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Comments

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PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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JOHN HENRY WIGMORE

Judge Advocate

1917–1920

John Henry Wigmore was born on March 4, 1863, in San Francisco, California. He received an A.B. degree from Harvard in 1883 and M.A. and LL.B. degrees from the same institution in 1887. Wigmore began his teaching career with three years as a lecturer in Anglo-American law in Japan. In 1893, he became Professor of Law at Northwestern and was made Dean eight years later.

When he applied for an Army commission in 1916, John Wigmore was at the peak of his career. In addition to having been Dean of the Northwestern University Law School since 1901, his treatise on evidence had been published. He had organized and headed the National Conference on Criminal Laws and Criminology which later became the American Institute of Criminal Law and Criminology under his continuing guidance. He was completing a term as President of the Association of American University Professors. However, in spite of these imposing qualifications, he entered the military service with the rank of Major.

After being placed on active duty in 1917 he was sent to Washington. General Enoch H. Crowder, The Judge Advocate General of the Army, had been given the additional title and office of Provost Marshal General. The primary duty of the Office of The Provost Marshal General was to administer the Selective Service draft. Major Wigmore was given the title, "Chief, Statistical Division, Office of The Provost Marshal General." He originated and placed into execution the general plan of statistical tables concerning classification, deferment, industry and agriculture, which were employed in the raising of our military forces. Over ten million registrants were screened and classified under the system devised by Major Wigmore.

In addition to organizing the Selective Service draft, Major Wigmore performed many other duties. He did liaison work with nearly every government agency in Washington. He was also a member of the War Department Committee on Education and Special Training which organized the Student's Army Training Corps. This committee was responsible for recommending desir-

able or necessary changes in the system of classifying enlisted personnel and in coordinating with educational institutions in the organization and administration of the Student's Army Training Corps program.

Wigmore served as a member of the Board of Editors which revised and enlarged the *Manual for Courts-Martial.* He authored and later amplified the Chapter on Evidence in the 1917 and 1921 Manuals. His efforts in these projects merited him the only chapter by-line in the two Manuals, and he also received special acknowledgement in the preface to both.

In recognition for his services, Wigmore was promoted to Lieutenant Colonel in early 1918 and to the rank of Colonel later that year. He was discharged on May 8, 1919. He was awarded the Distinguished Service Medal:

> For exceptionally meritorious and distinguished service to the Government in connection with the administration of the Selective Service Law during the war. He organized and put into execution an excellent system of classification of registrants and his sound judgment and ability for analysis contributed materially to the success of the Department.

In addition he received the Cross of the French Legion of Honor in August 1919.

In the following year, on September 24, 1920, he was recalled to active duty "in connection with the revision of the Manual for Courts-Martial." After his revision of the Chapter on Evidence for the 1921 Manual he was relieved from active duty on October 25, 1920. However, as the nation's foremost expert on military and industrial mobilization, the Army had Wigmore attached to the Army General Staff as part of its post-war mobilization plans.

Wigmore wrote several law review articles growing out of his military experience.[1] In addition, he prepared the bibliography and preface for *Military Law and Wartime Legislation.*[2]

While not eligible for retirement benefits, he retained his status as a reserve officer, signing his last oath of office in 1940 at the age of 77. Three years later, on April 20, 1943, John Henry Wigmore died. He was laid to rest in Arlington National Cemetery, Washington, D.C.

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[1] See *Lessons from Military Justice,* 4 J. AM. JUD. SOC'Y 151 (1921); *Modern Penal Methods in Our Army,* 9 J. CRIM. L. 163 (1918); *Soldiers' and Sailors' Civil Rights Bill,* 12 ILL. L. REV. 449, 3 MASS. L. Q. 204 (1918); *Some Lessons for Civilian Justice to be Learned From Military Justice,* 10 J. CRIM. L. 170 (1919).

[2] (West Pub. Co. 1919).

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NUCLEAR WEAPONS AS A LAWFUL MEANS OF WARFARE*

BY CAPTAIN FRED BRIGHT, JR.**

I. INTRODUCTION

There are three basic effects of a nuclear explosion: blast, thermal radiation (light and heat), and nuclear radiation.[1] Both blast and thermal radiation result from conventional explosions: these two effects differ only in magnitude when comparing a nuclear explosion to a conventional explosion.[2] The distinguishing characteristic , therefore, of a nuclear weapon is nuclear radiation, which "can neither be seen, heard, smelled, felt, nor tasted. It consists of streams of fast-flying particles or waves from the shattered atoms which penetrate the human body and can cause illness and death."[3]

What is nuclear radiation, and how does it affect the legality of the use of nuclear weapons during hostilities? The U.S. Army *Field Manual 27–10*[4] provides:

> The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.[5]

The unpublished annotation to this provision of *Field Manual 27–10* explains as the reasons for the conclusion that such a weapon is now lawful: that it has been used, that it still exists, that the major powers are practically committed to use it in a future war, and that it has been accepted to the extent that it is

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*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Thirteenth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

**JAGC, U.S. Army; B.S., 1955, University of Tennessee; LL.B., 1957, University of Tennessee; Member of the Bars of the State of Tennessee and of the United States Supreme Court and United States Court of Military Appeals.

[1] U.S. DEP'T OF ARMY, FIELD MANUAL NO. 101–31–1, NUCLEAR WEAPONS EMPLOYMENT, para. 2.2(b) (1963) [hereinafter cited as FM 101–31–1].

[2] U.S. DEP'T OF ARMY, PAMPHLET NO. 39–3, THE EFFECTS OF NUCLEAR WEAPONS 1–2 (1962) [hereinafter cited as DA PAM 39–3].

[3] GREENSPAN, THE MODERN LAW OF LAND WARFARE 370 (1959).

[4] U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27–10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27–10].

[5] *Id.* para. 35.

spoken of in the context of disarmament rather than illegality. The qualifying word "explosive" was inserted in order to avoid taking a position on a weapon designed for the exclusive effect of radiation.[6]

This annotation illustrates that the legality of the different nuclear effects may depend upon different international laws of war. Consequently, it is necessary to first describe these effects before determining what rules of warfare may apply. Of course, nuclear radiation, being the only newcomer to weaponry of the three effects, will receive the most emphasis, as it presents the main problem from a legal standpoint.

II. CHARACTERISTICS OF NUCLEAR EXPLOSIONS

A. *GENERAL PRINCIPLES*

All substances are made up from one or more elements, and the smallest part of any element that can exist while still retaining the characteristics of the element is called an atom.[7] Every atom consists of a relatively heavy central region or nucleus.[8] A nuclear explosion results from one or both of two processes: fission and fusion. The fission process occurs when the nucleus of an atom of a heavy material is split into two smaller nuclei; while in the fusion process a pair of light nuclei unite (or fuse) together, forming a nucleus of a heavier atom.[9] Both processes are accompanied by the release of a large amount of energy. For example, the complete fission of one pound of uranium or plutonium releases as much energy as the explosion of 8,000 tons of TNT; and the fusion of all the nuclei present in one pound of deuterium, or "heavy hydrogen," releases approximately the same amount of energy as the explosion of 26,000 tons of TNT.[10]

The power of a nuclear weapon is expressed in the terms of the energy release, or yield, when it explodes compared with the energy liberated by an explosion of TNT. Thus, a one kiloton nuclear weapon produces the same amount of energy as 1,000 tons of TNT, and a one megaton nuclear weapon has the energy equivalent of one million tons of TNT.[11] It does not follow, however,

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[6] See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-161-2, 2 INTERNATIONAL LAW 43 (1962).
[7] DA PAM 39-3, at 3.
[8] *Id.* at 4.
[9] *Id.* at 5.
[10] *Id.* at 5, 6.
[11] *Id.* at 6.

that the casualty potential of explosions of equal yield will be the same for a conventional explosive, such as TNT, as for a nuclear weapon. To the contrary, a nuclear device is capable of far more damage than an equivalent yield non-nuclear explosion, as the remaining sections in this chapter will show.

B. *EFFECTS OF NUCLEAR EXPLOSIONS*

The three principle effects of a nuclear explosion—blast, thermal radiation, and nuclear radiation—have been discussed briefly. It is now appropriate to explain how each of these effects results from a nuclear explosion.

1. *Blast.*

Immediately following the detonation of a nuclear weapon in the air, an extremely hot gaseous fireball is formed.[12] Very soon after the explosion, these hot gases expand, causing a blast wave to form in the air and move away from the fireball at a high velocity.[13] When this primary air blast wave strikes the ground, a second blast wave is produced by reflection; and some distance from ground zero the two waves merge, forming the "Mach stem," which results in considerable overpressure at the earth's surface.[14] Blast causes most of the destruction from a nuclear air burst,[15] but neither thermal nor nuclear radiation can be overlooked.

2. *Thermal Radiation.*

One of the significant differences between a nuclear and a conventional high-explosive weapon is the large proportion of energy (approximately one-third) of a nuclear explosion which is released in the form of thermal radiation. Temperatures attained in a nuclear explosion are estimated at tens of million degrees, compared with only a few thousand degrees in a conventional explosion.[16] The intense heat and light rays emitted from the fireball travel at about the speed of light and in straight lines, unless scattered; thus, any solid opaque material between the fireball and an exposed individual or object would act as a protective shield.[17]

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[12] *Id.* at 87.
[13] *Id.* at 87, 102.
[14] *Id.* at 88.
[15] *Id.* at 317.
[16] *Id.* at 316–17.
[17] *Id.* at 316, 322.

3. *Nuclear Radiation.*

The final effect—that of nuclear radiation—is peculiar to a nuclear weapon. Nuclear radiation is divided into two categories: initial nuclear radiation, which is that emitted within one minute after the explosion; and residual nuclear radiation, which includes all radiation emitted after the first minute.[18] The first type of nuclear radiation to be considered is initial nuclear radiation.

The initial nuclear radiations consist mainly of gamma rays and neutrons, both of which can travel great distances through air.[19] Gamma rays travel at the speed of light; neutrons travel more slowly, but still at an extremely fast rate.[20] These initial radiations travel generally along straight lines; however, a certain amount of diffusion results from the collision of the neutrons and gamma rays with elements of the atmosphere through which they pass. Consequently, in the target area there is some nuclear radiation traveling in all directions.[21]

Although some of the initial nuclear radiation is absorbed by the atmosphere, it has high penetrating power, particularly gamma rays; thus, the problems of shielding are quite different in regard to thermal and initial nuclear radiations. For example, one mile from a one megaton explosion, initial nuclear radiation would probably kill a large proportion of exposed individuals even though such individuals were surrounded by 24-inch concrete, although a much lighter shield would completely protect these persons from thermal radiation.[22] The effective ranges of these two nuclear effects also differ considerably. For explosions of moderate and large energy yields, thermal radiation is harmful at considerably greater distances than initial nuclear radiation. Beyond about 1¼ miles from ground zero the initial nuclear radiation from a twenty kiloton air burst would not cause observable injuries even without protective shielding, while serious skin burns could result from exposure to thermal radiation at this distance. On the other hand, from a small yield burst—one kiloton or less—initial nuclear radiation has a greater effective range than thermal radiation.[23]

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[18] *Id.* at 8–9.
[19] *Id.* at 9.
[20] FM 101–31–1, para. 2.19(b).
[21] *Ibid.*
[22] DA PAM 39–3, at 370.
[23] *Id.* at 370–71.

Residual nuclear radiation consists of both neutron-induced radiation and fallout. Neutrons liberated in the fission process are captured by the weapon materials through which they must pass to escape, by nitrogen and oxygen in the atmosphere, and by elements present in soil and water. Such substances then become radioactive by this neutron-induced activity and add to the hazard of contamination.[24]

Although neutron-induced radiation is an integral part of the residual radiation, the most commonly known nuclear effect is that of fallout. When the fireball comes in contact with the ground, large quantities of substances enter the fireball at an early stage and are fused or vaporized. Then as heat causes the fireball to rise, it causes an updraft and produces strong air currents which raise dirt and debris from the earth's surface to form the stem of the mushroom cloud. This radioactive cloud is formed of the condensation of the vaporized fission products and other weapon residues which, along with the dirt and debris, are ultimately distributed back to the earth as fallout.[25]

The induced contamination is found within a relatively small pattern around ground zero, while the fallout is in a large irregular pattern encompassing ground zero and extending long distances downwind from the point of burst.[26] Both induced contamination and fallout persist for relatively long periods, but total radioactivity falls off rapidly after the explosion. For every seven-fold increase in time after burst, the dose rate decreases by a factor of ten; thus, seven hours after the explosion the dose rate will be one-tenth what it was only an hour afterward.[27] Thus, it may be seen that the time interval elapsing between the explosion and the actual exposure of an individual to radioactive contamination will materially affect the exposure dose.

Not every nuclear explosion contains the same proportion of residual nuclear radiation, for radioactive contamination results almost exclusively from the fission process.[28] Even in the fusion process, however, a fission explosion is necessary to obtain the high temperatures which are essential to make the fusion reac-

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[24] *Id.* at 432–34.
[25] *Id.* at 39–40, 90–91.
[26] FM 101–31–1, para. 5.1(a).
[27] DA PAM 39–3, at 417–18.
[28] *Id.* at 9, 414.

tions take place.[29] In a pure fission weapon the residual nuclear radiation carries twice the proportion of the total energy released compared to a fusion, or thermo-nuclear, weapon.[30]

The terms "clean" and "dirty" are used in describing the relative proportions of radioactivity in nuclear weapons. A "clean" weapon is one designed to yield significantly less radioactivity than a normal weapon, in which no special effort has been made either to increase or decrease radioactivity. Thus, a fusion weapon is cleaner than a fission weapon, although no pure fusion weapon has yet been devised.[31] It is possible to change the composition of fallout from a nuclear weapon by including significant quantities of certain elements for the purpose of producing radioactivity. Such a process is known as "salting," and weapons which are salted would be considered "dirty." [32]

C. *EFFECTS ON PERSONNEL AND PROPERTY*

1. *Property.*

Most of the material damage caused by an air burst nuclear weapon is due mainly to the blast wave, which travels at about the speed of sound.[33] In addition to the overpressure caused by the blast and "Mach effect," blast winds also accompany the shock front. These winds may attain velocities of several hundred miles an hour near ground zero; and even at a distance greater than six miles from a one megaton explosion, the peek velocity will be more than seventy miles per hour.[34] Considerable structural damage results from the air blast. In fact, the combination of high peak overpressure, high wind pressure, and longer duration of the compression phase of the blast wave results in the destruction of buildings similar to that produced by earthquakes and hurricanes; whereas an ordinary explosion will usually damage only part of a large structure.[35]

Although blast is responsible for most of the destruction caused

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[29] *Id.* at 22.

[30] In a typical air burst of a fission weapon, the approximate distribution of total energy released is as follows: blast, 50 per cent; thermal radiation, 35 per cent; initial nuclear radiation, 5 per cent; and residual nuclear radiation, 10 per cent. In a thermonuclear weapon, the percentages of initial and residual nuclear radiation would be reversed. *Id.* at 8–9.

[31] *Id.* at 435–36.

[32] *Ibid.*

[33] *Id.* at 43, 102.

[34] *Id.* at 43–44.

[35] *Id.* at 196.

by a nuclear air burst, thermal radiation contributes to the overall damage by igniting combustible materials and thus starting fires in buildings or forests.[36] Thin or porous materials will flame, while thick organic materials char, but do not burn.[37] Of course, the most important factors bearing upon the ignition of materials, other than the nature of the material itself, are thickness and moisture content.[38] Suffice it to say that considerable property damage can result from thermal radiation.

Nuclear radiation, on the other hand, causes practically no physical damage to property, other than the contaminative effects imposed upon matter exposed to radioactivity. The potential damage here is not to the property, but to persons coming in contact with that property, as will be discussed in the following section.

2. *Personnel.*

Although property damage is an important factor in a military appraisal of a weapon, damage to personnel is the primary concern of the international lawyer. Nuclear weapons have a high casualty potential because of several reasons: one, the explosive energy yield is much higher than with conventional weapons, thus increasing both the area and degree of destruction; two, high energy yields cause the duration of the overpressure and winds associated with the blast wave to be so prolonged that injuries occur at overpressures which would not be effective in a conventional explosion; three, there is a much greater proportion of thermal radiation in a nuclear explosion and, consequently, more flash burns; four, conventional weapons do not emit nuclear radiation.[39]

The two explosions over Japan in August of 1945 supply the only direct information concerning human casualties from such a weapon. Both the bomb exploded over Hiroshima and the one detonated over Nagasaki were fission type weapons of approximately twenty kiloton yield, and the height of burst of each was about 1,850 feet.[40] The following table contains the best available estimate for civilian casualties resulting from all the nuclear effects of these two explosions:

[36] *Id.* at 317.
[37] *Id.* at 325.
[38] *Id.* at 326.
[39] *Id.* at 551.
[40] *Id.* at 549.

CASUALTIES AT HIROSHIMA AND NAGASAKI[41]

Zone	Population	Density (per square mile)	Killed	Injured
	HIROSHIMA			
0 to 0.6 mile	31,200	25,800	26,700	3,000
0.6 to 1.6 miles	144,800	22,700	39,600	53,000
1.6 to 3.1 miles	80,300	3,500	1,700	20,000
Totals	256,300	8,400	68,000	76,000
	NAGASAKI			
0 to 0.6 mile	30,900	25,500	27,200	1,900
0.6 to 1.6 miles	27,700	4,400	9,500	8,100
1.6 to 3.1 miles	115,200	5,100	1,300	11,000
Totals	173,800	5,700	38,000	21,000

Blast injuries to personnel occur in two different ways: directly and indirectly. Direct injury results from exposure of the body to the environmental pressure variations accompanying the blast wave. Lung damage can occur at overpressures as low as fifteen pounds per square inch, and fifty per cent eardrum rupture occurs at overpressures between twenty and thirty pounds per square inch. An indirect blast injury results from the impact of missiles on the body or the displacement of the body as a whole.[42]

Thermal radiation can cause burns to the body directly, by absorption of the radiant energy by the skin, or indirectly, resulting from fires started by the thermal radiation. An estimated twenty to thirty per cent of the fatal casualties in Hiroshima and Nagasaki were caused by flash burns. Apart from other injuries, thermal radiation burns would have been fatal to nearly all persons in the open with no appreciable protection up to 6,000 feet from ground zero.[43] Eye injuries directly attributable to thermal radiation among the survivors of Hiroshima and Nagasaki were relatively unimportant, and there have been no known cases of permanent blindness attributable to either explosion.[44] As previously discussed, the casualty-producing ability of thermal radia-

[41] *Id.* at 550.

[42] *Id.* at 554–57.

[43] *Id.* at 564–65. Although conceding that personnel can be burned at great distances from the burst, the U.S. Army doctrine for employment of nuclear weapons does not consider thermal radiation when estimating damage to enemy forces, but does consider it when considering the safety of friendly troops. See FM 101-31-1, para. 2.16. Such a view seems to overlook the fact that thermal radiation travels much faster than blast; hence, an individual exposed to thermal radiation might still have time to gain shelter from the blast effects.

[44] DA PAM 39-3, at 572–73.

tion can practically be eliminated by any opaque material acting as a shield. Nuclear radiation, however, is not so easily shielded. What effects does nuclear radiation have on the human body?

The harmful effects of nuclear radiations are apparently caused by the ionization produced in the cells composing living tissue which alters or destroys some constituents necessary to the normal functioning of these cells. Breaking of the chromosomes, swelling of the nucleus and of the entire cell, increase in viscosity of the cell fluid, increased permeability of the cell membrane, and destruction of the cells are examples of the results from the actions of ionizing radiations on cells of the body.[45] Depending upon the total dose to which individuals are exposed and the rate at which the dose is received, these radiations can result in immediate injuries ranging from nausea to certain death.[46]

In addition to the immediate effects, certain late effects resulting from these ionizing radiations may not appear for a considerable time after the explosion. Approximately 100 survivors who were within six-tenths of a mile from ground zero at the time of the Japanese explosions incurred cataracts.[47] There is also some shortening of the life span forecast for victims of nuclear radiation, but the extent has not been determined.[48] An increase in leukemia cases was revealed among individuals within nine-tenths of a mile from ground zero at the time of the Japanese explosions.[49] There also appeared to be an increase of frequency of malignant growths in people who were within one mile of ground zero at the Hiroshima explosion, although such an indication has not been shown as to the victims at Nagasaki.[50] Additionally, women who were pregnant at the time of the Japanese detonations and who suffered nuclear radiation injury showed a marked increase in stillbirths and infant deaths, and children born of these women showed slightly increased frequency of retardation.[51]

Radioactive fallout also affects personnel. Burns from early fallout result in loss of hair and skin lesions to exposed parts of the body, along with increased skin pigmentation; but there are no lasting external effects other than possible bone marrow in-

[45] *Id.* at 577–78.
[46] *Id.* at 592–95.
[47] *Id.* at 598.
[48] *Id.* at 599.
[49] *Ibid.*
[50] *Id.* at 600.
[51] *Id.* at 601.

juries.[52] The amount of radioactive material from early fallout absorbed by the body by inhalation is very small, as all but the very minute particles are filtered out by the nose.[53] Most internal damage from fallout results from ingestion; however, this type of injury has not proven significant to either the Japanese victims or to certain inhabitants of the Marshall Islands accidentally injured from a nuclear explosion in 1954.[54] Although few radioactive materials from early fallout are ingested directly into the body, certain radioactive elements may work their way into the body through plants which are later consumed. Experiments with these elements and animals indicate that anemia, bone necrosis, cancer, and leukemia all may result.[55]

D. *TYPES OF BURST*

The number and proportion of casualties resulting from the different nuclear effects is primarily dependent upon the yield of the weapon and type of burst. The types of burst of nuclear weapons may be divided into four categories: (1) high altitude, (2) air, (3) surface, and (4) subsurface.

1. *High Altitude.*

A high altitude burst is one in which the explosion occurs at an altitude in excess of 100,000 feet. At such altitudes the fraction of energy converted into thermal radiation is greater than explosions at lower altitudes, and the percentage of energy converted into air blast is less. The ratio of energy emitted as nuclear radiations is independent of the height of burst, but in high altitude bursts the fallout is so widely dispersed in the stratosphere that there is no immediate hazard on the surface from residual nuclear radiations.[56]

2. *Air.*

An air burst is one in which the weapon is exploded at an altitude less than 100,000 feet, but at such height that the fireball does not touch the surface. Nearly all of the shock energy from an air burst appears as air blast, although a small portion is transmitted into the ground. The thermal radiation will travel considerable distances through the air and can cause moderately severe burns

[52] *Id.* at 602–03.
[53] *Id.* at 607.
[54] *Id.* at 610–11.
[55] *Id.* at 613.
[56] *Id.* at 11.

to exposed skin as far away as twelve miles from a one megaton explosion.[57] Since the fireball does not touch the ground in an air burst, no appreciable quantities of surface material are taken up into the fireball; consequently, the radioactive particles are lighter and remain in the air longer, thereby losing a substantial portion of their radioactivity by the time they reach the earth's surface.[58] But as the height of burst decreases, the significance of the fallout increases.[59]

A low air burst provides the most effective coverage for the greater majority of field Army targets while still giving a very high assurance of precluding militarily significant fallout. Present U.S. Army doctrine is that this type of burst should be used in every case unless a specific requirement dictates another option.[60]

3. *Surface.*

In a surface burst the fireball touches the surface of the earth.[61] Blast and thermal radiation have about the same relative effects from a surface burst as from air burst. But in a surface burst the radioactive cloud is much more heavily loaded with dirt and debris than in an air burst; hence, radioactive fallout is more hazardous in the former than in the latter.[62]

Fallout from a surface burst can produce serious contamination far beyond the range of blast, shock, thermal radiation and initial nuclear radiation, because prevailing winds may carry small particles from the radioactive cloud to the ground a considerable distance from the explosion. The total quantity of contaminated material produced by the surface burst of a one megaton weapon with a high fission yield is so large that fallout may continue to arrive in hazardous concentrations up to perhaps twenty-four hours after the burst.[63] Intentional surface bursts are detonated whenever fallout is desired; and fallout is employed to restrict the use of areas to the enemy, as an obstacle to his movement, or as a spoiling attack to throw his tactical plans off balance.[64]

4. *Subsurface.*

A nuclear explosion may occur under such conditions that its

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[57] *Id.* at 10.
[58] *Id.* at 415.
[59] *Id.* at 436–37.
[60] FM 101–31–1, Appendix III, Annex A, para. 4(a).
[61] DA PAM 39–3, at 38.
[62] *Id.* at 39–40.
[63] *Id.* at 438.
[64] FM 101–31–1, para. 4.11.

center is beneath the ground or underwater. In such a burst most of the blast energy appears as underground or underwater shock; but a certain proportion, which increases the nearer the center of burst is to the surface, escapes and produces air blast.[65] Practically all of the thermal radiation from a subsurface burst is absorbed by the surrounding soil or water;[66] consequently, this nuclear effect is of little consequence to this type of burst. Nuclear radiation, on the other hand, becomes of considerable significance in a subsurface burst. In an underground explosion the fireball, in addition to its hot gaseous contents, includes vaporized earth and the weapon residues. As the gases are released and vaporized and as the fireball rises, large quantities of earth, rock and debris are lifted into the air in the form of a cylindrical column.[67] Of course, the actual extent of radioactive contamination would depend on the depth of the burst, the nature of the soil, the atmospheric conditions, and the energy yield of the explosion;[68] but there is a considerable fallout of contaminated matter in an underground burst. It is estimated that if a one megaton weapon were dropped and penetrated fifty feet underground in sandy soil before exploding, a crater 300 feet deep and nearly 1,400 feet across would be formed; thus, approximately ten million tons of earth and rock would be displaced.[69]

An underwater explosion takes place in essentially the same manner as an underground detonation. The initial nuclear radiations merge continuously into those produced over a period of time following the explosion; hence, the distinction between initial and residual radiations is not significant.[70] A column of water and spray surrounded by a high cloud of mist develops from an underwater explosion. The water fallout (or rainout) from this radioactive cloud can spread over a substantial area, disseminating radioactive rain, and contaminating the water or vessels within range.[71]

III. THE LEGALITY OF NUCLEAR WEAPONS

What are the applicable rules and principles in international law pertaining to nuclear warfare? Article 38 of the Statute of the

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[65] DA PAM 39-3, at 11.
[66] *Id.* at 61, 66.
[67] *Id.* at 63-64.
[68] *Id.* at 65.
[69] *Id.* at 64.
[70] *Id.* at 61.
[71] *Id.* at 58-61.

International Court of Justice sets out the sources of international law for that Court as: International conventions, international customs, general principles of law recognized by civilized nations, judicial decisions, and the teachings of highly qualified international lawyers.[72] These sources will be considered in discussing the legal aspects of the employment of nuclear weapons.

A. *INTERNATIONAL CONVENTIONS*

1. *The St. Petersburg Declaration of 1868.*

The St. Petersburg Declaration of 1868 stated the only legitimate object of war to be the weakening of the military forces of the enemy, and, further:

> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[73]

This declaration was entered into by seventeen European states, and the United States was not a party thereto. Therefore, the United States could not be bound as a party to the agreement. If, however, the Declaration was merely declaratory of then existing "laws of humanity," it could have legal effect on non-signatories as customary law or as a general principle of international law.[74]

Assuming that the St. Petersburg Declaration set out a general principle of international law, what is its significance in determining the legality of nuclear weapons? The Declaration states a philosophy of warfare; and the very generality of its terms enables such a philosophy to survive through the years, even in our modern era of total warfare.[75] But the vagueness and generality of

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[72] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 at 1060, T. S. 993 (effective October 24, 1945) [hereinafter cited as Statute of I.C.J.].

[73] A Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, November 29, 1868, 3 PHILLIMORE, INTERNATIONAL LAW 161 (3d ed. 1885).

[74] See Neinast, *United States Use of Biological Warfare*, 24 MIL L. REV. 1, 22 (1964).

[75] FM 27-10, para. 34, prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering;" however, a conventional provision to which the United States is a party is cited in support of this proscription: Annex to Hague Convention No. IV, Regulations Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2295, T.S. 539 (effective February 28, 1910) [hereinafter cited as HR].

the terminology of the Declaration, although enhancing the durability of the philosophy, render negligible any deterrent effect of this convention upon the utilization of any particular means of warfare. Few, if any, commanders will fail to use a weapon because it "causes unnecessary suffering" or "renders death inevitable." In order for a proposed deterrent of a means of warfare to be effective, it must not depend upon a subjective interpretation on the part of a commander in the field or a policy maker of a state.[76]

Are nuclear weapons prohibited by the St. Petersburg Declaration? It has been stated that nuclear radiation causes lingering and painful deaths and therefore offends against the principles laid down by this Declaration.[77] Depending on the exposure dose and the rate in which it is received by the human body, nuclear radiation may or may not cause death, or even illness; moreover, the dose and range of nuclear radiation vary with different types of explosions, heights of burst, and yield of the weapon.[78] Consequently, it cannot be said that every nuclear explosion will result in lethal nuclear radiation. To the contrary, the effect of nuclear radiation may be *de minimus* compared to blast and thermal radiation.

To conclude that the St. Petersburg Declaration "as an independent norm is extremely questionable" [79] and that it has "little relevance to modern warfare"[80] are somewhat summary condemnations of the Declaration; for such conclusions overlook the present existence of the principles set out in 1868. However, to construe these general principles as prohibiting the use of nuclear weapons is certainly a strained interpretation. Suffice it to say that nuclear weapons are not "outlawed" by the St. Petersburg Declaration.

2. *The Hague Convention No. IV of 1907.*

As the United States was a party to Hague Convention No. IV of 1907,[81] there is no doubt but that our Government is bound by the terms of the Convention. Let us now look at the specific

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[76] See Neinast, *supra* note 74, at 23.

[77] See GREENSPAN, THE MODERN LAW OF LAND WARFARE 372 (1959).

[78] See notes 45–71 *supra* and text accompanying.

[79] O'Brien, *Biological/Chemical Warfare And The International Law Of War*, 51 GEO. L. J. 1, at 19 (1962).

[80] STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 552 (2d ed. 1959).

[81] Convention with Other Powers Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. 539 (effective February 28, 1910).

provisions of the Convention and determine its applicability to nuclear warfare.

At the suggestion of de Martens, a Russian delegate at both Hague Peace Conferences, 1899 and 1907, a clause was inserted to emphasize that the rules of customary international law remained in force even though not expressly provided in the Regulations on Land Warfare. The purpose of this clause was to avoid the interpretation that anything not expressly prohibited by the Regulations would be permissible.[82] This so-called de Martens Clause in the Preamble to Hague Convention No. IV of 1907 provided that in all cases not expressly covered by the Regulations on Land Warfare, the inhabitants and the belligerents should remain under the protection of the "principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[83] Article 22 of the Hague Regulations provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[84] This article was included for the same purpose as the de Martens Clause, that is to show that the specific articles of the Regulations were incomplete and that any restrictions imposed by other rules of warfare remained intact.[85] Thus, these two provisions were intended as reminders that previously existing rules of warfare remained in effect unless expressly covered in the Regulations. Consequently, even if nuclear weapons are not specifically covered in the Hague Regulations, the applicable customs and general principles of international law still apply. Both of these sources of law will be considered later; it is now appropriate to consider certain provisions of the Hague Regulations.

