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Grave Breaches: American Military Intervention in the Late Twentieth- Century and the Consequences for International Law

Calla Cameron
Claremont McKenna College

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Claremont McKenna College

Grave Breaches:
American Military Intervention in the Late Twentieth-
Century and the Consequences for International Law

Submitted to Professor Daniel Livesay

By
Calla Jo Cameron
For
Senior Thesis
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Acknowledgements:

When I was 18, I wrote my first research paper on war crimes and crimes against humanity. By the time I was 19, I had written three more, all centered around the concept of American immunity. These projects left me hopeless about the future of humanitarian law and historical accountability. When I expressed such feelings to my father, he told me something I have not been able to forget: “You cannot let yourself become so jaded by the world that you no longer want to do good in it.” Those words have remained with me, and I had to repeat them to myself several times while writing this thesis, and I am grateful to have heard them. However, I am much more grateful for the endless support both of my parents, Melanie and Brian, have given me all of the days of my life, without which I would not be submitting a thesis at all. My family gave me the greatest two gifts one could receive: unconditional love, and an education.

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Introduction: A Summary of International Laws of War

Our History with Atrocity Crimes

Article 1 of the Treaty between the United States of America and the Cherokee Nation, signed July 22nd, 1779, one of the first treaties the US signed, reads:

That all offenses or acts of hostility by one or either of the contracting parties against the other be mutually forgiven and buried in the depths of oblivion, nevermore to be had in remembrance.¹

Even before the Articles of Confederation unified the American colonies in March, 1781, the foundation of the relationship between the United States and international law had been laid.

This foundation relied, as the above quotation suggests, in the practice of forgiving and forgetting atrocity crimes. The very beginning of American foreign policy dictated that our nation bury our responsibility for atrocity crimes “in the depths of oblivion.” America’s history with international law and international crime has been peppered by instances of war crimes and crimes against peace that are rarely prosecuted because of the United States’ immense power.

¹ Continental Congress, Article 1, Treaty between the United States of America and the Cherokee Nation, quoted in David Scheffer, “War Crimes and the Clinton Administration”, *International Justice, War Crimes, and Terrorism: US Record* (Vol. 69, No. 4, 2002), 1109.

Our nation's relationship with international criminal law, however, has also been one of support and leadership. During the Nuremberg Tribunals, the State Department effectively merged war crimes and human rights by viewing them through a politically universalist, state-centered prism that made the prevention of cruelty a policy priority, write Liliana Riga and James Kennedy in their study of the emergence of the human rights movement.² America's leadership during Nuremberg altered the narrative about state-sanctioned violence, transforming international legal theory from one respecting sovereignty above all into a system that made human life a priority.

The duality of the United States' relationship with international criminal law and human rights atrocities is a fascinating theme that weaves through all of American history, but most distinctly demonstrates the contradictory nature of American foreign policy in the latter half of the 20th century. America is both protector of human rights and perpetrator of human rights atrocities, global police force and aggressor. The Cold War exacerbated the tensions caused by American military dominance. The international political and physical power of the American military allowed the United States to do as it pleased in the 20th century with few consequences, but that power also brought watchfulness from the global community and an expectation that the United States would intervene when rogue states or leaders committed crimes against humanity. The international legal community has expected the United States to act and illegally intervene in some situations, but to pursue policy changes peacefully through diplomatic channels on other occasions.

² Liliana Riga and James Kennedy, "Putting Cruelty First: Interpreting War Crimes as Human Rights Atrocities in US Policy in Bosnia and Herzegovina," *British Sociological Association Journal* (Vol. 46, No. 5, 2012), 862.

For example, when Slobodan Milosevic terrorized the Balkan states with his violent brand of Serbian nationalism in the 1990s, human rights monitors, refugees, and American citizens pleaded with Western forces to prevent Milosevic's ethnic cleansing campaign from becoming a genocide.³ When NATO illegally entered the conflict by bombing Yugoslav military targets, scholars and onlookers praised the Clinton Administration for bringing a war criminal to justice while also arguing that the United States had committed crimes against peace, and breached its treaty obligations.⁴ This duality does not reflect two mutually exclusive arguments, but rather, two conflicting, but valid, truths; the US occupies a unique place in the international order in which it both influences the creation of law designed to protect civilians and peace, but also violates that law to serve its own interests and ideology. The core argument of this thesis lies in analyses of three armed conflicts in Vietnam, Nicaragua, and Kosovo. The United States violated the laws of war, and because of American military and political predominance, never faced serious consequences. As this thesis will demonstrate, the international community's inability to prosecute or properly punish the United States for grave breaches of the laws of war has had an immense impact on the development of human rights law.

The Post-Nuremberg Laws of War and American Adherence

The Nuremberg Tribunals represent a momentous turning point in international legal history; accordingly, one must understand Nuremberg as the foundation of modern international law before delving into the subject of American breaches of that law. The trials of members of the Nazi Party and perpetrators of the Shoah served not only as a reckoning for the decimation of

³ Steven Livingston, "Media Coverage of the War: an Empirical Assessment," in eds. Albrecht Schnabel and Ramesh Thakur, *Kosovo and the Challenge of Humanitarian Intervention*, United Nations University Press (Tokyo, 2000), 377.

⁴ For more information, please see Chapter Two on Kosovo.

Europe's Jews, Poles, homosexuals, and other minority groups, but also as an assessment of the crime of war. International law following Nuremberg "witnessed a change in thinking about the rights, obligations, and duties" of the nation-state as an international actor.⁵

The Crime of Aggression

The Nuremberg Tribunal's Chief Justice Robert Jackson saw the crime of aggression as the Nazi's ultimate crime against humanity.⁶ After Nuremberg, when drafting the Geneva Conventions and the Charter of the United Nations, the United States and other Allied nations codified the crime of war.⁷ These documents, signed and ratified by the United States, outlined that states could only engage in violence against another state in self-defense, and even then, only if the United Nations Security Council had determined that that was the only course of action.⁸ The UN Charter holds state sovereignty as an extremely important principle, declaring that states cannot intervene in one another's internal affairs. When there is "an internal struggle for control of a national society," the UN Charter rules that "the outcome... [should be] virtually independent of external participation," and "it is inappropriate for a foreign nation to use military power to influence the outcome," as renowned international legal scholar Richard A. Falk summarizes.⁹ Post-Nuremberg, wars of aggression were no longer permissible. Nonetheless, this practice did not stop states from engaging in violent intervention, but rather, caused states to depict their wars and military conflicts differently.¹⁰ Nations no longer state that their wars are

⁵ Henry T. King and Theodore C. Theofrastous, "From Nuremberg to Rome: A Step Backward for US Foreign Policy," *Case Western Reserve Journal of International Law*, (Vol. 31, No. 1, 1999), 50.

⁶ Telford Taylor, *The Anatomy of the Nuremberg Trials*, Alfred A. Knopf Publishing (New York, 1992), 45.

⁷ Chapters 1, 2, and 3 have much more detailed discussions of the text of these documents.

⁸ See above.

⁹ Richard A. Falk, "International Law," in ed. John Ratte, *From Nuremberg to My Lai*, Amherst College Press (Amherst, 1979), 174.

¹⁰ Linda S. Bishai, "Leaving Nuremberg: America's Love/Hate Relationship with International Law," *Review of International Studies*, (Vol. 34, No. 3, 2008), 438-442.

just. Instead, states encourage a narrative of self-defense, of preemptive self-defense, or as peace-keeping missions when, in fact, the military action is taken to protect that nation's interests abroad.¹¹ This shift in international legal practice has complicated international governmental and legal bodies' ability to apply the laws of war to modern conflicts.

Defining War Crimes via the Geneva Conventions

In 1950, Justice Robert Jackson wrote in a Supreme Court decision that modern American law has come a long way since the outbreak of war made every enemy national an outlaw, subject to both private and public slaughter, cruelty, and plunder.¹² Jackson was, of course, an idealist. Though American law dictated that civilians would be treated with respect and dignity, the pages of this thesis are filled with instances of enemy nationals indeed being treated as outlaws and combatants in the name of military necessity. Nonetheless, the laws to which Jackson's opinion alludes is clear and decisive about how states must treat all civilians in times of war.

The Geneva Conventions, as they are collectively called, consist of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Third Geneva Convention relative to the Treatment of Prisoners of War, and finally, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The United States signed these four treaties in 1949, and ratified them soon after, adopting the majority of the terms in the US Army Field Manuals for Land and Sea Warfare.¹³ This means that all American servicemen and women, all

¹¹ Ibid.

¹² *Johnson v. Eisentrager*, 339 U.S. 763 (1950), 768-769.

¹³ This issue will be discussed more fully in Chapter 2.

American citizens, and all American leaders are obligated to follow the terms of the Geneva Conventions as the laws of war.

The Fourth Geneva Convention obligates states to respect all foreign civilians, regardless of the state of the armed conflict in which the state is involved. States have an obligation to protect civilians and ensure that their militaries are actively protecting civilians.¹⁴ States are also prevented from committing what are called “grave breaches” of the laws of war. Grave breaches consist of the most heinous crimes against humanity, including murder, rape, kidnapping, forced deportation, and torture; committing any one of these acts constitutes a war crime.¹⁵ Additionally, state signatories are required by the Fourth Geneva Convention to find and try perpetrators of such atrocities, regardless of the perpetrator’s nationality.¹⁶ Unfortunately, as the following chapters will demonstrate, the United States has broken each of these sacred obligations.

Upon the creation of the International Criminal Court, Marc Thiessen, a spokesman for the Senate Foreign Relations Committee, bluntly explained his committee’s refusal to support the ICC by simply saying “we are not willing to put the United States up to the justice of the world.”¹⁷ Thiessen’s honest remark reflects much about America’s role in the global community. First, the United States’ ability to simply decline to follow its treaty obligations without fearing real consequences is unique and has influenced a good portion of 20th century foreign policy. Second, Thiessen’s statement implies that the US has done wrong, and that there is justice to be

¹⁴ International Committee of the Red Cross (ICRC), Article 2, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, <http://www.refworld.org/docid/3ae6b36d2.html>.

¹⁵ *Ibid.*, Article 147.

¹⁶ *Ibid.*, Articles 145-146.

¹⁷ Marc Thiessen, quoted in King and Theofrastous, 82.

faced, and crimes to be uncovered. Finally, the statement suggests that Thiessen believes that the global legal community would deem some actions criminal that Thiessen either thinks are justifiable or not criminal in the first place. As the final portions of this thesis will discuss, America's military activities in the 20th century have had a significant impact on the International Criminal Court.

Methods, Sources, and Structure

The body of this thesis consists of three case studies in order to demonstrate the depth and impact of American war crimes in the late 20th century. The first chapter analyzes the US military's response to war crimes committed in Vietnam, and the judicial structure of the US military in order to explain why American soldiers were never prosecuted in domestic or military courts for their war crimes. It does this by first describing the nature of American crimes and the culture of violence within deployed troops, discussing the political pressures that made true prosecution unlikely, and finally by detailing the impact these unpunished crimes had on the international legal order. Then, the second chapter will demonstrate the manners in which the CIA and the Reagan Administration violated the laws of war by supporting the violent Anti-Sandinista paramilitary groups that terrorized Nicaragua after the Sandinista Revolution in 1979. Both of these chapters rely heavily on eyewitness testimony of both American citizens and soldiers and the victims and perpetrators of atrocity crimes, and compare the stories told to the international law we see broken in the testimony. Finally, the third chapter analyzes the human rights laws NATO broke in its involvement in the Kosovo conflict. This chapter differs from the first two significantly, as it is a demonstration of America's role as a global protector during the

Clinton Administration. The thesis will conclude by discussing the ways in which these three conflicts have impacted the development of international criminal law after 1999.

A theme that returns again and again in the study of American war crimes is the power of individuals; this is what separates a historical analysis of the progression of international law from a theoretical approach based on international relations. American foreign policy is not a predestined or even planned trajectory created by anti-humanitarian politicians. The identities, political affiliations, personal histories, and temporal locations of individual decision makers all influence American military activity and the consequences imposed when an atrocity takes place. One cannot view American military and legal history as a static, overdetermined timeline. Rather, these histories were processes shaped by political, cultural, and economic pressures specific to the circumstances in which they took place.

Chapter One: Atrocities in Vietnam and American Military Justice

Introduction:

The Vietnam War represents one of the darkest periods in American history, and certainly within the Cold War. The conflict ended what was called “the consensus era” in the United States, a period of little mainstream partisan disagreement, and exposed stark divisions within American society over the place of the United States in the global community and the role morality ought to play in warfare and interventionism.¹⁸ The signing of the Geneva Conventions, as discussed in the introduction to this thesis, marked a new era in global cooperation and the prevention of genocide and crimes against humanity for the future; however, American actions in Indochina challenged these hopes. This chapter will focus on the United States’ failure to fulfill its obligation to prosecute its military’s war crimes and the consequences not prosecuting perpetrators of war crimes has had on international criminal law.

¹⁸ The period immediately after the Second World War was an era of both domestic peace and Cold War anxiety. The consensus era refers to the relatively calm state of sociopolitical affairs between 1950 and ~1968, during which period the American economy drastically improved quality of life. The consensus era perhaps appears as calm and bipartisan as it does because of the contentious era that followed it.

The United States' involvement in the Vietnam War opened a new narrative about the rules of warfare in the international community and the application of the precedent of international law created during and immediately after the Nuremberg Judgement. The American military's actions in Vietnam and the lack of international action against leaders in the United States contrasted the precedent set at Nuremberg and directly violated the laws of war codified by the 1949 Geneva Conventions. The war crimes committed by the United States' military were not isolated events separate from the conflict as a whole, but rather, were representative of the atmosphere and culture of violence that characterized the Vietnam War. This chapter will survey the modern discussions of international law through the lens of the Vietnam War and United States war crimes, beginning with an analysis of the legality of the US entrance into the war, then with a discussion on the US military's behavior during the war, and finishing with a broad survey of the effect the Vietnam War has had on international law and its application.

