, the compromise is most unsatisfactory. Yet, maybe the large concession to coastal states that is especially relevant in the longer term, has meanwhile produced a consensus document that brought immediate benefits and has helped regulate maritime affairs in a fairly stable manner for already more than twenty years. So while there are some provisions that have problematic implications, essentially, there are no doctrines that would make UNCLOS a fundamentally flawed document.

A key decision that marks the value of UNCLOS has been to disentangle the various levels of state interests in the sea by establishing a graduated system of rights that strikes a workable, and obviously widely accepted balance between the interest of international maritime trade to open as much of the seas as possible to unhampered transfer and the interests of coastal states in the economic exploitation of marine and subsoil resources.

As territorial waters (plus subsoil and air space) has been defined a zone of 12 miles from the shoreline (or more exactly a defined baseline that evens out irregularities) of the coastal state. While exclusive sovereignty is recognized to each state in his territorial waters, the Law of the Sea Convention has nonetheless understood to counterbalance this claim of sovereignty with the legitimate interests of other states. UNCLOS Article 2, 3 makes this clear by stating that

“The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”

We understand this as saying that sovereignty in territorial water is not absolute – its exercise is conditioned by norms at the international level.

The right of innocent passage (as regulated in UNCLOS Articles 17-19) bows to the fundamental necessity of international seafaring of reliable and direct sea lanes. The terms regulating what is to be considered innocent passage are favorable to most forms of maritime navigation in that it mandates a general supposition of innocent passage for direct sailing through territorial waters on a course chartered to reach the final destination. This is reinforced by the conditions set by Article 24 on the coastal state, establishing a principle of non-discrimination among vessels intending to pass through its territorial waters. The terms aimed at protecting the security interests of the coastal state do clearly specify what constitutes a breach of the general supposition of innocent passage. It therefore does not leave any wide and potentially arbitrary definitional power with the coastal state which this might abuse to effectively bar most maritime traffic from its waters. The list of violations of innocent passage (UNCLOS Article 19, 2) is still extensive enough to go beyond direct military risks to national security, and includes others from the economic sphere (fishing, research/exploration) and environmental sphere (willful and serious pollution).

Yet, these provisions are not fully able to resolve conflicts of interests that arise between the presumption and privilege of innocent passage and legitimate security interests of the coastal state. At least two such conflicts spring to mind. The first is of military nature, the second touches the economic and ecological interests of the coastal state.

A first conflict arises from conceding the right of innocent passage also to warships as long they abstain from any threat or use of force in combination with the leniency given to a wide notion of “continuous and expeditious” as implicit in Article 18, 2. Are modern warships with their capabilities for targeted and immediate strikes not inherently a threat of force? How would we judge a case where a naval power has a quarrel with a coastal state and has placed demands or even an ultimatum to comply with the demands on the coastal state, and then, in this situation, a few warships of the naval power come along to “innocently pass” the territorial waters of the coastal state, not taking their passage too hurriedly? While the warships might themselves engage in none of the activities that would infringe on innocent passage as collected in Article 19, 2; their mere presence given the tense relationships between the two countries may very well be felt as threatening. Yet, since at the heart of the problem we have the unequal power capabilities that allow the exertion of pressure in international relations, the resolution will hardly be found in the field of the Law of the Seas. Less so since the distance of 12 nautical miles that might have helped against earlier generations of warships with mounted artillery, it is no relevant *cordon sanitaire* against cruise missiles. And outside of the 12 mile-zone of territorial waters, the foreign warships are even free to threaten and exercise with weapons.

Secondly, there is a tension between the terms of Article 21 and Article 24 that becomes relevant in some fields of regulative efforts by the coastal state. While Article 21, 1 a) in conjunction with 1 d) and f) would suggest that the coastal state can demand minimum norms as to the technical details of the vessels claiming innocent passage through its territorial waters, Article 24, 1 a) could be construed to contradict such efforts as “having the practical effect of denying or impairing the right of innocent passage”. We can find this tension illustrated in attempts to make a double-hull required for tanker ships after several catastrophic shipwrecks e.g. off the coast of Spanish Galicia or the French Pas de Calais. Especially in straits and relatively shallow waters the safety of navigation is directly affected by shipwrecks; in any case, an immediate and severe threat for the environment of the coastal state and the living resources of the sea are involved in the sinking of any oil tanker. Such safety requirements, though, aim exactly at having the effect that Article 24, 1 a) prohibits. Only if they can exclude single-hull tankers from passing through their territorial waters – even if only innocently - will coastal states be able to achieve more security against massive oil pollution of their shores. These conflicting provisions do not even dissipate in the exclusive economic zone (EEZ) that as to navigation has supposedly already a “high seas”-character, but Article 56, 1, b, iii) concedes to the coastal state the jurisdiction with regard to the protection and preservation of the

marine environment. How such jurisdiction could be exerted in any meaningful way without regulating the safety of navigation and pollution standards is unclear.

