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NATO SOFA—ARTICLES VII AND VIII:

AN AMERICAN'S TRIAL IN A FOREIGN COURT:
THE ROLE OF THE MILITARY'S TRIAL OBSERVER

Captain Jack H. Williams

THE INTERNATIONAL RESPONSIBILITY OF A STATE
FOR TORTS OF ITS MILITARY FORCES

Major William R. Mullins

Articles

THE ACQUISITION OF THE RESOURCES
OF THE BOTTOM OF SEA—
A NEW FRONTIER OF INTERNATIONAL LAW

Lieutenant Commander Richard J. Grunawalt

THE SETTLEMENT OF ARMY MARITIME CLAIMS

Captain Thomas J. Whalen

1966 ANNUAL INDEX

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PREFACE

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HEADQUARTERS
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MILITARY LAW REVIEW—VOL. 34

AN AMERICAN'S TRIAL IN A FOREIGN COURT: THE ROLE OF THE MILITARY'S TRIAL OBSERVER

By Captain Jack H. Williams**

Little has been written in over ten years concerning the role of the U.S. trial observers which are required by Article VII, NATO-SOFA. This article reviews current policies and practices of the United States armed forces regarding trials of U.S. personnel in foreign courts and the role of U.S. trial observers, from the standpoint of the requirements proposed by the Senate Resolution of 15 July 1953 and the NATO Status of Forces Agreement.

PREFACE

Since the landmark study by Snee and Pye of the actual operation of article VII of the NATO Status of Forces Agreement first appeared in 1956, virtually nothing has been written concerning the work done by U.S. trial observers, either under NATO-SOFA or in other jurisdictions. This study is an attempt to update developments in this area and to present, for the first time, the actual workings of the trial observer system as viewed by the observers themselves.

To obtain the information contained in Parts IV and V of this article, I contacted over seventy persons who are presently serving or have served as trial observers for the Army, Navy, and Air Force. Some of these individuals were contacted by questionnaire, others by interview. Forty-five letters and interviews were used for this study, and they are cited as Trial Observer Letters and Trial Observer Interviews, followed by a number, which merely indicates the order in which they were received. Collectively, the forty-five trial observers have observed 2,680 trials of U.S. personnel (including 262 trials of dependents and 95 trials of U.S. civilian employees) before the tribunals of 18 foreign countries.

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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 Fourteenth 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.

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I. INTRODUCTION

Such is the patriot's boast where'er we roam,
His first, best country, ever is at home.
And yet, perhaps, if countries we compare,
And estimate the blessings which they share,
Though patriots flatter, still shall wisdom find
An equal portion dealt to all mankind.[1]

The lieutenant slowly trudged up the wide marble steps of the Palace of Justice. He had been here many times before, and the thought of another day in the humid courtroom was not an appealing one. After pushing past the mammoth bronze doors, the lieutenant turned down the corridor to the left, retracing the now familiar route to courtroom number three. Entering, he scanned the room for the interpreter from his office, and seeing him in the third row, he slipped into the bench beside him. They exchanged a few words, and waited for the magistrates to enter. As the proceedings began, the lieutenant caught the eye of the young private first class who was on trial today, charged with vehicular homicide. Obviously nervous and uncomfortable, the PFC faintly smiled as he recognized the lieutenant who had talked with him several weeks before at the prison. Perhaps it was a small feeling of comfort to him as the trial began, and he realized that besides himself, the lieutenant was the only other American in the courtroom.

From time to time the interpreter whispered a few words to the lieutenant, commenting on a point of law or perhaps an unfamiliar procedure. The court recessed several times that day, and during each recess the lieutenant and the interpreter discussed the events which had transpired during the previous proceedings.

Several days later, the trial was finally concluded. The lieutenant collected his notes and those of the interpreter and began to prepare his final report. The PFC had been found guilty and sentenced to six months' imprisonment and $500 fine. During the trial, statements had been read from witnesses who were not in attendance, and a considerable amount of hearsay had been elicited from the witnesses who were questioned by the court, rather than by the PFC's attorney or the prosecutor. Unusual practices? Yes, by American standards, but quite in accord with the laws of this particular country. If anything, one would have to say that the laws and procedures of this state could not properly be compared with the laws and procedures in the United

[1] GOLDSMITH, THE TRAVELLER.

States; it was a completely different system, and a far older one than our Anglo-Saxon tradition. Although unlike our system of jurisprudence, it could not in itself be termed as unjust.[2]

After summarizing the events of the trial, the lieutenant concluded his report with the following statement: "The accused received a fair trial. He was not denied any of the rights guaranteed under article VII of the Status of Forces Agreement."

A typical case, a typical trial, a typical trial observer, a typical report—only the trial observer could know or report whether this serviceman had received the fair trial guaranteed by treaty, and perhaps even he would not be sure.

Since the NATO Status of Forces Agreement[3] went into effect some thirteen years ago, nearly 60,000[4] U.S. service personnel, dependents, and civilian employees of the U.S. have been tried in the courts of more than 41[5] foreign countries. This is a large number of cases, to be sure, even though a considerable number of these are minor offenses, such as traffic violations, resulting in fines rather than imprisonment. Nevertheless, the thought of standing trial for *anything* in *any* court, let alone the court of a foreign country, can be a frightening one.

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[2] For example, Schwenck compares the criminal procedures of NATO countries with criminal procedure under the Fourteenth Amendment, and concludes that even though there are great differences, such differences in themselves do not necessarily amount to a lack of due process. See Schwenck, *Comparative Study of the Law of Criminal Procedure in NATO Countries Under the NATO Status of Forces Agreement*, 35 N.C.L. REV. 358, 378 (1957).

[3] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846 (effective 23 Aug. 1953) [hereinafter cited as SOFA art. _____].

[4] See *Hearings Before a Subcommittee on the Operation of Article VII, NATO Status of Forces Treaty of the Senate Armed Services Committee*, 89th Cong., 1st Sess. (1965). In reviewing the period from 1 Dec. 1963 through 30 Nov. 1964 the Department of Defense listed a total of 48,270 cases tried by foreign courts. There have been 9,646 cases tried between 1 December 1964 and 30 November 1965. These statistics include the cases tried in non-NATO countries as well as the NATO cases.

[5] These include trials in the following: Ascension Island, Antigua, Australia, Austria, Azores, Bahamas, Belgium, Bermuda, Canada, Costa Rica, Denmark, Ecuador, France, Germany, Greece, Greenland, Hong Kong, Iceland, Iran, Italy, Jamaica, Japan, Kenya, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Philippines, South Africa, Spain, Switzerland, Trinidad, Turkey, United Kingdom, West Indies, West Pakistan, and Yugoslavia. DEP'T OF DEFENSE, STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (1 Jan. 1954–30 Nov. 1965) (11 vols.).

To the serviceman, dependent or civilian employee who finds himself charged with an offense in a foreign court, the apprehensions of such a trial are manifested in such questions as: "Can they try me?", "Can I be fined or imprisoned in their jails?", "Will I have an attorney?", "Will I get an interpreter?", "Am I going to get a fair trial?", "Does my country even care, and will it help me?" The answer to each of these questions should be "yes," and the one person upon whom most of the responsibility falls is the trial observer, for he alone can be counted on to be present.

Who is this trial observer? Why is he necessary? How does he approach such trials? What can he do to insure that any rights guaranteed to the accused by local law and international agreement are observed, and how will he *know* whether or not they are being observed? These questions are the subject of this article—the role of the trial observer: what he does or should do as found in both policy and practice.

II. "FAIR TRIAL" GUARANTEES OF ARTICLE VII, NATO STATUS OF FORCES AGREEMENT

A. *THE SENATE RESOLUTION OF 15 JULY 1953*

1. *Background.*

In order to understand the "world of the trial observer" as it exists today, we must look briefly to the situations and events which brought about the need for such an individual.

With the signing of the North Atlantic Treaty,[6] it became evident that a considerable number of U.S. troops would be stationed within the territories of other states.[7] This brought to the fore the longtime argument of which sovereign has jurisdiction over such forces for criminal offenses—the state sending the forces or the state in which they would be stationed?[8] One view is that if a foreign sovereign gives permission for troops of another

[6] 4 April 1949, 63 Stat. 2241, T.I.A.S. No. 1964 (effective 24 Aug. 1949).

[7] Troops from other NATO members also might be stationed in the United States. See Ellert, *The United States as a Receiving State*, 63 DICK. L. REV. 75 (1959).

[8] For excellent discussions of the status of visiting forces see Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U. L. REV. 349 (1955); Note, *Criminal Jurisdiction Over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1046–50 (1957). See also, Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, U.S. NAVAL WAR COLLEGE, 52 INTERNATIONAL LAW STUDIES, 1957–1958 (1965). An interesting discussion of immunity from jurisdiction is found in STAMBUK, AMERICAN MILITARY FORCES ABROAD 119–56 (1963).

sovereign to enter its territory, such permission is an implied consent to exempt such troops from its jurisdiction.[9] Some writers suggest that the proposition that a host state is obliged to grant immunity to members of a visiting force is indeed a rule of international law,[10] while others urge that this is not the case, and that any immunity which the visiting forces may have is only finally determined by agreement.[11] The fact that there is considerable disagreement tends to indicate that this is not universally accepted

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[9] In U.S. law, this view was initially proposed by Chief Justice Marshall in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 139 (1812). For other cases which discuss this proposition, though often in dicta, see Coleman v. Tennessee, 97 U.S. 509, 516 (1879); Dow v. Johnson, 100 U.S. 158, 165 (1880); Tucker v. Alexandroff, 183 U.S. 424 (1902); Chung Chi Cheung v. The King, [1939] A.C. 160 (P.C. 1938); Wright v. Cantrell, 44 N.S.W. St. 45 (1943); In re Gilbert, Sup. Fed. Ct. Brazil, 22 Nov. 1944, [1946] Ann. Dig. 86 (No. 37); Ministere Public v. Triandafilou, Ct. of Cassation, Egypt, 29 June 1942, [1919–1942] Ann. Dig. 165 (No. 86) (Supp. vol.).

[10] See King, *Jurisdiction Over Friendly Armed Forces*, 36 AM. J. INT'L L. 539 (1942); King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM. J. INT'L L. 257 (1946).

[11] Re states that: "Sound legal analysis, therefore, would require the conclusion that although a certain immunity exists for foreign friendly visiting forces, the extent of the immunity is strictly a matter of agreement. It is for the territorial sovereign to determine the extent to which he wishes to waive the exercise of his jurisdiction. The agreements actually entered into by the nations of the world, as well as the decided cases, clearly demonstrate that the problem has always involved reconciling 'the practical necessities of the situation with a proper respect for national sovereignty.'" Re, *supra* note 8, at 392. (Footnote omitted.)

After tracing the history of U.S. experience in this area, Stanger concludes that "[t]he frequent instances in which the allocation of jurisdiction was determined by international agreement and implementing municipal legislation not only indicates that states did not feel compelled to accord a general immunity to visiting armed forces but also suggests that the situation is inherently so complex and the conflicting interests so evident that international agreements and implementing legislation are necessary to a satisfactory arrangement." Stanger, *supra* note 8, at 139. See, generally, Barton, *Foreign Armed Forces: Immunity From Supervisory Jurisdiction*, 26 BRIT. YB. INT'L L. 380 (1949); Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, 31 BRIT. YB. INT'L L. 341 (1954). See also Department of Justice Document entitled "International Law and the Status of Forces Agreement," found in *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. 38–56 (1953); also in *Hearings on H. J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs*, 84th Cong., 1st Sess., pt. 1, 245–48 (1955) [hereafter cited as *Hearings on 309*]; also found, with textual modifications in 53 COLUM. L. REV. 1091–113 (1953).

as a rule of international law.[12] Perhaps the argument should never have arisen at all since the NATO situation is a unique one.[13] One can hardly justify the term "visiting forces" when the troops of one state are rather permanently stationed in the territory of another in a peacetime situation. The U.S. forces, in particular, have been stationed in some of the NATO countries a little too long to be referred to as "visiting forces." In wartime, exclusive jurisdiction in the sending state has been the rule, but even in this situation there have usually been agreements between the parties providing for such exclusive jurisdiction.[14] The view of the United States has been that exclusive jurisdiction in the sending state was not a universally accepted rule of international law; and that even if we had urged it, the NATO countries would not have been willing to recognize such a doctrine.[15] Therefore, when we ratified the NATO Status of Forces Agreement on 24 July 1953,[16] it was felt that we had obtained the best arrangement possible under the existing situation.[17]

2. *Jurisdiction Under the Status of Forces Agreement.*

Under the NATO Status of Forces Agreement, the military authorities of the sending state have "the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State." [18] Thus, the exclusive jurisdiction of the sending state is limited to those few offenses of a purely

[12] It is interesting to note, for example, that most of the authoritative texts on international law give very brief and very qualified comments on the theory of immunity of visiting forces. See 1 OPPENHEIM, INTERNATIONAL LAW 846–49 (8th ed. Lauterpacht 1955); 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 405–06 (1941); 1 HYDE, INTERNATIONAL LAW 819–22 (2d rev. ed. 1951); BRIERLY, THE LAW OF NATIONS 267, 269 (6th ed. 1963).

[13] A study made by the Department of Justice, in response to a request by Representatives Dodd and Vorys, concludes "We have been unable to find, however, any comparable situation where a state has quartered troops in a foreign sovereign state during peacetime either under an agreement or otherwise." *Hearings on 309*, at 385.

[14] See Stanger, *supra* note 8, at 111–39.

[15] Hon. Robert Murphy, Deputy Under Secretary, Department of State, told the House Committee on Foreign Affairs that "[w]e believe that these arrangements (under SOFA) are reasonable and practicable and represent considerable concessions to the viewpoint of the United States by our Allies." *Hearings on 309*, at 160.

[16] 19 June 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

[17] See 99 CONG. REC. 8776–77 (1953) (letter from Under Secretary Walter Bedell Smith to the Chairman of the Senate Foreign Relations Committee, 5 May 1953).

[18] SOFA art. VII, para. 2(*a*) (reprinted as app. A of this article).

military nature, such as AWOL or disrespect. The receiving state has exclusive jurisdiction "over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its laws but not by the laws of the sending State." [19] These security offenses are further defined in paragraph 2(*c*) of article VII to include treason, sabotage, espionage or violation of any law relating to the official secrets or national defenses of the receiving state.

All other offenses are considered as subject to the concurrent jurisdiction of the parties. It is in this concurrent area that the so-called NATO-SOFA "formula" applies, giving the military authorities of the sending state *primary* jurisdiction to try members of the force or of a civilian component for offenses *solely* against the property or security of the sending state *or* offenses *solely* against the person or property of another member of the force, or civilian component [20] or dependent,[21] as well as offenses by servicemen and civilian employees arising out of an act or omission done in the performance of official duty.[22] The receiving state has the primary right to exercise jurisdiction over all other offenses.[23]

While it is not my purpose to discuss the intricacies of jurisdiction under article VII, the basic mechanics of the system are of significance in understanding the development of the trial observer program.[24] Paragraph 3(*c*) of article VII provides that the state having the primary right to exercise jurisdiction shall "give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance." Finally, paragraph 9 sets forth the basic guarantees for members of a force, civilian component, or dependent who are prosecuted by the receiving state. It provides that he shall be entitled:

[19] SOFA art. VII, para. 2(*b*).

[20] In U.S. practice, this term applies only to U.S. nationals serving with, employed by, or accompanying the armed forces. See Dep't of Defense Directive No. 5525.1, sec. I (20 Jan. 1966).

[21] Dependents of either the members of the force or civilian component. The members of the force, civilian component, and dependents are referred to collectively as "U.S. personnel." See *ibid.*

[22] SOFA art. VII, para. 3(*a*). See app. A.

[23] SOFA art. VII, para. 3(*b*). See app. A.

[24] There are a number of excellent sources which explain in detail the practical operation of article VII, SOFA. These include SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION (1957); U.S. DEP'T OF ARMY PAMPHLET NO. 27–161–1, 1 INTERNATIONAL LAW 121–31 (1964); ELLERT, NATO "FAIR TRIAL" SAFEGUARDS 21–55 (1963).

(*a*) to a prompt and speedy trial;
(*b*) to be informed, in advance of trial, of the specific charge or charges made against him;
(*c*) to be confronted with the witnesses against him;
(*d*) to have compulsory process for obtaining witnesses, in his favor, if they are within the jurisdiction of the receiving State;
(*e*) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the condition prevailing for the time being in the receiving State;
(*f*) if he considers it necessary, to have the services of a competent interpreter; and
(*g*) to communicate with a representative of the Government of the sending State, and when the rules of the court permit, to have such representative present at his trial.[25]

The representative mentioned in (*g*) is, in U.S. practice, the trial observer.

3. *Effect of the Senate Resolution.*

When the SOF Agreement was sent to the Senate for its "advice and consent," it made use of the waiver and right to the presence of a government representative requirements contained in article VII to establish procedures to be followed for trials of U.S. personnel. In the Senate Resolution of 15 July 1953,[26] the United States Senate resolved to advise and consent to the ratification of the Status of Forces Agreement with the understanding[27] that "[w]here a person subject to the military jurisdiction is to be tried by the authorities of the receiving state, under the treaty the Commanding Officer of the Armed Forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States . . . ."[28] If, in his opinion, "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3(*c*) of Article VII . . . ."[29] If the receiving state refuses to waive jurisdiction, then the "commanding officer shall request the Department of State to press such request

[25] See app. A.
[26] [1953] 2 U.S.T. & O.I.A. 1828–29, T.I.A.S. 2846 [hereafter cited as S. Res.].
[27] Note that the Senate Resolution is *not* a reservation to the treaty, rather it is an "understanding," which makes it a domestic matter entirely. *Cf.* HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW § 484 (1943).
[28] S. Res. para. 2.
[29] *Id.* para. 3.

through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives . . . ." [30] Thus, technically, if the designated commanding officer has examined the laws of the country in which one of our persons is to be tried, and if he finds that it does not contain the procedural safeguards set forth in the Constitution and feels that the accused will not be protected because of the absence or denial of such guarantees, then he *must* ask the receiving state to waive jurisdiction. The practical result of this is that the United States requests waivers in nearly all cases.[31] This, of course, tends to lessen the significance of the waiver provision of article VII, as this provision related only to cases of particular importance.[32] It does take the burden and expense of trial from the receiving state and place it upon the United States, but of course our own personnel are involved and from a standpoint of military discipline, our authorities would prefer to try their own personnel for such offenses. Under the Senate Resolution it would appear that we are absolutely justified in requesting numerous waivers, since the laws of no member of NATO, not even the United Kingdom, guarantee all of the procedural safeguards which one would enjoy under the Fourteenth Amendment of the U.S. Constitution. Most of the members of NATO are civil law countries, and the civil law system can no more be compared to the American system than an apple can be compared to an orange. Both are good, and there are certain similarities, but

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[30] *Ibid.*

[31] Senator Bricker's position was that "judge advocates should try to obtain a waiver of jurisdiction for every American serviceman in foreign custody." Bricker, *Safeguarding the Rights of American Servicemen Abroad,* J.A.J. No. 15, Oct. 1953, pp. 1, 3. It has been Army policy to obtain the maximum number of waivers possible. See Dep't of Army Letter, AGAM–P(M) 250.3, 18 March 1958, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 5(a), 8 April 1958, as amended by Dep't of Army Letter, AGAM–P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 5(a), 28 June 1962. Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement,* 51 AM. J. INT'L L. 29, 46 (1957). Present policy is to request a waiver when "there is danger that the accused will not receive a fair trial." See Dep't of Defense Directive No. 5525.1, sec. IV E.2 (20 Jan. 1966).

[32] Snee and Pye state that it is only where there is danger of concrete prejudice to the accused that the waiver provisions of the Senate Resolution should be applicable. SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 119 (1957).

one cannot say that one is better than the other for any reason—they both have their merits.[33]

The final portion of the resolution provided that

> A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior United States Military representative in the receiving state will attend the trial of any such person by the authorities of the receiving state under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the agreement shall be reported to the commanding officer of the armed forces of the United States in such state who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives.[34]

Here we see the "representative present at the trial" of paragraph 9(*g*) of article VII is given the specific duty of reporting any denial of the safeguards found in paragraph 9.

Why did the Senate feel that it would be necessary to impose these requirements in order to protect the rights of U.S. personnel under an agreement which in itself provided for certain basic safeguards to individuals tried in the courts of a receiving state? Obviously, one reason was to try to insure that our personnel would not be denied what we consider to be basic procedural rights where they are subject to trial under an alien system of justice. Another reason stemmed from a feeling that we were getting a "bad deal" in the SOF Agreement; that we had "given up" something and this was an attempt to get a little of it back.[35]

What were these constitutional rights which an accused "would enjoy in the United States?" An interservice legal committee decided that the Senate must have intended that these rights were those which an accused would have under the Fourteenth Amendment in a state court of the United States.[36] Secretary of the Army, Wilber Brucker, later stated that the purpose of this memorandum was for the use of the country commanders "as a basis for comparing the foreign criminal law and procedure ap-

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[33] The procedural differences with regard to the area of self-incrimination, for example, are discussed in Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962); *cf.* Rouse & Baldwin, *supra* note 31, at 53. Snee and Pye compare the U.S. law regarding burden of proof, presumption of innocence, and the right against self-incrimination with the laws of France, Italy, Turkey, and the United Kingdom. See Snee & Pye, *op. cit. supra* note 32, at 129–37.

[34] S. Res. para. 4.

[35] 99 CONG. REC. 8780–82 (1953) (remarks of Senator Bricker).

[36] Dep't of Defense, Inter-Service Legal Committee Memorandum (17 Nov. 1953).

plicable in the area within their respective commands with basic constitutional rights within the contemplation of the Senate Resolution." [37] In conjunction with this action, and in response to the Senate Resolution, the Department of Defense directed the Commander-in-Chief of the European Command, on 21 August 1953, to undertake a general examination of the criminal and procedural laws of the NATO countries.[38] These have developed into what are known today as the "Country Law Studies."

Although the Senate Resolution stated that "the criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements," our agreements with countries which subsequently entered NATO contain almost identical provisions.[39] In like manner, our treaty with Japan [40] contains the article VII guarantees, and adds a few additional ones.[41]

4. *Hearings on the "Bow Resolution."*

There were fairly few trials under the Status of Forces Agreement during the first few years.[42] Nevertheless, there were rumors of unfair trials, of U.S. personnel in primitive prison conditions, and the like, which prompted the introduction in 1955 by Representative Bow of House Joint Resolution 309. The purpose of the resolution was to provide for the revision of the Status of Forces Agreement, and similar agreements, or else the withdrawal of the United States from such treaties and agreements so that foreign criminal courts would not have criminal jurisdiction over U.S. personnel stationed within their countries. Hearings [43] began on 13 July 1955 before the House Committee on Foreign Affairs and lasted six days, through 26 July 1955. They were subsequently concluded on 2 February of the next year. Although the resolution was never passed, the hearings did serve the purpose of pointing up the merits as well as the problem areas in the actual operation

[37] *Hearings on 309*, pt. 1, at 249.

[38] See *id.* at 340–41.

[39] Greece, Turkey, and the Federal Republic of Germany. See part I, app. B, of this article.

[40] 19 Jan. 1960 [1960] 2 U.S.T. & O.I.A. 1652, T.I.A.S. No. 4510 (effective 23 June 1960).

[41] See part II, app. B.

[42] In 1954 there were 1,475 cases world-wide, of which only 812 were in the NATO countries. In 1955 this figure rose to 3,142 of which 2,111 were trials in NATO countries. See *Hearings Before the Subcommittee to Review Operation of Article VII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces of the Senate Armed Services Committee*, 86th Cong., 1st Sess. 20 (1959).

[43] *Hearings on 309.*

of article VII.[44] The result was that the Department of Defense and the military authorities were required to come up with some explanations and statements of policy. First of all, the committee requested assurance that all trial observers would be qualified lawyers.[45] They inquired whether observers were required to attend all trials set forth in the Senate Resolution and were informed that an observer would be provided by the services in all

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[44] Hon. Robert Murphy, Deputy Under Secretary, Department of State, started off by boldly proclaiming: "There was not a single case in which there was a basis for the United States to protest that the safeguards assured by the Status of Forces Agreement for a fair trial were not met, or that there was any other unfairness. There has been not a single instance of cruel or unusual treatment. A United States representative has been present at every one of the trials in these cases." *Id.* at 166. Later in the hearings it was shown that in a trial under the Japanese agreement, observers had reported that an adequate trial had not been had, which was due in part to a "technical" denial of confrontation. *Id.* at 351. At another point, a spokesman for the Department of Defense indicated that in another trial the U.S. trial observer had not been present during the entire trial. *Id.*, pt. 2, at 549. There were numerous other embarrassing moments during the hearings, due largely to previous overzealous statements such as Mr. Murphy's.

[45] This was brought about by the interesting discourse between Representative Fulton and Monroe Leigh, Assistant General Counsel for International Affairs, Department of Defense.

"Mr. Fulton. Why in some instances do the United States Forces have people attending the trial of United States servicemen abroad representing the United States forces when they are not learned in the law?

"Mr. Leigh. I think that we have.

"Mr. Fulton. Why is there not in all cases, a representative who is a lawyer or learned in law?

"Mr. Leigh. We try to do that in every case where it is possible.

"Mr. Fulton. Isn't it possible to have a JAG officer go to whatever station it is necessary, to represent the young man in the United States forces abroad while he is under attack in a court where he can't speak the language?

"Mr. Leigh. Well, we are sure that he has the lawyer in the first place. The observer's function is somewhat different from the lawyer, but as I say the current instruction is that the observer also be a lawyer whenever possible. We did not want to bind the overseas commands until we had heard from them, as to whether they could actually find enough manpower to do this. You see, this includes traffic offenses, as well. It could become quite an administrative burden, but it is our intention to do that.

"Mr. Fulton. Above the ordinary police case in the field of both misdemeanors and felonies, would it not be possible as a practical matter for the Judge Advocate General's Department to have a representative within its manpower resources, appear at the trial of each United States serviceman abroad?

"Mr. Leigh. Let me consult with General Hickman on that.

"Mr. Fulton. For misdemeanors and felonies.

"Mr. Leigh. Excluding the traffic offenses?

"Mr. Fulton. That is right.

"General Hickman. I can't speak for the Navy and the Air Force. Certainly we can in the Army.

cases except minor offenses such as traffic violations.[46] An inquiry was made of the adequacy of interpreters for the accused,[47] and interest was expressed in the number of cases in which Americans were being tried in foreign courts for offenses which would not

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"Mr. Fulton. Would you have the services supply that, with the chairman's permission, for the record. I think a representative of the United States Forces learned in law should be supplied in every case of a misdemeanor, or felony where trial is held of a United States serviceman in a foreign court.

"Mr. Leigh. We will undertake to get that.

"Chairman Richards. If you can get that statement we will place it in the record at this point."

(The Department of Defense subsequently confirmed that each of the other two services could also provide legally learned observers in every such case.) *Id.*, pt. 1, at 335.

[46] The Department of Defense furnished the following report: "A report was requested as to whether there has been full compliance with the Department of Defense policy concerning the attendance of observers where United States military personnel are tried by foreign tribunals.

"During the hearings last July, the committee asked whether it would be possible to have legally learned observers attend all trials of United States military personnel before foreign tribunals. Previously, the Department of Defense had required that United States observers attend all trials of military personnel before foreign tribunals and that these observers should be lawyers whenever possible. It was subsequently determined that the military services could provide a lawyer to serve as an observer in all cases except those involving minor offenses such as traffic violations. In these latter cases, the Department of Defense would continue to require that an observer attend all trial proceedings but could not assure that he would be legally trained. The committee was notified of this and the Department of Defense issued the necessary instructions.

"It is possible, as was stated during the hearings last July, that there may be some cases where an observer is not present because the United States authorities did not have notice of the impending trial. For example, a serviceman may prefer to pay a fine in a minor case without having the matter brought to the attention of his superiors. However, in these cases of which the United States authorities did have notice, there has been only one instance where a United States observer was not present during the proceedings before a foreign tribunal. This case involved a morals charge and the judge, exercising his discretion under the laws of the country concerned, closed the court to all persons except the accused, witnesses and counsel. Charges against the accused in this case were later dropped, and the matter has been taken up with the authorities concerned to prevent, if possible, a recurrence of this nature. There was another case where the observer, although present at the trial, had been directed by the judge to take a seat so far from the proceedings that he could not follow them completely. This case has been taken up with the authorities of the country concerned to insure that the rights of the accused are preserved and to prevent a similar occurrence in the future." *Id.*, pt. 2, at 937.

[47] The statement furnished by the Defense Department said: "A request was made for a report on the practices followed with respect to translation where a serviceman is tried before a foreign tribunal.

"Generally speaking, the method of translation used by an interpreter varies according to circumstances. At trials, the interpreter will provide the accused with a running translation as testimony is received by the court.

ordinarily be criminal offenses in the United States.[48] A particular point was made regarding the forwarding of trial observer reports to the Judge Advocate General's Office of the services concerned, since it appeared that these reports were filed in the local headquarters but not sent to Washington except in the case of a *cause célebre*.[49] In general, the Department of Defense, and the Army in particular, more than rebutted the various arguments set forth in favor of modifying SOFA or withdrawing from it.[50]

The tenor of the hearings was fairly well summed up by Representative Harrison A. Williams of New Jersey who stated:

> I got the impression . . . that there is a general feeling, or some feeling among members, and I think perhaps the American people, that when a serviceman abroad is charged with a crime by that country, that somehow he is just thrown by us to the wolves and we have lost him, forgotten him, and have no interest in him.
>
> I think the fact that we have here three witnesses who are very close to the top of their departments, one is soon to be the head of his department [Brucker], the fact that these men have such minute information themselves of these individual cases, is good refutation to this idea that

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At other times, the trial proceedings will be halted while the interpreter translates for the accused. In general, foreign courts are no better equipped to provide simultaneous translation, such as is available at the United Nations, through individual earphones, than are our courts in this country. It should be stressed, however, that an accused is guaranteed the right, under the NATO Status of Forces Agreement and similar agreements, to have a competent interpreter, and any failures to afford this safeguard to an accused will be considered as a basis for immediate action to preserve his rights." *Ibid.*

[48] *Id.*, pt. 1, at 316. An example cited was the case of a dependent wife stationed in Japan who was indicted for negligently setting fire to her house. *Id.* at 312–13.

[49] "During the hearings last July, I requested the Secretary of the Army to furnish me with copies of the observers' reports in all cases of criminal prosecution of our servicemen which had resulted in sentences of imprisonment.

"To my amazement I was informed by Mr. Brucker that the Department of Defense had not required these reports to be forwarded to Washington, except in cases which had attracted particular notice in the press, or which had been the subject of congressional inquiry, or in which the Senate Resolution procedure was involved. . . ." *Id.*, pt. 2, at 535.

[50] One of the best statements was that from SHAPE Commander General Gruenther in the form of a letter message dated 1 March 1956 to the Chairman of the House Foreign Affairs Committee which stated in part: "Our foreign troops are not in wartime occupied countries. They are on the territory of sovereign friends who have willingly joined in a unique peacetime alliance to preserve our common freedoms and to prevent another and even more devastating world conflict. It would be impossible to explain to our allies why the United States would refuse to permit their jurisdiction over the more serious offenses committed off duty. Already and freely they have surrendered jurisdiction over onduty offenses and in practice have willingly relinquished jurisdiction in most cases of offduty offenses." *Id.* at 947. (Note that this statement was received after the hearings were concluded.)

somehow our boys are lost and forgotten where they do run into trouble abroad.

