Comment

TODAY’S LIVING, TOMORROW’S DEAD:
ANALYZING THE DUTY TO PROSECUTE OR EXTRADITE GRAVE
BREACHES OF THE GENEVA CONVENTIONS

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INTRODUCTION

The overarching purpose of international humanitarian law is to minimize the horrors of war as much as possible.¹ By adhering to international

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humanitarian law, nation-states seek to “preserve a measure of humanity even during conflicts.”

Virtually all of the provisions in the Geneva Conventions and other international humanitarian law treaties further this general goal, both in theory and as applied in practice. After all, very few would argue that a prohibition of the willful killing of civilians does not attempt to make wars more humane, and does not serve as a deterrent at least some of the time.

Some international humanitarian law provisions, however, do not have this sort of positive impact. In fact, some international humanitarian law principles may actually encourage war and result in even greater death and suffering among military and civilian populations. The duty to prosecute or extradite individuals accused of grave breaches of the Geneva Conventions is one such principle. This provision, while theoretically furthering international humanitarian law’s overarching goal, may actually have the opposite effect if nations chose to abide by it. This Comment will examine why full compliance with the duty to prosecute or extradite creates undesirable outcomes, and why traditional international humanitarian law enforcement mechanisms have failed to motivate the United States to comply with this duty. Because the duty to prosecute or extradite produces outcomes that are at odds with the primary purpose of the Geneva Conventions and international humanitarian law, the international community should amend the Geneva Conventions to eliminate this duty, rather than attempt to convince nations to comply.

I. The Duty to Prosecute or Extradite: A Brief Overview

Not all violations of international humanitarian law require a nation-state to prosecute or extradite individuals who have been accused of committing such

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2 Id.
4 UNL, supra note 1.
violations. In fact, scholars have generally interpreted some provisions of major international treaties as requiring prosecution or extradition only “in a few narrowly defined situations.” However, when these situations arise, a nation’s “failure to prosecute can amount to an international breach.” This section briefly summarizes the situations where international humanitarian law requires nations to prosecute or extradite individuals for violations.

A. The Geneva Conventions

The four Geneva Conventions, which apply to international armed conflicts involving two or more nation-states, differentiate between “grave breaches” and other violations. Each of the Geneva Conventions specifically states that “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health” are grave breaches. Geneva Conventions I, II, and IV also include the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” in the definition of “grave breach.” Geneva Convention III makes it a grave breach to “compel[] a prisoner

5 For instance, the Geneva Conventions do not require prosecution and extradition for violations that take place in civil wars or other internal armed conflicts, or in international conflicts where hostilities are sporadic or isolated. 1125 U.N.T.S. 609, 614.

6 These narrowly defined situations include serious international crimes, such as genocide. See Michael P. Scharf, From the eXile Files: An Essay on Trading Justice for Peace, 63 WASH. & LEE L. REV. (forthcoming 2006), available at http://ssrn.com/abstract=799004.

7 Id.


9 See Geneva Convention I, supra note 8, art. 50; Geneva Convention II, supra note 8, art. 51; Geneva Convention III, supra note 8, art. 130; Geneva Convention IV, supra note 3, art. 147.

10 Id.

11 Geneva Convention I, supra note 8, art. 50; Geneva Convention II, supra note 8, art. 51; Geneva Convention IV, supra note 3, art. 147.
of war to serve in the forces of the hostile Power, or [to] willfully deprive a prisoner of war of the rights of fair and regular trial.”

Geneva Convention IV further states that it is a grave breach to unlawfully deport, transfer, or confine a protected person, to deprive a protected person of the right to a “fair and regular trial,” and to take hostages.

Nation-states that are signatories of the Geneva Conventions are obligated to search for and prosecute those believed to have committed grave breaches. If a nation-state does not wish to conduct a trial itself, it is required to extradite the individual to a state that is willing to hold such a trial. The Geneva Conventions also prohibit nation-states from granting amnesty or immunity to individuals accused of committing grave breaches in international armed conflicts, although this prohibition of amnesty does not apply to atrocities committed during civil wars. Thus, one could say that signatories to the Geneva Conventions have

