Revolutions in Justice: Advancing the Rome Statute System to Fight Impunity in Future Wars

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Abstract

The modern system of international criminal justice, which was born out of World War II and built in its current form during the early 1990s, is both revolutionary and a relic. The ideals, innovation, and vision that created the international legal order were ground-breaking at the time but have failed to evolve at a pace that ensures its relevance and efficacy. The challenges we face today are drastically different from those in the period in which the framework was conceived, the institutions were formed, and the laws were drafted. While these changes have been incremental over several decades, technological advances have led to fundamental transformations in how individuals communicate, how societies interact, and how states engage with each other and their constituents. The law, in contrast, has been slower to evolve, owing in large part to the dearth of enforcement mechanisms. One can point to an abundance of academic literature and soft law instruments that provide scholarly guidance on the interpretation of international law applicable to new and emerging technologies. However, this debate is siloed from the practical realities of international law in which very few court cases have tested how international law applies to these technologies in practice. This Article assesses the effectiveness of the current system of international criminal justice in the face of emerging threats, assessing whether and how existing international law applies and identifying where it falls short.

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I. INTRODUCTION

The current system of international criminal justice is both revolutionary and a relic. The ideals, innovation, and vision that established today's international legal order were ground-breaking at its creation but have failed to evolve to meet modern challenges and emerging threats. From the Cold War to the Global War on Terror to the return of Great Power Competition, the world has witnessed fundamental shifts in how societies communicate, how states engage and, significantly, how wars are waged. Yet, despite several technological transformations and revolutions in military affairs (RMAs) since the post-World War II era, the laws and institutions that the global community relies on reflect the world as it was in the twentieth century.[1] The relatively static and slow system of international criminal justice in the face of these dynamic and fast-moving advances in technology, conflict, and globalization begs the question: are current international laws, institutions, and practices adequate for today's world?

This Article explores this question and concludes that warfare's changing nature necessitates a forward-looking renovation of the international criminal justice system. In particular, this Article focuses on the limitations of international law and its enforcement mechanisms in the face of irregular warfare, including the use of cyber and information operations, non-attributable or covert activities, and the participation of non-state and quasi-state actors such as paramilitaries, proxies, and private military companies.

The laws of armed conflict are state-centric, derived from the Westphalian principle of sovereignty and based predominantly on the conventional Clausewitzian way of war.[2] In contrast, many conflicts today are unconventional, traversing territorial borders and involving a diversity of actors outside the state apparatus. Cyberspace, the electromagnetic spectrum, and the digital information environment are significant military domains enhanced by the ability to rapidly acquire, analyze, and disseminate information.[3] Moreover, the democratization of sophisticated technologies is enabling a growing number of private actors to engage in what were previously considered inherently governmental functions.[4]

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1 John F. Morris, *On the Precipice of a New Era of Warfare? Reflections on Military Revolutions, Past and Future*, MOD. WAR INST. AT W. POINT (Nov. 14, 2024), https://perma.cc/6KWD-CTPL.

2 Joseph M. Guerra, *An Introduction to Clausewitzian Strategic Theory: General Theory, Strategy, and their Relevance for Today*, 2 MIL. STRATEGY MAG (2012) at 30, https://perma.cc/PJG9-YHVJ.

3 MAJOR LEONARD G. LITTON, THE INFORMATION-BASED RMA AND THE PRINCIPLES OF WAR, (1999).

4 Eric Rosenback & Aki J. Peritz, *The Role of Private Corporations in the Intelligence Community*, HARVARD BELFER CTR. (July 2009), https://perma.cc/6QE4-QEL5.

These dynamics are leading to conflicts that are more persistent, global in scope, clandestine in nature, deniable by design, and legally ambiguous.[5]

While the objectives of international criminal justice are multifaceted, its primary purpose is to "put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes."[6] In order to achieve this goal, international criminal courts and tribunals must be able to efficiently and effectively investigate, indict, arrest, and try the individuals who perpetrate core international crimes. There are, however, significant obstacles and systemic problems that stand in the way of judicial institutions carrying out this mandate.

New and emerging technologies have sped up the tempo of battle, for example, by using automation and artificial intelligence (AI) to identify targets and replace other human tasks with greater speed.[7] The volume of data generated during modern conflicts provides extensive insights into events on the ground, but the ephemeral nature of digital information means that investigators must respond rapidly to preserve evidence in a much shorter time frame than ever before. These investigators also need a different skill set to handle digital evidence than their predecessors who engaged in historical war crimes investigations, traditionally conducted after the secession of hostilities.[8] Thus, a new, more diversified workforce and innovative ways of working are essential to building criminal cases during contemporary conflicts.

This Article begins with an overview of how the international criminal justice system has developed from the Nuremberg and Tokyo tribunals to the present day and outlines the current avenues for accountability for perpetrators of international crimes. The next Section describes how emerging technologies are changing warfare in the twenty-first century and generating a multitude of transnational threats that the current system is ill-equipped to address. The Section then addresses critical challenges in establishing the facts and applying the law. Finally, the Article concludes with a proposal for a new way forward that involves legal, institutional, and operational reforms. While some of the proposals may be premature or impracticable in the current political environment, which is moving away from accountability and multilateral cooperation, this Article argues that the time is ripe for an in-depth and difficult discussion on what the next generation

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5 Markus Kyckman & Mikael Weissmann, *Global shadow war: a conceptual analysis*, 8 DYNAMICS OF ASYMMETRIC CONFLICT, 6 (2015).

