NONGOVERNMENTAL ORGANIZATIONS AND THE INTERNATIONAL CRIMINAL COURT: IMPLICATIONS OF HOBBES' THEORIES OF HUMAN NATURE AND THE DEVELOPMENT OF SOCIAL INSTITUTIONS FOR THEIR EVOLVING RELATIONSHIP

On November 28, 2004, the Sudanese government ordered Oxfam Great Britain[1] and Save the Children UK[2] to leave the Sudan.[3] Both nongovernmental organizations ("NGOs") were providing humanitarian assistance to the 1.7 million refugees who had fled their homes in the Darfur region.[4] The Sudanese government objected to public statements the organizations had made, which it characterized as supportive of the rebels, asserting that the organizations should have raised their concerns privately with government officials.[5] The expulsion orders serve as a reminder and a warning for other humanitarian organizations operating in the Sudan and around the world.[6] Humanitarian organizations operate at the will, and often

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[1] Oxfam is devoted to preventing death and disease resulting from natural disasters and armed conflict. Oxfam Great Britain, How We Work in Emergencies, http://www.oxfam.org.uk/what_we_do/emergencies/how_we_work/index.htm (last visited Jan. 2, 2006).

[2] Save the Children UK provides "health care, nutrition support, child protection and education" for children and family members in emergency situations. Save the Children UK, Save the Children Withdrawal from Darfur (Dec. 21, 2004), http://www.savethechildren.org.uk/scuk/jsp/resources/details.jsp?id=2342&group [hereinafter Withdrawal from Darfur].

[3] Somini Sengupta, *Sudan Orders the Expulsion of Aid Officials From 2 Groups*, N.Y. TIMES, Nov. 30, 2004, at A3. On November 29, 2004, under mounting international pressure, the Sudanese humanitarian affairs minister delayed implementation of the orders. *Id.* As will be discussed later in this Comment, Save the Children UK withdrew from Darfur on December 21, 2004. Withdrawal from Darfur, *supra* note 2; *see infra* notes 289–91 and accompanying text. Oxfam Great Britain, on the other hand, has sustained operations in the region. *See* Oxfam Great Britain, Crisis in Darfur, What is Oxfam Doing?, http://www.oxfam.org.uk/what_we_do/where_we_work/sudan/emergency/updateoxfam130104.htm (last visited Jan. 2, 2006).

[4] Sengupta, *supra* note 3, at A3; Oxfam Great Britain, Crisis in Darfur, http://www.oxfam.org.uk/what_we_do/where_we_work/sudan/emergency/index.htm (last visited Jan. 2, 2006). Up-to-date information on the genocide in the Sudan is available on the Holocaust Museum's website and Human Rights Watch's website. The Holocaust Museum, Sudan: Darfur Overview, http://www.ushmm.org/conscience/alert/darfur/contents/01-overview (last visited Jan. 2, 2006); Human Rights Watch, Sudan, http://www.hrw.org/doc?t=africa&c=sudan (last visited Jan. 2, 2006).

[5] Sengupta, *supra* note 3, at A3. The response work of these organizations was jeopardized as a result of statements that were far less inflammatory than had been suggested—that members of the Sudanese government should be held accountable at the International Criminal Court, or that the organizations were cooperating with the International Criminal Court. *See id.*

[6] This incident is by no means the only reminder that NGOs have received of their fragile relationships with host governments. As part of a panel discussion at Emory University, Michael Rewald, Senior Advisor

the whim, of host governments—the very governments that are frequently responsible for the suffering that these organizations seek to alleviate.

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Human Rights Watch[7] recently published a report titled *How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals*.[8] The question that this publication contemplates is of particular interest to NGOs, as these organizations have worked tirelessly to assure the establishment of the International Criminal Court ("ICC").[9] NGOs have dedicated significant resources to this endeavor because the suffering that they aim to eliminate is often caused by those whom the ICC was created to hold accountable. Thus, it is not surprising that many NGOs and their employees are eager to assist the ICC.

Likewise, it is not surprising that the ICC is an eager recipient of NGO assistance. NGOs are generally the first to respond to a humanitarian crisis; on the scene long before peacekeeping forces or criminal investigators, they "are in a privileged position to observe what happens."[10] Thus, the information they obtain is potentially invaluable to the ICC. This is particularly true because the ICC differs in an interesting way from other international authorities. While the International Court of Justice ("ICJ") is charged with settling disputes between states,[11] the ICC's mission is to hold individuals

for CARE International, discussed the precarious position of NGOs seeking to raise a voice without jeopardizing their ability to respond to humanitarian crises. By way of illustration, he commented that the Sudanese government responds to criticism by throwing up obstacles, specifically noting that the visa of a reporter was not renewed after he published a critical op-ed piece in the *Washington Post*. Michael Rewald, CARE Int'l, Address at Emory University's Panel Discussion on the Crisis in Sudan (Oct. 27, 2004).

[7] Human Rights Watch is a NGO that investigates and publicizes human rights abuses. Human Rights Watch, About HRW, http://www.hrw.org/about/whoweare.html (last visited Jan. 2, 2006) [hereinafter About HRW].

[8] HUM. RTS. WATCH, THE INTERNATIONAL CRIMINAL COURT: HOW NONGOVERNMENTAL ORGANIZATIONS CAN CONTRIBUTE TO THE PROSECUTION OF WAR CRIMINALS (Sept. 2004), http://hrw.org/backgrounder/africa/icc0904/ icc0904.pdf [hereinafter HUM. RTS. WATCH REPORT].

[9] *See infra* Part I.

[10] Kate Mackintosh, *Note for Humanitarian Organizations on Cooperation with International Tribunals*, 86 INT'L REV. RED CROSS 131, 131 (2004), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ZBEG6/$File/IRRC_853_Mackintosh.pdf.

[11] *See* Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm. "Only states may be parties in cases before the [ICJ]." *Id.* at 1059.

accountable irrespective of state lines.[12] Consequently, whereas the ICJ and other international authorities presuppose a community of nations, the ICC rests on an assumption of world citizenship and, as a result, its success depends on the cooperation of global civil society.

But what happens when handing information over to the ICC compromises the work of a NGO, threatens the safety of its employees, or endangers the lives of the very people that the organization seeks to assist? This Comment, like the Human Rights Watch publication, explores the relationship between NGOs and the ICC. However, it addresses the topic from a decidedly different perspective by examining, first, whether the ICC can compel NGOs to turn over evidence and, second, whether NGOs should cooperate with ICC investigations.

In addressing the latter question, this Comment contends that NGOs, as epistemic communities,[13] form as a result of human self-interest rather than altruistic intentions. This argument is patterned on the theories of the seventeenth-century philosopher Thomas Hobbes, who maintained that states form not as the result of a human desire for community, but rather because of the innate self-interest which drives all human behavior.[14] Relying on Hobbes' theories, this Comment argues that NGOs, which, like states, are aggregates of individuals, act in a self-interested manner.[15] While the ICC regime contemplates such self-interested behavior on the part of states, its failure to similarly accommodate self-interested behavior by NGOs is problematic, as self-interest will likely cause NGOs to distance themselves from the court.

This Comment proceeds to develop the argument as follows. Part I provides background information on both the establishment of the ICC and the role of NGOs in international law. Part II further sets the stage by discussing some of the roles NGOs may be called upon, or choose, to perform in assisting the ICC in bringing war criminals to justice.

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[12] *See* Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] (affirming that the parties to the treaty are determined to hold accountable the perpetrators of the serious crimes (individuals) over which the court has jurisdiction).

[13] Epistemic communities are transnational groups comprising individuals who share an interest in a particular issue and a common set of values which lead them to support similar responses to the issue. Carlos F. Diaz, *With Law in Their Minds: Some Reflections on the Nature of Public International Law at the Light of Current Political Science Theory*, 4 ILSA J. INT'L & COMP. L. 1133, 1145 (1998) (quoting Oran R. Young & Gail Osherenko, *Testing Theories of Regime Formation: Findings from a Large Collaborative Research Project*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 223, 250 (Volker Rittberger ed., 1993)).

[14] *See infra* Part IV.A.1.

[15] *See infra* Part IV.A.3-4.

Part III then turns to the legal question of whether the ICC can compel NGOs to turn over information. Section A of Part III examines the ICC's organic legislation, the Rome Statute. Section B reviews the Rules of Procedure and Evidence developed for the ICC. Section C looks at the decisions of other international criminal tribunals relating to privileged communications, which will likely serve as strongly persuasive authority for the ICC. And in conclusion, Section D argues that NGOs most likely will be granted a qualified privilege in the transfer of information to the ICC.

Part IV then turns to the practical question of whether NGOs will cooperate with ICC investigations, setting forth an argument regarding the behavior of NGOs constructed on Hobbes' theories regarding human nature. Section A of Part IV discusses the connection between Hobbes' views on human nature and the formation of societal organizations, including NGOs. And in conclusion, Section B contends that NGOs are likely to behave as self-interested actors in international affairs, undermining the work of the ICC.

I. BACKGROUND

A. History of the ICC and NGOs

The history of the ICC and the emergence of NGOs as international actors are inextricably linked and can both be traced back to 1862. That year, reflecting on the personal tragedy that accompanies war, Henry Dunant asked in *A Memory of Solferino*, "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?"[16] These words struck a chord with Gustave Moynier, a prominent member of Swiss society, and many others throughout Europe, ultimately leading to the establishment of the International Committee of the Red Cross ("ICRC").[17] Within two years, ten nations had ratified the Geneva Convention of 1864[18] at the behest of the ICRC.[19] Moynier, a founding member and president of the ICRC, initially rejected the idea of creating an international

[16] ICRC, From the Battle of Solferino to the Eve of the First World War (Dec. 28, 2004), http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNVP [hereinafter ICRC History] (quoting HENRY DUNANT, A MEMORY OF SOLFERINO (ICRC 1986) (1862)).

[17] *Id.*

[18] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, II Malloy 1903, I Bevans 7.

[19] ICRC History, *supra* note 16.

criminal court to enforce the Convention.[20] However, confronted with the atrocities of the Franco-Prussian War, Moynier concluded that "a purely moral sanction was inadequate 'to check unbridled passions,'" and, at a meeting of the ICRC in 1872, he presented a proposal for a treaty establishing a permanent international criminal court.[21] Due to considerable criticism from international legal experts, the proposal was abandoned.[22]

As armed conflict intensified over the course of the twentieth century so did the cries for justice in its aftermath. Eager to prosecute the German Kaiser after World War I, the Allies included provisions for ad hoc tribunals in the Treaty of Versailles.[23] At the conclusion of World War II, similarly-conceived tribunals were actually convened at Nuremberg and Tokyo.[24] In the wake of the Holocaust, the mantra "Never Again" was adopted by the international community.[25] In an effort to ensure that it was a promise and not just an empty phrase, the Genocide Conventions[26] and the Universal Declaration of Human Rights[27] were adopted,[28] and the U.N. General Assembly requested that the members of the International Law Commission ("ILC") study the possibility of establishing a permanent international criminal court.[29] The establishment of a court, however, was sidelined by Cold War politics.[30]

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[20] Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INT'L REV. RED CROSS 57, 58 (1998), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/BFF1AE58DAA8E25AC1256B66005B8BB3.