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12 Geneva Convention III, supra note 8, art. 130.
13 Geneva Convention IV, supra note 3, art. 147.
14 See id., art 146 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”).
16 See Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CAL. L. REV. 451, 483-88 (1990) (summarizing how the Geneva Conventions’ requirement to prosecute or extradite has been interpreted).
17 The International Committee of the Red Cross, in its commentary to Additional Protocol II, actually encourages the use of amnesty in internal conflicts, because they are “gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.” YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 1402 (1987).
accepted an absolute duty to prosecute or extradite those accused of being international war criminals.\(^{18}\)

**B. Other Treaties & Agreements**

Two other notable international humanitarian law treaties – the Genocide Convention\(^{19}\) and the Torture Convention\(^{20}\) – require mandatory prosecution or extradition for certain violations. The Genocide Convention, which, among other things, prohibits killing, physically harming or mentally damaging “in whole or in part, a national, ethnical, racial, or religious group,”\(^{21}\) requires individuals who violate the Convention to be prosecuted in the state in which the genocide occurred or in an international criminal court, and compels states to extradite these individuals to states willing to prosecute them if they are unable to do so.\(^{22}\) Similarly, the Torture Convention requires that states either prosecute or extradite individuals\(^{23}\) who commit the act of torture as is defined by the convention.\(^{24}\) While other international treaties, such as the International Covenant on Civil and Political Rights,\(^{25}\) may strongly recommend prosecution or extradition, they do not explicitly require states to take these actions. The following sections will

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\(^{18}\) See generally INT’L COMM. OF THE RED CROSS, supra note 15 (exploring duties imposed by the convention).


\(^{21}\) Genocide Convention, supra note 19, art. 2.

\(^{22}\) Id. art. 6.

\(^{23}\) Torture Convention, supra note 20, art. 6 (requiring states to extradite those accused of committing torture if they do not wish to prosecute such individuals themselves).

\(^{24}\) Id. art. 1 (defining torture as “any act by which severe pain or suffering… is intentionally inflicted on a person” for, among other things, obtaining information, intimidation, or punishment).

examine the mandatory duty to prosecute or extradite for grave breaches of the Geneva Conventions.

II. REASONS FOR NON-COMPLIANCE

One might wonder why a nation-state that has signed on to the Geneva Conventions and other international humanitarian law treaties would not want to either prosecute or extradite an individual who has been accused of committing such horrible atrocities. In most circumstances, it is unlikely that a nation such as the United States would object to putting a despot such as Saddam Hussein on trial for grave breaches of the Geneva Conventions. However, there is one situation that would give the United States or other nations a legitimate reason to avoid compliance with the duty to prosecute or extradite: a situation where the decision not to prosecute or extradite can avert a potential conflict and save many lives. This section will explain the economic and moral motivations nations may have for disregarding the duty to prosecute or extradite, and address the most common counterarguments.

A. The Economics of Justice

One of the purposes of international humanitarian law is to deter individuals from committing various atrocities, particularly against civilians. 26 If individuals, ranging from a common soldier to the absolute leader of an authoritarian regime, know that they may be held accountable for their atrocities in the future, they have an incentive to avoid committing them in the first place (or, in the case of leaders, an incentive to prevent their subordinates from committing them), for the failure to comply with international humanitarian law

26 UNL, supra note 1.
can result in actual negative consequences. This argument clearly has merit: there is little dispute that the presence of a law, along with awareness of the law and the creation of appropriate enforcement mechanisms, will usually have some deterrence effect, although the level of deterrence can greatly vary. However, there are situations where the possibility of sanctions under international humanitarian law no longer serves as a deterrent – namely, situations where individuals have already committed many atrocities, particularly multiple grave breaches of the Geneva Conventions. A tyrannical leader who has already ordered multiple genocides and routinely executes prisoners of war without a trial has little or no incentive to cease these practices. Once a certain threshold is reached, a leader would suffer no additional punishment from additional diplomatic sanctions or from the fear of potentially receiving a higher sentence if tried for these crimes. After all, if a tyrant has already committed enough atrocities to receive a sentence of life in prison, the marginal cost of committing additional atrocities is very close to zero. At this point, the tyrant has little incentive to cease his behavior, other than the threat of an actual war with another nation that seeks to depose him.

Perhaps these arguments are best illustrated by drawing on an actual case study where the United States has attempted to disregard the duty to prosecute or extradite in exchange for peace. In 2003, shortly before commencing the war on

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27 See Roht-Arriaza, supra note 16, at 472 (arguing that prosecuting individuals for such atrocities “ensure[s] human rights by deterring both future and current violators”).