6 UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, INT'L CRIM. CT. (2020).

7 Noah Sylvia, *The Israel Defense Forces' Use of AI in Gaza: A Case of Misplaced Purpose*, RUSI (July 4, 2024), https://perma.cc/K5LK-ZMDT.

8 DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY,(Sam Dubberley, Alexa Koenig & Daragh Murray eds., 2020).

of international law and legal institutions are needed to hold perpetrators accountable for core international crimes in future wars.

II. THE EVOLUTION OF INTERNATIONAL CRIMINAL JUSTICE

International criminal justice refers broadly to a professional legal field that focuses on preventing and punishing perpetrators of core international crimes–genocide, war crimes, crimes against humanity, and the crime of aggression. The field consists of the legal instruments and customs that establish the laws, the institutions that enforce those laws, and the practitioners working within those institutions.

There are three branches of public international law in which most practitioners in the field specialize: international criminal law (ICL), international humanitarian law (IHL), and international human rights law (IHRL). This article focuses on ICL and IHL, since these bodies of law provide for individual criminal accountability as opposed to state responsibility. While IHL can be traced back over centuries, modern ICL was born in 1945 with the establishment of the international military tribunals for Nuremberg and the Far East.[9] These tribunals were part of a broader movement to create an international legal order to maintain global peace and security, which also included the U.N. Charter, the Convention on the Prevention and Punishment of Genocide, and the four Geneva Conventions of 1949, as well as the founding of the U.N. Security Council, International Court of Justice, and INTERPOL. Over time, in response to specific armed conflicts and mass atrocities across the globe, new international investigative mechanisms and judicial bodies have been established.

Today, the modern international criminal justice system is composed of entities with investigative and/or prosecutorial powers including international, hybrid, and national courts and tribunals; U.N. investigative mechanisms, commissions of inquiry (COIs), and fact-finding missions (FFMs); and regional policing organizations and joint task forces. In addition, a robust civil society of non-governmental organizations (NGOs) and academic centers has grown to support these interstate institutions. Today's primary institutions with jurisdiction over core international crimes are the International Criminal Court (ICC) and national courts in countries that have incorporated the Rome Statute into their domestic legislation and provide for some form of universal jurisdiction.

A. From Nuremberg to a Permanent ICC

In the aftermath of World War II, the Nuremberg and Tokyo tribunals were created to try German and Japanese war criminals. These tribunals laid the

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9 *See* S. DARCY, *Introduction: The Birth Of International Criminal Justice, in* COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW (2007).

groundwork for modern ICL, founded by the statutes that first defined crimes against humanity, crimes against peace, and war crimes.[10] While the Hague Convention first established the laws governing armed conflicts, it did not address responsibility for individuals or mechanisms for enforcement. As the Nuremberg judges noted, "The Hague Convention nowhere designates such practices [methods of waging war] as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders."[11] Thus, these trials were unprecedented in establishing that "individuals could be held criminally responsible for international crimes, regardless of official position, and that superiors' orders were not a full defense to criminal behavior."[12] These trials led to the articulation of the Nuremberg Principles and,[13] soon after, a U.N. agreement on the Genocide Convention.[14]

Over the ensuing four decades, there was little progress in this area of law with a few exceptions such as the 1977 Additional Protocols to the Geneva Conventions, which provided rules on the application of the law to non-international armed conflicts.[15] It was not until the 1990s that the Nuremberg Principles were advanced with several important developments: two ad hoc criminal tribunals, followed by the establishment of the first permanent international criminal court:

- 1993: International Criminal Tribunal for the Former Yugoslavia (ICTY)
- 1994: International Criminal Tribunal for Rwanda (ICTR)
- 1998: International Criminal Court[16]

The horrific atrocities in the former Yugoslavia and Rwanda motivated the world community to once again unite and take action to prevent and deter serious

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10 Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.

11 *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., https://perma.cc/8UV7-GDEU (last accessed Apr. 27, 2025).**Error! Hyperlink reference not valid.**

12 *Evolution of International Criminal Justice*, INT'L CRIM. CT. PROJECT, https://perma.cc/LU6X-TGDN (last accessed Apr. 27, 2025).

13 U.N. INT'L L. COMM'N, U.N. PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NUREMBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL (1950), https://perma.cc/7B6X-B88B.

14 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

15 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

16 The Rome Statute was signed in 1998 but did not enter into force until 2002.

international crimes.[17] These conflicts led to the creation of the first international criminal tribunals since Nuremberg and Tokyo, with the ICTY established in 1993 to address civil war in the Balkans followed a year later with the establishment of the ICTR to prosecute genocide and war crimes in Rwanda.[18] At the same time, these conflicts inspired action from the International Law Commission, which completed a draft statute for a permanent international criminal court in 1994. After several years of negotiation between states, the Rome Statute, which established the ICC, was signed in 1998 with the ratification of 104 states and entered into force in July 2002. Today, the ICC has garnered additional support with a total of 125 states as of January 2025.