Article 23 of the Hague Regulations provides:

> [I]t is especially forbidden—
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> a. To employ poison or poisoned weapons;
>
> b. To kill or wound treacherously individuals belonging to the hostile nation or army.
>
> . . .
>
> e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;[86]

These three subsections of Article 23 will be considered sepa-

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[82] SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 10 (1958).
[83] 36 Stat. 2280.
[84] HR, Article 22, 36 Stat. 2301 (1907).
[85] SCHWARZENBERGER, *op. cit. supra* note 82, at 11.
[86] HR, Article 23, 36 Stat. 2301–02 (1907).

rately in discussing their applicability to the use of nuclear weapons.

The prohibition of the treacherous wounding or killing of individuals as provided in Article 23(b) merits little discussion concerning the use of nuclear weapons. A weapon in and of itself is an inanimate object and is incapable of being *per se* treacherous.[57] Therefore, whether or not a weapon is used treacherously depends upon its users. Any weapon, including a nuclear weapon, could be used in a treacherous manner. If a nuclear weapon were employed in such a manner as to permeate intentionally cloud masses with radioactive material, resulting in a subsequent contaminated rainout on the unsuspecting enemy, such an act would probably constitute treachery in violation of Article 23(b). However, the mere fact that a weapon is capable of being used treacherously certainly does not support the proposition that its every use is necessarily treacherous. Therefore, this Article of the Hague Regulations poses no objection to nuclear weapons as such.

Article 23(e) prohibits means calculated to cause unnecessary suffering. This facet was discussed to some extent in conjunction with the St. Petersburg Declaration. The same objections noted in the prior discussion as to the vagueness of the term unnecessary suffering are applicable here. What is or is not unnecessary suffering on a battlefield is an almost indefinable term. The problem is in resolving the question "unnecessary to what?" The underlying principle of the St. Petersburg Declaration was the weakening of the military forces of the enemy by disabling the greatest possible number of men. Thus, the object of warfare is to place the enemy combatant *hors de combat*. Consequently, a weapon which would normally get the enemy out of the fight, if used or designed in such a manner as to unnecessarily increase his suffering while *hors de combat*, would violate international law. But again, how much suffering is necessary; and how much, unnecessary? As previously concluded, such a non-specific provision cannot effectively deter any particular means of warfare. It is conceivable that a multi-megaton nuclear weapon could be devised to unleash such force that its mere use would create unnecessary suffering. It is also conceivable that a nuclear weapon could be exploded in such a manner as to maximize the effect of nuclear radiation and cause con-

[57] Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision*, 45 AM. J. INT'L L. 37, 41 (1951).

siderable suffering and many deaths. On the other hand, it is quite clear that a fusion weapon, exploded in a manner so as to minimize the effects of nuclear radiation, would not overstep the bounds of permissible suffering. Hence, Article 23(e) cannot be construed as absolutely prohibiting nuclear weapons.

Whether or not the prohibition of the employment of poison or poisoned weapons under Article 23(a) encompasses nuclear radiation is the major issue in regard to the Hague Regulations. As mentioned in the Introduction of this thesis, *Field Manual 27–10* provides that explosive atomic weapons are not violative of customary or conventional international law; but the unpublished annotation to that provision concedes that a weapon designed for the exclusive effect of radiation might violate Article 23(a).[88] Is nuclear radiation a type of poison? Before answering this question, it will be necessary to define the word "poison."

Merriam-Webster New International Dictionary defines poison as "any agent which, introduced (esp. in small amount) into an organism, may chemically produce an injurious or deadly effect." [89] Nuclear radiation certainly has an injurious, chemical effect upon a human body exposed to harmful quantities of such radiation; but is nuclear radiation an "agent?" An agent is defined as "an active principle; a substance or element capable of producing a reaction." [90] In determining whether nuclear radiation is an agent, it will be necessary to consider separately initial and residual nuclear radiation.

Initial nuclear radiation is an invisible traveler through the air. It is composed not of elements or substances, but primarily of neutrons and gamma rays, neither of which can be called a substance. Just as its name connotes, initial nuclear radiation is a form of radiation, just as heat and light are, and, having no chemical structural formation, cannot be construed as an agent or as a poison.

Residual nuclear radiation, on the other hand, particularly radioactive fallout, consists of many solid particles of varying sizes, shapes, and elements. Fallout is further divided into two categories: early and delayed. The early fallout consists of the

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[88] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-161-2, 2 INTERNATIONAL LAW 43 (1962).

[89] MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1905 (2d ed. 1961).

[90] *Id.* at 48.

particles reaching the earth within twenty-four hours after the explosion,[91] whereas the delayed fallout is composed of the very fine particles present in the radioactive cloud which ultimately reach the ground more than twenty-four hours after the detonation of the weapon.[92] The principle hazards from early fallout are from exposure of the body to gamma rays from sources outside the body and from beta particles which come directly in contact with the skin, causing burns.[93] This type of injury results from radiation, just as initial nuclear radiation, emanating from agents outside the body, not from the introduction of a radioactive agent into an organism of the body. Consequently, early fallout does not come under the definition of poison.

The delayed fallout hazard, on the other hand, is due to radioactive material ingested into the body.[94] However, as previously mentioned, radioactivity falls off at a fairly rapid rate; hence, these fine particles will have lost much of their contamination by the time they reach the ground. Then by the time the radioactive elements reach the body through plants ingested as food or through other means, the end effect on the body will produce little, if any, injurious results.[95] Thus, delayed fallout, although constituting an agent introduced into an organism, does not produce injurious or deadly effects; therefore, delayed fallout does not fall within the definition of poison.

The issue of whether nuclear radiation constitutes poison has been resolved differently by those who have written in this area. One writer defines poison as "any substance that 'when introduced into, or absorbed by, a living organism destroys life or injures health.' " [96] He then concludes that "a fairly strong case can be made for the assimilation of radiation and radioactive fallout to poison." [97] Another writer, using the same definition, concludes that both initial nuclear radiation and fallout constitute poison within the meaning of Article 23(a),[98] and that "all atomic and thermo-nuclear devices, . . . insofar as they result in neu-

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[91] DA PAM 39-3, at 437.
[92] *Id.* at 474-75.
[93] *Id.* at 473-74.
[94] *Id.* at 474.
[95] *Id.* at 611-17.
[96] SCHWARZENBERGER, *op. cit. supra* note 82, at 27, citing *Shorter Oxford Dictionary.*
[97] *Id.* at 35.
[98] SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 156-60 (1959).

trons, gamma rays and radioactive fallout in large or small quantities, would produce contamination of air and earth, and hence run contrary to the recognised laws of war," regardless of the relative proportion of nuclear radiation, compared to the effects of blast and heat.[99] Both of these writers look to the internal effects which nuclear radiation has upon the body, likening these effects to that of poison; but neither view distinguishes between early and delayed fallout, nor between externally and internally induced radiation injury and the comparative danger of each. Other writers, giving the matter a much more cursory treatment than the two discussed above, emphasize the effect of radioactive contamination in concluding that nuclear weapons emit poison, but without offering to define poison.[100]

The better approach is to analyze the effect of nuclear radiation, break it down into its separate categories, then apply the facts gleaned from this analysis to the term poison in a definitive sense. Such an approach leads to the conclusion that neither initial nor residual nuclear radiation falls within the prohibition of Article 23(a) against the use of poison or poisoned weapons. Hence, the drafters of the annotation to Paragraph 35, *Field Manual 27–10,* need not have qualified atomic weapons with the term "explosive" to avoid taking a position on a weapon designed for the exclusive effect of radiation.

3. *The Geneva Protocol of 1925.*

The Geneva Gas Protocol[101] provides in part that:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
>
> . . . .
>
> To the end that this prohibition shall be universally accepted as a part of International Law; binding alike the conscience and practice of nations; . . .[102]

As discussed in regard to Article 23(a) of the Hague Regulations, nuclear radiation does not constitute poison. What effect, then, does the Geneva Gas Protocol have upon the use of nuclear weapons?

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[99] *Id.* at 160.

[100] See GREENSPAN, *op. cit. supra* note 77, at 372; STONE, *op. cit. supra* note 80, at 343.

[101] Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65 [hereinafter cited as Geneva Gas Protocol].

[102] 94 L.N.T.S. 67 (1925).

In addition to asphyxiating, poisonous, or other gases, all "analogous liquids, materials or devices" are expressly condemned by this convention.[103] One view is that as nuclear radiation and radioactive fallout can be considered as poison, they can certainly be likened to poison gas or weapons of an analogous character, which are prohibited by this Protocol.[104] Another view is that the word "poison" as used in Article 23(a) of the Hague Regulations covers everything that is poisonous and has a broader connotation than the terms of the Geneva Gas Protocol, but that "the words 'analogous liquids, materials and devices,' would appear to prohibit 'radioactive fall-out,' whatever may be its exact nature." [105] Still another approach is that the inclusion in the Geneva Gas Protocol of the words, "analogous liquids, materials, and devices" condemn atomic weapons by inference or analogy, although such weapons are not specifically banned.[106] One further approach is to state that nuclear radiation violates both the Geneva Gas Protocol and the Hague Regulations, but without differentiating between the two types of nuclear radiation or explaining how the conventions are so violated.[107]

Although all of the above views conclude that the terms of the Protocol are applicable to nuclear radiation, wherein is nuclear radiation analogous to poison gas? Radiation is neither solid, liquid, nor gas; how can it then be construed as an analogous liquid, material or device? But in addition to radiation in the literal sense, radioactive fallout must also be considered. As shown in the discussion pertaining to Article 23(a) of the Hague Regulations, the major hazard from early fallout is external exposure of the body to gamma rays or beta burns emitted from radioactive matter. The effects of these types of radiation can hardly be classified as analogous to poison or poison gases. And the insignificant quantities of delayed fallout which reach the body through ingestion produce practically no harmful results; thus, the body cannot be construed as being poisoned by delayed fallout.

If nuclear radiation does not have similar characteristics to poison or poison gas, can it still be construed as an analogous

[103] *Ibid.*

[104] SCHWARZENBERGER, *op. cit. supra* note 82, at 38.

[105] SINGH, *op. cit. supra* note 98, at 163–64.

[106] SPAIGHT, AIR POWER AND WAR RIGHTS 276 (3d ed. 1947). See also GREENSPAN, *op. cit. supra* note 77, at 372–73.

[107] See NARAYANA, MANUAL OF INTERNATIONAL LAW 361 (1968); Fliess, *The Legality of Atmospheric Nuclear Tests—A Critical View of International Law in the Cold War*, 15 U. FLA. L. REV. 21, at 26 (1962).

weapon under the terms of the Protocol, because of the resultant effects upon the human body from exposure to a damaging radiation dose?[108] It has been observed that radioactive contamination "has the virtual effect of poisoning the whole area [of the explosion]."[109] While this is not an accurate use of the word "poisoning," nuclear radiation does cause certain internal reactions within the body which are similar to poisoning. Therefore, it is a more tenable contention to construe nuclear radiation as being an analogous device within the purview of the Geneva Gas Protocol than to conclude that nuclear radiation is poison and prohibited by Article 23(a) of the Hague Regulations. However, in applying the Protocol, the question "analogous to what?" must be resolved. The obvious answer is, "analogous to poisonous or asphyxiating gases." For the reasons already presented, neither initial nor residual nuclear radiation should be analogized with poison or asphyxiating gases; therefor, nuclear weapons are not prohibited by the Geneva Gas Protocol.

If, however, the Protocol were construed as encompassing nuclear radiation, what is the resultant effect upon the United States? The United States was not a party to this agreement. The effect, therefore, of a multilateral international convention upon non-signatories must be considered.

The very wording of the Protocol—"justly condemned by the general opinion of the civilized world" and "universally accepted as a part of international law; binding alike the conscience and practice of nations"[110]—purports to establish general international law binding on all nations. Treaties entered into by a large number of states for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of guiding some international institution are considered to be sources of general law.[111] Such treaties are the substitute in the international system for legislation and are referred to as "lawmaking treaties;" but even a lawmaking treaty does not bind states that are not parties to it.[112] Therefore, the United States is not bound by the Geneva Gas Protocol.[113] If this treaty declares an

[108] For a discussion of the effects of nuclear radiation upon personnel, see notes 36–55 *supra* and text accompanying.
[109] GREENSPAN, *op. cit. supra* note 77, at 372.
[110] Geneva Gas Protocol, 94 L.N.T.S. 67 (1925).
[111] BRIERLY, THE LAW OF NATIONS 58 (6th ed. 1963).
[112] *Ibid.*
[113] Japan was likewise not a party and would not be bound by the Geneva Gas Protocol.

existing customary rule of law, it is the custom and not the treaty itself that will govern the actions of the United States.[114] Many of the signatory states expressed reservations to the Geneva Gas Protocol. France, Belgium, Roumania, the British Empire, India, Canada, U. S. S. R., the Union of South Africa, Australia, and New Zealand all expressly stated their intention to be bound only in relation to other parties to the Protocol and not towards any enemy power whose armed forces or whose allies do not respect the provisions of the Protocol.[115] Spain ratified on condition of reciprocity, accepting the Protocol as compulsory in relation to other parties, but without expressly stating a policy towards non-signatories.[116] These reservations indicate that the parties to the Protocol did not recognize any customary law which would bind them in the absence of the agreement.[117] To the contrary, express declarations were made by ten of the signatories to the effect that the use of poisonous gas against non-signatories was contemplated. If existing customary law prohibited gas warfare, such reservations would have been entirely unnecessary.

Of course, customary international law may develop from a multilateral agreement entered into by a large number of nations. Some writers advocate that the practice of states in failing to use poisonous gases either in World War II or the Korean Conflict has resulted in an absolute ban against the first use of poisonous gases or analogous substances as a rule of custom.[118] It is difficult, however, to conceive of a custom developing from the non-use of a weapon, prohibited by a convention, even though non-signatories to the convention voluntarily refrained from its use.[119] The better view is that no such custom exists in the present state of international law.

Even if such custom had become established, nuclear weapons could hardly be considered as falling within this custom; for nuclear weapons were employed in World War II. Furthermore, the failure to employ gas warfare in World War II is not analogous to atomic warfare, for the use of gas, even if considered

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[114] Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 43 (1960).
[115] Geneva Gas Protocol, 94 L.N.T.S. 67–71 (1925).
[116] *Id.* at 69.
[117] Kelly, *supra* note 114, at 50; *cf.* Neinast, *supra* note 74 at 30. *But see* 2 OPPENHEIM, INTERNATIONAL LAW 342–44 (7th ed., Lauterpacht ed. 1952); SCHWARZENBERGER, *op. cit. supra* note 82, at 38; *cf.* STONE, *op. cit. supra* note 80, at 556.
[118] See SCHWARZENBERGER, *op. cit. supra* note 82, at 38, 48; O'Brien, *supra* note 73, at 36.
[119] See Kelly, *supra* note 114, at 50.

violative of international law, promised no particular military advantage, while nuclear effects would be decisive.[120] It is therefore concluded that nuclear warfare is not prohibited by the Geneva Protocol either as a rule of conventional or customary international law.[121]

B. *INTERNATIONAL CUSTOMS*

It has already been concluded that the Geneva Gas Protocol has not, either by codification or evolution, established a customary rule of international law prohibiting the use of nuclear weapons or the effect of nuclear radiation. A reiteration of this discussion would be superfluous. However, other customary rules of international law relevant to the legality of nuclear warfare must be considered.

1. *The Distinction Between Combatants and Noncombatants.*

For many years civilians occupied a protective status in warfare. On the battlefield of yesteryear the distinction between combatant and noncombatant was easy to make, and persons in this protected category were considered immune from the means of warfare. But the modern concept of total war has enlarged the battlefield considerably so that its limits are not so clearly defined as when wars were fought with the sword or the musket.[122] As one writer has observed, "Admitting that a knight should not hack down a defenseless old woman and that a seventeenth-century cannoneer should not deliberately aim for a convent, is it so clear that it is more important to save civilian lives in Hamburg than to defeat Hitler?" [123] The technological innovations of the Twentieth Century concerning weaponry and warfare have caused a considerable diminution of the distinction between combatants and noncombatants.

In order to distinguish between combatants and noncombatants it is necessary to determine what are legitimate military objectives in modern warfare. One writer has concluded:

> [T]he scope of legitimate objects of warfare is considerably wider than combatants and includes somewhat indefinite categories of civilians

[120] Brodie, *Implications for Military Policy*, THE ABSOLUTE WEAPON: ATOMIC POWER AND WORLD ORDER 87 (Brodie ed. 1946).

[121] *Accord*, O'Brien, *supra* note 79, at 36.

[122] For a discussion of the battlefield in modern warfare, see Mundt, Modern Warfare and Property on the Battlefield, April 1964 (unpublished thesis presented to The Judge Advocate General's School, U.S. Army).

[123] O'Brien, *Nuclear Warfare and the Law of Nations*, MORALITY AND MODERN WARFARE 138 (Nagle ed. 1960).

> engaged in war work . . . . [L]egitimate target areas are no longer limited to military objectives . . . but extend to centres of communications, large industrial and administrative establishments of any kind and any area likely to become important for the conduct of war. Thus, at present, the principle of the protection of the enemy civilian population appears to apply at the most in favour of a residue of persons who fulfill two conditions. They must not be connected with the war effort and be remote from important target areas.[124]

Civilians still enjoy some immunity from attack. *Field Manual 27–10* provides that civilians may not be made the object of attack directed exclusively against them.[125] But this provision is more restrictive than the generally accepted view of the inviolability of civilians in present international law.[126] Certainly civilians directly engaged in the war effort are legitimate objects of attack.

The provision of Article 25 of the Hague Regulations[127] prohibiting the attack or bombardment of undefended towns, villages, dwellings, or buildings, is incorporated into *Field Manual 27–10*.[128] Defended places, however, are defined as including: a city or town surrounded by detached, defense positions and a place occupied by a combatant military force or through which such a force (excluding medical units alone) is passing.[129] Other legitimate objects of attack are:

> Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.[130]

This latter provision shows that certain civilians may be the direct object of an attack: employees of a munitions plant or warehouse, etc.

The development of the airplane and ensuing aerial bombardments have brought into play "target area" bombing, the bombardment of the work force of military objectives in the hinterland. Target area bombing was often employed in World War II. One authority concludes that the principle of civilian immunity does not make sense when it is offered to protect the men

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[124] SCHWARZENBERGER, *op. cit. supra* note 82, at 21–22.
[125] FM 27–10, para. 25.
[126] See SCHWARZENBERGER, *op. cit. supra* note 82, at 21–22; STONE, *op. cit. supra* note 80, at 628–31; Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 360, 366–69 (1952).
[127] HR, Article 25, 36 Stat. 2302 (1907).
[128] FM 27–10, para. 39.
[129] Id., para. 40.
[130] *Ibid.*

and women in the hinterland engaged in the production of airplanes, tanks, ships, munitions, or the machine tools and precision instruments used by the military forces. He would permit the bombardment of this civilian work force either on the job or at home and would even consider bombardment to tear down civilian morale, a legitimate military objective in modern warfare.[131]

How does target-area bombing fit into a discussion of the legality of nuclear weapons? It may be argued that there is little difference between the devastation produced by "target area" bombing and nuclear explosions. One writer answers this contention by concluding that target area bombing is a method of attack, not a weapon, and that the area of bombardment in target-area bombing is proportionate to the target sought, while in nuclear bombing the disproportion is immense.[132] Another concludes that in target-area bombing the area included in the assault is not out of proportion to that which the military objectives occupy, while in atomic bombing "the disproportion is immense."[133] This latter authority further indicts atom bombing as being indiscriminate insofar as civilians are concerned.[134]

Proportionality as a general principle of international law will be considered at length later in this article. But to categorize all nuclear weapons as being necessarily disproportionate insofar as their total destructive powers compare to the military objectives against which they are directed is judging the weapons in a vacuum. By the same token, to conclude that all nuclear weapons discriminate against noncombatants is an arbitrary condemnation based on an inadequate factual appraisal. To be sure, a nuclear weapon could be utilized in such a manner as to violate the customary distinction between combatants and noncombatants. For example, if a city of 100,000 population were destroyed by a nuclear explosion merely because it contained a munitions factory employing 1,000 workers, such a weapon would be both indiscriminate and disproportional. But a one kiloton air burst exploded over an advancing combat division in an uninhabited desert would certainly not violate the protected status of noncombatants.

Whatever remnants of the traditional concept of the inviolability of civilians still exist in international law are applicable to

[131] See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 628–31 (2d ed. 1959). *But see* 2 OPPENHEIM, *op. cit. supra* note 117, at 527–28.
[132] GREENSPAN, THE MODERN LAW OF LAND WARFARE 371–72 (1959).
[133] SPAIGHT, *op. cit. supra* note 106, at 274.
[134] *Id.* at 276.

an attack by nuclear weapons. Yet, none of the effects of a nuclear weapon necessarily discriminate against noncombatants. Certainly a tactical type weapon fired by an artillery piece would not ordinarily come under this objection. It has been previously shown that the several nuclear effects vary according to many factors. But the area of these effects may be limited to the legitimate military objectives against which they are intended. Nuclear weapons, just as any other weapon, are capable of being used in a discriminatory manner towards noncombatants; but this capability does not mean that their use will necessarily discriminate. Consequently, this custom of the protection of noncombatants does not prohibit the use of nuclear weapons.

2. *The Practice of States.*

Whether or not the failure of nations to engage in gas warfare has resulted in the development of a rule of customary international law enveloping the provisions of the Geneva Gas Protocol has already been considered. It is now appropriate to inquire as to whether such a custom has developed as to nuclear weapons. In our present international society two major world powers are dominant. The policies and practices of the Soviet Union control the so-called Communist bloc, while the United States is the leader of the Western nations. Consequently, this discussion will be restricted almost exclusively to the practice of these two states.

The only known employment of nuclear weapons in time of war occurred in August of 1945. Since that time there has been no known use of either nuclear explosives or radiological warfare. The Korean Conflict, however, has been the only opportunity since that time in which the United States could have utilized its nuclear arsenal. But Korea was not a world effort, and the security of the free world as a whole was not in jeopardy. Moreover, Russia did not occupy an active combatant status in Korea, and the United States was the only active participant with an effective atomic stockpile. Had the United States resorted to atomic weapons in Korea, this action would have resulted in ostracism by all international authorities who considered the first use of such a weapon a violation of international law.

Many writers who considered the first use of an atomic weapon unlawful justified the bombings of Hiroshima and Nagasaki on the grounds of reprisal or retaliation in view of the many atroci-

ties committed by the Japanese.[135] Such a defense would not have been available in Korea, however; and the use of such force in this "police action" could have prejudiced the international image of our Government, for many nations would have criticized the use of nuclear weapons. The failure to use such weapons in Korea, therefore, did not indicate that the United States considered such use to be prohibited by law but rather inadvisable politically.

The first Soviet atomic explosion occurred in August 1949.[136] Since 1949, Russia has carried on an intensive program in the development of nuclear weapons. Although the first experimental thermonuclear device was exploded by the United States late in 1952, it was not long before high yield thermonuclear bombs were in inventory in this country and Russia; in fact, Russia exhibited the first megaton air burst on November 23, 1955, some six months prior to the equivalent accomplishment on the part of the United States.[137] The past decade has resulted in an intensification in the nuclear weapons race on the part of both major world powers, and neither country has indicated by practice that the use of nuclear weapons is prohibited by international law. To the contrary, the actions of these nations have been aimed towards preparing for an ultimate nuclear conflict.

The United States has officially expressed the opinion that explosive atomic weapons are not violative of international law.[138] This provision of *Field Manual 27–10* has already been discussed and will not be reiterated. The British *Manual of Military Law* provides that no rule of international law deals specifically with the use of nuclear weapons,[139] and that the use of any weapon not expressly dealt with by a rule of international law is governed by "the ordinary rules and the question of the legality of its use in any individual case will, therefore, involve merely the application of the recognised principles of international law, as to which, see Oppenheim, vol. II, pp. 346–352." [140] The cited portion of the treatise deals with the legality of the atomic weapon but comes to no definite conclusions concerning

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[135] *Cf.* 2 OPPENHEIM, *op. cit. supra* note 117, at 351; STONE, *op. cit. supra* note 131, at 344.

[136] Reinhardt, *Hiroshima Plus 20*, Army Magazine, February 1965, p. 31, at 33.

[137] *Id.* at 34.

[138] See FM 27–10, para. 35.

[139] 3 *Manual of Military Law*, para. 113 (1958).

[140] *Id.* para. 107.

its lawfulness or unlawfulness. Consequently, this portion of the British Manual, although failing to take a clear position on the legality of nuclear weapons, does not conclude that the first use of such weapons are contrary to existing international law. Thus, it appears that Great Britain would look at each use or proposed use of a nuclear weapon separately and apply the existing facts and circumstances to determine whether international law is complied with, rather than categorically declaring all nuclear weapons to be contrary to law.

In November 1961, the states of the world were called upon to express an official view concerning the use of nuclear weapons. A resolution was adopted by the U.N. General Assembly, declaring the use of nuclear weapons to be a violation of the U.N. Charter; to be contrary to the rules of international law and the laws of humanity because they cause unnecessary suffering; and to be indiscriminate towards noncombatants.[141] The resolution passed by a vote of 55–20–26. Russia and the rest of the Communist bloc, as well as the African nations and several others, voted in favor of the proposal. The United States and the Western countries voted against; while twenty-six others, consisting mostly of the Latin-American states, abstained.

Of course, the General Assembly does not have the legislative powers to bind all members by a resolution of this nature. Furthermore, a resolution does not have the effect of a formal treaty upon even the members voting for it; it is a statement of policy, rather than positive international law. But a resolution, which is no more than a recommendation of the General Assembly, is an important instrument in weighing world public opinion, particularly as to the official positions of the individual nations voting on the resolution.[142] While an argument may be made that such a resolution reflects an international custom against the use of nuclear weapons, the concern of states over armaments is certainly distinguishable from a custom against using them. The position which the various states took in voting on the resolution may be considered as some evidence of their official view towards the

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[141] U.N. General Assembly Resolution 1653 (XVI): Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, November 24, 1961 (A/Ree/1653 (XVI), Nov. 28, 1961), U.S. ARMS CONTROL AND DISARMAMENT AGENCY, PUBLICATION 5, DOCUMENTS ON DISARMAMENT 648 (1961).

[142] See 1 OPPENHEIM, INTERNATIONAL LAW 424–25 (8th ed., Lauterpacht ed. 1955); GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 164–65 (revised ed. 1949).

legality of the use of nuclear weapons, but the mere consensus of a majority of the members voting on the resolution is not declaratory of customary international law, unless such a custom has, in fact, been established.

It is true that the nations of the world have become more concerned in recent years with armaments. This concern will be summarized in the succeeding discussion on legal controls of nuclear weapons. Perhaps a custom will develop, making nuclear weapons prohibited as a weapon of warfare. Perhaps such a custom is now in its embryonic stage, but it has not as yet developed into a rule of customary international law.

3. *The Establishment of Legal Controls.*

Ever since the bombings of Hiroshima and Nagasaki, an interest in disarmament has been evidenced in world public opinion. After the surrender of Japan, President Truman summoned Congress to a special session to deal with the problem of reconverting America into a peacetime economy, and during this session the control of the atomic bomb was discussed extensively.[143] From the end of World War II to the present, the control of armaments, especially nuclear armaments, has been prevalent both on the part of individuals and states.

The United States and Russia have made various proposals concerning arms control, particularly in regard to nuclear weapons. These negotiations began in 1946 and have continued ever since in the form of proposals and counter-proposals submitted by both powers. Two major discrepancies have been apparent in the plans submitted thus far: the proposals of the Soviet Union have required complete nuclear disarmament at an early date, but without adequate safeguards, such as inspections; whereas, the Western proposals have contained rigid inspection provisions, destroying Soviet secrecy, but without specifying a date of completion.[144] These gaps in the disarmament negotiations were summarized by the Chairman of the Disarmament Subcommittee of the U. S. Senate Foreign Relations Committee on June 24, 1960:

> The essence of the Soviet plan was lots of talk about disarmament, little control, and no study.
>
> The essence of the Western plan was lots of study, a bit of control, and an uncertain and indefinite amount of disarmament.[145]

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[143] LONGARZO, ATOMIC ENERGY: ITS LEGAL AND POLITICAL IMPACT ON AMERICAN SOCIETY 2 (1951).

[144] BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 562–67 (1961).

[145] 106 CONG. REC. 14195 (1960) (remarks of Senator Humphrey).

The attitude of the United States towards the control of armaments is exemplified by a nation-wide address over radio and television by the late President John F. Kennedy on March 2, 1962. After referring to an explosion by Soviet Russia of a fifty-eight megaton nuclear test weapon, President Kennedy stated the objectives of the United States:

> to make our own tests unnecessary, to prevent others from testing, to prevent the nuclear arms race from mushrooming out of control, [and] to take the first steps toward general and complete disarmament . . . . But if they [the leaders of the Soviet Union] persist in rejecting all means of true inspection, then we shall be left no choice but to keep our own defensive arsenal adequate for the security of all free men. . . .[146]

What relevance has this discussion of disarmament negotiations to the legality of nuclear weapons? The concern over disarmament on the part of the nations of the world is a development of the modern means of warfare. The proposals and understandings which develop over the international bargaining table may well evolve into a multilateral convention. Moreover, the attitudes displayed by the participants in the world arena may establish customary international law in the absence of an agreement. To date no customary rule of law prohibiting the use of nuclear weapons has evolved; to the contrary, the defensive approaches taken by the two major powers and their expressed concern for the consummation of a "world-wide" agreement indicate the absence of such a custom. For if nuclear warfare were considered to be *malum in se* according to general international custom, then the nations of the world and organizations such as the International Committee of the Red Cross would have no cause for concern over the accomplishment of a multilateral agreement to that effect.[147]

Although no agreement on disarmament has yet been reached, a limited nuclear test ban treaty has been accomplished.[148] This multilateral agreement, to which the United States, United Kingdom, U. S. S. R., and a large number of the nations of the world are signatories, prohibits nuclear test explosions in or beyond the atmosphere or underwater, and in any other environment if such explosion causes radioactive debris to be present outside the ter-

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[146] Address by President Kennedy over Radio-Television, *Nuclear Testing and Disarmament*, March 2, 1962, in U.S. ARMS CONTROL AND DISARMAMENT AGENCY, PUBLICATION 3, GENERAL SERIES 2, at 19–20 (March 1962).