[21] *Id.* at 59 (quoting *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*, 11 BULLETIN INTERNATIONALE DES SOCIÉTÉS DE SECOURS AUX MILITAIRES BLESSÉS 122 (Comite Internationale Avril 1872) (translation of quotations by the author)).

[22] *Id.* at 63–64.

[23] Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, *in* GLOBAL CIVIL SOCIETY 2002, at 137, 139 (Helmut Anheier et al. eds., 2002), *available at* http://www.lse.ac.uk/Depts/global/Publications/Yearbooks/2002/2002chapter6.pdf. When the Kaiser was granted asylum in the Netherlands, the Allies' interest in the establishment of such tribunals dissipated quickly. *Id.*

[24] *Id.*

[25] Coalition for the International Criminal Court, A Timeline of the Establishment of the International Criminal Court, http://www.iccnow.org/pressroom/factsheets/CICCFS_Timeline_Sept04.pdf (last visited Jan. 2, 2006) [hereinafter CICC Timeline].

[26] Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3 [hereinafter Geneva Conventions].

[27] Universal Declaration of Human Rights, at 71, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[28] *See* Glasius, *supra* note 23, at 139.

[29] *Id.*

[30] *Id.* Throughout the Cold War, NGOs including the International Law Association, the Association de Droit Penal, and the World Federalist Movement remained committed to the establishment of an international

Shortly after the fall of the Berlin Wall in 1989, Trinidad and Tobago resurrected the proposal for an international criminal court, and the U.N. General Assembly once again charged the ILC with drafting a statute establishing such a court.[31] In 1993 and 1994, clear violations of the Genocide and Geneva Conventions in both the former Yugoslavia and Rwanda caused the U.N. Security Council to establish ad hoc tribunals pursuant to Chapter VII of the U.N. Charter.[32] Simultaneously, the ILC completed work on a draft statute and recommended that nations convene to negotiate a treaty and enact the statute.[33] Outrage over the atrocities in Yugoslavia and Rwanda galvanized the international community and "the idea of a permanent court gained momentum."[34]

B. Pre-Conference Work of NGOs

NGOs seized the momentum that events of the early 1990s had generated.[35] When the U.N. General Assembly decided to refer the text to an ad hoc committee for further review, the ILC's 1994 draft statute seemed likely to meet the same fate as previous proposals.[36] However, a small number of NGOs formed the NGO Coalition for the ICC ("CICC").[37] Working together through the CICC, the organizations lobbied state and intergovernmental representatives; produced expert documents, reports, and journal articles; disseminated information; organized conferences and seminars; and raised funds to enable poor states to send delegations to these conferences.[38]

Additionally, at the 1995 International Conference of the Red Cross and Red Crescent, the ICRC contributed to the growing momentum by once again

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criminal court. Additionally, the International Law Commission continued work on an international criminal code. *Id*.

[31] *Id*. Trinidad and Tobago were interested in the establishment of an international criminal court to assist in the prosecution of international drug traffickers. *Id.*

[32] *See id.*

[33] *Id*. at 140.

[34] Knut Dormann & Louis Maresca, *The International Committee of the Red Cross and Its Contributions to the Development of International Humanitarian Law in Specialized Instruments*, 5 CHI. J. INT'L L. 217, 226 (2004).

[35] Glasius, *supra* note 23, at 146.

[36] *See id.*

[37] CICC Timeline, *supra* note 25. Other NGOs involved in the formation of the Coalition for the ICC included Asociación Pro Derechos Humanos, Fédération Internationale des Ligues des Droits de l'Homme, Lawyers for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, Rights & Democracy, and the Women's Caucus for Gender Justice. *Id.*

[38] Glasius, *supra* note 23, at 147.

urging states to establish a permanent court.[39] Concerned by the violation of international humanitarian law and frustrated by the unwillingness of states to fulfill their enforcement duties under existing treaties, the ICRC expressed sentiments similar to those Gustave Moynier had expressed while president of the organization over a century earlier.[40]

Within a year, the U.N. ad hoc committee charged with reviewing the ILC's proposal had been converted to a Preparatory Committee and was drafting text for an anticipated diplomatic conference.[41] The ICRC and the CICC continued to play influential roles as the Preparatory Committee finalized the draft statute in preparation for the 1998 U.N. Diplomatic Conference of Plenipotentiaries ("Rome Conference").[42]

C. Presence of NGOs at the Rome Conference.

Both state governments and global civil society were well represented at the Rome Conference. In addition to the 160 state delegations in attendance, 236 NGOs sent representatives.[43] Furthermore, over the course of the four years since its inception, the CICC had grown from a coalition of 6 NGOs to one of over 800 NGOs.[44]

At the Conference, the CICC continued its lobbying efforts, directly addressing state delegates and "[contacting] ministers, parliamentarians, and media in the [delegates'] capital[s]."[45] It provided experts and interns to smaller and poorer delegations.[46] It also organized vigils and rallies.[47] Additionally, three news groups worked feverishly throughout the Conference to keep delegates, representatives of NGOs, and those unable to attend apprised of developments.[48] However, while the ICRC collaborated with the CICC, it did not align itself with the organization, choosing to preserve "its

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39 Dormann & Maresca, *supra* note 34, at 226.

40 *Id.* at 227.

41 Glasius, *supra* note 23, at 140.

42 Dormann & Maresca, *supra* note 34, at 227; *see* Johan D. van der Vyver, *Civil Society and the International Criminal Court*, 2 J. HUM. RTS. 425, 427 (2003). The Rome Conference was held from June 15 to July 17, 1998. CICC Timeline, *supra* note 25.

43 CICC Timeline, *supra* note 25; Glasius, *supra* note 23, at 147.

44 Glasius, *supra* note 23, at 147.

45 *Id.* at 150.

46 *Id.* at 151.

47 *Id.* at 152.

48 *Id.*

traditional neutral and independent stance."[49] Consequently, "[w]hile the [other] NGOs were generally more outspoken, the ICRC relied more on its habitual quiet but firm humanitarian diplomacy."[50]

At the conclusion of the Conference, the Rome Statute was adopted with 120 states voting in favor, 7 voting against, and 21 abstentions, thereby establishing the first permanent criminal court capable of prosecuting individuals for violations of humanitarian law.[51] The efforts of both the CICC and the ICRC are reflected in the Rome Statute. The CICC and ICRC were particularly influential with respect to the decision to have an independent prosecutor,[52] the decision to expressly include gender specific crimes,[53] and the development of the list of war crimes over which the court would have jurisdiction.[54]

D. Post-Conference Involvement of NGOs

Invigorated by the adoption of the Rome Statute, the CICC and the ICRC continued to work toward an operational court.[55] In 1999, the CICC launched a campaign for worldwide ratification.[56] While some expected the ratification process to be a lengthy one, fewer than four years after it was adopted, the Rome Statute entered into force on July 1, 2002.[57] However, the NGOs have not rested on their collective laurels. Even today, many NGOs continue to push for universal ratification of the Rome Statute and its implementation at the national level.[58] Furthermore, NGOs played a significant part in the drafting of the Rules of Procedure and Evidence, the Elements of Crimes, and the Rules of Procedure for the Assembly of Parties,[59] and led the successful

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[49] Dormann & Maresca, *supra* note 34, at 227 n.35.

[50] *Id.* This characterization of the manner in which both the ICRC delegation and the NGO delegations operated is that of Knut Dormann and Louis Maresca, who are legal advisors to the ICRC. *See id.* at 218 n.5.

[51] *See* Glasius, *supra* note 23, at 140. The final vote on the Rome Statute was by secret ballot. *Id.*

[52] *Id.* at 153–55; Michael Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT'L L. & COM. REG. 407, 438 (2001).

[53] Glasius, *supra* note 23, at 153–55; van der Vyver, *supra* note 42, at 434–35.

[54] *See* Dormann & Maresca, *supra* note 34, at 227.

[55] Van der Vyver, *supra* note 42, at 434–35; Dormann & Maresca, *supra* note 34, at 228–31.

[56] Coalition for the International Criminal Court, http://www.iccnow.org/index.html (last visited Jan. 2, 2006) [hereinafter CICC Index]; CICC Timeline, *supra* note 25.

[57] CICC Timeline, *supra* note 25. The sixtieth ratification, which triggered the Statute's entry into force, was received on April 11, 2002. *Id.*

[58] CICC Index, *supra* note 56; CICC Timeline, *supra* note 25; Dormann & Maresca, *supra* note 34, at 231; van der Vyver, *supra* note 42, at 434–35;

[59] Dormann & Maresca, *supra* note 34, at 228–29; van der Vyver, *supra* note 42, at 434–35.

campaign for ratification of the Agreement on Privileges and Immunities.[60] Having played such an integral role in the establishment of the ICC, NGOs appear poised to further expand their long-established presence in the global community and take on new roles in international affairs.[61]

II. PROPOSED ROLES FOR NGO INVOLVEMENT IN ICC PROCEEDINGS

ICC investigations in Uganda, the Democratic Republic of Congo, and the Central African Republic are underway;[62] however, the roles NGOs will play in ICC operations are still largely a matter of speculation. Putting aside the question of whether NGOs are legally required to assist the ICC, commentators have identified four areas in which NGOs could provide invaluable assistance to the ICC.

First, NGOs could serve in a public relations capacity, disseminating information about the court and its proceedings to the general public and the media.[63] Such efforts have long been the province of NGOs.[64] For example, in the 1890s, Friends of Armenia, the National Armenian Relief Committee, and the Near East Relief Committee were instrumental in raising U.S. awareness of the Armenian Massacres.[65] In recent years, NGOs have become adept at utilizing the Internet to mobilize individuals.[66] Coupling their vast experience in conveying information with new technological resources, NGOs have been particularly effective in disseminating information about developments pertaining to the ICC to a variety of audiences.[67]

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[60] Coalition for the International Criminal Court, Agreement on Privileges and Immunities, http://www.iccnow.org/buildingthecourtnew/apic.html (last visited Jan. 2, 2006). The Agreement on Privileges and Immunities provides the court and its officials with diplomatic protections similar to those afforded to the United Nations and its personnel. *Id.* The tenth ratification, which triggered the Agreement's entry into force, was received on July 22, 2004. *Id*.

[61] *See* Chadwick F. Alger, *Evolving Roles of NGOs in Member State Decision-Making in the UN System*, 2 J. HUM. RTS. 407 (2003); van der Vyver, *supra* note 42, at 434.

[62] CICC Timeline, *supra* note 25.

[63] HUM. RTS. WATCH REPORT, *supra* note 8, at 14.

[64] *See, e.g.*, PETER BALAKIAN, THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA'S RESPONSE 18 (2003) (detailing the role of NGOs in publicizing the Armenian Massacres and Genocide).

[65] *See id.*

[66] *See, e.g.*, Amnesty International, http://www.amnesty.org (last visited Jan. 2, 2006); Human Rights Watch, http://www.hrw.org (last visited Jan. 2, 2006).