It seems to me that the departments represented here are zealous in protecting our men when they do run into trouble.[51]

It is interesting to note that a new Department of Defense directive[52] appeared in November of 1955 (between the hearings), and many of the policies of the services under SOFA which had been criticized by members of the committee during the early hearings were modified or changed by this directive: The procedures prescribed in the Senate Resolution would be applied in all overseas areas;[53] that the country law studies will be maintained and subject to continuing review to keep them current;[54] a requirement that all trial observer reports be immediately forwarded to the Judge Advocate General of the service concerned;[55] and a provision for U.S. personnel tried in foreign courts to be provided with civilian counsel at government expense.[56]

B. *THE APPLICATION OF THE SOFA "FAIR TRIAL" GUARANTEES IN NON-NATO COUNTRIES*

The DOD Directive discussed above set forth a policy which expanded the whole scope of trial observing by providing that:

Although the Senate Resolution applies only in countries where the NATO Status of Forces Agreement is currently in effect, the same procedures for safeguarding the interests of United States personnel subject to foreign jurisdiction will be applied insofar as practicable in all overseas areas where United States forces are regularly stationed.[57]

This policy has been retained, and the latest DOD Directive contains the identical language.[58] Of course, most of the agreements with non-NATO countries in which our troops are "regularly stationed" do contain the SOFA-type safeguards.[59] Therefore, application of the procedures set forth in the Senate Resolution would not seem difficult. Going beyond this, however, the Army's policy has been that the Resolution's procedures "for safeguarding the interests of United States personnel subject to foreign criminal jurisdiction will be applied insofar as possible *in*

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[51] *Id.*, pt. 1, at 306–07.
[52] Dep't of Defense Directive No. 5525.1 (3 Nov. 1955).
[53] Dep't of Defense Directive No. 5525.1, sec. IV (3 Nov. 1955).
[54] Dep't of Defense Directive No. 5525.1, sec. VII (3 Nov. 1955).
[55] Dep't of Defense Directive No. 5525.1, sec IX B (3 Nov. 1955).
[56] Dep't of Defense Directive No. 5525.1, sec. X (3 Nov. 1955). This was later provided for by statute. See 10 U.S.C. § 1037 (1964).
[57] Dep't of Defense Directive No. 5525.1, sec. IV (3 Nov. 1955).
[58] See Dep't of Defense Directive 5525.1, sec. IV A (20 Jan. 1966).
[59] See app. B.

all overseas areas." [60] This was done to include those countries in which troops are not regularly stationed but which, upon occasion, try out personnel who may commit criminal offenses while visiting these countries.[61] The question which is left open, however, is how one is to apply the Senate Resolution procedures in the absence of any SOF-type agreement. As with many things, the policy looks simple, but in practice its application becomes quite another story.

1. *What Standard Is To Be Applied?*

As previously noted, under the Senate Resolution the commanding officer must determine whether there is danger that an accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States. If he believes that the accused will not be protected, and requests a waiver which is granted, there is no problem. But what if no waiver is requested, or, if requested, it is denied and the accused tried nevertheless? Is the trial observer to judge the trial itself by the Fourteenth Amendment standards, or solely by the paragraph 9, article VII, guarantees of SOFA? This has been a continual source of argument since the NATO Status of Forces Agreement went into effect. Congressman Bow was of the opinion that the constitutional standard must be applied.[62] Some local Army regulations flatly state that a *fair trial* is to be determined not only by the presence of the protections of article VII, SOFA, but also by the fundamental safeguards guaranteed by the U.S. Constitution. Generally, they cite the 17 November 1953 Memorandum of the Interservice Legal Committee.[63] Technically, it would seem that the trial observer is limited to the SOFA safeguards.[64] The most that can be said, perhaps, is that this is an unresolved area. The brunt of the problem falls squarely upon the trial observer, and will be discussed in Part IV of this article.

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[60] Dep't of Army Letter, AGAM-P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 2, 28 June 1962. (Emphasis added.)

[61] In countries where we have MAAG or Mission-Type Agreement, such immunity from jurisdiction as may result from the agreement only applies to the *members* of the MAAG or Mission, not to our personnel who are there on leave, etc. A listing of the various agreements relating to jurisdictional status of U.S. personnel in foreign countries is contained in appendix B of this article.

[62] See *Hearings on 309*, pt. 2, at 535.

[63] See, for example, USAFE Reg. No. 110-1, para. 3(f) (17 Sept. 1965), and USAREUR Circular No. 550-50, para. 4(g) (10 July 1957).

[64] See ELLERT, *op. cit. supra* note 24, at 21-44.

2. *"National Treatment" and "Minimum Standards."*

In countries with whom we have no agreements containing SOFA-type safeguards, any attempt by a trial observer to apply the SOFA guarantees to trials of U.S. personnel would be purely a unilateral act. Are we then, as a *practical* matter, limited to the "national treatment" theory,[65] under which an alien in a foreign court is entitled only to those procedural safeguards to which a national of that country is entitled, or is there an international minimum standard of justice which a state must accord an alien before its courts?[66] The answer will depend upon whether the country trying our personnel subscribes to either of these theories. In either event, it does appear that U.S. personnel in such a situation are better protected than an ordinary tourist would be.[67]

3. *Additional Problems.*

Another problem area is that of dependents and the civilian component.[68] Because of Supreme Court decisions eliminating these categories of persons from the jurisdiction of courts-martial in peacetime,[69] they can no longer be tried by the United States as the sending state under paragraphs 2(*b*) and 3(*a*) of article VII, SOFA. As a practical matter, they can *only* be tried by the receiving state for offenses committed within that state. Can we then request waivers of jurisdiction from the receiving state to try these personnel? Apparently so, on the theory that even though we do not have jurisdiction to try these persons, we still have jurisdiction over them for many other purposes. Thus, from the standpoint of punishment, we can take administrative action against them for minor offenses, but we can do virtually nothing if they commit felonies, other than to permit the receiving state to exer-

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[65] An excellent discussion of the national treatment theory is found in ELLERT, *op. cit. supra* note 24, at 13–16.

[66] See 1 OPPENHEIM, INTERNATIONAL LAW 350 (Lauterpacht 8th ed. 1955). See also ELLERT, *op. cit. supra* note 24, at 16–20, 56–72.

[67] See *Hearings on 309*, pt. 1, at 293.

[68] See notes 20–21 *supra* and accompanying text.

[69] See McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957). However, civilians can still be tried in the U.S. for certain offenses committed within the receiving state. These offenses are few in number and limited in application. They include such military offenses as aiding the enemy and spying (articles 104 and 106) under the UCMJ, and such federal offenses as the use of foreign commerce to aid racketeering (18 U.S.C. § 1952 (1964)); the making of false entries and reports of moneys and securities (18 U.S.C. § 2073 (1964)); and certain counterfeiting offenses under Chapter 25 of Title 18 of the U.S. Code. See also United States v. Steidley, 14 U.S.C.M.A. 108, 33 C.M.R. 320 (1963).

cise jurisdiction. If it will not, then the individual remains unpunished. When the next *Reid*[70] situation arises a trial observer will find himself in a foreign court attempting to apply the article VII standards in the trial of a wife who has murdered her soldier husband. While this is a completely inappropriate tribunal for such an offense, the situation is not likely to be remedied by Congress until there is a *cause célebre*.

As simple as it might seem initially, the application of the paragraph 9, article VII, guarantees to any trial, even if it were one in a state court of the United States, can be quite complicated.[71] Add to this a foreign court, under a different system of law, speaking a language which the trial observer, in most instances, does not understand, and the problem is considerably heightened. Do we feel that such trials and the work done in connection with them are significant? Consider this statement which a representative of DOD made to a Senate subcommittee:

> During recent years, there has been something akin to an administrative revolution in the work of the Defense Department concerned with this problem. Whereas, formerly their business was entirely that of administering the Uniform Code of Military Justice, now perhaps one-half of the man-hours of the service personnel abroad in the Judge Advocate General's Corps is devoted to administration of the status-of-forces agreements.[72]

The numerous treaties, the Senate Resolution, the SOFA safeguards, the DOD directives, and the various regulations of the three services are of little significance if one individual does not perform properly and diligently. The trial observer is this individual—*his actions are the primary source of life and meaning to* the many policies and platitudes contained in these volumes of paper.

III. EMERGENCE OF THE TRIAL OBSERVER

The concept of having a representative of the accused's government present at his trial in a foreign court is certainly nothing new under international law. This has been a customary practice of many nations, incorporated in consular conventions, and viewed as one of the normal duties of the consul in assisting and protecting the citizens of his country abroad.

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[70] See Reid v. Covert, *supra* note 69.

[71] For a comprehensive discussion of the application of article VII to trials in the NATO countries, see ELLERT, *op. cit. supra* note 24, at 21–55.

[72] *Hearings Before the Subcommittee On the Operation of Article VII, NATO Status of Forces Treaty, of the Senate Armed Services Committee*, 85th Cong., 2d Sess. 2 (1958).

A. *MILITARY PRECEDENCE*

One of the earliest U.S. treaties providing for a "trial observer" for military personnel facing trial by the court of the country in which he is stationed was the 1941 Leased Bases Agreement between the United States and the United Kingdom,[73] which provided in part:

> In cases in which a member of the United States forces shall be a party to civil or criminal proceedings in any court of the Territory by reason of some alleged act or omission arising out of or in the course of his official duty, United States counsel (authorized to practise before the courts of the United States) shall have the right of audience, provided that such counsel is in the service of the Government of the United States and appointed for that purpose either generally or specifically by the appropriate authority.[74]

Obviously, this "counsel" was more than an observer; but aside from his "right of audience," his function was much the same, *i.e.*, to insure that the accused was advised properly of his rights, that he received the same, and that the U.S. officials were apprised of the disposition of the case.

An almost identical provision is found in the 1950 agreement between the United States and the United Kingdom relating to the establishment of a long range proving ground for guided missiles in the Bahamas.[75] Thus, it is not surprising, in 1951, to find that it was the U.S. representative who introduced the first draft of what was to become paragraph 9 of article VII, NATO-SOFA, providing, *inter alia*, for the right "To have a representative of his government present at any stage of the detention and trial by the receiving state." [76] The working group felt that this was one safeguard which it might be necessary to amend in order to bring it into line with the practice in other countries.[77] The U.S. redraft which provided "To have a representative of his government present at any stage of the detention or trial, except during the preliminary examination (instruction) or grand jury proceeding," [78] did not meet the approval of the representative of the United Kingdom, who felt that the wording appeared to imply a *right* of

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[73] 27 March 1941, 55 Stat. 1560, E.A.S. 235.

[74] Leased Bases Agreement with Great Britain, 27 March 1941, Art. VII, 55 Stat. 1560, E.A.S. 235.

[75] 21 July 1950 [1950] 1 U.S.T. & O.I.A. 545, T.I.A.S. 2099.

[76] NATO, Summary Record of the Meetings of the Working Group on the Military Status of the Armed Forces, MS–R(51) 4 (1951).

[77] *Ibid.*

[78] See NATO, Documents of the Working Group on the Status of the Armed Forces, MS–D(51) 2 (1951).

the government representative to be present.[79] After another revision,[80] the final paragraph, as it was incorporated into the NATO Status of Forces Agreement, was approved on 7 May 1951 by the Council deputies.[81]

B. *STATE DEPARTMENT PRACTICE*

For many years, it has been customary for U.S. consular officials to attend trials of Americans before foreign tribunals. Generally, this practice is set forth in consular conventions, under which the host country will notify our consular officials when an American is arrested for an offense in that country.[82] The consul will then be permitted to consult with the accused and will probably refer him to a local attorney.[83] In serious cases, the consular official will attend the trial as an observer. His responsibility is to insure that the American receives a fair trial under the laws of the country in which the offense takes place.[84] Thus, we see the application of the "local law" standard by our State Department personnel as the measure of a fair trial. If the court does not conform to this norm, then the consular official will go to the local officials and attempt to work the problem out with them. If the offense is serious, and if the local officials cannot or will not rectify the situation, then the case is referred to our embassy for further action on that level.

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[79] He added that in British cases heard in America, the judge himself decided who should or should not be present. Thus the judge might decide *to not permit the government representative to remain, even though this* situation was unlikely and the judge could be warned of the undesirability of taking such action. NATO, Summary Record of the Minutes of the Juridical Subcommittee of the Working Group on the Military Status of the Armed Forces, MS (J)-R(51) 5 (1951).

[80] The Canadian representative suggested replacing "his government" with "of the government of the sending state" since in the case of a person of a third nationality, the government of the sending state would still be responsible. NATO, Summary Record of the Meetings of the Working Group on the Military Status of the Armed Forces, MS-R(51) 5 (1951).

[81] NATO, Documents of the Council Deputies, D-D(51) 127 (1951). The negotiation of NATO-SOFA was done by a Working Group assisted by a Juridical Subcommittee and a Financial Subcommittee. Their work was then subject to the approval of the NATO Council Deputies.

[82] *Interview with Mr. Ben Fleck, Office of Eastern Asian Affairs, Dep't of* State, Feb. 1966.

[83] The accused must hire the attorney himself. All consuls keep a list of suitable local attorneys. One judge advocate noted, however, that the consular list in his area primarily contained local attorneys who spoke English. His view was that it is far better to hire an attorney for his legal ability rather than his ability to speak English. Trial Observer Interview No. 3.

[84] Interview with Mr. Ben Fleck, Office of Eastern Asian Affairs, Dep't of State, Feb. 1966.

Thus, as a practical matter, the government representative under NATO-SOFA is merely an heir to the existing consular practice. In implementing the Agreement we have chosen to make him a military lawyer or civilian attorney employee, thereby removing our personnel from the normal trial observing responsibility of the consul. We may note that the military member, civilian employee, or dependent is far better protected than the average civilian tourist or businessman in the same foreign country. Under NATO-SOFA, we can request a waiver of jurisdiction, pay for the attorney, have the assistance of the trial observer, and the protection of the paragraph 9 safeguards in addition to the local law. Even in a non-NATO country, U.S. personnel will still have the attorney's fees paid for by the United States [85] and, as will be seen, they will have the wide range of services provided by the trial observer.

IV. FUNCTIONS AND DUTIES OF THE TRIAL OBSERVER

A. *WHO IS THE TRIAL OBSERVER?*

If one were to make a statistical survey of all individuals currently serving as trial observers in the three services, he would come up with an "average" trial observer who would be, most likely, a captain (lt. jg) between the ages of 25 and 30, who is married and has 1½ children, has been in the service 4.5 years, and has observed 25 to 30 trials. Of course, there is no "average" or "typical" trial observer.[86] This is partially due to the manner in which trial observer duties are assigned locally. The general manner of assignment is prescribed by the Senate Resolution: [87] The observer is appointed by the Chief of the Diplomatic Mission or Consular Offices concerned upon recommendation of the senior U.S. military representative in the receiving state. Virtually every regulation, directive, or circular states that the observer will be selected for maturity of judgment and will be a lawyer.[88] As a practical matter, nearly every judge advocate's name is submitted upon his arrival at a new duty station in a foreign country. Although one does not find it in directives or regulations, the observer duties are handled locally in one of three ways.[89] In some

[85] In most cases. See sec. IV H of Dep't of Defense Directive No. 5525.1 (20 Jan. 1966). It should be noted that these funds are available for persons subject to the UCMJ and not for civilians and dependents.

[86] My interviews and letters from trial observers indicate this clearly. Some have observed over 800 trials, others as few as six.

[87] Para. 4.

[88] See, for example, Dep't of Defense Directive No. 5525.1, sec. IV G(1) (20 Jan. 1966).

[89] Trial Observer Letters; Trial Observer Interviews.

commands, one of the newly arrived junior officers is appointed as a trial observer, and he becomes the "office trial observer" for most, if not all, of his tour. Other offices assign a civilian attorney (U.S. civilian employee) from that office to act as the trial observer, and he does this on a more or less permanent basis. The third method is to assign whoever is available as trial observer on a case-by-case basis.[90] In a large office, this is the least preferable method as no one develops much professional competence as a trial observer. In a small office, or where the trial observing duties are shared by two or three officers, this method works very well, as it obviously should result in several well qualified observers in that office.

B. *PREPARATION FOR TRIAL*

1. *Duties Imposed by Regulation.*

Neither the new DOD Directive nor most of the command directives contain any guidance for trial observers prior to trial. A notable exception to this is Fifth Air Force Regulation 110–1,[91] which details considerably the duties of the trial observer in preparation for trial. In many instances, of course, a command directive would be inappropriate as local procedures vary considerably. In some areas there are local SOP's for the trial observer's guidance; [92] in others there are none.[93]

2. *Initial Steps.*

Nearly all trial observers follow the same basic procedures in preparation for trials of U.S. personnel. Initially they read the local office file concerning the offense, and, if there is time, read the local prosecutor's file or court dossier.[94] Very often, the military lawyer is well aware of the facts of the case before he is ap-

[90] A very experienced judge advocate who has served as a trial observer views the roster basis for trial observers as an exceptionally poor practice. Trial Observer Interview No. 3.

[91] Para. 21(c) (20 June 1963).

[92] For example, the Army SOP for Germany states that trial observers will advise the accused of the special guarantees afforded by paragraph 9, article VII, NATO SOFA, and the pertinent articles of the supplementary agreement. The observer will also insure that the accused is aware of his basic rights under German law. The accused should be given a copy of the accused's information sheet (Information for U.S. Personnel Facing Trial by German Court). A certificate should be signed by the accused acknowledging the foregoing. U.S. DEP'T OF ARMY, INFORMATION FOR TRIAL OBSERVERS (GERMANY). See also U.S. DEP'T OF ARMY, SOP FOR A U.S. TRIAL OBSERVER (JAPAN).

[93] Several observers indicated that they had no local SOP's or that the ones they did have were of no value. Trial Observer Letters Nos. 13, 20, and 7.

[94] In countries where this is permissible.

pointed as observer, as the incident reports and investigations normally come through his office long before the accused is indicted. In some countries, there is such a court backlog that the observer has ample time in which to prepare. In one country, for example, it takes six months to a year for the average case to come to trial.[95] In some commands, the trial observer is also the foreign liaison officer, in which case he has met the local prosecutor and defense counsel and made many of the pretrial arrangements regarding the accused beforehand. It is possible for him to have hired the accused's defense counsel.[96] Under AR 633–55,[97] the local judge advocate office may hire civilian attorneys to represent the accused as a defense counsel.[98]

Nearly all trial observers interview the accused prior to the trial.[99] This is probably one of the most useful functions that a trial observer could perform; it provides him with an opportunity to assure the accused that the United States has a considerable interest in his welfare. The observer can explain some of the basic procedures of the local law, become more familiar with the accused's side of the case, and help to allay many of the fears the accused usually has regarding his forthcoming trial in a foreign court. In some countries it is standard procedure for the trial observer to meet the judge prior to the trial to discuss the case.[100] The observer may also talk with the accused's unit commander to be sure that any favorable character and background material was supplied to the defense counsel and to arrange, when appropriate, for the attendance at trial of military character witnesses.[101] This

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[95] See Trial Observer Letter No. 21. "By the time a case comes to trial (in this command it normally takes from six months to a year), I have usually spent sufficient time consulting with the attorneys involved, answering Congressional Inquiries, etc., to become sufficiently familiar with the law involved."

[96] Trial Observer Letter No. 20. "In Austria I hired the defense counsel (In Innsbruck, Salzburg, and Vienna) and observed the trials."

[97] Army Reg. No. 633–55 (24 Aug. 1956). This regulation implements 10 U.S.C. § 1037 (1964) which provides for government payment of counsel fees.

[98] The accused actually chooses the attorney, and the judge advocate office then contracts for his services.

[99] Only one observer stated that this was not usually done in his area as it was considered an interference with the duties of the defense counsel. Trial Observer Letter No. 3.

[100] This practice is followed in Japan and Austria, for example. Trial Observer Letter Nos. 8, 19, and 20.

[101] Trial Observer Letter No. 20. There is no reason why trial observers cannot aid an accused in this manner, if they wish. Most do not have the time.

type of assistance may very well be necessary in cases in which there are initial hearings prior to the filing of charges.[102]

3. *Research on the Applicable Law.*

Unless he is very familiar with the local law from previous experience, the trial observer will normally research the law relating to the charge against the accused, as well as other matters which could come up at the trial. Finding the local law in English is likely to be a problem for those observers who do not speak or read the language well enough to read the country code. Several observers indicated that they made considerable use of local law books,[103] but many offices apparently have little in the way of English translations of the local code.[104]

One would think that the Country Law Studies,[105] previously referred to,[106] would be of some assistance in this regard. Unfortunately, these studies are not that extensive and have little value to the observer except as an orientation in the local law. Of course, the primary purpose of these studies was to assist the local commanding officer in determining whether or not the accused would be guaranteed the Fourteenth Amendment safeguards, and if he determined that there was danger that the accused might not be, to request a waiver. Thus, these studies are of a comparative law nature, comparing Fourteenth Amendment safeguards with those of the local law. Therefore, they generally do not deal with specific offenses and procedures with which an observer would need

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[102] For example, in Turkey, "Trial Observer is often alone, except for an interpreter, when the case breaks and even at the first hearing. Therefore, by necessity he must, if he is to render an adequate service, assume some of the functions of counsel for the accused as far as advice, assistance, and preparation are concerned, until counsel is retained and even subsequent thereto. The Government will not hire local counsel until charges are filed and often important decisions are made prior to this time, especially where preliminary hearings or hearing solely on arrest are held." Trial Observer Letter No. 26.

[103] See Trial Observer Letters Nos. 16 and 20; Trial Observer Interview No. 3.

[104] One observer noted that he had considerable need for certain local codes, but there was no indication that his office had any intent in acquiring them. Trial Observer Letter No. 11.

[105] The Country Law Studies program has now been expanded to include a number of the non-NATO as well as NATO countries. See Dep't of Defense Directive No. 5525.1, sec. IV D (20 Jan. 1966). There are now studies available for the following countries: Belgium, Canada, China, France, Germany, Greece, Italy, Japan, Netherlands, Norway (Review), Panama, Pakistan, Philippines, Spain, Thailand, Turkey, Venezuela, India (Review), and the following surveys: Syria, Yugoslavia, Argentina, Columbia, Cuba, Cyprus, Ethiopia, and Ghana.

[106] See notes 26–56 *supra* and accompanying text.

to be familiar. A properly prepared study, it would seem, could be of value to an observer in alerting him to local procedures with which an observer would need to be familiar. A properly prepared study, it would seem, could be of value of to observer in alerting him to local procedures which, under certain circumstances, might not meet the guarantees of article VII, NATO-SOFA. At least as an orientation vehicle, they could be of value to an inexperienced observer.[107]

4. *Counsel for the Accused.*

In some instances, local law provides for the *mandatory* appointment of defense counsel by the court, or counsel *may* be appointed upon motion of the accused, and perhaps even without expense to the accused.[108] If not, the local judge advocate office will assist the accused in obtaining local counsel and in certain instances [109] the government pays the costs. Trial observers who are also the contracting officers for local civilian counsel note that this arrangement tends to make the defense counsel very cooperative and probably acts as an incentive for them to do their best, as they know that the trial observer will be watching.[110] Even where this is not the case, observers indicate that, in general, they have excellent relations with the defense counsel.

In some countries, a problem arises which is a familiar one to most judge advocates, and that is the American attorney practicing abroad. Some of these individuals, of course, are excellent. Unfortunately, however, there are always a few, located near large military installations, who are complete incompetents and prey on the enlisted personnel in that area. In the states we have seen them appearing as counsel in general and special courts-martial, and collecting an undeserved fee from the accused, as the appointed military counsel is invariably the one who does the work, and is far better qualified. In certain overseas areas, these individuals find the military man facing trial in a foreign court an

[107] The Air Force trial observers apparently do not have access to the Country Law Studies. Few had even heard of them. A number of observers indicated that the local country law study was very good, but had not been brought up to date to reflect changes in the local law as well as additional rights now applicable under the Fourteenth Amendment to U.S. state trials. The reason for this seems to be the lack of funds and manpower necessary to revise these studies.

[108] In motor vehicle cases, the accused's insurance company may provide counsel on both the civil and criminal aspects of the case. Trial Observer Letter No. 33; Trial Observer Interview No. 3.

[109] See Dep't of Defense Directive No. 5525.1, sec. IV H (20 Jan. 1966).

[110] See Trial Observer Letters Nos. 7, 20, 23 and 30.

easy mark, as our personnel tend to feel that an attorney who is a local national will not adequately represent their interests as well as a local American.[111] This, of course, is a mistake, and it should be the duty of every judge advocate office to insure that only reputable attorneys are retained for the accused.

Insofar as the importance of preparation for trial is concerned, trial observers time and time again emphasized the psychological significance of assisting the accused during this period. If the trial observer has acted properly, he will have allayed many of the fears that an accused would normally have facing a foreign tribunal. He must convince the accused that everything that can be done is being done for him. One result of this is that the accused has a better attitude at time of trial than he would otherwise have, and in some instances this may result in an acquittal or a lighter sentence. The other effect, of course, is that if the accused is satisfied that his rights are being protected, he is less likely to feel that he got a "bad deal," if convicted, and thereby reducing the inquiries and erroneous publicity which often have unjustly plagued the system. By careful preparation, the trial observer can avert many of the problems which might later arise at trial.

C. *ATTENDANCE AT TRIAL*

1. *Official Duties.*

Until recently, the duties of the trial observer were to attend and prepare formal reports in all cases of trials of United States personnel by foreign courts or tribunals except minor offenses.[112] Formerly, a trial observer's report [113] had to include, among other

[111] The following view of one trial observer is fairly typical: "The Japanese attorney is bound by a much higher code than his American expatriate; he does not carry out the ambulance chasing mannerisms that are so often the characteristic of the overseas American civilian attorney. I have found that Japanese attorneys are quite reluctant to take a case or appeal until they are sure that the accused feels that he is the man that can help him. The word of a Japanese attorney is invariably good and in my opinion the Japanese bar is superior, much superior, to the American bar. The reason for this is quite simple in that the Japanese allow only the privileged few to the bar and only the most qualified are accepted. There are many prefectures in Japan that do not have a practicing attorney within their confines. There are only approximately four schools in the entire nation that educate attorneys and even after their most rigorous training the Japanese attorney is faced with a bar examination that would pale the imagination of American law school graduates. The total result of the Japanese legal educational system is an excellent attorney." Trial Observer Letter No. 1.

[112] See Dep't of Defense Directive No. 5525.1, sec. IV G(2) (5 May 1962) (superseded by Dep't of Defense Directive No. 5525.1 (20 Jan. 1966)).

[113] Reports Control Symbol OSD–1023.

things, comment on the adequacy of the defense counsel, the accused's interpreter, and a résumé of trial proceedings. Finally, the observer was to comment on the "fairness of trial, with especial emphasis on observance of procedural safeguards guaranteed by international agreement." [114] If the designated commanding officer concurred in the opinion of the observer that the trial was unfair and that appropriate action should be taken by the Department of State to protect the rights of the accused, the commander was to submit this recommendation through the unified commander and the Judge Advocate General of the service concerned to the Office of the Secretary of Defense.[115] The new DOD Directive changes this somewhat by limiting the trial observer's report to a factual description or summary of the proceedings,[116] the main purpose of which is to enable the designated commanding officer to determine "(1) whether there was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement, and (2) whether the accused received a fair trial under all the circumstances." [117] The trial observer is limited in his report to stating conclusions only as to the failure to comply with procedural safeguards, *not* as to the fairness of the trial, unless the designated commander directs otherwise.[118] The impact of this Directive upon the trial observer system remains to be seen. One should note at this point, however, that in many ways it merely states the actual practice.

Under the previous DOD Directive, the command directives, regulations and SOP's added additional duties and prohibitions for the trial observer.[119] The result has been that the practices of trial observers are not uniform by any means and this situation is not likely to change. (This in not to imply that lack of uniformity is undesirable in all areas.) Thus, for example, in several jurisdictions, the trial observer is responsible for the custody of the accused, and he may be accompanied by MP's to, from, and during the trial.[120]

2. *Appearance in Court.*

The various practices are extremely evident once the trial observer reaches the courtroom. In some jurisdictions it is estab-

[114] *Ibid.*
[115] Dep't of Defense Directive No. 5525.1, sec. IV G(3) (5 May 1962).
[116] *Ibid.*
[117] *Ibid.*
[118] Dep't of Defense Directive No. 5525.1, sec. IV G(4) (5 May 1962).
[119] See, for example, USAREUR Circular 550–50 (10 July 1957).
[120] See Trial Observer Letters Nos. 21 and 23; Trial Observer Interview No. 6.

lished practice to meet the court members, prosecutor, and officials prior to trial [121] and even discuss the case with them. In others, the observer remains as obscure as possible.[122] Although most observers sit among the spectators, some sit at the counsel table with the accused,[123] some in the press box,[124] and some on the bench between the court and the procureur.[125] In general, court officials are very courteous to the trial observer and he is well received. Some observers get to know these officials quite well, officially as well as socially. This tends to promote foreign-American relations, and it probably does not hurt the accused either. On the other hand, some courts and officials are indifferent to the trial observer. The court may ignore him completely, or show actual offense at his presence,[126] but these are the exceptions.

3. *The Right To Be Present.*

The language of paragraph 9(*g*) of article VII, NATO-SOFA,[127] gives a qualified right to have an observer present when the rules of the court permit. Although I know of no instance in which an observer was denied admittance to a trial, it has undoubtedly happened,[128] or will happen.[129] The possible significance of such action is noted by Re, who concludes:

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[121] Trial Observer Letters Nos. 3, 6, 18, 19, 21 and 23.

[122] It is interesting to note that one Air Force regulation encourages trial observers to wear civilian clothes. See Fifth Air Force Reg. No. 110–1, para. 21(a) (20 June 1963). Trial observers in Austria are also precluded from wearing a uniform. One observer solved this by making sure, through the defense counsel, that the judge knew an American observer was present. On the other hand, in one command, local SOP states that the military uniform *must* be worn. Trial Observer Letter No. 21.

[123] Trial Observer Letter No. 1 (Japan); Trial Observer Letter No. 32 (Philippines and Hong Kong).

[124] Trial Observer No. 28.

[125] Trial Observer Letter No. 15 (Morocco). Several observers, in difficult countries, stated that although the court generally offers them a seat with counsel or court officials, they always decline graciously and sit among the spectators.

[126] Trial Observer Letter No. 9. In this same country (non-NATO), observers indicate that the officials are usually glad to see the trial observer as he is required to tip them in order to obtain necessary clerical assistance such as copies of charges, records, etc.

[127] See app. A.

[128] There would be a technical denial in situations where an accused is tried, or even has several hearings before our authorities know that he is in the receiving state's custody or charged with an offense. This occurred in the case of *Wood* before the Italian Supreme Court of Cassation, where the failure of the trial judge to notify the commanding officer pursuant to Italian law implementing article VII, paragraph 9(*g*) of NATO-SOFA (providing for a U.S. observer) was held to be the basis for absolute nullity. Digested in *Judicial Decisions*, 54 AM. J. INT'L L. 411 (1960).

To be denied the right to have a representative of the Government of the sending State present at the trial might very well be more important than a so-called public trial. Furthermore, this deprivation of representation is contrary to one of the requirements enumerated in the statement of the Committee on Foreign Relations that a representative of the United States attend the trial of an American serviceman being tried in the courts of a receiving State. Although the statement does not have legal effect, it does, nevertheless, declare and make known to the Commanding Officer in the foreign country, and through the Department of State to the foreign country itself, the policy of the United States. . . .[130]

4. *Participation in the Trial.*

To date, the rule has been one of strict non-participation in the trial by the trial observer, as typified by the Headquarters, Department of Army letter[131] which stated that "He will not be considered as a member of the defense panel, nor will he attempt to interject himself into the trial proceedings. He will, however, if the occasion necessitates and circumstances permit, take appropriate measures to advise defense counsel of the rights of the accused under applicable treaties or agreements."[132] This is a complete understatement. If the trial observer *did not* take such action, he would be derelict in his duties and might as well not attend the trial at all.[133]

What is done in practice? Several observers indicate that they are *often* called upon by the court to answer questions of military

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Snee and Pye suggest that since the right to have an American representative present at the trial is a right which is granted to the *accused*, then he may waive this right. They cite the case of a Naval officer tried in Italy on a morals charge who strongly objected to the presence of the American observer. Snee & Pye, A Report on the Actual Operation of Article VII of the Status of Forces Agreement, 10 Oct. 1956, p. 102 n.14 (unpublished report in the Georgetown University Law Center library).