[147] *Accord*, Lauterpacht, *supra* note 126, at 370.

[148] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. & O.I.A. 1313, T.I.A.S. No. 5433 (effective October 10, 1963).

ritorial limits of the state conducting the test. This treaty applies only to peacetime tests, however, for each party has the express right to withdraw if it decides that "extraordinary events, related to the subject matter of this treaty, have jeopardized the supreme interests of its country." [149] Certainly, the entering into hostilities by a signatory to the agreement would constitute an "extraordinary event," justifying that state's withdrawal from the treaty. Consequently, this agreement, although the first and an important step in the direction of disarmament, does not apply to the employment of nuclear weapons in wartime.

C. *GENERAL PRINCIPLES OF LAW*

"General principles of law recognized by civilized nations" are listed as a source of international law in the Statute of the International Court of Justice.[150] These general principles of international law have developed from equitable or natural law principles.[151] Two such principles will be discussed in connection with the use of nuclear weapons: principles of humanity and the principle of proportionality.

1. *Principles of Humanity.*

A leading treatise on international law concludes that principles of humanity are among the determining factors governing the growth of the laws and usages of war.[152] What are these principles of humanity, and how do they affect the laws of weaponry? Humanitarian consideration may lead to the development of other general principles, of customs, or of a convention, which may be used as a norm by which to measure weapons. For example, the St. Petersburg Declaration provided that the employment of arms which caused unnecessary suffering or which render death inevitable were "contrary to the laws of humanity." [153] This prohibition against means causing unnecessary suffering was again embodied in the Hague Regulations.[154] Thus, it may be seen that principles of humanity lead to the development of other principles or rules of warfare, such as the proscription against weapons causing superfluous suffering, which may be used to measure specific weapons. On the other hand, principles of human-

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[149] *Ibid.*
[150] Statute of I.C.J., Article 38, 59 Stat. 1060.
[151] Kelly, *supra* note 114, at 51.
[152] 2 OPPENHEIM, *op. cit. supra* note 117, at 226–27.
[153] See text accompanying note 73, *supra.*
[154] HR, Article 23(e), 36 Stat. 2302 (1907).

ity in and of themselves are not an international norm by which weapons may be judged.

Certain humanitarian considerations have been invoked by advocates of the abolishment of nuclear warfare. The opinion has been expressed that nuclear weapons are, in and of themselves, immoral as well as illegal, in that they are contrary to the dictates of humanity.[155] Although certain humanitarian considerations common among civilized nations have become a part of the law of war,[156] neither nuclear radiation nor the other effects of a nuclear explosion can be said to necessarily offend against these principles of humanity. A misuse of nuclear weapons conceivably could constitute a violation of these principles; for example, an intentional nuclear attack against civilians not connected with the war effort and remote from important target areas may, in addition to violating the custom of inviolability of noncombatants, amount to a crime against humanity.[157] But this is not to say that nuclear radiation is *per se* inhumane. Furthermore, any inhumane use of nuclear weapons will violate other rules of the law of warfare which have developed from these humanitarian principles. It is concluded that principles of humanity, although useful in formulating international laws governing warfare, do not prohibit nuclear weapons.

2. *The Principle of Proportionality.*

The use of any means of warfare is governed by the principle of proportionality and its concomitant principle of military necessity. *Field Manual 27–10* prohibits the use of force "which is not actually necessary for military purposes," and then defines military necessity as "that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." [158] What is militarily necessary in a given combat situation will, of course, depend on the prevailing facts and circumstances. One writer prefers to qualify this principle of military necessity by the requirement of legitimacy,[159] to which there certainly is no

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[155] SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 154–55 (1959).

[156] FM 27–10, para. 3a, requires belligerents to "conduct hostilities with regard for the principles of humanity and chivalry."

[157] See SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 48–49 (1958).

[158] FM 27–10, para. 3a.

[159] See O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35 (1960).

objection, for an "illegitimate" means of warfare could not be justified under the guise of military necessity.

What effect does military necessity have upon the principle of proportionality? *Field Manual 27–10,* in discussing bombardments, assaults, and sieges, concludes that "loss of life and damage to property must not be out of proportion to the military advantage to be gained." [160] Thus, it can be seen that what means are utilized in a tactical situation must be proportional to the required military necessities. But the scope of proportionality is governed by the military objective of the appropriate commander without regard to the ultimate political consequences beyond a military encounter. For example:

> [T]he necessity and proportionality of measures taken by Rommel in the desert would be judged in the light of his military objective of driving the British out of Egypt rather than on the basis of Hitler's ultimate aims of illegal conquest.[161]

The prevailing military situation, rather than a national ideology, must be the basis for a determination of the legitimate use of a weapon.

The use of a nuclear weapon, just as the employment of any type of force in warfare, would be governed by this principle of proportionality, as measured by the military exigencies of the situation. Some writers categorically condemn nuclear weapons as being disproportionate.[162] But such an approach, in effect, judges the weapons in a vacuum, instead of judging each separate use or proposed use of a nuclear device by its attendant facts and circumstances.

This doctrine of proportionality is closely related to the custom of immunity of noncombatants. Soldiers in warfare are expected to lay down their lives on the battlefield, and military means which accomplish this result cannot be criticized so long as the rules of warfare are not violated. But the effects of nuclear radiation, particularly fallout, have aroused considerable controversy among international lawyers. It has been said that nuclear warfare will result in world-wide fallout which results in contamination of vast areas and ensuing death and suffering of

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[160] FM 27–10, para. 41.

[161] O'Brien, *supra* note 159, at 50.

[162] See SPAIGHT, AIR POWER AND WAR RIGHTS 274 (3d ed. 1947); GREENSPAN, *op. cit. supra* note 132, at 371–72; see SINGH, *op. cit. supra* note 155, at 240.

innocent persons far from the battlefield.[163] The indiscriminate use of high yield nuclear weapons could well accomplish this result, and such an employment would be disproportionate to any military objective and in violation of international law. Yet, tactical atomic weapons such as artillery shells may be confined to an area not disproportionate to the legitimate military objectives, in which case no disproportion would necessarily lie.[164] Of course, the extent and duration of radioactive contamination caused by a nuclear explosion would weigh heavily in determining whether a particular use conformed to the requirement of proportionality, but neither initial nor residual nuclear radiation can be considered disproportionate without looking to the actual consequences.

It has been shown that the yield of a nuclear device, along with certain other factors, determines the extent of its destructive powers. Limited nuclear warfare with tactical weapons may well be waged within the limits of proportionality and military necessity.[165] Small nuclear devices in the kiloton or sub-kiloton range do not produce significant quantities of residual radiation, especially when detonated in the air; but the high yield megaton weapons can spread radioactive contamination over vast expanses. Several factors must be considered in determining the proportionality of a nuclear weapon, particularly one in the megaton range: effect on the enemy, both military and civilian; effect on friendly forces, both of the allies and of the using force; effect on neutrals; and effect on mankind in general.[166] Thus, it may be concluded that there can be no blanket acceptance or condemnation of nuclear weapons based on the doctrine of proportionality. Their use in a given situation may well conform to the requirements of military necessity; on the other hand, there are some types and uses of nuclear weapons which would be clearly disproportionate by any reasonable standard.[167]

Even the most outspoken opponents of nuclear warfare concede the legality of its use in reprisal.[168] If the initial use of nuclear warfare were unlawful, it could be resorted to as a legitimate act

[163] GREENSPAN, *op. cit. supra* note 132, at 371–72.

[164] But one writer considers nuclear fallout as a violation of Article 23(a), HR, and the Geneva Gas Protocol, even when delivered by a tactical weapon, such as an artillery shell. *Id.* at 375.

[165] O'Brien, *supra* note 123, at 145.

[166] O'Brien, *supra* note 159, at 75.

[167] *Id.* at 76–77; *cf.* McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 689–90 (1955).

[168] SINGH, *op. cit. supra* note 155, at 215.

of reprisal,[169] for international law has long recognized the right of a state to retaliate against the illegal and injurious acts of another state. Reprisals are often said to be the main sanction for the law of war, in that they act as deterrents against future violations of the rules of warfare.[170] The principle of proportionality is also applicable to acts of reprisal; thus, an act of retaliation cannot be disproportionate to the illegal act which precipitated the reprisal.[171]

It is generally recognized that a reprisal need not be retaliated in kind, but there is a divergence of views as to whether nuclear weapons could be resorted to against a belligerent who, although committing an act in violation of the law of war, did not resort to nuclear warfare. One opinion is to the effect that as nuclear weapons are not prohibited by a positive rule of international law, their use in reprisal for a chemical or bacteriological attack, the initial use of which that writer concludes to be violative of positive international law, would be more easily justified than the converse use of chemical or bacteriological means in retaliation for a nuclear attack.[172] Another view is that the effects of a nuclear explosion, particularly fallout, are disproportionate to anything other than another nuclear weapon.[173] Under this latter view, could a ten kiloton weapon be launched in retaliation to a one kiloton weapon, or must kiloton be met equally by kiloton? Again, proportionality is the key; the force used in reprisal must be proportionate to the unlawful means against which the retaliation is directed. But the determination of what is proportionate is dependent on the prevailing military situation—a question of fact to be determined by the existing facts and circumstances.

D. *JUDICIAL DECISIONS*

For obvious reasons, there is a dearth of judicial decisions involving the use of nuclear weapons during hostilities. In fact, the only case in point which has been litigated was decided in Japan in December 1963.[174] The action was brought by several

[169] SCHWARZENBERGER, *op. cit. supra* note 157, at 40, 48.

[170] See O'Brien, *Biological/Chemical Warfare and the International Law of War*, 51 GEO. L.J. 1, 43–44 (1962).

[171] SCHWARZENBERGER, *op. cit. supra* note 157, at 4–41, 45.

[172] See O'Brien, *supra* note 170, at 59.

[173] See SINGH, *op. cit. supra* note 155, at 215.

[174] Shimoda v. Japan, No. 2914 of 1955 and No. 4177 of 1957, Tokyo District Court, Civil Affairs, 24th Department, December 7, 1963 (translated in Enclosure No. 1 to Airgram A–775, from American Embassy, Tokyo, to U.S. Dep't of State, March 18, 1964).

victims and survivors of victims of the atomic bombings of Hiroshima and Nagasaki. The plaintiffs alleged that the use of these weapons by the United States violated international law and that the Government of Japan, by waiving all claims of the state and its nationals in the peace treaty entered into with the Allied Powers at the close of the War, had deprived the plaintiffs of their right to recover damages. Recovery was denied on the ground that the plaintiffs had no standing in international law to bring a claim and that their sovereign effectively waived these claims by treaty.[175]

Although recovery was not allowed, the court in *obiter dictum* expressed some significant views concerning the legality of these bombings. Both Hiroshima and Nagasaki were defended against air attacks by antiaircraft guns; and both cities contained military objectives, such as armed forces, military facilities, and munitions factories. However, there were approximately 330,000 "ordinary citizens" in Hiroshima and 270,000 in Nagasaki.[176] The court concluded that international law was violated in that the bombs constituted "indiscriminate aerial bombardment of an undefended city"[177] and caused unnecessary suffering, contrary to the Declaration of St. Petersburg and Article 23(e) of the Hague Regulations.[178] The issue of whether nuclear radiation constituted poison or poison gas was discussed, but no opinion was expressed.

Judicial decisions are considered a subsidiary means for determining rules of international law, along with teachings of the most highly qualified publicists.[179] The opinion of this court may, therefore, be considered as supporting, to an extent, the contentions already set forth that nuclear weapons are indiscriminate insofar as the combatant-noncombatant distinction is concerned and that these weapons cause unnecessary suffering. However, the effect of this decision upon the international law of war is extremely limited for several reasons. First of all, the opinion of the court in regard to the application of international law to the bombings was dictum in its entirety. Secondly, the court's opinion was directed solely to the facts presented in the instant case; thus, even if the bombings of Hiroshima and Nagasaki were

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[175] *Id.* at 37–41.
[176] *Id.* at 30.
[177] *Ibid.*
[178] *Id.* at 32.
[179] Statute of I.C.J., Article 38(d).

indiscriminate and/or disproportionate to the military advantages to be gained, it does not follow that another use of a nuclear weapon will necessarily have similar effects. And thirdly, the tribunal rendering the decision was a domestic court of the sovereign of the complaining parties. For these reasons this decision adds little to the development of the international laws governing weaponry.

E. *OPINIONS OF PUBLICISTS*

The second subsidiary means for determining international law is the application of "the teachings of the most highly qualified publicists of the various nations."[180] The opinions of the international lawyers who have written in this field have been integrated into the discussions pertaining to the conventions, customs, and general principles of law. A detailed analysis of these various opinions would amount to superfluous reiteration; consequently, only a brief summary of the teachings of publicists, generally divided into three schools, will follow.

The first group considers any first use of nuclear warfare as prohibited; the followers of this theory include Schwarzenberger, Greenspan, Spaight, and Singh. Schwarzenberger concludes that the more powerful weapons may violate the custom of inviolability of civilians, while nuclear radiation is prohibited by the prohibition against the use of poison and poisonous weapons.[181] Greenspan deduces that the conventional prohibition against poison and poisoned weapons includes residual radiation and radiological warfare and that the combined effects of nuclear weapons discriminate against noncombatants, exceed the principle of proportionality, and cause unnecessary suffering.[182] Spaight is of the opinion that nuclear weapons are both indiscriminate and disproportionate, and that inferentially they contravene the provisions of the Geneva Gas Protocol.[183] Singh condemns nuclear weapons as a means of warfare on the grounds that nuclear radiation is poisonous within the purview of Article 23(a) of the Hague Regulations or the Geneva Gas Protocol, that nuclear explosives are necessarily indiscriminate, and that their only permissible use would be as retaliation in kind.[184] And lastly, a Russian publica-

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[180] *Ibid.*
[181] See SCHWARZENBERGER, *op. cit. supra* note 157, at 48.
[182] See GREENSPAN, *op. cit. supra* note 132, at 371–73.
[183] See SPAIGHT, AIR POWER AND WAR RIGHTS 274–76 (3d ed. 1947).
[184] See SINGH, *op. cit. supra* note 155, at 154–60, 163, 215.

tion compiled by a group of attorneys concludes that present international legal thought condemns atomic and hydrogen weapons and other means of mass annihilation.[185] Although its terminology is more closely akin to propaganda than to legal writing, this latter source is some evidence of the opinions of Soviet legal scholars.

The second group concludes that there is no express prohibition against the use of nuclear weapons under existing international law. Included in this camp are Lauterpacht, O'Brien, McDougal, and Schlei. Lauterpacht considers the issue to be predominantly of a political nature, which he considers a proper matter of concern for the international lawyers.[186] O'Brien concludes that the lawfulness of the use of nuclear weapons in each instance rests on the principle of proportionality as it applies to the principle of legitimate military necessity.[187] McDougal and Schlei take an approach quite similar to O'Brien, judging each specific use of a nuclear weapon by its attendant facts and circumstances.[188]

The third group believes that the present state of international law is inadequate to effectively control modern weapons, especially nuclear weapons. Stone espouses this view, believing that a new specific prohibition is essential to any effective legal norm under the present state of the law.[189] Stowell takes a similar position, concluding that the laws of war cannot rule out any means effective to secure the ends of war.[190]

IV. SUMMARY

Two effects of nuclear explosions—blast and thermal radiation—are nothing new to warfare, as both are present in conventional explosions. Neither of these two effects has been considered unlawful in conjunction with conventional weapons, nor is there any logical theory of international law under which either could be considered absolutely prohibited. Even if a "clean" nuclear weapon were devised, however, it is conceivable that a particular weapon might be used in such a manner as to violate

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[185] See U.S.S.R. ACADEMY OF SCIENCES, INSTITUTE OF STATE AND LAW, INTERNATIONAL LAW 426 (Ogden transl. 1962).

[186] See Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 371 (1952).

[187] See O'Brien, *supra* note 159, at 116–17.

[188] See McDougal and Schlei, *supra* note 167, at 689–90.

[189] See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 344 (1959).

[190] See Stowell, *The Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 786–87 (1945).

the principle of proportionality, to discriminate against noncombatants, or to cause unnecessary suffering, but these violations of international law would be attributable to the manner in which the weapon was used, not the weapon itself. It is also possible that, because the effects of heat and blast are of considerably greater magnitude in a nuclear explosion than those attainable from conventional explosions, certain high yield "clean" nuclear weapons would have such horrendous results that they would necessarily be disproportionate to the military advantage to be gained or indiscriminate towards noncombatants. But it does not follow that all nuclear weapons are so indictable.

Nuclear radiation, on the other hand, was introduced as a means of warfare in August 1945. Determining how nuclear radiation fits into the laws of war has precipitated some consternation among international lawyers. Almost twenty years have elapsed since the bombings of Hiroshima and Nagasaki, yet the attempts to categorize nuclear radiation in terms of the rules of warfare have resulted in a wide divergence of views. Whatever nuclear radiation is, neither the effects of initial nor residual radiation are poison or analogous to poisonous gas within the meaning of the terms of Article 23(a) of the Hague Regulations or the Geneva Gas Protocol.

As there is no conventional rule of law prohibiting nuclear radiation, there likewise is no custom or general principle to this effect. Nuclear radiation is not necessarily discriminatory towards noncombatants, nor do its effects contravene the principle of proportionality or cause unnecessary suffering. The effects of nuclear radiation in each individual use of a nuclear weapon must be weighed by the existing facts and circumstances to determine legality. Blast, heat, and initial nuclear radiation may be limited to a legitimate military objective, but the fallout effects may affect innocent persons over such a wide area that the results would be both disproportionate and indiscriminate towards noncombatants. On the other hand, the type and yield of a particular explosion may result in the limiting of all destructive effects to legitimate military objectives.

No existing rule of international law prohibits nuclear weapons nor any of their effects. Just as in the case of any other weapon, each individual use must be analyzed by its attendant facts and circumstances to determine whether any of the laws of war have been violated.

V. CONCLUSIONS

That the present state of international law is inadequate to govern either a limited or total war is easily discernible from the foregoing discussion. If each particular use of a nuclear weapon rests on its own merits, the policy makers of a state or the commanders in the battlefield are free to make their own subjective determinations whether to engage in nuclear warfare and to what extent. Thus, an irresponsible government or an irresponsible commander could precipitate a nuclear holocaust. What steps should be taken to obviate such an eventuality?

Disarmament negotiations between the two major world powers have thus far accomplished little. It may be contended that the consummation of a multilateral agreement concerning the use of nuclear weapons would have a hollow ring, for, as one writer has observed, "the idea that war is in the nature of a fair fight is erroneous, for the true principle that any means is legitimate that will conduce to effective fighting has always prevailed in the end to surmount popular outcry and validate the use of each new weapon." [191] But this view is not well taken, for not all means of violence are permissible in warfare. Poisoned weapons, dum-dum bullets, and projectiles filled with glass are examples of weapons still considered to be contrary to international law.[192] It is true that the laws of war, just as many domestic laws, are sometimes broken; but laws do not cease to be law merely because they are broken.[193]

Admittedly, any arms control negotiation should be cautiously approached; and any resulting agreement, closely scrutinized and viewed with a certain amount of skepticism. One approach to the evaluation of an agreement on armaments considers three broad possibilities:

> that the agreement will operate as planned; that one or both sides will cheat and get away with it; that at some point in time the agreement will break down and both sides will resume, openly, the prohibited activities. . . .[194]

This is a practical and realistic appraisal of the problem.

The international negotiation table contains two principal adversaries: the United States and Soviet Russia. The Soviets have

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[191] *Id.* at 784–85.
[192] FM 27–10, paras. 34, 37.
[193] *Cf.* Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision*, 45 AM. J. INT'L L. 37, 45–46.
[194] HALPERIN & SCHELLING, STRATEGY AND ARMS CONTROL 43 (1961).

a pragmatic approach to international law, appraising all tenets and their application in terms of their utility to the Communist cause;[195] thus, a rule of law is considered as binding by Russia only if it aids her political cause.[196] As long as the three possibilities listed in the preceding paragraph are foreseen, open negotiations aimed toward a program of international arms control should be continued.

What should be the goal of these negotiations? The present structure of the international society lacks the established means of control for the implementation of a program of complete disarmament. Complete disarmament would not be politically advisable for the United States or any state without an effective system of inspection and control, nor would it be advisable for the United States to enter a program of immediate destruction of our nuclear stockpiles and the means of delivering the warheads. Dictates of self-preservation and aspirations for world-wide peace and freedom require that our country maintain a sufficient nuclear capability to retaliate against any aggressive act or delict by opposing force. But to strive for a more sophisticated system of international controls of armaments and the future prohibition against the use of nuclear weapons is a noble goal. An international agreement to this effect may be the first step, but "we cannot merely get rid of armaments and leave a vacuum. Something has to be put in their place. In the human story that 'something' has always been law." [197]

The present state of the law leaves open the possibility of nuclear *Kriegsraison* and the great devastation which may result, particularly now that Communist China possesses nuclear armaments. The dignity of the individual human being and of the civilized nations demands something better. A world organization with an effective means of inspection and enforcement is necessary to the supervision of any efforts towards arms control and to the modernization of the laws of war pertaining to weapons. The ultimate goal of our arms negotiation should be to achieve such an international means of control.

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[195] LISSITZYN, INTERNATIONAL LAW IN A DIVIDED WORLD 15 (1963).

[196] See STONE, *op. cit. supra* note 189, at 60–63; Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 39 (1960).

[197] Larson, *Arms Control through World Law*, ARMS CONTROL, DISARMAMENT, AND NATIONAL SECURITY 423 (Brennan ed. 1961).

TREASON AND AIDING THE ENEMY*

BY CAPTAIN JABEZ W. LOANE, IV**

I. INTRODUCTION

It has been said that no crime is greater;[1] it has been termed ". . . the most serious offense that may be committed against the United States;"[2] it has been classified as "the highest of all crimes."[3] Chief Justice Marshall once commented: "As there is no crime which can more excite and agitate the passions of men, no charge demands more from the tribunal before which it is made a deliberate and temporate inquiry."[4] All of these quotations refer to the same offense—the crime of treason.

It is a crime which, in many ways, is set apart from all others. It is the only crime specifically denounced by the Constitution of the United States.[5] It is the only federal crime upon which conviction must be predicated on the testimony of two eye-witnesses to the overt act of the offense.[6] It may only be committed in time of war or quasi war since it must be predicated either in levying war against the United States or in aiding an "enemy." It is the only crime which, if successfully committed, may cease to be a crime. As Sir John Harrington noted:

> Treason doth never prosper; what's the reason? Why, if it prosper, none dare call it treason.[7]

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[1] Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870).

[2] Stephen v. United States, 133 F.2d 87, 90 (6th Cir.), *cert. denied,* 318 U.S. 781 (1943).

[3] Charge to Grand Jury, 30 Fed. Cas. 1024, 1025 (No. 18269) (C.C.D. Mass. 1851).

[4] Marshall, C. J., in *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 125 (1807).

[5] U. S. CONST. art. III, § 3.

[6] *Ibid.* This assumes, of course, a plea other than guilty. However, it should be noted that some states require two witnesses to any crime punishable by death. See State v. Chin Lung, 106 Conn. 701, 139 A. 91 (1929).

[7] FAMILIAR QUOTATIONS 29 (12th ed. Morley Ed., 1951).

Throughout the ages the motivations for treason have been as numerous as the crimes themselves. Some have committed treason for money, some for pride, power, or prestige, some for more elusive ideological goals. In medieval England, where our exploration of the law begins, the treason cases generally dealt with machinations against the monarch or in plotting to alter the succession to the throne. In the days of Elizabeth I, the cases developed a religious flavor. In later years, the factors have included financial gain or political conviction. Today the suggestion has been advanced that the modern scientist, because of the universality of his technical knowledge, feels himself under a lesser duty to obey national loyalty.[5]

The annals of treason have tainted the rich and poor alike; the powerful as well as the common citizen. Through its history have passed such notable figures as Thomas Becket, Sir Walter Raleigh, Anne Boleyn, Sir Thomas More, Benedict Arnold, and Jefferson Davis; it has included such strange personalities as Guy Fawkes, John Brown, William Joyce and Ezra Pound. And it has encompassed the unnumbered hundreds who passed through the musty volumes of the State Trials[6] on their way to the "usual punishment" and oblivion.

It is not the purpose of this article to examine these individuals in depth or the details of the "offenses" which brought them to trial. Rather it is intended to explore the historical development of the civil offense of treason and the parallel military offense of aiding the enemy; to compare the two; and to consider the defenses to the respective offenses. For indeed, until comparatively recently, the mere fact of the indictment was tantamount to conviction and little other than outright denial was available to an unfortunate defendant.

It is hoped that this article will help to solve some of the many problems which may easily be conceived. When, for example, may an American sufficiently shake off his citizenship that he can aid America's enemy and avoid a treason charge? Is physical opposition to the enforcement of the laws of the United States by its officers treason? If so, were the students at the University of Mississippi guilty of treason by participating in the 1962 riots? Can a citizen "adhere" to an enemy without "aiding"

[5] WEST, THE NEW MEANING OF TREASON (1964).

[6] Howell, A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time (1816) [hereafter cited as How. St. Tr.]

him, and, conversely can he "aid" the enemy without "adherence"? Is a soldier who conducts propaganda lectures for the enemy in a POW camp guilty of giving them "aid"? If so would it make any difference if none of the other prisoners were affected? What is the status of the alien who resides in this country? Is this status affected if he is a citizen of an "enemy" country? The situations may be ingenuously contrived. The courts must wrestle for the answers.

II. THE HISTORY OF TREASON

A. *THE ENGLISH BACKGROUND*

There is no better introduction to the law of treason in the United States than a short review of the English law, since the present American law is direcly traceable to a statute published by Edward III in 1350.[10] During the early fourteenth century England was in a state of flux. These were days of constant civil war attended by one parliamentary crisis after another. When one faction gained power it frequently subjected the nobles and landowners of the other to the harassment of trial for treason based solely on political or quasi-political considerations. As no legal definition of treason existed, no one could foretell what action or word might be interpreted as committing the offense.[11] An additional troublesome area concerned the fact that lands and possessions of anyone convicted of treason were subject to attainder or forfeiture.[12]

There was, understandably, increasing agitation that the offense be more rigidly defined. To the barons and large landowners this argument was quite persuasive in view of the forfeiture provisions.[13] In addition, the definition was of importance in restraining the power of the crown to suppress any subject by arbitrary construction of the law.

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[10] Statute of Purveyors, 1350, 25 Edw. 3, Stat. 5, c. 2.

[11] For the proposition that it was still difficult to tell after the statute see Carpenters Case, 11 Henry VI (1434), digested in BUND, A SELECTION OF CASES FROM THE STATE TRIALS 29 (1st ed. 1879), where a convicted wife murderer was also adjudged a traitor in order that he might receive the greater punishment as an "example." The same fate befell the convicted murderer of the Duke of Glouchester, Proceedings Against John Hall, 1 How. St. Tr. 162 (1399).

[12] Clarke, *Forfeitures and Treason in 1388*, 14 ROYAL HIST. SOC. TRANS. 4th 65 (1931).

[13] Perhaps because of continuing pressure Edward III further modified the attainder provisions in 1360 to provide no forfeiture for persons not attainted in their lifetime. Statute of Westminster, 1360, 34 Edw. 3, c. 12.

Eventually the King yielded to the pressures. There resulted the famous statute of 25 Edward III which defined the offense as being committed:

> When a man doth compass or imagine the death of our lord the King, or of our Lady his Queen, or of their eldest son and heir; or if a man doth violate the King's companion, or the King's eldest daughter unmarried, or the wife [of] the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere, and thereof be provably attainted of open deed by the people in their condition.[14]

The statute goes on to define five other acts which may constitute treason (e.g., counterfeiting, assaulting certain of the King's officers), and concludes with what, for those days, must have been a novel proposition, that no other act would constitute treason unless made so by act of King and Parliament.[15] Shorn of the language concerning the monarch and those portions intended to purify the succession, the statute can be fairly said to state the American definition today.

That Edward III defined the offense was laudable. Yet many of the pre-statutory problems remained. One reason for this was that the courts possessed the power of interpreting the statute and could thus put whatever meaning they chose on such vague phrases as "compass or imagine" and "giving them aid or comfort."[16] In 1668, for example, members of a riotous group engaged in pulling down "bawdy houses" who failed to obey a Constable's order to desist were convicted of treason, the court holding that this constituted "levying war" against the King.[17] An additional problem was the personality of the monarch. Under the "strong" monarchs the offense tended to have much wider definition. During the reign of Henry VIII, the crime is considered to have had its widest interpretation. As a matter of fact, Henry VIII extended treason to cover such situations as wishing harm to the King or calling him a tyrant.[18] However, a reading of the cases in the days of Elizabeth I would tempt a contrary conclusion as

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[14] Statute of Purveyors, 1350, 25 Edw. 3, Stat. 5, c. 2.

[15] *Ibid.*

[16] For an extreme position see the Trial of Algernon Sidney, 9 How. St. Tr. 818 (1683). Sidney was convicted solely on evidence of possession of unpublished manuscripts. It is difficult to see how this "compassed the death" of the King.

[17] Trial of Peter Messenger, 6 How. St. Tr. 879 (1668).

[18] For a good discussion of treason during the reign of Henry VIII, see Thornily, *The Treason Legislation of Henry VIII*, 11 ROYAL HIST. SOC. TRANS. 3d 87 (1917).

to treason's golden age. It is reported that after the Northern Rebellion of 1569, Elizabeth had some 1,200 peasants executed as traitors, many on mere suspicion, and without the benefit of a trial.[19]

Thus, notwithstanding the apparent clarity of the Statute of Edward III, the law of treason continued to be drawn by a wavering hand. Justice was dependent upon the whim of the King or the policy of the judge. The rights of an accused seemed to have returned to the early days of anarchy. It was not until 1695 that the substantive law was backed up by procedural guarantees. This was the date of the enactment of the so-called "Treason Trials Act" which was to play an important part in the growth of the American law.[20] Considering the harsh justice meted out by the Tudor courts, this statute is remarkable in expanding the rights of an accused. First, it provided that the accused was entitled to a copy of the indictment five days prior to trial (although not the names of the witnesses).[21] Secondly, he was entitled to be represented by counsel.[22] Commoners were granted a jury trial consisting of 12 freeholders who were required to vote unanimously in order to convict.[23] In addition, a statute of limitations was established as three years.[24] But finally, and most important, it spelled out another rule which has come to be regarded as fundamental. In the absence of a confession a conviction could only be had by the testimony of at least two witnesses to the overt act of treason.[25] And it was carefully postulated that if two or more treasons were charged in the indictment it was necessary that there be two witnesses to each separate act.[26]

In concluding that the English law has carried over almost verbatim to the American it may be well to touch tangentially on the one phase which, fortunately, has not. That was the so-called "usual sentence" which was meted out to the convicted traitor.