Beginnings of an Intervention and Laws of War

The United States first became involved in Vietnam before violent conflict actually began. During the Cold War, the "domino theory" arose. The domino theory was the concept that if a few regions fell to Communism, then soon all developing nations would be toppled by Communism as well, like dominoes, and the Soviet Union win the Cold War and control the world, threatening the United States' national security.¹⁹ Vietnam was elevated, by the National Security Council, to the highest level of security due to fears that all of Southeast Asia would fall to Communism after the French left Vietnam.²⁰ Protecting Vietnam from the influences of a

¹⁹ George F. Kennan, "The Sources of Soviet Conduct". *Foreign Affairs* (25.4, 1947): 566–582.

²⁰ Perry Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers'" in *The Vietnam War and International Law* ed. Richard Falk, 49-93. Vol 4. Princeton University Press (Princeton, NJ, 1976). 56.

possibly leftist new regime became a national security priority. This line of logic led to policies in the early 1960s that dictated that protecting South Vietnam's right to self-determination became a military matter, rather than a diplomatic issue. Nation building became intervention, and the US broke with the Geneva Accords.

Before the United States began the combat stage of its intervention in Vietnam, “[t]he distinction between what was to be done in a covert versus an overt manner was made on the basis of the legal requirements of the Geneva Accords.”²¹ The United States covertly ignored the requirements the international legal community created for third party intervention by not obtaining United Nations Security Council's permission to intervene in the region, which still applied even though the Vietnamese governments (North and South) breached treaty law overtly.

²² The United States' role in choosing the South Vietnamese government was in violation of the US' treaty obligations to avoid intervention in another state's internal affairs.²³

The Crime of Aggression and Collaborative Defense

American and French involvement in the development of the Vietnamese government actually determined the nature of the Vietnam War; technically, the war was international conflict, and cannot be classified as a civil war because of American and French presence in the nation before and while armed hostilities began. The Vietnamese struggle became an international conflict because external forces (the French and the Americans) that were “High Contracting Parties” under the Geneva Conventions involved themselves before armed conflict

²¹ Ibid, 65.

²² Ibid., 65.

²³ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

began.²⁴ Because of American involvement, the conflict cannot be divided up among the parties based on the nature of the involvement of one party to another; dividing up the various combatants becomes yet more confusing when one considers whether or not the Viet Cong, North Vietnamese, and South Vietnamese forces were aligned with or party to the laws of the Vietnamese state. The United States entrance into this conflict *could* be justified by the concept that the North Vietnamese regime attacked the South Vietnamese state, which was friendly to the United States, first. In this case, the United States would have entered the war not as an aggressor, but as an actor of collaborative defense.

Collaborative defense describes a situation in which it is permissible for a third party to come to the aid of one of the groups engaged in combat as a defender. This means that the third party (in this case, the United States) may engage in warfare and defend another group only if the defendant was not the aggressor and experienced an armed attack. Though the United States came to the aid of South Vietnam before armed conflict began, the nature of guerrilla and civil warfare prevents the world from knowing which party actually fired the first shot, meaning that the United States does not have a fully sound claim to collaborative defense. Moreover, the United States did not follow the protocol set forth in the UN Charter. Articles 33 and 34 dictate that states may not intervene in one another's internal affairs, let alone put troops on the ground, without UNSC permission; states must first make a complaint to the UNSC, which has an obligation to try every peaceful measure possible before allowing violence to take place.²⁵

²⁴ Jordan J. Paust, "Legal Aspects of the My Lai Incident-- A Response to Professor Rubin" in *The Vietnam War and International Law*, ed. Richard Falk, 359-378. Vol 3. Princeton University Press (Princeton, NJ, 1972). 361-362. See also: Fourth Geneva Convention, Article 2.

²⁵ United Nations, Articles 33-34, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <http://www.refworld.org/docid/3ae6b3930.html>.

The North Vietnamese regime simply countered American and South Vietnamese interests for the Vietnamese state. Under the Geneva Conventions, conflicting interests did not constitute an attack on South Vietnam, and thus was not a valid reason for the United States to have entered the war, since both the North and South argued that the other was the initial aggressor.²⁶ Though the State Department, White House, and Department of Defense argued that the United States was acting in defense of the freedom of the South Vietnamese state and its people, both the legal theory and the perception of events that these institutions relied upon are questionable.²⁷ Scholar and activist Richard Falk best synthesizes doubts over the application of the defense justification:

[t]he real issue is whether the State Department's interpretation of what constitutes... [defense] has ever been recognized and accepted; or whether... the right of self defense is restricted to instances when the necessity for action is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.²⁸

Indeed, the State Department did claim that the situation in Vietnam did call for instant and overwhelming action.²⁹ However, the application of the right of self or collaborative defense is questionable. American actions during this tumultuous time are unfounded; Vietnam was threatening only in respect to the domino theory, and not actually threatening to the state security of the United States. Self defense, under the Geneva Conventions, implies defense once one has been attacked; the United States State Department applied the term self defense to mean defense of state interests, rather than of the state or the states' allies territories and peoples.

²⁶ ICRC. See also: Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

²⁷ Secretary of State Dean Rusk, "Laos and Viet-Nam--A Prescription for Peace," (Washington, D.C., 22 May 1964), *Department of State Bulletin*, (8 June 1964). See also: Secretary of Defense Robert S. McNamara, "The Defense of the Free World," (New York, 21 May 1964), *Department of State Bulletin*, (8 June 1964).

²⁸ Richard Falk, *Crimes of War*. Random House (New York, 1971), 196.

²⁹Memorandum for the President's Special Committee, "Military Implications of the US Position on Indochina in Geneva," 17 March 1954, *The Pentagon Papers* (Gravel Edition, 1972), 451-54.

Moreover, American intervention in Vietnam demonstrates a desire to control the fates and governmental structures of other nations and peoples rather than a desire to defend the defenseless. Technology and innovation following the second World War globalized American interests, and in the second half of the 20th century, the United States and other former empires worked to add weight to their influence in former colonies. This use of influence inherently gave more power to the larger, more economically stable nations, which then became inherently repressive, using the resources of the smaller, dependent state, even though the larger nation did not officially claim control of the smaller. “Multinational corporations, arms sales, and training programs... all exert[ed] an... interventionary influence” even without the use of a military as the economic elite in capitalist nations pressed for specific government programs in the occupied state.³⁰ Even if the North and South in Vietnam had reunified and never came to blows, American and French influence and presence would have affected Vietnam’s autonomy.

Before discussing the war crimes that the United States committed, one must first understand the principles of international law and decide whether or not the laws of war are applicable to United States involvement in Vietnam. Many regard the Vietnam War as an armed conflict since the Congress never declared war upon any Vietnamese state. This does not excuse American atrocities. The Geneva Conventions bind nations in any armed conflict in which either war is declared officially by a party or in which one party occupies the territory of another and engages in armed hostility with another party.³¹ Even in the absence of a declaration of war international laws of war apply, following Article 2 of the Fourth Geneva Convention.³² This is

³⁰ Richard Falk, *Human Rights and State Sovereignty*, Holmes & Meier Publishers (New York, 1981). 131.

³¹ ICRC. See also: Gertrude Chelimo, “Defining Armed Conflict in International Humanitarian Law”, *Student Pulse: Law and Justice* (2011).

³² ICRC, Article 2.

true in the United States as a constitutionally enforced principle, because Article VI, Section II of the Constitution declares that “all treaties made... under the authority of the United States, shall be the supreme law of the land.”³³

The United States had never denied the applicability of international law or warfare to American military actions in Vietnam. Moreover, the Department of State declared in 1966 that “the rules of international...armed conflict apply regardless of any declaration of war,” repeating the words of Article Two of the Geneva Convention.³⁴

Nevertheless, the military did not follow the rules of warfare that the United States had signed into law. When the Viet Cong began breaking the rules of warfare, the American military did as well. The United States may have only been following the Viet Cong’s example, but the “the laws of war continually apply to both sides in a conflict, irrespective of whether the other side has committed or is committing frequent violations of these laws.”³⁵

Defense by claiming that the other side was also committing a crime is called a *tu quoque* defense, and was unsuccessfully employed at Nuremberg by Nazi war criminals on trial.³⁶ The Vietcong resorted to more brutal guerilla tactics, which put American leaders in a confusing position of deciding what was militarily necessary to defeat the enemy; if the other side begins committing crimes to gain more ground, how could the American military hope to win the war

³³ United States Constitution, Art. VI, Sec. 2. “This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.” The United States Congress ratified the Fourth Geneva Convention in 1955 after signing the treaty in 1949.

³⁴ Anthony D’Amato, Harvey L. Gould, and Larry D. Woods, “War Crimes and Vietnam: The Nuremberg Defense and the Military Service Resistor”, *California Law Review*, (Vol 57, Is 5, 1969).

³⁵Ibid.

³⁶ For more information on the *tu quoque* defense and the Nuremberg Tribunal’s ruling of inadmissibility, see: Nicole A. Heise, “Deciding Not to Decide: Nuremberg and the Ambiguous History of the Tu Quoque Defense”, *Social Science Research Network* (2009).

without committing those same crimes? Rather than follow the laws of war, the American military resorted to dirtier and dehumanizing tactics. The line between what was wrong and what was necessary to win the war was blurred for American combatants and the United States ignored the international law and precedent that dictated that it was still expected to follow the rules of warfare. As the war moved farther away from permissible combat, the more overwhelming the sense of lawlessness and violence became for combatants on the ground.

Atrocity Crimes and the American Soldier

This atmosphere of brutality was the context in which horrific massacres occurred, like Son My and My Lai. The environment bred confusion, and violence; it confused the military's goals, so that military leaders pressed commanders for high body counts, with fewer other goals, a trend that several Vietnam veterans called "body count mania."³⁷ Captain Michael O'Mera noted after his discharge that "the command emphasis on body count was so tremendous that it was felt... at the lowest level," and that "the only measure of success in Vietnam... seemed to be body count."³⁸ The goal of the war, as the captain saw and experienced, was not to free Vietnam, but to "wage war against the Vietnamese people."³⁹ According to Article 3 of the Fourth Geneva Convention, states must protect the lives, well-being, and dignity of any person that is not a confirmed combatant, regardless of their race or ethnicity.⁴⁰ Instead, American soldiers

³⁷ Robert B. Johnson, "Statement on Policy and Command," ed. The Citizens Commission of Inquiry, *The Dellums Committee Hearings on War Crimes in Vietnam*, (Vintage Books, New York, 1971), 47.

³⁸ Michael O'Mera, "Statement on Policy and Command," ed. The Citizens Commission of Inquiry, *The Dellums Committee Hearings on War Crimes in Vietnam*, (Vintage Books, New York, 1971), 71.

³⁹ *Ibid.*, 73.

⁴⁰ International Committee of the Red Cross (ICRC), Article 3, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, <http://www.refworld.org/docid/3ae6b36d2.html>.

systematically brutalized Vietnamese civilians in order to leave potential Viet Cong combatants with no material resources.

The Mekong Delta saw unrivaled brutality as the target of Operation Speedy Express. OSE was a major air operation intended to cleanse the Delta of Viet Cong operatives via helicopter warfare, most significantly in what were called free fire zones. Free fire zones were areas in which civilians were told to leave before a certain time. After that time, the American military would “shoot anything that ran,” and raze the surrounding villages in order to purge them of Viet Cong.⁴¹ Air warfare became a mark of the American military’s depreciation of Vietnamese lives by allowing combatants to overlook the differences between Viet Cong and civilians, in that they were instructed to fire at will at any movement, rather than engaging with another human.

Air warfare was much safer for American soldiers, but it also made for far more gratuitous violence.⁴² Pressure for a body count that likely far exceeded the number of actual enemy combatants led to the 9th Air Division (one of the air divisions responsible for Operation Speedy Express) having the lowest weapons-captured-to-enemies-killed ratio in the entire Vietnam War-- meaning the 9th Division killed the most people who were likely to have only been civilians, as they were completely unarmed at the time of their deaths.⁴³

The 9th Air Division’s mistakes are demonstrative of the body count mania that characterized the orders military leaders gave. The testimony of many Vietnam veterans, including that of the Concerned Sergeant, highlighted the haunting and omnipresent press for a

⁴¹ Neil Sheehan, “Should We Have War Crime Trials?”, *The New York Times* (March 28, 1971).

⁴² Ibid.

⁴³ Nick Turse, “A My Lai a Month”, *The Nation* (2008), 14.

higher and higher body count.⁴⁴ The Concerned Sergeant expressed his concern at the violence taking place, and at the pressure from his commanding officer to “shoot anything that move[d]” in a public letter to General Westmoreland.⁴⁵ The logic of the extremely high body count goal was that to decrease the dead rural Vietnamese population meant to decrease the strategic base of support and number of potential new members for the Viet Cong, regardless of the criminality of this tactic.⁴⁶

The devaluing of Vietnamese life became endemic in the American military. Evidence of possible war crimes came into the light through the testimony of soldiers returning from the field, like Captain O’Mera and the Concerned Sergeant. In addition to his comments on aerial warfare, the Concerned Sergeant also reported that “it was common to detain an unarmed civilian and force them to walk in front of [a unit] in order to trip enemy booby traps.”⁴⁷ This practice is a direct violation of the rules of war as laid out in the Geneva Convention, as it constitutes “wilfully causing great suffering or serious injury to [the] body” of a civilian.⁴⁸ Declassified Army investigation papers show that evidence was found to support the Concerned Sergeant’s claims, and the similar claims of other military personnel, confirming American violations of the laws of war.⁴⁹ Unfortunately, even though legislation was drafted in Congress to create sufficient judicial resources to prosecute American war criminals,

⁴⁴ Sheehan., 31. “The words Lieutenant Calley used [to] describe the act of slaughtering the 102 men, women, and children for whose deaths he is being held responsible evokes this atmosphere [of violence] in a most uncanny fashion. He told the prosecutor that he was ordered ‘to waste the Vietnamese... waste, waste them, Sir.’ Were this just Lieutenant Calley speaking, the word would not carry much meaning, but the word is from the argot of the American soldier in Vietnam. Human beings are ‘wasted’ there, they are blown away. Soldiers have a unique ability to find words to describe the reality of wars.”