[129] The Department of Defense, in 1955, made a summary of the laws of the NATO countries and Japan regarding public trials, concluding: "As will be seen from the foregoing, the courts of NATO countries have discretion, in certain limited areas, to order a closed trial. To date there has not been one instance where a United States representative has been refused admittance to a trial of United States personnel." *Hearings on S09*, pt. I, at 355.

[130] Re, *supra* note 8, at 361.

[131] See Dep't of Army Letter, AGAM–P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 2, 28 June 1962.

[132] *Id.*, para. 6(c).

[133] On the other hand, Snee and Pye feel that the observer should attend the trial in that capacity only and should avoid any interference with the accused and his counsel. If he became emotionally involved in the trial, it would tend to nullify his value as an observer. Interview with Rev. Joseph M. Snee, S.J., Professor, Georgetown University Law Center, and A. Kenneth Pye, Professor, Duke University Law School, March 1966.

administration such as finances, personnel matters, and the like.[134] Obviously, there is no person present in the courtroom better qualified to assist in such matters.

The more prevalent problem is the trial observer's relationship with the accused. At least half of the observers indicated that the accused looks to them as a "second defense counsel," although they do not encourage this. In jurisdictions where the trial observer sits with the accused and his counsel, this is inevitable. While, of course, the observer should act through the defense counsel, there are times when, of necessity, he must assist the accused in problems of interpretation.[135] One situation, in particular, is where the trial observer or his interpreter discovers that the interpreter for the accused has made an error of substance in translation. It does seem that there could be other instances where the trial observer should take like action, rather than sit idly by and watch prejudicial errors take place when he could have averted them.[136] While there is no question that an "observer" must not interject himself into the proceedings, there should be nothing wrong with the court calling upon him for information, or for him to point out errors to the defense counsel. The rule has no basis in the Senate Resolution and the absolute prohibition seems questionable.

5. *The Trial Observer's Interpreter.*

Some of our trial observers speak the language well enough not to need an interpreter, and this is by far the most preferable situation.[137] Most trial observers, however, require an interpreter which is usually furnished by the local judge advocate office.[138] Many offices employ individuals in the office who act as interpreters for the trial observers, in addition to other duties.

It is obvious that the trial observer's interpreter must be very good, or the whole system is meaningless. Happily, most trial

[134] Trial Observer Letter No. 23; Trial Observer Interviews Nos. 2 and 8.

[135] This would arise in the case of the dual interpreter as discussed in Part IV c(5), *infra*.

[136] Only one observer indicated he was a strict non-participant in every sense of the word. He states that he avoids every situation which would put him in the position of acting in the capacity of an attorney for the accused. Trial Observer Letter No. 27.

[137] One observer indicated that he was fluent in one language but was stationed as trial observer in another (neighboring) country. Trial Observer Letter No. 17.

[138] In one command the observers note that the interpreters are furnished by the Provost Marshal's Office. They state that these are usually PFC's of Mexican or Puerto Rican ancestry who are considered to be "interpreters" solely for this reason, even though they may not speak much English. Trial Observer Letter No. 21.

observers have very good interpreters.[139] As previously stated, a good interpreter can be of more value than mere translation, in that he can watch for mistakes of substance which the court-appointed interpreter may make so that the trial observer can call these to the attention of the defense counsel and have them corrected.

In several jurisdictions where the court-appointed interpreter for the accused is often very poor, there has developed a practice which I refer to as the "dual use" interpreter. In these jurisdictions, the trial observer's interpreter also acts as interpreter for the accused, and the court-appointed interpreter is not utilized. Observers using this system state that the interpreter from the local judge advocate office is always far superior, not only because of ability, but also due to his long association with military terms and American slang.[140] In general, since the trial observer's interpreter is furnished by the military, he or she is usually very competent. There are some problem areas, however.[141]

6. *The Accused's Interpreter.*

The competency of the interpreter for the accused is certainly more important than that of the trial observer. Obviously, if the interpreter is not absolutely dependable, the accused will be confused, suspicious, and if he is convicted, he will be convinced that he has not had a fair trial.[142] In the NATO countries and Japan, the court-appointed interpreters vary considerably. Of all the observers contacted, only those observing in Germany consistently reported excellent court-appointed interpreters. Apparently, the German courts are very concerned that those they furnish are extremely proficient in English. In those jurisdictions where the court-appointed interpreters are consistently very poor, the local office interpreter is used, as previously mentioned. An observer on the continent pointed out that although the court-

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[139] Some even went so far as to state that their interpreters were always outstanding. Trial Observer Letters Nos. 3, 4, 23, 27, and 28. One observer said that his interpreter wrote down the entire proceedings verbatim. Trial Observer Letter No. 20. Another states that his interpreter takes shorthand notes of the entire proceedings. Trial Observer Letter No. 33.

[140] Trial Observer Letters Nos. 1, 17, and 26.

[141] Though not the fault of the interpreter, one trial observer expressed his plight as follows: "I sit at the trial and take what notes I can from my interpreter's comments. However, I hear very little as there is no word for word interpretation due to the speed of the trial and the lack of decorum in the courtroom. It is usually impossible to hear what is going on." Trial Observer Letter No. 13.

[142] Trial Observer Letter No. 14.

appointed interpreters spoke English well, they were speaking it as spoken in England and often were not able to convey the nuances and connotations of words or phrases as used in America.[143]

Since interpreters in the same court will vary, one solution for the trial observer is to listen to the interpreter for a while, cross-checking him with his own interpreter, and if he is not adequate, report this to the defense counsel so that he can ask for a recess and request a new one.[144] In those non-NATO countries where there is no requirement that the court appoint an interpreter, the situation depends entirely upon the quality of interpreter which the local judge advocate office can obtain. Some offices have no interpreters and use enlisted personnel who speak the language, or whomever they can get. Although generally the interpreters are adequate, there are still several commands in which the interpreters for the accused are considered by the trial observers to be very poor.

D. *APPLICATION OF THE "FAIR TRIAL" GUARANTEES*

1. *The Trial Observer's Dilemma.*

The new DOD Directive is designed to clarify and establish, for all the services, the standards to be applied in trials of U.S. personnel held before foreign courts.[145] It indicates that the procedures set forth in the Senate Resolution are to be followed [146] and states that the trial observer is to report any failure to comply with the procedural safeguards of the pertinent status of forces agreement.[147] Previous DOD directives[148] never went as far as to state the standards to be used by the trial observer, leaving this up to the individual services to promulgate in their own directives. The Department of the Army's policy letter [149]

[143] Trial Observer Letter No. 28.

[144] Trial Observer Letter No. 8. This practice is actually set forth in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 72, [1955] 3 U.S.T. & O.I.A. 3156, T.I.A.S. No. 3365: "Accused persons shall, unless they freely waive such assistance, be aided by an interpreter both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement."

[145] See Dep't of Defense Directive No. 5525.1 (20 Jan. 1966).

[146] See Dep't of Defense Directive No. 5525.1, sec. IV A (20 Jan. 1966).

[147] See Dep't of Defense Directive No. 5525.1, sec. IV G(3) (20 Jan. 1966).

[148] See Dep't of Defense Directive No. 5525.1 (3 Nov. 1955); Dep't of Defense Directive No. 5525.1 (5 May 1962).

[149] See Dep't of Army Letter, AGAM-P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 2, 28 June 1962.

did not clarify this further, but the overseas commands did, in various ways. USEUCOM Directive No. 45–3,[150] for example, left the matter as vague as the Department of the Army letter. USAREUR Circular 550–50 [151] specified the standards for a "fair trial" in some detail, listing, in addition to the article VII protections, the absence of prejudice "through the absence or denial of any of the substantive rights and procedural safeguards guaranteed by the U.S. Constitution in criminal proceedings in all civil and military courts of the United States." [152] He was to be guided generally by the Memorandum of the Interservice Legal Committee [153] which was an annex to the Circular. The Navy [154] left the matter as open as the USEUCOM Directive, and, like it, only mentioned standards in the outline of the trial observer's report [155] which provides for "comment on fairness of trial, with especial emphasis on observance of procedural safeguards guaranteed by international agreement." The Air Force in Europe [156] adopted the same standards as USAREUR Circular 550–50, but in Japan the Air Force Regulation gives no standards to be applied.[157]

Thus, in some areas the trial observers were left on their own in determining what standards to apply, whereas others were given the constitutional standard in addition to article VII. Observers who did this in good conscience found that they were reporting a number of trials as violative of the Fourteenth Amendment safeguards,[158] for judicial systems in civil law countries cannot

[150] Para. 10 (19 Oct. 1962).

[151] Para. 4*g* (10 July 1957).

[152] USAREUR Circular 550–50, para. 4g(2) (10 July 1957).

[153] See, in particular, Part 5 of the DEP'T OF DEFENSE INTERSERVICE LEGAL COMMITTEE, MEMORANDUM (17 Nov. 1963).

[154] See CINCLANTFLT Instruction No. 5820.1 (7 Feb. 1963).

[155] Reports Control Symbol OSD–1023. These are the same for all services.

[156] See USAFE Reg. No. 110–1, paras. 3, 12 (17 Sept. 1965).

[157] Fifth Air Force Reg. No. 110–1 (20 June 1963).

[158] Snee and Pye noted that "some Judge Advocates objected strongly to the requirement that they state their opinion as to whether the constitutional rights of an accused were violated. It was argued that (1) nothing in the Senate Resolution requires a report as to the deprivation of rights not guaranteed by paragraph 9 of Article VII; (2) in some cases it is a very close question whether a particular procedure is guaranteed by the Constitution; and (3) the country law study of France, prepared by Com 2, itself recognizes that confrontation in the constitutional sense is non-existent under French criminal procedure. Hence it was suggested that, in order to be honest, an observer must conclude in almost every case that a violation of a constitutional right, which the accused would have enjoyed in an American trial, has occurred, although this is clearly not what was contemplated by the requirement that he express his opinion on this matter." Snee and Pye, *supra* note 128, at 29.

withstand such comparisons. Such reports were looked upon with disfavor by superiors, who invariably washed them out and no complaint was made. Blame, of course, fell upon the trial observer, but it was not he who specified a standard. As a result, some trial observers merely reported that the accused was not denied any of the guarantees contained in paragraph 9 of article VII or those applicable to state trials under the Fourteenth Amendment, knowing that this was totally untrue. Others still are trying to apply the constitutional guarantees [159] which never should have been a standard in the first place. As a result, many observers have developed their own norms for determining whether an accused has received a fair trial.

In general, what these observers do is apply the guarantees of article VII plus the "national treatment" rule, *i.e.*, is the accused guaranteed the procedural rights which a citizen of the receiving state would have before such tribunal.[160] Such an approach cannot be criticized—perhaps it is the best way to view the trial. There are many problem areas, however, such as in France, Japan and Morocco where the court tries the criminal and civil aspects of the trial in the same hearing.[161] One trial observer noted that in addition to the SOFA safeguards, he watches the judge's attitude[162]—certainly a valid area of observer concern. What most observers do in fact is to look at the whole trial and, under the circumstances, determine whether it was fair. Even if certain safeguards were not observed, they will not report an unfair trial unless the absence of such safeguards was prejudicial, or even if prejudicial, if the sentence was light.[163] They do this because

[159] Trial Observer Letters Nos. 26 and 28.

[160] Trial Observer Letters Nos. 3 and 6.

[161] Trial Observer Letters Nos. 27, 28, and 33.

[162] ". . . in Germany, at least, a fair judge makes a fair trial. The significant signs—so far always present—are complete explanation of the defendant's rights to him; provision of a really qualified interpreter, careful cross examination of witness, etc." Trial Observer Letter No. 11.

[163] "French trial procedure prohibits an accused from receiving a 'fair trial' under the generally accepted meaning of that expression by Americans. There is no right of examination or cross examination of witnesses by accused or his counsel. All examinations of witnesses are conducted by the court. Counsel or accused may ask questions of the witnesses, but the court may refuse. The accused has no rights to be confronted by the witnesses against him, police reports of statements of witnesses are acceptable as well as reports of the pretrial examining magistrate (Juge d'Instruction). Evidence obtained by force or coercion of the accused may be used. For example, an accused may refuse to submit to a BAT, but if he does so he is subject to criminal prosecution for such refusal. These are only a few examples of the unavailability before French courts of some of the safeguards which, in American law, we hold to be essential in order to insure a 'fair trial.' Be this

this is the view of their military superiors, in most instances. If in fact these are the norms to be used by trial observers, then we should say so in directives and regulations, rather than to do as we have done in the past and leave the observer in a quandary. The approach of one very competent and experienced observer (77 trials) is noteworthy at this point:

> I would emphasize to other trial observers that they refrain from any criticism of the court or proceedings in front of an accused and refrain from making any comment unfavorably comparing the procedure with federal or state courts. Such comments not only make the accused apprehensive of the outcome of the proceedings but can boomerang on the observer because his comments may later have to be justified if the accused complains to Congress. It would be well to remember that the objective of insuring that U.S. personnel obtain a fair trial is not considered to require that a trial be identical with a trial in the United States. Some observers have used their reports as vehicles for expressing criticism based on personal beliefs and judgments as to the validity and relative weight of evidence or as to the normal practices and procedures of the court on the grounds that they differed from Anglo-Saxon jurisprudence but which criticism had no valid bearing on the element of fairness of the trial or rights of the accused under the Status of Forces Agreement. This type of criticism creates some doubt as to whether the observer is officially impugning the fairness of the trial so as to require diplomatic action when the problem is merely one of a difference in practices and jurisprudence without affecting the defendant's basic rights under the Status of Forces Agreement.[184]

2. *Japan, Turkey and Germany—A Representative View.*

These three countries are representative of the spectrum of trials under the NATO-SOFA and SOFA-type (Japan) safeguards. The problems encountered by the observers in each of these countries are different and deserve special mention.

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as it may, while the procedures in the trial court may be, and are, open to criticism, I am convinced that the system of pretrial hearings conducted by the Juge d'Instruction in the presence of the accused and counsel, plus the care exercised by the court at trial, provides a measure of protection of the accused at least equal to that of the safeguards enforced in American courts.

"The only 'norms' that I look to see satisfied are those which the French judiciary employ in their trial of Frenchmen. If there is a departure from these norms, I would consider such departure prejudicial. In only one case have I observed such a departure and that was by civil party counsel and not the court. This particular counsel was very vituperative against the American military in general and obviously sought to prejudice the accused on issues not before the court. I do not believe the court was influenced, but it did permit this improper argument in a courtroom filled with Frenchmen. This incident was contained in my observer's report of trial and, as a result, the attorney in question was removed from the list of approved attorneys by the Country Representative." Trial Observer Letter No. 14.

[184] Trial Observer Letter No. 8.

In Japan, a case is never tried in its entirety at one time, contrary to the American practice. The Japanese schedule a series of hearings. At the first, which is usually the arraignment, a witness may be heard, perhaps several. Then a second hearing is scheduled for perhaps one or two months later. At this hearing, the testimony of an additional witness may be heard, and this procedure is continued until the whole case is heard and judgment rendered. As a result, it takes many months to complete a case.[165] In the meantime, the observer files interim reports.

Is this procedure a denial of the right to a speedy trial? Technically, yes—but it is standard under the Japanese system, thus observers do not report these trials as unfair for this reason. There is considerable misunderstanding among our own personnel regarding Japanese trials;[166] but nearly every observer in Japan indicates that the Japanese courts are models of integrity and fairness.[167] It should be noted that Japanese law does not provide for trials *in absentia*.[168]

In Turkey one encounters the same problem as in Japan—there are a series of hearings which go on and on. One observer reported several cases which had at least thirty hearings over a two- to three-year period.[169] Unless the case is an extremely complicated one, I have little doubt that an observer could justifiably find a denial of a speedy trial in such cases. Improvement is being made, however, and in 1965 the Turkish legislature abolished certain penalties and sentences which we had viewed

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[165] Trial Observer Letter No. 19; Trial Observer Interview No. 9.

[166] "The accused generally is decorous towards me as a military counsel. At this stage of the procedure, the trial, he is generally filled with such rigid fear and apprehension of going to a Japanese prison that he is quite beside himself with fright. Somehow stories about brutality, malnutrition, and other vacuous bogy men tales are rampant among military personnel. As a matter of fact, Japanese jails are considerably more pleasant than some of the Federal prisons in America. The accused is furnished hot Navy chow and he is allowed to have as much reading material as he desires." Trial Observer Letter No. 1.

[167] This observer's comment on Japanese judges is typical. He states that "The Judge is a dispassionate, cool, legal intellectual who is highly trained and qualified and who has absolutely no personal interest in the end result of the trial. The total result of this is that practice before a Japanese court is dignified, intellectual, and ultimately justice producing. Probably no other group in Japan is more revered and honored than the Japanese judge and the integrity of the Japanese bench is without blemish. You could quite easily compare a Japanese judge with the morality and professionalism of our highest and most competent judges on the American Federal bench." Trial Observer Letter No. 1.

[168] Trial Observer Letters Nos. 1, 5, 8, 15, 19 and 30.

[169] Trial Observer Letter No. 26.

as objectionable. Apparently, relations with the Turkish courts would improve considerably if our personnel spoke their language.[170]

In Germany, one problem area is encountered when a court, upon occasion, will consider the statement of an absent witness.[171] Although this is a technical denial of confrontation, it arises so rarely that it appears to be only an infrequent problem. German trials may also extend over long periods of time, but they are short by comparison and the question of a speedy trial is rarely raised. The reports from observers in Germany were more nearly alike than for any other country, stating that the German courts were infinitely fair[172] and extremely courteous.[173] The comment of one observer, which was echoed by several of the others, was that he truthfully believed that the German courts would conduct themselves no differently if the trial observer were not present.[174]

3. *Trials in Countries Where Article VII-Type Guarantees Are Not Present.*

Although the Senate Resolution applies only in countries where the NATO-SOF Agreement is in effect, the same procedures for safeguarding the interests of United States personnel are prescribed by the DOD Directive to be applied in all overseas areas where troops are regularly stationed.[175] Previous to the appearance of his Directive, Department of Army policy was to the same effect.[176] As a practical matter our primary concern in the non-NATO countries is to have local justice administered properly and to have the accused returned to our jurisdiction.[177] In practice, most observers in such areas apply local law standards, although some apply the Fourteenth Amendment guarantees as well.[178] In most of these areas, it would seem that the best we can do is to apply the local procedural safeguards as a test and try to get

[170] *Ibid.*

[171] Trial Observer Letter No. 16.

[172] Trial Observer Letters Nos. 16 and 23.

[173] Trial Observer Letters Nos. 20 and 23; Trial Observer Interview No. 6.

[174] Trial Observer Letter No. 11.

[175] Dep't of Defense Directive No. 5525.1, sec IV A (20 Jan. 1966).

[176] See Dep't of Army Letter, AGAM–P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 2, 28 June 1962.

[177] Trial Observer Letters Nos. 25 and 31; Trial Observer Interview No. 1.

[178] Trial Observer Letters Nos. 9, 18, 20, and 32.

the country concerned to observe them.[179] In some jurisdictions this is enough of a problem.

a. *Mexico.* Although we have no forces as such stationed in Mexico, a large number of military personnel and their dependents visit Mexico each year as tourists, giving rise to approximately 1,000 cases per year reported from Mexico.[180] In the absence of any type of status of forces treaty, Mexico has exclusive jurisdiction in Mexico over our personnel for offenses arising there. A U.S. citizen arrested in Mexico has the right to call the closest American consul, and in practice our military authorities are generally notified by the local court, or the consul, when a service member is arrested.[181] The Commanding General, Fourth U.S. Army, is designated as the responsible authority for reporting all cases arising in Mexico.[182]

Since it is normal for an accused to be held in jail from three to five days before bail is permitted, it is our policy to request a release from jurisdiction.[183] In serious cases, unless a Mexican attorney has been engaged in behalf of the service member, the request for release will be denied.[184] When the military authorities are notified that a member is being held by Mexican authorities, he is visited by the appropriate command representative and informed of the possible availability of U.S. funds for counsel's fees and court costs, and assisted in requesting the same.[185] This results in counsel being provided whenever possible and minimizes the confinement of our personnel in Mexican jails.

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[179] An observer in Austria reported that he had no difficulty in applying the local procedural law, except for the court-appointed interpreters. He stated that he never saw a really competent one—that they usually misconstrued questions of substance and made guesses as to the accused's answers. However, the result was that the court never got the truth and it always worked to the advantage of the accused. Generally, release of the accused was conditioned upon the observer getting the accused out of the country immediately. Trial Observer Letter No. 20.

[180] For example, during the 1964 reporting period there were 1,100 cases reported. In 56 of these the charges were dropped; there was one sentence to confinement; and the other 1,043 convictions resulted in fines only. DEP'T OF DEFENSE, STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (1 December 1963–30 November 1964).

[181] Trial Observer Letter No. 2; Trial Observer Interview No. 1.

[182] See Army Reg. No. 633–54, para. 2*f* (26 Feb. 1958).

[183] Trial Observer Letter No. 2.

[184] Fourth Army Memorandum, subject: Mexican Jurisdiction Procedures (undated).

[185] *Ibid;* Trial Observer Interview No. 1; Trial Observer Letters Nos. 2 and 25.

In most instances, the cases arising in Mexico are not serious enough to require counsel to be furnished, as our personnel, in cooperation with the Mexican officials, have been able to obtain the release of our personnel with a minimum of time and expense.[186] Generally, our problems in Mexico have been most effectively handled by the development of close working relationships with the Mexican authorities.[187] The primary value of the trial observer in Mexico has been in negotiating for the release of our personnel, advising them of their rights, and assisting them in obtaining the services of a local attorney, where necessary.[188]

4. *Trials in Absentia.*

In civil law countries the practice of trying a person in his absence can result in two basic problems. Obviously, for the accused, the problem is that if he leaves the country and is tried *in absentia* and found guilty, the sentence will be applied to him if he ever returns to that country. From the standpoint of the trial observer, the only technical problem area is the right to be present and to be confronted by witnesses.

Most trials *in absentia* are ones in which the court consents to the accused's absence from trial and advises him of the possible consequences. The accused must then get approval of local officials and the U.S. country representative to leave the country. If he does so, he in effect waives his right to be present and cannot later complain if he returns and the sentence is carried out. With military personnel, the general practice is for the court and other local officials to consent to his absence only in more minor cases.[189] The U.S. officials generally permit his departure only in cases of the expiration of his term of service, or where his tour is over in that country.[190] In serious cases, he will not be permitted to depart, and there have been instances of service

[186] In serious cases where we indicate that court-martial charges have been preferred against the accused, consular officials can treat this as a federal offense and arrange for deportation proceedings with Mexican officials. Trial Observer Letter No. 2.

[187] Including the Mexican military authorities, who have been of considerable assistance in helping us to obtain releases of our personnel held in custody. Trial Observer Interview No. 1.

[188] They report that their greatest need is an English translation of the Mexican code. Trial Observer Letters Nos. 2 and 25.

[189] Trial Observer Letters Nos. 26 and 33; Trial Observer Interview No. 8.

[190] An example of a local practice is illustrated by one observer as follows: "The defendant finds out from the prosecutor's office how much to leave as a deposit, the prosecutor in court asks for a sum which, added to the costs, will total the deposit, the court gets the point, and everybody is happy. This

personnel being held in the country by U.S. authorities for two years or more while awaiting trial.[191] In countries in which there *must* be a trial if the victim of an accident is injured to a certain extent, the defendent will often be permitted to leave if the insurance settlement has been made.[192] The criminal trial itself may take place several years later, with only the trial observer present.

5. *Trials of Civilians.*

Trials of U.S. civilian employees and dependents are observed in the same manner as trials of military personnel. As previously noted, we sometimes request waivers from the receiving state of the primary right to try these persons. Here, of course, we must be able to show that we can impose some type of punishment.[193] In the case of serious offenses we would not be able to do this, and the receiving state would try the individual.[194] In some non-

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sort of thing takes place to permit a soldier to rotate. We do make a report, obviously rather concise. All such trials have been with the consent of the defendant." Trial Observer Letter No. 10. So far as the individual's record is concerned, it is submitted that such a conviction will be treated as a *charge* rather than as a conviction.

[191] Trial Observer Interview No. 3.

[192] *Ibid.*

[193] Several examples are noted in the following discourse:

"Sen. Ervin. . . . I just wondered if you could indicate something as to the nature of the administrative and disciplinary actions taken.

"Mr. Forman. Those include, Mr. Chairman, a case of civilian employees, dismissal or suspension of employment, withholding or denial of certain privileges on the base, such as PX privileges, the right to drive an automobile, and so forth.

"In the case of dependents to some extent there may be some withholding or denial of privileges or possibly the sending of the serviceman involved—or rather the serviceman of the dependent involved home with his dependent.

"Sen. Ervin. Maybe the general should answer this question.

"Gen. Hodson. I might add that in the case of dependents some overseas commanders have a policy that if a dependent becomes involved in difficulties of the type we are discussing, the commander has a policy of returning the dependents to the United States while requiring the serviceman to complete his tour unaccompanied by dependents.

"This has a rather salutary effect when the command knows that this is what will happen if the dependents become involved in difficulty.

"Sen. Ervin. I would think that would perhaps be the most effective thing that can be done in the absence of jurisdiction to fix some kind of criminal punishment.

"Gen. Hodson. This is particularly true in the case of juveniles."

Hearings Before the Subcommittee on the Operation of Article VII, NATO Status of Forces Treaty of the Senate Armed Services Committee, 88th Cong., 2d Sess. 4 (1964).

[194] See, for example, the case of a dependent Mrs. Jo Ann Baker who was tried in Greece in 1963 for killing her three children and sentenced to 16 years imprisonment. Time Magazine, 16 July 1965, p. 34.

NATO areas, however, such as Korea, even the receiving state cannot try U.S. civilians, and, as a result, serious offenders go unpunished.[195] In the non-NATO countries where dependents and civilians are subject to criminal jurisdiction of that state, they are still better protected than a tourist would be under the *same circumstances as the Senate Resolution procedures are* applied to them.[196]

a. *Juvenile Offenders.* Juvenile dependents, in general, receive very lenient treatment in most jurisdictions.[197] In Germany, they are generally tried in a "family court," sometimes before women judges. Such courts rely heavily on extensive pretrial investigation and show genuine concern for the welfare of the accused. The problem area is the military member who is a juvenile, as it is rare for him to be tried in a juvenile court, for if he is in the military he is viewed as being old enough to stand trial. However, most courts take his age into consideration in imposing sentence.[198]

E. *THE TRIAL OBSERVER'S REPORT*

Clearly, under the Senate Resolution any failure to comply with the provisions of paragraph 9 of article VII must be reported by the trial observer to the commanding officer who shall then request the Department of State to take appropriate action to protect the rights of the accused.[199] In policy, this procedure is further refined to require the concurrence of the commanding officer in the trial observer's findings before requesting Department of State action.[200] Very few cases have ever been reported to the Department of State, and protests have been made by them in only a few cases to date. This does not mean that there are not any trials which are reported as being unfair; there are a number reported each year, but few of them ever get to the diplomatic protest stage.

Until the new Directive appeared, the trial observer's report required an opinion of the trial observer in three areas: (1) the

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[195] Trial Observer Interview No. 3. The new agreement with the Republic of Korea will rectify this situation when it is ratified and enters into force.

[196] See note 175 *supra* and accompanying text.

[197] Trial Observer Letters Nos. 3, 28, and 33. Often juveniles will receive suspended sentences. Trial Observer Letter No. 23.

[198] Trial Observer Letter No. 8. Trial Observer Interview No. 3. For the effect of a foreign juvenile court trial on subsequent proceedings, see United States v. Cadenhead, 14 U.S.C.M.A. 271, 34 C.M.R. 51 (1963).

[199] S. Res. para. 4.

[200] See, for example, S. Res. para. 4.

adequacy of the defense counsel; (2) the adequacy of the interpreter for the accused; and (3) a comment on the fairness of the trial based upon the presence or absence of safeguards contained in the pertinent international agreement, if any. Some observer reports are prepared by the observer's interpreter and then edited by the trial observer.[201] Most observers, however, just take notes from the interpreters and then compile the report themselves.[202] The length of these reports varies considerably, from two to thirty pages or more. Traditionally, the observer reports from Japan are most lengthy, as many observers there include court documents, excerpts from the testimony, and the result is a very thorough report. Except in minor cases, a two-page observer report is too short to be of any value whatsoever, although observers indicate that the information requested of them requires no more.

What do we do with these reports? Primarily they are used to compile statistics and to answer congressional inquiries. The statistics are used for a formal report to the Senate each year, as required by the Senate Resolution. They show numbers of trials by country, sentences imposed, types of offenses and waiver statistics.[203] Other than this, the observer's report is of little value, except, of course, where the observer indicates the denial of a procedural safeguard.[204] In such instances, the observer's report forms the basis for replies to congressional inquiries, answers to parents of the accused, and the commanding officer's request to the State Department for diplomatic intervention, if necessary.

Of the thousands of trials of U.S. personnel in foreign courts which are reported each year, very few are reported as unfair.[205]

[201] Trial Observer Letters Nos. 28 and 34; Trial Observer Interview No. 10.

[202] Because of the hearings system in Japan, an observer there must go over the content of each hearing with his interpreter and usually with the defense counsel and file an interim report each time. Trial Observer Letter No. 1.

[203] After reporting waiver statistics for 20 years, our personnel finally discovered that both exclusive and concurrent jurisdiction offenses were being lumped together in the final statistics, thus resulting in a deceiving waiver figure. Obviously, under SOFA, only the concurrent jurisdiction offenses have any significance. Present reports are now based upon these for the purpose of the waiver statistic. Even these are somewhat misleading, however, as no distinction is made between waivers requested when the primary right to try is with the receiving state and waivers requested where we actually have the primary right to try.

[204] In Japan we require 30 copies of trial observer reports. It is inconceivable to me that we can productively use 30 copies. See U.S.F.J. Policy Letter No. 110–1, para. 4g(3) (15 June 1963); USARJ Reg. No. 22–2, para. 30 (19 Oct. 1964); and Fifth Air Force Reg. No. 110–1, para. 21 (20 June 1963).

[205] Of all the statistics we keep, we apparently keep none on how many trials are reported as unfair.

This is not too surprising, since virtually all trial observers, particularly in the NATO countries, indicate that these courts usually go out of their way to be fair and lenient to U.S. personnel. The statistics on sentences and suspensions of sentences bear this out.[206] In the non-NATO countries, however, the courts have less reason to be so considerate, and there are some unfair proceedings reported.

The concern of the conscientious and competent trial observer is that when he finally reports an unfair trial (perhaps out of dozens of excellent ones), nothing is done.[207] The problem is that trial observers become demoralized and feel that they are wasting their time.[208] What they do not realize, and perhaps the most significant point, is that through their actions, both prior to and during their trial, and even by their presence alone, Americans abroad are daily receiving some of the most equitable trials that the courts of these countries can provide. Viewed in this light, the observer's report is of secondary importance.

1. *Impact of the New DOD Directive.*

Basically, the new DOD Directive is an attempt to give finality to the question of what criteria are to be applied by observers to trials of U.S. personnel in foreign courts.[209] Whether it will

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[206] See DEP'T OF DEFENSE, STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (1 Jan. 1954–30 Nov. 1965).

[207] This reply is a typical example: "I have reported three trials as being unfair in my more than four years here; I know of some other JA's who have concluded in this fashion on rare occasion. It is obvious to the observer that his findings are going to be smoothed over by his superiors. It is obviously demoralizing to observe a trial in a strange language, and be under a tacit compulsion to say you approve what is going on, no matter what." Trial Observer Letter No. 10.