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[19] BUND, *op. cit. supra* note 1, at 219.

[20] Statute of Westminister, 1695, 7 & 8 William 3, c. 3.

[21] *Ibid.*

[22] Prior to this act counsel was forbidden. The accused could merely represent himself and this was largely at the mercy of the attorney for the crown. For a notorious example see the prosecution by Edward Coke in the Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603).

[23] Also to acquit.

[24] Probably motivated by the case of the trial of Colonel Algernon Sidney, 9 How. St. Tr. 818 (1683), who complained that the evidence against him may have been 20 to 30 years old. He was executed.

[25] Statute of Westminister, 1795, 7 & 8 William 3, c. 3.

[26] *Ibid.*

An illustration of the hideous barbarism can be vividly demonstrated by the sentence given Thomas Howard, Duke of Norfolk, in 1571:

> Wherefore thou shalt be had from hence to the Tower of London, from thence thou shalt be drawn through the midst of the streets of London to Tyburn, the place of execution; there thou shalt be hanged, and being alive thou shalt be cut down quick, thy bowels shall be taken forth of thy body, and burnt before thy face, thy head shall be smitten off, thy body shall be divided into four parts or quarters; thy head and thy quarters to be set up where it shall please the queen's majesty to appear; and the Lord shall have mercy upon thou.[27]

For commoners the sentence often included the removal of privy parts prior to disemboweling.[28] The Duke was lucky. As with most nobles, his sentence was commuted to simple beheading. Others were not so fortunate. It is surprising that this sentence continued to be given in the Nineteenth Century,[29] and is reported to have been pronounced (although not carried out) as late as 1867.[30] By this time the minimum penalty in the United States was five years imprisonment and a $10,000 fine.

It does not appear that any consideration was ever given to adopting the "usual sentence" in the United States.

B. *THE CONSTITUTIONAL VIEW OF TREASON*

Prior to the Revolution there existed in the colonies a variety of statutes, decrees, and royal grants which recognized the existence of the crime of treason.[31] Reported law prior to the formation of the United States is rare. The only available extensive record of trial is the case of Colonel Nicholas Bayard who was tried in the province of New York for high treason in 1702.[32] Bayard was tried under a New York statute which provided that it was treason to disturb "by force of arms, or other ways, . . . the peace, good, and quiet of this their majesties' government, as it is now established . . . ." [33] Bayard's offense appears to have been that of circulating a petition deemed critical of the provincial government. Notwithstanding an opinion from the attorney gen-

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[27] Trial of Thomas Howard, Duke of Norfolk, 1 How. St. Tr. 957, 1031 (1571).

[28] See, *e.g.*, Trial of William Parry, 1 How. St. Tr. 1095, 1111 (1584).

[29] See, *e.g.*, Trial of E. M. Despard, 28 How. St. Tr. 346, 527 (1803).

[30] WEYL, TREASON 7 (1950).

[31] For a collection of the various Colonial laws see, Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944).

[32] Trial of Colonel Nicholas Bayard, 14 How. St. Tr. 471 (1702).

[33] *Id.* at 473.

eral that this did not amount to treason, Bayard was tried, convicted and given the "usual sentence." Fortunately, there was a change of Governors and the conviction was reversed. The point to be drawn from the case is that, notwithstanding the fact that the trial was predicated on a New York law bearing no significance to the Statute of Edward III, the legal arguments in the case all revolved on that English statute.[34] While the language may have been changed to fit the immediate needs of the emerging colonies, the image of treason continued in its English form.

During the Revolutionary War, treason underwent a change. The emerging states began to enact laws making it treason to adhere to George III or his forces. These varied in language but all followed the Statute of Edward III, either by similar language or by express reference.[35]

When the framers met to establish a Constitution a definition of treason was indeed important in their minds. But there must have been much soul searching. In the first place, the framers had just finished committing treason themselves, at least so far as the English were concerned. On the other hand, they had vivid recollections as to the danger of internal treason. The plot of Benedict Arnold and the activities of the loyalist Tories had almost wrecked the fledging nation they were striving to promote.

How should treason be defined—by the Constitution itself or the Congress? The Pinckney Report,[36] provided for it to be done by Congress.[37] So, apparently, did the New Jersey plan.[38] But thereafter, the framers had second thoughts. It may be surmised that they, like the barons of 1350, felt the offense of treason needed a rigid definition, free from the whims of a subsequent legislative body. The Committee on Detail rejected both proposed versions and substituted its own:

> Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have the power to declare the punishment of treason.

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[34] *Id.*

[35] Hurst, *supra* note 31, at 226, 256–57.

[36] Charles C. Pinckney, delegate from South Carolina.

[37] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION of 1787, at 136 (1937).

[38] 3 FARRAND, *op. cit. supra* note 37, at 614.

> No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted.[39]

The Legislature was to retain the power to fix the punishment but not to define the crime. Understandably the debates on the subject proved lively.[40] James Madison opened the issue by contending that the proposed definition did not go as far as the Statute of Edward III and that more latitude ought to be left to the states. Madison's thinking on the latter was doubtlessly influenced by the Virginia experience of Bacon's rebellion which was directly solely against the local government. The thrust of his contention involved a proposal to insert the phrase "giving them aid and comfort." Interestingly enough the delegates themselves split on the effect of such insertion. Some thought the words would extend the definition of treason; some, with whom the author concurs, found them restrictive; some were satisfied that they were mere words of explanation. In the end, the motion to insert the words carried.[41] A sharp dispute next developed as to whether the states would still retain the right to enact laws for treason against the state. Madison wanted them to retain this power. By a 6 to 5 vote, the delegates voted to limit the constitutional provision to treason "against the United States." [42] At Dr. Frankin's urging the language requiring two witnesses to the same overt act, one of the guarantees of the Treason Trials Act, was included by an 8 to 3 majority.[43] Final debate centered about whether to permit confession in open court alone to be sufficient for conviction. The delegates agreed that such would suffice, although some considered the language superfluous. It was inserted.

In conclusion, then, the delegates had hammered out what would thereafter constitute treason against the United States. The end product, which was included in the new constitution, provided:

> Treason against the United States, shall consist only in levying war against them or in adhering to their enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testi-

[39] 2 *id.* at 182.

[40] See *id.* at 345–50; MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 430–34 (Int'l ed., Hunte Scott ed. 1920).

[41] 2 FARRAND, *op. cit. supra* note 37, at 345–46.

[42] *Id.* at 349.

[43] *Id.* at 348.

mony of two Witnesses to the same overt Act, or on Confession in open Court."[44]

A reading of the provision discloses a final sentence as to which no discussion is found in the available records.

The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[45]

One problem alone remained for discussion—should the President have the power to pardon convicted traitors. Virginia supported an exception to the executive pardoning power of the President is cases of treason. Reasoned Mr. Randolph: "The President himself may be guilty." [46] But the counter-argument ran that pardon is a necessary power and that should the President himself commit the offense he could always be impeached.[47] On the vote only Virginia and Georgia supported the motion.[48]

C. *THE DEVELOPMENT OF THE FEDERAL LAW*

Having been given the authority Congress proceeded quickly to implement it. The Act of April 30, 1790, after carefully reciting the substantive guidelines specified by the Constitution, set the punishment for treason as death.[49] In establishing procedural safeguards, Congress included its up-to-date version of the Treason Trials Act and specifically permitted an accused qualified counsel and the authority to subpoena defense witnesses.[50] It also required that the accused be furnished a copy of the indictment and the names and addresses of prospective jurors and witnesses at least three days prior to trial.[51] The act entitled the defendant to challenge up to 35 jurors peremptorily, and, concerned about a failure to plead, provided that if the accused either stood mute, or refused to plead, the court would proceed to try the case as on a plea of "Not Guilty." [52]

It was under this statute that the courts had their first taste of "American Plan" treason. During the administration of Wash-

[44] U.S. CONST. art. III §, 3.
[45] It was apparently lifted from an earlier draft and inserted by the Committee of Style. See 2 FARRAND, *op. cit. supra* note 37, at 601.
[46] *Id.* at 626.
[47] The counterargument was made by Mr. Wilson of Pa., who had recently represented four defendants tried for treason in Pa. courts.
[48] 2 FARRAND, *op. cit. supra* note 37, at 627.
[49] Act of April 30, 1790, 1 Stat. 112.
[50] 1 Stat. 112, at 118.
[51] *Ibid.*
[52] 1 Stat. 112, at 119.

ington and Adams the new treason law was applied twice. One instance arose out of the "Whiskey Rebellion" of 1794, the second out of "Fries' Rebellion" in 1798. Both involved a judicial interpretation of what constituted "levying war." Shortly thereafter came the machinations of Aaron Burr and the subsequent trials of the ex-Vice President and others for treason. Burr's case involved the technical legal problems involved in proving the "overt act."

The states proceeded to enact their own laws of treason as they were permitted to do under the Constitution. But the applications of such statutes has been minimal. Only two cases of completed prosecutions by a state have been uncovered: one involving Thomas Dorr by Rhode Island, and one involving John Brown by Virginia.[53] The former was sentenced to prison for life, the latter was executed. John Brown and five of his band of raiders hold the distinction of being the only men executed for treason by either state or federal authorities in the United States.[54]

As the nation grew the number of prosecutions for treason continued to be few. True each war brought its share of recalcitrants. The War of 1812 had its Federalists and the Mexican War its Whigs.[55] But military opposition to the Government by its citizens did not occur again until 1857. This was the full scale disobedience by the Mormons in Utah that eventually led to military opposition to the Army units sent to restore order. With uncharacteristic fury, President Buchanan issued a proclamation to the Mormons:

> Fellow citizens of Utah! this is rebellion against the government to which you owe allegiance. It is levying war against the United States, and involves you in the guilt of treason. Persistence in it will bring you to condign punishment, to ruin, and to shame.[56]

The Mormons desisted, but the nation was on the verge of its greatest crisis, the result of which was to temper the punishment for treason and to create the similar, but less odious, offense of engaging or assisting in a rebellion. Were the Confederates traitors? The South contended that secession was a right and that the secessionists were no more traitors than the embattled

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[53] Hurst, *supra* note 31, at 807.

[54] WEYL, *op. cit. supra* note 30, at 238, 260.

[55] *Id.* at 163–86, 201–11.

[56] Proclamation of April 6, 1858, 11 Stat. (App) 796. See also WEYL, *op. cit. supra* note 30, 212–37.

patriots at Bunker Hill. The North held the view that they were insurgents and rebels, and thus could only be considered traitors. The courts resolved the problem in favor of the United States early in the war. Said the Supreme Court, "They [Confederates] . . . are none the less enemies because they are traitors." [57] A District Judge elaborated:

> This is a usurpation of the authority of the federal government. It is high treason by levying war. . . . The fact that any or all engaged in the commission of these outrageous acts under the pretended authority of the legislature, or a convention of the people . . . does not change or affect the criminal character of the act. Neither South Carolina nor any other state can authorize or legally protect citizens . . . in waging war against their government, any more than the Queen of Great Britain or the emperor of France.[58]

But holding that the Confederates were traitors created additional problems. The mandatory sentence on conviction was death under the 1790 statute. For the occasional treason this was deemed appropriate. But now, according to the courts, there were half a million traitors under arms and many more giving them aid and assistance. It was easy to foresee a bloodbath of enormous proportions if the law was applied. Congress foresaw that the Civil War made the mandatory death penalty obsolete. Accordingly, in 1862, the law was amended to provide that henceforth the convicted traitor "shall suffer death . . . or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars." [59] At the same time Congress also established the offense of engaging or assisting in rebellion, and authorized the seizure and sale of enemy property.[60] For engaging in or aiding rebellion the maximum punishment was established at ten years imprisonment or a fine of ten thousand dollars, or both.[61]

The effect of this legislation was threefold. First, it preserved the Act of 1790 prescribing the penalty of death in force for the punishment of offenses committed prior to 17 July 1862. Secondly, it punished treason committed after that date with death or fine and imprisonment unless the treason consisted of

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[57] Prize Cases, 67 U.S. (2 Black) 635, 674 (1862).

[58] Charge to Grand Jury, 30 Fed. Cas. 1032, 1033 (No. 18270) (C.C.S.D. N.Y. 1861). See also United States v. Greathouse, 26 Fed. Cas. 18 (No. 15254) (C.C.N.D. Cal. 1863); United States v. Greiner, 26 Fed. Cas. 36 (No. 15262) (E.D. Pa. 1861).

[59] Act of July 17, 1862, 12 Stat. 589.

[60] 12 Stat. 589, at 590–91.

[61] 12 Stat. 589, at 591.

engaging or assisting in rebellion. In the latter case it abandoned the death penalty entirely. The offense of engaging in rebellion, designed exclusively to cover the Civil War, remains in force today.[62]

The transition of the treason act of 1790, with the graft of the 1862 statute, into the current law of treason is a problem of only minor semantics. It is sufficient for comparative purposes that the current code provision be quoted without further comment:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.[63]

III. TWO TYPES OF TREASON

A. *TREASON BY LEVYING WAR*

While the vast majority of the early English treason trials were concerned with the offense of compassing the King's death, some few were addressed to the problem of treason by levying war. Where the former, because of the wide construction to which it was subject, gave the courts little trouble, the latter forced the development of at least rudimentary legal concepts which could be applied with some consistency. The construction of compassing the King's demise still played a part, but an increasingly minor one. Thus while conspiring to levy, without more, was held not to constitute treason by levying war, it was still held to be compassing the King's death.[64]

Participating in a rebellion aimed at the overthrow of the government or enlisting in a foreign army intending the same result seems clearly violative of this offense. Less clear is the area of riot or disorderly conduct not amounting to full scale insurgency. The case involving the tearing down of "bawdy houses" has already been cited for its unusual interpretation of "levying war." [65] The record of trial discloses that a mob of some 500, semi-organized and carrying indiscriminate weapons, not only dismantled the offending houses, but beat the constables sent to

[62] See 18 U.S.C. § 2383 (1958).
[63] 18 U.S.C. § 2381 (1958).
[64] Trials of Twenty Nine Regicides, 5 How. St. Tr. 947, 984 (1660).
[65] See Trial of Peter Messenger, 6 How. St. Tr. 879 (1668).

disperse them and shouted "Down with the red coats!" The Chief Justice saw no humor when he charged the jury:

> By levying of war is not only meant, when a body is gathered together, as an army is, but if a company of people will go about any public reformation, this is High Treason, if it be to pull down inclosures, for they take upon them the regal authority; the way is worse than the thing.[66]

Sir Matthew Hale dissented. He viewed the situation as nothing more serious than disorderly conduct.[67] But the English courts quickly backed off from this broad construction. Thereafter, the prosecutions for treason by levying war, arising out of domestic disturbances, were limited to such situations as where mobs acted with force to prevent the execution of a law,[68] or rioted to force the legislature to repeal an unpopular statute.[69]

The United States faced a similar situation in its history. In 1794, the "Whiskey Rebellion" flared in the western counties of Pennsylvania in resistance to a tax on spirits.[70] Federal officers were first threatened, the assaulted. In July of 1794 a mob attacked the home of the chief excise officer which was defended by a number of men including 12 regulars from Fort Pitt. After a day long siege the garrison surrendered and the house was burned. Subsequently, the mob, in a show of force, marched through Pittsburgh, although no further violence developed with the garrison. The arrival of troops from Philadelphia put an end to the uprising. A number of the participants were apprehended and charged with treason. Only two persons, however, were actually brought to trial.[71] In the *Mitchell* case the defense contended that the attack on the excise officer's home was an attack on him as an individual and not in his capacity as an officer of the United States, and, further that there was no attempt to resist the law on a nationwide scale. The argument was simply that this was a riot, but not treason. Justice Paterson charged the jury:

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[66] *Id.* at 884.

[67] *Id.* at 911. In a time when acquittals in treason cases were notably few, six of the 14 defendants were acquitted outright and four convictions were later reversed.

[68] See Trial of Sir John Freind, 13 How St. Tr. 1 (1696).

[69] See Trial of George Gordon, 21 How. St. Tr. 485 (1781).

[70] For a full account of the incident see United States v. Insurgents, 27 Fed. Cas. 499 (No. 15443) (C.C.D. Pa. 1795).

[71] See United States v. Vigol, 28 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); United States v. Mitchell, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795).

> If [the object of the insurrection] was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offense, in legal estimation, is high treason; it is a usurpation of the authority of government; it is high treason by levying of war.[73]

Both defendants were promptly convicted and sentenced to death. Both were later pardoned.[78]

If the actions of the "Whiskey Rebels" clearly evidence a determined effort to oppose an act of Congress, those of the "Northhampton Insurgents" do not. In 1799, John Fries led a party of somewhat over 100 men to free 20 farmers being held by United States marshals for conspiracy to violate the Land Tax Act. The mob arrived at a tavern where the prisoners were being held, threatened the marshals, and secured their release. The group then promptly disbanded. No one was killed or wounded; no one was fired on. John Fries was tried for treason.[74] Charged in substantially the same language used in the *Mitchell* case, two juries returned verdicts of guilty. [75] Even in a country where the specter of revolution was still a real fear, it is difficult to conceive how Fries could have been convicted of levying war. Measured against the facts, Fries' "insurrection" appears fragmentary, momentary, and of little significance. If this was treason then almost any riot or disorder involving opposition to a law of the United States can be construed as treason. Certainly the 1962 Oxford, Mississippi, riots constituted activity far more serious than anything undertaken by Fries and his men. Weyl suggests that the trial was purely political and that Fries was a victim of a Federalist plot.[76] In any event reason prevailed and Fries was eventually pardoned.[77]

Broadened by the *Fries* construction, treason by levying war was due for an even wider interpretation. By 1806, the schemes of ex-Vice President Aaron Burr began to come to light and in 1807 Burr himself was brought to trial for treason by levying war. The alleged overt acts had occurred at a place called Blennerhasset's Island in western Virginia. Yet both the prosecution and defense agreed that Burr was nowhere near the island at the time. Chief Justice Marshall, concluding that Burr's presence at

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[73] United States v. Mitchell, *supra* note 71, at 1281.

[74] WEYL, *op. cit. supra* note 30, at 85.

[75] Case of Fries, 9 Fed. Cas. 826 (No. 5126) (C.C.D. Pa. 1799); Case of Fries, 9 Fed. Cas. 924 (No. 5127) (C.C.D. Pa. 1800).

[76] *Ibid.*

[77] WEYL, *op. cit. supra* note 30, at 107–09.

[78] *Id.* at 109.

that place was unnecessary, quoted with approval from the *Bollman* case:[78]

> It is not the intention of the court to say that no individual can be guilty of [treason] who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.[79]

Burr was eventually acquitted. With his trial, the heyday of treason by levying war passed. Stretched to cover Fries and Burr the wide interpretation as to what constituted 'levying war" began to contract. Even as Burr sat in a Richmond courtroom, the Circuit Court in Vermont was drawing a sharp distinction between resistance to the law for a private purpose and resistance of a general character.[80] Thus the recovery by force of private property seized by a revenue agent, though accomplished by a force of about 60 men and accompanied by desultory fire between the mob and militiamen was held to be of a private character and not to constitute levying war.[81] The court was also concerned about the *de minimis* aspects of this affair. "In what can we discover the treasonable mind?" asked Judge Livingston. "Can it be collected from the employment of ten or twelve muskets?" [82] Mentioning the *Fries* case the court proceeded to emasculate its holding.

The vitality of the *Mitchell* case continued until the 1851 decision in *United States v. Hanway.*[83] The facts of that case leave it clear that Hanway aided one of several armed bands advocating forceable resistance to the fugitive slave law. In the immediate violence out of which the case arose a slaveowner was killed, his son wounded, and police officers attacked and beaten. Charging the jury, Justice Grier professed to see a change in the legal definition of "levying war." The "better opinion there at present" he charged, "seems to be that the term levying war should be confined to insurrection and rebellions for the purpose of over-

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[78] *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).
[79] United States v. Burr, 25 Fed. Cas. 55, 161 (No. 14693) (C.C.D. Va. 1807).
[80] See United States v. Hoxie, 26 Fed. Cas. 397 (No. 15407) (C.C.D. Vt. 1808).
[81] *Ibid.*
[82] *Id.* at 399–400.
[83] See United States v. Hanway, 26 Fed. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851).

throwing the [G]overnment by force and arms. Many of the cases of constructive treason quoted [by the English writers], would perhaps now be treated merely as aggravated felonies." [84] With this encouragement the jury promptly acquitted the accused.

Outright rebellion thus continued to come within the area defined by the term "levying war." The Civil War appeared to some to be the opportunity to utilize this term to prosecute the Conferates for treason. As a matter of record, however, only a few indictments arose out of that war, and these produced lenient results. The sentences of Ridgely Greathouse and his compatriots, for example, convicted of levying war by attempting to outfit a privateer for Confederate service were terminated upon their taking the oath of allegiance to the United States.[85] The indictments against such contrasting individuals as Charles Greiner,[86] a member of a Georgia artillery company which participated in the seizure of Fort Pulaski, and Jefferson Davis,[87] President of the Confederate States, were never brought to trial.

Since that time, a number of incidents have occurred which might have been considered a basis for charges of treason by levying war. The activity of the Klan during Reconstruction, the Haymarket Riots of 1886, and the march of the Bonus Army in 1932 were all serious enough to require the dispatch of troops to maintain law and order. But the definition which limits treason by levying war to actual rebellion against the Government seems to have prevailed. It is significant that since the *Davis* case not one attempt has been made to revive the offense.

B. *TREASON BY ADHERING TO THE ENEMY GIVING HIM AID AND COMFORT*

Unlike the offense of treason by levying war which passed from the scene almost one-hundred years ago, the offense of treason by adhering to the enemy has achieved a considerably longer and more useful existence. This phase of treason encompasses two elements: adhering to the enemy and giving him aid and comfort. With these elements the problem of intent is inexorably intertwined. A citizen may intellectually, emotionally

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[84] *Id.* at 127.

[85] United States v. Greathouse, 26 Fed. Cas. 18 (No. 15524) (C.C.N.D. Cal. 1863).

[86] See United States v. Greiner, 26 Fed. Cas. 36 (No. 15262) (D.C.E.D. Pa. 1861).

[87] See Case of Davis, 7 Fed. Cas. 63 (No. 3621a) (C.C.D. Va. 1867–1871).

and spiritually sympathize with the enemy. He may harbor disloyal thoughts. But so long as he fails to engage in some sort of conduct designed to give the enemy aid and comfort, the crime of treason is not complete.[88] Conversely a citizen may do an act which gives the enemy aid and comfort, but if there is no adherence to the enemy's cause there is no treason.[89] By doing the act he may appear outwardly a traitor but he is not legally a traitor.[90] Nor does it appear necessary that the enemy wants or needs the proffered assistance. The mere fact that it is offered or rendered with the requisite intent will make the crime complete.

As in other aspects of the law, we must go back to England for a starting point. Interwoven throughout the English cases is the conception that adhering to the enemy necessarily compassed the death of the king. For that reason, indictments for aiding the enemy, in and of itself, are scarce. But at least as early as 1691 it was recognized as a separate offense.[91] At the trial of Sir Richard Grahme for attempting to smuggle out of England a number of documents concerning the status of military defenses, Lord Chief Justice Holt, after commenting on the indictment for compassing the King's death, observed: "There is another treason in the indictment mentioned and that is for adhering to, and abetting the king's enemies, there being open war declared between the king and queen and the French king.[92]

Defining the rationale of the offense the Solicitor General of England argued in 1781:

> How can any state exist, how contend with an enemy, if it is to suffer within its own bosom men employed to give intelligence of all its operations to those with whom it is at war? One man, so employed, may often times do much more mischief to the country of whose operations he gives intelligence than an army of 50,000 men.[93]

The English courts also established the proposition that the offense was complete once the overt act occurred and it was no defense that the enemy was not actually aided.[94] The conviction of Viscount Preston was sustained notwithstanding that his attempt to smuggle defense plans out of England was terminated

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[88] Cramer v. United States, 325 U.S. 1 (1944); United States v. Werner, 247 Fed. 708 (E.D. Pa. 1918), *aff'd* 251 U.S. 466 (1919).
[89] See Kawakita v. United States, 343 U.S. 717 (1952).
[90] United States v. Werner, 247 Fed. 708 (E.D. Pa. 1918), *aff'd* 251 U.S. 466 (1919).
[91] See Trial of Sir Richard Grahme, 12 How. St. Tr. 645 (1691).
[92] *Id.* at 730.
[93] Trial of F. H. DeLa Motte, 21 How. St. Tr. 687, 798 (1781).
[94] See Trial of Sir Richard Grahme, 12 How. St. Tr. 645 (1691).

by his apprehension.[95] Nor did it avail those accused of treason by attempting to mail secrets abroad in time of war to contend that the letters were intercepted before they left the country.[96] The celebrated trial of Captain Thomas Vaughan resulted in the conviction for aiding the enemy of a seaman who went "cruising" under a French commission where there was no evidence that he made any hostile attempt upon an English vessel.[97]

All of these cases have been cited by American courts. Perhaps the leading case in the United States involves the efforts of Max Haupt to acquire a job for his son, a Nazi secret agent, at a factory engaged in producing lenses for the top-secret Norden bombsight. The efforts consisted solely of visiting the homes of a plant superintendent and a shop foreman and inquiring into the means of securing such employment. There was no evidence that a job application was ever submitted or that any further step was taken in that direction.[98] Affirming the conviction, Mr. Justice Jackson commented succinctly:

> His acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but the defendant did his best to make it succeed. [That] His overt acts were proved in compliance with the hard test of the Constitution, are hardly denied and the proof leaves no reasonable doubt of the guilt.[99]

While not necessary to the result, this principle was expressly adhered to in the case of radio propagandist, Douglas Chandler.[100] The evidence established that Chandler had prepared a number of broadcasts for the use of the German Radio Broadcasting Company. Chandler contended there was no evidence any of the recordings were ever used, or if used, that anyone in the United States ever heard them. Dismissing this argument the court concluded:

> It does not even matter whether the particular recordings . . . were actually broadcast. Chandler's service was complete with the making of the recordings, which became available to the enemy to use as it saw fit. . . . His act of making the recording for the enemy is like giving to an enemy agent a paper containing military information, which would

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[95] *Ibid.*

[96] Trial of David Tyrie, 21 How. St. Tr. 815 (1782); Trial of Florence Hensey, 19 How. St. Tr. 1342 (1758).

[97] Trial of Captain Thomas Vaughan, 13 How. St. Tr. 485 (1696).

[98] For a detailed discussion of the evidence in this regard, see United States v. Haupt, 152 F.2d 771 (7th Cir. 1945) *aff'd*, 330 U.S. 631 (1947).

[99] Haupt v. United States, 330 U.S. 631, 644 (1947).

[100] Chandler v. United States, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918 (1948).

> be a completed act of aid and comfort, though the enemy agent later lost the paper and thus never put the information to any effective use.[101]

Who is the "enemy" for the purpose of receiving this aid and adherence? In the English cases, oriented as usual with monarchical concepts, it was the foreign sovereign himself. The early American cases immediately following the Revolution departed from this concept. One early Pennsylvania case charged the defendant with intending ". . . to raise again and restore the Government and tyranny of the King of Great Britain. . . ." [102] However, reference to the king, as such, played an increasingly lesser role and prosecutions were based merely on aid to his soldiers.[103]

An opportunity to fully explore the definition of an "enemy" did not arise until the Civil War. The problem quickly arose as to whether the Confederates were "enemies" for the purpose of the treason law. The problem was resolved in the negative by Mr. Justice Field in the *Greathouse* case.[104] He charged the jury:

> The term "enemies" as used in the second clause, [of the Constitutional provision] according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.[105]

The practical result was that all future treason prosecutions against the Confederates had to be charged "levying war." [106] It is interesting to note, and practical politics appears to have dictated, that the definition of an "enemy" for the purpose of treason and that for the purpose of confiscating the property of an "enemy" received diametrically opposite treatment. In the latter situation the courts had no problem holding Confederate soldiers and citizens to be enemies and their property subject to forfeit.[107]

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[101] *Id.* at 941.

[102] Respublica v. Carlisle, 1 U.S. (1 Dall.) 35 (1778).

[103] Respublica v. Malin, 1 U.S. (1 Dall.) 33 (1778); *accord*, United States v. Hodges, 26 Fed. Cas. 332 (No. 15374) (C.C.D. Md. 1815).

[104] United States v. Greathouse, 26 Fed. Cas. 18 (No. 15254) (C.C.N.D. Cal. 1863).

[105] *Id.* at 22.

[106] *But cf.* Prize Cases, 67 U.S. (2 Black) 635 (1862) which seems to accord the Confederacy belligerency status although for a different purpose (*i.e.*, violating the blockade).

[107] The Venice, 69 U.S. (2 Wall.) 258 (1864); Mrs. Alexander's Cotton, 69 U.S. (2 Wall.) 404 (1864).

The offense of treason by aiding the enemy can only be committed during time of war.[108] But it does not necessarily follow that the war must be attired with all the customary trimmings, such as a formal declaration. It is true as a matter of fact that all previous treason prosecutions in this area have arisen out of incidents which occurred during time of a formally declared conflict. For this reason, it is perhaps unfortunate that no treason prosecution followed the Korean conflict by which the standards of that "war" could be tested. Some support for the proposition that less than a "formal" war will suffice may be found in an Attorney General's opinion in 1798, during the maritime dispute with France, that the treason law applied to a French citizen who was in the United States buying supplies for French bases in the West Indies.[109] Again, in 1871, the Attorney General expressed the opinion that persons apprehended running guns and ammunition to hostile indians were subject to military court-martial for "relieving the enemy."[110]

Today a practical question may be raised concerning the status of the Viet Cong. Are they an "enemy" as that word is used in the treason statute? This question has recently received collateral consideration with the decision to issue certain awards for valor in combat in South Vietnam. Fearing that the term "enemy" might be legally inapplicable,[111] Congress amended the statutes governing the award of the Medal of Honor, Distinguished Service Cross and Silver Star to include situations where American servicemen were in conflict with an opposing foreign force or serving with a friendly foreign force engaged in an armed conflict.[112] Yet when it awarded the Medal of Honor to Captain Roger Donlon, the Department of the Army had no hesitancy in referring to the Viet Cong as an "enemy" on five occasions.[113]

While the cited authorities do not fully resolve the question, they may be taken to indicate that the civil offense of treason and its military counterpart of aiding the enemy could well be committed in an escalated "cold war" situation.

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[108] United States v. Fricke, 259 Fed. 673 (S.D.N.Y. 1919).

[109] See 1 OPS. ATT'Y GEN. 49 (1798).

[110] See 14 OPS. ATT'Y GEN. 470 (1871).

[111] 1963 U.S.C. CONG. & AD. NEWS 776.

[112] See 10 U.S.C. §§ 3741, 3742, 3746 (Supp. V, 1964).

[113] See Gen. Orders No. 41, Hq Dept. of Army (17 Dec 1964).