[67] *See* Glasius, *supra* note 23, at 150–51. Initially, NGOs targeted specialists, holding conferences, publishing articles in law journals, and producing reports. *Id.* However, as work on the Court progressed, nongovernmental organizations began holding press conferences, gathering celebrity signatures, and producing press kits. *Id.*

Second, NGOs could serve as intermediaries between victims and witnesses and the court.[68] This is a role for which NGOs are particularly well-suited given the close relationships these organizations establish with both victims and witnesses in their capacity as providers of humanitarian services.[69] Among other things, NGOs could convey information to victims and witnesses, educate them as to the course of proceedings, prepare them for participation in such proceedings, and help them obtain legal counsel.[70] Additionally, NGOs could facilitate collective action, help to minimize the security risks associated with participation in an investigation or trial, and assist in preparing applications for reparations.[71] NGOs have served as intermediaries between victims and witnesses in national courts for decades.[72]

Third, NGOs could serve in a watchdog capacity.[73] The ICC is designed to complement national criminal justice systems rather than serve as a super-national court-of-last-resort.[74] The ICC will only exercise jurisdiction over cases that state parties are either "unable" or "unwilling" to prosecute.[75] For years, NGOs have monitored national legal systems and reported injustices to the international community in the hope that heightened awareness and political pressure will effect change.[76] Under the ICC regime, NGO reports

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[68] HUM. RTS. WATCH REPORT, *supra* note 8, at 14.

[69] *Id.*

[70] *Id.* at 18.

[71] *Id.*

[72] *See generally, e.g.*, Victim Support, http://www.victimsupport.org/vs_england_wales/index.php (last visited Jan. 20, 2006). Victim Support is a NGO that has been operating in England, Northern Ireland, and Wales for the past 30 years and that is in contact with approximately 1.25 million victims and witnesses each year. *Id.* Victim Support offers the following services to victims of crime: confidential counseling, information regarding police and court procedures, information about compensation and insurance, and information about other organizations. *Id.* Victim Support provides both prosecution and defense witnesses with the following services: confidential counseling, the opportunity to see the court before testifying, information about court procedures, a quiet place to wait prior to being called to testify, assistance with expense forms and other practical issues, assistance in contacting those who can provide information about the case, and post-testimony counseling and assistance. *Id.*

[73] *See* Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals*, 98 AM. SOC'Y INT'L L. PROC. 192, 194 (2004). NGOs have already assumed a watchdog role, monitoring the adoption of national legislation in compliance with the Rome Statute. *E.g.*, Amnesty International, Malta: Amnesty International's Concerns with the International Criminal Court Act 2002 (May 18, 2004), http://web.amnesty.org/library/index/ENGEUR330012004 (criticizing Malta for not involving NGOs in the drafting of the Act and for a lack of transparency in the process).

[74] *See* Rome Statute, *supra* note 12, pmbl. ("*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions").

[75] *Id.* art. 17(1)(a).

[76] *E.g.*, Amnesty International, Frequently Asked Questions, What Does Amnesty International Do?, http://web.amnesty.org/pages/aboutai-faq-eng#2 (last visited Jan. 2, 2006) (stating that Amnesty International's campaigning has been aimed at freeing prisoners of conscience, ensuring that political prisoners

will take on new force because they will prove useful to the ICC in assessing a state's ability or willingness to manage a case and the need for ICC intervention.[77]

Fourth, NGOs could provide information to the ICC prosecutor's office.[78] Such information might provide useful background, result in the prosecutor initiating an investigation, further an ongoing investigation, or assist the prosecutor in evaluating the ability or willingness of a state to conduct its own investigations into alleged crimes.[79] This information could be shared directly with the prosecutor's office, presented to the court in the form of an amicus curie brief or through oral testimony, or sent directly to the U.N. Security Council.[80] This type of cooperation by NGOs in ICC investigations and proceedings would represent a dramatic shift toward a new activist form of humanitarianism.[81]

Neutrality is one of the fundamental tenets of classical humanitarianism.[82] In the 1890s, it was Clara Barton's[83] calculated neutrality that allowed her to gain the approval of the Sultan of Turkey for a humanitarian mission within Turkish borders and, in so doing, gain access to the Armenian victims of the genocide that the Sultan's government was perpetrating.[84] The Rome Statute, however, suggests a shift away from classical humanitarianism, explicitly anticipating involvement of NGOs in the operations of the court and envisioning the development of a strong partnership between the ICC and NGOs in furtherance of justice.[85]

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receive fair trials, abolishing the death penalty and other inhuman treatments or punishments, ending extrajudicial executions, and ensuring that perpetrators of these abuses are brought to justice according to international standards).

77 *See* Wald, *supra* note 73, at 194.

78 HUM. RTS. WATCH REPORT, *supra* note 8, at 14.

79 *Id*.

80 *Id*. at 14–15, 17.

81 *See* Rewald, *supra* note 6. Mr. Rewald, a Senior Advisor for CARE International, has remarked that the difficulties facing NGOs reflect a shift from classical humanitarianism into a new form of humanitarianism marked by cautious activism. *Id.*

82 *See, e.g.*, BALAKIAN, *supra* note 64, at 78–80 (recounting Clara Barton's commitment to neutrality in assisting the victims of the Armenian Massacres).

83 "Clara Barton was a national hero, the heir to Florence Nightingale, and the first president of the American Red Cross." *Id*. at 63.

84 *Id*. at 78–80.

85 *See infra* Part III.A.

III. WHETHER THE ICC CAN COMPEL NGOS TO SURRENDER EVIDENCE

Article 21 of the Rome Statute delineates the sources of law to be used by the court in its proceedings and the weight to be accorded to each source.[86] The primary sources of law to which the court is to refer are the Rome Statute, the Rules of Procedure and Evidence, and the Elements of Crimes, the latter two drafted subsequent to the former.[87] Where appropriate, the court is to consider applicable treaties and customary international law.[88] If an issue is not addressed by the court's controlling documents, existing treaties, or customary international law, the court may rely on general principles of law derived from domestic laws.[89] While the court's own decisions are not binding precedent,[90] it is likely that these decisions as well as those of other international tribunals will serve as strong persuasive authority.[91] The ICC will rely on all of these sources in determining whether the court can compel NGOs to surrender evidence.

A. The Rome Statute

The involvement of NGOs at the Rome Conference is apparent in the Rome Statute. The establishment of an independent prosecutor, inclusion of gender specific provisions, and development of the list of war crimes reflect the agendas and efforts of NGOs at the Conference.[92] Moreover, the Statute both explicitly and implicitly refers to NGOs, envisioning future involvement for these organizations in ICC proceedings.[93]

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[86] Rome Statute, *supra* note 12, art. 21.

[87] *Id.* art. 21(1)(a).

[88] *Id.* art. 21(1)(b).

[89] *Id.* art. 21(1)(c).

[90] *See id.* art. 21(2) (stating that the court may, but is not required to, apply rules of law as interpreted in its previous decisions).

[91] *See* Mackintosh, *supra* note 10, at 138 (discussing the persuasive authority of an ICTY decision on the ICC and other international tribunals).

[92] *See supra* notes 52–54 and accompanying text.

[93] *See* Rome Statute, *supra* note 12, arts. 15(2), 44(4), 116. Article 15(2) allows the prosecutor to "seek additional information from States, organs of the United Nations, intergovernmental or *non-governmental organizations*, or other reliable sources that [the prosecutor] deems appropriate." *Id.* art. 15(2) (emphasis added). Article 44(4) provides that in exceptional circumstances the court may "employ the expertise of gratis personnel offered by States Parties, inter-governmental organizations or *non-governmental organizations* to assist with the work of any of the organs of the Court." *Id.* art. 44(4) (emphasis added). Article 116 provides that "the [c]ourt may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and *other entities*, in accordance with relevant criteria adopted by the Assembly of States Parties." *Id.* art. 116 (emphasis added).

In accordance with Article 13 of the Rome Statute, the court has jurisdiction over situations "referred to the Prosecutor by a State Party," situations "referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations," and situations investigated by the Prosecutor in accordance with Article 15 of the Rome Statute.[94] In part, Article 15 provides that "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."[95] Additionally, it authorizes the prosecutor to solicit "additional information from States, organs of the United Nations, intergovernmental or *non-governmental organizations*, or other reliable sources that [the Prosecutor] deems appropriate" for the purpose of analyzing the strength of information the prosecutor has received regarding a situation.[96]

The implications of Article 15 are particularly significant in light of Articles 54 and 64 of the Rome Statute. Addressing the duties of the prosecutor, Article 54 asserts that "[t]he Prosecutor shall: [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute."[97] Furthermore, Article 64 provides that the trial chamber has the power to "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States"[98] and to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties."[99] When viewed together, Articles 15, 54, and 64 of the Rome Statute suggest that NGOs might be the frequent recipients of requests for information in the course of trial proceedings and investigations by the ICC prosecutor's office, and that State Parties might be obligated to compel them to comply with such requests.[100]

The Rome Statute, however, acknowledges the dangers attendant to cooperation with the ICC, given the open nature of the trial proceedings[101] and

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94 *Id.* art. 13.

95 *Id.* art. 15. *Proprio motu* means: on his or her own initiative.

96 *Id.* art. 15(2) (emphasis added).

97 *Id.* art. 54(1)(a).

98 *Id.* art. 64(6)(b).

99 *Id.* art. 64(6)(d). Under Article 93, State Parties are obligated to facilitate the voluntary appearance of persons as witnesses or experts before the Court. *Id.* art. 93(1)(e).

100 *See id.* arts. 15, 54, 64.

101 *Id.* art. 64(7) (providing that "[t]he trial shall be held in public").

the defendant's right to evaluate all evidence and confront all witnesses.[102] Article 54 of the Rome Statute requires the prosecutor to "respect the interests and personal circumstances of victims and witnesses"[103] and provides that the Prosecutor may "[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents."[104] Article 68 of the Rome Statute also provides that "[w]here the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, [during pre-trial proceedings], withhold such evidence or information and instead submit a summary thereof," as long as such measures are "exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[105] Under Article 64 of the Rome Statute, the trial chamber may exercise similar discretion so as to protect witnesses.[106] These provisions will prove useful to NGOs wishing to cooperate with the ICC.

The Rome Statute not only anticipates the continued cooperation of NGOs but also requires it, albeit with appropriate precautions.[107] The prosecutor may solicit additional information from NGOs during the course of an investigation and, subsequently, the trial chamber may enlist the cooperation of states in compelling the attendance of witnesses and production of evidence.[108] The ICC's right to information in the possession of NGOs and the expectation of their cooperation is tempered only by the discretion of the prosecutor and the trial chamber.[109] However, in exercising that discretion, Article 69 of the Rome Statute asserts that "[t]he Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence."[110]

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[102] *Id.* art. 67(1)(e) (guaranteeing the defendant the right "[t]o examine, or have examined, the witnesses against him or her").

[103] *Id.* art. 54(1)(b).

[104] *Id.* art. 54(3)(e).