28 See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW ch. 2 (explaining punishment’s deterrence effect).

29 Of course, people can reasonably disagree as to whether the deterrence effect caused by a particular punishment is large enough to warrant the passage of the law. However, even in these situations few would argue that the deterrence effect is absolutely zero. For instance, those who oppose the death penalty may argue that any additional deterrence caused by capital punishment is outweighed by other factors.

30 See Scharf, supra note 6, at 5 (acknowledging that these individuals, once they commit enough atrocities to receive the maximum penalty of life imprisonment, no longer have an incentive to seek peace or prevent future breaches).
Iraq, President George W. Bush, working closely with Middle East leaders such as President Hosni Mubarak of Egypt, offered Saddam Hussein a compromise.\textsuperscript{31} Under the terms of this compromise, Hussein and other high-ranking members of the Iraqi government would voluntarily relinquish power and go into exile;\textsuperscript{32} Bush and Mubarak had persuaded Bahrain to provide Hussein with sanctuary.\textsuperscript{33}

Of course, Hussein chose to reject this deal, despite public pronouncements from Bush that he would invade Iraq and prosecute Hussein as a war criminal if the deal was not accepted.\textsuperscript{34} If Hussein had accepted Bush’s exile proposal, there is little doubt that the agreement, if enforced, would have resulted in a blatant disregard for the Geneva Conventions’ duty to prosecute or extradite on the part of the United States and Bahrain.\textsuperscript{35}

Why was the United States willing to breach the Geneva Conventions to give Saddam Hussein sanctuary? From the perspective of the United States, Hussein voluntarily stepping down from power would produce the most economically efficient outcome. As of March 2006, the United States has spent an estimated $251 billion on the Iraq war;\textsuperscript{36} as of April 11, 2006, 2,360 American soldiers have died in the Iraq war, with 206 other coalition deaths, as well as more than 17,469 American soldiers wounded in action.\textsuperscript{37} Perhaps even more

\textsuperscript{31} Emily Wax, Arab Leaders Fail in Last Minute Efforts: Mubarak Blames Iraq, Cautions Coalition: Bahrain Signals that it Would Give Hussein Sanctuary, WASH. POST, Mar. 20, 2003, at A21.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Richard Stevenson, Threats and Responses: The President; Bush Gives Hussein 48 Hours, and Vows to Act, N.Y. TIMES, Mar. 18, 2003, at 1. Later that year, President Charles Taylor of Liberia accepted a similar deal. Ryan Izza, Charles at Large, THE NEW REPUBLIC, Apr. 25, 2005, at 10. This deal did not violate the duty to prosecute or extradite because the Liberian war was a purely internal conflict. See Scharf, supra note 6, at 32 (stating that the Taylor exile deal was not a violation of international law because “there is no treaty-based nor customary international law duty to prosecute crimes against humanity or war crimes in an internal conflict”).
\textsuperscript{35} Id.
\textsuperscript{37} Id.
significantly, more than 128,000 Iraqis, including more than 70,000 women and children under the age of twelve, are estimated to have died as a result of the war, although this figure is in dispute by the U.S. Department of Defense.  

Because Hussein’s exile would prevent significant monetary losses as well as prevent a substantial amount of human suffering – from combatants and non-combatants – it is not difficult to see why the United States government offered this option to Hussein. Of course, one could argue that many of these losses were primarily caused by the United States for initiating the war in Iraq. While individuals can reasonably disagree as to whether initiating a war was the proper response to Hussein’s rejection of the exile offer, there is little doubt that offers of exile and amnesty have the potential to reduce significant suffering, particularly when hostilities have already begun. For example, in the past thirty years, sixteen nations have granted amnesty to individuals accused of committing international war crimes to provide those individuals with an incentive to cease hostilities. These nations, aware of the extent of the atrocities committed by these individuals, knew that “insisting on criminal prosecutions [could] prolong the conflict, resulting in more deaths, destruction, and human suffering.” By offering amnesty and refusing to prosecute or extradite, these nations gave members of hostile regimes a reason to come to the bargaining table and resolve the current conflict. Without an amnesty arrangement, these individuals would have nothing to gain from peace, since peace would have most likely lead to a trial and punishment of life imprisonment. As one government official has stated:

39 These nations were Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, the Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay. Steven Ratner, New Democracies, Old Atrocities: An Inquiry in International Law, 87 GEO. L.J. 707, 722-23 (1999).
40 Scharf, supra note 6, at 4.
“The quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow.”41