[208] "Idealistically, trial observers are an important function in the courts in the trial of aliens in foreign countries. However, from a practical point of view, we are totally and absolutely useless. I have observed trials where the results were totally unfair and against all constitutional guarantees of U.S. personnel involved. Upon reporting the trial and the fact that an American was being held in jail, nothing was accomplished. At best, it weighs on the mind of the Trial Observer and frustrates him for his inability to accomplish anything for a person wrongfully confined. I cannot really recommend any changes at the present time. The trial observer who functions according to regulations will be able to provide a fairly accurate report. My personal opinion is that the report does not seem to carry any weight after it is prepared and it is just another matter of filling files full of paper work." Trial Observer Letter No. 13.

[209] The Army's view is as follows: "This draft is predicated upon the belief that compliance with the Senate Resolution . . . requires that a determination be made *prior* to trial whether an accused if tried by a local court would be

accomplish this particular objective remains to be seen. It is my belief that it will not, as it suffers from some of the same ills as previous directives, *i.e.*, vagueness. As discussed in Part IV.C. of this article, the Directive removes the "fair trial" determination from the observer and places it upon the "designated commanding officer." [210] In making his determination, however, the designated commanding officer is directed as follows:

> Due regard should be had to those fair trial rights listed in Appendix B hereto which are relevant to the particular facts and circumstances of the trial in question.[211]

This unfortunate hedging was brought about by disagreement between the services regarding the question of whether the Fourteenth Amendment safeguards should be applied to foreign trials.[212] The result is that the three services are implementing the Directive in their own manner, and the question is not likely to be any more settled than before. However, since the Directive was intended as an interim revision only,[213] there may be a more definitive policy set forth in the future.

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accorded the Constitutional safeguards to which he would be entitled if he were being tried before a court of the United States so that appropriate diplomatic action envisaged by the Senate Resolution can be taken. This draft also reflects the belief that *after* trial the Senate Resolution requires only assurances that the treaty safeguards have been accorded the accused." Memorandum for the Assistant General Counsel (International Affairs) DOD, from Chief, International Affairs Division (Army) JAGW 1965/1020, para. 2 (25 Jan. 1965).

[210] Dep't of Defense Directive No. 5525.1, sec. IV G(3), (4) (20 Jan. 1966).

[211] Dep't of Defense Directive No. 5525.1, sec. IV G(4) (20 Jan. 1966).

[212] The Air Force did not concur in the Army's proposal to eliminate any requirement that the fair trial safeguards guaranteed by the U.S. Constitution be considered in determining whether the accused had received a fair trial. The Air Force felt that the rights of the accused in paragraph 4 of the resolution referred not only to the treaty guarantees but also to those rights referred to in paragraphs 2 and 3 of the Resolution. Finally, they stated that it is unrealistic to interpret paragraph 3 of the Senate Resolution, with its standards embodying U.S. Constitutional rights, as applying only prospectively. Letter from Chief, International Law Division, Office of the Judge Advocate General, U.S.A.F., to Assistant General Counsel (International Affairs), Dep't of Defense (23 Feb. 1965).

[213] A JAG memorandum notes that pending comprehensive revision, the Assistant General Counsel (International Affairs) DOD has proposed this interim revision to accomplish the following: "a. To set forth more clearly procedures to be followed by a designated commanding officer prior to trial of United States personnel in a foreign tribunal; b. To delineate with more precision the criteria to be utilized by a trial observer and to append to the directive a listing of fair trial rights considered relevant to the question of whether an accused received a fair trial under all the circumstances; c. To specify with more particularity the policy of the Department of Defense to insure that at all times U.S. personnel in foreign custody are to be fairly treated; d. To restructure DD Form 838 in order to permit presentation of

Perhaps the most undesirable result of the Directive is that it makes the trial observer little more than a court reporter.[214] Aside from this status being a blow to observer morale, it now becomes difficult to justify a lawyer's professional talent being applied to a job as a mere reporter of facts. In effect, we are saying that the same man to whom we entrust the defense and prosecution of our own personnel before our courts-martial cannot be relied upon to make a proper determination of fairness of another nation's court trials. It is hoped that the designated commanding officers will exercise their discretion under the Directive[215] and permit their observers to make this determination. It is difficult to see how the commanding officer, who has not seen the trial, can properly make a determination as to its fairness.

One excellent result of the DOD Directive is that the Army is implementing it, for the first time, with an Army regulation.[216] Unlike the previous "Agency letter," [217] however, the new regulation will contain a section relating to the duties of the trial observer with more specificity.

V. THE VALUE OF THE TRIAL OBSERVER

It is my firm belief that a trial observer who does only what he is required to do under the Senate Resolution, the DOD Directive, and the various regulations, *i.e.*, merely attends the trial and and files his report, is of no value in assuring a "fair trial" under the laws of a foreign country or under an international agreement. His value lies in the fact that he is, or should be, in on the case from the very beginning and can thus eliminate many of the inherent problems which can give rise to an allegation of an unfair

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the waiver of foreign jurisdiction rate as a statistic summarizing solely relinquishment by foreign authorities of concurrent jurisdiction offenses." Memorandum: Draft Revision of DOD Directive 5525.1, Status of Forces Policies and Information, JAGW 1965/1447 (29 Nov. 1965).

[214] Snee and Pye concur. Interview with Rev. Joseph M. Snee, S. J., Professor, Georgetown University Law Center, and A. Kenneth Pye, Professor, Duke University Law School, March 1966. See Dep't of Defense Directive 5525.1, sec. IV G(3) (20 Jan. 1966).

[215] "Unless the designated commanding officer directs otherwise, the Report shall not contain conclusions with respect to (2)." See Dep't of Defense Directive No. 5525.1, sec. IV G(3) (20 Jan. 1966).

[216] This regulation will supersede and incorporate Army Reg. No. 633–54 (30 Sept. 1964), Army Reg. No. 633–55 (24 Aug. 1956), and Dep't of Army Letter, AGAM–P(M) 250.3, 20 June 1962, JAGW, subject: Procedures to be Followed Where United States Personnel Are Subject to Foreign Criminal Jurisdiction, or Confined in Foreign Penal Institutions, para. 2, 28 June 1962.

[217] See Dep't of Army Letter, *supra* note 60.

trial *before* they arise at trial. Officially, our whole emphasis regarding trial observing is misplaced. Our concern should not be primarily, as it is, with the filing of reports and the recording of nice statistics to show to the Senate subcommittee each year. Rather, our emphasis should be upon establishing better relationships with local officials, obtaining the best local attorneys for our personnel, and insuring that he will have, at all stages, the services of a competent interpreter.

This is not to infer that our personnel necessarily deserve some sort of a "break" before foreign courts. Those who commit the common law-type felonies do not really deserve the break they do get before most foreign tribunals—in the form of lighter sentences than they would receive before a court-martial or state court of the United States.[218] We do seek leniency for our personnel who commit offenses such as traffic violations and negligent homicides of the type which would give rise to a civil action in the United States, but are treated as serious criminal offenses in many foreign countries.

To assist him in his preparation, the observer must have an English translation of the local code.[219] While these are found in many judge advocate offices, there are a number of countries in which such translations are not yet available.

In countries in which no SOF-type agreement is applicable, our trial observers are given no official guidelines of the standards to be used in determining the fairness of the trial. However, we find that most of these observers follow the "local treatment" theory, that is, the trials of U.S. personnel are viewed from the standpoint of a trial of a citizen of that country, and are deemed to be fair, if the local law is applied to our personnel in the same manner as it would be applied to a citizen. Other observers in non-SOFA areas should be informed of this practice, as a number of them still use U.S. constitutional standards.[220]

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[218] "In all countries there is an attempt to bend over backwards to see that American offenders are given every possible break. In nearly every case the sentence is significantly less than would be given by a United States military court." Letter from Alfred M. Gruenther, General, U.S. Army Supreme Commander, Allied Powers Europe, to Hon. Stewart L. Udall, House of Representatives, 1 March 1966, reprinted in *Hearings on 309*, pt. 2, at 946. Recent statistics indicate that this is still the case; see DEP'T OF DEFENSE, STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (1 December 1964–30 November 1965.)

[219] Snee and Pye emphasized the importance of such translations in 1956. Interview with Rev. Joseph M. Snee, S. J., Professor, Georgetown University Law Center, and A. Kenneth Pye, Professor, Duke University Law School, March 1966.

[220] Trial Observer Letters Nos. 26, 28, and 32.

The observer must have the services of a competent interpreter, or be able to speak the language himself. Time after time observers have indicated the importance of being able to speak the language of the country in which they observe.[221] Obviously, all our observers cannot be trained in a foreign language, although this would be a preferable solution.[222] The next best solution, however, is for the local judge advocate office to employ the services of a competent local attorney who does speak the language, as an attorney-advisor. This individual could serve as interpreter for the accused or as trial observer, if necessary. Even if he served only as interpreter for the trial observer, the result would be far better than the average situation we face today, as he would know the law as well as the language.[223] This is something which the average interpreter cannot do, as it is very difficult for someone other than a lawyer to properly explain, let alone interpret, a complicated legal issue.

The other value of the attorney-advisor-interpreter, and perhaps the most significant, is his ability to comfortably discuss the cases with local enforcement officials, counsel, prosecutor, and the court. Much more can be accomplished through the establishment of good working relationships with these individuals than could ever be hoped for by sitting back and "claiming our rights." I should emphasize at this point that practice of the "dual use" interpreter, where the interpreter from the judge advocate office actually sits with the accused, his attorney, and the trial observer and interprets for all. This was originally done in areas where the court-appointed interpreter for the accused proved to be

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[221] Trial Observer Letters Nos. 9, 10, 17, 20, and 35; Trial Observer Interviews Nos. 1, 6, and 8.

[222] Representative Dodd felt this was important during the Hearings on House Joint Resolution No. 309:

"Mr. Dodd. Do we select people who are completely familiar with the language of the country involved?

"Mr. Brucker. Yes, we do. I don't know about the 'completely familiar,' as to how thoroughly they are. They are supposed to be acquainted with the language and customs. They have local interpreters, and they have local personnel working with them.

"Mr. Dodd. Are they lawyers?

"Mr. Brucker. They are required under the directive to have the representative be a lawyer-trained man.

"Mr. Dodd. I thought I heard someone say yes.

"Mr. Brucker. I should say possibly there are some cases where the man is not lawyer trained. They don't have such a person there. They are required where possible."

Hearings on 309, pt. I, at 276.

[223] This type of arrangement has shown excellent results in at least one command. Trial Observer Interviews 3 and 10.

inadequate, but has developed into a practice which is far more beneficial to all parties than the other system. The attorney-advisor-interpreter in the status of a "dual use" interpreter, for both the accused and observer, would be an ideal arrangement. This, of course, is something which observers have done on their own—it is not found in directives, regulations, or local SOP's. It is a practice which can be of value to other trial observers both in NATO and non-NATO countries.

Initially, the observer's psychological effect upon the accused should help to avert many problems before they arise. By advising him of his rights, explaining to him what to expect at trial and how to react to it, the observer who uses good common sense can comfortably guide the accused through an alien experience and thus avoid congressional inquiries, unfavorable publicity, and other needless repercussions which a frightened accused might generate.[224]

As the observer has a psychological effect upon the accused, he should likewise have an effect upon the court. Most countries are proud of their court systems, and they wish to extend to the observer the common courtesies due another member of the profession. Their reaction to his appearance is more than favorable in most instances.[225] Except in areas where it is prohibited by the country itself, the observer and the accused should both be in uniform.[226] In those countries with whom we have status of forces agreements, the observers should always be in uniform, as their presence in court is in *fulfillment of an international obligation*, and there is nothing wrong with apprising the court of this fact. The observer who does not make his presence known to the court is not very effective.

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[224] "The presence of an observer is also a psychological plus for the accused. Everybody likes to think that somebody cares and that any real miscarriage of justice will be accurately reported to people with standing at least to protest." Trial Observer Letter No. 20. "Most persons who stand in the dock as criminal defendants face an unusual and to them exceedingly hostile environment. They are frightened and ashamed to be there. They do not know what to say to the court or how to act . . . the trial observer can be of invaluable assistance through his advice and presence. The observer provides a link between the defendant and that which he knows—the Air Force." Trial Observer Letter No. 6.

[225] For example, one observer noted that in Italy the courts seemed very pleased to have the command show enough interest to send an officer to observe. Trial Observer Letter No. 4. Most observers contacted indicated that they were cordially received by the courts.

[226] In at least two commands, the policy is to wear civilian clothes. Trial Observer Letter No. 5; Trial Observer Interview No. 2. See also note 122 *supra*.

While there is no question that an observer should not interject himself into the proceedings during trial, he *can* and *must* be able to advise the accused and the accused's counsel when necessary.[227] Observers indicate that situations requiring this often arise, and that for this reason they like to be seated as close to the accused and his counsel as possible.[228]

When the trial is finally over and the observer has filed his report, has he really been of enough value to justify the time, energy and expense involved? If he approaches his task with a view toward *doing what he can* to see that the accused *receives* a "fair trial," rather than with the attitude of finding out all the things he can that are *unfair* about the trial, *then* he is performing a valuable service.[229]

Thus, I believe that the value of the trial observer is not in the report that he files, but in those actions which he takes before and during the trial. Few of these actions are found in any directives, regulations, or SOP's. They include such acts as arranging for competent defense counsel, competent interpreters, and witnesses for the accused; in meeting with the accused and with the court; and finally, in just being present at the trial, giving notice to the court that the United States has enough concern for its personnel to send a legal officer to insure that the applicable rights are observed. As one observer noted:

> Were it not for the results achieved by the Trial Observers, the system would have long ago been condemned as unworkable.[230]

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[227] In a statement submitted by the Department of State, it was emphasized that "United States military law officers may, in addition, advise both the defendant and the defendant's counsel." *Hearings on 309*, pt. 2, at 557.

[228] Trial Observer Interview Nos. 2 and 8 indicated that being as close to the accused as possible was of primary importance to them.

[229] It is interesting to note that in the case of Keefe v. Dulles, the Court of Appeals for the District of Columbia implied that the trial observer's finding of a fair trial was final, and that the Department of State had no duty to intervene, nor could it be legally compelled to intervene in the behalf of petitioner's husband (serving a sentence in a French prison). The court indicated that it was clear that the terms of the treaty were complied with and that the American observer who was present found no violation of any basic rights which petitioner's husband would have enjoyed at an American trial. United States *ex rel.* Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 952 (1955).

[230] Trial Observer Letter No. 26.

APPENDIX A

Article VII, NATO SOF Agreement

1. Subject to the provisions of this Article,

(*a*) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(*b*) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

2. (*a*) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(*b*) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(*c*) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(*a*) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or

property of another member of the force or civilian component of that State or of a dependent;

(ii) offiences arising out of any act or omission done in the performance of official duty.

(*b*) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(*c*) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the other State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right is cases where that other State considers such waiver to be of particular importance.

4 The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

5. (*a*) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(*b*) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.

(*c*) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

6. (*a*) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by one authority delivering them.

(*b*) The authorities of the Contracting Parties shall notify

one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (*a*) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.

(*b*) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its forces for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(*a*) to a prompt and speedy trial;

(*b*) to be informed, in advance of trial, of the specific charges made against him;

(*c*) to be confronted with witnesses against him;

(*d*) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;

(*e*) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(*f*) if he considers it necessary, to have the services of a competent interpreter; and

(*g*) to communicate with a representative of the Government of the sending State and, when the rules of the

court permit, to have such a representative present at his trial.

10. (*a*) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.

(*b*) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State, and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.

11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

APPENDIX B

Treaties Relating to Jurisdiction Over U.S. Personnel For Criminal Offenses

(The U.S.T. & O.I.A. and T.I.A.S. listings for several of the countries do not reveal the actual jurisdictional status of our forces in these countries as such status is governed by other treaties which are unpublished or classified secret.)

I. NATO-Status of Forces (4 U.S.T. & O.I.A. 1792, T.I.A.S. 2846)
Belgium
Canada 5 U.S.T. & O.I.A. 2139, T.I.A.S. 3074
Denmark
France
Greece (plus 7 U.S.T. & O.I.A. 2555, T.I.A.S. 3649)
Italy
Luxembourg
Netherlands (plus 6 U.S.T. & O.I.A. 103; T.I.A.S. 3174)
Norway
Portugal
Turkey (plus 5 U.S.T. & O.I.A. 1465; T.I.A.S. 3020 amended by 6 U.S.T. & O.I.A. 2917; T.I.A.S. 3337)
United Kingdom
United States
Germany, Fed. Rep. (plus 14 U.S.T. & O.I.A. 531; T.I.A.S. 5351. 14 U.S.T. & O.I.A. 670; T.I.A.S. 5351)

II. Treaties With A Jurisdictional Article Similar to Article VII, NATO-SOFA

Japan 11 U.S.T. & O.I.A. 1652; T.I.A.S. 4510

Paragraph 9 of article XVII of The Japanese SOFA reads as follows:

"Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

"(a) to a prompt and speedy trial;

"(b) to be informed, in advance of trial, of the specific charge or charges made against him;

"(c) to be confronted with witnesses against him;

"(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

"(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

"(f) if he considers it necessary, to have the services of a competent interpreter; and

"(g) to communicate with a representative of the government of the United States and to have such a representative present at his trial."

Agreed official minutes re paragraph 9 above read as follow:

"1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution.

"(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

"(b) He shall enjoy the right to a public trial by an impartial tribunal;

"(c) He shall not be compelled to testify against himself;

"(d) He shall be permitted full opportunity to examine all witnesses;

"(e) No cruel punishments shall be imposed upon him."

West Indies Federation 12 U.S.T. & O.I.A. 408; T.I.A.S. 4734

Art IX, para. 9, qualifies the right to have a public trial stating:

". . . to communicate with a representative of the United States and, when the rules of the court permit, to have such a representative present at his trial which shall be public except when the court decrees otherwise in accordance with the law in force in the territory."

Nicaragua T.I.A.S. 2876, T.I.A.S. 4106

Iceland 2 U.S.T. & O.I.A. 1533; T.I.A.S. 2295 (even though a NATO member, the status of forces in Iceland is governed by this agreement rather than by NATO-SOFA)

Libya 5 U.S.T. & O.I.A. 2449; T.I.A.S. 3107, 7 U.S.T. & O.I.A. 2051; T.I.A.S. 3607

Article XVI (5) of TIAS 3107 states that any individual whose misconduct renders his presence in Libya undesirable shall be removed from Libya upon request of the Libyan Government.

Under TIAS 3607, Libya waives its criminal jurisdiction over U.S. personnel except in cases of "serious public concern," or cases which are of particular importance to the United Kingdom of Libya.

Ethiopia 5 U.S.T. & O.I.A. 749; T.I.A.S. 2964

Pakistan 10 U.S.T. & O.I.A. 1366; T.I.A.S. 4281

New Zealand T.I.A.S. 4151, 4591, 9 U.S.T. & O.I.A. 1958

Australia 14 U.S.T. & O.I.A. 506; T.I.A.S. 5349 (Article VIII, Sec. 9, is same as NATO-SOFA)

Spain (Procedural Agreement No. 16 to the 26 September 1953 Agreements)

This agreement provides that members of U.S. Forces shall be entitled to the same rights and privileges as those enjoyed by Spanish citizens, to include:

(1) Protection against Ex Post Facto Law

(2) Protection against Bills of Attainder

(3) A prompt and speedy trial

(4) Be informed, in advance of trial, of the specific charge or charges against him

(5) Have a public trial and be present at his trial

(6) Have the burden of proof placed upon the prosecution

(7) Be tried by an impartial court

(8) Be protected from the use of a confession obtained by illegal or improper means

(9) Be confronted with the witnesses against him

(10) Have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the Government of Spain

(11) Have legal representation of his own choice for his defense during trial and pretrial procedure or shall be furnished free legal counsel under the same terms and conditions applicable to Spanish citizens

(12) If he considers it necessary, to have the services of a competent interpreter

(13) Have a representative of the United States Forces present at his trial.

III. MAAG Agreements (In general these provide for diplomatic immunity to members of the MAAG).

Belgium T.I.A.S. 2010, amended by T.I.A.S. 5234
Brazil T.I.A.S. 2776
Burma T.I.A.S. 2163
Cambodia T.I.A.S. 2447, 3240
Chile T.I.A.S. 2703
Colombia T.I.A.S. 2496
Cuba T.I.A.S. 2467 (never officially terminated)
Denmark T.I.A.S. 2011, T.I.A.S. 4002
Domincan Republic T.I.A.S. 2777 (terminated 20 June 1961, but paras. 2, 3, 4, 5, and 6 of Article I continue in force)
Ecuador T.I.A.S. 2560
Ethiopia T.I.A.S. 2787
Germany T.I.A.S. 3443
France T.I.A.S. 2012
Great Britian T.I.A.S. 2017
Greece T.I.A.S. 1625
Guatemala T.I.A.S. 3283
Haiti T.I.A.S. 3386
Honduras T.I.A.S. 2975
Indonesia T.I.A.S. 2306
Iran T.I.A.S. 2071
Italy T.I.A.S. 2013
Japan T.I.A.S. 2957, amended by T.I.A.S. 5192
Korea T.I.A.S. 2436, amended by 4613
Laos T.I.A.S. 2447
Libya T.I.A.S. 3857, 4620
Luxembourg T.I.A.S. 2014, amended by T.I.A.S. 4866
Netherlands T.I.A.S. 2015
Nicaragua T.I.A.S. 2940
Norway T.I.A.S. 2016, amended by T.I.A.S. 5144
Pakistan T.I.A.S. 2976
Peru T.I.A.S. 2466
Philippines T.I.A.S. 2834
Portugal T.I.A.S. 2187
Saudi Arabia T.I.A.S. 2812
Senegal T.I.A.S. 5127

Spain T.I.A.S. 2849
Taiwan T.I.A.S. 2293
Thailand T.I.A.S. 2434
Turkey
Uruguay T.I.A.S. 2778
Vietnam T.I.A.S. 2447

IV. Mission Agreements

Mission agreements are in existence with the following countries:

Argentina
Bolivia
Brazil
Chile
Colombia
Costa Rica
Cuba
Ecuador
El Salvador
Guatemala
Haiti
Honduras
Iran
Korea
Liberia
Nicaragua
Panama
Paraguay
Peru
Uruguay
Venezuela

THE INTERNATIONAL RESPONSIBILITY OF A STATE FOR TORTS OF ITS MILITARY FORCES

By Major William R. Mullins**

While thousands of claims have been paid under the provisions of article VIII of the NATO Status of Forces Agreement, this important area has been neglected by writers. In order to help to fill this void, the author discusses the historical background of state responsibility and the place of article VIII in international law; the article's effectiveness and U.S. policy in implementing it; and the author concludes with some recommended changes and a model article VIII.

I. INTRODUCTION

From the effective date of the NATO Status of Forces Agreement (NATO-SOFA) [1] through November 1964, 99,639 criminal cases involving U.S. military personnel, ranging in gravity from relatively minor assaults to rape and murder, were subject to the primary jurisdiction of our NATO allies.[2] In 66,265 cases, or more than 66 per cent of the time, jurisdiction was waived to the United States.[3] In its annual reports to the Congress the Department of

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[1] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846 [hereafter cited as SOFA art. _____]. Dates of ratification are as follows: United States—24 July 1953; France, Norway and Belgium—23 August 1953; Canada—27 September 1953; The Netherlands—18 December 1953; Luxembourg—18 April 1954; United Kingdom—12 June 1954; Turkey—17 June 1954; Denmark—27 June 1954; Greece—25 August 1954; Portugal—22 December 1955; Italy—21 January 1956; Federal Republic of Germany—1 July 1963. Iceland, having no armed forces, is not a party to NATO-SOFA.

[2] See *Hearings Before a Subcommittee of the Senate Armed Services on the Operation of Article VII, NATO Status of Forces Treaty*, 89th Cong., 1st Sess. 8 (1965).

[3] *Ibid.*

Defense takes pardonable pride in the large percentage of waivers granted under article VII of NATO-SOFA.

In the meantime, outside the limelight of congressional hearings, and practically unremarked [4] in the many law review articles and treatises dealing with NATO, thousands of claims were paid during the same period of time to the inhabitants of NATO countries under article VIII of NATO-SOFA.[5] It is with this provision, the silent partner of article VII, that this study will be principally concerned.

Human nature being what it is, it is self-evident that when the troops of one country are stationed upon the territory of another, crimes will be committed, property will be damaged or destroyed, and local inhabitants will be tortiously injured by the visiting forces. Professor Alwyn V. Freeman states that "wrongs committed by the soldiers of a foreign government on leave . . . against the inhabitants of another country are productive of more ill-will between parties than any comparable minor type of human contact." [6] Due to the international situation since World War II, never before in history have so many foreign soldiers, particularly U.S. soldiers, been present during peacetime upon the territory of other states. [7] Consequently the equitable settlement of claims arising out of incidents involving members of our armed forces has assumed an unprecedented importance.

The objects of this article are: (a) to summarize the historical background of a state's responsibility under international law

[4] The great paucity of published material is shown by the fact that I have found only three works dealing more than perfunctorily with article VIII, NATO-SOFA: FREEMAN, RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES (1957); LAZAREFF, LE STATUT DES FORCES DE L'O.T.A.N. ET SON APPLICATION EN FRANCE (1964); and Fitch, The Impact Overseas of Article VIII, NATO Status of Forces Agreement, Jan. 1955 (unpublished thesis at The Judge Advocate General's School).

[5] Article VIII, NATO-SOFA, is set forth in full in appendix A. The magnitude of the U.S. claims program under article VIII is shown by the following statistics: In France, 17,946 claims in the total amount of $5,110,709.08 were paid during the period 1953–1965; in Germany, 13,831 claims totaling $2,064,273.71 were paid between 1 July 1963 and 31 December 1965; and in Belgium 89 claims in the amount of $12,394.51 were paid in the period 1953–1965. Letter from U.S. Army Claims Service to author, 15 February 1966. In the NATO countries for which it has single service responsibility plus Japan (Japan since 19 November 1958), the Air Force paid 7,800 claims totaling $4,692,719 for the period 1954 through 1964. Letter from Claims Division, Office of the Judge Advocate General of the Air Force, to author, 21 December 1965. From 1956 through November 1964, 2,858 claims totaling $828,485.72 were paid by the Navy in Italy. Letter from U.S. Sending State Office for Italy to author, 18 January 1966.

[6] FREEMAN, *op. cit. supra* note 4, at 58.

[7] See LAZAREFF, *op. cit. supra* note 4, at 2.

for the acts of its soldiers in foreign countries; (b) to show why a change in existing practice was required in order to facilitate implementation of the NATO alliance; (c) to analyze the claims provisions of NATO-SOFA, particularly in respect to their effectiveness in implementing U.S. policy, and to study article VIII in operation, summarizing its strengths and weaknesses as demonstrated by twelve years' experience; (d) to compare the provisions of article VIII with the claims provisions of recent bilateral agreements concluded by the United States with non-NATO countries, showing the continuing influence of the article; and (e) to suggest changes in article VIII to make it more effective.

II. HISTORICAL BACKGROUND

The jurisdictional co-equality of states is a basic principle of public international law. This simply means that no state can claim jurisidiction over another.[8] Thus, though states can sue in foreign courts, generally they cannot be sued there unless they voluntarily submit to the jurisdiction of the foreign court.[9] One authority gives the rationale for this principle in the following language:

> A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence a citizen of a nation wronged by another nation, must seek redress through his own government. . . .[10]

Thus the classical rule of international law considers the liability of a state for damages to another state or its inhabitants to rest upon a "state to state" basis with settlement being accomplished through the diplomatic process.[11] In international law the individual is considered as an object of the law, not a subject. As such the individual is benefited or restrained by international law only insofar and to the extent that it establishes the right or the duty of his state to protect his interests or to regulate his conduct

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[8] 1 OPPENHEIM, INTERNATIONAL LAW 264 (8th ed. Lauterpacht 1955).

[9] *Id.* at 264–66. However, the rule of absolute immunity has been modified or abandoned by most states in regard to acts of a private law nature such as ordinary commercial transactions. *Id.* at 273.

[10] THORPE, PREPARATION OF INTERNATIONAL CLAIMS 11 (1924).

[11] ROUSSEAU, DROIT INTERNATIONAL PUBLIC 357 (1953).

through its domestic laws.[12] The impact of this principle is to establish the procedural incapacity of an individual to bring an international claim against a non-consenting sovereign.[13]

Under the "state to state" or diplomatic doctrine the claim of an individual citizen of one state against another state is "espoused" or "adopted" by the state of his nationality and asserted in its own name against the other state.[14] American authorities usually denote the act of demanding reparation from a foreign state on behalf of an individual as "interposition." [15] It all boils down to the idea that when a state espouses a claim it makes it its own, and the claim becomes "national" in the sense that it occupies the same legal position as a claim of the espousing state itself.[16] As a consequence the espousing state gains full control of the claim. It may, as a matter of right, refuse to present it at all; it may surrender or compromise it without consulting the claimant, and it may decide for itself the time and manner of presentation.[17]

In order to take advantage of the remedy offered by international law, the individual claimant must meet at least three condi-

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[12] Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

[13] Sohn and Baxter, drafters of the Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School for the International Law Commission, propose modifications in the object theory. Though under article 23 a state maintains the "primary" right of presenting a claim on behalf of its national to the state which is alleged to be responsible, under article 22 a claimant is granted the privilege of presenting his claim directly to the state alleged to be responsible or to present it in his own right to a competent international tribunal if the state allegedly responsible has conferred on the tribunal in question jurisdiction over such claims. Thus to a limited extent the draft convention attempts to change the individual's status from that of an "object" to that of a "subject" of international law. See Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 578–81 (1961).

[14] ROUSSEAU, *op. cit. supra* note 11, at 361–62.

[15] See 1 HYDE, INTERNATIONAL LAW 474 (1st ed. 1922).

[16] ROUSSEAU, *op. cit. supra* note 11, at 368.

[17] 1 HYDE, *op. cit. supra* note 15, at 477. A devastating indictment of the doctrine is given in an editorial comment appearing in the *American Journal of International Law* where the author states: "The present technique in international reclamation is generally conceded to be exasperating to individual claimants and productive of friction between governments. The interests of individuals in the redress of their grievances through interposition of their own governments are necessarily subordinated to national interests, considered from a general point of view; and dossiers of claims gather dust, awaiting favorable moments for the establishment of arbitral commissions, which may in turn leave tasks half done, and all claimants without relief, upon the appearance of new crises in intergovernmental relations." Turlington, *A New Technique in International Reclamation*, 37 AM. J. INT'L L. 291, 292 (1943).

tions: (a) he must establish the existence of a judicial or political link with his espousing state, usually nationality; (b) he must exhaust any internal remedies offered by the state against whom the claim is made; and (c) he must have "clean hands." [18] In addition he must be able to establish the legal responsibility of the state against whom the claim is made by showing that the state in question has violated a rule of international law.[19]

In regard to state responsibility for the acts of military personnel in peacetime, Hyde states the classic rule that liability is "dependent upon the circumstances that the soldier was, at the time of his misconduct, engaged in the performance of his duties, and also, that his superior officers failed to use the means at their disposal to prevent what occurred or to discipline the offender." [20] Consequently, in many cases no remedy at all was available to the inhabitants of a foreign country, because under the above criteria there is no state responsibility for acts of misconduct by soldiers who are not in the performance of their official duties and where there is no evidence of dereliction of duty by an officer or NCO in charge.

Prior to World War II the United States attempted to correct the deficiencies in the remedies provided under international law through special legislation for specific situations, such as the Act of 18 April 1918 for payment of claims caused by our troops in France during World War I,[21] or by *ex gratia* payments in

[18] ROUSSEAU, *op. cit. supra* note 11, at 362. The requirement that a claimant must exhaust the internal remedies offered by the state against whom claim is made is subject to exceptions. Thus the requirement does not apply when it is established that justice in the local courts is wholly lacking; where injury was caused by arbitrary and unjust actions of higher officials of the foreign government and there appears to be no adequate ground for believing that relief can be afforded by judicial proceedings; the local courts have been superseded by military or executive authorities or are menaced and controlled by a hostile mob; or where local remedies are insufficient. See U.S. DEP'T OF ARMY PAMPHLET, NO. 27–161–1, 1 INTERNATIONAL LAW 98 (1964).