[105] *Id.* art. 68(5). States may also request that "confidential or sensitive information" be protected. *Id.* art. 68(6). Greater deference to State sovereignty is afforded with respect to information that, if disclosed, would pose a threat to national security. *Id.* art. 72.

[106] *Id.* art. 64(6)(c). The ITCY trial chamber denied a prosecution motion requesting such protective measures for former NGO employees testifying in Slobodan Milosevic's trial. *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Prosecution Motion for Protective Measures (Concerning Humanitarian Organisation) (Apr. 1, 2003), *available at* http://www.un.org/icty/milosevic/trialc/decision-e/030401.htm.

[107] *See supra* notes 92–106 and accompanying text.

[108] *See supra* notes 94–99 and accompanying text.

[109] *See supra* notes 101–06 and accompanying text.

[110] Rome Statute, *supra* note 12, art. 69(5).

These rules require the court to respect the confidentiality of communications that take place in the course of certain relationships and urge the court to do the same in others.[111]

B. Rules of Procedure and Evidence Regarding Privilege

The ICC Rules of Procedure and Evidence privilege communications arising in the context of a limited number of relationships. For two reasons the specific privileges announced in the Rules of Procedure and Evidence are relevant to the discussion of whether information obtained by NGOs is privileged. First, in many instances the kind of work being done by NGOs falls into an existing category of privileged communications.[112] Second, these provisions may be relied upon to draw analogies to other instances in which a privilege might be asserted.[113] Rule 73(1) establishes that "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure" unless the person consents to the disclosure of such communications in writing or waives the privilege as a result of disclosure of the information to a third party.[114] Rule 73(2) extends the universally accepted attorney-client privilege delineated in Rule 73(1) to communications with other professionals, if confidentiality is essential to the professional relationship, the information is conveyed with the expectation of non-disclosure, and the recognition of such a privilege "would further the objectives of the [Rome] Statute and the Rules [of Procedure and Evidence]."[115]

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[111] *See* International Criminal Court, Rules of Procedure and Evidence, R. 73, U.N. Doc. ICC-ASP/1/3 (2002), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf [hereinafter ICC Rules of Procedure and Evidence].

[112] *E.g.*, Human Rights First, About Us, Internship Program, http://www.humanrightsfirst.org/about_us/jobs/interns.htm (last visited Jan. 2, 2006) (noting that, among other things, Human Rights First provides legal assistance to "refugees in flight from persecution and repression"); Médecins Sans Frontières, http://www.msf.org (last visited Jan. 2, 2006) (stating that MSF is "committed to two objectives: providing medical aid wherever needed regardless of race, religion, politics or sex and raising awareness of the plight of the people [they] help"); Mennonite Central Committee, About MCC, http://www.mcc.org/about (last visited Jan. 2, 2006) (stating that one purpose of the Mennonite Central Committee is "demonstrat[ing] God's love by working among people suffering from poverty, conflict, oppression and natural disaster").

[113] *See* Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (July 27, 1999), *available at* http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm (the ICRC made an argument analogizing to the attorney-client privilege).

[114] ICC Rules of Procedure and Evidence, *supra* note 111, R. 73(1).

[115] *Id.* R. 73(2).

Rule 73 also addresses specific relationships to which the privilege should be extended.[116] Rule 73(3) directs the trial chamber to be particularly conscious of the confidential nature of relationships established with medical doctors, psychiatrists, psychologists, and counselors, and to be especially sensitive to such relationships if the patients are victims.[117] Additionally, Rule 73(3) directs the trial chamber to consider privileging communications made to clergy members and establishes an absolute privilege for communications made in the course of sacred confession.[118] Rule 73(4) establishes an absolute privilege for information obtained by the ICRC and its past and present employees.[119] Under this rule, all information obtained "in the course, or as a consequence, of the performance by the ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement" is privileged.[120] However, if after prescribed consultations[121] the ICRC does not object to a disclosure in writing or the ICRC waives the privilege as a result of officially releasing the information to the public, the court will admit the evidence.[122]

C. Persuasive Authority from Other International Criminal Tribunals

The newly adopted ICC Rules of Procedure and Evidence are not identical to the rules developed by the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").[123] However, in the absence of judicial interpretation of the ICC Rules, decisions from these tribunals are useful guides for interpreting the ICC Rules.[124] In fact, some ICC Rules represent the codification of judicial holdings from these tribunals.[125] While an international criminal tribunal has yet to recognize any kind of privilege for information obtained by NGOs, the

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116 *See id.* R. 73(3), R. 73(4).

117 *Id.* R. 73(3).

118 *Id.*

119 *Id.* R. 73(4).

120 *Id.*

121 *Id.* R. 73(4)(a).

122 *Id.* R. 73(4)(b).

123 *Compare* ICC Rules of Procedure and Evidence, *supra* note 111, *with* International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.36 (adopted Feb. 11, 1994, last amended Nov. 16, 2005), *available at* http://www.un.org/icty/legaldoc-e/basic/rpe/procedureindex.htm [hereinafter ICTY Rules of Procedure and Evidence], *and* International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.1 (entered into force June 29, 1995, last amended June 7, 2005), *available at* http://65.18.216.88/ENGLISH/rules/070605/070605.pdf.

124 *See* Mackintosh, *supra* note 10, at 138.

125 ICC Rules of Procedure and Evidence, *supra* note 111, R. 73(4).

ICTY has recognized the existence of testimonial and evidentiary privileges in several analogous contexts.[126] In *Prosecutor v. Simic*, the ICTY recognized an absolute privilege for information obtained by the ICRC,[127] and in *Prosecutor v. Brdjanin*, the ICTY recognized a qualified privilege for information obtained by war correspondents.[128]

In *Simic*, the trial chamber was presented with the opportunity to recognize a privilege for all NGOs.[129] However, the tribunal severely limited its holding, narrowly tailoring its rationale by relying heavily on the unique characteristics of the ICRC.[130] Nevertheless, this opinion opens the door for strong arguments, based on factual analogy, in favor of recognizing a privilege for all NGOs.[131] Although the factual relevance of the appeals chamber's decision in *Brdjanin* is less obvious, the policy arguments that the judges relied upon in this case are more akin to those which might appear in a decision regarding whether information obtained by NGOs should be privileged.[132] To date, discussions of NGO privilege have relied on these two opinions.[133] However, it is Judge Hunt's separate opinion in *Simic* that provides the most applicable treatment of the issue because that opinion deals with the ICRC as a NGO rather than as a special international entity.[134]

1. ICRC's Absolute Privilege

Although the ICRC's absolute privilege was subsequently incorporated into the ICC's Rules of Evidence and Procedure,[135] it was first recognized by the

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[126] *E.g.*, Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (July 27, 1999), *available at* http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm; Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002), *available at* http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm.

[127] *Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness.

[128] *Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal.

[129] *See Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness.

[130] *See id.*

[131] *See id.*

[132] *See Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal.

[133] *See generally* Mackintosh, *supra* note 10.

[134] *Simic*, Case No. IT-95-9-PT, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness (July 27, 1999), *available at* http://www.un.org/icty/simic/trialc3/decision-e/90727EV59551.htm.

[135] *See* Mackintosh, *supra* note 10, at 133.

ICTY in *Simic*.[136] A former ICRC employee that had visited detention camps in Yugoslavia in the course of his official duties as an ICRC translator contacted the ICTY and offered his assistance in the prosecution of Blagoje Simic.[137] While the translator wished to testify in Simic's trial, the ICRC vehemently objected to him doing so.[138] The trial chamber concluded that the ICRC had a legal interest in the translator's information, given that he had collected it while acting in the course of his official duties.[139] Thus, the trial chamber turned its attention to whether the ICRC had a "relevant and genuine" confidentiality interest that required the information be considered privileged.[140]

Reminiscent of Clara Barton's calculated neutrality in the face of strong pro-Armenian sentiments,[141] the ICRC argued that allowing the translator to testify before the ICTY would jeopardize its humanitarian efforts worldwide.[142] Furthermore, it claimed that insofar as allowing the testimony would call its neutrality into question, it violated international human rights law conferring certain duties on the ICRC.[143] While acknowledging the validity of the ICRC's concern, the prosecutor argued that the court should determine whether evidence gathered in the course of humanitarian missions should be subject to subpoena on a case-by-case basis through a balancing test.[144]

The trial chamber painstakingly asserted that the issue at hand was one of discretion, rather than jurisdiction.[145] It maintained that while Rule 89 of the ICTY Rules of Procedure and Evidence[146] dictates that evidence is to be admitted liberally, such power must be tempered with discretion and comport with customary international law.[147] However, the trial chamber rejected the

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136 *See Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness.

137 *Id.* ¶ 1.

138 *Id.* ¶ 9.

139 *Id.* ¶ 36.

140 *Id.* ¶ 38.

141 *See* BALAKIAN, *supra* note 64, at 78–80.

142 *See Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 13.

143 *Id.* ¶¶ 13–14.

144 *Id.* ¶ 26.

145 *See id.* ¶ 38.

146 ICTY Rules of Procedure and Evidence, *supra* note 123, R. 89(c).

147 *Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶¶ 40–42.

argument that information obtained by the ICRC was privileged under Rule 97,[148] which privileged attorney-client communications.[149] Consequently, the trial chamber asserted that any privilege conferred upon the ICRC would have to be a matter of conventional or customary international law.[150]

The trial chamber concluded that the ICRC is a private organization, which has developed an international legal personality as a result of the mandate bestowed upon it through the Geneva Conventions and Additional Protocols.[151] The trial chamber recognized the special status conferred upon the Red Cross as a matter of custom, referencing the trial chamber's own request that the organization inspect U.N. Detention Camps.[152] Additionally, it highlighted the centrality of confidentiality to the mission of the ICRC, acknowledging the organization's long history of maintaining neutrality and impartiality in the face of conflict.[153]

With respect to the policy implications associated with disclosure, the trial chamber asserted that requiring the ICRC to surrender information to the trial chamber would have a detrimental impact on the ability of the ICRC to fulfill the mandate that the international community had conferred upon it and would increase the safety risks to the organization's staff members and the victims they serve.[154] Supporting its contention with empirical evidence that the ICRC plays a unique role in international affairs, the trial chamber noted that almost all other humanitarian organizations had been asked to leave Yugoslavia.[155]

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148 ICTY Rules of Procedure and Evidence, *supra* note 123, R. 97.

149 *Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 43.

150 *Id.*

151 *Id.* ¶ 46. The Red Cross relied upon Article 9 of Geneva Conventions I, II, and III; Article 10 of Geneva Convention IV; Article 81, Paragraph 1 of Additional Protocol I; Article 10, Paragraph 3 of Geneva Conventions I, II, III; Article 11, Paragraph 3 of Geneva Convention IV; Article 126 of Geneva Convention III; Article 143 of Geneva Convention IV; and Article 3 of all Geneva Conventions. *Id.* ¶ 47; *see* Geneva Conventions, *supra* note 26.

152 *Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶¶ 48–50.

153 *Id.* ¶¶ 51–58. In concluding that confidentiality was central to the ICRC's mission, the trial chamber found that submission of evidence by ICRC delegates to the International Military Tribunal at Nuremberg in 1946 and the organization's rare public comments were exceptions not inconsistent with adherence to the ICRC's policies of non-disclosure. *See id.* ¶¶ 60–64.