The contentious question therefore is, how much risk to its economic and ecological well-being does a coastal state have to accept for the ideal of free maritime commerce, and how much can be required of ship-owners and naval states to ensure safety if they wish to profit from innocent passage. Since it appears unlikely that Article 19, 2 h) can be claimed to apply here (are single-hull tankers a form of gross negligence that would characterize any resulting pollution as willful?), UNCLOS seems to be agnostic on this conflict within its provisions.

In the regulations that were adopted in UNCLOS on the major international straits, the coastal states improved their legal control over these waters vis-à-vis preceding conventions, such as the one from 1958. By universally declaring territorial waters to cover a distance of 12 nautical miles from the shore-baseline, most of the key straits to maritime traffic had effectively transformed them into sovereign territory of nation-states. For non-straits states, this represented a considerable deterioration over the earlier situation where many straits had a section of high seas in their middle. Article 38, 1 in particular constitutes a redefinition of the principle upheld by the ruling of the International Court of Justice on the Corfu Straits. Such straits where a seaward alternative exists are now no longer considered as principal international waterways where the “right of transit passage (...) shall not be impeded”¹. Such straits could for instance now be mined to generally impede passage while not discriminating against any particular nation or vessel. For it is not directly clear whether this would be a violation of Article 24, 1: in effect such a closure of the 'internal straits' would merely impose a detour through an alternative part of the coastal state's territorial waters, not per se hamper the innocent passage to an extent of making it impossible.

Also, the concession that straits-abutters had to make in return, granting “transit passage” even if to “all ships and aircraft” relinquishes less control than the provision on innocent passage does. “Transit passage” as defined in UNCLOS Article 39 speaks of “duties of ships and aircraft during transit passage”, rather than merely taking up a task of definition as Article 18 had done for “innocent passage”. In particular the provision “proceed without delay” leaves less leeway to the ships making passage.

This provision, however, appears only reasonable given the different nature between territorial water in general and straits as the crucial bottlenecks of maritime traffic. A delayed passage, and continued presence of a warship or submarine at one of these points could allow the foreign naval power letting whose vessels continuously cruise their to take the role of a virtual arbiter of right of

1 United Nations Convention on the Law of the Sea; Article 38, 1

passage through these straits by means of implied but easily perceived force. In this context the provision that submarines can pass only not submerged and have to fly their flag is important in forestalling an usurpation of straits by any major naval power. Submerged boats could hardly lay any convincing claim to good faith. Especially at these narrow passages on the international maritime routes it is important that captains have good faith in the security of this waterway.

In the field of economic prerogatives, the concession of a 200-mile zone of exclusive economic rights (EEZ) to coastal states represents a considerable shift in the favor of coastal states, especially those with a long shoreline along the major oceans so that they can fully exert the claim over a 200-mile zone, not having to reduce it due to overlapping claims. Earlier claims had oscillated between three and twelve miles. As a consequence of UNCLOS, states with relatively small populations but long shorelines such as Chile, New Zealand, Argentina, Australia, or Canada have obtained exclusive control over the economic exploitation of a large part of the world's fishing grounds. The continuously rapid growth of world population and the resulting nutrition needs have further increased the commercial value of this privilege.

In turn, the increased fishing activities at an international level also raises some concerns about the sustainability of the current approach to fishing. Since many fish are highly migratory, and the marine fauna in general is a complex and interrelated ecosystem, the fishing policies pursued in either part of the EEZ or the high seas is likely to have consequences for fishing yields elsewhere. In such a context, the need for a collectively managed effort to conceive of and enforce sustainable fishing policies has become more urgent. To this end, the relatively concentrated system of major fishing grounds holders that the 200-mile rule has established may actually be helpful in bringing such a managed system about. The provisions of Article 61 on the "Conservation of the living resources", consequently assign to the coastal state the right to determine the allowable catch as well as the duty to ensure the maintenance of living resource against over-exploitation. A leading role for coastal states is also implied in Article 63, 2), which demands that they seek a cooperation with other states for the conservation of stocks of fish that are endemic in and beyond the EEZ. This package of rights and obligations would mark the coastal states as the evident leaders of any wider system of fisheries management. They can therefore be the catalysts for a sounder economic use of living maritime resources.