[19] ROUSSEAU, *op. cit supra* note 11, at 361.

[20] 1 HYDE, *op. cit. supra* note 15, at 531.

[21] Act of 18 April 1918, ch. 57, 40 Stat. 532. With the arrival of large American forces in France damage claims accumulated rapidly and the situation became embarrassing with the French authorities pressing for a solution of the problem. The Act of 18 April 1918 provided that claims for damages caused by American military forces could be presented by the inhabitants of France or other non-enemy country to any officer appointed by the President and would be approved if payable in accordance with the law or practice governing the military forces of the country in which they arose. Wells, The Effect of International Agreements on the Administrative Settlement of Tort Claims Against the United States Army, April 1954, pp. 19–21 (unpublished thesis at The Judge Advocate General's School). Between 1 August 1918 and 1 December 1919, 51,745 claims were presented, of which 38,299 were paid. *Id.* at 22.

individual cases paid through special acts of Congress.[22] However, early in World War II it was realized that the *ad hoc* approach used in the past did not meet the needs brought on by the widespread stationing of great numbers of U.S. troops throughout the world. Consequently, the Foreign Claims Act of 1942, which provided an administrative method for paying both scope (line of duty) and non-scope (non-line of duty) claims arising out of the acts or omissions of U.S. personnel, was passed by the Congress.[23] Under the Foreign Claims Act the duty status of a soldier whose misconduct gives rise to a claim has no bearing upon the determination of liability or amount. The avowed purpose of the act was to promote "friendly relations," an object which could only be realized by disregarding the duty status of our personnel abroad.

After World War II the free world, and particularly Western Europe, was faced with the threat of aggressive Soviet imperialism. This threat created a sense of insecurity in the free countries of Western Europe, who had joined together to promote, with American assistance, the reconstruction and recovery of their community.[24] The American response was the theory of "containment," first exemplified by the Truman Doctrine [25] and subsequently implemented by the creation of the NATO alliance, which required the stationing of large numbers of our troops on the territory of our allies. As the Soviet threat involved the internal subversion of our allies through the agency of indigenous communist parties, in addition to the external military menace

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[22] *Ex gratia* payments are those for which the obligation to pay is merely moral, there being no legal obligation under international law upon the state making such payments. Freeman lists a number of examples, a representative sampling being as follows: Congress passed a special act appropriating money to pay the claim of Wong Ehr-Ko who was killed by an automobile belonging to the legation guard commandant, which had been misappropriated by two enlisted men. $500 was paid to Sun Fuich'in, a Chinese civilian, who was assaulted by a marine in China in 1923. In 1937, $2,000 was paid to the mother of Lucia de Jeanneret, a Chilean citizen who had been assaulted in 1921 in Valparaiso by a seaman attached to an American ship anchored in the harbor. In 1921 and 1922 violent brawls between members of the U.S. Marine Corps and a group of Nicaraguan citizens resulted in seven of the latter being killed and eight wounded. An indemnity was granted by Congress in the amount of $1,500 for each death and $150 for each wounding. He observes that in these cases no legal basis to invoke the international responsibility of the state could properly be established. See FREEMAN, *op. cit. supra* note 4, at 83–86.

[23] See *10 U.S.C. § 2734 (1964)*.

[24] See *Hearings on the North Atlantic Treaty Before the Senate Committee on Foreign Relations*, 81st Cong., 1st Sess. 236 (1949).

[25] See BOLLES & WILCOX, THE ARMED ROAD TO PEACE 13–15 (1952).

posed by the Soviet Army, the development and maintenance of friendly sentiments toward the United States by the inhabitants of free world countries became a political necessity and an indispensable ingredient of U.S. policy.

III. NATO-SOFA: A NEW CONCEPTION IN INTERNATIONAL RELATIONS

A. *BACKGROUND*

In the words of one authority, the Atlantic Pact "marked the end of an illusion and the birth of an unprecedented coalition." [26] As the collective defense provisions of the NATO Treaty contemplated that the forces of the member countries would be stationed in the territory of other members, it was deemed necessary to adopt uniform procedures governing the relationship of these forces to the civilian authorities.[27] It was evident that all sorts of political and administrative difficulties would arise if the visting forces of a NATO member were treated differently in each NATO country to which they were sent, or if the status of the forces of several NATO powers stationed in another's territory would be determined by different standards established by non-uniform bilateral agreements. In consequence, after prolonged negotiations NATO-SOFA was signed on 19 June 1951 and subsequently ratified by the members of the alliance.

NATO-SOFA, both in regard to its provisions concerning criminal jurisdiction and its provisions concerning claims, represents a compromise between two essentially conflicting theories of international law: the law of the flag, and the principle of territorial sovereignty. The doctrine of the law of the flag is essentially that an army operating on foreign territory is entirely removed from the control of the territorial sovereign and possesses an exclusive jurisdiction over its members.[28] The principle of territorial sovereignty means that the jurisdiction of the territorial sovereign over all persons within its territory is exclusive and plenary.[29] There is a plethora of authority to support both propositions.[30]

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[26] See LAZAREFF, *op. cit. supra* note 4, at 1.

[27] FREEMAN, *op. cit. supra* note 4, at 142.

[28] CHALUFOUR, LE STATUT JURIDIQUE DES FORCES ALLIEES PENDANT LA GUERRE 1914–1918 (1927), in LAZAREFF, *op. cit supra* note 4, at 11.

[29] ROUSSEAU, *op. cit. supra* note 11, at 224–25.

[30] Most authorities supporting the proposition that a visiting force is, under international law, immune from the jurisdiction of the receiving state rely

That the question was present in the minds of the drafters is shown by the following quotation from the Summary Record of the Working Group of the NATO-SOF Agreement:

14. THE ITALIAN REPRESENTATIVE considered that it would be preferable to present the case of the exclusive jurisdiction of the sending State as an exception to the rule of the right of jurisdiction of the receiving State. . . .

15. THE NETHERLANDS REPRESENTATIVE did not agree with the Italian view. He regarded the rule of the right of jurisdiction of the receiving State to be an exception to the principle of the right of jurisdiction of the sending State; military acts fell normally within the competence of the military authorities. In his opinion, this was the rule adopted by international law.

16. THE BELGIAN REPRESENTATIVE did not consider this rule of international law to be applicable in the present case. There was no doubt a proviso which recognized that sending State exercised exclusive jurisdiction over the members of its armed forces stationed abroad, but as

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upon the opinion of Chief Justice Marshall in the case of *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), where the Chief Justice concluded that a sovereign is understood to have "ceded" a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions. Hyde states the proposition in the following language: "Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities to whose service they belong, unless the offenders are voluntarily given up." See 1 HYDE, INTERNATIONAL LAW 819 (2d rev. ed. 1945) (footnote omitted). Other authorities such as Oppenheim place the alleged exemption of visiting military forces from the jurisdiction of the territorial sovereign on the idea of "exterritoriality," on the same basis as the exemption granted heads of state and diplomatic envoys. 1 OPPENHEIM, INTERNATIONAL LAW 325 (8th ed. Lauterpacht 1955). A strong defense of the law of the flag doctrine is set forth in King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L LAW 539 (1942). On the other hand the Department of Justice in an exhaustive memorandum prepared for the Senate Foreign Relations Committee, entitled *International Law and the Status of Forces Agreement*, concluded that the claim that under international law friendly foreign forces are immune from the criminal jurisdiction of the host state is without foundation, and that even where there is no express agreement among the nations, claims of immunity have generally been rejected except in a few cases where the offenses occurred in the line of duty. See *Supplemental Hearing on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty Before the Senate Foreign Relations Committee*, 83d Cong., 1st Sess. 38 (1953). Some of the authorities who support the Department of Justice view are: Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 BRIT. YB. INT'L L. 186 (1954); Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 CALIF. L. REV. 1091 (1953); and Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U. L. REV. 349 (1955). Re summarizes the territorial sovereignty rule as follows: "Clearly, therefore, the rule is one of territorial supremacy and all exceptions thereto 'must be traced to the consent' of the territorial sovereign. The exceptions involve situations where the territorial sovereign has waived

that proviso implied the possibility of conflicting sovereignty, it could not apply to the present case, in which twelve countries, by international agreement, were committed to respect common rules.

17. THE UNITED STATES REPRESENTATIVE considered that this was a difficulty of principle which was more apparent than real: The agreement on a common status would enable these difficulties arising out of international law to be overcome.[31]

The end result of the drafters' labors were the twin articles, article VII dealing with criminal jurisdiction and article VIII dealing with claims, which in effect created a "new" practice or "rule" in international law.[32]

B. *ARTICLE VIII*

In article VIII the drafters transformed into an international obligation the practice of the United States and of certain other countries, such as Great Britain, of providing remedies on an *ex gratia* basis for cases in which no possible basis of international responsibility could be established.[33]

The "new" approach to the settlement of claims embodied in article VIII was a necessary consequence of the "new" type of alliance represented by NATO, which contemplated the unprecedented long-term stationing in peacetime of large bodies of foreign troops belonging to several nations on each other's territory. The customary rules and practices of international law relating to the settlement of claims against a foreign state are almost exclusively oriented toward the situation of an alien who has a claim against a foreign state in which he is present or has economic or other interests. The rules are thus directed toward the protection of the interests of a state's nationals abroad, and do not provide an adequate remedy for claims against a foreign state which arise out of actions in the claimant's home state. For example, one of the requirements for the diplomatic espousal of a claim by a claimant's home state is that he exhaust the local remedies provided by the state against which the claim is made. While this rule is reasonable in the case of an American residing in France who has a claim against the

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the jurisdiction that would normally attach. These situations do not involve any 'exterritoriality' but are referred to as *exemptions* from the territorial jurisdiction . . . ." Re, *supra* at 390.

[31] NATO, Summary Record of Minutes of the Juridical Subcommittee of the Working Group on the Military Status of the Armed Forces, MS(J)–R (51)2, paras. 14–17 (1951).

[32] Since article VII has already been covered by Captain Williams in the previous article, no attempt will be made to repeat that discussion here, except where it is necessary to explain the effect of article VIII. See Williams, *An American's Trial in a Foreign Court*, 34 MIL. L. REV. 1 (1966).

[33] See FREEMAN, *op. cit. supra* note 4, at 147–48.

French government or vice-versa, it is entirely unrealistic and unjust to require a Frenchman with a $1,000 claim against the United States arising out of an incident which occurred in his own country to exhaust the domestic remedies provided by the United States for such claims, before his claim can be espoused by his government.[34] Consequently, the "exhaustion of local remedies" requirement is abolished in article VIII.

In addition to enlarging state responsibility for certain claims where no liability is imposed by international law, and abolishing the "exhaustion of local remedies" requirement, the manner in which article VIII deals with two other bugaboos of customary international law, *i.e.*, (a) nationality of claimants and (b) sovereign immunity, also represents a new departure. One authority concludes that the procedure adopted in paragraph 5 of article VIII, covering claims suffered by "third parties" in the "territory" of the receiving state, abandons the "nationality" *requirement so necessary to settlement through the diplomatic* process. In regard to the question of sovereign immunity he makes the following comment:

> In customary international law the claim by a person to whom damage was caused in the territory of the receiving State by acts of the forces of the sending State would fail because of the rule of sovereign immunity. . . . These difficulties have been eliminated by the interesting procedure under which the receiving State appears as party defendant in the suit, while the sending State reimburses its costs and expenses. A satisfactory arrangement has thus been reached, in which the sending State A retains its immunity from the exercise of jurisdiction by the courts of the receiving State B, while it assumes the liability to reimburse B, and thus to *make good the damage done by its forces. . . . The rule of sovereign* immunity remains intact, but harmless.[35]

IV. ARTICLE VIII CONSIDERED

Article VIII covers three types of claims: (a) inter-governmental claims;[36] (b) claims arising out of the acts or omissions of members of a force or civilian component done in the per-

[34] Many authorities agree that in certain areas the "local remedies" rule is an anachronism. In this connection Professor William L. Griffin has made the following comment: "Again, suppose the alien's claim arises from harm outside the territory of the respondent government. For example, the President of a Latin American Republic goes to a private medical clinic in the United States and returns to his own country without paying his bill. Suppose a United States Army soldier kills a French farmer's cow. Should the alien claimant have to go to the respondent country to exhaust his local remedy? No!" AM. SOC'Y INT'L L., 1964 PROCEEDINGS 118.

[35] Meron, *Some Reflections on the Status of Forces Agreement in the Light of Customary International Law*, 6 INT'L & COMP. L. Q. 689, 694 (1957).

[36] SOFA art. VIII, paras. 1–4. An intergovernmental claim is a claim by one member state against another for damage to its own property.

formance of official duty, or any other act or omission for which a force is legally responsible, and causing damage in the receiving state to third parties, other than any of the contracting parties; [37] and (c) claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving state not done in the performance of official duty.[38]

This part will be principally devoted to a discussion of the three categories of claims with particular emphasis on problems of interpretation and application in practice.

A. *INTER-GOVERNMENTAL CLAIMS*

Inter-governmental claims which are covered by paragraphs 1–4 of article VIII fall into two categories: (a) those where there is a complete waiver; and (b) those where there is a partial waiver.

Complete waiver applies to all property used by the military services of one party which is damaged by the armed forces personnel of the other party acting in the execution of their duties "in connection with the North Atlantic Treaty" or for damage to "military" property which arises from the use of any vehicle, vessel or aircraft owned by a party and used by its armed services in connection with the operation of the treaty. Each contracting party also waives completely all claims for injury or death suffered by its military personnel who are in the performance of official duty.[39]

In the partial waiver category, damage to "other property" owned by a contracting party and located in its territory is waived up to the amount of $1,400 or its equivalent. Unless the parties agree otherwise, issues concerning liability and amount are to be determined by an arbitrator selected in accordance with a formula set forth in paragraph 2(*b*) of article VIII.

Though the provisions dealing with waiver are fraught with ambiguity and thus with consequent possibility for disagreement, in actual practice problems under the waiver clauses have been surprisingly few. The principal ambiguities will be briefly discussed below.

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[37] SOFA art. VIII, para. 5. The article does not define what is meant by "legally responsible." See note 66, *infra*, for a discussion of an instance where it could be applied.

[38] SOFA art. VIII, para. 6.

[39] The provision would obviously bar recovery of medical and hospital expenses of U.S. personnel injured by receiving state personnel.

The qualifying phrases limiting complete waiver to the situations where the member of the armed force causing the damage was in the "execution of his duties in connection with the operation of the North Atlantic Treaty" or from the use of property so employed, was apparently intended to limit waiver to damages arising strictly within the cadre of NATO operations, leaving damages in other circumstances, such as a naval ship collision in the Far East, to be settled under the general rules of international law. Although it is possible for military units, aircraft, or ships of a contracting party to cause damage while present or operating in the territory of another NATO member without their presence being in "connection with the operation of the North Atlantic Treaty," as a practical matter all such units are normally "presumed" to be "in connection with the operation of the North Atlantic Treaty" for waiver purposes. Thus, in practice, it is the location of the military unit or property, rather than its mission, which determines whether a claim falls under the waiver provisions.

In regard to the partial waiver for damage to "other property owned by a Contracting Party" the question is simply to determine what is meant by "other property." The only reference to the matter in the Working Group papers is the following statement:

> That the phrase owned by the Contracting Parties was understood to signify the property of the State itself and not of political sub-divisions thereof.[40]

The German Supplementary Agreement specifically provides that waiver shall not apply to property owned by the German Federal Railways or to the German Federal Post nor to damage to Federal roads.[41] The solution adopted in France is that claims by or against non-military French government agencies, organizations and/or nationalized industries, such as the E.D.F. (electricity), or the P.T.T. (Post, Telegraph and Telephones), are handled in the same manner as any other third party claims arising under article VIII. Under this solution the United States still retains the benefit of a partial waiver in each case, as under paragraph 5 of article VIII, the sending state pays only 75 per cent of the amounts paid claimants.

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[40] NATO, Summary Record of the Working Group on the Military Status of the Armed Forces, MS–R(51)10, para. 12.

[41] See Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 41, para. 3(b) [1963] 1 U.S.T. & O.I.A. 531, T.I.A.S. 5351.

Another ambiguity is whether in the partial waiver situation the $1,400 waiver figure applies only to claims where the total damage is less than $1,400 or whether this amount is deductible when the damage is in excess of $1,400. The latter interpretation would appear to be the correct one on the basis of the following statement appearing in the Summary Record in connection with a preliminary draft:

> It was pointed out that the meaning of the first sentence following the table was not very clear. The Working Group agreed to return to the original wording which stated that the claim was waived, not if the damage was less than the amount shown in the table, but up to the amounts shown in the table.[42]

However, the French have taken the view that if the damage exceeds $1,400 the partial waiver provision does not apply. The disagreement is largely theoretical in view of the practice of considering practically all non-military governmental bodies and organizations as proper third party claimants under paragraph 5. Consequently, as a practical matter the instances where partial waiver would be applied are minimal.

The arbitration procedure set up in paragraph 2(*a*) has never been utilized, which demonstrates that the problems of interpretation posed by the waiver provisions are more apparent than real.

B. *IMPLEMENTATION*

Paragraph 10 of article VIII provides that the authorities of the sending state and of the receiving state shall cooperate in the procurement of evidence for a fair hearing and disposal of claims with which the contracting parties are concerned. Other practical details for implementing article VIII are set forth in the *Annex to NATO Document D–D (52) 26* (23 January 1953), prepared by the Working Group for the North Atlantic Council deputies. It provided for the establishment of sending and receiving state offices,[43] and directed that the contracting parties make arrangements for notification as to claims filed, the furnishing of evidence, and for the reimbursement of the sending state share of paragraph 5 claims.

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[42] NATO, Summary Record of the Working Group on the Military Status of the Armed Forces, MS–R(51)18, para. 27.

[43] The following offices have been designated as U.S. sending state offices in NATO countries: Italy—Officer in Charge, U.S. Sending State Office for Italy, APO New York 09794; Portugal—U.S. Naval Attache and Naval Attache for Air, APO New York 09678; Iceland—Commanding Officer, U.S. Naval Station, Navy No. 568, Fleet Post Office, New York, N.Y. (As previ-

The procedure contemplated by article VIII is practically the same from the point of view of the potential claimant for both paragraph 5 (official duty) and paragraph 6 (*ex gratia*) claims. The claimant files his claim with the receiving state authorities who notify the sending state and request that the sending state office furnish the U.S. Report of Investigation,[44] which is forwarded together with a certificate concerning the duty status of the U.S. personnel involved. The receiving state authorities complete their investigation by collecting all the evidence from the own claimant and other receiving state sources. If the claim falls under paragraph 5, the receiving state will proceed to settle or adjudicate the claim in accordance with the laws and regulations applicable to claims arising from the activities of its own armed forces.[45] Every six months [46] the receiving state forwards to the sending state office a consolidated statement of paragraph 5 claims paid with a proposed distribution requesting reimbursement.

If the claim falls under paragraph 6, the receiving state, after receipt of the U.S. Report of Investigation and the completion

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ously noted, Iceland is not a party to NATO-SOFA. Instead Icelandic claims are settled under a bilateral agreement with the United States); Belgium—United States Army Claims Office, France, APO New York 09686; Canada—U.S. Sending State Tort Claims Office, Staff Judge Advocate, 26th Air Division, Steward AFB, New York; Denmark—U.S. Sending State Tort Claims Office, Office of the Air Attache, United States Embassy, Copenhagen, Denmark (however the Foreign Claims Commission sits at USAFE Headquarters in Weisbaden, Germany); Greece—U.S. Sending State Tort Claims Office, Attn: Staff Judge Advocate, 7206th Support Group, APO New York 09223 (there is a one-man Foreign Claims Commission in Greece; the three-man commission sits at USAFE Headquarters in Weisbaden, Germany); Luxembourg—U.S. Sending State Tort Claims Office for Luxembourg, Commander, 36th Air Base Group, Attn: Staff Judge Advocate, APO New York 09132 (the Foreign Claims Commission sits in Weisbaden); The Netherlands—U.S. Sending State Tort Claims Office, 32d Fighter Intercepter Squadron, Attn: Staff Judge Advocate, APO New York 09202; Norway—U.S. Sending State Tort Claims Office, Norway, Office of the Air Attache, United States Embassy, Oslo, Norway; Turkey—U.S. Sending State Tort Claims Office, Attn: Staff Judge Advocate, TUSLOG, APO New York 09294; United Kingdom—U.S. Sending State Tort Claims Office, Attn: Staff Judge Advocate, Headquarters Third Air Force, APO New York 09126. The U.S. Army Claims Service, Fort Holabird, Maryland 21219, is the designated U.S. receiving state office.

[44] The U.S. Report of Investigation consists of the Claims Officer's Report (DA Form 1209 in the Army), to which is attached military police reports, accident reports, witness statements, photographs, repair estimates, or other pertinent evidence concerning the incident out of which the claim arose.

[45] SOFA art. VIII, para. 5(*a*).

[46] SOFA art. VIII, para. 5(*e*)(iv). By bilateral agreement, the billing period has been reduced to three months in France.

of its own investigation, returns the entire file to the sending state together with its recommendations as to liability and amount. At periodic intervals the sending state informs the receiving state of the action it has taken in regard to each claim.

Paragraphs 5 and 6 are not self-executing.[47] Paragraph 5 is implemented by the Act of 31 August 1954, 10 U.S.C. § 2734a, which grants authority to pay the U.S. share of paragraph 5 claims. Paragraph 6 is implemented by the Foreign Claims Act of 1942, as amended,[48] which, as will be shown later, falls short of meeting our obligations under paragraph 6.

C. *ADVANTAGES OF THE ARTICLE VIII PROCEDURE*

Before article VIII came into effect, claims now cognizable under paragraph 5 were settled directly by the United States under the provisions of the Foreign Claims Act. Claimants, with considerable justification, complained of the strange laws and procedures applied to their claims; of delays in settlement; and low awards.[49] As under paragraph 5, line of duty claims are now processed in accordance with the domestic law of the claimant's country by his own countrymen. The U.S. is the gainer from the public relations viewpoint and at the same time makes money on the deal.[50] Although the decision as to liability and amount in regard to paragraph 6, or *ex gratia* claims, is made by the sending state, the claimant has many of the advantages he enjoys under paragraph 5, since he files his claim with his own claims authorities who investigate and collect the evidence available from the claimant and other receiving state sources, and makes recommendations to the sending state on the liability and amount.[51] The claimant is also given the option, however

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[47] *Hearings on the Status of the North Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Foreign Relations Committee*, 83d Cong., 1st Sess. 28 (1953).

[48] 10 U.S.C. § 2734 (1964).

[49] Fitch, The Impact Overseas of Article VIII, NATO Status of Forces Agreement, Jan. 1955, pp. 57–60 (unpublished thesis at The Judge Advocate General's School).

[50] As the receiving state pays 25 per cent of the amounts allowed, in addition to the administrative costs and expenses shouldered by it, the sending state winds up financially as well as politically to the good.

[51] The receiving state investigation and recommendations are also quite helpful to the sending state authorities. During my four years with the U.S. sending state office for France, I found the receiving state office most helpful in securing additional evidence, medical examinations, experts' appraisals, etc.

illusory in practice, of proceeding directly against the individual tortfeasor in the local courts.[52]

D. *PROBLEMS OF INTERPRETATION AND PRACTICE CONCERNING PARAGRAPHS 5 AND 6*

Other than excepting the contracting parties, paragraph 5 does not define who may be considered as "third parties" under its provisions, leaving unclear the question of whether or not sending state personnel may be so considered. While some NATO countries do consider U.S. personnel as "third parties" under certain circumstances, others do not.[53]

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[52] A surprising number of claimants are either unaware of their right to file an *ex gratia* claim or elect to pursue the individual tortfeasor anyway, especially if the tortfeasor is tried on criminal charges in the local courts. In most civil law countries the injured party can, by a very simple procedure, join his civil claim with the criminal prosecution. This has led to unfortunate consequences for some claimants who, finding their judgments uncollectible, file an *ex gratia* claim beyond the two year statute of limitations provided in the Foreign Claims Act.

Under certain circumstances a claimant must proceed first against the individual tortfeasor. Thus, in France, if the U.S. serviceman is insured, potential claimants are required to exhaust their remedies against the insurance company before the claim or claims will be considered under article VIII.

[53] France treats U.S. personnel as third parties if they are outside the performance of official duty at the time of the incident and for damage to their personal property even in line of duty. Letter from Le Controlleur General Simonet, French Army Claims Service, to U.S. Claims Office, France, 24 Nov. 1959. The question has not arisen in Belgium. Canada has informally agreed that our personnel would not be proper third party claimants. However, under Canadian law, U.S. servicemen, civilian employees, and dependents could bring an action in the courts against the Canadian government, though this has not happened yet. Although in one instance the British considered a U.S. soldier, injured by a local national U.S. employee who was also in the performance of official duty, as a proper third party claimant, they have taken the position that a "member" of a force injured or killed while in the performance of official duty by reason of an act or omission of another member of the same force who was also in the performance of official duty, should not be considered as a "third party." Letter from British Joint Service Mission to Chief, Claims Division, U.S. Dep't of Army, 2 March 1960. Thus, the question cannot be said to be settled in Great Britain. The Netherlands does not treat U.S. personnel as third parties. The question has not arisen in Denmark, Norway, Luxembourg, Greece, or Turkey. Interview with Attorney Adviser, Claims Division, Office of the Judge Advocate General, U.S. Dep't of Air Force, Oct. 1965. In Germany, U.S. personnel are specifically excluded as third parties under the provisions of article 41, paragraph 6, of the German Supplementary Agreement. The question has not arisen in Portugal. Letter from Office of the Naval Attache to the author, 4 Nov. 1965. In Italy, the problem has also not arisen. Letter from U.S. Sending State Office for Italy to the author, 24 Feb. 1966. The advantage to the U.S. serviceman lies in the situation where his contributory negligence would bar recovery under the Military Claims Act (10 U.S.C. § 2733 (1964); implemented by Army Reg.

The basis for the variety of practice in regard to this question arises out of differences of opinion whether members of a force should be considered to be "assimilated" to their governments, thereby excluding them as third parties under the limitation which expressly excludes "Contracting Parties" from the meaning of "third parties." Initially the United States apparently regarded the question as one of policy with either interpretation being legally permissible.[54] In Canada an informal agreement was arrived at whereby our personnel were excluded as third parties,[55] and in the German Supplementary Agreement [56] members of a force were specifically excluded. However, in 1959 it was determined that the United States, as a receiving state, would regard members of a force or civilian component as "third parties" for purposes of article VIII,[57] and on 9 May 1962 the Department of State through the Office of the Legal Adviser set forth the official position of the United States in the following language:

> It is our view that the term "third parties" includes any person in a foreign country where the agreement is in force, including members of a force or civilian component and their dependents. We have reached this conclusion after considering (1) the plain language of paragraph 5, Article VIII, together with related provisions, and (2) the general purpose and negotiating history of the claims Article. As Mr. Burke pointed out in his letter, the only parties expressly excluded from the term "third parties" are the "Contracting Parties." Therefore, according to the plain language of paragraph 5, the term "third parties" may be construed to include anyone not otherwise excluded. We have concluded

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No. 27–21 (20 May 1966)), but if the doctrine of comparative negligence, applied in most civil law countries, is applicable he could obtain partial recovery. In France, U.S. servicemen are given the option of filing under Army Reg. No. 27–21 or under paragraph 5, NATO-SOFA. USAREUR-COMZ Reg. No. 25–20.

[54] See Memorandum from Office of General Counsel, Department of Defense, for Chief, Claims Division, Office of the Judge Advocate General of the Air Force, subject: Interpretation of the term "third parties" as used in the NATO-SOFA and the Japanese Administrative Agreement (1959). The following statement is made in the Memorandum: "As a legal matter it is fairly open to question whether members of a force, a civilian component or dependents of a member of a force, or a civilian component should be considered proper third parties for purposes of Article VIII. Accordingly, it is legally permissible to include such personnel as 'third parties' or to exclude them."

[55] See *supra* note 53.

[56] See Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 41, para. 6 [1963] 1 U.S.T. & O.I.A. 531, T.I.A.S. 5351.

[57] Department of Army Letter, JAGD 1958/3, subject: Applicability of Article VIII, NATO-SOFA, to Members of a Force, A Civilian Component, or Dependents of a Member of a Force or a Civilian Component (23 July 1959).

that the agreement does not offer any express or implied exclusion, other than the one mentioned, nor does it appear from either the language of the agreement or its negotiating history that the negotiators considered this problem.[58]

Subsequently, by letter dated 17 May 1962,[59] the Department of State advised the Department of Defense that the United States should not thereafter negotiate agreed interpretations of paragraph 5, article VIII, to the effect that U.S. personnel are not third parties under that paragraph. In regard to any past agreed interpretations, the question of whether they should remain in force could be decided only upon examination of each such agreed interpretation.

Under the French interpretation members of a force are "assimilated" to their government only when *injured* while acting in the performance of official duty. In the words of Controller General Simonet, a member in this situation "merges into one of the Contracting Parties" to whom the right to claim damages is denied by paragraph 4, article VIII.[60] In all other cases members of a force will be considered as third parties. The rationale given for this distinction is that under French law military personnel injured while acting in the performance of official duty are entitled to disability pensions and other benefits and are excluded from receiving any additional compensation. In practice the French interpretation results in excluding only a small percentage of cases since the great majority of claims involve property damage to the private vehicles or other personal property of U.S. personnel.

Claims arising out of the acts or omissions of nonappropriated fund employees acting within the scope of their employment are generally considered by the receiving states as covered under paragraph 5.[61]

A major problem arising under paragraph 6 involves claims by landlords for damage to rented premises caused by the negligence

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[58] Letter from Legal Adviser, Department of State, to General Counsel, Department of Defense, 9 May 1962.

[59] Letter from Legal Adviser, Department of State, to Assistant General Counsel, Department of Defense, 17 May 1962.

[60] Letter from Le Controlleur General Simonet, French Army Claims Service, to U.S. Claims Office, France, 24 Nov. 1959.

[61] The United States considers such personnel as "Civilian Components" within the meaning of article I, paragraph 1(*b*), NATO-SOFA. AIDE-MEMORIE, 25 April 1955, American Embassy, Paris, to Ministry of Foreign Affairs, based on Department of State Instruction No. CA-6964, 12 April 1955, to American Embassy, Paris, copies to embassies of other NATO powers.

of U.S. personnel. In general, U.S. foreign claims commissions consider such claims as arising out of contract and pay only where the act or omission of our personnel amounts to gross or willful negligence.[62] As a consequence of this rule, hardship sometimes results where the U.S. tenant fails to take out fire insurance, and the house or apartment burns through his simple negligence.[63]

Another major problem involves claims arising out of the acts of the dependents of U.S. personnel. Such claims are not covered by the Foreign Claims Act.[64] The rationale behind the Foreign Claims Act is simply "that the United States is responsible for the fact that this group of individuals is present in a foreign country; and so far as the injured French, Belgian, Dutch or Norwegian citizen is concerned, it doesn't matter whether the individual who damaged him was on official business or not when he committed the act . . . ." [65] In my opinion the same rationale applies to the dependent situation. As the situation now stands, the injured party can only pursue whatever remedy he might have under his domestic law against the individual dependent, or against the parents where the damage is caused by dependent children.

Another gap in coverage, at least insofar as the Army is concerned, is in regard to the payment of claims arising out of the unauthorized use of U.S. vehicles by local national employees. Though accidents arising out of authorized use are payable under paragraph 5, such employees are properly not considered as members of a force or civilian component for the purpose of paragraph 6. However, the sending state could probably be considered responsible in some countries under the "any other act, omission or occurrence for which a force or civilian com-

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[62] Interview with former Chief, U.S. Army Claims Office, Germany, at the Office of the Judge Advocate General of the Army, Oct. 1965. However, in Italy such claims are considered by the U.S. sending state office as tort claims rather than contract claims if the damage exceeds normal wear and tear and is caused by the negligence of the U.S. personnel. Letter from U.S. Sending State Office, Italy, to author, 24 Feb. 1966.