154 *Id.* ¶ 65.

155 *Id.* ¶ 68.

Ultimately, the trial chamber held that the ICRC had a "right under customary international law to non-disclosure of the [i]nformation."[156] In adopting this position, the trial chamber concluded that both the ratification of the Geneva Conventions by 188 states and the general practices of states in relation to the ICRC were sufficient to meet customary international law's *opinio juris* and general practice requirements.[157] Buttressed by this rationale, the trial chamber distinguished the appeals chamber's decision in *Prosecutor v. Blaskic*,[158] dismissing the prosecutor's argument that even if information obtained by the ICRC was privileged, the privilege was merely a qualified one and a balancing test therefore must be performed.[159] Thus, the trial chamber not only held that information obtained by the ICRC was privileged, but also that the ICRC's privilege was absolute and unequivocal.

2. War Correspondents' Qualified Privilege

Subsequent to the adoption of the ICC Rules of Procedure and Evidence, the ICTY was confronted with another question pertaining to evidentiary privilege. In *Brdjanin*, the tribunal addressed the issue of privilege with respect to journalists.[160] The appellate chamber ultimately held that there was a qualified testimonial privilege for war correspondents.[161]

The trial chamber subpoenaed Jonathan Randal, a war correspondent for the *Washington Post* who had published a story quoting Brdjanin regarding the situation in Banja Luka, Brdjanin's desire for the area to be ethnically cleansed, his preparations for the legal expulsion of non-Serbs from the area, and his disdain for human rights conventions.[162] The interview with Brdjanin

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156 *Id.* ¶ 74.

157 *Id. See generally* The Paquete Habana, 175 U.S. 677 (1900) (requiring a showing that a general practice is accepted as law to establish the existence of customary international law).

158 Prosecutor v. Blaskic, Case No. IT-95-14-AR108 *bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), *available at* http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html. The prosecutor in the *Simic* case argued that the ICRC's interest in confidentiality was analogous to the national security interests of a state and thus any privilege was subject to a balancing test under *Blaskic*. *Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 7.

159 *See Simic*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶¶ 76–79.

160 Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002), *available at* http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm.

161 *Id.*

162 *Id.* ¶¶ 3–4. The article at the center of this dispute quotes Brdjanin as commenting that "he personally argued that those unwilling to defend [Bosnian Serb territory] must be moved out" and that he hoped "to create an ethnically clean space through voluntary movement," further asserting that "Muslims and Croats . . .

was conducted with the assistance of another journalist who served as an interpreter.[163] Randal contested the subpoena.[164] The trial chamber concluded that, while journalists should not be unnecessarily subpoenaed in light of the important role they play in the dissemination of information, once an article has been published and its sources revealed, the risk resulting from compliance with a subpoena for pertinent information is minimal.[165]

On appeal, Randal argued that failure to recognize a qualified privilege for journalists would jeopardize the ability of journalists to investigate and report effectively.[166] He also argued that it would increase the personal risks to journalists and their sources and would result in "less journalistic exposure of international crimes . . . thus . . . hindering . . . the very process of international justice that international criminal tribunals . . . are designed to serve."[167] Citing ICC Rule 73 as persuasive authority, Randal asserted that journalists, as professionals whose work depends on confidentiality, ought to be granted a qualified privilege.[168] He also relied on ICTY Rule 97 which grants a privilege to attorney-client communications,[169] the trial chamber's decision in *Prosecutor v. Simic*,[170] and the trial chamber's decisions in *Prosecutor v. Delalic*[171] and *Prosecutor v. Blaskic*,[172] which privileged the testimony of an ICTY Interpreter and the Commander-in-Chief of the U.N. Protection Force respectively.[173] In addition, drawing upon international conventions and

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'should not be killed, but should be allowed to leave—and good riddance.'" Randal also quotes Brdjanin as stating that the authorities in neighboring Serbia pay "too much attention to human rights." The article goes on to discuss Brdjanin's plan to enact laws expelling non-Serbs from government housing. Jonathan C. Randal, *Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal*, WASH. POST, Feb. 11, 1993, at A34.

163 *Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 3.

164 *Id.*

165 Prosecutor v. Brdjanin & Talic, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena (June 7, 2002), *available at* http://www.un.org/icty/brdjanin/trialc/decision-e/t020612.htm.

166 *Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutary Appeal, ¶ 11.

167 *Id.*

168 *Id.* ¶ 13 (citing ICC Rules of Procedure and Evidence, *supra* note 111, R. 73). *See supra* notes 114–22 and accompanying text.

169 *Id.* ¶ 12 (citing ICTY Rules of Procedure and Evidence, *supra* note 123, at 97).

170 *Id.* ¶ 13. *See supra* Part III.C.1.

171 Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter (July 8, 1997), *available at* http://www.un.org/icty/celebici/trialc2/decision-e/70708SP2.htm.

172 Prosecutor v. Blaskic, Case No. IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), *available at* http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html.

173 Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 13 (Dec. 11, 2002), *available at* http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm.

decisions of the European Court of Human Rights, courts of the United States, and courts of the United Kingdom, Randal built a case for the existence of a qualified privilege for journalists in customary international law.[174] Randal's arguments were given more force by the thirty-four amicus curiae briefs filed by media organizations which cautioned that in the absence of a qualified privilege journalists were more likely to be seen as agents of a future prosecutor and, thus, participants rather than mere observers in a conflict.[175]

The prosecutor attempted to distinguish this case from others in which testimonial privilege was invoked by asserting that Randal waived any right to privilege through the publication of his articles in the *Washington Post*.[176] Additionally, the prosecutor argued that Randal's alleged privilege was novel and, therefore, unlike the attorney-client privilege and the functional immunity afforded to state officials, which have long been a part of the legal tradition.[177]

The appellate chamber recognized a qualified privilege for war correspondents and announced a two-pronged test for determining whether the privilege was applicable, thereby rejecting both the test applied by the trial chamber and the exacting standard suggested by Randal.[178] In so doing, the appellate chamber narrowed the issue and its holding to the subset of journalists who serve as war correspondents.[179] It did this because war correspondents play a particularly vital public role in providing reliable information capable of provoking action by individuals and governments and because failure to grant a privilege might be detrimental to their work, causing interviewees to be less forthcoming and making them the targets of acts of aggression.[180] Furthermore, the appellate chamber asserted that inherent in freedom of expression is the "right to know," a liberty which war correspondents directly serve.[181] Under the two-pronged test, the testimony of a war correspondent is required only if "the evidence sought is of direct and important value in determining a core issue in the case" and if that evidence "cannot reasonably be obtained elsewhere."[182] On remand, applying the

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174 *See id.* ¶ 14.
175 *See id.* ¶ 7.
176 *See id.*
177 *Id.* ¶ 25.
178 *See id.* ¶ 50.
179 *See id.* ¶ 51.
180 *Id.* ¶¶ 43–44.
181 *Id.* ¶ 37.
182 *Id.* ¶ 50. Concurring in the judgment but writing separately, Judge Shahabudeen further analyzed the two-pronged test, suggesting that the first prong should be considered satisfied when the proposed evidence

appellate chamber's newly formulated test, the trial chamber concluded that Randal's testimony was privileged.[183] While the appellate chamber created a new test, the recognition of a qualified privilege was not inconsistent with Judge Hunt's earlier separate opinion in *Simic*.

3. Judge Hunt's Separate Opinion Regarding the ICRC's Privilege

Concurring in the trial chamber's decision to exclude the evidence in *Simic*, Judge Hunt wrote a separate opinion treating the ICRC as a NGO and recognizing only a qualified privilege.[184] In assessing the arguments of the ICRC and the prosecutor, Judge Hunt drew two useful analogies. First, he pointed out that the ICRC's arguments in favor of recognizing an absolute privilege equated ICRC employees with "witness[es] bound by the obligations of professional secrecy," such as lawyers.[185] Second, he noted that the prosecution's arguments in favor of a qualified privilege equated the ICRC with a "State instrumentality making a claim of public interest immunity."[186]

Judge Hunt did not dispute the majority's assertion that the tribunal was bound by customary international law,[187] nor did he disagree with the majority's determination that as a matter of customary international law the ICRC retained an absolute privilege from disclosure of information in the course of proceedings in national courts.[188] Rather, he rejected the extension of customary law pertaining to national courts to the proceedings of international courts, opining that neither general practice nor the requisite *opinio juris* existed to support such an argument.[189] Moreover, Judge Hunt maintained that it would be impossible to ascertain the application of general principles of international law regarding evidentiary issues because some

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could be "'advantageous' and 'to the point' in determining core issues in a serious criminal case." Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-A, Separate Opinion of Judge Shahabudeen, ¶¶ 23, 30 (Dec. 11, 2002), *available at* http://www.un.org/icty/brdjanin/appeal/decision-e/sep-op.htm.

183 Prosecutor v. Brdjanin & Talic, Case No. IT-99-36, Decision on Prosecution's Second Motion for a Subpoena of Jonathan Randal (June 30, 2003), *available at* http://www.un.org/icty/brdjanin/trialc/decision-e/030630.htm. The trial chamber found that the testimony at issue did not meet the first prong of the appellate chamber's test and, therefore, did not apply the second prong to the facts in the case. *See generally id.*

184 Prosecutor v. Simic, Case No. IT-95-9-PT, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, ¶¶ 42–43 (July 27, 1999), *available at* http://www.un.org/icty/simic/trialc3/decision-e/90727EV59551.htm.

185 *Id.* ¶ 11.

186 *Id.* ¶ 12.

187 *Id.* ¶ 20.

188 *Id.* ¶ 23.

189 *Id.*

civilized nations have adopted common law systems while others have adopted civil law systems.[190]

Judge Hunt asserted that, in the absence of procedural law, the tribunal should rule in the interest of ensuring a "fair and expeditious trial."[191] Noting that "in relation to the rules of evidence and matters of procedure, international law chooses, edits, and adapts elements from the rules of the better developed systems of law, employing their legal reasoning and analogies in order to do so,"[192] Judge Hunt advocated adopting the common law approach of balancing the harms associated with admission of the evidence against the harms associated with the exclusion of evidence.[193]

Judge Hunt concluded that the correct balancing test weighs "whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party . . . as to outweigh the risk of serious consequences of the breach of confidence in the particular case."[194] He constructed a neutral test because he recognized that "powerful public interest[s]" were present on both sides of the issue.[195] On the one hand, he identified such an interest in the protection of the ICRC's adherence to its obligations of confidentiality and neutrality because the willingness of warring parties to grant full access to the ICRC is dependent upon its adherence to these principles.[196] On the other hand, he recognized that there was also such an interest in ensuring the availability of relevant evidence to the courts, so that they might facilitate just outcomes.[197] Applying his test in *Simic*, Judge Hunt concluded that the risks associated with disclosure outweighed the obstacles posed by the exclusion of the evidence.[198] In spite of the neutrality of Judge Hunt's test, the application of this test to most cases involving NGOs will result in the exclusion of evidence.[199]

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190 *Id.* ¶ 24.
191 *Id.* ¶ 25.
192 *Id.* ¶ 26.
193 *Id.* ¶ 27.
194 *Id.* ¶ 35.
195 *Id.* ¶ 17.
196 *Id.* ¶ 14.
197 *Id.* ¶ 17.
198 *See id.* ¶ 41.
199 *See supra* notes 194–97 and accompanying text.