B. Experimental Models and Mandates

Around the time during which the Rome Statute came into force, several new mechanisms were created to investigate and prosecute international crimes in conflicts which occurred before the ICC was formed or were otherwise outside the scope of the newly founded court's jurisdiction.[19] Unlike the ICTY and ICTR which were formed unanimously by the U.N. Security Council and thus considered fully international, these newer institutions came about through a variety of different agreements between states and through U.N. bodies, and are thus considered as hybrid or internationalized:[20]

- 2000: Special Panels for Serious Crimes in East Timor
- 2000: Special Court of Sierra Leone
- 2001: Extraordinary Chambers in the Courts of Cambodia
- 2003: Iraqi Special Tribunal
- 2007: Special Tribunal for Lebanon
- 2010: Residual Mechanism for International Criminal Tribunals
- 2010: Residual Special Court of Sierra Leone
- 2015: Special Criminal Court in the Central African Republic
- 2016: Kosovo Specialist Chambers & Specialist Prosecutor's Office

The tribunals for East Timor, Sierra Leone, and Cambodia all addressed historical crimes, whereas the Iraqi and Lebanon tribunals were narrowly

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17 Benjamin B. Ferencz, *The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century*, 18 SICHERHEIT UND FRIEDEN (S+F) / SEC. AND PEACE, 25, 29 (2000).

18 *Id.* at 27.

19 *See generally* SARAH WILLIAMS, HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS (2012).

20 *See generally* AARON FICHTELBERG, HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION (2015).

construed to address specific persons (i.e., Saddam Hussein) or specific incidents (i.e., the assassination of Prime Minister Rafik Hariri). In 2010, noting the problem of shuttering tribunals when convicted individuals were still serving out sentences or accused persons were at large, two residual mechanisms were created for the Special Court of Sierra Leone and jointly for the ICTY and ICTR. Since then, two new internationalized courts have formed in the Central African Republic and in The Hague to address past serious crimes in Kosovo that the ICTY did not address. This trend, however, has slowed down as the geopolitics have changed, moving away from multilateral cooperation and revealing sharp divides between the Western-centric legal order and the rising power of China and Russia.[21]

With a discordant U.N. Security Council, other efforts have focused on investigation-only mechanisms created by the U.N. General Assembly or Human Rights Council. The U.N. can establish independent COIs, FFMs, or expert groups, staffing them with lawyers and investigators who conduct human rights investigations and publish reports on their findings. Beginning in 2006, the U.N. Human Rights Council established its first situation-specific, time-limited investigative bodies to collect information on human rights violations in the Occupied Palestinian Territory, Lebanon, Northern Gaza, and Darfur.[22] Over the past two decades, there have been roughly 40 Human Rights Council-mandated investigative bodies.[23] While these human rights investigative bodies do not conduct investigations with the same procedural safeguards and standards as criminal investigative bodies, they do collect information relevant to international crimes.

More recently, however, shortcomings in these human rights bodies have come to light when international criminal tribunals sought to rely on their findings, revealing a lacuna between the quality of human rights investigations and the procedural requirements of criminal investigations, sometimes called the "Hague-Geneva divide."[24] In response, the U.N. introduced a new model of investigative mechanisms tasked with collecting and preserving information to criminal evidentiary standards for the purpose of future trials.[25] These mechanisms have been used as a workaround in situations where the Security Council cannot come to unanimous agreement. They are not vested with prosecutorial powers and

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21 BRICS is an intergovernmental coalition of countries. The acronym stands for Brazil, Russia, India, China, and South Africa.

22 *See Human Rights Council-mandated Investigative Bodies*, U.N. HUMAN RIGHTS COUNCIL, **Error! Hyperlink reference not valid.** https://perma.cc/N4AQ-9N4Z.

23 *Id.*

24 Federica D'Alessandra et al., *Anchoring Accountability for Mass Atrocities*, *in* OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT (2022). **Error! Hyperlink reference not valid.**

25 Federica D'Alessandra, *The Accountability Turn in Third Wave Human Rights Fact-Finding*, 33 UTRECHT J. INT'L & EUR. L. 59 (2017).

therefore must work with national courts, the ICC, and other tribunals to try the cases they build:

- 2011: The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (IIIM)
- 2015: Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD)
- 2018: Independent Investigative Mechanism for Myanmar (IIMM)