B. Counterarguments

Some scholars, such as Michael Scharf, have argued that the duty to prosecute or extradite does not create inefficient outcomes. In a forthcoming article, Scharf concedes that there are substantial short-term gains in exile arrangements or amnesty-for-peace deals.42 For instance, Scharf agrees that these agreements have been instrumental in creating regime change in the Philippines, Haiti, Ethiopia, Uganda, and Liberia.43 Because the international community is very reluctant to sanction the use of force to remove a rogue regime from power and prosecute its leaders for violations of international humanitarian law, Scharf contends that the “cooperation of the leaders is needed to bring about peaceful regime change and put an end to violations of international humanitarian law.” This is something that cannot be done if those leaders “find themselves or their close associates facing potential life imprisonment.”44

Despite conceding that there are substantial benefits to exile and amnesty-for-peace agreements, Scharf argues that nations should not violate their duty to prosecute or extradite when grave breaches occur. According to Scharf, the potential long-term costs of these agreements outweigh any short-term benefits. By granting amnesty or exile to these individuals, Scharf argues, nations provide them with an opportunity to commit more crimes – perhaps even more serious crimes – in the future. Scharf cites two historical examples to support this claim. First, he correctly points out that Saddam Hussein was only able to rise to power after he had been released from prison preceding the 1968 coup that gave the

42 Scharf, supra note 6, at 5.
43 Id.
44 Id.
Ba’ath party power over the Iraqi government. Second, Scharf quotes Adolf Hitler, who, when persuading his staff to embrace his genocidal policies, inquired: “Who after all is today speaking about the destruction of the Armenians?”

However, neither Saddam Hussein nor Adolf Hitler provides an appropriate analogy. While Hussein had spent some time in prison, as well as a brief period where he had fled to Egypt to avoid prosecution for an attempted assassination, Scharf gives Hussein too much credit for the 1968 coup. Hussein did not initiate the 1968 coup. Rather, his mentor and cousin, General Ahmad Hassan al-Bakr, was primarily responsible for the coup, with Hussein playing only a minor role in the coup. It is very unlikely that Hussein would have ever risen to such a high level position within the Ba’th party without his strong connection to al-Bakr, and it is even more unlikely that he would have reached a position where he would take complete control of the Iraqi government. Furthermore, Hussein only forced al-Bakr to resign after he intended to merge Iraq and Syria and give Hussein’s position to Syria’s president. If Hussein had not risen to power, it is doubtful that a regime with a heavy Syrian influence would have been any more humane.

Perhaps the most important difference, however, is that Hussein was not imprisoned for committing a grave breach of the Geneva Convention. Rather, Hussein had been imprisoned for actions related to an internal conflict, which

45 Id. at 32.
46 Id. at 10. Scharf implies that the lack of prosecution of those responsible for the Armenian genocide during World War I provides Germany with a greater incentive to engage in genocide, for Hitler and others did not believe they would be held accountable for their actions even if they were to lose the war. Id.
50 See The Personal History of Saddam Hussein, supra note 48.
creates no duty to prosecute or extradite. In fact, the United Nations and the International Committee of the Red Cross have supported granting amnesty to individuals who commit war crimes in internal conflicts as a means of encouraging peace. Scharf himself argues that it was correct for the United States and the United Nations to offer Liberian President Charles Taylor exile in exchange for stepping down from power. If it is not only permissible, but even encouraged, to provide amnesty or exile agreements to those who commit crimes in internal wars, then Scharf’s use of Hussein as an example makes little sense: Scharf does not appear to object to the type of internal conflict amnesty programs that would permit individuals such as Hussein to escape punishment for their crimes.

Scharf’s analogy to Hitler fails for similar reasons. While Hitler’s rise to power and the Holocaust might have been prevented if the aftermath of World War I had been handled differently, it is doubtful that punishing those who mass-murdered the Armenians alone would have had a meaningful impact on Germany’s post-war development. Historians have established that:

the insecurities of post-World War I Germany and the anxieties they produced provided an emotional milieu in which irrationality and hysteria became routine and illusions became transformed into delusions, [and] Germans, otherwise individually rational, yielded themselves to pathological fantasies about the Jews . . . the chiliastic system of National Socialist beliefs could further influence their already distorted sense of reality.