IV. THE JURISDICTIONAL ASPECTS OF TREASON

A. *OVERSEAS TREASON BY AMERICAN NATIONALS*

No one would suggest that the prosecution of a native or naturalized American citizen for treason committed within the borders of the United States would raise a jurisdictional problem. But treason committed overseas is a different matter. The law punishes as traitors those who adhere to the enemies of the United States within the country or elsewhere.[114] Where the law is applied to American citizens, it is the "or elsewhere" that raises the problem. It is a problem of recent origin. For once we are unable to glean from the State Trials any case dealing with overseas treason,[115] and history has shown it to be basically an American problem. True, England produced Casement,[116] but the evidence in the *Joyce* case strongly points to the fact that even "Lord Haw Haw" was an American national.[117]

At the outset, it may be well to consider where the concept of overseas treason originates. Normally the answer would be found in the Constitution. It has been noted that treason is the only crime defined in that document. But a re-reading of Article 3, section 3, fails to disclose the words "or elsewhere." The convention that framed the Constitution certainly considered them. Its members were familiar with the statute of Edward III.[118] Yet the words do not appear in the draft submitted by the Committee of Detail,[119] and a proposed substitute which would have included them was defeated by an 8 to 2 vote.[120] The words first appear in the statute by which Congress implemented the authority given it to declare the punishment for treason.[121]

It follows that one objection to the inclosure of the words "or elsewhere" in this statute is that the power of Congress is limited

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[114] 18 U.S.C. § 2381 (1958).

[115] Unless you consider the *Vaughan* case involving treason on the high seas. Case of Captain Thomas Vaughan, 13 How. St. Tr. 485 (1696).

[116] An Irish revolutionary who attempted to carve out an independent Ireland with German help during World War I. On his return from Germany he was captured, tried for treason, and executed. See Rex. v. Casement, 115 L.T.R. (N.S.) 267 (1917).

[117] Rex v. Joyce, 173 L.T.R. (N.S.) 377 (1945), *aff'd sub nom.* Joyce v. Director of Public Prosecutions, 174 L.T.R. (N.S.) 206 (1946). See also WEST, THE NEW MEANING OF TREASON (1964).

[118] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 345 (1937).

[119] *Id.* at 182

[120] *Id.* at 347–48.

[121] Act of April 30, 1790, 1 Stat. 112.

to providing the punishment for treason and does not extend to declaring where the offense may be committed. A second argument is that the words "or elsewhere" qualify only the phrase "giving aid and comfort" and do not apply to the phrase "adheres to." If this were true and both the adherence and the aid and comfort to the enemy took place outside the United States the statute would not be violated.

Both of these contentions were unsuccessfully asserted in the *Chandler* case.[122] With regard to the former the court replied that had the framers intended to restrict the crime to the United States, they could easily have done so.[123] Furthermore, the restrictive words "within their territories" had been deliberately rejected by the Committee of the Whole.[124] The latter contention too was rejected, the court concluding that such theory ". . . violates the plain language of the statute." [125]

If this proposition can be considered as firmly settled, what recourse is open to the American overseas who chooses to support his country's enemy? The Nationality Act of 1940 opened the door: voluntary expatriation.[126] Prior to that statute wartime expatriation was prohibited,[127] but this restriction was eliminated in the new legislation. Among the recognized means by which nationality could be lost were (a) obtaining naturalization in a foreign state, (b) taking the oath or making a formal declaration of allegiance to a foreign state, or (c) making a formal renunciation of United States citizenship before a diplomatic or consular official of the United States in a foreign state.[128]

How many Americans took advantage of the Nationality Act to transfer their allegiance to a wartime enemy and thus avoided post-ward prosecution for treason is unknown. A Federal Court has used the phrase "many persons." [129] One writer has gone so

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[122] United States v. Chandler, 72 F.Supp. 230 (D. Mass. 1947), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

[123] 171 F.2d at 929.

[124] 2 FARRAND, *op. cit. supra* note 118, at 347–48.

[125] United States v. Chandler, 72 F.Supp. 230, 233 (D. Mass. 1947), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); *accord*, Gillars v. United States, 182 F.2d 962 (D.C. Cir 1950), Best v. United States, 184 F.2d 131 (1st Cir.), *cert. denied*, 340 U.S. 939 (1950).

[126] Nationality Act of 1940, § 401, 54 Stat. 1137.

[127] Act of March 2, 1907, 34 Stat. 1228.

[128] Nationality Act of 1940, § 401, 54 Stat. 1137.

[129] See D'Aquino v. United States, 192 F.2d 338, 348 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).

far as to assert that "several thousand" changed allegiance to Japan alone.[130] At least three were unsuccessful.

On December 8, 1941, approximately simultaneously with the declaration of war, Mildred Gillars, better known as "Axis Sally" executed a paper which contained the words "I swear my allegiance to Germany." The paper was then given to her superior. On the basis of this document, which was never produced, she urged the jury be instructed that if they found this to be a sufficient renunciation of citizenship, they must acquit. The court refused to give the instruction and the conviction was affirmed on appeal.[131] A loose interpretation of the statute might have sustained appellant's contention, but the court chose to require strict compliance. The court noted there was no evidence that the paper had been sworn to before anyone or that there was any connection between it and any procedure having to do with obtaining Reich citizenship.[132] Nor did it find any substance to appellants' contention that her citizenship had ceased when her United States passport, submitted for renewal in 1941, had been retained by the consular agent. A passport is some evidence of citizenship, it is indeed useful in travel, but, concluded the court, its absence does not deprive an American of his citizenship.[133]

A second argument advanced in favor of successful expatriation under the Nationality Act of 1940 was advanced by Iva D'Aquino, the "Tokyo Rose" of the Pacific theater. She noted that under the expatriation provisions of the act a person was permitted to shed his allegiance to the United States and by so doing could engage in adherence, aid and comfort to the enemy with impunity.[134] She argued that to try her for treason for acts which the law permitted others to do was unreasonable and arbitrary and constituted a denial of due process under the Fifth Amendment.[135] But the court found no sound basis for such contention and concluded it was no more than a mere ". . . play on words." [136] The Constitutional argument got no further than the effort to give the statute a broad construction.

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[130] See Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, 43 AM. J. INT'L L. 441, 451 (1949).
[131] Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).
[132] *Id.* at 983.
[133] *Id.* at 981.
[134] See D'Aquino v. United States, 192 F.2d 338, 348 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).
[135] See *ibid.*
[136] See *id.* at 349.

One last problem area in the field of overseas treason concerns the status of the dual citizen. Such an individual was Toyoma Kawakita.[137] Born in California of Japanese parents who were citizens of Japan, he was thus a citizen of the United States by birth, and, by Japanese law, a citizen of Japan. In 1939, he visited Japan on an American passport to attend college. When the war broke out he chose to stay in Japan and finish his education. During this period he was registered by the Japanese police as an alien. Subsequently, he attempted to renounce his American citizenship. To do this he had his name entered on a family census register. He then obtained employment with a metal company where he was assigned as translator in connection with the use of American prisoners of war as laborers. Not content with a passive role he continually humiliated the captives and frequently subjected them to brutal treatment. In 1946, he re-applied for his American passport and returned to the United States. A chance recognition by a former prisoner caused his arrest and subsequent trial for treason. On appeal Kawakita stressed his Japanese nationality. In addition to the entry of his name in the family register, he argued for the broader proposition that an individual possessing dual nationality who resides in one of the countries of which he is a national cannot be guilty of treason against the other country.[138] The assertion appears to be based on the "right" of a dual national to make an election, in time of war, to which of his sovereigns he will adhere. The court promptly rejected his contention. Concerning the contention that Kawakita, by his acts, had renounced his American citizenship the court answered:

> That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor. An American citizen owes allegiance to the United States wherever he may reside.[139]

As regards the family register, the court dismissed this contention on the theory that the registration was merely as assertion of some of the rights Kawakita already possessed by reason of his dual nationality.

The *Kawakita* holding is far from decisive. It is a minority

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[137] See Kawakita v. United States, 96 F.Supp. 824 (S.D. Cal. 1950), *aff'd*, 190 F.2d 506 (9th Cir.), *aff'd*, 343 U.S. 717 (1951).

[138] See Kawakita v. United States, 343 U.S. 717, 732 (1951).

[139] *Id.* at 735.

opinion. Two justices took no part in the decision and three dissented.[140] The dissent is based on the conclusion that by his acts Kawakita had expatriated himself as well as he could have.[141] Blakemore appears to make even a more telling point. He discusses the unusual Japanese law of "recovery" of nationality and concludes that any person who so "recovers" under Japanese law has effectively expatriated himself under the Nationality Act of 1940.[142] Since "recovery" under Japanese law may be accomplished through inclusion in the Family Register Record, Kawakita can thus be said to have expatriated himself prior to the time of his treasonous acts.

It may be concluded, then, that an American may avoid his natural loyalty to his country through an act of voluntary expatriation. But the mere fact that such person purports to verbally or informally renounce his citizenship or purports to pledge his allegiance to any enemy state, without complying with its formal requirements, will not excuse the crime of treason. Before allowing a citizen to adhere to our enemies the courts will demand a strict compliance with the statutes dealing with expatriation even for a person with a dual nationality status. The "highest of all crimes" cannot be lightly evaded.

B. *TREASON BY RESIDENT ALIENS*

If treason by an American citizen must be either black or white, then treason by a resident alien can only be described as gray. The allegiance owed by a citizen is fixed and certain; that owed by an alien imperfect and temporary. If the nationality of the alien is that of an enemy belligerent the problem is increased. The alien may feel no love for the country in which he resides; he is more likely than its native son to wish it ill, but if he commits one overt act designed to accomplish its downfall, the noose looms just as high.

The underlying rationale behind punishing the alien for treason against the host country is not new. It was firmly established in England. It was clearly expressed in 1781 by Mr. Justice Butler, in passing the "usual" sentence upon one DeLa Motte, a Frenchman living in England who had attempted to send military secrets to aid his homeland, as follows:

> During your residence in this country, as well as during the course of

[140] See *id.* at 745.
[141] See *id.* at 746.
[142] See Blakemore, *supra* note 130, at 449.

> your trial, you have received the protection of the laws of the land. As such you owed a duty to those laws, and an allegiance to the king whose laws they are; but you have thought it fit to abuse that protection you have received.[143]

The adoption of this principle in American law appears clear although the actual trial of an alien for treason is unknown in this country. It has already been observed that the Attorney General in an early opinion, concluded that a French citizen in this country was subject to trial for treason.[144]

Further support for the general principle may be found in *The Pizzaro*.[145] The question concerned whether or not an English citizen could be the "subject" of the King of Spain, for treaty purposes, where his ship had been seized by an American privateer during the War of 1812. Holding that he could, Justice Story, referring to the location of that citizen's actual residence, concluded:

> . . . a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporarily indeed, . . . but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace.[146]

With the outbreak of the Civil War zealous judges, foreseeing a rash of impending treason trials, charged their grand juries in

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[143] Trial of DeLa Motte, 21 How. St. Tr. 687, 814–815 (1781).

[144] See 1 OPS. ATTY. GEN. 49 (1798). It can be argued that his holding is inconsistent with the decision in United States v. Villato, 2 U.S. (2 Dall.) 370 (1797), a trial for treason of an alleged American sailor who joined the crew of a French vessel which subsequently captured an American ship. At the trial the accused successfully contended that he was not an American citizen but a Spaniard. Arguing on the merits the U.S. Attorney conceded "that if the prisoner is not a nationalized citizen of the United States, he must be discharged." United States v. Villato, *supra* at 371. In the subsequent holding both judges concurred that since the accused was found not to be a citizen of the United States he must "consequently be released from the charge of high treason." United States v. Villato, *supra* at 373. Given broad interpretation these words can be read to mean that no foreigner can be tried for treason. But as the acts were committed on the high seas it is more reasonable to conclude that the place of the acts must have been considered by counsel and the court, and not as suggesting that a resident alien could not be found guilty. It has never been suggested that a foreigner who aids our enemy overseas can be brought himself within our treason law. It is significant that no subsequent effort has been made to give this language a wider construction.

[145] 15 U.S. (2 Wheat.) 227 (1817).

[146] *Id.* at 246. It is unfortunate that Justice Story used the words "domiciled" and "resides" interchangeably since the former implies an intent to remain.

detail with the law of the offense.[147] Only one of these specifically included instructions concerning resident aliens but it specifically adhered to the English rule, charging that any such sojourner, enjoying the protection of the United States, owes a local allegiance, and may be guilty of treason by cooperating with rebels or foreign enemies.[148]

Only one case arising out of that conflict seems to have considered the problem of treason by resident aliens,[149] but that case is significant in its adherence to the English rule. The suit involves an effort to recover damages for goods owned by British citizens which were seized in Alabama by United States forces. The court discusses the loyalty owed by a resident alien in this language:

> The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. . . . [I]t is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native born subject might be. . . .[150]

Thus, another of the English rules has been assimilated into the American law of treason. As with many others it can at times be considered harsh. Certainly the *Carlisle* case can be read for the proposition that Carlisle could have been convicted of treason as a resident alien. The rationale behind such prosecution would have been that the alien was enjoying the protection of the laws of the United States.Yet Carlisle was deep in Alabama where the laws of the United States protected him about as well as they could have in Africa. Consider also the case of the alien whose homeland has become the "enemy." Does his duty to his country extend to working for its success in the state where he resides? If he does so he subjects himself to a treason prosecution by that state. But the rule is harsh where tested by the needs of the individual. Tested by the needs of the state it becomes necessary in the interest of national self-protection.

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[147] See, *e.g.*, Charge to Grand Jury, 30 Fed. Cas. 1032 (No. 18270) (C.C. S.D. N.Y 1861); Charge to Grand Jury, 30 Fed. Cas. 1036 (No. 18272) (C.C.S.D. Ohio 1861).

[148] Charge to Grand Jury, 30 Fed. Cas. 1039 (No. 18273) (D. Mass. 1861); *cf.* Charge to Grand Jury, 30 Fed. Cas. 1047 (No. 18276) (C.C. E.D. Pa. 1851).

[149] See Carlisle v. United States, 83 U.S. (16 Wall.) 147 (1872).

[150] *Id.* at 154–55. Note again the words "domiciled" and "residence" are used interchangeably.

V. AFFIRMATIVE DEFENSES

A. *IN GENERAL*

Will anything negate the crime of treason? With a survey of the English cases as a guide it is tempting to answer in the negative. For hundreds of years head after head rolled from the Tyburn block after trials which were little more than formality, and under circumstances where an acquittal could be dangerous for the jury.[151] In such a setting any affirmative defense was doubly dangerous since the very nature of such defense admits the acts complained of but seeks to excuse or justify them by attacking some other element of the offense. It is not surprising, therefore, that all but a scattered few chose to plead not guilty and, with the law against them, endeavor to argue the facts.

Of those few who have attempted to assert affirmative defenses some have bottomed their reliance on grounds of lack of citizenship.[152] One notable exception, and a study in the futility of it all, was the celebrated case of Sir Walter Raleigh.[153] Tried in 1603, Raleigh was convicted of treason by plotting rebellion. His sentence to death was suspended and he languished in prison for 14 years. Subsequently he was released and commissioned to lead a military expedition to Guiana which involved fighting with the Spanish. By the time he returned to England the political situation had shifted and England was currying favor with Spain. The Spanish minister demanded his execution. Not knowing any offense to try him for, the authorities decided merely to vacate the old suspended death sentence and execute Raleigh for treason. He urged in vain that the Commission from the king had amounted to a pardon.[154] A former Lord Chancellor and most of the lawyers in England agreed with him.[155] Nevertheless the Lord Chief Justice ruled otherwise.[156] The pardon must be specific, he held, it could not be implied. Raleigh went to the block. Constructive treason was a one edged sword; it cut only in favor of the prosecution.

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[151] Following the acquittal of Sir Nicholas Throckmorton, 1 How. St. Tr. 869 (1554), an enraged judge ordered the jury imprisoned and subsequently fined them heavily.

[152] See notes 114–49 *supra*, and text accompanying.

[153] Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603).

[154] *Id.* at 34.

[155] *Ibid.*

[156] To further point up the hopelessness of the situation it should be noted that the Lord Chief Justice was none other than Sir Edward Coke, who had prosecuted Raleigh at the original trial.

Other efforts at raising affirmative defenses have faced equally bleak results. Drunkenness has been raised, but evidence that the defendant was in a state of ambulatory stupefaction has been considered insufficient to establish a defense to a charge of treason by resisting law officers.[157] Nor may the motive of the accused, that he genuinely believes what he does is in the best interests of his country, be raised as bearing on his intent to aid the enemy.[158] While insanity has been recognized as a defense to treason, only one case has been found where it was successfully argued.[159] One affirmative defense has been raised consistently enough to be treated separately. That defense is duress, the deprivation of an individual's free will to act.

B. *DURESS*

The defense of duress was first fully considered following the rebellion of 1745 that came to grief at the Battle of Culloden. Alexander MacGrowther had participated in that rebellion. At his trial, witnesses testified that he had been seen on several occasions with the rebel army and wearing its uniform.[160] MacGrowther asserted, however, that he had been a most unwilling participant. He had joined the rebel army, this he conceded. But, he contended, he had done so only after the Duke of Perth, in whose regiment he had served, had threatened to burn the houses and destroy the crops of any of his tenants who desisted. Even with this, MacGrowther argued, he had hesitated, until he was told he would be would be forceably bound and taken along anyway.[161] Lord Chief Justice Lee was not persuaded. He instructed the jury: "[T]he fear of having houses burnt, or goods spoiled, . . . is no excuse for joining and marching with rebels. The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels." [162] MacGrowther was found guilty but his argument was not entirely unsuccessful for he was later reprieved.

While a shortened version of the *MacGrowther* rule was cited as *dicta* in the *McCarty* case,[163] it was first given serious consid-

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[157] See Trial of George Purchase, 15 How. St. Tr. 651 (1710).
[158] Best v. United States, 184 F.2d 131 (1st Cir.), *cert. denied*, 340 U.S. 939 (1950).
[159] See Trial of James Hadfield, 27 How. St. Tr. 1281 (1800).
[160] Trial of Alexander MacGrowther, 18 How. St. Tr. 391, 392 (1746).
[161] *Id.* at 393.
[162] *Id.* at 394.
[163] Respublica v. McCarty, 2 U.S. (2 Dall.) 86 (1781).

eration in this country in *United States* v. *Vigol*,[164] one of the cases growing out of the Whiskey Rebellion. Vigol's contention seems to have been more that he was caught up in the spirit of things than that he was actually forced to participated. His defense found no favor with Justice Patterson who instructed the jury in words similar to those employed by Lord Chief Justice Lee some 50 years earlier. Commenting on the reason behind the rule the judge stated:

> If indeed such circumstances [apprehension of something less than immediate fear of death] could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of society must inevitably, be laid prostrate.[165]

A vigorous assault on the *MacGrowther* rule was leveled in 1815 by William Pinkney, attorney for John Hodges who was tried for treason for returning four British stragglers who had been taken prisoner during the British withdrawal from Washington in the war of 1812.[166] It appeared that the British had threatened to burn the town of Upper Marlboro and hold women and children hostages until the men were returned. Pinkney stressed the military severity of the situation in an eloquent speech. He argued:

> [T]he enemy were in complete power in the district. . . . They were unawed by the thing which we called an army, for it had fled in every direction. They were omnipotent. . . . They menaced pillage and conflagration; and after they had wantonly destroyed edifices which all civilized warfare had hitherto respected, was it to be believed that they would spare a petty village, which had renewed hostilities, before the seal of its capitulation was dry? There was menace; power to execute; probability, nay, certainty, that it would be executed. How, then, can you find a wicked and traitorous motive in the breast of my client? [167]

Given weak instructions by an uncertain court the jury agreed with Pinkney, and "without hesitating a moment," returned a finding of "not guilty." [168]

The *Hodges* case appears to represent a departure from the *MacGrowther* rule. If so, it was only temporary. The Civil War brought a prompt re-recognition of the rule,[169] which has been

[164] 2 U.S. (2 Dall.) 346 (1795).
[165] *Id.* at 347.
[166] United States v. Hodges, 26 Fed Cas. 332 (No. 15374) (C.C.D. Md. 1815).
[167] *Id.* at 335.
[168] *Id.* at 336.
[169] See United States v. Greiner, 26 Fed. Cas. 36, 39 (No. 15262) (E.D. Pa. 1861).

reasserted to this day. If any relaxation of the rule can be found in the *Gillars* case,[170] it is only to the extent that the coercion or compulsion has been extended from threat of immediate death to include threat of immediate serious bodily injury. This can hardly be considered the opening of a door.

Only one more case need detain us. In the trial of "Tokyo Rose" the defense conceded that the rule announced in *Gillars* was correct where applied within the United States, but argued that it was an unsatisfactory rule when the accused was in an enemy country, for in such situations he was unable to get protection from the United States and the compulsion was on the part of the enemy government itself.[171] Recognizing that this might hold true for an individual conscripted into the enemy army, the court responded:

> We know of no rule that would permit one who is under the protection of an enemy to claim immunity from prosecution for treason merely by setting a claim of mental fear of possibly future action on the part of the enemy.[172]

Thus it has been seen that while the legal rule on duress as applied to treason seems strict on its face, it has not been harsh in application. Where the threat has proved real enough the courts have not been harsh on the individual affected even though the threat has been less than that required to excuse him by law. The United States citizen, as does its soldier, owes his country a determination to resist by all means within his power, and only when he has been brought to the last ditch of resistance may he save his life at the temporary expense of that duty.

VI. THE MILITARY LAW OF TREASON

The Trial Counsel addressed the court: "If any member of the court or the law officer is aware of any facts, which he believes may be a ground for challenge by either side against him, he should now state such facts." A Lieutenant turned to the Law Officer: "Sir, I challenge myself on the grounds that I am hostile to the accused and that prior to the convening of this court I have formulated the opinion and expressed the opinion that the accused is a traitor."[173]

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[170] Gillars v. United States, 182 F.2d 962, 976 (D.C. Cir. 1950).

[171] D'Aquino v. United States, 192 F.2d 338 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).

[172] *Id.* at 359.

[173] Statement of Lt. Schowalter, disqualifying himself as a member of the court. United States v. Batchelor, 7 U.S.C.M.A. 354, 362, 22 C.M.R. 144, 152 (1956).

But "treason *as such* is not an offense properly cognizable by a court-martial." These are the words of no less of an authority than Colonel Winthrop.[174] Yet almost immediately the effect of this conclusion becomes blurred. It is for an excellent reason that Winthrop italicizes the words "as such." All will readily admit that the word "treason" has never appeared in the articles of war which, since 1775, have governed the armies of the United States. Yet Winthrop feels compelled to explain that the articles concerning relieving and communicating with the enemy are "treasonable in their nature" and he quotes with approval such definitions of the offenses as "overt acts of treason" and "closely allied to treason." [175] The Colonel concludes: "Whenever, therefore, an overt act of the class specified in these Articles gives substantial aid and comfort to the enemy, and thus evidences, so far forth, an adherence to his cause, it can scarcely be regarded as less than an act of treason." [176]

The two articles of war referred to by Winthrop have subsequently synthesized into the present Article 104 of the *Uniform Code of Military Justice* which defines the offense as follows:

> Any person who—
>
> (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or
>
> (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

The Code provision, like the civil law of treason, may be traced for its antecedents to the middle ages. As a matter of fact, Winthrop finds the basis for the substantive provisions of Article 104 in the military code of Gustavus Adolphus in 1621.[177]

The equivalent English provisions appeared as Articles 17 and 18 of the British Articles of War of 1765 which were in force at the beginning of the Revolutionary War."[178] These articles were lifted, almost verbatim, into the American Articles of War of

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[174] See WINTHROP, MILITARY LAW AND PRECEDENTS 629 (2d ed. 1920).

[175] *Ibid.* Winthrop was commmenting on the 45th and 46th Articles of War of 1874.

[176] *Id.* at 629–30.

[177] WINTHROP, *op. cit. supra* note 174, at 907. Specifically, see Articles 67–72, 76, 77. The offense antedates even that; see, for example, the trial of Marshall D'Audreham in 1367, noted in Keen, *Treason Trials Under the Law of Arms*, 112 ROYAL HIST. SOC. TRANS. 15th 100 (1961).

[178] WINTHROP, *op. cit. supra* note 174, at 931.

1775,[179] and in substance describe the offense contemplated by Article 104.[180]

Only one minor variation seems worth noting. The original provision punishing aiding the enemy limited such assistance to "money, victuals, or ammunition,"[181] and the language remained unchanged in Article 45 of the 1874 Articles of War.[182] But times had canged. The day where aiding the enemy was limited by the very nature of warfare itself was over. The Civil War had pointed out a myriad of new ways to aid enemies. Winthrop, aware of the undue restriction, considered the old phraseology to be "bald and imperfect." [183] He argued that a change was necessary, and suggested the insertion of an additional phrase such as "or other thing" or "otherwise." [184] It may be that the proper approach should not have been to add more words, but rather to subtract a few. The provision could have been reduced simply to "Whosoever relieves the enemy." The difficulty may have been that this result would have placed on the courts the burden of interpreting the meaning of "relieves," and opened the door to the return of the "constructive treasons" long feared by the English.

Congress apparently chose to go along with Winthrop's recommendation. In enacting the Articles of War of 1916, the words "or other thing" were inserted.[185] Perhaps Congress selected the wrong phrase. The added language achieved the purpose of substantially broadening the scope of the offense, but created a problem of semantics in the *Olson* case.[186] Olson had achieved notoriety as an orator in North Korean prison camps. At the behest of his captors he engaged in pro-Communist and anti-American speechmaking with the mission of "educating" his fellow prisoners. Prosecuted under Article 104, Olson contended that making a speech was not aiding the enemy with any "thing." In a two to one decision the Board of Review disagreed.[187] Noting that aiding

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[179] *Id.* at 953, Articles 27–28.

[180] The Court of Military Appeals has characterized Article 104 as bearing a "striking resemblance" to its 1775 counterpart. See United States v. Batchelor, 7 U.S.C.M.A. 354, 368, 22 C.M.R. 144, 158 (1956).

[181] WINTHROP, *op. cit. supra* note 174, at 953, Article 27.

[182] Act of 22 June 1874, Title XIV, Ch. 5, art. 45, 18 Stat. 233

[183] WINTHROP, *op. cit. supra* note 174, at 631.

[184] *Ibid.*

[185] Act of 29 August 1916, § 3, Article 81; 39 Stat. 619.

[186] United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R 250 (1957).

[187] CM 384483 Olson, 20 C.M.R. 461 (1955), *aff'd*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

the enemy by participating in propaganda radio broadcasts had been sufficient to predicate at least three civil convictions for treason,[188] the Board of Review concluded that the psychological aspects of warfare had "become as important as arms, ammunition, and guided missiles." [189] The Court of Military Appeals viewed it otherwise. Tracing the history of Article 104, the court concluded that the word "thing" must be equated to "tangible object." [190] Olson's conviction, however, was sustained on the ground that the specification still described the Article 104 offense of communicating, corresponding or holding any intercourse with the enemy.[191] The military construction concerning the use of the words "or other thing" is important as the only area where military rule is different from the civil rules applicable to treason by aiding the enemy.

It has been suggested that Article 104 defines a military law of treason. The objections to that are many. Where in Article 104 is any requirement that a conviction must be based on the testimony of two witnesses to the same overt act? Forgetting, for the moment, the crime of treason by levying war, where in the treason statute is aiding the enemy limited to "arms, ammunition, supplies, money, or other thing"? If the two offenses are truly different, in what respects are they different?

An arguable distinction advanced by Winthrop between the offenses described by Article 104 and treason is that the latter is a specific intent offense; that is, there must be proof of an intent to betray.[192] But this view is not uncontested. Dean Miller of Duke University takes a contrary approach. He states: "In order that the crime of treason be committed there must be an intent. However no specific intent is required. It is sufficient that the defendent intended to do the prohibited act." [193] It is well settled that the offenses described by Article 104 require only a general intent.[194]

The problem of intent in treason *vis-a-vis* Article 104, is one with which the courts have wrestled with only limited success.

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[188] 20 C.M.R. at 464.
[189] *Id.* at 463.
[190] United States v. Olson, 7 U.S.C.M.A. 460, 467, 22 C.M.R. 250, 257 (1957).
[191] *Id.* at 468, 22 C.M.R. at 258.
[192] See WINTHROP, *op. cit. supra* note 174, at 630.
[193] MILLER, CRIMINAL LAW 502 (1934).
[194] See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 183; United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

Tht problem was squarely raised in the case of *Martin v. Young,* a *habeas corpus* proceeding involving the application of Article 3*a*, *Uniform Code of Military Justice,* to a serviceman who had been discharged and reenlisted subsequent to alleged Article 104 offenses.[195] This provision permitted court-martial for an offense committed in a previous enlistment, which would otherwise have been prohibited, where the offense was punishable by confinement for five years or more and could not be tried in any United States court.[196] The Government contended that Martin met this criteria and proceeded to charge him under Article 104 for offenses committed in a previous enlistment while a prisoner of war in Korea. The Government's argument was almost contemptuously brushed aside by the court. The conduct alleged against Martin, held the court, would also, *inter alia,* constitute treason and hence he was subject to prosecution in United States courts under civilian federal law.[197] In dealing with the argument that treason was a specific intent offense while Article 104 was not, the court hedged. Looking to the specification itself the court found Martin charged with giving aid to the enemy "wrongfully, unlawfully, and knowingly." [198] This, the court held, imports "criminality" and it was unnecessary to determine whether or not Article 104 denounced a general intent offense.[199] Just what the court meant by "criminality" was never made clear.

The meaning of the holding in the *Martin* case was subsequently discussed by the Court of Military Appeals in the *Batchelor* decision.[200] The court referred without comment to Winthrop's conclusion that treason required specific intent and went on to hold that Article 104 required only general intent.[201] Discussing the case of *Martin v. Young* the court found nothing inconsistent with that holding. It concluded: "What the judge did not say is that Article 104 requires a specific intent, or that it prescribes the offense of treason, or that the Government is prohibited from overproving its case in prosecutions under Article 104." [202] Concerned with the intent required under Article 104, the Court of Military Appeals can be accused of looking at *Martin v. Young*

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[196] Martin v. Young, 134 F.Supp. 204 (N.D. Cal. 1955).
[196] UNIFORM CODE OF MILITARY JUSTICE, Article 3*a*.
[197] 18 U.S.C. § 2381 (1958). See Martin v. Young, 134 F.Supp. 204, 207 (N.D. Cal. 1955).
[198] *Id.* at 208.
[199] See *id.* at 208.
[200] United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).
[201] *Id.* at 368, 22 C.M.R. at 158.
[202] *Ibid.*

through military justice glasses. It is suggested that the language in that case may well be read, not for the proposition that Article 104 requires specific intent, but that treason requires something less.