⁴⁵ Turse, 14.

⁴⁶ Ibid., 15-16.

⁴⁷ Ibid., 14.

⁴⁸ ICRC.

⁴⁹ Deborah Nelson and Nick Turse, “Civilian Killings Went Unpunished”, *The New York Times* (August 6, 2006).

in the period after the disclosure of the My Lai massacre, when the legislation had the greatest prospect of winning approval, [the President and Attorney General] were deficient in the moral qualities that might have...provide[d] Congress with political leadership, and the several attempts Congresspeople made to reign in the Vietnam conflict were defeated.⁵⁰ Had President Nixon or Attorney General John Newton Mitchell been different men, the history of the Vietnam War would be wildly different.

While individuals should be held responsible for their crimes, some crimes of war may be blamed on individuals, the daily practices and expectations that the American military engaged in built the culture of violence that allowed war crimes to occur. The My Lai massacre is one of the most striking examples of this environment, but the daily atrocities that took place created a context in which My Lai seemed acceptable and encouraged a disregard for Vietnamese life. The scholars Orville and Jonathan Schell wrote in a letter to the *New York Times* that Army units were being ordered not to “generate” any more refugees, because the field pacification camps in which the Army held displaced persons were becoming too full.⁵¹ After that decision,

peasants were not warned before an airstrike was called in on their village... The usual warnings by helicopter loudspeaker or air dropped leaflets were stopped...They were killed in their villages because there was no room for them in the swamped pacification camps. It was under these circumstances of official acquiescence to the destruction of the countryside and its people that the massacres of... [My Lai] occurred.⁵² It is as though the American military taught its forces that when in doubt, kill.

Punishment? The Dearth of Courts Martial

⁵⁰ Patrick Hagopian, *American Immunity: War Crimes and the Limits of International Law*, University of Massachusetts Press (Boston, 2013), 3.

⁵¹ Orville Schell and Jonathan Schell, Letter to the NY Times, (Nov. 26, 1969), 44.

⁵² D'Amato, et. al., 1088.

When courts-martial did occur in order to address the criminality of certain actions, they were often to try individual combatants, and not commanding officers. Moreover, these individuals were not charged with war crimes, but with murder or manslaughter, despite these actions falling directly under the United States Army Field Manual.⁵³ The Army Field Manual's 1956 laws of land warfare are specific on what types of actions constitute war crimes, and what treaties soldiers are obligated to adhere to. The Manual dictates specifically that "at the request of a party to the conflict, an enquiry shall be instituted... concerning any alleged violation of the [Geneva] Convention."⁵⁴ Members of the American media, American government, and the American military repeatedly called for the investigation of potential war crimes perpetrated in the Vietnam War; by not opening any such investigation at the request of parties to the conflict, the United States Army violated its own laws of warfare. Moreover, the Manual acknowledges that the United States is signatory to Article 146 of the Geneva Convention, which orders that Contracting Parties

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.⁵⁵

By prosecuting members of the armed forces for murder or manslaughter rather than the war crimes they actually committed, the United States Army breached the international, domestic, and military law by which it was governed. International legal scholars like Richard Falk, Gabriel Kolko, and Jonathan Schell wrote eloquent and outraged books, letters, and opinion

⁵³ Department of the Army, Headquarters. (1956). *Law of Land Warfare* (FM 27-10). Retrieved from https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf. Relevant sections include (but are not limited to): 4a; 4b; 9; 25; 29; 33b; 34b; 41; 495; 496; 498; 499; 501; 502; 504; and 506.

⁵⁴ *Ibid.*, Section 496.

⁵⁵ *Ibid.*, Section 506a, 506c.

articles, but to no avail; even the American people could not compel the American government or military to properly prosecute its servicemen.⁵⁶

The Trial of Captain John Kapranopoulos

The court martial of Captain John Kapranopoulos is a particularly disturbing case study. Kapranopoulos was court martialed for the murder of two Vietnamese civilians, though his actions were clearly under what the Army Field Manual calls a violation of the laws of war. When asked what to do with an unarmed and unidentified captured Vietnamese noncombatant, Kapranopoulos told his soldiers “I don’t care about prisoners, I want a body count, I want that man shot.”⁵⁷ When another unarmed Vietnamese man was captured and his men asked what to do, he replied, “Are you sh***ing me?” Kapranopoulos ordered both civilians shot.⁵⁸

Despite the testimony of several members of his group who witnessed and/ or took part in the killings, Captain Kapranopoulos was found innocent of premeditated murder. While the evidence may have proved Kapranopoulos guilty beyond a reasonable doubt, the circumstances in which the trial occurred probably affected the ability of the panel to find against the young captain. All courts-martial were heard by panels before 1969. When the courts-martial took place in Vietnam, these panels were made up of active combat commanders; declaring Kapranopoulos guilty would have been difficult for men likely sympathetic to his predicament, given that they were physically and mentally surrounded by the culture of dehumanization of the Vietnamese.⁵⁹

⁵⁶ See eds. Erwin Knoll and Judith Nies McFadden, *War Crimes and the American Conscience*, Holt, Rinehart & Winston Publishing (New York, 1970). Knoll and McFadden’s work features several of the public letters and articles written by Kolko, Falk, and Schell.

⁵⁷ Fred L. Borch, “I Want That Man Shot”, *The Army Lawyer* (September 2014), 1.

⁵⁸ *Ibid.*, 1.

⁵⁹ *Ibid.*, 3.

The *Kapranopoulos* decision is an example of the devaluation of Vietnamese lives, and enforces the statement that “military courts sometimes follow[ed] the unofficial ‘mere gook’ rule.”⁶⁰

Public Outcry and International Response

Americans and the international community noticed this atmosphere of brutality. Veterans and members of the media tried to spread the word about the atrocities being committed by writing to American leadership like the Concerned Sergeant did, by giving testimony as many veterans did in the film *Hearts and Minds*, or by testifying in non-prosecutorial Congressional hearings.⁶¹ The military continued holding courts martial without charging any of the accused with war crimes, and the American federal judicial system also did not prosecute any military personnel for their actions in the war.

If the United States had an interest in prosecuting members of the military for their actions in Vietnam, it could have without contradicting any domestic or foreign precedent. . In the United States, military personnel may not be prosecuted for crimes abroad in state courts, but they could have been prosecuted in federal courts.⁶² Similarly, joint offenses committed by military personnel abroad and domestically are classically tried by military courts *and* civilian courts, which could have been employed by the United States during Vietnam.⁶³ Unfortunately, in 1971 the federal government announced that it would not prosecute veterans who had violated

⁶⁰ Ibid., 4. The “mere gook rule” is a moniker for the unofficial, but omnipresent, notion that the Vietnamese people were merely “gooks.” Borch asserts in his piece that military courts during the Vietnam War often discussed and ruled on the extra-judicial killings of Vietnamese civilians as if the civilians were less than human, or that their deaths were less significant than the deaths of civilians elsewhere.

⁶¹ For more information on the Winter Soldier Investigation and testimony, see: Ernest Bolt, “Vietnam Veterans Against the War and the Winter Soldier Investigation”, (University of Richmond, 1971). For more information on the film *Hearts and Minds*, see: Peter Davis, *Hearts and Minds*, BBS Productions (1974). For more information on the Dellums Committee Hearings, see The Citizens Commission of Inquiry, *The Dellums Committee Hearings on War Crimes in Vietnam*, (Vintage Books, New York, 1971).

⁶² Paust, Vol. 4, 460.

⁶³ Ibid., 462.

international law due to the lack of precedent for doing so in the American legal system and the political controversy prosecution could cause.⁶⁴

American military law is extremely complicated, consisting of many different written and unwritten codes and practices, compounded by the military's separation from the domestic judicial system. Many in the military argue that servicemen and women cannot be tried in a domestic court with a civilian jury because such a jury would not be a jury of the servicemen's peers.⁶⁵ The military's own codes promote the policy of prosecuting soldiers for crimes without calling them war crimes. "The Manual for Courts-Martial...provides that... a specific violation of the [US Army Field Manual] should be charged rather than a violation of the law of war."⁶⁶ This practice is illegal under the Geneva Conventions, and violates the very spirit of the laws of war by favoring Americans; the US government has allowed the Army to write a law literally excusing its soldiers from prosecution under the Geneva Conventions. The US Army Field Manual even directly says in Paragraph 507(b) that "the US normally punishes war crimes only if they are committed by enemy nationals."⁶⁷ During the 1950s, when writing its Field Manuals and the Manual for Courts-Martial, the American military walled itself off from the rest of the

⁶⁴ Ibid., 447. "In April 1971 the United States declared that it would not seek to prosecute United States ex-servicemen who have violated the international law of war in Vietnam. Only two justifications were given for the government's failure to engage in a war crimes prosecution program. First, a rather dubious excuse for law enforcement rests on the view of some government legal experts that the issue is 'too hot' politically now. Secondly, some legal experts within the government had expressed a doubt whether present federal law allows the trial of civilians for war crimes committed while in the military." After reading extensively within Paust's own work and federal law, it is clear that civilians may be tried in federal courts for war crimes committed while in the military.

⁶⁵ Thomas Wayde Pittman and Matthew Heaphy, "Does the US Really Prosecute its Service Members for War Crimes?", *Leiden Journal of International Law*, (Vol. 21, No. 1, 2008), 169. .

⁶⁶ Ibid., 171.

⁶⁷ Department of the Army, Paragraph 507(b).

American judicial system, effectively ensuring that an American soldier would never be charged with war crimes.⁶⁸

The refusal to prosecute put the pressure on the international community to handle the blatant violations of war crimes law. The Bertrand Russell War Crimes Tribunal answered the call early in the Vietnam war, opening an intensive investigation on the actions of the American military and the various international laws these actions broke. Unfortunately, the Russell Tribunal could not prosecute; it only investigated. The Russell Tribunal recommended that forums be held in the United States in which veterans could testify; collections of testimony led eventually to a Congressional inquiry spearheaded by Representative Ronald Dellums. The Dellums Committee heard four days of disturbing eye witness testimony that implicated the military in hundreds of war crimes, and recommended the Pentagon prosecute members of the military for their crimes in Vietnam.⁶⁹

Head of the Russell Tribunal Jean Paul Sartre believed that there should have been a permanent Nuremberg Tribunal to deal with the crimes of war.⁷⁰ The temporary nature of both of these tribunals impeded their ability to hold states accountable. Moreover, Russell Tribunal was never intended to prosecute; Russell advocated that the international law must be enforced by state structures and by the ideology of not perpetrating crimes in the first place, rather than because of the condemnation of international courts or other states.⁷¹

⁶⁸ Pittman and Heaphy, 173.

⁶⁹ The Citizens Commission of Inquiry, *The Dellums Committee Hearings on War Crimes in Vietnam*, (Vintage Books, New York, 1971), vi-xiii.

⁷⁰ Falk, *State Sovereignty*, 196. The full Sartre quotation: “There is a cruel lack of that institution [the Nuremberg Tribunal]-- which appeared, asserted its permanence and universality, defined irreversibly certain rights and obligations, only to disappear, leaving a void which must be filled and which nobody is filling.”

⁷¹ *Ibid.*, 196. Falk argues that Sartre had too much faith in an institution’s ability to enforce change; rather, Falk wrote, the world would be better served to have an ideological shift that stressed the impermissibility

Since the end of the Vietnam War, international human rights law has evolved rapidly. The generalized norms of international law as set forth in the main legal instruments on human rights are either declaratory in stature (such as the Universal Declaration of Human Rights), nonbinding because powerful nations have not ratified, or simply discounted because there is no body of international law enforcement.⁷² The American military's blatant disregard for international human rights and the laws of war in Vietnam best exemplifies this lack of respect for international legal concerns. If nations as powerful as the United States ignore the treaties they have signed, the international community can have no hope of enforcing those treaties, as the next chapters will demonstrate.

The United States' crimes in Vietnam went mostly unpunished. This fact tunnels through the foundation of international law; without international prosecution or condemnation for breaking international law, international human rights law and the rules of warfare become useless. After World War Two, General Curtis LeMay reflected that if the Allies "had lost the war, we all would've been prosecuted as war criminals."⁷³ The Geneva Convention and the establishment of rules of combat were intended to ensure that regardless of *who* won a war, both sides would face the consequences for taking the lives of noncombatants. The world lost a chance to enforce this concept when leaders in the American military were not prosecuted as war criminals.

of violations of human rights and international law, instead of putting the onus on an international institution that states were unlikely to respect over their own authority.

⁷² Ibid., 155.

⁷³ General Curtis LeMay, quoted by Alfonso A. Narvaez, "Gen. Curtis LeMay, an Architect of Strategic Air Power, Dies at 83," *New York Times* (October 2, 1990).

Chapter Two: Responsibility and Oversight in Nicaragua

Introduction:

For over 40 years, the United States-supported Somoza family network ruled Nicaragua with an iron fist. The regime maintained its power by oppressing the people, keeping rural Nicaraguans largely illiterate, intensely impoverished, and indebted to the few wealthy landowners who benefited greatly from the Somoza dictatorship. Among these beneficiaries were American investors who held vast shares in Nicaragua's agricultural industry.⁷⁴ Somoza's National Guard maintained order in the small country through violence, intimidation, and crackdowns on the press, many members having trained at the United States' controversial School of the Americas.⁷⁵ Despite the repression tactics Somoza and his Guard employed, a revolutionary movement called the *Frontera Sandinista de Liberación Nacional* (The National Sandinista Liberation Front) successfully overthrew the dictatorship in July of 1979, immediately installed a leftist government, and began implementing what many conservatives in the United States believed to be radical social changes.