[63] For example, French law, as between the tenant and the landlord, places a practically absolute liability upon a tenant for damage or destruction of rented premises by fire and in consequence many landlords are inadequately insured in reliance upon this rule. See CODE CIVIL arts. 1733–1734 (Fr. 65th ed. Dalloz 1966).

[64] The Foreign Claims Act covers only claims generated by military personnel or civilian employees or claims which arise incident to noncombat activities, or claims arising from acts or omissions of nonappropriated fund employees. See Army Reg. No. 27–28, para. 2 (20 May 1966).

[65] FREEMAN, *op. cit. supra* note 4, at 89.

ponent is legally responsible" provision of paragraph 5.[66] Under its foreign claims regulation, the Air Force eliminates the problem by considering such claims as payable under the Foreign Claims Act,[67] an interpretation which has been rejected by the Army.

Another handicap in the carrying out of our obligations under paragraph 6 is the inability to make advance partial payments in meritorious cases. As the Foreign Claims Act requires that one lump sum settlement be made with an injured party, long delays often arise in the case of serious injuries, since no settlement can be made until a victim's injuries are consolidated and a final medical determination of his permanent partial disability can be made. This often results in a serious hardship to the victim and tends to dissipate the good will which normally accrues from the payment of *ex gratia* claims. This is especially true in countries such as France where such advance partial payments are made in paragraph 5 cases by the receiving state. Since Congress, by Public Law 87–212, 8 September 1961, 1961,[68] authorized advance partial payments up to the amount of $1,000 in claims involving aircraft and missile accidents, it has seemingly accepted the equity of such payments, and it is considered that a request to Congress for a further extension of the practice would be favorably received.

Perhaps the greatest problem of interpretation arising out of article VII and article VIII is the question of who shall determine the duty status of sending state personnel involved in incidents which involve the commission of a criminal offense or form the basis for the submission of a claim, or both. Article VIII is silent on this point, although paragraph 8 provides that if there is a dispute it shall be submitted to an arbitrator ap-

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[66] Under the "holder theory" in Germany, the owner or "holder" of a vehicle may be held liable for damage caused by a misappropriated vehicle if he fails to exercise reasonable care to forestall misappropriation of the vehicle. For example, the Germans would consider as "scope" the situation where an individual steals a truck and gets out of a motor pool or post due to the negligence of a gate guard. If the U.S. gate guards and other personnel have exercised reasonable care to prevent the theft, any claims arising from the accident in which the stolen vehicle was involved would be considered "non-scope." Interview with former Chief, U.S. Army Claims Office, Germany, at the Office of the Judge Advocate General of the Army, Oct. 1965.

[67] U. S. Dep't of Air Force, Manual No. 112–1, para. 121a(2) (c)2 (1963).

[68] 10 U.S.C. § 2736 (1964).

pointed in accordance with paragraph 2(*b*) for decision.[69] However, it is implicit from the practice in regard to article VII supported by the Working Group papers that at least the initial decision should be made by the sending state. The U.S. position in regard to article VII has consistently been that the authorities of the sending state should have exclusive authority to determine the duty status of U.S. personnel.[70] During the negotiations the U.S. Working Group representative on two specific occasions emphasized the U.S. view that the military authorities of the sending state, and not those of the receiving state, were alone capable of determining whether or not an offense had been committed in the performance of official duty.[71] That this view was at least tacitly accepted by the negotiators is shown by the fact that a suggestion by the Portuguese representative that a provision should be inserted providing for the possibility of an appeal to arbitration was rejected as not being consistent with the speed required in the repression of criminal offenses, and on the ground that if grave difficulties of principle arose between the parties, the general procedure laid down in article XVI could always be adopted.[72] When Great Britain enacted its law implementing NATO-SOFA, criticism in Parliament of the idea of duty status being determined by the sending state resulted in an amendment to the effect that a certificate from an accused's commanding officer would be determinative of duty status "unless the contrary is shown," making it possible for British courts to consider evidence in rebuttal of the commanding officer's certificate.[73] The French authorities have essentially agreed to the U.S. position and the two countries have established an administrative procedure whereby the determination of the U.S. staff judge advocate or legal officer will be accepted by the French, subject to U.S. reconsideration if the French consider the original determination

[69] SOFA art. VIII, paras. 8, 2(*b*). The working papers disclose no background information as to why paragraph 8 was inserted. At an early meeting the chairman of the Juridical Sub-Committee stated that any such dispute should be settled within the terms of article XVI. NATO, Summary Record of the Minutes of the Juridical Subcommittee of the Working Group on the Military Status of the Armed Forces, MS(J)–R(51) 7, para. 1. Article XVI provides that all differences between the contracting parties which cannot be settled by negotiation between them shall be referred to the North Atlantic Council.

[70] Baldwin, *Foreign Jurisdiction and the American Soldier*, 1958 WIS. L. REV. 52, 65–66.

[71] NATO, Summary Record of the Working Group on the Status of the Armed Forces, MS–R(51)14.

[72] *Ibid.*

[73] See Baldwin, *supra* note 70, at 67–68.

erroneous.[74] In Turkey it has been agreed by an exchange of *aide-mémoires,* between the American Embassy and the Turkish Ministry of Foreign Affairs, that an official certificate bearing the signature of the person holding the highest ranking office of the United States military forces in Turkey will be accepted by the Turkish judicial authorities.[75] In Italy the certificate of the U.S. authorities is always considered as controlling. There has been a decision by a lower Italian court to the effect that the Italian authorities and third parties are not permitted to look behind the certificate.[76]

Despite the ambiguity caused by the granting of the right to demand arbitration of the question in paragraph 8 of article VIII, it is submitted that the same rule should be applicable to duty status determination for claims purposes. In Germany the determination of the sending state office is normally considered as conclusive subject to reconsideration if new evidence is presented by the German authorities. However, under the Supplementary Agreement, recourse can be had to the arbitration provisions of article VIII if no agreement can be reached.[77] The practice in all NATO countries seems to be for the U.S. authorities to make the initial determination subject to reconsideration upon request of the receiving state, with any disagreement being amicably negotiated.[78] In France, the French Army Claims Service accepts the determination of the U.S. sending state office. My research has failed to disclose any case where an arbitrator has in fact been appointed to determine the question. However, the French courts[79] have held that the question must be determined by an arbitrator and that third parties can

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[74] Ellert, *Implementation by the United States and France of the Criminal Jurisdictional Provisions of the NATO-SOF Agreement*, 2 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 365, 382 (1963). The Cour de Cassation has held that for the purposes of article VII, the sending state is solely qualified to determine duty status. See Cassation, Chambre Criminelle, 16 Feb. 1961, in LAZAREFF, *op. cit. supra* note 4, at 214.

[75] SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 52 (1957).

[76] Letter from U.S. Sending State Office for Italy to author, 18 Nov. 1965.

[77] See Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 41, para 11(b) [1963] 1 U.S.T. & O.I.A. 531, T.I.A.S. 5351.

[78] Interview with Attorney Adviser, Claims Division, Office of the Judge Advocate General, U.S. Dep't of Air Force, Oct. 1965.

[79] The courts can be seized of the question through a variety of means. For example, a claimant sues directly a member of the force for whom a "performance of official duties" certificate has been given by the U.S. authorities and accepted by the French authorities. The raising of the question by insurance companies is discussed at note 89 *infra* and accompanying text.

demand an arbitrator even in cases where the sending state and the receiving state are in agreement on the proper determination.[80]

Another aspect of the problem involves the effect of a prior determination for article VII purposes on the determination for the purposes of article VIII in view of the different criteria applicable to criminal as opposed to civil responsibility. The attitude of the different services having single service claims responsbility for the various NATO countries is much the same.[81] The Air Force claims people usually follow the article VII determination, but they do not consider themselves bound by it.[82] The U.S. Army Claims Office, Germany, usually makes an independent determination, considering that "criminal jurisdiction" and "claims" constitute two separate channels.[83] This policy is also followed in France, although as a practical matter the two determinations will usually coincide.[84]

A fertile source of claims in NATO countries arises out of the operation of the privately owned vehicles of U.S. personnel. Although all U.S. commands overseas require that U.S. personnel

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[80] See Cour de Cassation, Chambre Civile, 7 Oct. 1961, Air Liquide et Kriegel c/ Coody et la "France," in LAZAREFF, *op. cit. supra* note 4, at 847. The right of a private individual to demand arbitration under article VIII has been ligitated in the United States. In the case of Robertson v. United States, 294 F.2d 920 (D.C. Cir. 1961), a controversy arose whether a Belgian corporal was a member of a "force" performing official duties at the time of his tortious act. The plaintiff moved to compel the government to seek arbitration. The court of appeals held that the district court was without power to order the government to seek arbitration, citing as the principal reason that the Treaty has no provision authorizing a private citizen to compel the United States to initiate international political action in a field reserved solely to the sovereign.

[81] Dep't of Defense Directive No. 5515.8, sec. IV A (4 Dec. 1963), assigns single service responsibility. In the NATO countries the Army has responsibility for Germany, France, and Belgium; the Air Force for Denmark, Norway, The Netherlands, Luxembourg, Great Britain, Canada, Greece, and Turkey; and the Navy for Italy and Portugal.

[82] Interview with Attorney Adviser, Claims Division, Office of the Judge Advocate General, U.S. Dep't of the Air Force, Oct. 1965.

[83] Interview with former Chief, U.S. Army Claims Service, Germany, at the Office of the Judge Advocate General, Oct. 1965.

[84] In France if the file contains the certificate given for criminal jurisdiction, and the sending state office agrees with the determination, the certificate is left in the file. However, if the sending state office disagrees with the determination either initially, or upon reconsideration requested by the receiving state, the first certificate is withdrawn from the file and a certificate prepared by the sending state office is substituted. The French courts have held that two different determinations, one for criminal jurisdiction purposes, and one for civil purposes, can arise out of the same incident, since, for criminal jurisdiction purposes, the courts hold the U.S. certificate conclusive (see *supra* note 74), while for claims purposes arbitration can be demanded (see *supra* note 80 and accompanying text).

have third party liability insurance in order to register their vehicles,[85] cases arise where there is no insurance or the insurance is invalid for one reason or another.[86] Claims in such cases are settled under article VIII. The most serious situation is where an insurance company insuring U.S. personnel goes into liquidation. The latest such occurrence involved a Delaware-chartered company which specialized in selling cheap third party liability insurance to U.S. servicemen in Europe. When forced into liquidation in 1963,[87] thousands of claims against U.S. servicemen insured by it remained unsettled. Although the liquidation has not yet been completed, if, as expected, the assets are insufficient to pay the claims in full, the unpaid balance on all such claims which meet the requirements of the Foreign Claims Act will have to be paid by the United States.[88]

In France, certain companies insuring U.S. personnel have successfully defended actions brought against them by third parties[89] on the ground that their insured were in the performance of official duty at the time of the accident, and that consequently the claims fall under the provisions of paragraph 5 of article VIII.[90] The rationale for this defense is that since paragraph 5(*g*) of article VIII exempts a member of the force from being subject to any proceedings for enforcement of a judgment against him in the receiving state regarding any matter

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[85] USAREUR Regulations No. 643–30 (4 Dec. 1963); Interview with Attorney Adviser, Claims Division, Office of the Judge Advocate General, U.S. Dep't of Air Force, Oct. 1965; letter from U.S. Sending State Office for Italy to author, 18 Nov. 1965.

[86] Such occurrences are common where the insurance policy has been legally cancelled for non-payment of premium or where the policy is invalid because the driver did not have a valid driver's license.

[87] The company was placed in liquidation by the French Insurance Department on 8 July 1963 and by the German authorities on 23 January 1964.

[88] To avoid possible complications arising out of the two-year statute of limitations provided by the Foreign Claims Act, the U.S. authorities agreed with the court-appointed liquidator to consider the date the company went into liquidation as the date which would be used for statute of limitations purposes in the event the U.S. later considered such claims. All claims files in the hands of the liquidator involving a claim of more than $500 were examined by U.S. personnel to insure that sufficient evidence was available if an adjudication by a Foreign Claims Commission became necessary.

[89] Contrary to U.S. practice, in most civil law countries the insurance company is made a party to the suit.

[90] See LAZAREFF, *op. cit. supra* note 4, at 374–76. In France, "performance of official duty" certificates are given by the U.S. authorities and accepted by the French as a matter of course where at the time of the accident the U.S. serviceman was using his privately owned vehicle to go to or from his home to his place of duty or was in a TDY status.

arising from the performance of official duty, the insurance company could only be liable to the same extent as its insured. Therefore, as a judgment could not be enforced its insured, a judgment could not be given against the insurance company since the company is entitled to all defenses available to the insured.

Acting on this theory the companies in question moved to make France a party to the action and, if the defense was upheld, judgment was granted against the French government. Since, under French law, court judgments are binding on the French administrative services, the U.S. and French governments often ended up paying the damages for accidents caused by our personnel while driving their privately owned vehicles.

The problem has been remedied in France. All companies doing business with U.S. personnel are required to insert a special clause in policies sold to such personnel extending the coverage of of their business and pleasure policies to all uses of the insured vehicle and saving the United States and French governments harmless from possible liability. However, the situation could well arise in other countries.[91]

In connection with the implementation of article VIII, mention should be made of the vital role of the sending state office. In France, the country with which the author is most familiar, the sending state office, in addition to performing the mechanical functions of forwarding reports of investigation to the receiving state, reimbursing claims paid under paragraph 5, and adjudicating paragraph 6 claims, maintains a close and cordial relationship with the receiving state office whereby mutual problems are solved on a give-and-take basis. For example, the sending state office gives its opinion of liability in dubious paragraph 5 cases at the time the U.S. Report of Investigation is forwarded to the receiving state, so that its opinion may be taken into consideration

[91] The special clause was worked out by the U.S. authorities, the French Army Claims Service, and the French Insurance Department. More than 70 companies agreed to insert the clause and were consequently placed on an "approved" list of insurance companies. Cars insured with non-complying companies will not be registered by the Provost Marshal. If the vehicle is not registered by the Provost Marshal, registration can only be accomplished through the French registration system. This method would involve payment of high fees and ineligibility for cheap gasoline coupons.

before the decision is made.[92] In instances where the receiving state is sued in a French court,[93] the sending state office furnishes evidence, legal memoranda, and other material to aid in the defense. Reciprocally, the French receiving state office, by rushing payment in cases of particular political importance to the United States, and in many other ways, exemplifies the spirit of cooperation which is the basis of the NATO alliance. The point is that with all the pitfalls and possibilities for disagreements inherent in article VIII as written, it is only by close and cordial liaison and cooperation that the article can be made to work. The sending state office is consequently the key to the operation of article VIII.

V. ARTICLE VIII AS A LUBRICANT IN ARTICLE VII MACHINERY

Rouse and Baldwin make the following statement:

> Experience indicates that prompt and efficient processing of civil claims can reduce the number of criminal prosecutions against United States personnel and increase the numbers of waivers of jurisdiction, or reduce the severity of sentences.[94]

The above-quoted statement cogently summarizes the importance of article VIII as an indispensable lubricant of U.S. policy in regard to article VII. A practical example, based on the author's experience in France, is as follows: An American soldier without provocation assaults a Frenchman, causing minor personal injuries which result in the loss of a few days work, medical expenses, and minor scars, etc. The victim brings a criminal charge, to which is joined a civil claim for damages, against the soldier, and a subsequent request for waiver of jurisdiction is denied by the French authorities. For some reason, the U.S. authorities are particularly desirous of obtaining jurisdiction of the soldier (usually to take administrative action to get him quickly out of the service). The claimant is willing to withdraw his criminal complaint if his civil damages are promptly paid. At this stage the U.S. sending state office, upon the request of the local staff judge advocate, steps into the picture, evaluates

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[92] In such cases detailed repair bills and estimates are forwarded to the receiving state which will apply "set-off" in comparative negligence cases or will collect the U.S. damages from the third party, deducting the sums so set off or collected in full from the quarterly bills. However, if no claim is filed by the third party the sending state must attempt collection directly from the third party since the receiving state is not "seized" of the affair.

[93] Under French law a claimant who is not satisfied with the offer made by the French Army Claims Service may sue France directly in the courts.

[94] Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 50 (1957).

the claim and makes the claimant an offer to pay his claim immediately if he will agree to withdraw the criminal charge. If the claimant accepts, a release is drawn up in which the claimant not only releases the soldier and the United States from civil liability, but he also agrees to withdraw his complaint. The case is informally coordinated with the French receiving state office in order to have its approval for shortcutting the normal procedure, and the claim is paid. The release is then submitted to the local prosecutor who is invariably willing to drop the charges if the complaining witness is satisfied. Of course, the claimant is advised that his claim will be considered regardless of whether or not he drops the charges, but, in case charges are not dropped, settlement cannot be effected until after the soldier has been tried. This advice to the claimant is not used, except indirectly, as a means of pressuring him, but instead is based upon an important legal point. Under French law, evidence of any civil settlement by or on behalf of the wrongdoer may be introduced at his criminal trial as evidence of his guilt to the criminal charge. Consequently the U.S. sending state office feels bound never to pay a claim of this nature until the criminal case is disposed of in one way or another. To do otherwise would put the office in the position of helping to convict our personnel in the French courts.

The procedure outlined in the above example is not necessary or even desirable in the average case. More typically, in cases which are not too serious from the criminal viewpoint (although civil damages might be quite large), the prosecutor just does not object to the granting of the U.S. request for waiver when informed that the civil claim will be settled under article VIII. In cases which are actually tried, the prosecutor often asks for, and the court often adjudges, a relatively light penalty, based largely on the fact that they know the victim will be compensated.

Although used in a somewhat different manner, article VIII is equally effective in Italy. Italian law provides that in a criminal case where an "extenuating circumstance" occurs and a reduction of punishment is not otherwise fixed by law, the punishment for the crime shall be reduced by not more than one-third.[85] The payment of the civil damages prior to trial is considered an "extenuating circumstance." In some cases application of this reduction-in-sentence rule can result in the accused not serving any of his sentence, since under Italian practice, if the sentence does not exceed twelve months and the accused is a first offender, the

[85] COUNTRY LAW STUDY FOR ITALY, 36–37 (1958).

confinement is suspended. Thus, an American serviceman who commits a crime for which the prescribed punishment is confinement for eighteen months or less usually ends up not serving any confinement at all if the victim is compensated under article VIII. Although prosecution is mandatory in most cases, and the victim cannot withdraw his criminal complaint as can be done in France, a practical by-product of the advance payment of civil damages is that the victim does not employ private counsel to aid the prosecution at the trial as he is entitled to do under the joint civil-criminal action permitted in civil law countries. Obviously this results in much less pressure for a stiff sentence.[96]

It is evident that the thousands of claims paid under article VIII have had an important influence in securing the vaunted 66 per cent waiver of jurisdiction to the United States under article VII. Without the high waiver percentage it is arguable that the Bow Resolution,[97] or one similar to it, might well have been adopted. In any event it is certain that without a just and efficient implementation of article VIII, the squeaks in article VII would become an angry roar.

VI. ARTICLE VIII COMPARED WITH THE CLAIMS PROVISIONS OF RECENT BILATERAL AGREEMENTS

The striking similarity between the provisions of article VIII and the claims provisions of subsequent bilateral Status of Forces agreements concluded by the United States with non-NATO countries attests to the continuing vitality of the article VIII concept in international law. Two of the more recent such agreements will be briefly discussed.

A. *THE AUSTRALIAN AGREEMENT*

The Status of United States Forces in Australia, Agreement and Protocol, was signed at Canberra on 9 May 1963.[98] Article XII of the Agreement which covers claims is in effect a paraphrase of

[96] For the above information relating to the practice in Italy the author is indebted to Lieutenant Colonel Robert D. Peckham, former Staff Judge Advocate, U.S. Army Logistical Command, Leghorn, Italy. Interview, 8 March 1966.

[97] In 1955, Congressman Bow introduced House Joint Resolution 309 providing for the revision of the Status of Forces Agreement to give exclusive criminal jurisdiction over American forces abroad to the United States, or if such revision could not be accomplished, for withdrawal of the United States from the Treaty. See *Hearings on H. J. 309 and Similar Measures Before the House Foreign Affairs Committee*, 84th Cong., 1st & 2d Sess. (1956).

[98] [1963] U.S.T. & O.I.A. 506, T.I.A.S. 5349.

article VIII with the greater part of the language being taken verbatim from the NATO article. Aside from minor changes in wording and paragraph arrangement only, two major additions or changes are made in the article VIII formula. Paragraph (5) of the Australian Agreement provides that "In accordance with the requirements of Australian law, the United States Government shall insure official vehicles of the United States Forces against third party risks." Paragraph (11)(b) provides in substance that the United States authorities shall, upon request, assist the appropriate Australian authorities to execute civil process involving private movable property located in areas used by the U.S. forces. Although the latter addition is self-explanatory, the first, relating to the insurance of official vehicles, requires some discussion. Normally the United States government is a self-insurer and official policy forbids the private insurance of government vehicles.[99] The acceptance of this clause in the Australian Agreement was probably predicated upon the small number of official U.S. vehicles in the country. It is noted that in two NATO countries, Norway and Denmark, the same practice is followed. Authority and funds to pay the premiums are included as a recurring provision in the annual Appropriation Act.[100] This practice is in derogation of paragraph 5 of article VIII and the equivalent cost of sharing provisions of the Australian Agreement (paragraph 7 of article XII) are obviously to the disadvantage of the United States, since it permits the receiving state to escape payment of its 25 per cent share of line of duty claims involving official vehicles.

The question was raised in France in 1959 when France adopted a compulsory insurance law which, by its terms, covered vehicles owned by a foreign state. The view of the French receiving state office, which was concurred in by the Ministry of Finance, was that the law did not apply to the official vehicles of the NATO forces since such an application would conflict with the terms of paragraph 5, article VIII of the Treaty, which provides an "exclusive" remedy for claims arising out of the use of such vehicles.[101] In the author's opinion, the French interpretation is the proper one.

[99] For example, in 1958 all nonappropriated fund activities were required to cancel any public liability insurance policies they then held. Dep't of Army Cir. No. 230–7 (26 Aug. 1958).

[100] See, for example, Dep't of Defense Appropriation Act for 1966, § 603, 79 Stat. 873.

[101] See letter from Le Controlleur General Simonet to U.S. Sending State Office, subject: Insurance of Vehicles Owned by a State Signatory to the NATO-SOF Agreement (undated).

There is one ambiguity in the Australian Agreement which should be mentioned. In paragraph (7), which is an almost exact paraphrase of paragraph 5 of article VIII, except for the exclusion from coverage of official vehicles insured in accordance with paragraph (5) discussed above, a phrase has been inserted to the effect that official duty claims would be settled thereunder "unless the interested parties otherwise agree." The effect of this phrase is not clear, although if taken at its face value the entire paragraph could be changed, modified or eliminated by mutual agreement.

B. *THE REPUBLIC OF CHINA AGREEMENT*

The proposed Agreement between the United States and the Republic of China[102] is of particular interest. The host country is given the option of substituting the article VIII formula *in toto* if the claims provision as written proves to be unsatisfactory.[103] The claims provisions of the Agreement which are contained in article XV again "steal" the language of article VIII. The waiver provisions, paragraphs 1 through 4 of article XV, are the same except that the provision for arbitration in paragraph 2(*b*) of article VIII is eliminated and a provision is included that such inter-governmental claims "shall be settled by the Government against which the claim is made in accordance with its domestic law." [104] The most important difference is the elimination of paragraph 5 of article VIII and the substitution of a provision providing that both line of duty claims (paragraph 5 of article VIII) and non-line of duty or *ex gratia* claims (paragraph 6 of article VIII) will be processed and settled in accordance with the applicable provisions of United States law. In effect, therefore, the parties have agreed to place all claims settling power in the sending state for which the *quid pro quo* is that the host country is relieved of the financial burden of paying 25 per cent of all scope or line of duty claims. The United States claims authorities are "kept honest" by the provision referred to above giving the Chinese the right to substitute the straight NATO article VIII formula at any time in the future.

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[102] The Status of United States Forces in China, Agreement and Protocol [hereinafter referred to as Chinese SOFA]. The Agreement has not yet been published.

[103] Chinese SOFA Agreed Minute No. 2.

[104] Chinese SOFA art. XV, para 2(b).

The provisions of the Chinese SOFA appear particularly apt for use in countries where the financial question of sharing in the cost of paying claims poses a problem.

It is also noted that in the Chinese Agreement the United States reserves the right to determine whether an act or omission occurred in the performance of official duty is subject to reconsideration upon request of the receiving state.[105] As the United States pays line of duty claims under the Agreement, this provision is of importance only in relation to paragraph 5(*a*) of article XV which provides that members of the force shall not be immune from the jurisdiction of the civil courts except in matters arising out of the performance of official duty or in respect to a claim where payment has been made in full satisfaction thereof.

The continued use of the article VIII formula by the United States in its bilateral agreements is generally to the good and demonstrates the basic soundness of the article. However, continued use of the article *in toto* without incorporating changes to correct its weaknesses and ambiguities, pointed out in Part IV of this study, is dangerous, and can lead to difficulty, especially when applied to countries outside the "Western World" which do not share the common legal and political heritage of the NATO allies.

VII. CONCLUSIONS AND RECOMMENDATIONS

The French authority, Lazareff, arrives at the following conclusion regarding article VIII:

> Taken all together the provisions of Article VIII can only be approved. This article, at the same time balanced and equitable, carefully distinguishes each one of its categories of damages and brings to the settlement of each one of them just solutions. It is in this spirit that the text was written, and it is in this spirit that it is daily applied.[106]

It is felt that the statistics relating to the waiver of jurisdiction in criminal cases cited in the Introduction strongly support the conclusion that article VIII has generally succeeded in the difficult objective of keeping friction with the governments and the inhabitants of foreign countries in which our troops are stationed at a minimum.

The experience of the author, which has been repeatedly confirmed by the opinions of other U.S. personnel who have dealt with article VIII, has shown that the success achieved is largely

[105] See art. XV; Agreed Minute No. 1.
[106] LAZAREFF, *op. cit. supra* note 4, at 408.

due to the close and cordial cooperation of the claims personnel on both sides, who have taken the Adam's ribs of article VIII and transformed them into a living, working reality, which like Eve has its faults but manages to get the job done.

On the other hand, article VIII is not flawless, and certain changes would improve it considerably. Paragraph 2, which deals with damage to "other property owned by a contracting Party" with a partial waiver in cases where the damage is less than $1,400, and which provides an elaborate arbitration procedure to determine liability and amount, has been shown by experience to be useless and by its vagueness serves only to create confusion. Its ambiguities were discussed in detail in Part IV. In the opinion of the author there is no sound reason for granting a waiver, either partial or total, for damage to non-military property. It is therefore recommended that paragraph 2 be eliminated, leaving in effect the complete waiver of damage to property used by the armed forces [107] and the mutual waiver of claims for injury or death of members of the armed forces engaged in the performance of official duties.[108]

In regard to the determination of duty status it is recommended that the sending state should determine the duty status of its personnel subject to reconsideration upon request of the receiving state, with the final determination of the sending state being binding. Any disagreements in regard to the criteria applied by the sending state, which could not be resolved by negotiation, could always be referred to the North Atlantic Council for resolution under article XVI.[109] This solution would obviate the need for paragraph 8 which provides for arbitration of the question. Thus with the deletion of paragraphs 2 and 8, the entire arbitration procedure would be eliminated.

To achieve more equitably and justly our obligations under paragraph 6 of article VIII, the Foreign Claims Act should be amended to extend coverage to acts of dependents and to include a provision for advance partial payment in meritorious cases.

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[107] See the present SOFA art. VIII, paras. 1, 3. In this connection, the limitation "in connection with the operation of the North Atlantic Treaty" contained in paragraph 1 should be eliminated to conform with practice, with the result that location of the military unit or property within the territory of a NATO member, rather than its mission, would be the determinative factor as to whether waiver should apply.

[108] See SOFA art. VIII, para. 4.

[109] Art. XVI provides that all differences between the contracting parties which cannot be settled by negotiation between them shall be referred to the North Atlantic Council.

Pending a revision of NATO-SOFA, the above-suggested changes relating to waiver and duty status could be implemented by bilateral agreements. The suggested changes to the Foreign Claims Act could of course only be accomplished by legislation. It is submitted that enactment of the suggested changes in the Foreign Claims Act would prove to be an excellent bargaining point, if one is found necessary, in gaining acceptance of bilateral agreements envisioned above.

A "model" article incorporating the suggested changes, which might prove useful in drafting claims provisions in future bilateral agreements or in case of revision of NATO, is included as Appendix B to this study.

APPENDIX A

AGREEMENT BETWEEN THE PARTIES TO THE NORTH ATLANTIC TREATY REGARDING THE STATUS OF THEIR FORCES

Article VIII

1. Each Contracting Party waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land, sea or air armed services, if such damage—

(i) was caused by a member or employee of the armed services of the other Contracting Party in the execution of his duties in connexion with the operation of the North Atlantic Treaty; or

(ii) arose from the use of any vehicle, vessel or aircraft owned by the other Contracting Party and used by its armed services, provided either that the vehicle, vessel or aircraft causing the damage was being used in connexion with the operation of the North Atlantic Treaty, or that the damage was caused to property being so used.

Claims for maritime salvage by one Contracting Party against any other Contracting Party shall be waived, provided that the vessel or cargo salved was owned by a Contracting Party and being used by its armed services in connexion with the operation of the North Atlantic Treaty.

2. (*a*) In the case of damage caused or arising as stated in paragraph 1 to other property owned by a Contracting Party and located in its territory, the issue of the liability of any other Contracting Party shall be determined and the amount of damage shall be assessed unless the Contracting Parties concerned agree otherwise, by a sole arbitrator selected in accordance with sub-paragraph (*b*) of this paragraph. The arbitrator shall also decide any counter-claim arising out of the same incident.

(*b*) The arbitrator referred to in sub-paragraph (*a*) above shall be selected by agreement between the Contracting Parties concerned from amongst the nationals of the receiving State who hold or have held high judicial office. If the Contracting Parties concerned are unable, within two months, to agree upon the arbitrator, either may request the Chairmen of the North Atlantic

Council Deputies to select a person with the aforesaid qualifications.

(*c*) Any decision taken by the arbitrator shall be binding and conclusive upon the Contracting Parties.

(*d*) The amount of any compensation awarded by the arbitrator shall be distributed in accordance with the provisions of paragraph 5 (*e*) (i), (ii) and (iii) of this Article.

(*e*) The compensation of the arbitrator shall be fixed by agreement between the Contracting Parties concerned and shall, together with the necessary expenses incidental to the performance of his duties, be defrayed in equal proportions by them.

(*f*) Nevertheless, each Contracting Party waives its claim in any such case where the damage is less than:

Belgium: B.fr. 70,000.	Luxembourg: L.fr. 70,000.
Canada: $1,460	Netherlands: Fl. 5,320
Denmark: Kr. 9,670	Norway: Kr. 10,000.
France: F.fr. 490,000.	Portugal: Es. 40,250
Iceland: Kr. 22,800.	United Kingdom: 500.
Italy: Li. 850,000.	United States: $1,400.

Any other Contracting Party whose property has been damaged in the same incident shall also waive its claim up to the above amount. In the case of considerable variation in the rates of exchange between these currencies the Contracting Parties shall agree on the appropriate adjustments of these amounts.

3. For the purposes of paragraphs 1 and 2 of this Article the expression "owned by a Contracting Party" in the case of a vessel includes a vessel on bare boat charter to that Contracting Party or requisitioned by it on bare boat terms or seized by it in prize (except to the extent that the risk of loss or liability is borne by some person other than such Contracting Party).