Each mechanism is situation-specific and set up slightly differently, focusing on criminal responsibility (distinguishing them from COIs and FFMs), and vested with only investigative powers (distinguishing them from criminal courts and tribunals). The first was the IIIM, established by the General Assembly in December 2016 to collect, consolidate, preserve and analyze evidence of international crimes and human rights violations in Syria.[26] Resolution 71/248 called upon states, parties to the conflict, and civil society to cooperate fully with the IIIM and to provide them with any relevant information, as well as other types of assistance. The second mechanism, UNITAD, was established in August 2017 after the Government of Iraq called upon the international community to assist in ensuring that ISIL members are held accountable for their crimes.[27] In response, the Security Council unanimously adopted a resolution to establish an investigative team, headed by a Special Adviser, to support domestic efforts to hold ISIL accountable.[28] Similar to the IIIM, Resolution 2379 called on the international community to assist Iraq in its accountability efforts and for other states to support UNITAD through mutual arrangements on legal assistance.[29] The newest mechanism was created by the Human Rights Council in September 2018 for the situation in Myanmar to "collect, consolidate, preserve and analyze evidence" AND "to prepare files in order to facilitate and expedite fair and independent criminal proceedings."[30] Its founding resolution called upon all states, civil society, and business enterprises to cooperate fully with the mechanism. This resolution was the first to specifically acknowledge the need for assistance from

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26 G.A. Res. 71/248 (Dec. 21, 2016).

27 S.C Res. 2379 (Sept. 21, 2017).

28 *Id.*

29 UNITAD Iraq, *Harnessing Technology-UNITAD*, YOUTUBE (May 12, 2021), https://perma.cc/93EF-ZGMV.

30 Human Rights Council, U.N. Doc. A/HRC/RES/39/2 (Sept. 27, 2018).

the private sector, which is an interesting addition, likely added to address the significant role that Facebook played in facilitating atrocities in Myanmar.[31]

C. National Courts and Universal Jurisdiction

In addition to international bodies, international crimes can be investigated and prosecuted in some national jurisdictions. In ratifying the Rome Statute, states agree to adopt its provisions into their domestic legislation. In fact, the Statute favors national proceedings and sets forth the principle of complementarity, which limits the admissibility of ICC cases to those in which states are unwilling or unable to investigate and prosecute.[32] Many of these countries permit universal jurisdiction, which allows for prosecutions of cases in which the state has no nexus to the victim, perpetrator, or territory in which the crime took place. In recent years, there has been a trend among states to create national war crimes units, contributing to a growth in these types of cases.[33] As a qualitative study of universal jurisdiction cases revealed, this practice has been expanding "as there has been a significant growth in the number of universal jurisdiction trials, in the frequency with which these trials take place year by year and in geographical scope of universal jurisdiction litigation."[34]

The Israeli trial of Adolph Eichmann in 1961 is often cited as the first universal jurisdiction case,[35] followed decades later by the trial of former Chilean dictator Augusto Pinochet by British authorities for genocide, torture, and other crimes during his rule in the 1970s and 1980s.[36] While there were "a series of high-profile setbacks to the practice" in the early 2000s,[37] the Syrian Civil War marked a turning point in the resurrection and embrace of universal jurisdiction. There are several reasons for this boom in universal jurisdiction cases, one of which is the increased sophistication of remote sensing technologies and the internet to facilitate cross-border investigations. Another factor has been the migration of refugees from conflict countries into Europe. With the ICC's lack of jurisdiction

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31 Republic of The Gambia v. Facebook, 567 F.Supp.3d 291 (D.D.C. 2021).

32 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

33 Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 600–01 (2020).

34 Maximo Langer, *The Quiet Expansion of Universal Jurisdiction*, EUR. J. INT'L L., 779, 779 (2019) (reporting "1,051 criminal complaints . . . filed on the basis of universal jurisdiction between the Eichmann case that was tried in 1961 and June 2010 . . . and there were 815 new universal jurisdiction cases [between 2008-2017], which represents a total nearly as high as the two previous decades combined").

35 *Id.*

36 *The Pinochet Precedent*, HUMAN RIGHTS WATCH (Nov. 1, 1998), https://perma.cc/MJG5-PW86.

37 Luc Reydams, *The Rise and Fall of Universal Jurisdiction, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337 (William Schabas & Nadia Bernaz eds., 2011).

over Syria and no chance of a Security Council referral, several European states have taken an interest in pursuing accountability for war crimes and other violations in Syria, particularly Germany, France, Finland, Sweden, and the Netherlands. The Eurojust Genocide Network acts as a coordinating entity between prosecutors' offices and other institutions dedicated to pursuing accountability for core international crimes, while Europol serves to coordinate law enforcement efforts. At the time of this writing, the formation of a new treaty—the Ljubljana-Hague Convention on Mutual Legal Assistance—is underway to streamline cooperation and evidence sharing between states on international crimes.

III. TECHNOLOGY AND THE CHANGING CHARACTER OF WAR

The evolution of technology and war share interesting parallels with the development of ICL. In 1946, the year after the Nuremberg trial, transistors—the semiconductors that underpin digital technologies—were invented. While there was incremental progress over the ensuing decades, it was not until the early 1990s that the exponential proliferation of digital technologies took off with the mainstreaming of the internet. After a decade of constant growth and the commercialization and democratization of personal computers, technology took another leap forward in the mid-2000s with the introduction of dynamic web pages, social media, and the smartphone—a period many refer to as "web 2.0."[38] Today, with the acceleration of generative AI, the internet is in its third generation.