D. Interpretation of Legal Authority Bearing on NGO Privilege

The implicit and explicit references to NGOs contained in the Rome Statute suggest that the ICC has jurisdiction over NGOs, or at least those operating in areas in which the court has jurisdiction.[200] However, the Rules of Procedure and Evidence suggest that information obtained by NGOs in the course of their operations may be privileged because the information either falls into an already defined category of privileged communications or is privileged under discretion of the court; thus, NGOs may not be obligated to surrender information to the ICC.[201] As evidenced by the survey of applicable international case law pertaining to privileged information, the question of whether a privilege should be granted to NGOs that do not share the ICRC's unique history and international mandate will be one of first impression for any international court or tribunal.[202] However, despite differences between the ICC and the ICTY,[203] scholars agree that the ICTY decisions regarding privilege will likely be treated as strong persuasive authority when the ICC confronts this issue.[204] *Simic* and *Brdjanin* are useful guides in predicting how the ICC will rule when presented with the issue of whether information obtained by NGOs should be privileged, but it is Judge Hunt's separate opinion which is most applicable to the question. It is this approach which NGOs should advocate that the ICC adopt.

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200 *See supra* Part III.A.

201 *See supra* Part III.B. The inclusion of an explicit, well-defined privilege for the ICRC in the Rome Statute cuts both ways on the question of whether nongovernmental organizations should be granted a similar privilege.

202 *See supra* Part III.C.

203 The ICTY was established by the United Nations Security Council in accordance with its Chapter VII powers to address situations that threaten world peace and security. Mackintosh, *supra* note 10, at 132. As such, it is an ad hoc tribunal with limited geographic and temporal jurisdiction. *See id.* All states can be compelled to cooperate. In contrast, the ICC derives its legitimacy from a treaty and is a permanent court. *Id.* at 133. Thus, both jurisdiction and cooperation may depend on whether a state is a party to the treaty. *See id.* Furthermore, the ICC strikes a different balance between the adversarial and inquisitorial models than the balance struck by the ICTY. Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 605 (2003). This balance incorporates "legal traditions from around the world, and contains time-honored values and concepts derived from national systems of many countries. It belongs to no particular system of law, and yet it is drawn from all and for all." Roy S. Lee, *An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750, 754 (2002). However, like the ICTY, the ICC embraces a common law approach to procedural law and "is not strictly bound to peremptory rules of procedural law and can adopt evaluations tending to verify whether the immediate proceedings constitute a violation of the right to a fair trial." Caianiello & Illuminati, *supra* note 52, at 436.

204 *See, e.g.*, Mackintosh, *supra* note 10, at 138 (discussing persuasive authority of an ICTY decision with respect to the ICC and other international tribunals).

While the policy issues implicated in *Simic* suggest that an absolute privilege like the one recognized for the ICRC may be recognized for other NGOs, the rationale and language of the majority's opinion limit the holding to the ICRC. The ICRC contended that even the possibility that it might be required to surrender information to a court would "endanger (or, in extreme cases, . . . sacrifice) the lives of those persons to whom the ICRC would consequently be denied access."[205] While similar concerns exist for all NGOs engaged in humanitarian work, the trial chamber's holding in *Simic* is based not on policy, but rather on the unique role played by the ICRC in international affairs.[206] The trial chamber's opinion focused on the ICRC's "pivotal role in the regime established by the Geneva Conventions and their Protocols to guarantee the observance of certain minimum humanitarian standards."[207] Moreover, the trial chamber explicitly limited its holding by asserting that its finding "that the ICRC has a right to non-disclosure does not 'open the floodgates' in respect [to] other organizations."[208] This admonition has not gone unheeded. Recently, in *Prosecutor v. Muvunyi*, the trial chamber of the ICTR held that the ICRC privilege was inapposite as to national Red Cross societies, insofar as they are acting independent of the ICRC.[209]

Scholars tend to agree that *Brdjanin* provides strong support for the assertion that at least a qualified privilege like that recognized for war correspondents will be extended by analogy to NGOs.[210] Some scholars even

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[205] Stephane Jeannet, *Recognition of the ICRC's Long-Standing Rule of Confidentiality—An Important Decision by the International Criminal Tribunal for the Former Yugoslavia*, 838 INT'L REV. RED CROSS 403–25 (2000), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/4F5883D9813ABFBFC1256B66005E8F4A.

[206] *See* Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness (July 27, 1999), *available at* http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm.

[207] *Id.* ¶ 72.

[208] *Id.* ¶ 72 n.56.

[209] Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Reasons for Chamber's Decision on Accused's Motion to Exclude Witness TQ, ¶ 16 (July 15, 2005), *available at* http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/150705.htm (noting that "[a]s stated by an ICTY Chamber in the Simic case, such finding 'does not 'open the floodgates' in respect of other organizations'" and asserting "that the ICC's Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization"). The Chamber in this case failed to reach the question of whether such national societies enjoyed an independent privilege because no evidence was presented by the defense "to suggest that the [Belgian Red Cross Society] has an international testimonial privilege in respect of the information in the possession of its employees." *Id.* ¶ 19.

[210] *See, e.g.*, Megan A. Fairlie, *Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict—Evidence in War Crimes Trials—Rule-Making Process of ICTY*, 98 AM. J. INT'L L. 805, 809 (2004); John R.W.D. Jones, *The Gamekeeper-Turned-Poacher's Tale*, 2 J. INT'L CRIM. JUST. 486, 491 (2004); Mackintosh, *supra* note 10, at 137.

contend that NGOs are covered by the ICTY's broad definition of "war correspondent."[211] The arguments made in *Brdjanin* "have immediate resonance for humanitarian organizations" for two reasons.[212] First, "[i]f there is a public interest in receiving information from a war zone, there is an arguably even greater public interest in the victims of conflicts receiving food, shelter and medical treatment from humanitarian players."[213] Second, the policy implications of requiring NGOs to surrender information are identical to those the ICTY recognized with respect to war correspondents: "loss of perceived neutrality, leading to lack of access and security threats."[214] However, the two-pronged test employed by the ICTY in *Brdjanin* provides limited protection against disclosure.[215]

Judge Hunt's opinion in *Simic* suggests an alternative approach directly applicable to NGOs.[216] As a result of his rejection of the ICRC's claim to a special privilege in international courts based in customary international law, Judge Hunt's analysis is applicable to all NGOs,[217] and therefore is a more appropriate authority than the *Brdjanin* opinion.

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[211] Fairlie, *supra* note 210, at 809. Some scholars contend that analogies between NGOs and war correspondents are not necessary and that the application of *Brdjanin* to NGOs requires no extension of its doctrine. *Id.* at 809. They argue that "Amnesty International, Human Rights Watch and the like [are] organizations that 'send people into areas of danger to gather information which they publish.'" *Id*. at 808–09. They maintain that in an attempt to narrow the scope of its holding, the court inadvertently broadened its holding so much that there is no need to extend the doctrine to other categories of witnesses because they already fall within the definition of war correspondent provided by the ICTY. *Id.*

[212] Mackintosh, *supra* note 10, at 137.

[213] *Id*. Acknowledging the far-reaching implications of the ICTY's holding in *Brdjanin*, others plead with the ICC not to adopt a similar position. Jones, *supra* note 210, at 491. They fear that adoption of a similar position will impede justice, as "correspondents reluctant to speak with the defense will no doubt rely on [*Brdjanin*] to forestall even an initial approach." *Id.* They express concern that the doctrine will be "extended further to cover other categories of persons who travel to war zones on official business, e.g. representatives of humanitarian organizations." *Id.* Thus, they contend that the compromise qualified privilege produces a no win situation for all involved, raising a host of problems for the defense, while providing little real protection for war correspondents or others to whom a similar privilege is granted. *Id.*

[214] Mackintosh, *supra* note 10, at 137. Those in favor of recognizing a privilege for NGOs seize upon the ICTY's focus on the loss of perceived neutrality in *Brdjanin*. They contend that *Brdjanin* provides authority for the argument that a NGO privilege should be recognized because of "the importance to the organization of being seen to be neutral, rather than because the organization would not normally speak out about events its employees have witnessed." *Id*. Thus, they conclude that even NGOs adopting a new form of activist humanitarianism might assert the privilege, and when information is in fact confidential in nature a NGO will likely be granted an absolute privilege. *See id.*

[215] Jones, *supra* note 210, at 491.

[216] *See supra* Part III.C.3.

[217] *Id.*

Moreover, Judge Hunt's reliance on a balancing test and the appellate chamber's reliance on a two-pronged test in *Brdjanin* may produce different results.[218] If the ICC chooses to adopt Judge Hunt's more flexible balancing approach, there is a chance that a NGO would be required to surrender evidence which is not "of direct and important value in determining a core issue in the case" or evidence that "cannot reasonably be obtained elsewhere."[219] Nonetheless, NGOs will be better protected by Judge Hunt's test for two reasons. First, the gravity of the policy implications weighing in favor of privileging information obtained by NGOs makes such an outcome highly unlikely. Second, it is likely that under Judge Hunt's test a privilege will be recognized even if the two-pronged test applied in *Brdjanin* is satisfied and information would consequently not be privileged.[220] Thus, it would be in the best interest of NGOs to rely on Judge Hunt's separate opinion in *Simic* rather than the *Brdjanin* opinion when arguing for a qualified privilege for information not already privileged under the ICC Rules of Procedure and Evidence.

IV. WHETHER NGOS WILL SURRENDER EVIDENCE TO THE ICC

A. A Hobbesian Argument

Regardless of whether NGOs are legally obligated to surrender evidence to the ICC, it is not clear that such obligations can be enforced.[221] Article 93 of the Rome Statute requires state parties to assist the ICC in the taking and production of evidence; however, this article only requires state parties to "[facilitate] the voluntary appearance of persons as witnesses or experts before the Court."[222] Therefore, while the ICC can "require the attendance and testimony of witnesses," state parties are not obligated to assist in the enforcement of such a requirement against a NGO.[223] Furthermore, because the ICC was established through a treaty, the cooperation of non-state parties

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[218] *Compare supra* notes 193–99 and accompanying text, *with supra* notes 178–82 and accompanying text.

[219] Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 50 (Dec. 11, 2002), *available at* http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm; *see supra* notes 178–82, 193–99 and accompanying text.

[220] *See supra* notes 178–82, 193–99 and accompanying text.

[221] Kress, *supra* note 203, at 616.

[222] Rome Statute, *supra* note 12, art. 93(1)(e). This is particularly problematic because Article 69 requires that a witness give testimony in person. *Id.* art. 69(2).

[223] *See id.* arts. 64(6)(b), 93(1)(e).

in compelling NGOs to provide evidence and testimony is even less probable.[224] Thus, in many instances, the ICC will have to depend on the voluntary cooperation and goodwill of NGOs.