4. Each Contracting Party waives all its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties.

5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties,

shall be dealt with by the receiving State in accordance with the following provisions:—

(*a*) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(*b*) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(*c*) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(*d*) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs (*e*) (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(*e*) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:—

(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.

(ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them: however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.

(iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of these armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.

(iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

(*f*) In the cases where the application of the provisions of sub-paragraphs (*b*) and (*e*) of this paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.

(*g*) A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

(*h*) Except in so far as sub-paragraph (*e*) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.

6. Claims against members of a force or civilan component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty shall be dealt with in the following manner:

(*a*) The authorities of the receiving State shall consider the claim and assess compensation of the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.

(*b*) The report shall be delivered to the authorities of the sending State, who shall then decide without delay whether they will offer an *ex gratia* payment, and if so, of what amount.

(*c*) If an offer of *ex gratia* payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sendng State shall make the payment them-

selves and inform the authorities of the receiving State of the decision and of the sum paid.

(*d*) Nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force or of a civilian component unless and until there has been payment in full satisfaction of the claim.

7. Claims arising out of the unauthorized use of any vehicle of the armed services of a sending State shall be dealt with in accordance with paragraph 6 of this Article, except in so far as the force or civilian component is legally responsible.

8. If a dispute arises as to whether a tortious act or omission of a member of a force or civilian component was done in the performance of official duty or as to whether the use of any vehicle of the armed services of a sending State was unauthorized, the question shall be submitted to an arbitrator appointed in accordance with paragraph 2(*b*) of this Article, whose decision of this point shall be final and conclusive.

9. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civilian jurisdiction of the courts of the receiving State except to the extent provided in paragraph 5(*g*) of this Article.

10. The authorities of the sending State and of the receiving State shall co-operate in the procurement of evidence for a fair hearing and disposal of claims in regard to which the Contracting Parties are concerned.

APPENDIX B

A MODEL ARTICLE VIII

1. Each Contracting Party waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land, sea or air armed services, if such damage—

(i) was caused by a member or an employee of the armed services of the other Contracting Party in the performance of his official duties; or

(ii) arose from the use of any vehicle, vessel or aircraft owned by the other Contracting Party and used by its armed forces, provided either that the vehicle, vessel or aircraft causing the damage was being used for official purposes, or that the damage was caused to property being so used.

Claims for maritime salvage by one Contracting Party against any other Contracting Party shall be waived, provided that the vessel or cargo salved was owned by a Contracting Party and being used by its armed services. The expression "owned by a Contracting Party" in the case of a vessel includes a vessel on bare boat charter to that Contracting Party or requisitioned by it on bare boat terms or seized by it in prize (except to the extent that the risk of loss or liability is borne by some person other than such Contracting Party).

2. Each Contracting Party waives all its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties.

3. Claims (other than contractual claims and those to which paragraph 4 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:—

(a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(b) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(c) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(d) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs (e)(i) (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(e) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs shall be distributed between the Contracting Parties, as follows:—

(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent chargeable to the receiving State and 75 per cent chargeable to the sending State.

(ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them; however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.

(iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.

(iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

(f) In cases where the application of the provisions of subparagraphs (b) and (c) of this paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.

(g) A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

(h) The provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 2 of this Article does not apply.

4. Claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty, including claims arising out of the unauthorized use of any vehicle of the armed services of a sending State, shall be dealt with in the following manner:—

(a) The authorities of the receiving State shall consider the claims and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.

(b) The report shall be delivered to the authorities of the sending State who shall then decide without delay whether they will offer an *ex gratia* payment, and if so, of what amount.

(c) If an offer of *ex gratia* payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sending State shall make the payment themselves and inform the authorities of the receiving State of their decision and of the sum paid.

(d) Nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force or of a civilian component unless and until there has been payment in full satisfaction of the claim.

5. Members of a force or civilian component will be considered as "third parties" under paragraph 3 of this Article, except for claims by or on behalf of military personnel for injury or death while engaged in the performance of official duties.

6. Each Contracting Party in its capacity as a receiving State will designate a Receiving State Claims Office, and in its capacity as

a sending State will designate Sending State Claims Offices for each of the other Contracting Parties. All contacts and liaison in regard to the application and execution of this Article shall be accomplished through the designated Sending and Receiving State Claims Offices.

7. The Sending State Claims Office will in each case furnish to the Receiving State Office a certificate as to whether an alleged tortious act or omission of a member of a force or civilian component was done in the performance of official duty. It shall review such certificate upon the request of the Receiving State Claims Office if that Office considers that circumstances exist which should lead to a different determination. After such reconsideration the final determination by the Sending State Claims Office will be binding on the receiving State.

8. Any disagreements which might arise in regard to the criteria utilized by the Sending State regarding duty status, or any other question of interpretation of this Article, which cannot be resolved by negotiation between the parties, may be referred to the North Atlantic Council for resolution in accordance with Article XVI.

9. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in paragraph 3 (g) of this Article.

10. The authorities of the sending State and of the receiving State shall co-operate in the procurement of evidence for a fair hearing and disposal of claims in regard to which the Contracting Parties are concerned.

THE ACQUISITION OF THE RESOURCES OF THE BOTTOM OF THE SEA— A NEW FRONTIER OF INTERNATIONAL LAW*

By Lieutenant Commander Richard J. Grunawalt**

States have used many means to acquire dominion over the resources of the bed of the sea and its subsoil. The author examines these means with particular emphasis on the inherent difficulties in applying recognized principles of territorial acquisition. He also analyzes the provisions of the 1958 Geneva Convention on the Continental Shelf pertaining to the extension of a coastal state's "sovereign rights" over such resources down to and beyond a depth of 200 meters, together with a consideration of the unresolved problems and some suggested solutions.

I. INTRODUCTION

A. *GENERAL INTRODUCTION AND PREMISE*

The race to space has undoubtedly captured the imagination of the world. The vast reaches of outer space are yielding up their secrets at an astonishing rate and the peoples of all nations are turning their eyes away from earthly anguish to gaze with awe into the heavens, for we have been told that man's destiny is in the stars. Man's destiny may be in the stars but it is submitted that his very survival is locked beneath the sea. It is the conquest of inner space rather than outer space that will provide mankind with the food, the fuel and the minerals necessary to free the world of want and famine. Man may dream of visiting other planets but the wherewithal to make that journey will most assuredly come from the sea. The peaceful and orderly exploration and exploitation of outer space is, of course, important, but the

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peaceful and orderly exploration and exploitation of the bottom of the sea is nothing less than essential.

The study of the development of the law which seeks to provide the community of nations with the ability to harvest the riches of the bed of the sea is both fascinating and challenging. It will be the purpose of this article to analyze the development of the law, as we know it today, in order that we may understand its application and, more importantly, that we may recognize its limitations. It is the premise of this study that the continued development of a body of international law under which the peaceful and orderly exploration and exploitation of the bottom of the sea can proceed, depends, in great measure, upon our full comprehension of how and why the "doctrine of the continental shelf" evolved. Generally speaking, "the doctrine of the continental shelf" refers to that concept whereby the resources of the seabed and the subsoil of the continental shelf are subject, *ipso jure*, to the exclusive jurisdiction of the coastal state for purposes of exploration and exploitation.

B. *THE CONTINENTAL SHELF DEFINED*

It is imperative at the outset to examine just what is meant by the term "continental shelf." In order to avoid any undue confusion in terms, one must recognize that the geological-geographical definition and the legal definition are separate and distinct. To the scientist, the continental shelf is the submarine extension of the continental land mass from the low water line into the sea to where there is a marked increase in slope to the great depth. The outer edge or rim of the continental shelf may be at a depth of more than 200 fathoms or at less than 65 fathoms, depending upon the configuration of the shelf itself. Generally speaking, however, the rim of the shelf, *i.e.*, the point where there is a marked increase of slope to greater depths, is found at or near the 100 fathom isobath.[1]

The breadth of the continental shelf varies a great deal more dramatically than does its depth. The shelf may vary from less than one to more than 800 miles in width.[2] In some areas, such as off the coast of Peru and Chile, the shelf may be virtually

[1] See *Scientific Considerations Relating to the Continental Shelf*, U.N. Doc. No. A/CONF. 13/2 (1957). "Isobath" is defined as "that portion of the sea which has an equal depth with other portions." FUNK & WAGNALLS, NEW STANDARD DICTIONARY (1952).

[2] MOUTON, THE CONTINENTAL SHELF 22 (1952).

nonexistent. The total area of the continental and insular shelf has been estimated at between 10½ and 11 million square miles, or about 18 per cent. of the total dry land area of the world.[3] Of this total area of the continental shelf, approximately one million square miles are contiguous to the coasts of the continental United States and Alaska.[4]

The continental slope may be defined as that part of the submarine extension of the continental and insular land masses which begins at the outer edge of the shelf and slopes into the great depths. These sloping sides of the continental shelf vary considerably in their steepness and no precise degree of declivity can therefore be established. The term continental terrace refers to the "zone around the continents, extending from the low-water line, to the base of the continental slope." [5]

The great irregularity in the configuration of the shelf prevents the geological definition from attaining any degree of certitude or fixity of dimension. If the term "continental shelf" is to have any useful meaning in the law, a more precise definition would appear to be necessary to prevent controversy. It is for this reason that the legal definition of the shelf has developed somewhat apart from geological reality. It is important that this distinction be recognized inasmuch as this difficulty of definition is one of the most persistent problems in this area of the law.

C. *THE IMPORTANCE OF THE CONTINENTAL SHELF*

The treasures locked beneath the continental shelf are practically inestimable. Undoubtedly one of the most valuable resources of the shelf is petroleum. Pratt suggests that there may be more than 1,000 billion barrels of oil contained in the continental shelf, which is several hundred times the world's present annual consumption.[6] Gypsum, manganese, sulfur, coal, iron, phosphates, gold, platinum, tin, tungsten and titanium are but a few of the many minerals and hydrocarbons capable of being

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[3] Franklin, *The Law of the Sea: Some Recent Developments*, U.S. NAVAL WAR COLLEGE, 53 INTERNATIONAL LAW STUDIES, 1959–1960, at 14 (1961).

[4] Pratt, *Petroleum on Continental Shelves*, 31 BULL. OF AM. ASS'N OF PETROLEUM GEOLOGISTS 657–58 (1947).

[5] *Scientific Considerations Relating to the Continental Shelf*, U.N. Doc. No. A/CONF. 13/2 (1957).

[6] See Pratt, *supra* note 4, at 672. Weeks estimates that over 60 countries are currently involved in off-shore oil exploration. See Weeks, *World Off-Shore Petroleum Resources*, 49 BULL. OF AM. ASS'N OF PETROLEUM GEOLOGISTS 1680, 1687 (1965).

obtained from the shelf.[7] The vast reservoir of natural gas which has been discovered and which is now being exploited beneath the bed of the North Sea represents but one example of the tremendous wealth of the continental shelf.

While the mineral and petroleum resources of the shelf illustrate most strikingly the wealth of the seabed and its subsoil, the rich and varied living resources of the shelf must not be underestimated. Pearl and chank fisheries, and sponge, coral and oyster beds have been economically exploited for decades and, in some instances, centuries. The king crab fisheries in the Bering Sea alone are a multimillion dollar industry. Moreover, the potential of the continental shelf to supply food for the world's ever expanding population has only recently been significantly appreciated.[8]

The value of the resources of the continental shelf depends, practically speaking, upon the technical competence of those who wish to exploit them. Pearl and chank fisheries have long been commercially valuable because they have been subject to man's exploitational competence. Offshore oil and gas wells, on the other hand, are relatively new developments and the petroleum resources of the shelf have therefore been of commercial value for but a short period of time. As man's ability to exploit the resources of the shelf began to develop, the nations of the world quite naturally began to assert claims over the seabed and its subsoil and the search for precedent in international law upon which to base individual claims began.

II. THE CONTINENTAL SHELF AND TRADITIONAL INTERNATIONAL LAW

A. *THE RES OMNIUM COMMUNIS—TERRA NULLIUS DICHOTOMY*

With respect to that part of the geological-geographical continental shelf lying between low water mark and the outer edge of the territorial sea, customary international law decreed that sovereignty of the coastal state over territorial waters applied equally to the bed of the sea thereunder and to the skies above.[9]

[7] AMADOR, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA 89 (2d ed. 1959).

[8] For a discussion of the sea's potential to supply the protein needed to feed the population explosion, see Alverson & Schaefers, *Ocean Engineering—Its Application to the Harvest of Living Resources*, 1 OCEAN SCIENCE & OCEAN ENG'R 158 (1965).

[9] 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 7–13 (1965).

The continental shelf, for the purposes of this article, will be restricted to that part of the geological shelf which begins at the outer limit of the territorial sea.[10]

The basic question which confronted the international lawyer in his quest to determine the judicial status of the continental shelf hinged upon whether the shelf was capable of being acquired by anyone. On the one hand were those who maintained that the shelf was, like the high seas, *res omnium communis*, that is, belonging to all states equally, while others considered the shelf as being *terra nullius*. The term *terra nullius* pertains, in customary international law, to territory which is capable of being, but which has not yet been, acquired by any sovereign. The high seas, however, have long been regarded as being *res omnium communis* and thus incapable of being acquired by any state. One school of thought took the position that traditional international law dictates that the continental shelf, like the superjacent high seas, is incapable of acquisition and that the two should stand together.[11] Lauterpacht, taking the opposite approach, maintained that:

> [T]here is no principle of international law—and certainly no principle of international practice—which makes the submarine areas share automatically the status of the high seas. Unlike the latter, they are not *res omnium communis*.[12]

Hackworth indicates that the subsoil beneath the seabed is *terra nullius* and thus open to acquisition. Hackworth's reference to the subsoil of the shelf, in contradistinction to the seabed, is illustrative of a further refinement of the difference of opinion which existed among international lawyers in this area. Since the subsoil is capable of being penetrated by tunnels originating from the territory of the littoral state without any necessity of piercing the infinitesimally thin layer lying above, there exists the possibility of exploiting the subsoil without interfering with the sanctity of the high seas.[13] For those who were unable to accept

[10] The question of the breadth of the territorial sea is, of course, a continuing problem with many ramifications and no attempt will be made to analyze this area of the law.

[11] See Oda, *A Reconsideration of the Continental Shelf Doctrine*, 32 TUL. L. REV. 21, 33 (1958); 1 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER, 213 (1932). See Waldock's analysis of this position in his paper, Waldock, *The Legal Basis of Claims to the Continental Shelf*, GROTIUS SOC'Y, 36 TRANSACTIONS 117 (1951).

[12] Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. YB. INT'L L. 376, 414 (1950).

[13] 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 396 (1940). Colombos, while strongly contending that the bed of the sea is incapable of occupation by any state, accepts this same distinction regarding the subsoil thereunder. See COLOMBOS, INTERNATIONAL LAW OF THE SEA 62–63 (5th ed. 1962).

Lauterpacht's concept of the separability of the seabed and the superjacent high seas, this distinction was important.

In considering the argument that there are but two regimes in the community of international law—the land mass consisting of state territory and *terra nullius*, and the high seas—it is necessary to remember that international law has long been reluctant to admit of any encroachment on the concept of the freedom of the seas. The erection of installations upon the seabed would tend, to some extent, to hazard navigation, and projection of such installations above water would cause "islands of sovereignty" to pockmark the face of the hitherto open sea. These notions are naturally repugnant to the view that the high seas are the common property of all nations and thus are not subject to the exclusive control of any one state.

If the continental shelf is regarded as being *res omnium communis*, it follows that the exploitation of the shelf must be entrusted to the international community for the benefit of all nations.[14] Proposals of this nature are generally regarded as being impractical for many reasons and have been consistently rejected by the practice of states.[15]

Even prior to the development of offshore petroleum exploitation, the theory that international law classified the seabed as *res omnium communis*, and thus on all fours with the waters of the high seas, satisfied very few people. In fact the contrary position has some precedent dating back several centuries. Feith made the following commentary on this aspect of the development of the continental shelf doctrine:

> At all times and in many parts of the world coastal States, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside territorial waters whenever this was technically possible.
>
> As soon as technical progress is so far advanced that, in spite of the depth of the sea, the sea-bed or its subsoil can usefully be developed, no-one in practice is prepared to assert that the mineral or other resources to be obtained from the sea-bed and its subsoil by such development are resources belonging to the community of nations, which no

[14] This position was taken by Mr. Shuhsi Hsu before the International Law Commission. See INT'L L. COMM'N, 1 YEARBOOK 215–16 (1950). Professor de la Pradelle, Sr., advocated much the same concept before the French Branch of the International Law Association in December of 1949. Professor Pradelle's views are discussed in the INT'L L. ASS'N, FORTY-FOURTH CONFERENCE REPORT 91 (1950).

[15] See Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 AM. J. INT'L L. 225 (1951).

> State or individual can or may appropriate. Such sea-bed and subsoil resources have always found an owner, in spite of the view of many writers that the sea-bed and its subsoil are '*res communis*.' And there is no doubt that international law has sanctioned such appropriations, even though it is in conflict with the idea of '*res communis*.' [16]

Feith's view is one of particular value in that he recognized that states will not accept any "solution" to the problem which is not practical of application and which ignores the political and economic realities of the world. The practice of states, as Feith suggests, indicates that the doctrine of the freedom of the high seas demands only that there not be an *unreasonable* interference with the high seas by operations conducted on the continental shelf.

B. *THE RECOGNIZED MODES OF TERRITORIAL ACQUISITION*

Once we abandon the *res omnium communis* approach and accept the idea that the shelf is capable of being acquired by a state, we are then faced with the problem of determining how this acquisition can legitimately be accomplished. Those who viewed the seabed and its subsoil as *terra nullius*, that is, like land territory without a master, turned to recognized modes of acquisition of land territory for the solution to the problem. Generally speaking, there are five principal modes of acquiring land territory: cession, subjugation, accretion, prescription and occupation.[17] Cession and subjugation are inapplicable to our inquiry but accretion, prescription and occupation all have been advanced, to some extent, in support of continental shelf claims.

1. *Accretion.*

Accretion, in general terms, refers to the process by which new land is created as when islands rise out of the sea, or by alluvial or delta process.[18] This mode has been advanced as one possible theory upon which sovereignty over the shelf can be claimed by the coastal state. The gist of this position seems to rest upon the assumption that the shelf is essentially an embankment formed by the dumping of continental detritus upon the continental slopes, similar to the delta process at the mouth of a river.[19]

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[16] Feith, *Report of the Committee on Rights to the Sea-Bed and Its Subsoil*, in INT'L L. ASS'N, FORTY-FOURTH CONFERENCE REPORT 90 (1950).

[17] 1 OPPENHEIM, INTERNATIONAL LAW 563 (8th ed. Lauterpacht 1955).

[18] *Id.* at 564.

[19] Kuenem, *The Formation of the Continental Terrace*, 7 ADVANCEMENT OF SCIENCE 25 (1950).

It would appear that this analogy is more of an academic exercise than a rational examination of the facts and application of the law. In the first place, the notion that the shelf is but the accumulated sediments from the continent, which have been cut out of the land mass by the action of rivers, waves and wind, is only partially correct.[20] Moreover, to accept the notion that the continental sediment carries with it the sovereignty of the state from whence it came, as it spreads across the continental shelf, would necessarily complicate rather than simplify the problem.

2. *Prescription.*

The concept that title to the bed of the sea could be acquired by prescription played an important role in the history of the development of the continental shelf doctrine. Title by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where the possession was wrongful but the legitimate owner either did not or could not assert his own rights.[21] The basis for the concept is the preservation of order and stability in the international arena. Inasmuch as the possession contemplated within this concept must be uninterrupted over a long period of time,[22] this mode of acquisition is of only limited application to the continental shelf. Yet such incidents as the development of pearl and chank fisheries in the Gulf of Manaar by the Portuguese, British and Dutch many years ago was important in that it resulted in the recognition that exclusive rights of exploitation of the resources of portions of the shelf could be acquired, and provided precedent for the rejection of the *res omnium communis* doctrine as it applied to the continental shelf.[23]

3. *Occupation.*

Occupation is an original mode of acquisition which involves the intentional appropriation by a state or territory not already under the sovereignty of any other state.[24] Modern international law indicates that effective occupation, in contradistinction to

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[20] AUGUSTE, THE CONTINENTAL SHELF 31 (1960).

[21] HALL, INTERNATIONAL LAW 125 (8th ed. Higgins 1924). Whether prescription is an original or a derivative mode of acquisition is an academic rather than a practical question and need not concern us here. See FENWICK, INTERNATIONAL LAW 357 (3d ed. 1948).

[22] Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. YB. INT'L L. 332 (1950).

[23] Hurst, *Whose is the Bed of the Sea?*, 4 BRIT. YB. INT'L L. 34, 41 (1924).

[24] 1 HACKWORTH, *op. cit. supra* note 13, at 401.

fictitious or notional occupation, is required, and that possession and administration are the two prerequisites to an effective occupation.[25] Unlike the theory of prescriptive acquisition of territory, occupation does not require a long, continued possession. The extent of the occupation which will suffice to establish title depends, in actual practice, upon the nature of the territory involved, and it would appear that the more remote and desolate the territory the less "occupation" would be deemed necessary to acquire title.

The so-called "hinterland" and "sphere of influence" theories were outgrowths of this view and are illustrative of the uncertainty of what manner of occupation was required before a valid claim would be made out.[26] The continuity of unoccupied territory was once stated to be a sufficient basis for territorial claims. It was soon recognized that the concept of continuity[27] is more a negation of, than it is an exception to, the theory of effective occupation. In *The Island of Palmas* case, Max Huber, arbitrator, concluded that: "The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."[28] The Permanent Court of International Justice, however, in adjudicating the *Case of Eastern Greenland*,[29] gave some credence to the doctrine of continuity, as it applied to remote arctic areas unclaimed by any other power, by holding that the colonization of part of Greenland served as an effective occupation of the whole.

While the degree of control which is required to constitute effective occupation will vary, the weight of authority seems to indicate that continuity, as such, is insufficient to create title. Therefore, if we analogize between submarine areas and land territory, it appears that some form of effective occupation of the continental shelf would be required to convert it from *terra nullius* (if that is what it is) into national territory. Waldock was one of the foremost proponents of the application of the doctrine of acquisition by occupation to the continental shelf. Waldock maintained that actual settlement or exploitation is not a *sine qua non* of effective occupation, and that the degree of occupation necessary to effect the assumption of jurisdiction

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[25] 1 OPPENHEIM, *op. cit. supra* note 17, at 557.

[26] FENWICK, *op. cit. supra* note 21, at 350.

[27] The concept of "continuity" seems to differ from the concept of "contiguity" only in that the latter presupposes an intervening body of water between the existing state territory and that sought to be acquired. For the purposes of this article, the terms will be considered as synonymous.

[28] *The Island of Palmas* (United States v. Netherlands), 2 HAGUE REP. 83 (1928).

[29] *Case of Eastern Greenland*, P.C.I.J., ser. A/B, No. 53 (1933).

over the bed of the sea is far less than that which would be required of land territory. He stated that:

> the *proximity*—relation between the coastal State and the *adjacent* continental self—assumes importance, for it serves to add an element of effectiveness to what might be a paper occupation.[30]

This is in reality no more than a rephrasing of the idea that continuity, although not in and of itself sufficient to establish a valid claim, is, nonetheless, of considerable importance in determining what shall be regarded as effective occupation. Waldock's attempt to reconcile the modern view of title by occupation with the realities of submarine area exploitation points out the difficulty inherent in applying concepts created to handle land area problems to the bed of the sea.

Young rejected Waldock's approach to the problem and argued that it would be improper to apply the concepts of effective occupation to the acquisition of submarine areas. He begins by pointing out the inherent difficulties in determining just what should constitute effective occupation below the surface of the sea. Young then makes a most important point by emphasizing that the application of the rule of occupation disregards the interests of the adjacent coastal state. As Young so ably puts it:

> Rights would rest in the occupant, no matter whence he came or how tenuous his prior connection with the region. A principle which permitted such a situation would rightly seem intolerable to most coastal States, and especially so to one unable to proceed immediately with the development on its own account. Considerations of security, of trade and navigation, of pollution and of customs and revenue, would all militate against recognition of such a doctrine.[31]

It is important to note that the difference between the occupation theory proponents, such as Waldock, and the anti-occupation concept theorists, exemplified by Young, is one of approach rather than of result. Waldock's concept of a limited reaffirmance of the theory of continuity is in fact a recognition of the same problems which confronted Young. Waldock would modify the doctrine of effective occupation to fit the peculiar needs of submarine area acquisition by giving increased weight to claims made by littoral states in determining whether occupation is effective. Young rejects this dependency on analogous rules and indicates that a new approach is necessary when he states that Waldock's view:

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[30] Waldock, *supra* note 11, at 141. (Emphasis added.)

[31] Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 AM. J. INT'L L. 225, 230 (1951).

reintroduces into international law the idea of fictitious occupation as a valid basis for title. That concept, found by experience to be a fertile breeder of controversy, has been largely rejected in modern times, save perhaps for the polar areas. The wisdom of readmitting it with respect to submarine areas is at least questionable. To insist that occupation is necessary under a general rule and then to admit a spurious occupation as sufficient, is devious reasoning. *The necessity of a fiction strongly suggests that the problem is in the wrong pigeonhole, and that claims to submarine areas require different treatment from claims to land territory.*[32] [Emphasis added.]

The basic premise resulting from the foregoing comments is that the problem of the acquisition of control and jurisdiction over the continental shelf does not lend itself to solution by the application of international law principles which were designed and developed in the context of land acquisition. Therefore, the concept developed that the continental shelf was neither *res omnium communis* nor *terra nullius,* but was in law, as it is in fact, separate and distinct from either dry land or high seas. A new "pigeonhole" had to be acquired and we will now turn our attention to the practice of states to determine the nature of that pigeonhole.

III. THE PRACTICE OF STATES

A. *THE TRUMAN PROCLAMATION*

It is not surprising that the United States, with its advanced technical competence, was one of the first states to be faced with the practical and pressing necessity for a solution to the problem of acquisition of jurisdiction and control over the continental shelf. The Truman Proclamation of 1945[33] must be considered as one of the most significant events in the development of the continental shelf doctrine.[34] Basically, the Truman Proclamation declared that: (a) the worldwide need for new resources, particularly petroleum and minerals, required that efforts to discover and develop such resources be encouraged; (b) that such resources lie beneath the continental shelf and modern technology was capable of exploiting those resources; (c) that recognized jurisdiction over these resources is necessary in the interest of

[32] *Id.* at 230.

[33] Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945).

[34] While the Truman Proclamation was foreshadowed to some extent by the United Kingdom-Venezuela Treaty of 1942 ([1942] Brit. T.S. No. 10), which provided for the division of the seabed of the Gulf of Paria (between Venezuela and Trinidad) between them, the Truman Proclamation was the first clear-cut statement of principle on the subject to be promulgated by any state.

conservation and efficient utilization; (d) that the exercise of jurisdiction over the resources of the shelf by the contiguous state is just and reasonable; and (e) that therefore the United States regards the resources of the shelf contiguous to the United States as "appertaining to the United States, and subject to its jurisdiction and control." The Proclamation further states that the character of the high seas above the continental shelf was in no wise affected by the decree.

The Truman Proclamation made no attempt to define the term "continental shelf." A press release of the same date by the State Department, however, indicated that the shelf was delimited by the 100 fathom isobath.[35]

The essence of the Truman Proclamation is its expression of the principle that the littoral state has, as a matter of right, exclusive control and jurisdicton over the resources of the contiguous continental shelf. It is, therefore, a total rejection of the concept of *res omnium communis* as it pertains to the continental shelf and it avoids any attempt to found the assertion upon the *terra nullius*-occupation theory of acquisition of territory. It is then, in effect, an innovation to fit new circumstances. Rather than invoke customary international law as being analogous, the Proclamation seemed to be more of an expression of what the law should be than what the law was at that time. The justification for the action taken, as set forth in the Proclamation, may be summed up as: (1) the shelf is an extension of the land mass of the contiguous state; (2) pools of petroleum underlying territorial waters frequently also extend beneath the waters of the high seas; and (3) self-protection compels the coastal state to keep watch over the activities off its shores.

Franklin takes the position that it would have been preferable to have also invoked recognized sources of international law in support of the Proclamation rather than to have avoided what precedent did exist.[36] It would seem, however, that the invocation of such sources would have been not only unnecessary but would have been unwise as well, since the Proclamation purports to fill a vacuum in the law rather than to displace existing doctrine. The Proclamation constituted a new and fresh approach to an area

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[35] "Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf." Press Release, 28 Sept. 1945, 13 DEP'T STATE BULL. 484 (1945).

[36] See Franklin, *supra* note 3, at 41.

of great importance for which the established principles of international law held no clear solution. As Brierly once said:

> it is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world. That is not so; for many of these problems . . . the only remedy is that States should be willing to take measures to bring the legal situation into accord with new needs, and if States are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences.[37]

In this same connection it should be noted that the Truman Proclamation spoke of "control and jurisdiction" over resources of the shelf and did not invoke the term sovereignty. "Sovereignty" undoubtedly means different things to different people, and its inclusion in the Proclamation would have introduced more controversy than its exclusion ultimately did. Traditionally, sovereignty has been viewed as being vertical in nature, in that it extends both straight up into the atmosphere and straight down to the bowels of the earth.[38] If the Proclamation had asserted "sovereignty" over the shelf, the term would therefore have been inconsistent with the express proviso that the superjacent high seas were unaffected. Hurst speaks of the "zigzag" of sovereignty which would have resulted in that instance.[39] That is to say, the line demarking the extent of sovereignty would rise from the center of the earth to the outer rim of the shelf and then travel laterally along the shelf until territorial waters were reached, where it would again soar upward. The point to be gleaned from these remarks is that the term "sovereignty" has no precise meaning in this context, and it would appear that very little purpose would have been served by interjecting this debate over semantics into the Proclamation. Quite likely the term was excluded in keeping with the decision to avoid any suggestion of an unreasonable encroachment upon the freedom of the seas.

B. *POST-TRUMAN PROCLAMATION DEVELOPMENTS*

The Truman Proclamation was followed very shortly by a flurry of pronouncements from a large number of states asserting

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[37] BRIERLY, THE LAW OF NATIONS 264 (5th ed. 1955). Holland put the matter quite succinctly when he wrote: "Thus experience inexorably forces us to the conclusion that the outlines of a new rule of international law are ordained by moral, economic, political, and military factors, and not by recourse to analogous legal doctrine." Holland, *Juridical Status of the Continental Shelf*, 30 TEXAS L. REV. 586 (1952).

[38] Hurst, *The Continental Shelf*, GROTIUS SOC'Y, 34 TRANSACTIONS 153, 164 (1948).

[39] See *id.* at 164.

varying rights over the continental shelf beyond their territorial waters. These assertions were often similar, but occasionally far more extensive than those of the United States as embodied in the Truman Proclamation. Certain of these states proclaimed "sovereignty" over the shelf and the high seas above it as well. Argentina's claim, issued in October of 1946, declared that the epicontinental sea and continental shelf were "subject to the sovereign power of the nation," [40] and thus purported to assert sovereignty over all waters lying above the submarine platform, which extends as much as 500 miles from shore, subject only to the right of innocent passage.[41] Chile, Ecuador and Peru issued a joint declaration claiming "exclusive sovereignty" over the seas adjacent to their coasts to a minimum distance of 200 nautical miles. The United States, together with a number of other maritime nations, took exception to these claims and filed protests against such action.[42] The Truman Proclamation, on the other hand, and other similarly limited claims, found virtually no opposition in the world community. In discussing the significance of the many and varied instruments asserting title to submarine areas, Lauterpacht stated:

> none of them has drawn upon itself the protest of any State except in cases in which the proclamation of rights over the submarine areas has been used for asserting exorbitant claims lacking any foundation in law and alien to the apparent occasion which prompted them.[43]

By and large, the practice of states followed the lead of the Truman Proclamation. The general acquiescence of the international community to the assertion of jurisdiction and control over the resources of the shelf by the coastal state began to be regarded as evidence that a new rule of international law was in the making.