From a perspective of development policy, the assignment of 200-mile EEZs, has brought many coastal states that are poor or underdeveloped the possibility of profiting from the resources of the sea in a form that would support their efforts at economic and social development. Article 62, 2

specifically provides for these cases where the coastal state, presumably a poor or underdeveloped one, does not have the capacity to harvest the allowable catch himself and might consequently sell these fishing rights. Unfortunately, such a right is not necessarily a blessing. Given the limited state capacities for policing and administration, other states may just engage in high-seas poaching of stocks of fish or may negotiate excessive fishing quotas in the face of an inability of the coastal state to correctly evaluate an allowable catch that permits sustainable fishery. More generally, both the income from sub-contracted fishing as well as from exploitation of other natural resources to which the EEZ assigns exclusive access (Article 56, 1) may actually destroy the developmental process in its economic *and* political aspects, turning the country into a rentier state.²

It is with respect to the natural resources of the continental shelf contained in the EEZ that the appropriation of a 200-mile-zone represented a massive transfer of valuable resources under the custody and exclusive sovereignty of coastal states. Indeed, the compromise as reflected in UNCLOS Article 76-77 even extends the rights over the continental shelf even beyond the 200 miles, where as Article 82 specifies some small part of the revenues needs to be shared with the rest of the international community. Except for the geographical argument of closeness and contiguity which however more than 100 nautical miles out at sea appear at least somewhat shaky, there is no evident claim of rightful possession that any coastal state could credibly make. As to the continental shelf beyond the territorial waters there had been no precedent that would establish an *uti possidetis* claim to the submarine soil.

And it is in connection to the property rights that EEZ effectively assigns to the coastal state as its sovereign right, that the most dangerous potential of UNCLOS can be found. Given the wide-ranging rights and potential revenue streams an EEZ implies, states that still have unsettled border issues may harden their respective stances, as every single rock out at sea now becomes potentially valuable for the subsoil resources that come with it as the EEZ perimeter gets extended. The conflict over the Spratley islands in the South China Sea is an ongoing illustration of this danger to international peace and security that springs from this part of UNCLOS. To rectify these distorted incentives that might bring countries to armed conflict, a provision either in UNCLOS or at other relevant position would be needed that breaks any automatism of EEZ extension as a consequence of border changes that are not brought about in a peaceful manner. Somehow, the incentives for rivalry over the continental shelf need to be reduced.

The model of the International Seabed Authority in its abridged form could have provided also a framework for a managing of a part of the continental shelves, had they not been assigned in their

² See for instance the cases of Equatorial Guinea and Saudi-Arabia

full extent to the coastal states. It is not evident how a part of the continental shelf, more than 100 nautical miles from the coastline should be any less of a “common heritage of mankind” than the deep sea bed. That at least in this field a solution could be found that does not make geography the final arbiter of rights to the natural resources of the seas is a positive sign. A sign, which at the same time also points to what else might have been possible.

In the field of conflict resolution, something that is of eminent importance if a regime is to serve the purpose of international law as catalyst for peaceful settlement of disputes, the Law of the Sea regime is surprisingly unspecific. It generally grants states the right to choose any form of dispute resolution they can agree on, accepts binding clauses of more specific treaties as overriding, as well as offering a new tribunal for the regime itself, the International Court of Justice, an arbitral tribunal or a special arbitral tribunal for fisheries, pollution, research and navigation.³ In my mind, a more clear-cut decision for either using channels specified by particular treaties on the issue in question or having to direct oneself to the Hamburg tribunal for Law of the Sea might have resulted in a more concise dispute settlement. Since an international law regime shows its value principally at two stages: in providing a basis for a daily interaction within a clear framework and in expediting the resolution of conflicts that occur nonetheless, it would have to be considered a significant drawback, should this wide array of options indeed hinder rather than catalyze the settlement process.

In conclusion, the international regime on the seas is a compromise in the full meaning of the word. It has shortcomings that appear lamentable from a maximalist perspective, and it leaves questions open or only half resolved that should have been answered. And yet, it has brought tangible results, not least a significant degree of stability and certainty in the realm of international seaborne commerce that is so central to the functioning of the world economy.