52 See Sandoz El Al., supra note 17, at 1402.
54 Id.
Given the state of Germany at the time and what is known about Hitler’s mindset, it seems highly unlikely that punishing those who oversaw the genocide of the Armenians would have influenced Hitler to take a different course of action, or would have caused the German people to be less willing to follow Hitler and the Nazi party.

Scharf further argues that eliminating the duty to prosecute or extradite may influence individuals who have accepted amnesty or exile agreements to continue to commit crimes even after being removed from power out of a belief that they will not be prosecuted. As evidence, Scharf points out that Charles Taylor, while exiled in Nigeria, ordered the assassination of the president of Guinea, who had supported the rebels who removed Taylor from office. Scharf argues that, if Hussein had been allowed to go into exile in Bahrain, he could pose a very significant danger to Iraq’s transition to democracy. While recidivism by such individuals is a concern, it is not so great a concern as Scharf would have one believe. There are effective methods of punishment for such individuals if they engage in these sorts of activities while in exile or as recipients of amnesty. Amnesty from prosecution is not absolute, and a nation-state has the power to withdraw amnesty from such individuals if necessary. For example, Chile has revoked the immunity it bestowed upon former Chilean President Augusto Pinochet, and has begun the process of initiating criminal proceedings against him. The United States and the rest of the world community, upon realizing that an individual whom it has assisted in receiving amnesty or exile has once again begun to commit crimes, can put significant pressure on the host government to

55 See generally ADOLF HITLER, MEIN KAMPF (1926) (illustrating the extent of Hitler’s hate for the Jews and other groups).
56 Izza, supra note 34, at 10 (discussing Charles Taylor’s actions since his exile).
57 Scharf, supra note 6, at 32.
58 See id. at 33 (stating that amnesty arrangements “are not a permanent right of the recipient, but a privilege bestowed by the territorial state, which can be revoked by a subsequent government or administration”).
withdraw immunity and put the individual on trial. In fact, that is exactly what the United States, as well as the European community, intends to do with regard to Charles Taylor.\textsuperscript{60}

Scharf’s most compelling argument, however, is that allowing Hussein and others to go into exile deprives their victims of justice.\textsuperscript{61} Although it is true that an exile for peace agreement would result in Hussein never standing trial for his crimes and never receiving a criminal penalty, this does not mean that his victims cannot receive compensation for the damage that has been inflicted upon them. For instance, the participating nations could condition the exile for peace agreement on Hussein and other individuals paying their victims a large monetary sum as compensation for their losses. While some victims may not find monetary compensation as fulfilling as Hussein spending the rest of his life in prison, a nation must consider not only the costs and benefits of a peace agreement to the victims, but to all of society. Even though a tyrant’s victims may not be as satisfied as they would be if military intervention occurs and the tyrant is eventually prosecuted, this decreased satisfaction is greatly outweighed by the benefits of preventing another armed conflict and peacefully removing the tyrant from power.

\section*{III. Why Traditional International Law Enforcement Mechanisms Have Failed}

\textsuperscript{60} See Izza, supra note 34, at 10; see also Bruce Zagaris, European Parliament Passes Resolution Calling for Action to Ensure Taylor’s Court Appearance, 21 \textsc{International Enforcement Law Reporter} 200 (2005) (stating that the U.N. Security Council is considering a resolution that would pressure Nigeria to surrender Taylor for trial in Sierra Leone).

\textsuperscript{61} See Scharf, supra note 6, at 32 (“Morally, what right would American negotiators have to trade away the ability of thousands of Hussein’s victims to see the dictator brought to justice?”).
Unlike domestic law, there is no single sovereign entity that has the power to enforce violations of international law. While some international institutions exist that would provide for the prosecutions of these violations, enforcement through these international institutions would require that a significant portion of the world community take collective action – a very rare feat, since “sufficient political will on the part of the world community” is a prerequisite for such intervention. However, formal prosecutions by such institutions are not the only means of ensuring compliance with international humanitarian law. In fact, enforcement of international humanitarian law lies primarily with individual members of the international community.

Rudiger Wolfrum has identified thirteen ways through which nations and other actors may enforce international humanitarian law. Though most of Wolfrum’s arguments are well-reasoned and appear intuitively correct, the fact remains that none of Wolfrum’s enforcement mechanisms have successfully induced the United States to comply with the duty to prosecute or extradite. This section will analyze several of Wolfrum’s enforcement mechanisms and explain why they have failed to influence the United States government.