While the Sandinista government reduced the rate of illiteracy in Nicaragua from 50% of the population to just 15% in less than a year, eradicated polio in three years, and outfitted rural communities with hospitals and health centers as well as modern food production systems, the Reagan administration began efforts to overthrow the regime almost directly after President Reagan's inauguration in 1981.⁷⁶ These efforts began as covert support for anti-Sandinista groups (which from here will be referred to as *contras*) and developed throughout the early-1980s into overt financial, material, and organizational support accompanied by a crippling

⁷⁴ For more on basic Nicaraguan history, see Luciano Baracco, *Nicaragua: The Imagining of a Nation*, Algora Publishing (New York, 2005).

⁷⁵ For more information on the School of the Americas, see Richard F. Grimmett and Mark P. Sullivan, "United States Army School of the Americas: Background and Congressional Concerns", Federation of American Scientists, (2012), <https://fas.org/irp/crs/soa.htm>.

⁷⁶ Donald R. Pfof, "Reagan's Nicaraguan Policy: A Case Study of Political Deviance and Crime," *Crime and Social Justice* (27/28, 1987), 67.

economic embargo. Reagan and his administration continually encouraged support for the war and justified US involvement by using existing Cold War anxiety and emphasizing the potential for the spread of Soviet-style communism throughout the Western Hemisphere, even though the Sandinistas had little contact with the USSR, and the Sandinista regime was quite dissimilar from that of the Soviets. Reagan used rhetoric similar to that used to justify US engagement in Vietnam, by consistently arguing that should Nicaragua remain under the leadership of the Sandinista government, all of Latin America was vulnerable to a communist-takeover. Though this line of thought seems illogical now, in the 21st century, the latter half of the 20th century in the United States was dominated by this sort of anxiety, frequently referred to as the “domino theory,” which suggested that should a few “Third World” states fall to communism, the others in that region would as well, theoretically endangering American security interests and the survival of democracy.⁷⁷

The President used what scholar Donald R. Pfof calls “the bogey of the communist threat” as a means to justify continued illegal intervention in Latin America, defending his war by underscoring the common narrative of the time that portrayed the Cold War as a struggle between good and evil, with America and democracy on one end of the spectrum, and the USSR and communism on the other.⁷⁸ Of course, as this chapter will demonstrate, the truth is much more complicated. The *contras* were not “freedom fighters,” as Reagan liked to say, but were rather dangerous paramilitary groups who tore through Nicaragua committing gruesome

⁷⁷ President Dwight D. Eisenhower coined “the domino theory” when arguing about the dissolution of the French colony in Vietnam. For the full speech launching the popular phrase, see President Dwight D. Eisenhower, “Vietnam and the Domino Effect,” White House Press Conference, April 07, 1954, <http://www.history.com/this-day-in-history/eisenhower-gives-famous-domino-theory-speech>.

⁷⁸ Pfof, 83.

atrocities under the guise of war, outfitted and advised by US officials and CIA operatives throughout the 1980s.⁷⁹

However, though the *contras* were the direct perpetrators of most of these crimes, key players in the US government were also guilty of these crimes against the laws of war. By engaging in a proxy war that indiscriminately and intentionally targeted civilians, the United States breached treaty obligations both by interfering in the state of Nicaragua's affairs, forcing a trade embargo, and supporting and advising the *contras* as they committed horrendous war crimes. This chapter will demonstrate that the CIA and other US government officials were not only complicit in these crimes, but were aware of and encouraged attacks on civilians that the officials knew or should have known were violations of the laws of war, meaning such officials were also in violation of international and domestic laws.

Pre-existing Law:

It is important to note before detailing the instances of criminal activity exactly what constitutes a crime under international law, though this chapter will more thoroughly discuss American breaches of law after detailing the crimes committed. According to Article Two of the Fourth Geneva Convention, these laws apply *even if* neither party acknowledges the war or declares war officially, meaning that regardless of Congress' decision not to declare war against the Sandinista government of Nicaragua, the US is and was still legally obligated to follow the laws of war.⁸⁰ Furthermore, the United States' engagement in hostilities in Nicaragua breached Article 33 of the Charter of the United Nations, which dictates that states must first

⁷⁹ President Ronald Reagan, quoted in John B. Oaks, "Mr. Reagan's 'Flim-Flamming'", *New York Times* (April 17, 1985), A27.

⁸⁰ International Committee of the Red Cross (ICRC), "Article Two", *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, <http://www.refworld.org/docid/3ae6b36d2.html>.

seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means,

before engaging in behavior that would “endanger the maintenance of international peace,” generally in the form of a formal complaint to the UN Security Council.⁸¹ Unless Nicaragua, as a state, attacked the United States or its citizens violently and suddenly, the US had no legal right to bypass the UN-required mediation phase.

Essentially, before engaging in any armed attack, parties to the UN Charter must make every effort to solve the dispute, and request UNSC approval to engage in armed self- or third-party defense.⁸² One should note, additionally, that the Rio Treaty of 1947 which established the Charter of the Organization of American States (both of which the US is a party to) have similar requirements for states preceding any use of force.⁸³ The details of these treaty obligations and the proceeding breaches by the Reagan Administration will be further analyzed later in this chapter.

Domestically, in the spring of 1984 Congress rejected Reagan’s request for \$21 million of aid for the two largest contra groups, the *Frontera Democrática de Nicaragua* (Nicaraguan Democratic Front, FDN) and the *Alianza RevolucionDemocrática* (Democratic Revolutionary Front, ARDE), which led the Administration to use millions of dollars of discretionary funding to support the *contras*.⁸⁴ Congress held out until the summer of 1985, when the President’s

⁸¹United Nations, “Article 33, Paragraph 1”, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <http://www.refworld.org/docid/3ae6b3930.html>.

⁸² United Nations, “Article 37, Paragraph 1”, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <http://www.refworld.org/docid/3ae6b3930.html>.

⁸³ Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, <http://www.refworld.org/docid/3ae6b3624.html>.

⁸⁴ Cynthia Arson, “The Reagan Administration, Congress, and Central America: the Search for Consensus,” in *Crisis in Central America*, edited by Nora Hamilton, Jeffrey A. Frieden, Linda Fuller, and Manuel Pastor, Jr., Westview Press, (Boulder, 1988), 46-47.

domino theory rhetoric and promise to provide only “food and clothing and medicine and other supplies for survival” won \$27 million in “humanitarian” aid for the *contra* groups.⁸⁵ While Reagan promised to limit support to humanitarian aid, American officials, American mercenaries, and CIA operatives were actively training *contra* forces, designing operations, and supplying millions of dollars’ worth of weapons. Though technically within the President’s power, this deception of Congress and therefore the American people inspires serious ethical questions about the foundations of the war and American lawmakers’ understanding of aid to the *contras*. This description of obligations to international treaties and the American political community is intended to help readers understand the gravity of American involvement in the *contra*’s horrific warfare in Nicaragua.

Contra Activity:

The man said ‘Stop shooting! We are civilians! I am a physician from Germany. Don’t kill us!’ Jimmy Leo didn’t let this bother him. As the foreigner cried out again, ‘Don’t kill us!’ Jimmy Leo began firing at him, from the head down to the chest... We were satisfied when they were all dead.⁸⁶

The rest of the account of an FDN attack on a van full of 13 civilians is too gruesome to include in this work. In an interview with two foreign nonprofit workers (one German, the other Mexican), Eduardo Lopez Valenzuela recounts a 1982 massacre during which three women were brutally raped and then murdered as their ten companions, all health workers, looked on.⁸⁷ Lopez tells the interviewers about the rest of his small band’s day, during which they mutilated and killed two other civilians.⁸⁸

⁸⁵ Arnson, 50. See also: Hendrick Smith, “Stopped Short: Congress Reins in Reagan on Nicaragua Foreign Aid-- For Now”, *New York Times* (April 21, 1985), E1.

⁸⁶ Eduardo Lopez Valenzuela, interview with Dieter Eich and Carlos Rincón, *The Contras: Interviews with Anti-Sandinistas*, Synthesis Publications (San Francisco, 1984), 64.

⁸⁷ *Ibid*, 64.

⁸⁸ *Ibid*, 65.

The account is horrifying. Nonetheless, it is not unique, neither in the interviews that Dieter Eich and Carlos Rincón recorded, nor in the accounts that witnesses, survivors, and other perpetrators have given. Another former FDN militant told Eich and Rincón bluntly, “We had attacked civilian vehicles. There were dead, seriously wounded, and we took prisoners.”⁸⁹ At first glance, it seems a description of the same attack Lopez described, but instead, it is an account of a completely separate attack, one of the many by FDN and ARDE fighters that killed thousands of Nicaraguans, the vast majority of them civilians, including women, children, and the elderly.⁹⁰ The *contras* made no attempt to suggest, as American soldiers in Vietnam had, that the civilians they attacked were guerilla enemies; rather, as director of the FDN Adolfo Calero told reporter Stephen Kinzer in 1984, “There is no line at all, not even a fine line, between a civilian farm owned by the government and a Sandinista military outpost,” continuing to argue that arbitrary killing of civilians was entirely legitimate.⁹¹ Between 1982 and 1984, 23 primary school teachers, 135 adult education teachers, and 747 other *confirmed* civilian deaths at the hands of *contra* militants.⁹² Through eyewitness testimony, from both perpetrators and victims or witnesses, we also know that mutilation and gang-rape before death were common occurrences.

Additionally, the *contras* systemically conscripted an unknown number of men and women from the countryside to fight for the anti-Sandinista cause. Though many joined voluntarily after promises of a high pay and steady food supply, thousands of *campesinos* were

⁸⁹ Jeremías Hernández Membreño, interviewed by Eich and Rincón, 116.

⁹⁰ Father Bob Stark, interviewed by Paul Ramshaw and Tom Steers, *Intervention on Trial*, Praeger Publishing (New York, 1984), 96. Father Stark provides yet more evidence of *contra* violence. “This past May, for example, the *contras* attacked a village when there was a baptism party going on, and killed twenty people, including nine women and five children.”

⁹¹ Stephen Kinzer, “Nicaraguan Rebels Step Up Raids In Coffee Areas as Harvest Nears” *New York Times*, 23 Nov 1984: A1.

⁹² Pfost, p. 69

kidnapped as forced recruits, especially in the northern Atlantic Coast region.⁹³ Orlando Wayland, who eventually escaped the *contra* army, described in an interview the experience of being tied to members of his community, and forced to walk for four days and three nights, without stopping, to a training camp in Honduras.⁹⁴ “Three women gave birth on the march,” Wayland said. “As soon as a child was out, the umbilical cord was cut and they had to go on immediately.”⁹⁵ Upon arriving at the training camp, Wayland was tortured for days, and then, along with the other men from his village, was told that he could either fight for the *contras*, or continue marching to an unknown location. Wayland chose to become a soldier, but first, he was again tortured for two months by being tied to an ant hill, shoved underwater, tied securely in a river for days at a time, and being beaten regularly.⁹⁶ After finally being told that “whoever fled the camp was shot on the spot,” Wayland was given training, a uniform, and a weapon, but upon meeting the Sandinista force during his first forced battle, he was able to flee to safety.⁹⁷ Though Orlando Wayland was able to escape, many more likely were not able to; though there is no existing data on the number or fates of forced recruits in the *contra* armies, the systemic manner in which Wayland’s captors kidnapped his village and the testimony of other *ex-contra* leaders suggest that Wayland’s experience may have been shared by thousands of Nicaraguan men.

The forced conscription of the *campesinos* is just one of the many war crimes *contra* groups committed. By attacking and destroying hospitals, health centers, and religious centers, and by kidnapping, killing, torturing, and interning women, children, the elderly, and the sick

⁹³ Pfost, 69.

⁹⁴ Orlando Wayland, interviewed by Eich and Rincon, 121-123.

⁹⁵ *Ibid*, 124. Fortunately, and somewhat shockingly, Wayland said that all three women and their newborns survived the march.

⁹⁶ *Ibid.*, 126.

⁹⁷ *Ibid.*, 132-133.

and wounded without proper supplies, the *contras* violated Articles 14, 16, 24, 27, 28, 31, 32, 50, 55, 58, 76, 78, 85, 89, and 127.⁹⁸ In violating these conditions, the *contras* committed what the Geneva Conventions call “grave breaches” of the laws of war. Grave breaches are defined as the willful killing, torture, rape, forced recruitment, unlawful confinement and deportation, and causing great physical or mental suffering.⁹⁹ These crimes, of which there is indisputable evidence, constitute the most serious violations of any laws in history, and, as this chapter will soon argue, were supported by the United States government.

American Involvement:

The United States supported the *contras* by steadily supplying money, weapons, and strategic planning, while simultaneously damaging the Nicaraguan state with a trade embargo. These forms of aid were construed by the Reagan Administration as “humanitarian,” but in fact, allowed the US government to exercise control over the *contra* groups, even during military operations. The extent of this control is a keystone in the debate over whether or not the United States violated international agreements. This section will demonstrate that CIA operatives (and therefore the US) influenced *contra* military operations using financial support, by supplying weaponry, and by participating in paramilitary training and strategic planning with the *contras*.

Financial Support:

⁹⁸ ICRC. Though the *contras* are not a signatory state, they are still obligated to follow the laws of war as citizens of a signatory state. Moreover, there was a duty to prosecute them due to *aut dedere aut judicare*, which dictates that any state has the obligation to prosecute those who breach international criminal law, regardless of that state or party’s signatory status.

⁹⁹ ICRC, Article 50.