In brief, the Law of the Sea regime is what international law at its best always is: a work in progress that brings some progress as it works.

³ cf. Dunoff, Ratner, Wippman 2002:677

Question 5: The International Criminal Court

It is hard to imagine that one could easily find someone to criticize the mere existence of either the International Criminal Tribunal on the Former Yugoslavia (ICTY) or the Tribunal for Rwanda. Despite all their shortcomings, their serving as a stage for self-righteous appearances by Slobodan Milosevic and the skewed quantity of trials towards lower level perpetrators, their function of providing a minimal degree of adjudication and judicial retribution for the innumerable violations of basic norms of humanity would be felt as urgently needed, had it not existed.

Both courts were ad-hoc installations as a reaction of the international community acting through the Security Council under Chapter VII. And vividly demonstrated the need for an institution that would permanently take on the role they were fulfilling for particular cases and time: an International Criminal Court. Such an institution would occupy a space in the system of international entities that had so far been left void. The International Court of Justice can only hear cases brought before it by states, the same goes for other tribunals that are also limited in what subfield of international law they are authorized to judge on.

The perceived need for something like an International Criminal Court, led after long negotiations where the United States had voiced several points of criticism, to the signing of the Rome Statutes of 1998 that would give, from the moment of its entering into effect, respective judicial power to investigate and prosecute three fundamental crimes: genocide, war crimes, and crimes against humanity – if they had been committed after the court took up his work. The general purpose of the endeavor was similar to what had been done in Yugoslavia and Rwanda: allow for a prosecution of crimes as part of a healing and stabilization process – in cases where the infractions have taken place under or left a void of legal authorities with the intellectual, organizational and financial resources necessary to reestablish judicial performance.

We will discuss the controversy about the right of existence of the court and the material breaches of international law which its aims to prosecute.

At the base of it all, what is being challenged is the authority of the International Criminal Court to investigate, hear and prosecute certain cases; is whether ICC is a legitimate forum to discuss severe breaches of fundamental norms of war. Or whether it usurps power that rightly belongs exclusively to national courts, the Security Council or not even that as the allegations would reflect norms that were not valid at the time of the infractions.

The classical defense of “*nullum crimen sine lege, nulla poena sine lege*” has been cited by defendants over and over again, claiming that their deeds were not illegal or punishable under

domestic law at the time. The International Criminal Court will be able to encounter such arguments much more relaxed than the Allied Tribunal at Nürnberg. Time has passed and with the passage of time this defense holds even less merit in the three broad categories of crimes the ICC deals with than at any earlier moment. We have to assume that the parts of international law, where most infractions that are likely to be brought before the ICC are so fundamental that they are considered binding even on non-signatory state, and even more so of course for those states who adhere to them. No-one today can credibly claim not to have been aware of the illegality of such acts and the likelihood to be prosecuted after the cessation of hostilities. Most military field manuals include them, and in parallel most military organizations have introduced a structure of oversight and prosecution for any violation of such basic norms. As the justification of the International Military Tribunal at Nuremberg trying individuals in their personal responsibility has pointed out: there is a clear and unequivocal recognition of the rules of warfare in international law and state practice points to an intention to criminalize the prohibition, and earlier punishments of violations by both national courts and military tribunals.⁴ But these norms that the International Criminal Court is called upon to defend, go even well beyond that in their applicability for they represent “principles and rules of humanitarian law reflect 'elementary considerations of humanity’”.⁵

The subject matter of the ICC is therefore far from being a revolutionary change in the field of international law or a radical redrawing of the defensive lines of state sovereignty. It sticks to basic tenets of human rights law in armed conflict, that form the kernel of rights under the conditions of a competitive relationship.

The Security Council was the authority that set up the special courts for Yugoslavia and Rwanda during the 1990s. The International Criminal Court is not the third creation by Security Council resolution but rather an institution emerging from the joint will of a number of states that have signed and ratified the Rome Statutes which serve as the operating code for the court. The ICC, thus, is the product of a multilateral autogenesis.

As such, the ICC by no means stands outside the framework of the monopoly for legitimate power that currently is believed to fully reside with the Security Council. Since power is not on the agenda of the ICC, it does not infringe on the UNSC monopoly. And with its birth out of a multilateral treaty, the most we can expect to find there is the transfer of national sovereign rights to prosecute to a transnational body.