The early 1990s also marked the end of the Cold War and a change in the nature of conflict. As former CIA director James Woolsey described in 1993, "We have slain a large dragon [the Soviet Union], but we live now in a jungle filled with a bewildering variety of poisonous snakes. And in many ways, the dragon was easier to keep track of."[39] This prophetic statement foreshadowed the next phase of global conflict, which Professor David Kilcullen dubbed the Woolseyan environment: "threats emanate mostly from weak or failing states and from non-state actors (snakes) rather than from capable state adversaries (dragons)."[40] During the 1990s there were several chaotic internal conflicts in states such as Rwanda, Bosnia, Kosovo, Somalia, East Timor, and Sierra Leone, followed in the next decade by the Global War on Terror. After the signing of the Rome Statute in 1998, but before its entry into force in 2002, Al Qaeda terrorists attacked the

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38 Raquel Vazquez Llorente & Lindsay Freeman, *Finding the Signal in the Noise: International Criminal Procedure and Evidence in the Digital Age*, 19 J. INT'L CRIM. JUST., 163 (2021).

39 *Nomination of R. James Woolsey to be Director of Central Intelligence*, 103rd Cong. (1993); *see also* Douglas Jehl, C.*I.A. Nominee Wary of Budget Cuts*, N.Y. TIMES (Feb. 3, 1993), https://perma.cc/K8KS-QFB2.

40 DAVID KILCULLEN, THE DRAGON AND THE SNAKES: HOW THE REST LEARNED TO FIGHT THE WEST 11 (2020).

U.S. on September 11, 2001. Thus, as the ICC began its operations, the U.S. launched the first fronts in its counter-terrorism battle, Iraq and Afghanistan. These conflicts were characterized by the use of drones and automated systems, and the concepts of asymmetrical and network-centric warfare.[41] A decade into these protracted conflicts came the Arab Spring, and with it a new iteration of technologically enhanced conflict.[42] The Syrian Civil War, which began in 2011, is particularly emblematic of the impact that social media and interconnectivity has had on the documentation of armed conflicts.[43]

More recently, however, trends in twenty-first century warfare have veered back towards great power competition, but in a multi-polar rather than bi-polar world.[44] Concurrently, huge advancements in AI are giving way to a new era of technological transformation. This burgeoning era is already defined by two major international armed conflicts between Russia and Ukraine and Israel and Palestine, respectively, as well as a number of "shadow wars"—a form of conflict conducted surreptitiously in the grey zone between war and peace, where "different actors use different means to obtain their goals."[45] Shadow wars include, for example, China and Taiwan, Israel and Iran, and Russia against several Western democracies. Within these conflicts, powerful and technologically advanced militaries have deployed new cyber capabilities, unmanned vehicles, and autonomous weapons. The dragons are back, but they have evolved new and sharper talons and teeth by adopting the unconventional and asymmetrical tactics of terrorists and insurgents. Large states with strong militaries are prioritizing special operations forces and opting for non-traditional methods to confront and coerce their enemies while remaining below the threshold of armed conflict. Rather than all out armed conflict, strategies of the Cold War—espionage, propaganda, surrogacy, brinkmanship, economic coercion, political meddling, assassinations, and information warfare—are being resurrected and strengthened by powerful new technologies that blur the lines between war and peace, non-international and international armed conflict, civilians and combatants, and political and military objectives. This new theater of war is shaped by weapons

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41 *Id.*

42 *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST (2017).

43 *See* P.W. SINGER & EMERSON T. BROOKING, LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA (2018); *see also* DAVID PATRIKARAKOS, WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY (2017).

44 JIM SCIUTTO, THE RETURN OF GREAT POWERS: RUSSIA, CHINA, AND THE NEXT WORLD WAR (2024).

45 JIM SCIUTTO, THE SHADOW WAR: INSIDE RUSSIA'S AND CHINA'S SECRET OPERATIONS TO DEFEAT AMERICA (2019); TOM ENGELHARDT, SHADOW GOVERNMENT: SURVEILLANCE, SECRET WARS, AND A GLOBAL SECURITY STATE IN A SINGLE-SUPERPOWER WORLD (2014); Kyckman & Weissmann, *supra* note 5.

and methods of warfighting that can cripple infrastructure, blackout communications, shape human cognition, and devastate economies without crossing physical borders or, in some cases, leaving a trace.

A. Current and Emerging Trends in Conflict

All weapons are a form of technology—machinery and equipment developed from the application of scientific knowledge. Over time weapons have evolved from purely physical objects to encompass a range of intangible capabilities. Today's weapons include laser, sonic, shock wave, microwave, radiofrequency, energy pulse, chemical, biological, electronic, and cyber.[46] The nature of physical weapons is also evolving with the integration of AI. Emerging technologies in robotics, sensors, automation, and AI also influence the way in which wars are waged. New methods of warfare are less visible, less overt, and harder to attribute. From computer network attacks to biological weapons to pulsed radiofrequency energy, modern weapons may be deployed across borders without the victim immediately recognizing they are under attack.