Support for this interpretation may be bolstered by a close look at the language found in the Supreme Court opinion in the *Cramer* case.[203] Since intent must be inferred from conduct of some sort, the court concluded it would be permissible to draw the usual reasonable inferences as to intent from the overt acts.[204] This language indicates that something less than proof of specific intent will suffice.

The analogy of Article 104 to treason was considered tangentially in the *Dickenson* case.[205] The accused there contended that Article 104 was unconstitutional. The court saw the thrust of his contention as implying that the article represents only a particularization of different overt acts of treason.[206] When viewed more closely it appears the contention was actually broader; that by applying Article 104 to "any person," and thus including persons not otherwise subject to the Code, Congress was purporting to extend the definition of treason. This would be specifically prohibited by the Constitution. The obvious path to avoid this prohibition would have been for the court to hold that Article 104 and treason were two separate offenses. This the court declined to do, preferring not to reach such a "broad problem." [207] Realizing that this approach did nothing to solve the problem, the court rationalized further that since Dickenson was clearly a person subject to the Code, he had no standing to try to "vindicate the Constitutional rights" of some third party.[208]

The close relationship of Article 104 to treason is bolstered by an examination of some of the rules of law applied by the Court of Military Appeals. When faced with problems concerning the substantive law to be applied under Article 104, the court has turned to the civil treason cases. Thus instructions by a law officer which were identical to those approved by Federal courts as stating the law of the affirmative defense of duress to treason

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[203] Cramer v. United States, 325 U.S. 1 (1944).
[204] See *id.* at 31.
[205] United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).
[206] *Id.* at 448, 22 C.M.R. at 164.
[207] See *ibid.*
[208] See *ibid.*

have been upheld in three cases.[209] The civilian rule concerning the lack of motive as an excuse for treason has been applied to Article 104.[210] The definition of "enemy" has been lifted from its civilian counterpart.[211] The convictions of the "radio traitors" of World War II have been applied for the proposition that the obligations of citizenship continue to rest on the shoulders of one inside a foreign country and subject to the local rules of the enemy.[212] Indeed, while not required for an Article 104 conviction, the Army has shown itself not unmindful of the two witnesses rule.[213] Conversely, the civilian courts have not hesitated to prosecute for treason individuals who, by reason of a break in service, were lost to military jurisdiction.[214]

The usefulness of Article 104 is difficult to gauge. Records of military courts are woefully inadequate to permit research on the extent of its historical application. It is thus impossible to compile any statistics concerning the number of individuals who have been tried and convicted by military courts prior to the enactment of the Uniform Code. Only two cases involving World War II prosecutions in violation of Article of War 81 ever reached the Board of Review level and both involved offenses committed within the United States.[215] Following the Korean War the offense achieved some vitality as a vehicle for bringing prisoner of war collaborators to trial. It is reported that ten of these individuals were charged under Article 104 and eight convicted.[216] But its comparative lack of use in no way imports obsolescence. In an age where increased psychological and sophisticated pressures may mold the minds of some to ignore their obligations of loyalty

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[209] See United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), CM 388545, Bayes, 22 C.M.R. 487 (1956), *petition for review denied*, 7 U.S.C.M.A. 798, 23 C.M.R. 421, (1957).

[210] See United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

[211] See United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

[212] See United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

[213] See U.S. DEP'T OF ARMY, FIELD MANUAL 19–5, CIVIL DISTURBANCES AND DISASTERS para. 162*b* (1958).

[214] See United States v. Monti, 100 F.Supp. 209 (E.D.N.Y. 1951); United States v. Provoo, 125 F.Supp. 185 (S.D.N.Y. 1954), *rev'd*, 215 F.2d 531 (2d Cir. 1954), *2d indictment dismissed*, 17 F.R.D. 183 (D. Md. 1955), *aff'd per curiam*, 350 U.S. 857 (1955).

[215] CM 310327, Leonhard, 61 B.R. 233 (1946); CM 260393, Kissman (B.R., 24 Aug. 1944).

[216] Note, *Misconduct in the Prison Camp*, 56 COLUM. L. REV. 709, 745–46 (1956).

to their country, a military law of treason continues to be necessary to provide effective deterrent and adequate punishment.

VII. SUMMARY

A survey of the law of treason leaves little room for conclusions. It is, indeed, a history lesson in which, contrary to Orwell, the past controls the present. At the outset, it can certainly be observed that the current law, both as enacted by statute and interpreted by the courts is heavily dependent on its English antecedents. In every area the law has been found to have derived from its precedents and twentieth century judges have continued to rely on opinions expressed by their ancestors, often hundreds of years ago.

The English law of treason was found to have enjoyed wide and strict application and to have resulted in perhaps thousands of executions. In this area the United States courts have failed to keep pace. While castigating treason as the highest of crimes, the American courts have displayed more concern for individual rights and less for governmental vengeance. In contrast with the English experience, not one man has ever been executed for committing treason against the United States.[217]

Similar generalizations may be made with respect to Article 104, the military law of treason. Colonel Winthrop to the contrary, it appears impractical to call that offense by any other name. While certain legal distinctions may be found between the two offenses they are more than outweighed by the similarities. If the military law is narrower in scope than its civilian counterpart, it is because history has shown no need for a wider application. As a result any number of treasonable acts may be envisaged which would not violate the conduct denounced by Article 104. A prime example would be organized resistance to the enforcement of a federal statute or court order. But not a single instance may be conceived where the act that violates Article 104 would not also constitute treason.

There have been no trials for treason in this country for perhaps fifteen years. It may be partially for this reason that many writers, such as Dame Rebecca West, suggest that treason has entered an area of obsolescence and is passing rapidly to the obsolete. In a time of "cold war" as we know it today, there seems

[217] John Brown was executed for treason committed against the State of Virginia. See note 54 *supra* and text accompanying.

little chance that treason can legally be committed. However a host of related offenses, such as espionage, sedition, advocating the overthrow of the Government, and failing to register as a subversive organization, appear adequate to fulfill the security needs of the state during such a period. But this fact alone does not compel the conclusion that the law of treason has no place in modern society. Today treachery and disloyalty are a more real and serious fear than ever before. The peacetime traitor should, by whatever law is necessary, be penalized for the evil of his works and the wartime traitor punished for the villain that he is.

THE SIGNIFICANCE OF THE JENCKS ACT IN MILITARY LAW*

BY MAJOR LUTHER C. WEST**

I. INTRODUCTION

According to its legislative history, the so-called Jencks Act[1] was passed by Congress to correct a "grave emergency" in federal criminal law enforcement resulting from the Supreme Court's decision in *Jencks v. United States*.[2] The legislative history of the Act reveals that almost immediately following the decision "entire investigative files were ordered disclosed" by misinformed federal judges. "Startling decisions" were noted where district court judges ordered *pretrial* disclosure of statements in the hands of the government. The "boldness of attempts by defense lawyers to secure the names of *all* persons interviewed by federal agents in the criminal investigation of a crime, and to secure *grand jury minutes* was also noted with due consternation by our legislators in their report on the bill.[3]

The resulting Jencks Statute, set forth verbatim in the footnote,[4] was designed to correct the foregoing predicament in federal criminal law enforcement. The Act, briefly, was intended to protect government files from needless disclosure, to prevent defense fishing expeditions, and otherwise to lend stability to the somewhat shaky federal discovery procedures that followed in the wake of the *Jencks* decision.[5] The purpose of the Act has been defined as follows:

> Under 18 U.S.C.A. section 3500 the defendant is entitled, "*After a witness called by the United States has testified on direct examination,*

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] 18 U.S.C. § 3500 (1958).

[2] 353 U.S. 657 (1957).

[3] See 1957 U.S.C. CONG. & AD. NEWS 1861. See also appendices A and B, Palermo v. United States, 360 U.S. 343, 356, *rehearing denied*, 361 U.S. 855 (1959).

[4] 18 U.S.C. § 3500. "Demands for production of statements and reports of witnesses.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by

. . . "to any written statement" . . . signed or otherwise adopted or approved by him" [or other "statement" within the definition of the Act [6]] which is in the possession of the government and which relates to the subject matter as to which the witness has testified. The purpose is

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a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to the defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

[5] See Palermo v. United States, 360 U.S. 343, *rehearing denied*, 361 U.S. 855 (1959); Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963); United States v. Wenzel, 311 F.2d 164 (4th Cir. 1962); Foster v. United States, 308 F.2d 751 (8th Cir. 1962).

[6] A "statement" within the purview of the Act has been defined substantially as defined in the Act itself. See, *e.g.*, Johnson v. United States, 269 F.2d 72, 74 (10th Cir. 1959).

impeachment only. The Act is one of limitation. It circumscribes what may be obtained . . . and it, rather than the opinion of the Supreme Court in Jencks, measures the right to obtain statements or reports in the possession of the United States and the procedure to be used in obtaining them.[7] [Emphasis in the original.]

While the Jencks Act has made a distinct imprint on federal criminal law, its effect on military law has been less than pronounced. Federal decisions applying the Jencks Act are quite numerous.[8] Military case law, on the other hand, while quite early recognizing and accepting the application of both the *Jencks* decision and Act, reflects only seven cases where either the decision or statute have been cited.[9] The reason for the smaller number of cases is readily apparent to military lawyers. Due to traditional defense access to military investigative case files immediately following the formal pretrial investigative stages of a case,[10] military concern for the *Jencks* decision and statute (which provide only for a limited discovery procedure *after* a witness has testified for the government) has been less than enthusiastic. The foregoing notwithstanding, it is the purpose of this article to inquire into an area of the operation of the Jencks Act that may well have a significant bearing on military case law.

II. LOST OR DESTROYED EVIDENCE

As previously noted in the footnote, the Jencks Act, in subsection (d), provides essentially that if the United States "elects" not to produce the prior statement of a government witness after the witness has testified, and after the court has ordered the statement

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[7] Foster v. United States, 308 F.2d 751, 755 (8th Cir. 1962).

[8] For a compilation of federal cases citing the Jencks Act, see the annotation at 18 U.S.C.A. § 3500 (1964 Cumulative Annual Pocket Part).

[9] See United States v. Walbert, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963) (pretrial recorded statements of OSI agent while interviewing accused *within* the Jencks Act); United States v. Heinel, 9 U.S.C.M.A. 259, 26 C.M.R. 39 (1958) (*Jencks* decision applicable to military law); ACM 18433, Jackson, 33 C.M.R. 884 (1963) (Jencks Act applicable to Article 32 investigations); ACM 18153, Walbert, 32 C.M.R. 945, *aff'd on other grounds*, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963) (pretrial recorded statements by OSI agent while interviewing accused *not* within the Jencks Act); ACM 16357, Combs, 28 C.M.R. 866 (1959) (negligent pretrial destruction of verbatim Article 32 notes violated the Jencks Act); WC NCM 58-01416, Johnson, 28 C.M.R. 662 (1959) (questions propounded to accused undergoing a lie detector test not producible under the Jencks Act; agent's report containing "comments, ideas, opinions and conclusions" of the agent not producible under the Act); NCM 58-00089, Parks, 27 C.M.R. 829 (1958) (ONI reports producible under the Jencks Act).

[10] See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 33*i*(2).

produced, "the court shall strike from the record the testimony of the witness. . . ." Under usual military practice it would be almost inconceivable for the government to refuse to produce a pretrial statement of a government witness when ordered to do so by the law officer, *if* the statement is in the possession of the government and reasonably accessible. The risk of a military refusal here is slight, and the consequences obvious and swift. Military interest in this phase of the operation of the Jencks Act is understandably low. A slight danger to military prosecution does exist in this situation, but it is in a parallel situation where the government is *unable* to produce the former statement (*i.e.*, where the former statement, CID case notes, or sound recording are inaccessible, or have been lost or destroyed before trial), that the possibility of military error under the Jencks Act becomes of significant notice. While Article 32 investigations and formal CID reports are almost never lost or destroyed before trial (or retrial), CID case notes and sound recordings that are *not* made a part of the formal report are much more difficult to track down, are haphazardly filed, and are sometimes misplaced or destroyed before trial or rehearing.[11] It is in regard to this situation (*i.e.*, the pretrial destruction of Jencks Act evidence and its effect on military law) that the thrust of this article will be directed.

A. *THE COMBS DECISION*

While the question of lost or destroyed evidence subject to Jencks Act discovery process has been raised numerous times in federal courts, it was first reported in a military case. In *Combs*,[12] the issue was raised by a civilian defense counsel who prior to trial requested a verbatim copy of the reporters' notes taken at the Article 32 investigation. Although this request was made to the reporters and to the staff judge advocate, the notes were thereafter destroyed by the reporters "in accordance with usual

[11] See Change 1, Army Regs. No. 345-210, para. 506-06 (4 October 1963), which presently provides that military police criminal investigation "reports" will be forwarded to the U.S. Army Criminal Investigation Repository, Camp Gordon, Georgia, on completion "of action on the case or when the case is administratively closed . . . ." The regulations are silent as to the disposition of CID case notes or evidence that are not made a part of the "report." *But see* Army Regs. No. 345-210, para. 506-11(3) (31 October 1962), as changed (by implication) (requiring that all other papers be kept for specified periods). There are no regulations governing the disposition of statements taken by the Article 32 investigating officer, or verbatim notes taken by an investigating officer, that are not made a part of his formal report of investigation.

[12] ACM 16357, Combs, 28 C.M.R. 866 (1959).

and standard operating procedures." The defense counsel moved at trial to strike the testimony of several government witnesses because of the failure of the government to produce the notes. This motion, based on the Jencks Act, was denied, and the issue was preserved for appeal. On review the Air Force Board of Review noted that after the staff judge advocate received due notice that the defense wanted a verbatim copy of the Article 32 notes, he "made no attempt to safeguard the stenographic notes." The Board none the less held that the destruction of the notes "occurred as the result of negligence, rather than through an act of 'conscious' destruction," as had been alleged by the defense. The Board further held that "the accused's right under the Jencks Statute to examine *any statement* within the purview of the law, is absolute." (Emphasis added.) The Board accordingly held that the testimony of the pertinent witnesses should have been stricken from the record, and "that dismissal of the charges, instead of declaration of a mistrial, was also the appropriate remedy because the notes were no longer available for transcription."

B. *GOOD FAITH DESTRUCTION OF EVIDENCE*

While the above case announces a harsh rule against the government, it represents the only time the allegation of bad faith destruction, or negligent destruction, of Jencks Act material has been litigated, by either civilian or military courts. The good faith destruction of evidence, however, has been the subject of considerable federal civilian litigation. The issue was foreshadowed in *DeFreese v. United States*.[13] Here a wire recording of a government agent's interview with the defendant had been made prior to trial. The wire recording was later transcribed into a tape recording. The wire recording machine was returned, prior to trial, to the firm from which it had been rented. At the trial of the case, the defense demanded that the government produce a machine to play the wire recording. After an unsuccessful effort on the part of both the government and the defense to produce a machine that would play the wire recording, the court overruled the demand of the defense in this regard. A copy of the tape recording and the original wire recording, however, were furnished to the defense. On review to the Fifth Circuit, the court ruled: "The Jencks rule does not require the government to furnish something it does not have and cannot obtain. Here everything the government did have in its possession was turned over

[13] 270 F.2d 737 (5th Cir. 1959), *cert. denied*, 362 U.S. 944 (1960).

to the appellant, including a tape recording and transcript of the full original wire recording. This is all that justice and fairness require."

The issue was next presented to the Second Circuit in *United States v. Thomas*.[14] Here an FBI agent interviewed a prospective government witness before trial, and made notes of the conversation. Several days later the agent dictated a typewritten report from his notes. He checked the report against the notes for accuracy, and thereafter destroyed the notes. At the trial of the case the defense demanded the original notes, but was given a copy of the report, as the notes were no longer in existence. On appeal to the Second Circuit, the court noted there "was no refusal by the government to produce a statement 'in the possession of the United States.'" The court further commented that the notes had not been destroyed with an "intent to suppress evidence." The court ruled that the delivery of the typewritten report to the defendant, which accurately reflected what was in the destroyed notes, satisfied the requirements of the Jencks Act.

C. *THE CAMPBELL CASES*

The issue first reached the Supreme Court of the United States in 1961. In *Campbell v. United States*,[15] an FBI agent interviewed a witness to a bank robbery prior to trial. At the trial of the case the witness to the robbery stated that he had been interviewed prior to trial by the agent, and that the agent had written down what he had said. The trial judge ruled that the witness had made a statement within the Jencks Act, and ordered the United States to produce it. The Assistant United States Attorney representing the government stated he had no such statement as described by the witness, but that he did have a typewritten interview report prepared by the FBI agent sometime after the interview took place. The Assistant United States Attorney maintained that the typewritten report was not subject to the Jencks Act, and refused to deliver it to the defendant, but he did deliver it to the judge for his *in camera* inspection. The Assistant United States Attorney stated that he had no statement that the witness had adopted as his own, and that he did not have any notes in his possession taken by the FBI agent. He stated further that he did not know "whether [the notes] ever existed." The court thereafter refused to deliver the witness report to the defendant, but handed it to

[14] 282 F.2d 191 (2d Cir. 1960).
[15] 365 U.S. 85 (1961).

the witness himself to read. The witness was then asked if the interview report was a "substantially verbatim recital" of his oral statement to the FBI agent. The witness replied that it was not, and the defense was denied access to the report. The defense requested the court to call the FBI agent concerned, who was readily available, and ask him about the scope of this report. The court, while giving leave to the defense to call the agent as a witness for the defense, refused to call the agent as a witness for the court. The defense declined the offer, and the FBI agent was not called at all.

The Supreme Court was highly critical of the trial judge's conduct in this regard,[16] and after expounding its views on the proper procedure to be followed in such circumstances, raised a question as to the legal affect of the good faith destruction of Jencks Act evidence as follows:

> Moreover, failure of the judge to call for [the agent's] testimony foreclosed a proper determination of the petitioners' motion to strike the witness' testimony. If the Interview Report was not the original or a copy of the paper [the witness] described, and that paper was destroyed, the petitioners might have been denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for the decision whether (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection. The government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question. . . . We do not know that such a paper existed,

[16] The Supreme Court noted that "the trial judge ruled that it was for the petitioners to subpoena [the FBI agent] as 'their witness' if they believed his testimony would support their motions, and that he [the trial judge] would not of his own motion summon [the agent] to testify, or require the government to produce him." The Court stated "that this ruling was erroneous." The Supreme Court reasoned that the "inquiry being conducted by the judge [to determine whether demanded evidence is producible under the Jencks Act] was not an adversary proceeding in the nature of a trial . . ." and the trial judge had a duty "affirmatively to administer the statute" and to call the agent on his own responsibility. The Supreme Court was also highly critical of the trial judge permitting the government witness to examine the questioned document and state whether it was a substantial recital of his oral statement to the FBI agent. The Court stated this procedure "must be improper in almost any circumstances." The Court concluded, in this regard, that "the petitioners were deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent."

> and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of the [agent's] testimony.[17]

The majority of the court thus remanded the case to the District Court "to hold a new inquiry consistent with this opinion." In a concurring and dissenting opinion, Mr. Justice Frankfurter took issue with the above caveat. Mr. Justice Frankfurter wrote:

> Title 18 USC section 3500 requires the trial judge, upon a motion by the defendant, to "order the United States to produce any statement . . . of the witness in the possession of the United States" which is relevant to the direct testimony of the government witness. Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the government.[18]

Upon rehearing,[19] the District Court found that the agent's notes and report were not producible and did not rule on the issue of the destruction of the notes. The court also denied defense counsel's motion to call the witness who gave the statement to the agent. The First Circuit, after noting that the agent had testified that he had destroyed the notes in accordance with normal FBI practice, saw no basis to impose duties or sanctions on the FBI to retain notes, at least where there was no bad faith destruction involved. The court found that the report was not within the Act but held that the refusal to allow the witness to testify was erroneous and grounds for a further hearing as to whether the notes could be produced.[20] At the second hearing, the District Court found that the notes were substantially verbatim but did not decide what type of relief was appropriate since the Circuit Court had retained jurisdiction of the appeal.[21]

The First Circuit affirmed that the good faith destruction was not in violation of the Jencks Act. However, it reversed the District Court's holding that the notes and the interview report concerned, prepared several hours after the initial interview with the witness, and prepared on the basis of the destroyed notes and the agent's memory, were producible under the Jencks Act.[22] On appeal to the Supreme Court for the second time,[23] the Court

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[17] Campbell v. United States, 365 U.S. 85, 98 (1961).
[18] *Id.* at 102.
[19] See United States v. Campbell, 206 F. Supp. 213 (D. Mass. 1961).
[20] See Campbell v. United States, 296 F.2d 527 (1st Cir. 1961).
[21] See United States v. Campbell, 199 F. Supp. 905 (D. Mass. 1961).
[22] See Campbell v. United States, 303 F.2d 747 (1st Cir. 1962).
[23] See Campbell v. United States, 373 U.S. 487 (1963).

overruled the Circuit Court on the question of the interview report not being subject to the Act. In so holding, the Supreme Court stated: "Our holding that the interview report is producible under section 3500(e)(1) makes it unnecessary for us to consider any of the other issues [including the good faith destruction of evidence], and we intimate no view on the correctness of the Court of Appeals' ruling on them." [24]

D. *THE KILLIAN-CAMPBELL DICHOTOMY*

Unfortunately, the matter of good faith destruction of evidence subject to Jencks Act discovery procedures was not resolved by the Supreme Court in the *Campbell* decisions. In the second *Campbell* opinion, as noted, the Supreme Court expressly reserved opinion on the question. Yet prior to the second Supreme Court decision in *Campbell*, and subsequent to the first decision in the case, the Supreme Court made its decision in *Killian v. United States*,[25] wherein it held that certain notes destroyed by FBI agents in good faith in accord with their normal practice (and where secondary evidence of their content existed) "did not constitute an impermissible destruction of evidence nor deprive petitioner of any right." The Supreme Court further stated in *Killian:* "It is entirely clear that petitioner would not be entitled to a new trial because of the nonproduction of the agents' notes if those notes were so destroyed and not in existence at the time of the trial." Accordingly, it is difficult to understand the exact meaning of the Court's language in the second *Campbell* case wherein it expressed a reservation on the question of whether the destruction of evidence "without regard to the circumstances" was a violation of the Jencks Act.

Lower federal courts, however, have had occasion to rule upon the good faith destruction of evidentiary matter subsequent to both the first and second *Campbell* decisions. Following the first *Campbell* decision, in *United States v. Aviles*,[26] the District Court quoted Justice Frankfurter's concurring and dissenting opinion in *Campbell* with approval. The District Judge further noted: "This is not to state or imply that the government may with impunity and for improper ends destroy notes in an attempt to deprive criminal defendants of that which the Congress has seen fit to

[24] *Id.* at 492 note 5.
[25] 368 U.S. 231 (1961), *rehearing denied*, 368 U.S. 979 (1962).
[26] 197 F. Supp. 536 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *rev'd mem. sub nom.* Evola v. United States, 375 U.S. 32 (1963).

grant them." In *United States v. Greco*,[27] the Second Circuit noted that "appellant raises the same question urged upon the Supreme Court in Campbell . . . namely, 'that destruction [of notes] without regard to the circumstances should be so regarded [*i.e.*, as noncompliance under section 3500]'. . . ." The Second Circuit, however, refrained from answering this "important question." It reiterated its views, previously expressed in *United States v. Thomas*,[28] that the good faith destruction of notes was not in violation of the Act. The Circuit Court also quoted Justice Frankfurter's concurring and dissenting opinion in *Campbell* to the same effect. The Ninth Circuit, in *Ogden v. United States*,[29] (the first *Ogden* case), stated that the good faith destruction of notes, even in the absence of substitute evidence, in accordance with normal practice "before the prosecution of defendant was contemplated," and with no intent to supress evidence, was not in violation of the Jencks Act. The Ninth Circuit noted, however, in a footnote to the decision, that when "a producible statement has been innocently destroyed the court may require the government to furnish the information contained in the destroyed statement from a source which would not otherwise be subject to discovery."

In *United States v. Tomaiolo*,[30] the issue was again before the Second Circuit. Here original notes were destroyed after they had been reduced to a typewritten report. At the trial the typewritten report was furnished to the defendant. On the government's failure to produce the original notes the defense moved to exclude the witness' testimony. This motion was denied. On appeal to the Second Circuit, the court noted that the notes were destroyed in good faith, and that a transcription of the notes had been furnished to the defendant. The court ruled that the failure of the government to produce the original notes was not, under the circumstances, in violation of the Jencks Act. The court also cited Mr. Justice Frankfurter's concurring and dissenting opinion in *Campbell* as authority for its holding.

Following the second Supreme Court ruling in *Campbell*, the issue of good faith destruction was once again presented to the Ninth Circuit. In *Ogden v. United States*[31] (the second *Ogden* case), the Ninth Circuit cited the Supreme Court rulings in

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[27] 298 F.2d 247 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).
[28] 282 F.2d 191 (2d Cir. 1960).
[29] 303 F.2d 724 (9th Cir. 1962).
[30] 317 F.2d 324 (2d Cir. 1963).
[31] 323 F.2d 818 (9th Cir. 1963).

Killian and *Campbell,* and resolved the dilemma previously mentioned, by construing the Supreme Court's use of the words in the first *Campbell* decision, "without regard to the circumstances" (in referring to the destruction of evidence), as applying only to those cases wherein the original evidence had been destroyed "*'and . . . no copy had survived.'*" (Emphasis in the original.) The Ninth Circuit thus combined *Killian* and the *Campbell* cases, and announced the following rule:

> Whether sanctions are to be imposed if a producible statement has been destroyed in good faith and the information in the destroyed document relevant for impeachment *is not otherwise available,* and whether sanctions are to be imposed without regard to prejudice *if destruction is in bad faith* may remain open isues; but we think it is now settled that destruction of interview notes in accordance with normal administrative practice for normal administrative purposes unrelated to the suppression of evidence does not justify imposition of sanctions or a new trial, *where the same material is made available to defendant in a signed statement or interview report.* [Emphasis added.]

E. *HARMLESS ERROR RULE*

Closely akin to the rule announced in the second *Ogden* case, *supra,* which is the latest pronouncement on the subject, is the harmless error rule that has developed in federal cases.[32] The majority of cases, however, applying the harmless error rule to Jencks Act situations, have applied it only in limited circumstances. The rule has most often been applied where a suitable evidentiary substitute was made available to the defendant at the trial level, in place of the original evidence, or in situations where the original evidence, although not produced at the trial level, is available for appellate review.[33] The indiscriminate or liberal application of the harmless error rule to Jencks Act situations, however, has been criticized. There are courts "which have suggested that the harmless error doctrine can never apply as to

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[32] Reversal will not follow unless the "substantial rights" of the defendant have been affected. Kotteakos v. United States, 328 U.S. 750 (1946).

[33] See, *e.g.,* Killian v. United States, 368 U.S. 231 (1961), *rehearing denied,* 368 U.S. 979 (1962); Rosenberg v. United States, 360 U.S. 367 (1959); Leach v. United States, 320 F.2d 670 (D.C. Cir. 1963); United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963); United States v. Tomaiolo, 317 F.2d 324 (2d Cir. 1963); Hilliard v. United States, 317 F.2d 150 (D.C. Cir. 1963); United States v. Allegrucci, 299 F.2d 811 (3d Cir. 1962); Hance v. United States, 299 F.2d 389 (8th Cir. 1962); United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961); United States v. De Sisto, 289 F.2d 833 (2d Cir. 1961). For contrary authority, and a more liberal application of the harmless error rule, see Karp v. United States, 277 F.2d 843 (8th Cir.), *cert. denied,* 364 U.S. 842 (1960), discussed *infra,* note 38.

statements producible under the [Jencks] statute. . . ." [34] On the other hand, one federal court, as noted earlier, stated that a good faith destruction of evidence, *despite the absence of substitute evidence*, before the prosecution of defendant was contemplated could not substantially prejudice the rights of the defendant.[35]

While the foregoing authorities lean toward a limited application of the harmless error rule to Jencks Act violations, in the one case litigated on the subject before the United States Court of Military Appeals, the Court applied the harmless error rule most liberally.[36] In a situation where the defense made a lawful demand for Jencks Act evidence, following the testimony of a government witness, the law officer conducted an out-of-court hearing, but denied the defense request without making the government produce the requested evidence for the law officer's *in camera* inspection. Upon review, the Court of Military Appeals applied the harmless error rule on the basis that the *accused's testimony* showed unmistakably "there was no coercion, and no . . . inconsistency or conflict in the agent's direct testimony." The Court thus "speculated" as to the usefulness of the nonproduced evidence for defense impeachment purposes, and concluded that it was substantially worthless.[37] The Court did so without inspecting the evidence itself, or without requiring the trial court to inspect the evidence. While there is federal precedent to support the

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[34] See cases cited in Rosenberg v. United States, 360 U.S. 367, 375 (1959) (Brennan, J., dissenting opinion); United States v. Cardillo, 316 F.2d 606, 616 (2d Cir. 1963) (concurring opinion). See also United States v. McCarthy, 301 F.2d 796 (3d Cir. 1962), for a strange decision wherein the Third Circuit "speculated" in favor of prejudice as to the content of a nonproduced document, without referring to the actual content of the document itself, which was attached to the record for appellate review.

[35] See Ogden v. United States, 303 F.2d 724 (9th Cir. 1962). See also Alexander v. United States, 336 F.2d 910 (D.C. Cir.), *cert. denied*, 13 L. ed. 2d 346 (1964).

[36] See United States v. Walbert, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963).

[37] Speculation by appellate courts in this regard has been criticised. "The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant." Ogden v. United States, 303 F.2d 724 (9th Cir. 1962). "It is, of course, settled that if the defense is entitled to production of a statement, 'it is not for us to speculate whether they could have been utilized effectively.' . . . The question before us, however, is whether the statement in question 'related to' the direct testimony of the witness . . . ." United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963). *Accord*, United States v. Sheer, 278 F.2d 65 (7th Cir. 1960).

Court's ruling in this regard,[38] it is submitted that the better procedure would have been for the trial court to determine the matter of prejudice by conducting an *in camera* inspection of the requested evidence. In keeping with the spirit of the Jencks Act, and the majority of federal decisions, the case should have been *remanded* to the law officer[39] by the Court of Military Appeals for the purpose of making such an inspection.[40]

III. CONCLUSIONS

Despite conflicting court decisions on the matter of prejudice flowing from Jencks Act violations, the rule as quoted previously in the second *Ogden* case, *supra* (*i.e.*, the good faith destruction of Jencks Act evidence "where the same material is (otherwise) made available to the defendant" does not justify imposition of Jencks Act sanctions) is a workable and logical rule of law, and is in full accord with the harmless error rule that is applicable in federal cases. In possible opposition to the *Ogden* rule as being too liberal on this point, as previously noted, is the language of

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[38] See Karp v. United States, 277 F.2d 843 (8th Cir.), *cert. denied*, 364 U.S. 842 (1960), wherein the harmless error rule was applied to a factual situation quite identical to that in the text, above, where neither trial or appellate courts made an *in camera* inspection of the demanded evidence. The Eighth Circuit noted, however, while substantial prejudice was not present, it was none the less error for the trial court to have denied the defense request for production of the questioned evidence without conducting an *in camera* inspection.