Between 1981 and 1986, an estimated \$231 million was sent to the *contras*.¹⁰⁰ The first ~\$80 million sent between 1981 and 1983 was sent by the CIA with President Reagan's approval, without Congress' knowledge, while the greatest aid package Congress authorized (\$100 million in 1986) was labeled as humanitarian aid.¹⁰¹ Instead, this financial aid allowed the *contras* to build up their forces, hire mercenaries, and become a fully operational army. Without the money the US gave in the name of humanitarianism, the *contras* would not have been capable of building the force that decimated villages and towns throughout Nicaragua. In an interview with Eich and Rincón, Pedro Javier Nuñez Cabezas, one of the leaders of the FDN, said that the FDN was able to operate only after American financial support.

Everything came from the *gringos*... Before that, when there were financial problems, nothing happened, no action.¹⁰²

Nuñez' comments suggest that had the United States not sent what Nuñez described as "every conceivable kind of support," the FDN would not have become operational.¹⁰³ This highlights the significance of American support.

Material and Arms Support

As Nuñez said in his interview, "everything came from the *gringos*," including weaponry.¹⁰⁴ Another *contra* agent, Jorge Ramirez Zelaya, noted that his group was supported by the US "with comprehensive financial aid, with weapons, and with war material," since 1982. He explained that he never wanted for weapons after the Americans became involved, and that

¹⁰⁰ Pfost, 68.

¹⁰¹ Ibid.

¹⁰² Pedro Javier Núñez Cabezas, interviewed by Eich and Rincón, 50. It is significant that many of the former *contras* that Eich and Rincon interviewed identified Núñez as a leader with considerable contact with the American operatives.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

he was in near constant contact with Americans identifying themselves as working for the CIA.

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Although the Reagan Administration repeatedly assured Congress that any aid given was only humanitarian, suggesting that aid packages contained only food, clothing, and medicine, when the ARDE claimed they had insufficient arms to take a port in 1982, the CIA began weekly airlifts of weapons and ammunitions to ARDE camps.¹⁰⁶ Moreover, an unnamed “Western ambassador” told reporter Joel Brinkley that he watched planes drop “duffle bags from low altitudes” at the Nicaraguan border throughout the spring of 1982.¹⁰⁷ Officers from the ARDE told Brinkley that American pilots were flying the planes and delivering arms, but that other members of the ARDE leadership were “burning all the evidence and identification” of the planes and their airdrops.¹⁰⁸ One FDN member even told Eich and Rancón that though FDN received support from other states, at least the majority of his group’s weapons were from the *gringos*.¹⁰⁹

Operational and Strategic Support

American material and financial support were vital to the *contras*’ ability to wage war. However, American involvement in the planning of military operations and the training of contra soldiers had perhaps the greatest influence on the *contra* war. Though CIA operatives, the Reagan Administration, and proponents of the war in Nicaragua would later claim that Americans had little to no influence on the activities of the *contras*, the evidence suggests

¹⁰⁵ Jorge Ramirez Zelaya, interviewed by Eich and Rincon, 40.

¹⁰⁶ Joel Brinkley, “Threats by CIA Said to Influence Anti-Sandinistas,” *New York Times*, April 22, 1984, 10.

¹⁰⁷ *Ibid*, 10.

¹⁰⁸ *Ibid*, 10.

¹⁰⁹ Wayland, interviewed by Eich and Rincon, 128.

otherwise. Americans served as hired mercenaries, teachers and trainers, as well as strategic advisors within the *contra* structure.

In their interviews with former members of the FDN and ARDE, Eich and Rincón heard hours of testimony about *gringo* leadership in *contra* training camps. During one such interview, forced soldier Emerson Uriel Navarrete Medrana told the two that the Americans “gave [Navarrete’s group] specific instructions as to what we had to do” when they entered Nicaraguan villages and towns.¹¹⁰ Five other *contras* spoke about the Americans who not only trained their units, but also were completely in charge of the entire training camp, with *contra* officers answering to these Americans.¹¹¹ This testimony is supported by the extensive research scholars Paul Ramshaw and Tom Steers did when writing their 1987 report for the National Lawyers’ Guild. Steers and Ramshaw found that by 1984,

there [were] over 50 CIA agents and other US government agents in Honduras and Costa Rica assisting in the war effort. Over 90 US soldiers are working with the *contras* and providing training and advice, in addition to an unverifiable number of American mercenaries actively engaging in battle in Nicaragua.¹¹²

A former CIA operative in Central America, David C. MacMichael, told the scholars that a plan involved in a bombing raid [of a civilian village] was shot down, and it turned out that the flight crew were US citizens.¹¹³

While there does not appear to be sufficient evidence to say definitively whether or not

American citizens directly committed the crimes that the *contras* surely did; it would be rash

¹¹⁰ Emerson Uriel Navarrete Medrano, 94.

¹¹¹ Eich and Rincon, 40, 110, 130, 128.

¹¹² Ramshaw and Steers, 75.

¹¹³ Arnson, 84.

without such evidence to claim that an American mercenary killed a civilian directly. Nonetheless, American citizens witnessing and not forcibly stopping the commission of war crimes by the *contras* indicates liability on the part of the United States. As will be discussed in subsequent sections, American responsibility for *contra* crimes hinges on “whether the US government actually exercise[d] operational control over the activities of the *contras*.”¹¹⁴

In addition to MacMichael’s testimony, an ARDE officer said that even during battles, the CIA

had placed agents or trained mercenaries in key positions with the rebel group where they dictate.... Decisions on logistics, communications, and operations.¹¹⁵

Additionally, Edgar Chomorro, one of the most influential leaders of the FDN, told reporters that the CIA had advised him to “murder, kidnap, rob, and torture” those who stood in the way of the FDN cause.¹¹⁶ From the testimony gathered from eyewitnesses and *contras* fighting both voluntarily and involuntarily, it is clear that agents of the US government not only would have been able to stop *contra* violence against civilians by changing the strategic and operational plans that they supplied to the groups, but also were sources of encouragement for the commission of these crimes in the first place.

Responsibility and Oversight:

“The truth is, there are atrocities going on in Nicaragua,” President Reagan acknowledged at a fundraising dinner in 1985.¹¹⁷ However, despite widespread reports of *contras*

¹¹⁴ Francis A. Boyle, “Determining US Responsibility for Contra Operations Under International Law,” *The American Journal of International Law* (81/1, Jan. 1987), 87.

¹¹⁵ Brinkley, 10.

¹¹⁶ Noam Chomsky, *Turning the Tide: US Intervention in Central America and the Struggle for Peace*, Haymarket Books (Chicago, 1985), 20.

¹¹⁷ President Ronald Reagan, quoted by George de Lama, “Reagan Escalates War for Contra Aid,” *Chicago Tribune*, April 16, 1985, 2.

committing those atrocities, the President continued to argue that the Sandinistas were violently oppressing their people, and claim that the arms flow from Nicaragua to violent Salvadoran rebels continued to exist when much evidence to the contrary proved that it did not.¹¹⁸ The CIA and the Reagan Administration gave reason after reason for American involvement in the conflict: first, the US needed to stop the arms flow between Nicaragua and El Salvador, but when no evidence of such a trade existing in any significant way was found, the US had to continue to aid the *contras* in order to put pressure on the Sandinistas to hold elections. In 1984, when elections were held and declared free and fair by several international bodies, the Administration claimed that the elections were false and fraudulent.¹¹⁹ Though the Nicaraguan government fulfilled the requirements for negotiation set by the mediating states, the Reagan Administration continued to claim that it was the Sandinistas, not the US, holding up peace negotiations.¹²⁰ This continued even after the International Human Rights Law Group submitted a report to Congress detailing “16 alleged *contra* attacks on civilians... five ambushes of civilian vehicles... 11 kidnappings, and seven rapes.”¹²¹ Even after this report was filed, over \$127 million was given to the *contras*, and American agents continued to operate in Nicaragua.

All of these justifications for continuing the war in Nicaragua distracted from what was actually occurring in Nicaragua. American mercenaries and officials were outfitting, arming, funding, and training *contra* rebels while they violently attacked civilians in ambushes planned

¹¹⁸ David C. MacMichael, in Ramshaw and Steers, 83.

¹¹⁹ Chomsky, 111

¹²⁰ Anthony Lewis, “War is Peace,” *New York Times* (April 18, 1985).

¹²¹ Doyle Mcmanus, “Rights Groups Accuse Contras: Atrocities Against Civilians Charged,” *Los Angeles Times*, March 8, 1985. Full quotation: “Typical among [these attacks] was an Oct. 28, 1982 *contra* attack on the rural area of El Jicaro in northern Nicaragua. In an affidavit, Maria Bustillo, 57, testified that five armed men dressed in the FDN’s blue uniforms [supplied by the United States] burst into her house and dragged away her husband Ricardo, a Roman Catholic activist, and five of their children. The next morning, she found the mutilated bodies of the children. Her husband’s body was found later.”

by Americans. These Americans were violating the terms of both international agreements and domestic law by having oversight of and sufficient influence on *contra* military activities to stop the *contras*' criminal activity but not endeavoring to curtail the violence or prosecute those committing it. This means that every one of the 90 US soldiers and 50 CIA and government agents mentioned previously are responsible for *contra* crimes, as are President Reagan and the "core group" of bureaucrats that controlled the Nicaraguan war from Washington, D.C.¹²² Additionally, the Americans running training camps and giving the *contras* orders are also culpable for the crimes committed by those who took their orders.

The concept of indirect responsibility is complicated, but the behavior of American agents is governed by several bodies of law. One of these is the Geneva Conventions, to which the United States is a party; it has signed and ratified the treaty, and adopted its obligations into domestic law. This means that the United States is obligated to follow the requirements of the treaty. If it does not, it breaks international and domestic law. As this thesis has demonstrated, the United States frequently breaches the Geneva Conventions on the law of warfare, but these breaches should still be considered by readers as extremely serious.

An earlier section discussed the nature of the war crimes that *contra* groups committed, but the United States' role in those crimes can only be understood through an analysis of the Geneva Conventions. First, it is important to note that Article Two of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War (from here, GCIV) determines that these laws of war apply to signatory parties in any armed conflict, regardless of whether or not those parties declare war or even openly acknowledge the war; therefore, regardless of the

¹²² Boyle, 87-88. See also: Ramshaw and Steers, 75.

US Congress' decision not to declare war on Nicaragua, GCIV still applies.¹²³ Article 1 of the GCIV requires that all parties in a conflict respect civilians, and requires signatory states to ensure that other parties to the conflict also respect civilians.¹²⁴ The United States broke this obligation not only by refusing to stop the *contra*'s violence against civilians, but also by encouraging and training *contras* to "murder, kidnap, rob, and torture."¹²⁵ The terms of respecting civilians are outlined in Article 147, which details what actions constitute grave breaches of the laws of war; as noted earlier, these actions include murder, kidnapping, robbery, torture, rape, and forced conscription, all of which evidence demonstrates the *contras* committed.

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The United States had a duty to stop these crimes. The government clearly exercised a degree of operational control over the *contras* to be capable of preventing the outright strategy of harming civilians. As one ex-Marine turned mercenary said, "massacres of civilians are not scattered human rights abuses... but rather the game plan."¹²⁷ Not only does the GCIV require the United States, as a High Contracting Party, to search for and try known perpetrators of such grave breaches, but moreover, the US is deemed directly responsible for the actions of its agents by Article 29 of the GCIV.¹²⁸ Though the US signed and ratified these laws without an open treaty reservation, the state has consistently broken the terms of the GCIV through its actions in Vietnam and Nicaragua, among other conflict zones. Nonetheless, the only international court that was able to try states before the creation of the International Criminal Court in 2000 was the

¹²³ ICRC, Article 2.

¹²⁴ *Ibid.*, Article 1.

¹²⁵ Edgar Chomorro in Chomsky, 20.

¹²⁶ ICRC, Article 147.

¹²⁷ Chomsky, 186.

¹²⁸ ICRC Article 146, Article 29.

International Court of Justice, to which Nicaragua brought a complaint against the United States in 1984.

The ICJ released its decision in *Nicaragua v. USA* on June 27, 1986. The opinion established that the United States was responsible for financing, training, equipping, arming, and organizing the *contras*, and ordered the US to stop its attack on the Nicaraguan state.¹²⁹ The Court relied upon the charter of the Organization of American States' Article 19, which, like Article Two of the Charter of the United Nations, dictates that

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.¹³⁰

In *Nicaragua v. US*, the Court found that the US, by supporting the *contras* in such a concrete manner, had violated its treaty obligations to the OAS and UN. The Court also rejected the US' claim that its actions in the war were in the name of collective self defense, and ordered the US to cease all material support for the *contras*.¹³¹

Nonetheless, the Court did not mention whether or not it found the US responsible for the *contras*' actions. It did not hold *contra* fighters or their American directors responsible for international crimes, though it was within the Court's purview to do so. This action (or rather, inaction) by the Court was likely politically motivated; a decision against the United States, one of its most fervent proponents, would bring hostile criticism upon the Court. By deciding with

¹²⁹ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J.14, Article 437, Paragraph 101 (June 27, 1986).

¹³⁰ Organization of American States, Article 19.

¹³¹ *Nicaragua v. United States*.

the standing law, but without actually holding Americans responsible for the grave breaches of the laws of war, the Court avoided some of that criticism.¹³²

Regardless of the completeness of the Court's opinion, the Reagan Administration refused to acknowledge it. After the ruling, a State Department spokesman dismissed the case, saying that it was demonstrative of the Court's inability to handle cases of such a complex nature.¹³³ The Administration continued to argue that the Court did not have jurisdiction, and that the Court did not have access to sensitive materials that would excuse the American interference. In several editorials, the *New York Times* pledged its support for the Administration in the case, writing that "there was legitimate doubt whether Nicaragua had proper standing... to bring this case before the World Court."¹³⁴ This position, publicized by one of the largest news media organizations in the United States, lent considerable legitimacy to the Reagan Administration's position among the American people, regardless of the fact that it was technically incorrect. The court of public opinion did not call for the prosecution of members of the administration or CIA for its actions in Nicaragua, let alone the President himself, despite his openly breaking domestic law.