Furthermore, the International Criminal Court can claim to be the realization of commandments

4 Dunnoff, Ratner, Wippmann 2002:563

5 Dunnoff, Ratner, Wippmann 2002:583

included in the norms of law he is supposed to uphold. The intent of the contracting parties to the Geneva conventions that they be enforced is not only implicit in the mere act of concluding such conventions (after all, what would one negotiate, formulate and sign such documents of international law for if they are not to be applied?) but is explicitly mentioned in Article 49 of the Geneva Convention (I) “For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”:

“Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following, of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.” (emphasis added)

So that at least in the case of grave breaches of this convention, there is an obligation on all high contracting parties to enforce its provisions by searching, capturing and putting on trial those charged with committing the breaches. There is no good reason why the legislation that this Article calls for should not be able to take the form of a multilateral arrangement that establishes a judicial authority like the ICC. It is the ICC in front of which defendants will then be brought.

The ICTY, created in 1993 by a decision of the United Nations Security Council, had already been an effort for trying persons charged with having committed grave breaches of the Geneva Conventions. The ICC intends to continue that work in the same spirit but with a broader horizon. Whether breaches that are not explicitly referenced to criminal liability (e.g. Common Article 3 on internal conflict) can be prosecuted and fall under the jurisdiction of the ICC is another question.

In a quick summary we see that the key provisions of the Rome Statutes answer three fundamental

questions about this Court:

1) Is consent of states needed to initiate trial? Of the state where the crime occurred? Or: of the state of nationality of the defendant?

Article 12, 2 sets clear that the court can exercise its jurisdiction if either state where crime was committed or state of which defendant is a national, is partner to the statute

However, there will be no trial if the “case is not of sufficient gravity to justify action by the court” (Article 17,1, d)

2) Who holds the right to initiate an investigation and prosecution? Contracting states? UN Security Council? Court's prosecutor? And: can the Security Council halt proceedings?

Articles 13, 14 and 15 state that either state party can refer to prosecutor or the Security Council acting under Chapter VII; or even the Prosecutor on his own if has information suggesting crimes under the jurisdiction of the court have occurred. He has to have his investigation approved by a Pre-Trial Chamber based upon the collected information on the case.

Article 16: UNSC may defer investigation or prosecution by 12 months at a time, with a Chapter VII resolution

3) Is there a primacy of national courts or complementarity?

No prosecution takes place in the forum of the ICC if national courts are or have already tried the defendants, unless they were unwilling or unable to carry out a trial (due process, impartiality and independence of judicial authorities, or if the trial was supposed to shield the defendant.

What becomes evident from this short overview is that the International Criminal Court is first and foremost conceived as a substitute for the national level of investigation and prosecution. If such judicial activity is impossible to perform in a post-conflict scenario, the ICC stands ready to fill the void. On the other hand there are cases of “rogue states” with which a problem arises if there is some degree of complicity between individuals and the state, and victims are unlikely to find a judicial authority that will take up or can reasonably be expected to treat impartially the cases brought before them. Here, the ICC also serves as a go-between to help victims come to a fair process.

But also one problem springs to mind from these key provisions of the Rome Statutes: could it work as a post-conflict tribunal in case the next Yugoslavia or Rwanda springs up based on its existing set of rules? To me this is not clear but appears dangerously doubtful. If we envision a scenario where such a country would not have recognized the authority of the ICC, and is torn by internal

strife with atrocities: could the ICC persecute the perpetrators? Both the nationality as the territory criterion seem to point back at the state that does not recognize the ICC. If what Article 12 calls “preconditions to the exercise of jurisdiction” are not present, can this be healed? Is there another way to insert an investigation into these crimes into the ICC processes?

If this was not the case, it would reflect a grave failing of the ICC Statutes, for they would leave the procedures inapplicable to some of the most burning cases for which the ICC was supposedly conceived.

Or do these paragraphs reflect the humbling reality that short of intervention and abduction, a signatory power to the ICC Statutes does not hold many instruments with which to bring a defendant before court?

The most acerbic, and important because it is between democracies, criticism has come from the US. From that perspective, the International Criminal Court constitutes a threat to the freedom of action of the US military, a military whose international responsibility would allegedly require and merit a special status. One exempt from persecution by the International Criminal Court. The fear as formulated by William K. Lietzau that *ius in bello* will become a weapon of the weak against overwhelming force, i.e. in his mind the United States Armed Forces, and thus would unduly interfere with the “unique and vital national security responsibilities of the U.S. armed forces and the consequences for their front-line role in carrying out the nation's national security strategy”⁶, however, sounds hollow.