[39] *But see* United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957) (post trial hearing on alleged misrepresentation of counsel) where the Court said: ". . . In civilian jurisdictions, a hearing of this nature would normally be held by the trial judge. In the military, the law officer acts substantially as a trial judge, but his authority is limited to the particular court-martial to which he is assigned. Hence he is not in a position to act. . . ." *Id.* at 508, 25 C.M.R. at 12; *accord*, CM 408904, Schalck, 35 C.M.R. ____ (2 Sep. 1964). Compare UCMJ art. 36(a); Miller, *Who Made the Law Officer A Federal Judge?* 4 MIL. L. REV. 39 (1959). However, under existing procedures, a remand could be had to the board of review, which has fact finding power. See MCM, 1951, paras. 100*a*, 101. Nevertheless, a hearing at the trial level would appear more appropriate. Compare People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179 (1965) (trial venue preferred in post conviction procedure and thus new federally mandated remedy will be by coram nobis rather than habeas corpus).

[40] Subsection (c) of the Jencks Act states that upon refusal of the United States to deliver a pretrial statement of a government witness to the defense, upon the grounds that it does not *relate* to the testimony of the witness, "the court shall order the United States to deliver such statement for the inspection of the court in camera." While the Act uses mandatory language in this limited regard, case law does not require an *in camera* inspection in every situation, but strongly supports it. See United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964); United States v. Keig, 320 F.2d 634 (7th Cir.

the Supreme Court in the *Campbell* cases,[41] implying that the destruction of evidence subject to Jencks Act discovery, even in cases where substitute evidence *is* available, is still an open question. Also in opposition to the *Ogden* rule as being too liberal would be the cases previously noted "which have suggested that the harmless error doctrine can never apply . . . to statements producible under the [Jencks] statute." [42] In accord with the rule announced in the second *Ogden* case, and in the writer's opinion more logical and sound in content, are the decisions of the Supreme Court in the *Killian* case,[43] and lower federal courts, holding that the good faith destruction of Jencks Act evidence is not in violation of the Act where a reasonably accurate evidentiary substitute was made available to the defendant at the trial level.[44] Without further labor on the point, the writer submits that the rule

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1963); United States v. Chapman, 318 F.2d 912 (2d Cir. 1963); Hilliard v. United States, 317 F.2d 150 (D.C. Cir. 1963); Bary v. United States, 292 F.2d 53 (10th Cir. 1961); United States v. Tomaiolo, 280 F.2d 411 (2d Cir. 1960); Jacobs v. United States, 279 F.2d 826 (8th Cir. 1960); Karp v. United States, 277 F.2d 843 (8th Cir.), *cert. denied*, 364 U.S. 842 (1960). See also Palermo v. United States, 360 U.S. 343, *rehearing denied*, 361 U.S. 855 (1959), and United States v. Aviles, 315 F.2d 186 (2d Cir.), *rev'd mem. sub nom.* Evola v. United States, 375 U.S. 32 (1963), wherein the courts involved noted that in "doubtful" situations the statement should be submitted to the trial judge for his *in camera* inspection. (The court in *Aviles* affirmed the conviction where the statement had not been submitted to the trial judge for *in camera* inspection. However, the statement was attached to the record for appellate review, as provided for in subsection (c) of the Jencks Act.) In regard to the *Walbert* case discussed in the text above, it is submitted that the order of remand should have followed the form utilized in *Chapman* and *Keig, supra*, insofar as practical. The law officer should have been directed to hold an out-of-court hearing on the matter, attended by all parties to the trial, and, following an *in camera* inspection of the requested evidence (which apparently was still available), rule whether the failure of the government to produce the evidence at the original hearing substantially prejudiced the rights of the accused. If so, he should order a mistrial. If no substantial prejudice was found, the law officer should refuse to order a mistrial, attach the evidence concerned to the record of trial for review purposes, and return the record through the convening authority, to the appropriate board of review for further appellate review.

[41] See Campbell v. United States, 365 U.S. 85 (1961), and 373 U.S. 487 (1963).

[42] See cases cited in Rosenberg v. United States, 360 U.S. 367, 375 (1959) (Brennan, J., dissenting opinion).

[43] See Killian v. United States, 368 U.S. 231 (1961), *rehearing denied*, 368 U.S. 979 (1962).

[44] See *ibid.*; United States v. Comulada, 340 F.2d 449 (2d Cir. 1965); United States v. Aviles, 337 F.2d 552 (2d Cir. 1964); United States v. Spatuzza, 331 F.2d 214 (7th Cir. 1964); Ogden v. United States, 323 F.2d 818 (9th Cir. 1963); United States v. Tomaiolo, 317 F.2d 324 (2d Cir. 1963); United States v. Greco, 298 F.2d 247 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962); United States v. Thomas, 282 F.2d 191 (2d Cir. 1960).

announced in the second *Ogden* case (the good faith destruction of Jencks Act evidence where a reasonable substitute is made available at trial level is not a violation of the Jencks Act) is a sound rule of law and should be followed in the future by both military and federal courts.

Unresolved, of course, and as noted in the second *Ogden* case, is the problem of the negligent, or bad faith, destruction of Jencks Act evidence, regardless of whether a suitable evidentiary substitute is available. Excepting the possibility of the application of the harmless error rule (which conceivably could apply where the accused himself takes the stand and through his own testimony cleanses the record of error),[45] the law should not be too difficult to forecast in cases of negligent or bad faith destruction of evidence where there is *no* evidentiary substitute available. In regard to the *negligent* destruction of Jencks Act evidence, where substitute evidence is unavailable, it is submitted there is no better rule of law to follow in either federal or military cases, than the rule announced by the Air Force Board of Review in the *Combs* decision, *supra*.[46] Here the Board held, as previously noted, that the defendant's right to "examine any statement within the purview of the [Jencks] law is absolute," and ordered charges dismissed where the evidence had been "negligently" destroyed, and no substitute evidence existed. There can be little doubt that the same rule should apply with equal force to the bad faith destruction of evidence within the purview of the Jencks Act, where there is no substitute evidence available.[47] As the foregoing cases demon-

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[45] For cases exemplifying this point, see United States v. Walbert, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963), and Karp v. United States, 277 F.2d 843 (8th Cir.), *cert denied*, 364 U.S. 842 (1960).

[46] See ACM 16357, Combs, 28 C.M.R. 866 (1959), *supra* note 12, and accompanying text.

[47] See the following cases involving the destruction of Jencks Act evidence wherein the courts affirmatively noted with approval the absence of bad faith, or the intent to suppress evidence on the part of the government: United States v. Greco, 298 F.2d 247, 250 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962) ("There is no evidence that the notes were destroyed with intent to suppress evidence . . ."); Ogden v. United States, 303 F.2d 724, 737–38 (9th Cir. 1962) ("[T]he Court may . . . conclude that the substantial rights of the defendant were not affected . . ., if the statement was destroyed in accordance with normal practice . . ., for a sufficient reason wholly unrelated to the prosecution, in good faith and with no intention to suppress evidence . . ." [footnote omitted]); Campbell v. United States, 303 F.2d 747, 751 (1st Cir. 1962) ("Appellants make no contention that the original notes were destroyed in bad faith") (concurring opinion); United States v. Tomaiolo, 317 F.2d 324 (2d Cir. 1963) (The notes "were destroyed in good faith . . ."); Ogden v. United States, 323 F.2d 818, 820 (9th Cir. 1963) (" 'If the agents' notes . . . were destroyed by the agents in good faith and in

strate, however, where there is substitute evidence available for lost or destroyed evidence, regardless of the circumstanes surrounding the destruction of evidence, the harmless error rule more than likely would apply in either federal or military proceedings and bar the application of Jencks Act sanctions. By the same token, the writer submits, where the destruction of evidence is in good faith, in accord with usual operating procedures, and without intent to suppress evidence, if there is *no* substitute evidence available, full Jencks Act sanctions should apply (except in those situations where the accused himself, through his own testimony, cleanses the record of error).[48] But as noted in the second *Ogden* case, the answer to this question remains an open issue and must be resolved in future cases.

While the foregoing federal cases in this area indicate a very active interest on the part of the federal bar on the question of the destruction of evidence within the purview of the Jencks Act, the almost total absence of military cases on the issue points to a lack of sophistication on the part of military defense counsel in the mechanics of the Jencks Act. As military defense counsel become more and more acquainted with the fact that the Jencks Statute can have a very drastic effect on military law, routine demands for the production of Jencks Act evidence can be reasonably expected in military cases. When these demands are routinely made, the question of lost or destroyed evidence subject to Jencks Act discovery will surely be litigated in military courts, as it is presently being litigated in federal courts.

In view of the harsh sanctions that can be applied under this Act where evidence is lost or destroyed before trial (or retrial), staff judge advocates must make certain that military police agencies and Article 32 investigators retain all Jencks Act evidence that may come into their hands. As noted in the *Combs* decision, this evidence should be retained "until final review of the case" is completed. Otherwise, a lost, misplaced, or destroyed statement, case note, or sound recording of a pretrial interview

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accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right . . .'" [quoting from Killian v. United States, 368 U.S. 231 (1961)]); United States v. Aviles, 197 F. Supp. 536 (S.D.N.Y. 1961) (This "is not to state or imply that the government may with impunity and for improper ends destroy notes in an attempt to deprive criminal defendants of that which the Congress has seen fit to grant them.").

[48] See note 45, *supra*, and accompanying text.

with a government witness, or the defendant himself,[49] may cause fatal error in the trial of military cases.

[49] It has been judicially noted that the *Jencks* case "did not concern statements made by the defendant." DeFreese v. United States, 270 F.2d 737 (5th Cir. 1959), *cert. denied*, 362 U.S. 944 (1960). But case law is clear that statements made by the defendant to an agent of the government are "statements" within the definition of the Jencks Act, and are producible to impeach the testimony of the agent if the agent testifies for the government. See Clancy v. United States, 365 U.S. 312 (1961); United States v. McCarthy, 301 F.2d 796 (3d Cir. 1962); United States v. Allegrucci, 299 F.2d 811 (3d Cir. 1962); Karp v. United States, 277 F.2d 843 (8th Cir.), *cert. denied*, 364 U.S. 842 (1960); Johnson v. United States, 269 F.2d 72 (10th Cir. 1959); United States v. Walbert, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963). *Contra*, United States v. Johnson, 337 F.2d 180 (4th Cir. 1964).

COMMENTS

ASSASSINATION IN WAR TIME.* One hundred years ago, on the night of April 14, 1865, "Our American Cousin" was playing at Ford's Theater, Washington, D.C. During the third act, a man wearing a black slouch hat, dark clothing, and spurred riding boots entered the theater. John Wilkes Booth was about to commit the war crime of assassination.

His deed was not only the murder of a president, but also the treacherous killing of the commander-in-chief of the Union Army by a person associated with the enemy. For this latter reason, the Attorney General upheld the jurisdiction of a military tribunal to try the conspirators at a time when the civilian courts were open and functioning.[1]

I. THE ELEMENTS OF ASSASSINATION

This stigmatizing of assassination as a war crime has its roots deep in the customary international law of war.[2] Early writers

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] 11 OPS. ATTY. GEN. 297, 316–17 (1869). The opinion states in pertinent part as follows:

"That Booth and his associates were secret active public enemies no mind that contemplates the facts can doubt. The exclamation used by him when he escaped from the box to the stage, after he fired the fatal shot, *sic semper tyrannis*, and his dying message, 'say to my mother that I died for my country,' shows that he was not an assassin from private malice, but that he acted as a public foe. Such a deed is expressly laid down by Vattel, in his work on the law of nations, as an offense against the law of war, and a great crime.

". . . My conclusion, therefore, is that if the persons who are charged with the assassination of the President committed the deed as public enemies . . . they not only can but ought to be tried before a military tribunal. (July 1865)"

[2] See GROTIUS, ON THE RIGHTS OF WAR AND PEACE, Bk. III, Ch. 4, § XVIII, n. 4 (1642):

"For not only do the perpetrators of such deeds act contrary to the Laws of Nations, but also they who use their services." This customary rule is embodied in Art. 23b of the annex to Hague Convention IV, 1907, at 36 Stat. 2277, which states:

"It is forbidden to kill or wound treacherously individuals belonging to the hostile nation or army."

condemned it as treacherous murder.[3] They then, however, distinguished it from another type of killing, using as one example the daring exploit of Pepin, father of Charlemagne, who crossed the Rhine at night and slew his enemy in his chamber.[4] For this he was praised throughout Europe. Therefore, assassination must be distinguished from surprise attack by combatants against individuals. Should a resolute soldier steal into the enemy's camp at night, penetrate the general's tent, and stab him, he has done nothing that is not perfectly commendable and violative of no law of war. This distinction explains the essence of the war crime of assassination. It is, in most cases, the *selected* killing of an enemy by a person *not in uniform*.[5]

World War II saw three occasions where *uniformed* men went after *selected* military officers in the opposing camp. The first was the British commando raid at Beda Littoria in 1943, in an effort to kill or capture Field Marshal Rommel.[6] The second was the United States interception on April 18, 1943, of the Japanese plane carrying Admiral Isoroku Yamamoto, made possible by the deciphering of the Japanese message giving the admiral's inspection schedule. This incident is vividly described in the U.S. Army historical series on World War II[7] as follows:

> American intelligence officers had discovered the exact time on 18 April Yamamoto was due to reach the Buin area from Rabaul. Admiral Nimitz and his staff agreed that disposing of Yamamoto would advance the Allied cause, so the commander, Aircraft, Solomons, was told to shoot

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The custom was so well established that when an adventurer offered to assassinate Napoleon, Fox had him arrested and warned the French commander. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT'L L. 643, 646 (1942). Few, if any, governments have officially approved assassination as a method of warfare. Though it was practiced in China in the last century it was not authorized by the government. The same was true of the assassinations in the Afghan Wars of the 1840's. SPAIGHT, WAR RIGHTS ON LAND 86 (1911). The Confederacy did not approve either the assassination of Lincoln or the offering in South Carolina of $10,000 for the assassination of General Butler. *Id.* at 87.

[3] See, *e.g.*, BLUNTSCHLI, THE LAW OF WAR AND NEUTRALITY, § 52 (1878); Grotius, *op. cit. supra* note 2; HALLECK, ELEMENTS OF INTERNATIONAL LAW AND THE LAW OF WAR 181 (1866); LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 540 (1923); VATTEL, THE LAW OF NATIONS, Bk. III, Ch. VIII, § 155 (1758). In response to a letter of General Halleck in 1862, Francis Lieber wrote a tract on "Guerrilla Parties" in which he concluded as follows: "So much is certain, that no army, no society engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation, without the deepest injury to itself and disasterous consequences, which might change the very issue of the war."

[4] Other early examples relied upon are the attempt on the life of Ptolemy, King of Egypt, by Theodotus, called by Polybius, "a manly deed of daring," and the six hundred Lacedaemonians, led by Leonidas, who entered

him down. Eighteen P–38's, manned by picked pilots and led by Major John W. Mitchell, were sent on the mission. Taking off from Henderson Field on Guadalcanal, they flew low over waves for 435 miles by a circuitous route to the interception point northwest of Kahili. Yamamoto's flight hove in sight just as its fighter escort was leaving. Mitchell's attack section, led by Captain Thomas G. Lanphier, Jr., bored in and Lanphier made the kill. Yamamoto's plane crashed in the Bougainville jungle. He died. . . . This Lucifer-like descent of the aggressive, skillful Yamamoto, perhaps the brightest star in the Japanese military firmament, was a severe blow to the morale of the Japanese armed forces.

The third was the alleged German attempt to kill or capture General Eisenhower during the Battle of the Bulge.[8]

These three instances were not contrary to the laws of war and cannot be classified as attempts at assassination. A man in uniform, whether that of a general or a private, is a proper target.[9] The prohibition against assassination only protects him from being singled out for death at the hands of *someone not in uniform*. This is the heart of the treachery. It is not the selection

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the enemies' camp and sought their way to the royal tent. See VATTEL, *op. cit.* note 3, at 359 (Chitty Trans. 1844).

[5] Many authors and texts list assassinations as a prohibited method of waging war. Yet, rarely is any attempt made to define the term, other than calling it killing by treachery. U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE (1956) at para. 31 merely follows the pattern of Grotius, Vattel, and others in emphasizing what assassination is not. It states:

"This article (Art. 23b, Hague Regulations) forbids the assassination. . . . It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."

It is left to the [British] MANUAL OF MILITARY LAW, Pt. III, § 115 (1958) to describe, to some extent, the crime itself. It states:

"Assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans. . . ."

[6] See Combined Operations Headquarters Records, Middle East, Vol. 2A and the History of the Commandos and Special Service Troops in the Middle East and North Africa, June 1941–April 1943, cited in [British] MANUAL OF MILITARY LAW, Pt. III, § 115 (1958).

[7] MILLER, CARTWHEEL, THE REDUCTION OF RABAUL, U.S. ARMY IN WORLD WAR II—THE WAR IN THE PACIFIC 44 (Office of the Chief of Military History, Dept. of Army 1959). General MacArthur described the shooting as "one of the most significant strikes of the war." See MACARTHUR, REMINISCENCES 174 (1964).

[8] This appears to have been only a rumor, one of many of which circulated among the German soldiers as to the purpose of Skorzeny's Special Brigade. See SKORZENY, SKORZENY'S SECRET MISSIONS 234 (1951).

[9] Vattel sarcastically observes that if one condemns bold strokes against high officers, "his censure only proceeded from a desire to flatter those among the great, who would wish to leave all the dangerous part of war to the soldiery and inferior officers." VATTEL, *op. cit. supra* note 3.

alone, because that element was present in the death of Yamamoto. It was also present in the act of Pepin.

World War II, however, witnessed an act which had the earmarks of a classic assassination. On the morning of May 27, 1942, S.S. General Reinhard Heydrich, Reich protector of Bohemia and Moravia, was traveling in an open car from his home in the village of Panenske Brezany to his office in Prague. At a spot along his route two men were standing, apparently waiting for a streetcar. As his driver slowed for a curve the two men stepped quickly from the curb. One attempted to shoot Heydrich with a sten gun. When it failed to fire the other inflicted the fatal wound with a grenade. These two men were Jan Kubis and Josef Gabchik, Czech nationals, who had parachuted from a British plane to kill a certain selected individual, Reinhard Heydrich. With full knowledge of the country and the language, they were able, under the cloak of civilian clothing, to accomplish what a British battalion could not have done.[10]

This episode fulfills all the requirements of the war crime of assassination.[11] The treachery lay not in the selection but rather in the fact that the attackers hid their intent under the cloak of civilian innocence.[12] It is this innocence, however, that creates

[10] For a detailed account of this incident see BURGESS, SEVEN MEN AT DAYBREAK (1960). See also SHIRER, THE RISE AND FALL OF THE THIRD REICH 991-94 (1960) for a brief account of the death of Heydrich and the excessive reprisal the Nazis wreaked on the town of Lidice.

[11] It is possible that some legal justification for this act could have been found in the concept of reprisal if it were done because of prior unlawful acts of the German authorities. However, there does not appear to have been an attempt by any responsible allied government authority to term the assassination a reprisal. However, see SHIRER, *op. cit. supra* note 10, at 991, who terms it a retribution against the Nazis for their slaughtering of the conquered people. The [British] MANUAL OF MILITARY LAW, Pt. III, at 42 (1958) lists the killing of Heydrich as an example of a treacherous killing (assassination) by civilian persons in occupied territory, and thus a war crime justifying limited reprisal actions by the German authorities.

[12] It has been suggested that the distaste for the killing of the detached soldier may account for the original prohibition of assassination in customary international law, and that practice has since given a restrictive meaning to Art. 23b of the Hague Regulations, at least to the extent of killing individual soldiers in battle or occupied areas. Baxter, *So-called Unprivileged Belligerency, Spies, Guerrillas, and Saboteurs*, 28 BRIT. YB. INT'L L. 323 at 343 (1951). This suggested original basis is different from that of the observations of Vattel and Grotius on the subject and from the elements of the offense as given in the British Manual of Military Law. Therefore, the author's conclusion, that it is questionable whether the killing of Heydrich could be said to be an international crime because it was not an assassination, is based on an entirely different notion of the nature of the offense. It is the theme of this comment that the killing of Heydrich was an assassination, and being so has pointed up the real problem surrounding such an offense.

certain problems because every act of violence committed under its cloak is not considered treacherous. This is apparent from World War II where a different story was told about civilian innocence, a story which shakes the very foundation of the war crime of assassination. When the allies accepted the utility and legality [13] of waging war with civilian partisan groups behind enemy lines they naturally condoned the sudden strike against uniformed personnel by apparently innocent farmers, or the planting of a bomb in a military compound by a flower peddler. The civilian was given "first bite" as it were against the uniformed individual.[14]

Once the services of partisans are accepted and encouraged it becomes difficult and unreal to limit their aggressive activities by any such concept as that which forbids assassination. If British soldiers can attempt to get Rommel, why cannot they? If the Americans can search specifically for Yamamoto, why cannot they? [15]

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[13] For the legality of partisan warfare in occupied areas see the Dutch trial of General Hans Rauter reported in LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 434–35 (1948); and in XIV Law Reports of Trials of War Criminals 89–138 (1949) wherein the court stated that "resistance to the enemy in the occupied territory can be a permissible weapon; there is no contradiction in this [court had previously acknowledged the right of the occupier to punish persons taking part in such resistance] because such cases appear more than once in the Rules of War, especially in the case of espionage which is considered as a lawful weapon, while at the same time the belligerent party, which gets hold of a spy belonging to its opponent, has a right to punish such spy, even with death." This same analogy was used by the court in United States v. Wilhelm List in commenting on the guerrilla warfare in Yugoslavia and Greece. See VIII Law Reports of Trials of War Criminals 56 (1949).

[14] Soviet writers have tended to sanction warfare by nonuniformed men only in "peoples' war." See, *e.g.*, Kulski, *Some Soviet Comments on International Law*, 45 AM. J. INT'L L. 347 (1951); Trainin, *Questions of Guerrilla Warfare in the Law of War*, 4 AM. J. INT'L L. 534 (1946). The ideology and the after-the-act judgment inherent in such a distinction make this Soviet classification of little objective legal value.

[15] Grotius has quoted Pliny as saying "To deceive according to the manner of the time is called prudence;" adding that "yet custom has stopped short of the right of murder." GROTIUS, *op. cit. supra* note 2. The manner of the time today has sanctioned the use of civilian innocence as a cloak. As a consequence it is questionable now whether all assassinations are equivalent to murder as Grotius indicates. Stowell had anticipated a change in the moral outlook on assassination when he wrote in 1942 as follows: "It may well be that the advent of total war and increased government control of all civilian activity may lead to the disregard of the prohibition against assassination, as that against the sniping of pickets has been rendered obsolete or less important by airplane scouting." STOWELL, *op. cit. supra* note 2 at 646.

It is true that partisans can be punished if captured out of uniform. However, such punishment is not based on the fact that such individuals have violated a law of war or are in any sense war criminals, but rather on the fact that it is as proper for one side to employ them as it is for the other side to punish them. Spying is a close analogy here. The spy may be practicing an honorable profession, yet death awaits him upon capture. As a consequence, it is legitimate for men in uniform to work with partisans. Upon capture of such a mixed unit the partisan may face a dire penalty while the regular soldier would be treated as a prisoner of war.

There is a limit, however, in the manner in which a partisan must operate in order that he and those regular troops with him not run afoul of the prohibition against assassination. The partisan must ignore personalities in order to avoid a selectiveness in his killings. This is not always feasible.

II. KILLINGS BY ASSASSINATION AND RUSES IN INTERNATIONAL AND INTERNAL CONFLICTS

The elements of the war crime of assassination raise some interesting problems in the application of the existing laws governing treacherous killing, ruses, and civil wars. Seven situations will be examined briefly in order to illustrate the complexities that may arise.

Situation 1. A band of partisans may operate in occupied territory in conjunction with a small group of regular forces which has been parachuted in to organize such bands and to cooperate with them in attacking a number of targets, including selected individual political and military figures. The question would then arise whether the uniformed regular forces are assisting in an assassination [16] or conversely, whether the partisans are merely assisting in a lawful killing. The answer only partly lies in who fires the actual shot because both groups are integral parts of a single plan. The civilian cloak is usually an essential part of the operation.

Situation 2. Another factor in partisan warfare that raises questions in regard to assassination is the use of boobytraps, set

[16] The [British] MANUAL OF MILITARY LAW, Pt. III, § 115 (1958), in commenting on assassination, observes that "certain classes of treacherous killings or woundings committed by civilian persons in occupied territory might more properly be considered as infringements of the law of war, and thus as a war crime."

for a particular person.[17] For example, the door bell to a district military or political leader's house may be wired to explosives, or his vehicle may be fixed to explode when he turns the ignition key. Using the traditional approach it would seem to follow that if the trap were set by a man in uniform it would not be an assassination, but that if set by a partisan it would be. This would be so regardless of the fact that the individual who did the killing is miles away when the bomb actually explodes.

Situation 3. The law as to ruses introduces a further element of unreality into the situation. Suppose, in the situation just discussed above, the regular soldier wore his own uniform only while setting the boobytrap, changing into civilian clothes or even into the uniform of the enemy, in order to make good his escape. He would appear to have violated the law at no time.[18]

Situation 4. The ruse just discussed can be used in another manner. Suppose the British at Beda Littoria had used German uniforms in order to get close to Rommel or had Skorzeny used his American uniforms in order to penetrate the headquarters of General Eisenhower. Then, when within striking distance of their selected victim, they had thrown off the disguise and proceeded to kill him. This most probably would not have been assassination, the disguise being used merely as a ruse.[19]

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[17] Sherman, upon first encountering boobytraps set by Southern forces during his march to the sea, was reported to have condemned them as a violation of the law of war. MIERS, THE GENERAL WHO MARCHED TO HELL 264 (1951). However, the law of war has not borne him out. The propriety of boobytraps set for military personnel has seldom since been questioned.

[18] The problem raised by this kind of ruse was discussed and answered by the United Nations War Crimes Commission in the following manner:

"An interesting point would arise if the commando troops, after having destroyed the installations while they were in uniform, had then discarded their uniform and were then in process of flight as civilians when they were caught by the enemy agencies. Should they be tried as war traitors or possibly as spies? . . . They should be placed in a prisoner of war camp and treated rather as troops of a belligerent army who were fleeing from the scene of operations in disguise. It is not thought that this point has even been determined in any war crime trial to date." XI Law Reports of Trials of War Criminals 28–29 (1949).

[19] This type of ruse, the wearing of an enemy uniform, was the actual ruse used by Skorzeny in order to penetrate American defenses and secure the Meuse bridges during the Battle of the Bulge. Skorzeny reports the legal advice given him before his mission as follows:

"I had an interesting conversation with a colonel on General Winter's staff. This officer set forth the juridical aspect of my mission. According to him, . . . international law merely forbade a man in enemy uniform to use his arms. He therefore recommended that my soldiers wear German uniforms under the enemy uniforms; at the moment of the attack, properly speaking, they would shed their British or American uniforms.

Situation 5. A factor not yet discussed, but highlighted by situations 1 and 2 above, is that of the selected killings of noncombatants, principally party functionaries, political leaders, and essential technicians. The customary law of war has long prohibited attack directed exclusively against noncombatants.[20] Individuals who are in fact noncombatants are protected not only by the law against assassination but by this much broader rule. This protection which they have as noncombatants has not been sacrificed by the fact that they are essential to the war effort [21] or hold key party posts. They become tempting bait, however, for partisan bands. Once it is concluded that a partisan may kill a military man it is as difficult to say he can't kill a selected civilian as it is to say he can't kill a selected member of the military. Yet, it would be unwise to advocate or to encourage the overthrow of this basic protection of noncombatants.

On the other hand no such protection should be afforded a partisan. Since he is in fact a combatant it would be proper to lay ambushes for him. It would not be proper, however, under the existing rules of war, to seek to kill him by assassination.

Situation 6. The discussion so far has dealt only with international conflicts, a type of warfare in which United States forces may *not* be involved in the foreseeable future. However, they are involved in another type of conflict that has been described as "sublimited," "twilight," "antiguerrilla," etc. Such warfare forms an integral part of the counterinsurgency program in Vietnam. Here assassination may play a large role. High level assassinations, such as that of Heydrich, are sensational but infrequent and of doubtful military value. Such is not the case in the killing of

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"Naturally I decided to follow this advice." SKORZENY, *op. cit. supra* note 8, at 225. This advice was apparently correct because Skorzeny was acquitted in his war crimes trial. IX Law Reports of Trials of War Criminals 90 (1949). For a comment on the state of the law as to ruses after this acquittal see Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, 24 MO. L. REV. 16–50 (Jan 1959).

[20] "It is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE para. 25 (1956). HALL, INTERNATIONAL LAW, 397 n. 1 (5th ed. 1904) contains an interesting history of the development of the legal distinction between combatants and non-combatants.

[21] STONE, LEGAL CONTROL OF INTERNATIONAL CONFLICT 627–31 (1954) advocates a direct attack upon the civilian quasi-combatant who contributes directly to the war effort. He admits, however, that such is not now the state of the law.

minor officials by insurgents where the "military objective" is terror and the undermining of confidence in the government.[22]

This act of the insurgent not only is a violation of the local criminal law but it is also in contravention of Article 3 of the 1949 Geneva Conventions which prohibits the murder in civil wars of persons taking no active part in the hostilities.[23]

This application of Article 3 raises certain problems for the government forces when they attempt to select and kill certain members of the rebel organization. The government forces may not be violators of their own criminal law as is the insurgent. Likewise they would not be bound by the international rule against assassination because they are not involved in an international conflict. Yet they are bound by Article 3 and a breach may occur because the technique of assassination is at times as appealing to them as it is to the insurgent. For example, assassination has been suggested in a recent article in the Military Review as a device to be used under the term "armed propaganda." The author described "armed propaganda" as follows:

> This is the tactic of intimidating, kidnapping, or assassinating carefully selected members of the opposition in a manner that will reap the maximum psychological benefit.[24]

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[22] It has been estimated that over 10,000 village officials were killed by assassination and other means in South Vietnam by the Viet Cong between 1956 and 1960. Bernard L. Fall, lecture at the Special Warfare School, 4 June 1964.