With traditional bullets and missiles, the point at which the trigger is pulled, or the projectile is launched is clear, as is the point at which ammunition hits its target, causing physical damage to persons and/or property. This leaves no question as to whether an attack has occurred. Moreover, these weapons leave behind fragments or remnants from which trained investigators and forensic analysts may be able to determine the type of weapon used and, from that information, attribute the attack. Contrast this scenario with the introduction of a biological toxin into the atmosphere, electronic jamming of air traffic control, or an offensive cyber operation that disrupts critical networks—all of which use weapons and methods of attack that are not understood as kinetic in the traditional sense.

The informational dimension of warfare, which has become increasingly important in recent years, adds another complicating factor in modern conflict. Disinformation about an attack that did not actually occur could lead to retaliation. Psychological terror against civilians is harder to perceive and often not accounted for sufficiently. Thus, digital technologies are changing the nature of military affairs and societal engagement, increasing the sophistication of operations and the democratization of communications capabilities.

The harm caused by the use of these weapons is also harder to detect and measure. As the U.N. special envoy for digital and emerging technologies Amandeep Gill explains, "Force has traditionally been correlated with physical

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46 *See, e.g.,* LOUIS A. DEL MONTE, WAR AT THE SPEED OF LIGHT: DIRECTED-ENERGY WEAPONS AND THE FUTURE OF TWENTY-FIRST CENTURY WARFARE (2021); Anatoly Balous & Vitali Saladukha, *Modern Weapons: Possibilities and Limitations, in* VIRUSES, HARDWARE AND SOFTWARE TROJANS (2020).

destruction, injury and death, and few had imagined that non-physical attacks could be so significant as to become issues of international security."[47] As Gill points out, when cyber capabilities become more targeted, they also become more insidious at undermining social trust.[48] Military officials have also recognized the need to broaden the definition of harm, with some advocating for new metrics for non-kinetic actions to assess the full effects of grey zone operations,[49] and to provide a holistic understanding of the "arc of effects."[50] The world is just beginning to see the damage caused by the decay of social trust from disinformation, and this will only increase as AI, deepfakes, and other increasingly sophisticated technical innovations are weaponized.[51]

As grey zone operations increasingly replace conventional warfare, states can more easily evade their responsibilities under international law by using non-traditional forces. Rather than refraining from military operations that violate international law, some states have created new structures that are "deniable by design" in order to carry out special operations that, if attributed, might lead to retaliation, reputational damage, or criminal responsibility. When these plausibly deniable entities commit acts that could amount to war crimes or crimes against humanity, it is difficult, if not impossible, to hold them and their patrons accountable.

While the practice of using mercenaries and other irregular forces is not new, there has been a steep increase in the privatization of the force market, leading to an explosion of modern private military and security companies (PMSCs) that offer a range of services to governments and businesses around the world.[52] The use of PMSCs began formalizing and growing substantially in the early 1990s. The initial defense industrial complex of weapons manufacturers and military consultants came about through cost-saving on the government side and money-making on the business side. At the same time, the PMSC business developed as a means of providing personnel to supplement military forces—and provide flexibility when military objectives include tasks that militaries have historically been banned from doing. The benefit for the private sector is that they get to hide behind government protections, as well as protections for private companies

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47 U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, ANNUAL REPORT TO CONGRESS 82 (2020).

48 *Id.*

49 Amandeep S. Gill, *The Changing Role of Multilateral Forums in Regulating Armed Conflict in the Digital Age*, 102 INT'L REV. RED CROSS (2020).

50 Bradley DeWees et al., *Toward a Unified Metric of Kinetic and Nonkinetic Actions: Meaning Fields and the Arc of Effects*, JOINT FORCE Q. 85 (2017).

51 *See* U.S. DEP'T OF DEF., *supra* note 47, at 86.

52 SEAN MCFATE, THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR THE WORLD (2015).

which do not have the same oversight. A similar movement happened around the intelligence community and outsourcing of intelligence functions made possible by technology, creating a burgeoning field for private sector intelligence and offensive cyber operations or, as some refer to it, "cyber mercenaries."[53] As Nicole F. Rice explains, this proliferation of PMSCs "has been facilitated by global political, economic, and warfare evolutions."[54] Non-state actors have proliferated and, in some cases, grown as powerful as states themselves. "These include, among others, terrorist groups such as Al-Qaeda and the Islamic State, private military companies like Blackwater and Wagner, and, in an era when the sources of power and influence are diversifying, multibillionaires such as Elon Musk and Jeff Bezos."[55]

While the ICC has experience investigating and trying cases involving the militia leaders of non-state armed groups, there has yet to be a case involving private military forces. These quasi-state actors raise challenging questions about the applicable legal framework, as well as practical considerations about meeting the evidentiary burden of proof. Thus, in response to the rise of private forces, it is incumbent on international lawyers to get creative about how to apply existing laws, including those of the Rome Statute, to new types of belligerents.