Some have suggested that the genius in the ICC regime lies in the adoption of the principle of complementarity.[225] This principle acknowledges that states are motivated by self-interest and are unlikely to concede any of their sovereignty,[226] a proposition attributable to the seventeenth-century philosopher Thomas Hobbes.[227] In contrast, however, the ICC regime fails to similarly account for the motivations of NGOs, apparently assuming that NGOs are not motivated by self-interest[228] or, alternatively, that their

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[224] Mackintosh, *supra* note 10, at 133. A state party might still be obligated to compel a witness to testify under Article 86, which requires state parties to cooperate with the ICC. *Id.* Furthermore, a non-state party may be required to cooperate under Article 87 if it previously agreed to do so. *Id*. Additionally, if a situation is referred to the ICC by the U.N. Security Council in accord with its Chapter VII powers, the rulings of the ICC become binding on all states including those which are not parties to the Rome Statute. Lee, *supra* note 202, at 762–63.

[225] Lee, *supra* note 203, at 751–52. "The Rome Conference succeeded in creating an international criminal justice system without directly infringing upon national sovereignty. The angle taken was that international jurisdiction might be justified when a State was *unwilling or unable* to exercise its jurisdiction." *Id.* at 751 (emphasis in original); *see also* Rome Statute, *supra* note 12, arts. 1, 17.

[226] *See* Lee, *supra* note 203, at 751–52.

> The creation of an international criminal court is about enforcement of law and punishment of criminals. Both subjects are carefully guarded national prerogatives. States have inherent rights to punish anyone who has committed a crime within their territory and most constitutions also claim exclusive jurisdiction over their own nationals, regardless of where the crime was committed. For the longest time, it was generally believed that an international tribunal would require national courts to give up some of their jurisdiction and States would have to concede a part of their sovereignty to allow their nationals to be judged and sentenced by foreigners. It was therefore not surprising that for nearly fifty years, States had resisted the idea of having an international criminal court.

Id. at 750–51.

[227] *See* THOMAS HOBBES, LEVIATHAN 188, 394 (C.B. MacPherson ed., 1968) (1651).

[228] *See* Phillipe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 530 (2001). Describing the state of nineteenth-century international affairs, Phillipe Sands asserts:

> There were no nongovernmental organizations . . . around to intervene in the proceedings, and commercial interests . . . had to be channeled through the legal arguments of the [state delegations]. It was an order in which there existed no international organizations and no permanent international courts . . . . In those circumstances, the options for enforcement were limited. It was, in short, a legal order promoting a potentially Hobbesian state of nature, to be controlled by establishing a limited number of basic ground rules of intercourse while respecting the equal sovereignty of all nations.

Id. Furthermore, Sands contends that:

motivations are co-extensive with those of the ICC. NGOs maintain that they are motivated by altruism,[229] but Hobbes' theories suggest that this is not the case.[230] Employing a Hobbesian framework, this Section advances an argument that NGOs, like states, are formed as a result of human self-interest, and thus must also act in a self-interested manner.[231]

1. Hobbes on Human Nature

Hobbes' account of human nature is one of radical individualism.[232] In *Leviathan*, Hobbes contends that human beings are inherently self-interested and that the state develops not as a result of an innate human desire for community, but rather out of necessity.[233] It is only by transferring a quantum

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> Over the next century there were very significant changes. Regional and global institutions were created. Treaties and other international obligations were adopted across a broad range of subject areas, establishing limits on sovereign freedoms. New standards were adopted seeking to protect and promote fundamental human rights and, more recently, conserve the environment. Gradually, new actors emerged with an international voice, of which corporations and NGOs were to become the most active. Inherent in these developments—but not explicitly conceived—were the seeds for change: the development of a new consciousness of international public law governing legal relations beyond the nation state, available to influence public and administrative law at the national level, and accessible to an emergent international society.

Id.

[229] *E.g.*, Amnesty International, Statute of Amnesty International, http://web.amnesty.org/pages/aboutai-statute-eng (last visited Jan. 2, 2006) (asserting that Amnesty International "forms a global community of human rights defenders with the principles of international solidarity, effective action for the individual victim, global coverage, the universality and indivisibility of human rights, impartiality and independence, and democracy and mutual respect"); About HRW, *supra* note 7 ("Human Rights Watch believes that international standards of human rights apply to all people equally, and that sharp vigilance and timely protest can prevent the tragedies of the twentieth century from recurring. At Human Rights Watch, we remain convinced that progress can be made when people of good will organize themselves to make it happen."). Similarly, Irene Khan, Secretary General of Amnesty International characterizes the mission of her organization in this way:

> Human rights are about changing the world for the better. . . . There is no stronger international community than global civil society. Through its members and allies in the human rights movement, Amnesty International is committed to reviving and revitalizing the vision of human rights as a powerful tool for concrete change. Through the voices and visions of millions of men and women, we will carry the message of human rights forward.

Amnesty International, Why Human Rights Matter?: A Message from Irene Khan, Amnesty International's Secretary General, http://web.amnesty.org/report2004/message-eng (last visited Jan. 2, 2006).

[230] *See infra* Part IV.A.1–4.

[231] *See infra* Parts IV.A.1–4; IV.B.

[232] *See generally* HOBBES, *supra* note 227.

[233] *See generally id.*

of their rights to a state that individuals can escape an existence which is "solitary, poore, nasty, brutish, and short."[234]

Contrary to the perfectionist writings of the classical philosophers,[235] Hobbes contends that there is no ultimate end or supreme good for which all human beings strive.[236] He maintains that the human good lies in the continual satisfaction of desires, for which existence is a pre-condition, and nothing further.[237] To live is to desire, and to live well is to continually seek to satisfy one's desires.[238] The appetites of human beings are insatiable and the available resources limited.[239] While one might assume that some are more aptly suited for acquiring these goods and thus entitled to greater benefits, Hobbes maintains that the natural condition of human beings is such that we are so equally endowed in body and mind as to be equally capable, or incapable, of exacting our share.[240] The weakest of human beings, when in company with others, has the resources to kill the strongest human being.[241] Thus, equality in the ability to satisfy one's desires produces equality in the hope of being able to do so, which, in turn, leads to competition between individuals.[242]

Given the inherent equality of all human beings, the struggle never ends.[243] Once one has acquired a share of scarce resources, these precious commodities must be protected, and there is no better way to secure one's own holdings than through the conquest of those who might pose a threat to the security of those holdings.[244] However, regardless of how powerful an individual is, one is never immune from attack.[245] Thus, in this "cold war" atmosphere, in which there is a constant threat of attack, individuals seek "glory" as a form of deterrent against such an attack.[246] Under these conditions, every individual is

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234 *Id.* at 186 (ch. 13). *See infra* note 248 and accompanying text.

235 *See generally* ARISTOTLE, NICOMACHEAN ETHICS; THOMAS AQUINAS, SUMMA THEOLOGICA; CICERO, DE LEGIBUS.

236 *See* HOBBES, *supra* note 227, at 120 (ch. 6).

237 *Id.*

238 *Id.* at 129 (ch. 6).

239 *Id.* at 129–30 (ch. 6).

240 *Id.* at 183 (ch. 13).

241 *Id.*

242 *Id.* at 184–85 (ch. 13).

243 *Id.* at 185–86 (ch. 13).

244 *Id.* at 184–85 (ch. 13).

245 *Id.* at 186 (ch. 13).

246 *Id.*

at war with all other individuals.[247] It is for these reasons that, in the state of nature, life is "solitary, poore, nasty, brutish, and short."[248]

However dire the consequences of a war of all against all, Hobbes maintains that to follow one's desires and passions, no matter how they are to be realized, is natural.[249] Individuals have a right to do anything which they deem useful.[250] Given the "diffidence" associated with the state of war, any advantage one might gain may be useful, including that gained by taking the life of another.[251] No action in furtherance of satisfying one's desires is wrong until one is aware of a law which forbids one from acting in a particular manner.[252] One cannot be aware of a law until it is imposed, and a law cannot be imposed until there has been agreement between those affected and those who are to make such laws.[253]

2. Hobbes on Formation of the State

The development of the state is not a cooperative endeavor but rather a product of the "deliberative" prudential decisions and actions of individuals.[254] Hobbes asserts that it is clearly in the best interest of every human being to "endeavour peace, as farre as he has hope of obtaining it; and when he cannot obtain it, seek and use all helps and advantages of warre."[255] Thus, in the hopes of ensuring peace, it is in the best interest of each individual to enter into

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[247] *Id.* at 187 (ch. 13).

[248] *Id.* at 186 (ch. 13).

[249] *See id.* at 118–21 (ch. 6). Hobbes contends that by virtue of their humanity, human beings are not only inclined to preserve their own existence but are bound by natural law to do so. *Id.* at 189–90.

[250] *Id.* at 189 (ch. 14).

[251] *Id.*

[252] *Id.* at 188–202 (chs. 13–15). In light of Hobbes' assertion that an individual's actions cannot be deemed either just or unjust prior to the establishment of the state, many consider Hobbes to be a proponent of the positivist tradition. Moreover, Hobbes' writing may be used to support assertions of absolute state sovereignty. However, Hobbes' arguments are built on natural law foundations. *See id.* at 314. Hobbes is differentiated from those scholars typically considered natural law theorists (Aristotle, Aquinas, and Cicero) based on his assertion that good lies in the satisfaction of human appetites rather than the repression of those appetites. *See id.* at 120 (ch. 6).

[253] *See id.* at 188 (ch. 13).

[254] *See id.* at 223–28 (ch. 18). Hobbes asserts that "men have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all." *Id.* at 185 (ch. 13).

[255] *Id.* at 190 (ch. 14). This is to say that first and foremost among the "generall rule[s] of Reason," which constitutes the laws of nature, are the principles which lead human beings to enter into covenants with each other and, thus, to create a powerful state. *Id.* Thus, Hobbes asserts that natural law is a product of the prudent disposition of human beings to enter into covenants, conditionally, rather than an eternal law. *Id.*

contracts forfeiting some of his rights insofar as he can expect others to do the same.[256]

Consequences, rather than words, compel human beings to comply with contractual agreements into which they have voluntarily entered.[257] If a contract is to be effective, given the continual threat of the human condition devolving into a state of nature, it is necessary to set up a common power capable of enforcing such an agreement.[258] Thus, it is only in the context of the state ruled by a sovereign, empowered to enforce these covenants, that human beings are then further obligated by additional natural laws regarding "justice," "equity," "gratitude," and those moral virtues which follow from them.[259] According to Hobbes, sovereignty can be established by acquisition or institution, but either way is contingent upon the sovereign's own ability to promote the self-preservation of its citizens.[260] Thus, peace and common defense are best served when individuals enter into contracts with each other, transferring their rights to a sovereign and forming a state subject to a common power.[261]

Extending his analogy of the state as an artificial human being, Hobbes asserts not only that the state acquires, through a covenant between and among individuals, the collective rights of the people, but also their insatiable desires.[262] He contends that "every Soveraigne hath the same Right, in procuring the safety of his People, that any man can have in procuring the safety of his own Body."[263] Furthermore, he asserts that "the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoyd in regard of one another dictateth the same to [commonwealths]."[264]

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256 *Id.*

257 *See id.* at 196 (ch. 14).