A. Public Opinion

Wolfrum has argued that the manipulation of public opinion is perhaps the most effective means of enforcing international humanitarian law. According to

63 Id. at 518.
64 Id.
65 Id. at 524-50 (summarizing the thirteen ways international humanitarian law can be enforced without the presence of a single international sovereign entity).
66 Because of the limited scope of this Comment, and since some of Wolfrum’s thirteen methods are not directly applicable to this specific situation, I will limit my focus to the eight factors that are most relevant.
67 Id. at 527.
Wolfrum, “[t]he publishing of a violation of international law may render an essential contribution to enforcing behavior is in compliance with international law.”  

Because mass media outlets, such as television and radio, allow news services to broadcast their reports globally with very little time delay, Wolfrum believes that news reports about violations of international law can cause populations to demand that their national leaders comply with international law requirements.  

Although the mass media may influence the general public to support the enforcement of certain aspects of international humanitarian law, there is no evidence that public opinion will always support the blind following of international law without regard to the consequences of compliance. In general, public opinion polling has shown that the American public will favor outcomes that will result in more lives potentially being saved, regardless of whether the underlying conduct is legal or illegal. For instance, an NBC News poll conducted on March 29-30, 2003, shortly after the Iraq war began, found that fifty-six percent of respondents believed that the United States military should “do everything it can to minimize Iraqi civilian casualties, even if it means taking longer to achieve [U.S.] objectives.”  

Similarly, in a Newsweek poll conducted from November 10-11, 2005, fifty-nine percent of respondents stated that they support the use of torture by U.S. military and intelligence personnel if the torture results in the prevention of a terrorist attack.  

However, when an ABC News/Washington Post poll asked respondents a similar question, but did not mention the possibility that the torture would be inflicted to prevent a terrorist attack, sixty-four percent of respondents stated that the use of torture by U.S.

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68 Id.
69 Id.
70 Id.
71 Id.
military and intelligence personnel would be unacceptable.\footnote{\textit{Id.}} These differences are easy to reconcile: while the public generally supports many international humanitarian law provisions, the public will support violating certain provisions in specific scenarios where violating international humanitarian law may reduce aggregate human suffering.

As to the specific question of exile, public opinion polling immediately before the Iraq war confirms that an overwhelming majority of the American population would have supported Saddam Hussein going into exile in exchange for peace. In a Los Angeles Times poll conducted from January 30 to February 2, 2003, when asked if they “[w]ould . . . support or oppose allowing Saddam Hussein to go into exile in exchange for the U.S. not taking military action against Iraq,” sixty percent of respondents stated that they would support such an agreement, while only thirty percent said they would oppose it.\footnote{Los Angeles Times Poll, Jan. 30-Feb. 2, 2003, \textit{available at} http://www.pollingreport.com/iraq10.htm (last visited June 5, 2006).} Another poll, conducted by CNN and Gallup a week earlier, explicitly told respondents that if Saddam Hussein went into exile he would not be prosecuted for any of his actions as leader of Iraq. Sixty-two percent of respondents stated that they would support Hussein’s exile if it meant peaceful regime change, even if he received immunity from prosecution.\footnote{\textit{Id.}} Given the American population’s concern for the lives of civilians, these results are not surprising: while many of these individuals would certainly prefer to see Saddam Hussein brought to justice, the overwhelming majority of respondents are willing to let him go into exile in order to prevent the loss of further life – just like a majority of respondents who normally believe torture should be prohibited are willing to make an exception for situations where torture will prevent a terrorist attack. Because the direction of public opinion on international law issues appears to be strongly influenced by the outcomes of

\footnotetext[72]{\textit{Id.}}
\footnotetext[74]{\textit{Id.}}
following international law, a national leader’s fear of a public outcry would not
serve as an effective enforcement mechanism for the duty to prosecute or
extradite, since the general public would likely support violating this aspect of
international humanitarian law if it means saving lives.

**B. Reciprocity & Reprisals**

Reciprocity and fear of reprisals are two enforcement mechanisms that
serve a similar function. Wolfrum argues that nations can influence other nations
to comply with international humanitarian law through reciprocal interests: if one
nation does not comply with international humanitarian law, other nations may
not comply with international humanitarian law when dealing with that nation.  
Similarly, nations may not want to violate international humanitarian law when in
a conflict because the opposing nation may retaliate and escalate hostilities.