For the mere initiation of an investigation into crimes alleged to have been committed by United States military service personnel hardly is a measure that would directly interrupt in any meaningful way ongoing action tied to the preservation of national security interests. Especially since the primary right and obligation to try any offender remains with the state having jurisdiction over him, which would most likely be military tribunals of the U.S. armed forces in cases involving American service personnel. There is no automatic prosecution, as Lietzau claims, and “well-founded national decision not to prosecute” - whatever would constitute criteria for such a decision to be well-founded – are explicitly recognized in Article 17, 1, b). The formulation in the Rome Statute seems to imply that the proof of burden as to whether such decision not to prosecute was not based on acceptable criteria remains with the court's prosecutor.

Even more restrictive on the court's ability to prosecute is the additional condition that the case be sufficiently grave to justify further action by the court. (Article 17, 1, d) This provision in

6 Dunoff, Ratner, Wippman 2002:609

combination with the limited organizational capability of even the best-staffed international court pose in any case very practical limitations to which cases the court will decide to accept.

Now, to return to the scenarios that the United States is concerned about: for a member of the United States armed forces or any superior in the military and political line of command to end up as a defendant before the International Criminal Court there would have to be grave infractions of the most basic norms on warfare, with some degree of systemic character, *and* an abject failure of the respective authorities of the United States military or civil judiciary to prosecute these. So, if the United States worries about this ever occurring, and then being unable to vindicate effectively the defendants – military and civil – in front of a tribunal that has to apply laws the United States has voluntarily accepted as binding, then every citizen of the United States should worry about the state of its military. Severely doubting the good faith of an international tribunal of judges who can only rule based on internationally (i.e. inclusive United States) accepted minimum norms, and distrusting at the same time one's own ability to convincingly state a good faith case where one is certain to have it, conveys an unhealthy dose of bad faith. If the self-proclaimed greatest democracy of the world feels unable to uphold and enforce minimum norms of warfare that itself has helped to negotiate and accepted as legally binding, indeed, we should be concerned. And the International Criminal Court would be needed even more urgently.

In general, no one would reasonably take the fear of frivolous or unwarranted lawsuits being brought forward against a citizen as a sound reason to disband entire codes of laws or instances of judiciary authority. Unwarranted charges are being dealt with before court, not by abolishing a court. The International Criminal Court will have to work under the same strict norms of due and fair process as any national equivalent can be expected to and offers the possibility of appeal. These should give every defendant and his government ample opportunity to challenge the validity of the charges brought against him.

To be clear: despite my discussion of the controversy in terms of single defendants, it is highly unlikely that the Court will take up any charge against a single soldier for a single breach of the laws of war. The standard that Article 17, 1, d) sets is clear in that without sufficient gravity of the breach the case will not be admitted to be heard at the ICC. As the case of Abu Ghraib shows, cases that warrant a suspicion of systematic and more wide-spread infractions can be reasonably expected to be taken up by national military prosecutors. Only if they fail to do so will the ICC be considering stepping in. If the United States and other countries with a democratically-anchored and supervised military have a minimum degree of confidence in their internal leadership structure, they should not have to worry about the International Criminal Court. The relative exposure of the

United States military in its various missions around the world may yield a number of claims brought against it at the ICC. Unless something is very wrong with the US military, though, it will not have to worry about these ever getting heard and much less of anyone ever getting convicted by the judges at the ICC. It requires some preference for paranoia to suspect that a dominating part of the Pre-Trial Chamber, prosecutors, judges and appeals chambers are motivated by a political, anti-American agenda.

Concerning the controversy about the International Criminal Court's authority to accept any case for investigation or prosecution, the arguments brought forward by the United States that the state of which claimant is a nationality possesses a veto right appear to contradict basic tenets of national and international law that the United States itself founds its judicial system on. In fact, it was the United States who pioneered the universal jurisdiction of its courts in cases that go even well beyond the sphere of the gravest infractions of norms deemed universal, into matters like bankruptcy (Yukos), corporate and national liability and child custody. And neither in this case nor in cases where universal jurisdiction is not involved does any advanced legal system accept a deferring or interdicting veto by the state of whom the defendants holds nationality.⁷ Any practical considerations for the functioning of a legal system therefore demand the application of a principle of 'territoriality'. Not only does the state where crimes occurred have the most immediate and justified interest in its being prosecuted; there is also the overarching risk of destabilizing the entire normative power and credibility of its legal system should any significant part of the population be shielded from consequences of their crimes. It is fully legitimate that states that had crimes committed on their territory by whomever decide to defer their right to investigate and prosecute the alleged perpetrators to an authority such as the International Criminal Court.