One of the most direct breaches of American law that the President broke was the Boland Amendment. Signed on December 21, 1982, the Boland Amendment was a rider attached to the House Appropriations Bill of 1982, as well as to the Defense Appropriations Acts of 1982 and

¹³² Boyle, 86.

¹³³ Martin Cleaver and Mark Tran, "US Dismisses World Court Ruling on Contras," *The Guardian*, (June 28, 1986).

¹³⁴ Editors of the *New York Times*, "Scorning the World Court," *New York Times* (January 20, 1985).

1983.¹³⁵ The Amendment prohibits the use of funds to overthrow the government of Nicaragua. Indeed, in 1984, the President issued an assurance that

the US does not seek to destabilize or overthrow the government of Nicaragua; nor to impose or compel any particular form of government there,¹³⁶

though he said in February of 1985, and again on repeated occasion, that the goal was to make the Sandinista government “say uncle.”¹³⁷ Reagan did not simply break his promises to Congress to only give humanitarian aid, he also broke a domestic law that he, not his predecessors or the international community, signed into law when he signed the House Appropriations Bill, and the two Defense Appropriations Bills. Nonetheless, no one was prosecuted.

Justification:

The Reagan Administration defended its interference in Nicaragua using what this author will call the “Thanks, Communism” tactic. This strategy consisted of constant assurances from the President and other proponents of the contras that the Sandinistas were going to cause the fall of Latin America to communism. Anything and everything that happened in Latin America in the latter half of the 20th century that negatively impacted the United States was blamed on communism, even in instances where the Soviet state or its doctrine were not at all involved.

The State Department actively engaged in propagating this Cold War anxiety. In 1985, the State Department released a white paper on the Nicaraguan revolution that quoted Nicaraguan Interior Minister Tomas Borge Martinez as saying “this revolution goes beyond our borders.”¹³⁸ The white paper suggested that this quotation was conclusive proof that the

¹³⁵ Michael John Garcia, “War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution,” CRS Report 7-5700, RL30352 (February 17, 2012), <https://fas.org/sgp/crs/natsec/RL30352.pdf>

¹³⁶ Arnson, 42.

¹³⁷ Smith, E1.

¹³⁸ Wayne Smith, “Lies About Nicaragua,” *Foreign Policy* (67, Summer, 1987), 89.

Sandinistas had intentions to export leftist revolutions to the rest of Latin America. However, the State Department very seriously, and perhaps intentionally, misrepresented what Borge actually said by taking this quotation out of context; Borge's full quotation describes the Sandinista revolution as part of a new era in Latin America of independence from military dictatorships.¹³⁹ Nonetheless, the damage was already done; the white paper had been published, and added to anxiety among Americans over the small Central American nation, allowing the Reagan Administration to use that anxiety to promote the war. The President and his proponents threatened political opponents with being "soft on communism," which "heighten[ed] the domestic political costs of opposing the President."¹⁴⁰ Though under the UN Charter and the Geneva Conventions war may only be started for self- or third party-defense, by arguing that the *contra* war was preventing the dangerous spread of communism, Reagan expanded the definition of self-defense, helping to promote the concept's ever-expanding elasticity that has enabled states to wage war with little restraint since signing laws prohibiting wars of aggression.¹⁴¹

Consequences and Conclusion:

The consequences of the United States' war in Nicaragua have been vast and important. First, the US' actions in supporting the *contras* brought heavy criticism of the Reagan Administration from the international community. Second, the US' decision not to prosecute any *contras* for their crimes or any American officials for their oversight in those crimes has had a deep impact on international criminal law. International condemnation of American activities wrought damage on American credibility abroad. A delegation of "Concerned European

¹³⁹ Ibid.

¹⁴⁰ Arnson, 38.

¹⁴¹ Linda S. Bishai, "Leaving Nuremberg: America's Love/Hate Relationship with International Law," *Review of International Studies*, (34/3, July, 2008), 438-439.

Parliamentarians” wrote President Reagan a public letter warning that the US’ actions in Nicaragua would threaten NATO alliances.¹⁴² In 1983, the UN General Assembly condemned the intervention, and throughout the 1980s, leaders from states all over the world objected to the US unauthorized use of force and support for the contras.¹⁴³ By 1985, the Institute for Policy Studies released a report that began by noting that “American credibility with nations that are most important to our national welfare...is eroding.”¹⁴⁴ Though the Reagan Administration nor the CIA was prosecuted for its responsibility for *contra* crimes, American relationships abroad suffered greatly after the war.

There are many reasons why no American was held accountable for the war crimes committed in Nicaragua. These reasons will appear similar to those given for the lack of substantial prosecution efforts during and after the Vietnam War presented in the previous chapter. Foremost, there is no international body capable of forcing the United States to try an American citizen, let alone to export a citizen for trial in an international court. Even in the 1980s, the United States possessed the most powerful military in the world; there is very little on this earth that could force the United States government to do anything. As scholar Patrick Hagopian writes,

this situation places the onus of responsibility on the US for ensuring that its own legal institutions and courts respect and observe the same standards it has promulgated through its... participation in international tribunals.¹⁴⁵

¹⁴² Daniel Siegel, Tom Spaulding, and Peter Kornbluh, “Outcast Among Allies,” Institute for Policy Studies (November, 1985), 19.

¹⁴³ Ibid, 18.

¹⁴⁴ Ibid., 1. See also: Roger Peace, *A Call to Conscience: the AntiContra War Campaign*, University of Massachusetts Press (Boston, 2012), 45.

¹⁴⁵ Patrick Hagopian, *American Immunity*, University of Massachusetts Press (Boston, 2013), 8.

For a citizen to be prosecuted for crimes in Nicaragua, the American government would have to request and begin the prosecution, which is extremely unlikely. Such a prosecution would be seen as an admission of guilt on the part of the United States, admitting that the government had broken the law and done wrong, which would have such great political consequences internationally and domestically that it simply will not happen. That the ICJ refused to acknowledge American responsibility for contra actions tacitly allowed the US government to also continue to refuse to acknowledge this responsibility. If there is no allegiance to the law, the law is powerless; in engaging in *contra* activities, and in refusing to prosecute either *contras* or the Americans who aided them, the United States demonstrated its allegiance not to the law, but to its exemption from that law, contributing to the weakness of international criminal law.

Chapter Three: Humanitarian Intervention in Kosovo and the Law

Introduction:

The breakdown of the former Yugoslavia was a violent, long-lasting, and ethnically charged process. The territories that now make up Serbia, Montenegro, Albania, Macedonia, Kosovo, and Bosnia and Herçegovina were torn by pre-existing ethnic and religious tensions exacerbated by the fall of the Soviet Union in the early 1990s. This chapter will focus mainly on the human rights violations committed by the North Atlantic Trade Organization (NATO) during the spring of 1999 in Kosovo, but to understand the context of NATO's actions, we must first discuss the context in which they took place.

In 1989, as the USSR's growing weakness destabilized the Balkan region, the Serbian government officially revoked Kosovo's status as an autonomous province within the Socialist Federal Republic of Yugoslavia.¹⁴⁶ As the rest of the Balkans underwent violent transformations into Serbian authoritarianism that accompanied rising Serbian nationalism, Kosovo remained largely peaceful; nonetheless, as the early 1990s passed, Kosovo became the site of government oppression of Kosovar Albanians, an ethnic group with a long history of conflict with Serbs.¹⁴⁷ From these conditions sprung the Kosovo Liberation Army (KLA), which developed into a fierce guerilla army that clashed with Serbian police forces, spurring even more state-sanctioned violence.¹⁴⁸ NATO allies watched as the Balkans spun even further into a cycle of indiscriminate violence and a campaign of ethnic cleansing began. Many have criticized NATO's hesitance to act, suggesting that had the West intervened sooner, thousands of lives would have been saved

¹⁴⁶ Human Rights Watch, *Under Orders: War Crimes in Kosovo*, Human Rights Watch (New York, 2001), 17.

¹⁴⁷ *Ibid.*

¹⁴⁸ John Norris, *Collision Course: NATO, Russia, and Kosovo*, Praeger Press (Westport, 2005), xix.

from Slobodan Milosevic's humanitarian abuses, and from the displacement the Balkan wars caused.¹⁴⁹

Milosevic's strategy for overtaking Kosovo was to incite Serbian nationalists in the region, even going so far as to arm civilians Serbs and encourage them to use those weapons against Kosovar Albanians.¹⁵⁰ Riots, muggings, rapes, and kidnappings ensued at the hands of the police as well as armed civilians in the name of protecting Yugoslavia from "Albanian secessionists" who may or may not have existed. Moreover, Milosevic and his army began a campaign of ethnic cleansing, attempting to drive out or kill the Kosovar Albanians in Kosovo. While thousands of Albanians emigrated to neighboring countries as Milosevic became more and more oppressive, thousands more stayed as the Serbian state physically intimidated, economically and socially marginalized, and limited the rights of Kosovar Albanians.¹⁵¹ By the late 1990s, Serbian forces were driving an ethnic cleansing campaign against the Albanian population all over Yugoslavia, but most intensely focused on Kosovo.

People all across the world called for the Western powers to step in. Though NATO had been involved in the Balkan wars before the 1999 bombing campaign, Kosovo had been left untouched; however, the Kosovo region became especially violent along ethnic lines because Serbs and Albanians have fought over the land for centuries.¹⁵² As Kosovar Albanians realized that nonviolence was ineffective against Milosevic and the KLA began contributing to the

¹⁴⁹ Ibid. Throughout his entire memoir, Norris reflects over and over again that he believes NATO could have stopped the Balkan conflicts years earlier without having to use military intervention. He argues that Serbian nationalism would not have risen so quickly or so violently if Western powers had helped reorganize the Yugoslav region after the fall of the Soviet Union in 1989.

¹⁵⁰ Human Rights Watch, 27.

¹⁵¹ For more information on Milosevic's measures against the Kosovar people, see Human Rights Watch, 28-30.

¹⁵² Norris, xix.

violence, the international community looked on. This chapter will analyze the decision making process that led to NATO's Operation Allied Force, a 78-day bombing campaign, and the international legal theory behind it.

Alliance Politics, and Decisions

The Decision Making Process

One of the chief criticisms of Operation Allied Force is the means by which NATO came to the decision to bomb Kosovo. Every member of NATO has signed and ratified the Geneva Conventions as well as the United Nations Charter, meaning each state is bound to the procedures detailed in the Conventions and the Charter.¹⁵³ The UN Charter dictates the structure of the UN, while the Geneva Conventions are generally thought of as the laws of modern warfare.¹⁵⁴ According to Articles 33 and 34 of the UN Charter, states must bring their complaints against one another to the UN Security Council before taking any action, military or economic.¹⁵⁵ The UNSC has the authority to draft resolutions imposing sanctions, embargoes, and allowing states to use violence, but its ultimate goal is to maintain international peace and security.¹⁵⁶ Without a UNSC permission, a state is breaking international law of war by committing violence against or within another state; that violence is considered a war of aggression.¹⁵⁷ In the case of Operation Allied Force, NATO did not receive UNSC permission to bomb Kosovo.

¹⁵³ Members of NATO at the time of the Kosovo Conflict include: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, the United States, Greece, West Germany, and Spain. When East and West Germany were reunified in 1990, the nation joined the alliance fully. See: North Atlantic Trade Organization, "What is NATO?", <http://www.nato.int/nato-welcome/index.html>.

¹⁵⁴ See previous chapters for information on the Geneva Conventions.

¹⁵⁵ United Nations, Articles 33-34, *Charter of the United Nations*, 24 October 1945, <http://www.refworld.org/docid/3ae6b3930.html>

¹⁵⁶ *Ibid.*, Article 32.

¹⁵⁷ *Ibid.*, Article 33.

However, the UNSC did release several resolutions attempting to quell the violence in the Balkan states. In 1998, the UNSC passed Resolution 1160, which officially condemned Serbian use of violence against the people of Kosovo, as well as established an arms embargo. This meant that to sell or bring arms into the Balkan region became a crime.¹⁵⁸ Later the same year, the UNSC adopted Resolution 1199. Resolution 1199 noted that an arms flow to the Balkan states had continued after 1160, and firmly demanded that all actors, including guerilla groups and Milosevic's police force, commit to an immediate ceasefire. It also calls on Milosevic's government to cease its targeting of the civilian population in Kosovo, and to allow refugees to return to their homes.¹⁵⁹ The violence did not stop. Indeed, the targeting of Kosovar Albanian civilians seemed to increase in late 1998, bringing more calls to the international community to intervene.¹⁶⁰ In October of 1998, the UNSC condemned the Yugoslav government, and endorsed NATO efforts to keep Milosevic and his officials in peace negotiations, but also noted that those negotiations were not having the desired effect. It also reaffirmed the UNSC's previous demand for all violent actors to commit to a ceasefire, and urged states outside the region to commit humanitarian aid. Finally, it called for the full participation in and cooperation with the International Tribunal for the Former Yugoslavia by Yugoslav forces and leaders.¹⁶¹ These were the final UNSC resolutions released before the NATO bombing that began on March 24, 1999, and clearly never gave NATO, or any actor, permission to conduct an aerial campaign, or any

¹⁵⁸ United Nations Security Council, Resolution 1160, "On the Letters from the United Kingdom and the United States," 31 March, 1998,

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/090/23/PDF/N9809023.pdf?OpenElement>.

¹⁵⁹ United Nations Security Council, Resolution 1199, "On the Situation in Kosovo," 23 September, 1998, "<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement>."

¹⁶⁰ Human Rights Watch, 47.