Neither reciprocity nor fear of reprisals can effectively enforce the duty to
protect and extradite. Since the Geneva Conventions require that other signatory
nations grant certain protections even to nations that breach the Conventions, it
is unlikely that other Westernized or developed nations would stop complying
with international humanitarian law provisions when dealing with the United
States or another nation that has chosen to violate the duty to prosecute or
extradite. Furthermore, the nations that are most likely to not grant reciprocity –
rogue states governed by totalitarian dictatorships that have committed violations
in the past – are unlikely to change their behavior. Many of these nations would

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75 Wolfrum, supra note 62, at 527 (arguing that reciprocity and reprisals provide nations with incentives to comply with international humanitarian law).
76 *Id.*
77 See Geneva Convention IV, supra note 3, art. 33 (prohibiting reprisals against protected persons).
not have granted reciprocity to begin with; some of these nations also may not consider an offer of amnesty or exile in lieu of war to be a bad thing.

As for fear of reprisals, the entire purpose of an amnesty offer is to prevent a conflict from occurring, or to end a conflict that is currently taking place. For example, if Iraq had accepted the United States’ exile offer, the United States would have little reason to fear a reprisal from Iraq, since Iraq’s acceptance of the offer would have prevented the Iraq war from even starting.

C. Maintenance of Discipline

Military forces rely on discipline, which involves a strict adherence to rules and regulations. Wolfrum argues that this idea of maintaining discipline within the armed forces gives nations an incentive to comply with all aspects of international humanitarian law. Nations, by violating international humanitarian law, would set a bad example for their military and send a message that it is acceptable to disregard rules and regulations.

However, it is not likely that the United States military would experience a large increase in unruliness if the United States government failed to comply with the duty to prosecute or extradite. As in other legal systems, not all violations of international humanitarian law are equally egregious; in fact, the Geneva Conventions themselves make a distinction between grave breaches of the Conventions and other violations. Although one might expect a lack of discipline or increased lawlessness among American soldiers to develop if the United States government encouraged or supported certain violations of international humanitarian law (i.e. if the United States turned a blind eye to the

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79 Id.
80 Wolfrum, supra note 62, at 527.
81 Id.
82 Geneva Convention IV, supra note 3, art. 147 (specifying grave breaches).
situation at Abu Ghraib), it is unlikely that a violation of the duty to prosecute or extradite would result in a loss of discipline or a greater disdain for international humanitarian law or other laws within the military.

The United States government presumably would explain its rationale for not complying with the duty to prosecute or extradite. For example, if Saddam Hussein were granted amnesty from prosecution in exchange for stepping down from power, the United States government almost certainly would explain that it is granting Hussein immunity from prosecution in order to prevent war and greatly minimize human suffering. The typical soldier, even if he or she knows that allowing Hussein to go into exile violates international humanitarian law, would not likely view the United States’ actions as highly egregious. Likewise, if the United States is not disciplined for its violation, it is doubtful that the soldier would believe that all of international humanitarian law should not be taken seriously.

D. National Implementing Measures

Wolfrum argues that, to increase compliance with international humanitarian law, the provisions of international humanitarian law should be adopted by nations as domestic law, binding upon all individuals within that nation. However, no national implementing measures currently exist in the United States that would force the United States to comply with the duty to prosecute or extradite. In *Hamdan v. Rumsfeld*, the D.C. Circuit Court of Appeals held that the Geneva Conventions are not self-executing documents, and therefore U.S. courts cannot enforce their provisions in the absence of legislation that

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84 Wolfrum, supra note 62, at 549.
would make the Conventions enforceable in U.S. courts. Unless the U.S. Supreme Court holds differently – unlikely given the current composition of the Court – there are no enforcement mechanisms within the United States that would prevent the government from agreeing to an exile arrangement.

E. Dissemination of Humanitarian Law

According to Wolfrum, making individuals aware of what international humanitarian law entails will make them more likely to follow international humanitarian law themselves and expect others to abide by it as well. However, as with his discussion of public opinion, Wolfrum’s claims are completely unfounded. Wolfrum assumes that all or most individuals, upon learning about the intricacies of international humanitarian law, will blindly demand that all aspects of international humanitarian law should be followed to the letter and without exception, even if following international humanitarian law would create troubling end results. Given the state of American public opinion, it seems highly unlikely that the mere act of telling people that granting Saddam Hussein amnesty from prosecution in exchange for a peaceful transition to democracy would violate the Geneva Conventions would cause individuals to completely change their views. Rather, it seems intuitively more likely that few individuals would change their views, with most people either not minding the violation of international humanitarian law or believing that the law should be changed.