The concerns by the United States appears especially disturbing given the nature of the crimes that come under the jurisdiction of the International Criminal Court, and what this implies for their ability to be prosecuted even absent the ICC. Given that genocide, war crimes and crimes against humanity are not only infractions that are violations against basic human rights, and have a relatively long tradition and firm standing in the evolving field of international law we have to consider them as *ius cogens*. As such, they are widely believed to inherently justify universal jurisdiction even of judicial authorities at the national level since the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution".⁸

⁷ cf. arguments by Human Rights Watch, page 611

⁸ Lord Browne-Wilkinson citing "Demanjuk v. Petrovsky"; p. 617

In particular, in any armed conflict, prisoners of war charged with these offenses have to expect to be tried by authorities of the enemy that holds them in captivity. The right to do so is a generally accepted principle, and directly derived from the nature of these offenses as being against universal principles. Neither is universal jurisdiction new as a part of international law. From the late 1970s on, multilateral treaties concluded on crimes such as aircraft hijacking, bombing, attacks and assaults, torture and hostage taking were explicitly calling on individual signatories to either “prosecute or extradite”. This principle is not surprisingly very reminiscent of the ICC's approach to the precedence of national courts to prosecute, unless they are unwilling or evidently incapable so that the case may be transferred to The Hague. In the face of this reality, a court invested with international authority, with specialized judges and a higher degree of impartiality than can be expected from authorities of parties in a conflict, should be a welcome prospect.

And yet, there is a very real issue in not the why and what of the International Criminal Court but the how. Not all cases that will be brought before the ICC will present as neatly clear-cut cases of crimes such as the holocaust, Saddam Hussein's invasions of Iran and Kuwait or the Khmer Rouge's reign of terror. The grey areas of political morality under the conditions of armed conflict is what should rightly concern every political decision-maker in signatory states and those still weighing their options. The chilling euphemism “collateral damage” reflects a sad reality of war time where over and over again decision-makers at the operational level will be confronted with apparent military necessity that would imply death and destruction to civilian lives and property.

It is for this challenge of weighing competing interests and the evident mutual interests in restraint that states felt compelled to bring about regulations that would guide and contain the practices of warfare. The Geneva Conventions and the Hague Conventions of 1899 and 1907 deal with the vexed topic of permissible actions in war, and the dichotomy between what is considered expedient and effective from an operational military vantage point and the overarching desire to spare damage to health, life, and property wherever possible. The Conventions find the conceptual key to this conflict of competing interests in the principle of “proportionality”. Since an assessment of proportionality given the circumstances of an action and the decision that preceded it requires the capacity of the judges to themselves directly understand what was at stake and what were the options, there are two alternatives. Either the demands for the quality of judgment can be fulfilled by seating judges on the panel that all have a background in military affairs or by assisting the judges with a panel of experts who have expertise at the intersection of military affairs and the legal norms decide to guide and constrain it. In both cases, judges will have to guard their impartiality against emotional pressure and role identification, temptations that might occur due to the close

professional association with people from the military realm.

At any rate, the question of proportionality remains paramount, and is in any case in the best interest of any Western military if we assume that these will mainly be engaged in interventions where avoiding open hostility of the population on the ground is an indispensable factor for mission success.

However, lest we forget: the problem of judging “proportionality” does not start at the doors of the International Criminal Court. It is a problem that has to be faced at the national level in exactly the same manner: there may be military officials giving one assessment of why a certain action was proportional, and the authorities of civilian and judicial oversight who might take a very different stand. All democratic countries that have put into place institutional arrangements for the safeguarding of the provisions of the Geneva and The Hague Conventions know this problem. At any rate, the clear provisions in the Rome Statute's Article Article 8,2,b, iv) that the damage caused by an attack must be “clearly excessive in relation to the concrete and direct overall military advantage anticipated”, is rather wider and more respective of the interests of military efficiency than the more vague call for “proportionality” in The Hague Conventions of 1899 and 1907.