258 *Id.*

259 *See id.* at 188 (ch. 13). *See generally id.* at 311–35 (ch. 26) (regarding the development of civil law in the context of the formation of a state and its interconnected relationship with natural law).

260 *Id.* at 228, 272 (chs. 17, 21). Hobbes asserts, "The Obligation of Subjects to the Sover[eign], is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished." *Id.* at 272 (ch. 21).

261 *See id.* at 223–25 (ch. 17).

262 *See id.* at 127–28, 187–88 (chs. 6, 13).

263 *Id.* at 394 (ch. 30).

264 *Id.* at 394 (ch. 30).

3. Hobbes on Behavior of States

It would seem to follow that the state of nature that exists between states would motivate states to enter into covenants.[265] However, Hobbes maintains that there is no motivation for states seeking to fulfill the collective desires of individuals to enter into agreements amongst themselves because "there does not follow from [the state of nature that exists between states] that misery which accompanies the Liberty of particular men."[266] Furthermore, the dissolution of a state and the condition of war that necessarily ensues represent the greatest evil that can befall human beings,[267] and therefore it is the duty of the sovereign, above all else, to ensure the integrity of the state.[268] Maintaining absolute power is the means to this end, and Hobbes contends that for a sovereign to transfer any of the rights entrusted to it, including "the Power of Supreme Judicature," to another is a dereliction of its duties.[269]

4. NGOs: The Modern Manifestation of Hobbes' Leviathan

While Hobbes directly addresses the formation of the state, his theories are more generally applicable, explaining all forms of collective action. The scope of Hobbes' Leviathan is entirely dependent upon the relative prudential value of any arrangement.[270] In the context of seventeenth-century empirical realities, Hobbes maintained that individual self-interest would lead to the development and perpetuation of states.[271] But the state is merely one possible manifestation of the Leviathan. As a result of globalization, geography no longer defines the Leviathan. Epistemic communities including NGOs represent a modern manifestation of the Leviathan.[272]

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265 *See supra* Part IV.A.1–2.

266 *See id.* at 188, 394 (chs. 13, 30).

267 *Id.* at 376–77 (ch. 30).

268 *Id.*

269 *Id.*

270 *See id.* at 224 (ch. 17) ("The Multitude sufficient to confide in for our Security, is not determined by any certain number, but by comparison with the Enemy we Feare; and is then sufficient, when the odds of the Enemy is not of so visible and conspicuous moment, to determine the event of [war], as to move him to attempt.").

271 *See supra* Part IV.A.2.

272 An epistemic community "has been defined as '[a] group of individuals (whose membership usually transcends national boundaries and includes both scientists or experts and policy-makers) who share a common view regarding causal mechanisms and appropriate responses and who have a common set of values [that] emerges in conjunction with the issue in question.'" Diaz, *supra* note 13, at 1145 (quoting Young & Osherenko, *supra* note 13). Referring to a more restrictive definition of epistemic communities, Marlies Glasius nonetheless suggests that the methods of nongovernmental organizations "involved in the ICC Campaign . . . are characteristic of what Peter Haas and others have termed an 'epistemic community.'"

For over a century, states have not only failed to shield individuals from the misery which results from the condition of war characteristic of the state of nature that exists amongst states, but they have also failed on a number of occasions to ensure the security of their own citizens.[273] As a result of these failures and recognizing that the international promotion of human rights is in everyone's best interest,[274] individuals have increasingly transferred some of their allegiances to NGOs. However, NGOs, like states, acquire not only the rights of individuals, but also their insatiable desires.[275]

Extending Hobbes' theories regarding human nature and the formation of the state to their logical end, realists argue that because the state is conceived as an artificial human being, it follows that all actions of the state are necessarily self-interested.[276] An analogous argument regarding NGOs leads to the conclusion that for NGOs to act in a manner inconsistent with their own self-interest is detrimental to their well being, and thus irrational.[277] Assuming this is true, NGOs will only act in accord with moral principles if doing so is in their own best interest.[278] Thus, NGOs may cooperate with the ICC—but only if prudence supports such a course of action.[279]

B. Anticipated Behavior of NGOs as Self-Interested Actors

The assertion that NGOs with altruistic missions are, in fact, self-interested organizations is one that it is counterintuitive. It is one derived from the

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Glasius, *supra* note 23, at 152 (citing generally Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, *in* KNOWLEDGE, POWER, AND INTERNATIONAL POLICY COORDINATION (Peter Haas ed., 1992)).

273 *See, e.g.*, BALAKIAN, *supra* note 64, at 18 (discussing the Armenian Genocide); The Holocaust Museum, Holocaust Encyclopedia, http://www.ushmm.org/wlc/en (last visited Jan. 2, 2006) (providing information pertaining to the Holocaust); International Criminal Tribunal for the Former Yugoslavia, General Information, http://www.un.org/icty/glance/index.htm (last visited Jan. 2, 2006) (stating that the U.N. Security Council resolution establishing the ICTY "was passed . . . in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations"); International Criminal Tribunal for Rwanda, General Information, http://www.ictr.org/default.htm (follow "About the Tribunal" hyperlink; then follow "General Information" hyperlink) (last visited Jan. 2, 2006) (asserting that the tribunal was established to address "serious violations of humanitarian law [that] were committed in Rwanda.").

274 *See generally* WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL (2001) (advancing the position that promoting human rights is in everyone's best interest).

275 *See supra* note 262 and accompanying text.

276 *See* R. Paul Churchill, *Hobbes and the Assumption of Power*, *in* CAUSES OF QUARREL: ESSAYS ON PEACE, WAR AND THOMAS HOBBES 13, 15 (Peter Caws ed., 1989).

277 *See id.*

278 *See id.*

279 *See id.*

Hobbesian argument that states form not because of a human desire for community, but rather as a result of the innate self-interest which underlies all human behavior.[280]

In addition to being counterintuitive, the possibility that NGOs are self-interested actors is one that the Rome Statute fails to address.[281] This failure is likely to cause NGOs to distance themselves from the court, ultimately undermining its operations because the court's organic and procedural legislation envisions an integral role for NGOs.[282]

Empirical evidence supports the theoretical conclusion that NGOs are self-interested actors and can even be found in the history of the establishment of the ICC. The formation of the CICC demonstrates that, when the self-interests of NGOs so dictate, NGOs will cooperate with each other and with the ICC, even when doing so requires them to restrict their liberties. Prior to 1995, cooperation between NGOs was limited.[283] However, realizing that in spite of their individual efforts the proposal for an international criminal court was likely to be shelved once again, a small group of NGOs allied themselves and established a "broad-based network of NGOs and international law experts" to work to establish a court.[284] In contrast, the ICRC's arguments in *Simic* and the subsequent behavior of that organization illustrate that when cooperation and self-interest dictate different results, the actions of NGOs will be guided by the latter. In *Simic*, most of the ICRC's arguments hinged on its special status under the Geneva Conventions.[285] Furthermore, in the wake of the *Simic* decision, the ICRC has continued to distinguish itself from other NGOs rather than ally with them.[286]

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280 *See supra* Part IV.A.1–2.

281 *See supra* Part IV.A.

282 *See supra* Parts IV.A.4, IV.B.

283 Van der Vyver, *supra* note 42, at 426. The formation of the CICC did not come without costs for nongovernmental organizations accustomed to charting their own course, as there was little internal democracy within the CICC. Glasius, *supra* note 23, at 147.

284 *See* Glasius, *supra* note 23, at 146.

285 *See supra* notes 135–43 and accompanying text.

286 *See supra* notes 49–50 and accompanying text. *See, e.g.*, Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Reasons for Chamber's Decision on Accused's Motion to Exclude Witness TQ, ¶ 19 n.11 (July 15, 2005), *available at* http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/150705.htm (noting that "the ICRC's Legal Divison appears to make no public claim that testimonial privilege attaches to employees of national societies. On the contrary, at least one stated position (a memorandum prepared for ICRC delegates) suggests that it does not.").

Insofar as the interests of NGOs coincide with those of the ICC, NGOs will continue to ponder the questions of how they can contribute to the prosecution of war criminals and how the ICC and NGOs can enjoy a mutually beneficial relationship. But if providing information to the court compromises the work of a NGO, threatens the safety of its employees, or endangers the lives of the very people that the organization seeks to assist, NGOs as self-interested actors will be required to part ways with the ICC.

The code of conduct voluntarily adhered to by NGOs involved in disaster relief asserts that in all instances "the Humanitarian imperative comes first."[287] To ensure the continuation of humanitarian efforts, it is necessary to first ensure the safety and security of those providing the relief. While NGOs have an interest in the development and enforcement of international law in general, and the success of the ICC in particular,[288] NGOs will resist efforts made by the ICC to obtain information if an ongoing association with the ICC poses significant risks to either their employees or those they serve. Cooperation will be replaced with evasion, and the focus will shift to the question of whether NGOs are legally obligated to surrender information obtained in the course of their work to the ICC.

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While the Sudanese government's expulsion order serves as a reminder to humanitarian organizations that they operate at the will, and often the whim, of host governments, the subsequent events illustrate that self-interest dictates not only the behavior of states, but also that of NGOs, foreshadowing a rift between the ICC and NGOs. In the face of international pressure, the Sudanese government permitted Save the Children UK and Oxfam Great Britain to continue their operations in the Sudan, rescinding the November 28, 2004 expulsion order.[289] However, less than a month later, Save the Children

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[287] International Federation of Red Cross and Red Crescent, Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, http://www.ifrc.org/publicat/conduct (last visited Jan. 2, 2006).

[288] *See, e.g.*, Dormann & Maresca, *supra* note 34, at 231 (stating that ICRC's mission involves both "protecting and assisting victims of armed conflicts . . . and serving as a promoter and guardian of international human rights"). Additionally, given the significant role that nongovernmental organizations played in establishment of the ICC, nongovernmental organizations have a stake in its success. *See generally* van der Vyver, *supra* note 42.

[289] Richard Beeston, *British Aid Worker's Expulsion Ignites New Row in Sudan*, TIMES (London), Nov. 30, 2004, at 50; David Blair, *Sudan U-turn on Expulsions*, DAILY TELEGRAPH (London), Dec. 1, 2004, at 14.

UK withdrew from the Darfur region citing the "tragic deaths of four staff members in two separate incidents [during the previous two months,] as well as a series of extremely serious additional security incidents."[290] In a press release, the Director-General of Save the Children UK addressed the conflicting interests of the organization. Lamenting the withdrawal, he stated that "[Save the Children was] devastated that [it was] unable to continue to offer health care, nutritional support, child protection and education to the approximately 250,000 children and family members served by [its programs] in North and South Darfur. However, [the organization] just [could not] continue to expose [its] staff to the unacceptable risks they face[d] as they [went] about their humanitarian duties in Darfur."[291]

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[290] Withdrawal from Darfur, *supra* note 2.

[291] *Id.*

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