F. International Committee of the Red Cross

Wolfrum correctly points out that the International Committee of the Red Cross has a special status in international humanitarian law, and can help enforce

86 Wolfrum, supra note 62, at 549.
87 See supra Part III.A (detailing the current state of public opinion on international law).
international humanitarian law by monitoring compliance with the Geneva Conventions and notifying nations of violations committed by other nations in order to initiate a dialogue. However, it is doubtful that the International Committee of the Red Cross could effectively argue that a nation should enforce the duty to prosecute or extradite in cases of atrocities committed during international armed conflicts when it has actively encouraged amnesty and exile programs for individuals accused of atrocities committed during internal armed conflicts. Because of this, it is unlikely that nations would change their intended course of action. Furthermore, since both of the two conflicting parties would have mutually agreed to an exile deal in order to end or prevent hostilities, it is also very unlikely that they would decide not to enter the agreement simply because the International Committee of the Red Cross informed them nations that the mutual agreement violated the Geneva Conventions.

G. Diplomatic Intervention

Diplomatic intervention is the most likely way through which the duty to prosecute or extradite could be enforced. Nations, through the use of economic sanctions or public rebukes, could persuade other nations to not grant amnesty or exile in exchange for peace. However, diplomatic intervention against an exile for peace agreement seems unlikely. For instance, the United States did not experience any negative diplomatic consequences for offering exile to Saddam Hussein; in fact, several other nations supported the idea, such as Turkey, Saudi Arabia, and Qatar. Such a reaction from other nations is not surprising because exile offers many significant benefits over going to war or maintaining the status

89 Sandoz et al., supra note 17, at 1402.
90 Wolfrum, supra note 62, at 548.


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By going to war, Saddam Hussein may be brought to justice one day, but not without significant human suffering; however, by maintaining the status quo, Hussein would not have been prosecuted for his past crimes, and would continue to terrorize his own people, and potentially become a threat to neighboring nations. Through exile, the greatest gains are achieved with the least amount of cost, and nations who truly care about the underlying purpose of international humanitarian law – reducing human suffering – would see it as the best option. Certainly, they would not oppose it because it simply because it violates the letter of the law.

CONCLUSION

The Geneva Conventions’ duty to prosecute or extradite individuals who have been accused of committing grave breaches of the Geneva Conventions, while perhaps written with the noblest intentions, does not effectively further the underlying goals of international humanitarian law. Although individuals who have committed grave breaches of the Geneva Conventions should be brought to justice when possible, many tyrants, such as Saddam Hussein, simply cannot be prosecuted for their atrocities without significant military intervention to first remove them from power – military intervention that will surely result in tragic military and civilian casualties even under the best of circumstances, and, under the worst of circumstances, can provoke the tyrant into committing even more atrocities before he is actually overthrown.

Exile and amnesty serve an important peacemaking function: exile for peace deals have the potential to reduce human suffering by instituting regime change without costly and bloody military intervention. Despite the claims of scholars such as Scharf, it is not likely that exile for peace deals would create more harm than good. Although these agreements might at first glance appear to create incentives for dictators to sanction grave breaches of the Geneva
Conventions and commit other international humanitarian law violations, one must remember that the absence of amnesty agreements also creates an incentive for dictators to continue to commit atrocities, for they would have nothing to lose by continuing such actions. Therefore, in terms of efficiency, it does not seem reasonable to allow a mandatory duty to prosecute or extradite to continue to exist.

Although Wolfrum is incorrect as to the effectiveness of his enforcement mechanisms when it comes to enforcing all aspects of international humanitarian law, he is correct that allowing violations of international humanitarian law to go unpunished can reduce the public and the military’s confidence in international humanitarian law. While it is unlikely that not sanctioning the United States or other nations for breaching the duty to prosecute or extradite would significantly undermine the legitimacy of international humanitarian law, there is no reason to take such a chance. Therefore, rather than merely ignoring the Geneva Conventions’ provision requiring the mandatory prosecution or extradition of those who commit grave breaches of the Geneva Conventions, a more prudent course of action would be to amend the Geneva Conventions to remove such inefficient provisions because they result in outcomes contrary to the intended purpose of international humanitarian law.