It is also true that the “crime of aggression” and its addition to the jurisdiction of the International Criminal Court still represents an open question whose resolution bears both risks and opportunities. In a first instance, however, one should set clear that this contentious issue that is still in the process of deliberation does not in itself constitute any reason why the ICC as an institution should be rejected altogether. If such a standard was applied, most international institutions would need to be discarded, first and foremost the United Nations itself where a skewed and partly anachronistic assembly of five powers can halt any action for whatever reason. Unfortunately, also the politics of international law is the “art of the possible” to quote Bismarck – a reality that citizens from democratic countries should understand and have come to accept better than anyone else. A rationality of political instrumentality therefore provides the adequate guiding principle also in the realm of creating a firmer legal base for international relations. In this respect, the ICC is a step in at least roughly the right direction.

To come back to the contentious issue of adjudicating “aggression”, a very active directing of further steps is certainly needed there. It is beyond doubt that the working-definition of aggression for the ICC can hardly be a negative pattern of a narrow concept of state sovereignty. State practice has moved on because it had to. In a more closely intertwined world, the realm of internal affairs has narrowed. Regional and international repercussions of domestic violations of political and human rights transform them into a very real threat to international security and peace. Blatant and

massive disrespect for human rights in and of itself threatens to dissolve the fine fabric of international legal norms. And yet, state sovereignty remains an eminent defensive right, a negative freedom of states against the arbitrary use of “just wars” by nations with right-setting might. Removing this definitional power from the hands of individual states is rightly considered to be among the key achievement in the process of legally containing international relations. So, state parties will have to constructively work towards a compromise definition of “aggression” that reflects these ambiguities. Any definition will have to guard especially against the temptation of installing an authoritative and unchanging definition of “aggression”. Robbing this concept of its essentially political nature would be a square misfit with the evolving nature of international relations, and hence international law. The Political abhors the Absolute, and any attempt to impose it will be doomed to fail as adherence will erode over time with the changing demands of pragmatically equilibrating conflicting rights.

As the case of NATO's intervention in Kosovo illustrates, a reference to the unequalled authority of the United Nations Security Council to decide on the legitimacy of the use of force is a necessary but not exclusive element for a workable definition of “aggression”. It needs to leave room for cases where a vast majority of member states of the United Nations General Assembly and Security Council are in favor of action, as well as democratically legitimized regional associations directly affected by the risk to peace and security. While Article 52 of the UN Charter explicitly recognizes the role of such associations in the maintenance of peace and stability, particularly in the field of peaceful dispute settlement, the provision of UN Charter Article 53 that no action be taken without authorization of the UN Security Council might need to be handled more flexibly. All means of peaceful settlement having been exhausted, all efforts at reaching a compromise in the Security Council having been undertaken, in cases where the international community is faced with grave infractions of basic human rights and a majority agrees on the need for action, aggression will have to be put into the context of the “what” and “how” of intervention. The ICC's Statutes will have to reflect the awareness that there is an essential difference between wars of aggression for conquest, pillage or extermination, and those that aim at ending conflict, genocide and threat to neighbors and enjoy a broad backing in the international community. The revised reading that has emerged for Article 53 as giving permission to intervene before obtaining UNSC approval if so resolved by a legitimate regional institution should furnish a guideline. Any definition will have to allow for the fact that in this area more than elsewhere, international law is still *lege ferenda*.

Despite these evident challenges that defining “aggression” encompasses, placing this issue and the three crimes already defined in the Rome Statutes in the hands of the International Criminal Court may actually bear beneficial fruit for the management of international relations. Western states are

dramatically confronted with the abject cleavage between the multitude of cases of internal and transnational conflict and their scarce ability to directly intervene. The ICC would complete the continuum of policy instruments to gap this cleavage. Criminal indictments of those who blatantly disrespect human rights, pursue policies of aggression abroad, and wage war in a form that violates the basic norms designed to protect all those engaged in military operations and the civilian population as far as possible are a valuable addition to the inadequately filled toolbox of the international community. As Dunoff, Ratner, Wippman note, we should see “criminal processes as an alternative along a continuum to enforce human rights or humanitarian law”⁹ With the ICC in existence, we should therefore have more hope that something, as opposed to nothing will happen in the face of material breaches of basic human rights norms.

In the end, it is the overarching interest of all in the international community that international law must have – for its own sake – in ensuring it is perceived as having teeth. The International Criminal Court goes to some extent in this direction; working so as to give the paper tiger teeth that might cut. In a next step, he can hopefully be shown how to get access to the best feeding grounds.

9 Dunoff, Ratner, Wippman 2002:562