¹⁶¹ United Nations Security Council, Resolution 1203, "On the Situation in Kosovo," 24 October, 1998, "<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/321/21/PDF/N9832121.pdf?OpenElement>."

other military action. Nonetheless, it is notable that the Yugoslav government was able to completely ignore these resolutions by the institution that was intended to be the most powerful on earth. With no enforcement mechanism, the UNSC's resolutions did basically nothing to actually stop the violence taking place in the Balkans. Though NATO's use of force without the UNSC's endorsement was illegal and a breach of the UN Charter, the UN's efforts accomplished little. In October of 1998, soon after Resolution 1203 was released, NATO declared that airstrikes would be launched "if Milosevic broke [a previous agreement to] withdraw one-third of his troops from Kosovo, and the KLA was expected to cease its attacks as well."¹⁶²

The Decision to Act and Rambouillet

One of the most outspoken leaders within NATO was Secretary of State Madeleine Albright.

The American media even nicknamed the conflict in Kosovo "Madeleine's War," and consistently suggested that her passion (and thus, the United States' involvement) for intervention in the Balkans was caused by her own personal history as a refugee, first from Hitler's Prague, and then from the Soviet takeover of Belgrade in the mid-20th century.¹⁶³

Regardless of the source of Albright's interest in the conflict, her leadership as the first female Secretary of State drove NATO to action. In 1999, during Operation Allied Force, she told a *Time Magazine* reporter: "Just because you can't act everywhere doesn't mean you don't act anywhere."¹⁶⁴ Albright continually argued for humanitarian intervention, ushering the United States into a new role as "the indispensable nation asserting its morality as well as its interests to assure stability, stop thugs, and prevent human atrocities."¹⁶⁵ Albright led NATO's charge to

¹⁶² Norris, xxi.

¹⁶³ Walter Isaacson, "Madeleine's War," *Time Magazine*, May 9, 1999.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

bring Kosovar Albanian leaders and Milosevic's representatives to the negotiation table in Rambouillet, France in February of 1999.

John Norris, a State Department official, describes the Rambouillet Conference in his memoir about the conflict, *Collision Course*. Norris notes that the Albanians present at the talks represented such varied, disparate groups were "mutually distrustful," and did not hold the actual power needed to negotiate.¹⁶⁶ More importantly, Yugoslav President Milosevic did not attend the talks himself, instead sending several delegates who held low positions in his government, and were effectively powerless; Norris also reported that these delegates drank heavily.¹⁶⁷ On top of these issues, Russia, which held the most sway over the Milosevic regime, made clear at the negotiations that it hoped the talks would collapse.¹⁶⁸ Norris argued that

the view from Russia... was that the US and its allies were now committed to an ambitious new program of humanitarian intervention with NATO serving as the world's policeman,

an obvious reason for Russia to benefit from the failure of the conference.¹⁶⁹ In short, the conference was "doomed to failure from the start."¹⁷⁰ Though Kosovar representatives signed the conference's agreement that gave Kosovo autonomy with NATO ground troops as peacekeepers, the Serbian delegation refused to sign, continuing to state that Kosovo belonged to Yugoslavia, and rejecting a clause that would have allowed NATO unrestricted access throughout Yugoslavia.¹⁷¹ With Russia the only delegation that could impact Milosevic without a threat of force, the talks fell apart quickly. The delegates watched as Organization for Security and

¹⁶⁶ Norris, xxi.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid., 15.

¹⁷⁰ Ibid., xxi.

¹⁷¹ Human Rights Watch, 58.

Cooperation in Europe (OSCE) monitors reported Serbian and Yugoslav forces organizing themselves around Kosovo's border with Serbia proper, a clear indication that Milosevic was planning a large scale offensive against the Kosovo territory.¹⁷²

On March 20th, 1999, Milosevic and Serbian forces launched a new offensive against Kosovar Albanians after a winter of increasing the number of military and paramilitary members in Kosovo.¹⁷³ Where previously only police forces had clashed against KLA members during riots and seemingly random acts of violence, the weeks immediately preceding Operation Allied Force saw an increase in military deployments to the area. In January, 1999, the KLA ambushed a group of Serbian police officers south of Pristina. The government responded by conducting a summary execution of 45 ethnic Albanians in the village of Racak in a massacre that was photographed by monitors from the OSCE.¹⁷⁴ The well-documented carnage brought an outcry from the international community, which, weeks later, watched as Milosevic began "Operation Horseshoe" on March 20th, days after the Rambouillet Conference officially ended.

During the conference, NATO received reports from the Austrian government and later the German government that Milosevic was preparing a large-scale offensive against Kosovar Albanians; these reports alleged that planning for this operation began in the fall of 1998, months before the Rambouillet peace talks failed.¹⁷⁵ The OSCE withdrew its monitors on March 20th, resulting in a dramatic escalation of violence in Kosovo known as Operation Horseshoe.¹⁷⁶ It has been nearly impossible for observers to accurately track civilian casualties as a result of Operation Horseshoe, largely because Milosevic used NATO bombings as a scapegoat for

¹⁷² Ibid., 59.

¹⁷³ Ibid., 4.

¹⁷⁴ Ibid., 57.

¹⁷⁵ Press conference of German Foreign Minister Fischer, April 6, 1999, World Hall of the Foreign Office.

¹⁷⁶ OSCE/ODIHR, *Kosovo/Kosova: As Seen, As Told*, Part I, 37.

civilian casualties, and claimed that those killed or detained were actually Albanian militant rebels.

Despite the foggy nature of data, it is clear that Operation Horseshoe was an ethnic cleansing campaign. Immediately after OSCE monitors left the Balkans, Serbian and Yugoslav forces began burning villages, committing mass executions, and forcing thousands of Kosovar Albanians to leave their homes.¹⁷⁷ Much of this violence was shielded by the confusion caused by the NATO bombings that began on March 24, 1999.

The Air Campaign:

Just after eight in the evening on March 24, NATO began bombing military targets using planes flying around 15,000 feet above Kosovo.¹⁷⁸ That night, NATO forces struck 40 military targets and shot down three Yugoslav planes.¹⁷⁹ Throughout the 78 day air campaign, pilots continued to fly at high altitudes, following a strategy designed to minimize NATO casualties. Though Milosevic claimed his troops shot down the helicopter, the only NATO military members to die were killed in a non-combat helicopter crash that the US Army determined was a mechanical malfunction.¹⁸⁰

However, Operation Allied Force caused literally incalculable civilian casualties.¹⁸¹ In its study of the Kosovo humanitarian crisis, Human Rights Watch (HRW) found that there were 90

¹⁷⁷ Human Rights Watch, 112-113.

¹⁷⁸ Norris, 5.

¹⁷⁹ Ibid.

¹⁸⁰ Dana Priest, "Army's Apache Helicopter Rendered Impotent in Kosovo," *Washington Post*, December 29, 1999, A1.

¹⁸¹ Here, incalculable should be taken to mean literally uncountable. Milosevic's military frequently planted bodies at the site of a NATO bombing to up NATO's civilian casualties. Milosevic also allowed his military to use Kosovar Albanians as human shields during NATO bombings. So many Kosovar Albanians were murdered and buried in mass graves by the Yugoslav forces and armed Serbian nationalists that it is nearly impossible, even today, to calculate the number of people who lost their lives during the conflict.

separate incidents involving civilians deaths during NATO's 78-day bombing campaign.¹⁸² According to the data HRW presents, between 278 and 317 civilians died in Kosovo alone.¹⁸³ While these casualties are tragic, and horrifying, they should be considered as quite different from the civilians deaths discussed in previous chapters. In Vietnam and Nicaragua, Americans willfully and knowingly caused harm to the civilian populations, whether by attacking them directly without evidence that they were involved with the enemy, or by supporting groups that targeted civilians. Conversely, in Kosovo, the civilian casualties were accidental. Though NATO could have done more strategically to lessen the likelihood of civilians deaths, those deaths were fundamentally not intentional, protecting NATO troops and officers from being responsible for war crimes.

International Law and its Application

Intentionality is key to determining responsibility when considering violence that affects civilians. Were civilians the target of an armed attack? Did the attackers take appropriate measures to ensure civilian safety? What was the motivation behind the attack in the first place? As one can imagine, the answers to these questions fall on the spectrum between objective and subjective; finding evidence of such a nature is complicated, and the context of decisions is very important. This section will analyze the laws surrounding civilian casualties caused by NATO's airstrikes, and then the legality of NATO's involvement in the conflict as a whole.

Civilian Deaths and the Nature of Air Campaigns.

¹⁸² Human Rights Watch, 437.

¹⁸³ Ibid.

On April 14th, 1999, NATO pilots bombed what they believed, from an altitude of over 15,000 feet, was a military convoy on the Djakovica-Decan Road for about two hours.¹⁸⁴ Tragically, the convoy was not made up solely of military vehicles, as NATO strategists had previously thought. Instead, the 12-mile stretch that pilots bombed repeatedly was filled with Kosovar Albanian refugees, being escorted (or deported) by several military vehicles.¹⁸⁵ 73 confirmed deaths were civilians, and another 36 civilians were injured.¹⁸⁶ As more information was released by witnesses and human rights groups, NATO's response changed from insistence that the convoy was solely military, to a confession of a tragic mistake; many, including monitors from HRW, see this change in message as a sign that the bombing was sincerely not meant to harm civilians, and that NATO genuinely believed that there would be no civilian loss of life.¹⁸⁷ Additionally, HRW and the International Red Cross were unable to find any evidence suggesting that anyone within the NATO operation had any knowledge of civilians within the Djakovica-Decan convoy.¹⁸⁸ What this means, then, is that NATO did not commit a war crime, for it did not knowingly or intentionally gravely breach any of the Geneva Conventions.

Nonetheless, NATO's use of airstrikes in lieu of military action that could be more accurate in targeting does inspire questions about NATO's adherence to Protocol I of the Geneva Conventions. Protocol I generally protects civilians, and by signing it, each member state agreed that it "must take all precautions to avoid or minimize harm to civilians, and to this end may not attack... combatants and civilians indiscriminately."¹⁸⁹ Before the Djakovica-Decan bombings,

¹⁸⁴ Ibid., 444.

¹⁸⁵ Ibid., 445.

¹⁸⁶ Ibid., 444.

¹⁸⁷ Norris, 42. See also: Human Rights Watch, 445-446.

¹⁸⁸ Human Rights Watch, 439-440, 449.

¹⁸⁹ Ibid., 441.

NATO's policy was to have its pilots fly and bomb from at least 15,000. Even with the advanced technology available, weather changes and the limits of technology and human eyesight may have impaired NATO's ability to take adequate measures to protect civilians. As HRW's report declared,

if precision would have been greater... had NATO pilots flown lower, it could be argued that there may have been a point at which NATO was obligated to have its pilots fly lower.¹⁹⁰

By choosing the less accurate strategic option and having high flying pilots rather than ground troops or even bombing from a lower altitude, NATO violated humanitarian law. Each member state pledged upon signing the Geneva Conventions that it would take every precaution to protect the lives of civilians. Though the decision to go through with an aerial campaign may have saved countless military men and women, it resulted in excessive civilian casualties because NATO was not able to properly identify and verify many of the objects it bombed far below its planes. It is likely that ground troops or even lower flying planes would have been capable of properly avoiding civilian casualties.¹⁹¹ While NATO has an inherent interest in and right to value the lives of its soldiers and pilots, it also has a legal obligation to value the lives of civilians over the lives of its troops; not surprisingly, however, this principle falls into a political and moral gray area for many world leaders.

NATO's Entrance into the Conflict

By entering what was previously an internal conflict, NATO transformed the Balkan wars into an international armed conflict. This meant that on March 24th, 1999, at approximately

¹⁹⁰ Human Rights Watch, 443.

¹⁹¹ David Scheffer, "War Crimes and the Clinton Administration," *Social Research* (Vol. 69, No. 4, 2002), 1115.

8:01PM, as soon Operation Allied Force dropped its first bombs, the “full body of international humanitarian law applied” to all of the Yugoslav region, making Milosevic and his soldiers responsible for their crimes not only within Yugoslav laws, but also international laws.¹⁹² This allowed the United Nations to form the International Criminal Tribunal for the former Yugoslavia (ICTY), and to bring Milosevic and other Yugoslav decision-makers to justice for their crimes.¹⁹³ Though NATO’s entrance into the conflict was contrary to its member-states’ obligations Articles 33 and 34 of the UN Charter, the ICTY was able to support its claims to jurisdiction over the Yugoslav criminals because the conflict was international.

Nonetheless, the alliance did breach its UN obligations by committing violence without UNSC approval. Furthermore, it committed the act of aggression by entering the conflict when no NATO member-state had been attacked. As discussed in previous chapters, Article Two of the Geneva Conventions ensure the the laws of war apply even when the parties involved do not declare war officially.¹⁹⁴ The legal definitions surrounding the crime of aggression are complicated and nuanced, and have been hotly debated since states began codifying customary law together in the post-Great War world. After the 1928 Kellogg-Briand Pact codified an agreement between dozens of nations not to use war or violence to settle disputes, states needed a solid definition of the crime of aggression, which led to the 1933-1934 Conventions for the Definition of Aggression (CDA).¹⁹⁵ These conventions were signed and ratified by the League

¹⁹² Human Rights Watch, 441.

¹⁹³ For more information on ICTY, see <http://www.icty.org/en/about>. While this author would love to analyze the trials of Yugoslav war criminals, this thesis must be narrowed to examining the actions of American leaders, soldiers, and allies in the three case studies presented.

¹⁹⁴ International Committee of the Red Cross (ICRC), Article Two, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, <http://www.refworld.org/docid/3ae6b36d2.html>.