[23] The question has sometimes arisen whether insurgents are bound by Article 3 since they did not sign it. A negative position was reportedly taken by the insurgent leaders, Gbenye and Soumialot, in Stanleyville on 25 September 1964 in conversations with Red Cross Delegate Dr. Jean-Maurice Rubly. This overlooks the fact that the Congo State was bound by the convention, not any particular government or group within that State, and that international law of war is binding not only on States as such but also upon individuals of that State. U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE para. 3b (1956). For a conclusion that rebels are bound see PICTET, 4 COMMENTARY ON THE GENEVA CONVENTION 37 (1958). See also text of letter of Dec. 1, 1964 from Adlai E. Stevenson to the President of the Security Council (U.N. doc. S/6075) wherein he stated:

"... many persons are still being held by the (Congo) rebels in violation of international law and standards of civilized behaviour. My Government ... trusts that the Secretary-General's influence, as well as that of Members of the United Nations, will continue to be employed to secure strict adherence to the Geneva Conventions for the Protection of War Victims."

In a previous letter of Nov. 24 (U.N. doc. S/6062) Mr. Stevenson stated:

"They were held as hostages in clear violation of the Geneva Conventions on the Treatment of Victims of War."

[24] Fisher, *To Beat the Guerrillas at Their Own Game*, Mil. Rev., December 1963, p. 81, at 86.

Apparently this armed propaganda has been implemented to some extent. The following was reported in July 1964:

> South Vietnamese government squads, generally operating in stealth at night, have begun a campaign of terror against Viet Cong officials in the Mekong River Delta.
>
> Small teams of commandos, armed with exact intelligence and daggers, are moving into Viet Cong hamlets in critical provinces near Saigon, assassinating key Viet Cong leaders, and slipping away.
>
> They are leaving calling cards on the bodies of their victims—an enormous white eye printed on a black slip of paper.
>
> Officials say the idea is to fight the Viet Cong with Viet Cong tactics.[25]

Since Article 3 only protects "persons taking no active part in the hostilities" there would appear to be no prohibition against assassinating selected members of the armed forces of the insurgents whether they are part-time or full-time fighters. It is conceded that it is extremely difficult at times to say who on both sides are "taking no active part in the hostilities." However, certainly anyone who commits an act of violence in furthering or suppressing the revolt could easily be omitted from such categorization.

This situation has, therefore, reflected in civil wars the proposition of situation 5 that noncombatants cannot be the victims of assassination. It is concluded here, however, that guerrillas in civil wars may be such victims while their counterparts in international wars may not. These different results are reached because the rule against assassination only applies to international conflicts.

Situation 7. This theme of civil wars can be taken one step farther by placing a civil war in the context of a larger international conflict. Such could occur if one government encouraged a revolt against another government with which it is at war. From the standpoint of international law, the revolters would be bound only by Article 3 which does not forbid assassination of members of the armed forces. However, the professional soldiers of the enemy sent in to organize and encourage them would be bound by

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[25] As reported by AP correspondent Malcolm W. Browne on 14 July 1964. He added the following quote from an unnamed American:

"Some of the death squads have been finding a lot of empty beds. The Viet Cong leaders know that squads may come for them on any given night, and they never know when they will get a black eye pinned on themselves. So they are starting to sleep in different places every night and doing all the things our people have been forced to do for years. I don't think its going to help enemy morale."

the international rule against assassination. It is difficult to reconcile the different treaty requirements when both the professional soldier and the rebel work as a unit.[26]

III. CONCLUSION

It would seem that the law of war, as laws in many municipal societies, has not developed in a logical fashion. Assassination is not a particularization of a larger principle which prohibits attack by non-uniformed individuals because no such principle exists. It is likewise not derived from a prohibition against selectivity because such a principle also does not exist. It rests now on its own intrinsic merits.

These merits are subject to question. The sanctioned participants in the frame of war have exceeded the traditional military figure. With this change in facts should come an awareness of the impact this change has had on the underlying assumptions concerning the impropriety of assassination as a means of waging war. The following suggested rules would appear to give effect to the presence of the non-uniformed partisan both in international and civil wars:

1. The selected killing of uniformed personnel should be permitted by non-uniformed bands as it is now permitted by those in uniform. This is not a big concession because these bands are already permitted to attack the military.

2. The selected killing of non-uniformed personnel should be permitted where such personnel are or have been engaged in military operations.

3. The selected killing of a noncombatant no matter how important his position should not be permitted by anyone, in or out of uniform.

JOSEPH B. KELLY*

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[26] One of the original and still important missions of the Special Forces is the organizing and leading of indigenous guerrilla units in enemy territory. U.S. DEP'T OF ARMY, FIELD MANUAL 31-21, GUERRILLA WARFARE AND SPECIAL FORCES OPERATIONS para. 19 (1958).

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LEGAL SUPPORT REQUIREMENTS FOR CIVIL AFFAIRS OPERATIONS IN COUNTERINSURGENCY.*

> Regardless of the command mission, the command interests can be divided into five broad fields of interest: personnel, intelligence, operations, logistics, and civil affairs.[1]

Having thus placed civil affairs in perspective as one of the five fields of major interest of a military commander in any situation we must determine what these words mean. The definition given by the Joint Chiefs of Staff is a broad one:

> Those phases of the activities of a commander which embrace the relationship between the military forces and civil authorities and people in a friendly country or area, or occupied country or area, when military forces are present.[2]

Indeed one legal analyst in discussing this term has referred to it as ". . . the totality of relationships between the military commander and his civilian environment." [3]

Civil Affairs activities in counterinsurgency situations deal largely, albeit not exclusively, with Civic Action Programs and projects. Military Civic Action is the term used to describe the activities of military forces directed towards removing or alleviating the root causes of insurgency.[4]

In the discussion of Legal Support Requirements for Civil Affairs Operations in Counterinsurgency [5] situations, one is met

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF OFFICERS FIELD MANUAL—STAFF ORGANIZATION AND PROCEDURE, para. 2.2b (1960).

[2] U.S. JOINT CHIEFS OF STAFF, PUBLICATION 1, DICTIONARY OF UNITED STATES MILITARY TERMS FOR JOINT USAGE 45 (1962).

[3] Costello, The Emergency Powers of the Military Commander in the Host-Guest Situation, April 1963, p. 15 (unpublished thesis, The Judge Advocate General's School).

[4] See discussion in U.S. DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS, paras. 79-84 (1962). See also the recent statement by the Secretary of the Army, Ailes, *Prepared to Deter, To Fight and To Build,* Army Magazine, Nov., 1964, pp. 38-40.

[5] Counterinsurgency has been defined as "Those military, para-military, political, economic, psychological, and civic actions taken by a government to defeat subversive insurgency." U.S. JOINT CHIEFS OF STAFF, PUBLICATION 2, UNIFIED ACTION ARMED FORCES, C-4, § II, para. 41102 (1959).

at the outset with the problem involved in defining what is legal support as opposed to participation in the actual operation. In this area precise definitions are neither realistically possible nor necessarily even desirable. Nevertheless, as we proceed to examine some of the multiple functions of civil support for their optimum performance, we will see that as a practical matter there is a real distinction between such legal support and the conduct of the operation itself. This is not to say, of course, that judge advocates assigned to civil affairs staff sections or units engaged in such counterinsurgency operations may not find themselves assigned to the conduct of the actual operation as well as the provision of legal support. Where this happens, however, normally it will be a tribute to the qualities of the specific individual rather than to his location on the organization chart.[6] However, in this examination, discussion will be primarily focused upon the role of the judge advocate in his capacity as a legal advisor to a Civil Affairs unit or staff section which is engaged in counterinsurgency operations.[7]

U.S. Army Civil Affairs doctrine discusses the operations of Civil Affairs units by functions, but recognizes that each function is related to other functions.[8] For the purposes of this examination the legal support requirements for certain of these functions which might be applicable in counterinsurgency situations is set forth in tabular form below. The quoted material to the left is in each case the description of the function as set forth in the indicated subparagraph of Chapter 2, *FM 41–10*, and the legal support requirements pertaining thereto have been taken from a draft study of the USACDC Civil Affairs Agency:[9]

"11 *a* (1) Surveying governmental organization at all levels."	Commanders must be advised of status of government organization at all levels and legal obligations flowing to and from the military.

[6] See Kent, *The Role of The Judge Advocate in New Missions of the Army*, The Judge Advocate Journal, Bulletin No. 37, June 1964, pp. 28–31.

[7] For a discussion of the substantive law involved in such operations see U.S. DEP'T OF ARMY, FIELD MANUAL 100–20, FIELD SERVICE REGULATIONS, COUNTERINSURGENCY (U), § VII, *Legal Aspects* (1964) (CONFIDENTIAL); Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 95 (1963); U.S. Army, The Judge Advocate General's School, Special Text, Law and Population Control in Counterinsurgency, Jan. 1965.

[8] FIELD MANUAL, 41–10, *supra* note 4 at para. 10a.

[9] USA CDC CAA, Study 63–107, Legal Support Requirements and Organization of Legal Services Within Civil Affairs Units, Fort Gordon, Nov. 1964.

"11 *a* (4) Studying effectiveness of governmental officials and employees and of other community leaders; removing persons who are inimical to the United States or who are not in sympathy with its policies and objectives, and securing the appointment of leaders who will further desired programs."	Under cold war circumstances, commanders would have to proceed with great caution. Full legal coordination is required for fulfillment of the 2d and 3d clauses of this function, whenever U.S. personnel may be involved therein.
"11 *a* (5) Negotiating to gain support or cooperation for United States forces."	Experience has shown that negotiations to gain support or cooperation for the United States Forces in foreign countries in times of cold war require clearly understood agreements at all levels. Even in the circumstances of a Status of Forces Agreement it has been found constantly necessary to negotiate with local level authorities for terms of implementation. In any such negotiation the provision of legal support is mandatory for optimum benefit. In any negotiations the services of a skilled lawyer can be most helpful; both in the discussions and particularly in the final phases of reduction of agreements to writing in a manner which will be clear to and binding upon the parties. The military commander should be fully advised upon the limitations, if any, of local law upon the authority of local officials, or of private commercial interests, to bind their principals to such agreement.[10]
"11 *a* (6) Recommending organization, functioning, staffing, and authority of agencies of governmental or social control."	In conditions of the cold war outside of the United States, function 11 *a* (6) will be concerned both with non-military U.S. operations as well as with indigenous operations. Within the framework of the country team the military commander's recommendation will be of significant value particularly if a situation of insurgency is in being or imminent. In terms of U.S. military forces advice to indigenous forces, these recommendations could be delicate and difficult. They

[10] For a non-lawyer's statement of this requirement, see Jones, *The Nationbuilder*, Military Review, Jan. 1965, p. 66.

	should be accomplished only after careful study and sound professional advice by specialists in many fields including legal.
"11 *a* (7) Advising, conducting liaison with, supervising, controlling, or replacing organs of government."	In terms of cold war outside of CONUS, this function would be limited primarily to the liaison and advisory phases, but even here, care must be exercised in the execution of this function and this care will require adequate legal support for the civil affairs organization concerned.
"11 *a* (8) Participating on joint commissions, committees, or councils concerned with governmental affairs."	The powers of a military commander to participate in this function are and would be severely circumscribed by law and regulation and detailed legal support would be essential. Also this must be coordinated with the other members of the country team.[11]
"11 *c* (6) Supervision of those civilian agencies which enforce law and maintain order with particular attention to looting, rioting, control of liquor and narcotics; collection and disposition of weapons, explosives, and implements of war in the hands of civilians, and the enforcement of regulatory and other measures of the occupant."	Under circumstances of cold war, supervision of indigenous civilian agencies is normally not a function of U.S. Forces; however, there is an advisory function which frequently comes close to being supervisory in nature. For the proper fulfillment of this function under cold war circumstances, legal support will be required so as to assure compliance with host-nation law.
"11 *c* (13) Requisition and issuance of required police and fire department equipment in accordance with approved policies."	Insofar as this may be a military function, it would require legal analysis of the AID program, as well as of the MAP program and legal support would be required to determine which, if either, of these programs may be used for this purpose.
"11 *e* (4) Plans for military assistance in public welfare activities."	Legal support will be required under any possible circumstances here to determine the extent and scope to which this function may be performed in consonance with applicable law.
"11 *g* (5) Requisition and issuance of materials and supplies for use in schools."	This function can be applicable in connection with civic action missions. Where this is done, legal support may be required to determine legality of use of

[11] See Hausrath, Civil Affairs in the Cold War, ORO SP-151, Operations Research Office, The Johns Hopkins University, Oct. 1961, pp. 18–20.

	U.S. funds and materials for this purpose.
"11 *h* (1) Plans for use of labor."	All planning for the use of labor under any set of circumstances will require legal support to insure compliance with applicable United States, International, or Host-Nation Law as may be the case.
"11 *h* (2) Determination of labor availability and procedures for procurement of labor for authorized types of work."	Procedures for the procurement of labor and determination as to authorized types of work such labor may perform will require professional, legal support.
"11 *h* (3) Review of applicable laws and policies respecting labor and review of status, operation, and effectiveness of local agencies, institutions, and organizations concerned with labor matters."	This function, obviously on its face, requires professional, legal support for even minimum performance.
"12 *a* (1) Development of plans for the maintenance, preservation, rehabilitation, or restoration of the local economy."	All plans for the maintenance, preservation, rehabilitation, or restoration of the local economy, or under any set of circumstances, will require legal support to determine legality of the extent of military participation and/or control therein as may be applicable.
"12 *a* (6) Surveys of legal provisions applicable to economic matters and public and private agencies and institutions concerned with economic activities."	On their face, these two functions require competent professional legal support for even minimum performance.
"12 *a* (10) Preparation of requirements for materials to be diverted to military use in accordance with policy guidance published by higher headquarters and applicable requirements of law (see FM 27-10 and DA Pam 27-1)."	
"12 *e* (1) Recommendations as to policies and procedures concerning the custody and administration of property. (2) Review of types or classes of property to be	On their face each of these tasks involve legal or quasi-legal problems. They should always be performed with the assistance of close competent professional legal support. Failure to provide such support can lead not only to a multiplicity of claims against the United

taken into custody and analysis of civil laws pertaining to such property.

(3) Preparation of schedules of property to be placed under military controls as determined by policy directives, including—

(a) Property owned by enemy governments or nationals of those governments.

(b) Property of allied governments over which temporary control will be assumed.

(c) Private property susceptible of military use.

(4) Control and administration of certain categories of property designated for control, appointing custodians where necessary.

(5) Protection of all records of title, transfers, and other property transactions.

(6) Review of evidence available to determine ownership.

(7) Maintenance of registers for supplies and property transferred from civilian sources to military units."

States, the military personnel concerned, but of even greater importance here, to the alienation of the affected civilian property owners whose support is sought and required in the counterinsurgency effort.

This examination of some of the civil affairs functions which may require legal support clearly indicates that something far broader than mere skill in the application of established precedent is required. For this task judge advocates are needed who have the necessary mental breadth and wisdom to adapt the law. The Civil Affairs public law function has been described in this way:

This function deals with the legal implications of relations with the governments and populations of nations wherever U.S. military personnel are present. These functions may include, depending upon the circumstances, some or all of the following matters:

(a) Preparation of opinions on questions of law pertaining to civil-military jurisdiction, contracts, bonds, and other administrative matters.

(b) Creation of or supervision of tribunals.

(c) Review of or drafting of agreements with local authorities.

(d) Review of or drafting of legislation such as decrees, ordinances, and similar type documents.

(e) Legal advice in connection with problems, local procurement and supply actions.

(f) Provision of assistance to and training of local legal personnel.[12]

It may thus well fall to the lot of the Civil Affairs Judge Advocate to establish new legal safeguards and criteria which will enable U.S. and friendly forces to carry out their mission in the face of enemy sponsored anarchy. The substitution of the rule of law for such anarchy is a primary objective of the United States in all counterinsurgency operations.[13]

The Civil Affairs Judge Advocate who is fully read into and involved in the myriad activities of his unit can be of incalculable value by operating a sort of legal preventive maintenance program. If his relationship with his commander and his colleagues is as it should be, he will foresee many of the difficulties before they arise and may assist his colleagues in forestalling problems which could easily become major sources of embarrassment to themselves and to the command. The role of the Civil Affairs Judge Advocate can and must be a positive one to assist his colleagues in doing their job. This problem is not unique to Civil Affair units, but has been faced by many agencies of the U.S. government. Mr. Milton P. Semer, General Counsel of the Housing and Home Finance Agency, stated the matter very succinctly when he said:

> There are some who take a narrow view of the functions of a lawyer in a government agency—a view that would perhaps be adequate to deal with the type of legal question that turns on a single stated fact or a small number of stated facts. Where, however, the statutes and judicial decisions contain legal requirements stated in terms of very broad standards, and where these broad standards are applied to complicated factual situations involving numerous and sensitive private interests, it is unthinkable that the lawyers should be relegated to answering questions that administrative officials may or may not know enough to ask him. Rather it take close teamwork between the lawyer and technical or administrative officials, first, to identify whether a legal problem may exist; second, to articulate the question; and finally, to provide the answer—or better still—a range of alternatives. ***
>
> Some are fond of saying that there is no real difference in a complex government program between the lawyer's function and that of other technicians. The fact is that there are two important differences.
>
> Non-legal technicians give advice concerning the wisdom of proposed courses of action. Government lawyers do this too, but sometimes find that they are charged with the additional and unpleasant professional duty of exercising what is in effect a veto power over actions they find

[12] USA CDC, Final Draft Manuscript, FM 41-5, Joint Manual for Civil Affairs, Fort Belvoir, Sept. 1964, p. 26.

[13] Johnson, *Landpower Missions Unlimited, Army* Magazine, Nov. 1964, p. 42.

to be illegal. True, a government administrator may disregard the advice of his lawyer. In such a case, however, the administrative official runs a far greater risk of disaster to his own career than when he overrules the advice of his economist or his planner.

* * * * *

I do not mean to over-emphasize the distinction between legal and other staff functions. By and large, government lawyers work within the same framework as other staff technicians. They serve a program not only by preventing illegal actions, but also by helping to find alternative courses of action which are equally legal. In doing so they act as policy advisors, and it is essential that they remember to state for the benefit of the persons whom they advise whether they are talking about the legality of a course of action or its wisdom.[14]

That this philosophy is fully applicable to the military lawyer is shown by the statement of Colonel John F. T. Murray, JAGC, then the Commandant of the U.S. Army Judge Advocate General's School, when he said:

It has been aptly stated that the term "legal advisor" is packed with meaning. A truncated view of the role would describe the legal advisor as an aid to assist with legal problems. The identification of legal problems under this view would be made by persons untrained in the law. To be a true legal advisor it is essential that the staff judge advocate be familiar with all of the activities of the command, aware of all of the commander's decisions, and cut in on all of the problems which arise. Rather than assist with legal problems, he participates in the determination of legally acceptable solutions to all problems. The very nature of the lawyer-client relationship requires that communication between the legal advisor and his client be direct and personal. Legal advice cannot be properly rendered unless the advisor has a full understanding of the problem and is able to present his views directly to the responsible decision maker. It is not enough to present the legal advisor with a comtemplated decision and ask him if it is legally acceptable. If he is not aware of all of the facts which were available to the decision maker, he cannot possibly render his best advice.[15]

This legal support role, important as it is, in every aspect of the Army's mission, becomes doubly important when we realize that "Countering insurgency means subordinating every military act all levels to the accomplishment of a political end."[16]

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[14] Semer, *Urban Development and the Law*, Fed. Bar News, May 1964, pp. 151 and 171.

[15] Murray, *The Army's Lawyers and the Army's Mission*, Army Magazine, Feb. 1963, p. 56, at 58.

[16] Adams, T. W., *The Social Scientist and the Soldier*, Army Magazine, March 1964, p. 51.

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SOME OBSERVATIONS ON LESSER INCLUDED OFFENSES*

An accused may be found guilty of an offense *necessarily* included in the offense charged. . . .[1]

I. THE COMMON LAW AND MILITARY TESTS

Although the Code uses the term "necessarily" in its definition of lesser included offenses, that term in practice has had little, if any, significance. The word is a hold-over from the common law where it was necessary to the definition.[2] At the common law, to be lesser included in a greater offense, a lesser offense must be such that it is impossible to commit the greater without first having committed the lesser.[3] If Article 79 were strictly construed, it would be held that a military accused could be convicted only of necessarily included offenses according to the common-law definition. The Court of Military Appeals has not construed the article strictly, however. It is admittedly construed quite liberally.[4] The Court has, in effect, proceeded generally on the basis of the cognate[5] theory in determining lesser included offenses. That theory permits conviction of "cognate" or allied offenses of the

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[1] UNIFORM CODE OF MILITARY JUSTICE art. 79 [emphasis supplied]. The definition of included offenses as contained in Article 79 has not changed appreciably, if at all, during the entire history of military law in this country. See WINTHROP, MILITARY LAW AND PRECEDENTS 382 (2d ed. 1920); Manual for Courts-Martial, United States Army, 1921, para. 200; Manual for Courts-Martial, United States Army, 1928, § 78*c*, at 65; Manual for Courts-Martial, United States Army, 1949, para. 78. Article 79 is quite similar to FED. R. CRIM. P. 31*c*. Federal statutes in the past have been similar to Rule 31*c* and, hence, quite similar to previous military rules. See, *e.g.*, Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198.

[2] See 4 WHARTON, CRIMINAL LAW AND PROCEDURE § 1799 (12th ed. 1957).

[3] *Cf.* Giles v. United States, 144 F.2d 860, 861 (9th Cir. 1944). Compare Salinas v. United States, 277 F.2d 914 (9th Cir. 1960). The common law did not, however, permit a conviction of a misdemeanor on an indictment for felony. See Regina v. Bird, 2 Eng. L. & Eq. R. 449 (Ct. Crim. App. 1851). However, this rule passed when the reason for it no longer existed (*i.e.*, felony prosecutions no longer were a separate class where the defendant had fewer protections than in a misdemeanor prosecution). See Hardy v. Commonwealth, 58 Va. (17 Gratt.) 592 (1867). In the United States the rule was not generally followed. See Watson v. State, 116 Ga. 607, 43 S.E. 32 (1902); Hardy v. Commonwealth, *supra*; *cf.* Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198.

[4] See United States v. Hobbs, 7 U.S.C.M.A. 693, 23 C.M.R. 157 (1957).

[5] See Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U. L. REV. 62 (1962).

same nature. It requires a consideration of the offense "charged" or *alleged* in the language of the specification, although it may allege acts which are not essential for commission of the offense for which the accused is on trial.[6] Under the cognate theory, an accused may be convicted of a lesser offense which, under the common law definition, is not necessarily committed in the course of committing the greater offense. Those offenses are cognate for the reason that they contain several elements in common with the greater offense, but may also have elements not contained in the principal offense.[7] While the Court of Military Appeals has not used the term "cognate" in defining its test, the language used is in general agreement with the cognate theory. That theory is not concerned with the relationship of two offenses in the abstract, but rather it is concerned with their relationship from the standpoint of allegation and proof. As early as *United States v. Davis*,[8] the Court indicated that whether a lesser crime is included within that charged depends almost exclusively on the facts stated and proved in support of the offense alleged. A short time later, the Court stated that whether an offense is included in the *abstract* definition of the major offense was not the controlling test.[9] The Court has, however, placed considerable emphasis on the element of "notice" in determining the existence of lesser included offenses.[10] In addition, the Court has stated that the offenses must be substantially of the "same kind." [11] The cases of the Court point, therefore, to a test for determining lesser offenses somewhat different from that contained in the present Manual. An examination of the decisions of the Court reveals the following test which is actually being utilized in practice. An offense is lesser included in the offense alleged if both offenses are substantially the same kind so that the accused is fairly apprised of the charges he must meet and the specification alleges fairly, and the proof raises reasonably, all elements of both crimes. If the specification alleging the principal offense neither expressly contains an averment of an element of a lesser offense nor fairly implies its existence,

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[6] See United States v. Duggan, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954). The Court, in using language of the cognate theory, in effect, stated that it has abandoned the 1951 *Manual for Courts-Martial* test for determining lesser included offenses as stated in paragraph 158 thereof.

[7] See, *e.g.*, United States v. King, 10 U.S.C.M.A. 465, 28 C.M.R. 31 (1959); United States v. Malone, 4 U.S.C.M.A. 471, 16 C.M.R. 45 (1954).

[8] 2 U.S.C.M.A. 505, 10 C.M.R. 3 (1953).

[9] See United States v. Parker, 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953).

[10] See United States v. Maginley, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963).

[11] See United States v. Duggan, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954).

it cannot be said to be included within the crime alleged, for, even though it is proved by the evidence, the accused has not been apprised that he must be prepared to defend against the lesser offense. However, a greater offense which requires only a general intent may include lesser crimes which involve a specific intent.[12] The cognate theory clearly places a greater burden on the accused than does the common-law "necessarily included" theory. Under the first theory, he must be prepared not only to defend against the major offense but also against all cognate offenses. The Court of Military Appeals, like most modern courts, has not made any distinction between cognate offenses and "necessarily" included offenses. The term "lesser included offenses," in practice, covers both cognate and "necessarily" included offenses.

Under the cognate theory, it is only in the concrete factual situation, usually in connection with instructions or on a question of variance, that a discussion of lesser included offenses has particular significance. An attempt to determine lesser included offenses of a major offense in the abstract is almost impossible and requires a statement of so many provisions and exceptions that it is of little practical utility. Except by a comparison of the general nature of the two offenses under consideration, in light of the particular allegation of the major offense and the evidence which has been admitted in support thereof, an attempt to determine the relationship of greater and lesser offenses appears to be a circuitous process.

II. MULTIPLICITY AND THE COGNATE THEORY

In that connection, however, the relationship between multiplicity[13] and the concept of lesser included offenses[14] should be noticed. The relationship is established by that portion of Manual paragraph 76*a*(8) which provides that lesser included offenses are not separate for punishment purposes. Care must be exercised in considering the relationship, however, in view of the different purposes of the two paragraphs. The concept of multiplicity is significant primarily in the area of pleading and sentence, while the problem of lesser included offenses arises usually in connection with instructions and findings, especially in connection with the question of fatal variance.[15] Insofar as paragraph 76*a*(8) is

[12] *Cf.* United States v. King, 10 U.S.C.M.A. 465, 28 C.M.R. 31 (1959).

[13] See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter cited as MCM, 1951] para. 76*a*(8).

[14] See MCM, 1951, para. 158.

[15] Compare United States v. Boswell, 8 U.S.C.M.A. 145, 23 C.M.R. 369 (1957).

concerned, a theoretical analysis of lesser included offenses must be made in drafting appropriate charges. Moreover, since the concept of greater and lesser offenses is only one test of multiplicity, cases dealing directly with multiplicity must be viewed with caution when considering a problem strictly in the area of lesser offenses. Only those decisions which find multiplicity *because* of the fact that one offense is lesser included in the other are of value in this area.[16] Moreover, care must be exercised in utilizing a decision of the Court in the multiplicity area in solving problems in the area of lesser included offenses in order to avoid unjust and improper results. For example, the mere fact that a lesser included offense may be subjected by the Table of Maximum Punishments to a greater punishment than the principal offense has been held not to prevent a finding that the former is lesser included in the latter.[17] There, *both* assault with intent to commit sodomy and a completed sodomy were charged. In finding multiplicity because of the relationship of greater and lesser offenses,[18] the Court pointed out that the fact that the Table of Maximum Punishments provided a ten-year maximum for an assault with intent to commit sodomy and only a five-year maximum for sodomy did not prevent the assault from being lesser included in the sodomy.[19] The *Morgan* decision was designed to prevent multiple punishments for one offense, although alleged in more than one specification. Logically, an assault to commit an offense generally is less serious than the completed offense,[20] and no problems arise in those cases except where the President has prescribed a greater punishment for the lesser offense. For the purpose of preventing double punishment for a single offense alleged in two specifications, therefore, the fact that the lesser offense is punished more severely than the greater offense is of no

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[16] See United States v. Oakes, 12 U.S.C.M.A. 406, 30 C.M.R. 406 (1961); United States v. McVey, 4 U.S.C.M.A. 167, 15 C.M.R. 167 (1954). Compare United States v. Bridges, 9 U.S.C.M.A. 121, 25 C.M.R. 383 (1958); United States v. Posnick, 8 U.S.C.M.A. 201, 24 C.M.R. 11 (1957).

[17] See United States v. Morgan, 8 U.S.C.M.A. 341, 24 C.M.R. 151 (1957).

[18] See MCM, 1951, para. 76*a*(8).

[19] For another example of this anomaly, see MCM, 1951, para. 127, at 224–25 (housebreaking and assault with intent to commit housebreaking). Compare United States v. Brown, 8 U.S.C.M.A. 18, 23 C.M.R. 242 (1957).

[20] This conclusion is subject to doubt, however, in such cases as housebreaking which can be a relatively minor offense in the military. However, when it is preceded by an assault, it would appear almost always to be a fairly serious offense.

consequence. Serious problems arise, however, when there is an attempt to subject an accused to a greater punishment than that authorized for the *one* offense upon which he was arraigned. Therefore, cases such as *Morgan, supra*, should not be carried over to the doctrine of greater and lesser offenses for the purpose of subjecting an accused to greater punishment than that authorized for the offense alleged against him. While under the *Morgan* doctrine an accused may be sentenced to a less severe punishment than that *appearing* to be authorized, it does not appear to be authority for the imposition of a greater punishment.[21]

III. CONCLUSION

It appears that the Court has chosen not to follow the Manual interpretation of Article 79, but instead it has elected to apply its own interpretation to the solution of problems in the area of greater and lesser offenses. Since the problem of determining lesser offenses lies in the area of the substantive law,[22] Manual provisions do not have the force of law,[23] and the Court has been free to utilize Manual treatment of the subject whenever helpful[24] but to devise its own rules when Manual provisions have tended to hinder appropriate solutions to problems in this area.[25] In so doing, it appears that it has devised rules which are less mechanical and of greater utility in the solution of problems in the area of greater and lesser offenses.

ROBERT L. WOOD*

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[21] *Cf.* United States v. Calhoun, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955). Compare WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920 Reprint). Although *Calhoun* dealt with a compound offense, the ideas expressed by Judge Brosman in his concurring opinion appear to be applicable to the problem here under discussion. There, Judge Brosman stated, "It seems almost unnecessary to verbalize—by way of caveat—the notion that in *no case* may the aggregate punishment for lesser offenses under the present view exceed the maximum provided for the crime formally specified in the charge sheet." 5 U.S.C.M.A. at 435, 18 C.M.R. at 59. [Emphasis supplied.]

[22] United States v. McCormick, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960).

[23] See United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); *cf.* United States v. Bernacki, 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963).

[24] See United States v. Shelton, 4 U.S.C.M.A. 116, 15 C.M.R. 116 (1954); United States v. Duggan, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954).

[25] See United States v. Malone, 4 U.S.C.M.A. 471, 16 C.M.R. 45 (1954); United States v. Davis, 2 U.S.C.M.A. 505, 10 C.M.R. 3 (1953).

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