B. Critical Challenges in Enforcing the Law

New weapons, methods of warfare, and types of warriors make the enforcement of ICL and IHL particularly challenging, in gathering the evidence, establishing the facts, and applying the law. At the international level, there are technical and operational limitations, as well as political hurdles, to acquire evidence and the expertise to interpret and effectively use this evidence. Despite the existence of technology that allows data to be transmitted across borders in milliseconds, legal and bureaucratic barriers prevent timely information sharing. The legal framework for cross-border data sharing consists of international cooperation agreements and mutual legal assistance treaties (MLATs), which have been traditionally difficult to implement. These instruments have proved especially ineffective in the face of increasingly sophisticated crimes facilitated by new and emerging technologies. This problem is exacerbated by the constant evolution of technologies, which further hinders the development and implementation of workable solutions.

The roles of the military analyst and historian have been staples of international criminal investigations, providing context and expert knowledge.

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53 Andrew Doris & Mayesha Alam, *Hackers for Hire: Confronting the Growing Market of Cyber Mercenaries*, DIGITAL FRONTLINES (2025), https://perma.cc/Z9GU-D4VK.

54 Nikolai F. Rice, *Private Military and Security Companies as Tools of Strategy*, GEO. SEC.STUD. REV. (2019), https://perma.cc/U5WS-E4RU.

55 *See* Morris, *supra* note 1.

Former military personnel can often draw on their experience within the military to provide context to the operations of another military, since there are many commonalities across traditional militaries.

Investigators can place people within a known command structure when investigating international crimes allegedly committed by traditional military forces. For example, the rank of a certain individual can indicate where they fall on a traditional chain of command. Therefore, analysts can make assumptions about who gave who orders. This type of analysis and the assumptions that can be used to piece together the evidence do not transfer to PMSCs, which have different cultures, incentives, and structures than traditional militaries with hierarchical chains of command.

In the absence of accountability mechanisms to interpret and clarify the law, states have been escalating hostilities in the shadows. Impunity in the grey zone is, in part, the result of overly narrow interpretations of the law that are predicated on pre-digital notions of armed conflict and militaries. It is essential that international criminal justice practitioners discuss how to overcome the investigative challenges and evidentiary hurdles to meeting the requisite burdens of proof when dealing with private actors engaged in international crimes.

While there is consensus that IHL applies to new means and methods of warfare, many unanswered questions remain about the scope of its application. IHL establishes binaries—an armed conflict exists, or it does not; an armed conflict is international or non-international in character; a person is either a civilian or a combatant; an object is either civilian in nature or a military objective—the simplicity of which makes sense for applying the law during real time decision making in battle. Yet, these clear-cut distinctions do not fit contemporary contexts, which are far more complex in reality.

Not only is it more difficult to establish when an attack occurred, it is becoming increasingly complicated to pinpoint the period in which an entire armed conflict began, or a non-international armed conflict became an international armed conflict. For example, in Eastern Ukraine, pro-Russian separatists were joined by "little green men" in their fight for the Donbass, combatants who turned out to be Russian mercenaries working on behalf of the Kremlin.[56] Thus, the binary categories such as civilian and combatant simplify the legal analysis for real time decision making in traditional battle scenarios, but they do not provide adequate guidance for appropriate responses to hostile cyber operations, for example.

Current approaches to assessing whether the threshold of armed conflict is met fail to consider important factors like the attack's provenance, intent, objectives, context, and the full spectrum of its effects. The requirement for a

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56 *See* Tyler D. Wentzell, *Russia's Green Men: The Strategic Storytellers of Hybrid Warfare*, 22 CANADIAN MILITARY J. 42 (2021)

connection between an attack and an armed conflict is what distinguishes war crimes from isolated criminal acts and other crimes under the Statute, like genocide and crimes against humanity. Professor Harmen van der Wilt explains that "the current open-ended understanding of the nexus element leaves room for both restrictive and broader approaches in which the borders between war crimes and other—ordinary or international—crimes are blurred."[57] Van der Wilt raises concerns about the legal uncertainty caused by varying interpretations of the nexus requirement.[58]

An evolving interpretation of IHL is also necessary for the continued protection of civilians and civilian objects. Military necessity in these new domains differs from the traditional battlefield because military forces are not opening themselves up to physical attack. Thus, lawyers should strongly consider the calculus in cyberspace where military necessity is low and risk of harm to civilians is extremely high.

IV. ENVISIONING A NEW INTERNATIONAL LEGAL ORDER

In the current political climate, there is growing criticism of and resistance to international institutions and the Western-dominated international legal order established in the wake of the World War II. In many countries, far-right politicians have taken hold of their governments, promoting a return to nationalism.[59] This is a worrying trend in the face of emerging conflicts and evolving transnational threats—from AI, biotechnology, weapons of mass destruction to terrorism, transnational organized crime, and modern mercenaries. The very real possibility that our current system of global justice may not hold requires practitioners, scholars, and states to contemplate the international legal order 3.0. This Article does not offer an ultimate solution, but it does suggest some initial steps.

A. Legal Reforms

International humanitarian law and international criminal law must evolve to address the new nature of conflict—one fought not just by land, sea, air, and space, but also in the cyber, electromagnetic, and information domains; and one fought not just by states, but also by militias, organized armed groups, and private militaries. Thus, where appropriate and reasonable, existing law should be interpreted broadly to account for new technologies, operational concepts, and

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57 Harmen van der Wilt, *War Crimes and the Requirement of a Nexus with an Armed Conflict*, 10 J. INT'L CRIM. JUST. 1117 (2012).