¹⁹⁵ Kellogg-Briand Pact, Article 1, 24 July, 1929, http://avalon.law.yale.edu/20th_century/kbpact.asp.

of Nations member-states, several Middle Eastern states, and most of Northern and Eastern Europe, and declared that the crime of aggression would be defined as:

Declaration of war upon another state; Invasion by its armed forces, with or without a declaration of war, of the territory of another state; Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another state; Naval blockade of the coasts or ports of another state; and, provision of support to armed bands formed in its territory which have invaded the territory of another state...¹⁹⁶

Many international legal scholars argue that this definition has been in use for so many generations that it has become a part of international customary law.¹⁹⁷ However, defining customary law is notoriously difficult because it is based not on any tangible document or written standard, but rather on the practices of states and the laws to which they have actually adhered.¹⁹⁸

After the CDA came World War Two, and with it, the Nuremberg Protocols, which formed the foundation of the United Nations and modern international law. Principal VI, Paragraph A of the Nuremberg Protocols defines a crime against peace as the

[p]lanning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; [and the] participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned [in the previous clause].¹⁹⁹

Though this definition is noticeably different from that outline by the CDA, but it carries the same ultimate message when applied to NATO's intervention in Kosovo: NATO, as a signatory

¹⁹⁶ Convention for the Definition of Aggression, Article Two, 3 July, 1933, <http://www.worldlii.org/int/other/treaties/LNTSer/1934/75.html>.

¹⁹⁷ Linda S. Bishai, "Leaving Nuremberg: America's Love/Hate Relationship with International Law," *Review of International Studies*, (Vol. 34, No. 3, July 2008), 438.

¹⁹⁸ Bruce Benson, "Customary Law," in *The Enterprise of Law: Justice without the State*, Laissez Faire Books (Oakland, 2011), 46-51.

¹⁹⁹ UN General Assembly, Principle VI (a), *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946, <http://www.refworld.org/docid/3b00f1ee0.html>.

of the UN Charter, and with most of its members as participants in the CDA and the Nuremberg Tribunals, committed a crime against peace under these laws.

The UN Charter states in Article Two, Paragraph Four that states may not intervene in one another's affairs by any means "in any manner inconsistent with the [p]urposes of the United Nations."²⁰⁰ At first glance, this appears to be another obligation that NATO breached in 1999, but actually, it is where the Kosovo case differs drastically from those of Vietnam or Nicaragua.

²⁰¹ Scholar Peter J. Anderson wrote that "law and specific systems of ethics, of course, do not often coincide."²⁰² Though Anderson argues against NATO's use of force in Kosovo, describing it as a serious violation of international law, the law had not yet caught up to a humanitarian system of ethics. In order to comply with the spirit of international law described in the UN Charter, NATO had to break that law. The UN Charter professes again and again the organization's desire and intention to protect the innocent from state-sanctioned violence alongside the Geneva Conventions' mission. By 1998, it was clear that Kosovar Albanians would not have success against Milosevic using peaceful means, and that the KLA would never have the manpower or weapons supplies to end the ethnic cleansing campaigns and deportations.

²⁰³ Even if NATO's intentions for entering the war were not to uphold the UN's purpose, the consequences if Milosevic had been allowed to continue gaining control in the region would have been dire; his ethnic cleansing campaign could have turned into outright genocide if left unchecked. While stopping Milosevic does not excuse NATO's breaches of the law (especially

²⁰⁰ United Nations, Article 2 Paragraph 4, *Charter of the United Nations*, 24 October 1945, <http://www.refworld.org/docid/3ae6b3930.html>.

²⁰¹ To clarify, the author writes the following defense of NATO's involvement in Kosovo as an analysis of the international law applied, and not as a defense, endorsement, or explanation for NATO's use of high altitude pilots or lack of verification of civilian targets.

²⁰² Peter J. Anderson, "Air Strike: NATO Astride Kosovo," eds. Tony Weymouth and Stanley Henig in *The Kosovo Crisis: The Last American War in Europe?*, Reuters (London, 2001), 199.

²⁰³ Human Rights Watch, 15.

its lack of precaution for civilian casualties), Operation Allied Force did bring a war criminal's reign of terror to an end. By June of 1999, NATO's threats of deploying ground forces as well as the bombing campaign finally forced Milosevic to peace talks.²⁰⁴ The war ended with the Kumanov Agreement. There are still lingering questions over whether or not this agreement was legal and therefore binding, since the agreement was reached under threat of force at NATO's hand; Article 52 of the Vienna Convention on the Law of Treaties declares a treaty void if it is reached via coercion.²⁰⁵ Nonetheless, the treaty was honored, and Milosevic and many members of his government were tried by the ICTY.

After the War

The United States government never articulated a clear legal justification condoning its NATO actions, instead relying upon an amorphous listing of factors that together justified the intervention as a matter of policy, writes Harold Koh, critical of the decisions the Clinton Administration made during the Balkan wars.²⁰⁶ Koh is fundamentally correct; whenever asked to defend American violations of international law during the conflict, Clinton and Albright would dive into a conversation about the United States' responsibility to intervene in humanitarian conflicts.²⁰⁷

In an interview with CNN, Clinton said that "if the world community has the power to stop it, we ought to stop genocide and ethnic cleansing."²⁰⁸ Clinton went on to argue that the United States was obligated to intervene if there was a moral imperative, like stopping genocide or ethnic cleansing, if the physical territory was of strategic import to the United States, and if

²⁰⁴ Human Rights Watch, 500.

²⁰⁵ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, <http://www.refworld.org/docid/3ae6b3a10.html>, 133.

²⁰⁶ Harold Hongju Koh, "War Powers and Humanitarian Intervention," *Houston Law Review* (Vol. 53, No. 4, April, 2016), 977.

²⁰⁷ Norris. See also: Isaacson.

²⁰⁸ Norris, 42.

the intervention would have low American casualties.²⁰⁹ Though this broad argument, which CNN nicknamed “the Clinton Doctrine,” is quite difficult to put into practice, it points to a growing trend in international legal theory.

After Nuremberg established the modern conception of the crime of aggression, the Cold War enflamed the anxieties of the American people; all-out war seemed a daily threat. Scholar Linda S. Bishai writes,

[t]he American legal profession turned to the... consent-based approach... and developed a concept of the international lawyer as policymaker, in which a whole range of policy options [including an all-out war] could be justified as necessary, and as self defense or third party defense.²¹⁰ This meant that outlawing wars of aggression did not stop states from engaging in interstate violence, but rather, made those states justify the war in a different manner. Rather than arguing that a war is a just war between equal foes, as was ideal before the CDA, after Nuremberg, states justified their military actions by depicting wars as “wars of necessity, or self defense, policing action” or third party defense.²¹¹ The change is significant, and reflects Secretary Albright’s view of the Kosovo conflict as

ground zero in the debate over whether America should play a new role in the world, that of the indispensable nation asserting its morality as well as its interests to assure stability, stop thugs, and prevent human atrocities.²¹²

That the United States did not need to make a legal justification for its involvement in Kosovo demonstrates the truth of Joseph Margulies’ declaration that “power implies the license to make and justify the rules.”²¹³ This is sobering. NATO members were not sanctioned or tried

²⁰⁹ Ibid.

²¹⁰ Bishai, 438.

²¹¹ Bishai, 439.

²¹² Isaacson.

²¹³ Joseph Margulies, “American Immunity: War Crimes and the Limits of International Law: Review”, *Law and Society Review*, (Vol. 50, No. 1, 2016), 267.

for their actions in Kosovo, but instead, the UNSC passed Resolution 1244, authorizing a foreign civil and military presence in the region, while UN General Assembly President Kofi Annan praised NATO's actions.²¹⁴

Moreover, the UN made three mistakes that would impact the future of international law by not sanctioning NATO. First, the UN demonstrated to the world that there was no force on earth that could force wealthy Western nations, especially the United States, to do anything. Imposing economic sanctions on the United States, let alone every member of NATO, would cripple the world, and would likely be logistically impossible anyway, but demonstrating this truth so forcefully by not even trying to condemn NATO's illegal actions was a stark reminder of where power actually lay in the world.²¹⁵ Secondly, when the UN did not sanction NATO for committing crimes it had punished other states for committing, the UN showed that "its rules are enforced only selectively and only in accordance with the preferences of great powers."²¹⁶ The UN set an obvious double standard in its legal code that inherently weakened that code. Were some countries responsible under international criminal law while others were not? Were the laws NATO broke simply not going to be enforced anymore? One can easily see the confusion and immorality in this situation. Finally, the United Nations opened the door to future collective breaches of international criminal law. When it did not punish or condemn NATO for its breaches of law, the UN tacitly accepted that a "group of state can unilaterally decide to

²¹⁴ UN Security Council, *Security Council Resolution 1244*, "On the Deployment of International Civil and Security Presences in Kosovo", 10 June 1999, <http://www.refworld.org/docid/3b00f27216.html>. See also: Annan, Kofi; with Nader Mousavizadeh (2012). *Interventions. A Life in War and Peace*. Penguin Books. pp. 92–97.

²¹⁵ Lori Fisler Damrosch, "The Inevitability of Selective Response? Principles to Guide International Action," in *Kosovo and the Challenge of Humanitarian Intervention*, eds Albrecht Schnabel and Ramesh Thakur, United Nations University Press (Tokyo, 2000), 411.

²¹⁶ Damrosch, 405.

intervene.”²¹⁷ This principle alone could have grave impacts on the state of international criminal law. For example, should several states band together to exterminate an unpopular ethnic minority, and those states would be logistically difficult to punish, what action could the UN take, following the precedent it set after Operation Allied Force? The implications are, indeed, sobering. The aftermath of the conflict in Kosovo demonstrates that the US is of grave importance to the ability of the global community to respond to state-sanctioned violence and atrocity crimes, both as a predominant military power, but also as a state signatory of modern international criminal law.²¹⁸

Conclusion: The Aftermath of American Atrocity Crimes

The International Criminal Court: An Epilogue

²¹⁷ James Mayall, “The Concept of Humanitarian Intervention Revisited”, in Schnabel and Thakur, 328.

²¹⁸ G. John Ikenberry, “The Costs of Victory: American Power and the Use of Force in the Contemporary Order,” in Schnabel and Thakur, 85.

Though President Clinton repeatedly spoke of his hope for a permanent war crimes tribunal like the ones in Rwanda and Yugoslavia, he ultimately opposed the creation of the International Criminal Court. As a result, the United States is not a member of the ICC, a position that substantially weakens both the US' ability to claim it acts in the interests of the global community and the ICC's ability to properly enforce the Rome Statute, which mirrors the Geneva Conventions in its definitions of war crimes, crimes against peace, and crimes against humanity. America's consistent refusal to join the ICC stems from the fear the the ICC would prosecute Americans.

However, until it became clear that the Rome Statute would include the crime of aggression, the United States was a dedicated leader while the document was drafted. The United States vehemently argued against including the crime. One observer noted that

it was evident that the reluctance to give ambitious new crimes courts jurisdiction over the central crime of war-making derived from the [United S]tates' ambivalent legacy after Nuremberg.²¹⁹

At Nuremberg, the United States had insisted on prosecuting Nazi leaders for bringing such a war to Europe, and on demonstrating Nuremberg was not "victor's justice," but rather, a standard for all nations.²²⁰ However, as noted in the quotation above, American actions contradicted the ideology that dominated Nuremberg. The United States had reason to fear prosecution within the new ICC, as demonstrated by the previous chapters.

Instead of joining the ICC and acknowledging its war crimes, the United States adopted the American Service-Member's Protection Act. The Act prohibits American cooperation with

²¹⁹ Jonathan Bush, "The Supreme Crime and its Origins: The Lost Legislative History of the Crime of Aggressive War", *Columbia Law Review*, (Vol. 102, No. 8, 2002), 2328.

²²⁰ Taylor, 50-79.

the Court, and “authorizes the use of all means necessary to secure the release of Americans held by or for the ICC.”²²¹ Not only does the American government oppose the ICC, but it deliberately fights against its jurisdiction, attempting to undermine it.²²² Many regard the Court as a failure given its inefficiency and perhaps disproportional focus on African criminals, but it is possible that with American support, the Court could have been what it was intended to be: an enforcement mechanism for international criminal law.

The United States has also made little progress in regulating the domestic prosecution of American service-members. In 1996, Congress passed the War Crimes Act, which adopted the grave breaches defined by the Geneva Conventions into domestic law and created a system through which the Department of Justice could try a service-member.²²³ Unfortunately, no American service-member has ever been tried under the WCA.²²⁴ The political repercussions of trying someone under the law would be vast, especially because doing so would be effectively admitting that the American military violated international law.²²⁵ Though obviously ethically preferable to continuing to ignore the war crimes of the 20th century, trials of this nature are extremely unlikely to take place.

Final Notes

This thesis has demonstrated that the United States has indubitably committed grave breaches of the Geneva Conventions by using military intervention to protect American interests, by either directly committing or allowing the commission of crimes against civilians, and by

²²¹ Megan A. Fairlie, “The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage,” *Berkeley Law Review*, (Vol. 29, No. 2, 2011), 538.

²²² Emily Krasnor, “Undermining International Law by Opposing the International Criminal Court,” *Peace Review* (Vol. 16, No. 3, 2004), 323.

²²³ Pittman and Heaphy, 173-174.

²²⁴ *Ibid.*

²²⁵ *Ibid.*, 174.

failing to hold those perpetrators responsible. Nonetheless, there exists no force, military or economic, that could coerce the United States into submitting its service-members to international courts or tribunals. Thus, the responsibility to enforce the legal standards held sacred by the Geneva Conventions, the UN Charter, and the United States' own professed ideology lies solely with the United States itself. America is one of the few nations on earth capable of offering a fair and full trial to those who commit the most heinous of crimes. Thus far, it has refused to do so when its own leaders have violated the laws of war in Vietnam, and Nicaragua, and this refusal has changed the enforceability and the nature of the international criminal law that so many fought to codify.

Chapter Three quoted Secretary Madeleine Albright when she said that “just because you can't act everywhere doesn't mean you don't act anywhere.”²²⁶ Albright was defending America's involvement in Kosovo at the time, encouraging the United States to protect the rights of ethnic and religious minorities all over the world. However, this concept of acting where one is able can also be applied to the future of American war crimes law in holding individuals accountable for their past crimes; just because one cannot prosecute every war criminal does not mean one should not prosecute any.

²²⁶ Secretary of State Madeleine Albright, quoted in Walter Isaacson, “Madeleine's War,” *Time Magazine*, May 9, 1999.

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