58 *Id.*

59 *Europe and right-wing nationalism: A country-by-country guide*, BBC NEWS (May 5, 2016), https://perma.cc/3UHE-RME4.

domains of warfare. Accepting evolutive interpretations of IHL is consistent with the International Court of Justice's Nuclear Weapons Advisory Opinion, which states that "the entire law of armed conflict . . . applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future."[60] While the existing laws of armed conflict can be applied to new and emerging technologies, there are other areas of international criminal justice where the existing law falls short. Where such impunity gaps exist, it is necessary to develop norms and take legislative action.

Recently, a unique opportunity to take legislative action has emerged. During times of war, the protection provided by the Geneva Conventions and their Additional Protocols can extend to the cyber domain and apply to different types of actors. However, a comparable convention to establish individual criminal responsibility for hostile or coercive acts by states and state-like organizations targeting civilians during peacetime does not yet exist. Several years after the International Law Commission published a set of proposed draft articles on crimes against humanity titled the Draft Articles on the Prevention and Punishment of Crimes Against Humanity ("Draft Articles"),[61] the United Nations Sixth (Legal) committee took an important decision in November 2024 to advance toward negotiations. The negotiations on a global treaty regarding the prevention and punishment of crimes against humanity are slated to begin in January 2026.[62] While this is a helpful step in the right direction, the draft only covers defined acts that are widespread or systematic and directed against a civilian population pursuant to a policy, as initially defined in Article 7 of the Rome Statute.[63] It therefore does not include single acts of aggression and acts directed at other the civilians of other states that fall below the threshold of an armed conflict. In the absence of enforceable international policies and laws regarding hybrid acts, aggressors operate with relative impunity.[64] Thus, cyber-enabled crimes against humanity should be identified, defined, and codified in this new convention for crimes against humanity. This novel convention presents an opportunity to build on the normative framework governing state-sponsored cyber operations and, in so doing, strengthen accountability.

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60 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C. J. ¶ 86 (July 8), https://perma.cc/UPW2-RB9Q.

61 Int'l L. Comm'n, Draft Articles of the Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/74/10 (2019), https://perma.cc/27J6-HFV6.

62 Press Release, U.N. General Assembly, U.N. General Assembly Considers Draft Treaty on Crimes Against Humanity (Apr. 15, 2024), https://perma.cc/B4JQ-G4J4.

63 *See* Int'l L. Comm'n, *supra* note 61.

64 *See* DeWees et al., *supra* note 50.

B. Institutional Reforms

While the Rome Statute established the ICC as a new international institution, the principle of complementarity and the requirement for State Parties to incorporate atrocity crimes into their domestic legislation created a greater system beyond the Court itself.[65] This Rome Statute system has not yet been implemented and actualized to the degree it could be, leaving the majority of the burden to investigate and prosecute atrocity crimes on a single institution without police powers or a budget that matches its mandate. Strengthening the ability of State Parties to investigate and prosecute Rome Statute crimes and ensuring uniformity in practice across nation jurisdictions would help fill important impunity gaps. While there has been progress in the growing trend to use national courts under the principle of universal jurisdiction,[66] which is supported by the Eurojust Genocide Network and a handful of non-governmental organizations and civil society groups, these efforts could be strengthened with a new institution dedicated to centralizing and coordinating national efforts to investigate and prosecute international crimes.

C. Operational Reforms

Within international judicial institutions, reforms are needed for the personnel and process that make up the operations of international criminal courts and tribunals. Traditional international criminal investigations have relied heavily on witness testimony and physical documents to establish the facts, often gathering assistance from historians who can provide contextual information and military analysts who inform lawyers about the chain of command. Under each of the former three ICC Chief Prosecutors, the organizational structure and teams were different to some degree. While the most recent Chief Prosecutor's reforms broke down some silos between the investigation and prosecution teams, new silos were created that prevent comparison across teams. The ICC, other international or hybrid criminal tribunals, and national criminal courts should diversify their workforce and take a more dynamic approach to investigations. Whether through secondments, consultants, or hiring new staff, prosecutors' offices need people with different skill sets. Investigative teams need to be multidisciplinary and agile, sharing information with each other as it comes in,

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65 *See* Thierry Cruvellier, *Thinking About the Death of the ICC and What Comes Next*, JUSTICEINFO.NET (Feb. 7, 2025), https://perma.cc/SC8Y-G9SP (interviewing Mark Freeman and Mark Drumbl)**Error! Hyperlink reference not valid.**.

66 TRIAL INT'L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2025 (2025), https://perma.cc/785T-Y8UJ.

rather than isolating team members from each other. Investigations must be more dynamic and creative with maximum flexibility.

V. CONCLUSION

While the international criminal justice system is still relatively new, with the vast majority of its development occurring over the past two decades, there exists a pressing need for reform to keep pace with technological development and the changing character of conflict. Resistance to change and narrow interpretations to existing laws risk rendering obsolete and woefully inadequate the entire system of international justice.