C. *THE FORMULATION OF A NEW RULE OF CUSTOMARY INTERNATIONAL LAW*

Oppenheim defines customary international law as follows:

> Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the

[40] The complete text of the Argentine Decree may be found in 41 AM. J. INT'L L. 11 (Supp. 1947).

[41] See REIFF, THE UNITED STATES AND THE TREATY LAW OF THE SEA 307 (1959).

[42] *Id.* at 310. The text of the United States' letters of exception to these declarations can be found in 4 WHITEMAN, *op. cit. supra* note 9, at 793–801.

[43] Lauterpacht, *supra* note 12, at 383. An analysis of the post-Truman Proclamation assertions by various nations is contained in *Franklin, supra* note 3, at 49–63.

> rule which may be abstracted from such conduct is a rule of customary International Law.[44]

In determining whether the continental shelf doctrine, as exemplified by the Truman Proclamation, may be regarded as a rule of customary international law, the absence of protest by the international community is undoubtedly a major factor. Of equal importance is the fact that the assertion of control and jurisdiction over the shelf adjacent to the coast by the littoral state does not in the opinion of this writer constitute a change of international law so much as it provides a concept to fill a gap in the existing law which had been silent on the subject. Surely, if this new concept does no violence to existing law, the time necessary to establish the concept as customary need not be so great. Inasmuch as the Truman Proclamation, and others like it, were carefully drafted in order to avoid running afoul of any prohibition of existing law, the time that was necessary to establish the continental shelf doctrine as a rule of international law was relatively short.[45]

In 1951 however, Lord Asquith, sitting as arbitrator in the Abu Dhabi dispute, upon being urged to consider the continental shelf doctrine as customary international law, stated:

> there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed the hard lineaments or the definitive status of an established rule of International Law.[46]

Holland, however, writing in 1952 stated:

> By positive action or by acquiescence the nations of the world have accorded to the rule such uniform recognition as to establish it [the continental shelf doctrine] as accepted international law. . . .[47]

By the mid-1950's there would appear to have been such a pronounced frequency and uniformity of unilateral declarations by traditionally law-abiding states, embodying the continental shelf doctrine, that, in light of the absence of protests by other states, the doctrine could be regarded as a rule of customary international law. While the principle that exclusive rights to the resources of the shelf vest, *ipso jure*, in the littoral state was indeed accepted

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[44] 1 OPPENHEIM, *op. cit. supra* note 17, at 27.

[45] Lauterpacht also found considerable significance in the fact that leading maritime powers, such as the United States and Great Britain had accepted the doctrine in determining whether a customary rule had developed. Lauterpacht, *supra* note 12, at 376.

[46] *Arbitration Between Petroleum Development (Trucial Coast) LTD and the Shiekh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 247, 256 (1952).

[47] Holland, *supra* note 37, at 598.

as the established doctrine, it was not at all clear as to just how extensive these exclusive rights were.

Quite obviously, the claims asserted by a number of Latin American states went far beyond the bounds of the recognized law and of the established practice of the international community.[48] Some claims made no attempt to define the continental shelf while others adopted the more or less traditional 200 meter delimitation. Of greater significance was the wide divergence of opinion on the status of the superjacent waters. The great majority of states vigorously denied that the doctrine affected the status of these waters as high seas while a few states, notably those of Latin America,[49] invoked the doctrine to proclaim sovereignty over vast areas of the hitherto open seas.[50]

IV. THE CONVENTION OF THE CONTINENTAL SHELF

A. *GENERALLY*

The need for uniformity regarding the claims of the various nations to the resources of the continental shelf was, by the late 1940's, painfully apparent. The International Law Commission, charged by the General Assembly of the United Nations with the task of codifying and developing international law, undertook the study of the continental shelf problem and produced a number of draft articles. The work of the International Law Commission was ultimately considered by the Geneva Conference on the Law of the Sea which in turn resulted in the drafting of the 1958 Convention on the Continental Shelf.[51] While the development of the

[48] See *supra* note 43 and accompanying text.

[49] For an explanation and justification of Latin American practice and policy in this area, see AUGUSTE, THE CONTINENTAL SHELF (1960).

[50] At this juncture it would be well to note that the domestic legislation of a coastal state concerning the resources of its continental shelf is of no particular significance to this inquiry, except as it may be interpreted as being descriptive of the international assertions of that particular state. In this sense the relevancy of United States legislation is of collateral, rather than direct, concern to the formulation of a rule of customary international law. For American legislation, see Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301–03, 1311–15 (1964); Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331–43 (1964). Domestic legislation may be regarded, for the purposes of this article, as providing the necessary national regulation of the jurisdiction and control which the state asserts over the resources of the shelf in the international arena. An excellent yet brief discussion of United States federal legislation and judicial interpretation in this area may be found in 4 WHITEMAN, *op. cit. supra* note 9, at 764–88.

[51] 15 Sept. 1958 [1964] 1 U.S.T. & O.I.A. 471, T.I.A.S. No. 5578 [hereafter referred to as the Convention].

Convention provides a fascinating study of the process of international law development, compromise and codification, separate treatment of the various prior drafts and regional agreements which were instrumental in the formulation of the Convention is not essential to the purposes of this article.[52]

The Convention grants to the coastal state "exclusive sovereign rights" for the purpose of exploring and exploiting the resources of the shelf,[53] but explicitly states that it does not affect the legal status of the superjacent waters as high seas.[54] Of particular interest is the Convention's specific rejection of the necessity for occupation, either effective or notional, as a prerequisite to the creation of these "sovereign rights." [55] It is noted that the United States, during the working sessions of the Conference, consistently opposed the use of the term "sovereignty" in order to avoid even the remotest doubt about the status of the superjacent waters as high seas [56] and vigorously supported the text of article 3, which provides:

> The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

In view of the inclusion of article 3 in the Convention, the United States was able to accept the term "sovereign rights" as contained in article 2.

At this juncture, it would be well to note that the Convention was more of a codification of the law than an expression of new and untried concepts, since there was extensive, albeit very recent, state practice, precedent and doctrine in this area. It has previously been noted that there existed, by 1958, sufficient state practice to establish, as a matter of customary law, that exclusive jurisdiction over the resources of the shelf vested in the coastal state.[57] Therefore, the Convention, through compromise and caution, expresses the consensus of the international community. This observation that the Convention represents a consensus among the international community is borne out by the fact that the final vote was fifty-seven states in favor, only three opposed, and eight abstentions.

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[52] See in this regard Jessup, *The Geneva Conference on the Law of the Sea: A Study in International Law-Making*, 52 AM. J. INT'L L. 730 (1958).
[53] See Convention art. 2.1., 2.
[54] See Convention art. 3.
[55] See Convention art. 2.3.
[56] Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L L. 629 (1958).
[57] See *supra* note 47 and accompanying text.

B. *THE 200 METER-DEPTH OF EXPLOITABILITY COMPROMISE*

While the Convention laid to rest, once and for all, the concepts of *res omnium communis* and *terra nullius* as they pertain to the continental shelf, and specifically rejected the notion that the high seas were in any way affected by the doctrine, a number of problems were left unresolved. Foremost among these problems is that of the extent of the submarine area which the Convention purports to govern. Inasmuch as the greater portion of the remainder of this article will be dealing with precisely this issue, it is imperative that the exact language of article 1 of the Convention be examined in its entirety at this point. Article 1 provides:

> For the purpose of these Articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

This definition of the continental shelf represents no clear victory for any school of thought on the subject. It is, in fact, a compromise which seeks to satisfy the proponents of the virtues of uniformity, fixity and certitude as well as the advocates of the need for flexibility. We have seen that the geological definition of the shelf lacks any degree of precision due to its uneven configuration.[58] Yet the 200 meter isobath delimitation was regarded as fairly definitive of most of the shelf edge and had been accepted by many nations, including the United States, as the best workable standard. Moreover, at the time of the Convention it was generally believed that the likelihood of resources being exploited at depths in excess of 200 meters in the foreseeable future was remote. The 200 meter definition was accordingly urged by those who advocated that a specified depth limit would avoid misinterpretation while a failure to set a fixed standard would lead to controversy and lend credence to some of the exorbitant claims already existing.[59]

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[58] See *supra* note 1 and accompanying text.

[59] See MOUTON, *op. cit. supra* note 2, at 43. Lauterpacht, for instance, once stated that: "an exact limit has the merit of clarity, which is extremely desirable, since in matters pertaining to the continental shelf some governments are inclined in addition to legitimate assertion of right, to make others." Quoted in Franklin, *supra* note 3, at 27.

The 200 meter definition is, of course, arbitrary and represented a rigidity of concept not acceptable to those delegates to the Conference who advocated that the standard should be flexible in order to keep abreast of technical achievements. This school of thought proposed to define the shelf as extending to those submarine areas where the depth of the superjacent waters admitted of exploitation. Mouton was extremely critical of the proposals to incorporate the depth of exploitability concept into the definition and stated that the acceptance of such a concept would sacrifice "a perfectly clear and closely discernible limit, marked on all seacharts . . . for a rather vague conception . . . for a reason which contains a low factor of probability." [60]

The definition of the continental shelf, as incorporated in the Convention, is, therefore, a compromise between the 200 meter rule advocates and the depth of exploitability proponents. A number of other definitions were proposed and rejected, including those based solely on distance in contradistinction to depth, those which would depend upon the geological characteristics of the seabed and those which sought to fix the boundary at the true geological edge of the shelf at whatever depth that might be found.[61]

Gutteridge, in discussing the merits of the Convention definition, stated:

> The disadvantage of the definition finally adopted by the Conference, which is now to be found in Article 1 of the 1958 Convention, is that the criterion of exploitability is an uncertain one, that it is therefore difficult to determine at what limit, expressed in terms of depth of water, the rights of the coastal state over the continental shelf . . . will cease. . . .[62]

Miss Gutteridge, a member of the United Kingdom delegation to the Conference, presupposes that the Convention definition includes limitations other than the 200 meter or exploitability tests. We will return to this matter again, but at this point the uncertainty of the depth of exploitability test should be emphasized.

Initially, the question is what is meant by exploitation. Suppose, for example, that State *A*, at great cost, devises a method of extracting relatively valueless amounts of minerals from the shelf at depths in excess of 200 meters. Could we then declare that there has been an exploitation of th resources beyond 200 meters in

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[60] MOUTON, *op. cit. supra* note 2, at 43.

[61] See Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, 35 BRIT. YB. INT'L L. 102 (1959). For a concise description of the various proposed criteria which were rejected by the delegates in favor of the definition now embodied in article 1, see 4 WHITEMAN, *op. cit. supra* note 9, at 841.

[62] Gutteridge, *The Regime of the Continental Shelf*, GROTIUS SOC'Y, 44 TRANSACTIONS 77, 80–81 (1958).

depth? Or does the concept of exploitation carry with it a requirement that it be economical? These are questions which remain to be answered, and there are no provisions in the Convention to suggest answers.

Suppose further that State *A*, through the ingenuity and technical competence of its thousands of skilled scientists, devises a way to exploit the resources of the shelf at depths in excess of 200 meters. Does State *B*, a newly-emerged and technically backward nation thousands of miles distant, suddenly acquire "sovereign rights" over the resources of a vast stretch of her shelf which she may or may not have been aware existed? Franklin is of the opinion that:

> This depth which admits of exploitation should be interpreted *absolutely* in terms of the most advanced technology in the world, and not *relatively* in terms of the *particular* technology of any one coastal state.[63]

Mouton, too, assumes that the exploitability test is to be interpreted objectively[64] and therefore that our newly emerged nation, State *B*, would gain sovereign rights over the resources of the shelf, which she may not have known existed, due to State *A*'s technical competence. And finally, Young states:

> every coastal State would seem entitled to assert rights off its shore out to the maximum depths for exploitation reached anywhere in the world, regardless of its own capabilities or of local conditions, other than depth, which might prevent exploitation. . . . It is not difficult to envisage the confusion and controversy which must arise in the course of ascertaining, verifying, and publishing the latest data on such a maximum depth.[65]

This view is not shared by everyone, however. The Committee on Commerce of the United States Senate, in their report on the Marine Resources and Engineering Development Act of 1965, stated:

> Thus the Convention conveys both specific and immediate rights and prospective or potential rights, the latter to be acquired only as a result of national effort and achievement.[66]

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[63] Franklin, *supra* note 3, at 23.

[64] See MOUTON, *op. cit. supra* note 2, at 42.

[65] Young, *The Geneva Convention on the Continental Shelf: A First Impression*, 52 AM. J. INT'L L. 733, 735 (1958).

[66] S. REP. NO. 528, 89th Cong., 1st Sess. 11 (1965). The United States is currently studying the necessity for national legislation pertaining to the development of her continental shelf resources. During the course of the many hearings before the various interested committees of the House and the Senate, the Convention on the Continental Shelf has received a great deal of attention. See in this regard Wenk, *Congress Sharpens Ocean Interests*, Under Sea Technology, Jan. 1966, p. 36. See also the Senate debate on S.2218 which is a bill to establish United States jurisdiction over a fishing zone for twelve miles instead of three miles. 112 CONG. REC. 12972 (daily ed. 20 June 1966).

This language clearly illustrates the confusion which remains in the Convention definition. It should be remembered that one of the basic purposes behind the rejection of the occupation theory of acquisition, as it was applied to the shelf, was the necessity to avoid a scramble for control over the seabed. Yet in 1965 we find a committee of the United States Senate concluding that:

> The challenge is to develop devices and equipment that will enable the economic recovery of these minerals from the ocean bed, and will do so before some other nation can claim "squatters rights" *under the Convention on the Continental Shelf*.[67] [Emphasis added.]

Obviously any interpretation of the Convention which finds authority for "squatters rights" being asserted over portions of the shelf requires a rejection of the Franklin, Mouton and Young analysis of article 1.

That Franklin, Mouton and Young are correct in their view, and the Senate committee in error, is not only borne out by an analysis of the development of the final Convention draft, but it would seem to this writer that there now exists sufficient state practice, *irrespective of the terms of the Convention*, to establish conclusively that rights over the resources of the continental shelf [68] vest, *ipso jure*, in the coastal state.

One of the most persistent objections to the Convention definition of the shelf is that which views the adoption of the "depth of exploitability" concept as the opening of the door to the ultimate abolition of the domain of the high seas.[69] That the sanctity of the high seas has been diminished to some degree by the Convention cannot be denied. Yet it does appear that there are sufficient restrictions and limitations upon the continental shelf doctrine, both as expressed in the practice of leading maritime states, and as incorporated in the language of the Convention itself, to guarantee the integrity of the high seas from any unreasonable encroachment.

Looking at the Convention as a whole, it must be considered as a rather remarkable document. Undoubtedly, the doctrine of the continental shelf is now firmly entrenched in the law of nations, yet the integrity of the high seas has been respected. While the inclusion of the depth of exploitability test into article 1 has, as we have seen, created some uncertainty and confusion, the Con-

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[67] S. REP. NO. 528, at 14.

[68] As distinguished from the resources of the seabed beyond the outer rim of the shelf, which, as we shall soon see, is a most important distinction.

[69] See, for instance, Scelle's expressions of concern on this matter found in INT'L L. COMM'N, 1 YEARBOOK 135 (1956).

vention provides an excellent framework within which the community of nations can work to develop and exploit the resources of the continental shelf in an atmosphere relatively free from disorder and strife.

C. *THE IMPACT OF RECENT TECHNOLOGICAL ADVANCES ON THE CONTINENTAL SHELF DOCTRINE*

In the eight years since the Convention on the Continental Shelf was written, the world has witnessed an astonishing rate of technological achievement. During the drafting of the Convention, the possibility of exploiting the shelf at a depth in excess of 200 meters was considered to be extremely remote, at best. By 1965, however, geologists informed us that petroleum-bearing strata was being explored and exploited at depths in excess of 250 meters. E. C. Holmer, President of the Esso Production Research Company, recently wrote:

> In just the last ten years, maximum depths have been increased from 100 to 600 feet. The current world record is a 632-foot test well drilled in the Pacific off southern California in July, 1965. This record, however, probably will not last long. One company has ordered equipment for drilling in 1,100 feet of water in 1966.[70]

New developments would indicate that scientific exploration of petroleum is currently possible at depths below 4,000 meters.[71] It would further appear that the exploitation of resources at these depths will eventually be accomplished.[72] An excellent illustration of how rapidly the science of oceanography has progressed is the remarkable "Sealab" project being conducted by the United States Navy, in the course of which Commander Scott Carpenter recently spent 30 consecutive days at about 210 feet below the surface of the sea.[73]

Considering these recent developments, it is quite clear that the resources of the continental shelf, regardless of the depth at which they are located, will soon be subject to exploitation. Therefore, it should be recognized that the 200 meter limitation, which was deemed to be so essential in 1958, will soon no longer be determinative under the provisions of the Convention.

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[70] Holmer, *Offshore Oil Wells Go For Deep Water*, Under Sea Technology, Jan. 1966, p. 43.

[71] Garrett, *Issues in International Law Created by Scientific Development of the Ocean Floor*, 19 SW. L. J. 97 (1965).

[72] A noted geologist recently stated that: "The depth of 3000–5000 meters is now impractical for petroleum exploitation, but perhaps this will not be true in the future." Emery, *Characteristics of Continental Shelves and Slopes*, 49 BULL. OF AM. ASS'N OF PETROLEUM GEOLOGISTS 1379, 1383 (1965).

[73] See Philadelphia Inquirer, 18 Nov. 1965, p. 5–F, col. 2.

V. THE BED OF THE SEA BEYOND THE CONTINENTAL SHELF

A. *GENERALLY*

If we can now regard the modern doctrine of the continental shelf, as embodied in the Convention, as being firmly settled in international law, and if the uncertainties of the "depth of exploitability" test have been or soon will be solved by technological advances which will serve to make all of the shelf susceptible to exploitation, can we now harvest all of the resources of the ocean floor free from controversy and dispute in the sure and certain knowledge that international law presides over the arena? Obviously not. Even assuming that the principles enunciated in the Convention are universally accepted, which, of course, is not the case, the Convention must be regarded as being but the first chapter in the story which must ultimately be written about the exploitation of the bottom of the sea. For we must now come to grips with the problems which surround the exploitation of the seabed and its subsoil beyond the outermost limits of the continental shelf. As the continental shelf doctrine was fashioned to meet the practical problems which arose when science opened the shelf to exploitation, a new doctrine must now be fashioned to deal with the exploitation of the ocean floor beyond the shelf, and as Franklin stated:

> while the stakes are high with respect to exploiting the resources of the continental shelves of the world . . . the stakes will be even higher when science and technology discover ways of exploiting the deep ocean basins which are about twelve times the area of the continental shelves.[74]

B. *DEEP OCEAN TECHNOLOGY*

Ten years ago the question of who has control and jurisdiction of the resources of the ocean floor, beyond the geological shelf, was more or less academic. The possibility that these resources would be exploitable in the foreseeable future was deemed to be so remote that the question was not even debated, as such, during the Conference. The matter is no longer solely of interest to the academically inclined since our present technology will no longer permit us to avoid coming to grips with this problem. Probably two of the clearest examples of the extent to which scientists are now probing the secrets of the deep are the "Project Mohole" and the "Aluminaut" programs. "Project Mohole" is an operation designed to explore and sample the crust and the mantle of the earth

[74] Franklin, *supra* note 3, at 14.

by drilling into the ocean floor from a free-floating platform in 18,000 feet of water. The technical fallout from this extremely sophisticated project will obviously enhance the science of petroleum exploitation immensely.[75] The deep-submergence research submarine "Aluminaut," designed to descent to depths of 15,000 feet, is now undergoing sea trials. This highly maneuverable vessel is expected to have a range of eighty miles, a speed of 3.8 knots, and an endurance of about thirty-two hours.[76] The "Aluminaut" will, therefore, have the capacity to explore as much as seventy-five per cent of the ocean floor.[77]

C. *THE RESOURCES OF THE DEEP OCEAN FLOOR*

To understand properly the full significance of our technical achievements, some familiarity with the riches of the deep ocean floor is essential. The sea apparently acts as a great chemical retort which separates and concentrates the various elements, washed down by the continental rivers, into extraordinarily high-grade ore. This ore is found in the form of nodules which are deposited on the floor of the sea. Not only are these nodules deemed to be exploitable, but it has been estimated that they exist in sufficient amounts to supply the world with many minerals for thousands of years at the present rate of consumption. In his testimony before the House subcommittee on Oceanography, John L. Mero, President of Ocean Resources, Inc., stated that:

> While it is a well-known fact that the sea can serve as a source of all mankind's protein requirements, it is a much less known fact that the sea can also provide the earth's population with its total consumption of many industrially important mineral commodities. What is even more remarkable is the observation that the sea can provide these mineral commodities at a cost of human labor and resources that is a fraction of that required to win these materials from land sources.[78]

[75] Ragland, *A Dynamic Positioning System for the Mohole Drilling Platform*, 2 OCEAN SCIENCE & OCEAN ENG'R 1145 (1965).

[76] Loughman, *Aluminaut Tests and Trials*, 2 *id.* at 876.

[77] For an enlightening comment on the various major deep-submergence systems, including the Trieste II bathyscaph which has an *unlimited* depth capacity, see Walsh, *Economic and Logistic Aspects of Deep Vehicle Operations*, 2 *id.* at 858.

[78] Statement of John L. Mero, 18 Aug. 1965, *Hearings Before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries*, 89th Cong., 1st Sess., ser. 8–13, at 599 (1965). In this statement, Mero further observed that: "The presently available mineral disposits of the sea could easily supply the population of the earth with its total consumption of manganese, nickel, cobalt, copper, phosphorus, limestone, common salt, magnesium, bromine, flourine, potassium, boron, sulfur, aluminum and various other less important minerals, as well as supplying substantial portions of its consumption or iron ore, lead, zinc, titanium, molybdenum, uranium, zirconium, and so on." *Id.* at 600.

Testimony before the U.S. Senate Committee on Commerce, in 1965, disclosed that the nodules containing these metals occur at depths between 3,000 and 17,000 feet. Deep-ocean photography reveals that five to ten pounds of these nodules *per square foot* lie in many areas of the oceans.[79]

Of particular importance to the United States is the fact that these minerals include strategic metals which are now being purchased from foreign sources at an estimated annual cost of over one billion dollars.[80] The political-military advantages of obtaining strategic metals from the ocean floor are apparent. By tapping this source of wealth the United States would not only reduce her balance of payments deficits by some 1.2 billion dollars annually, but would at the same time free herself from dependence upon foreign sources for these metals.

From the foregoing remarks it should now be perfectly clear that the question of the jurisdiction and control of deep-ocean floor resources must be resolved and it is to this question which we will now turn our attention.

D. *THE CONTINENTAL SHELF DOCTRINE AND THE DEEP-OCEAN FLOOR*

As we have seen, the continental shelf doctrine sets forth the basic premise that the control and jurisdiction over the resources of the shelf vest, *ipso jure*, in the coastal state. This doctrine is based on a number of factors including the idea that the shelf is, geologically speaking, but an underwater extension of the coastal state's land mass. Undoubtedly the realities of national security played an important role in justifying the supremacy of the coastal state in this arena. Additionally, it was noted that the resources of the shelf could be more economically and comprehensively conserved and developed by the littoral state because of its proximity. And, in the final analysis, it was regarded as simply "just and reasonable" that the coastal state lay claim to these resources.[81] It should be readily apparent that these factors do not necessarily apply to deep ocean floor considerations. The ocean floor beyond the shelf cannot be considered as a submerged part

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[79] S. REP. No. 528, at 13.

[80] See Mero, *Hearings Before the Subcommittee on Oceanography, supra* note 78, at 600.

[81] All of these factors were invoked to support the claims of the Truman Proclamation. See *supra* notes 33–35 and accompanying text.

of the land mass; the very term "coastal state" has little, if any, significance beyond areas adjacent to the shore; and security considerations and economic advantages would be of real significance only in adjacent waters. It is therefore submitted that the continental shelf doctrine is of limited application to the solution of the deep ocean floor problem.

This is not to say that the continental shelf doctrine is without significance to our inquiry. Clearly, the concept will be of great import in determining the status of deep-water areas adjacent to the coast of the continents. But it would be erroneous to assume that the Convention on the Continental Shelf is dispositive of the question. It is conceded that there is language within the Convention which would, at first blush, appear to convey the idea that its terms were universal in application. This is precisely what was objectionable about the "depth of exploitability" test included in article 1 of the Convention. The definition of the continental shelf, as laid down by the Convention, purports to include all *adjacent* submarine areas to the point where the depth of the superjacent waters admits of the exploitation of the resources contained therein. It could then be argued that the extent of the submarine areas which fall within the purview of this definition depends solely upon the state of the art of technological exploitation of the seabed. While it is submitted that this view is erroneous, it must be admitted that it is not without some authority. Franklin for instance says:

> Under the depth-of-exploitability definition the maximum width of the shelf capable of exploitation will continue to increase as the world's technology for exploiting the submarine areas improves, whether those areas are what the geologists describe as the "continental shelf," or the deeper, more steeply inclined areas known as the "continental slopes." *For coastal state facing the open oceans the only limitation to exploitation will be that of technology.*[62] [Emphasis added.]

In interpreting article 1 of the Convention, however, it is essential that we give the proper weight to the word "adjacent" as it appears in the definition of the continental shelf. The submarine areas which are included within the definition are those which meet the "200 meter"—"depth of exploitability" test and which are also *"adjacent"* to the coast. While it is conceded that the term continental shelf is not meant to be taken in its strict geological sense, it would be absurd to maintain that the drafters of

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[62] Franklin, *supra* note 3, at 25.

the Convention were not principally concerned with the geological shelf.[83]

In determining whether the Convention includes submarine areas beyond the outer limit of the shelf, the intent of the drafters of the Convention is, of course, what we are seeking to discover. This intent can best be determined by reference to the proceedings of the Fourth Committee of the Conference on The Law of the Sea which was responsible for drafting the Convention on the Continental Shelf.[84] A careful analysis of these proceedings supports the conclusion that the Convention does not include the deep ocean floor within its purview, with the possible exception of such areas located immediately adjacent to the coast. The debate which preceded the adoption of the article 1 definition was not over whether or not to limit the application of the doctrine, but was rather a question of where that delimiting line was to be drawn. This question of the deep ocean areas was raised by the delegates of both Canada and Ceylon, but it appears that their query was more or less ignored by the other members as not being germane to the problem of the shelf. Mouton did, however, direct his attention to this inquiry when he observed that beyond the outer limits of the submarine areas over which the coastal state enjoys "limited sovereignty" under the Convention, the situation was governed solely by the regime of the high seas, and there was no longer any question of "exclusive rights" involved.[85]

The Solicitor of the Department of the Interior of the United States apparently has reached just the opposite position, however. Schoenberger, in discussing the seaward limit of the continental shelf for purposes of interpreting the Outer Continental Shelf Lands Act of 1953,[86] cites a Solicitor of the Department of Interior Memorandum of 5 May 1961. Schoenberger commented that:

> This opinion holds that there is no objection to the federal leasing of areas beyond the 100-fathom contour line and that the Outer Continental Shelf Lands Act extends to all submerged lands seaward of a coastal

[83] An illustration of this fact may be found in the comments of the French and the Netherlands delegates on the proposed amendment to article 1 which sought to substitute distance, instead of depth, as the test. Mouton, the Netherlands delegate, observed that such a proposal would curtail exploitation of the *continental shelf* and Gros, the French delegate, was unable to accept this amendment because he felt it was impossible to speak of distance where a "geological concept" was concerned. U.N. Doc. No. A/CONF. 13/38, at 12 (1958).

[84] See U.N. Doc. No. A/CONF. 13/42, at 31–48 (1958).

[85] See U.N. Doc. No. A/CONF. 13/42, at 44 (1958).

[86] 67 Stat. 462 (1953), 43 U.S.C. §§ 1331–43 (1964).

> State's off shore boundary and the waters superjacent thereto over which the United States asserts jurisdiction. The import of the opinion is that the limits of outer continental shelf leasing under the Outer Continental Shelf Lands Act should be considered as technological rather than geographical limits and that *the leasing authority under the Act extends as far seaward as technological ability can cope with the water depth. This is in accord with the convention of the sea adopted at Geneva* . . . upon which the opinion relies.[87] [Emphasis added.]

Schoenberger further discloses that the opinion involved the right of the Secretary of the Interior to lease a tract of the seabed at a depth of "several hundred fathoms" of water situated some fifty miles off the coast of California.

It is submitted that the Department of the Interior of the United States has misinterpreted the Convention. This is not to say that the tract sought to be leased was not within the definition of article 1. It may very well be within the definition, but that determination is not important here. What is significant is this expression of the view that there is no geological or geographic limitation to the continental shelf as it is defined within the Convention. Since the "sovereign rights" over the resources of the shelf vest, *ipso jure*, in the coastal state,[88] it would then necessarily follow under this view that the coastal state has exclusive rights over the resources of the seabed out to the midpoint of the oceans. Such a result may be deemed to be desirable by some, but it is certainly not contemplated by the Convention nor is it sanctioned by customary international law.

The interpretation of the Convention by the Committee on Commerce of the United States Senate, rendered in July of 1965, is further evidence of the confusion which pervades this area of our inquiry. This distinguished Senate committee concluded that:

> The Convention does apply, *without qualification*, to all mineral and nonliving resources of the Continental Shelf and areas *adjacent and beyond* "where these areas admit of the exploitation of the said area." [89] [Emphasis added.]

Contrast these views with those expressed by McDougal and Burke:

> . . . The Commission acted on the belief that exclusive control ought not to be limited by an arbitrary depth line which might be difficult to change,

[87] Schoenberger, *Outer Continental Shelf Leasing*, in LAW OF FEDERAL OIL AND GAS LEASES 303, 305 (1964).

[88] Article 2.2 of the Convention provides in part that: "The rights referred to . . . are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State."

[89] S. REP. No. 528, at 11.

> but that *within some degree of proximity to the coast* exclusive control ought to apply to all exploitation, irrespective of the depth involved. . . . At the same time it merits special notice that the notion of contiguity or proximity was emphasized by some members as qualifying the range of exclusive coastal control expressed by the exploitability criterion. *Exploitation was not considered to be within the authority of a particular coastal State if the area involved could not be considered within reasonable proximity to that State. Not only was there no objection to this qualification by other Commission members, but the text finally adopted makes express recognition that the range of exploitability has a limit insofar as it determines the reach of coastal authority.* . . . Although the term "adjacent" indicates some general limit, the Commission failed to give greater specificity to the degree of proximity required.[90] [Emphasis added.]

There would seem to be little doubt but that McDougal and Burke have correctly interpreted the scope of the definition set out in article 1 of the Convention. In considering the vagueness of that definition they commented further that:

> At some point, no doubt, it will be necessary to place a more precise limit on exclusive coastal control. It is already clear that contiguity and proximity are prerequisites to coastal control, but giving further concreteness to these general guides might best await the developments in economic, political, and social conditions which are at present only vaguely discernible, but which will be determinative of the limits best designed to promote the coastal interests of all.[91]

In summary, it is submitted that the Convention on the Continental Shelf does not include within its framework areas of the seabed which are not either (1) immediately adjacent to the coastal state or (2) a part of the geological continental shelf. It is further submitted that the status of the resources of the seabed beyond the ambit of the Convention has not been settled in international law nor is there any significant state practice in this area from which we may reasonably deduce the course which the law will ultimately take.

VI. SUMMARY AND CONCLUSION

A. *SUMMARY*

The continental shelf doctrine, as embodied within the Convention on the Continental Shelf, represents a new concept in the international law of acquisition of territorial sovereignty. The concept is new because the problems which the doctrine is designed to answer are of recent origin. Less than 30 years ago there was a great deal of doubt whether the resources of the bed of the sea, beyond the territorial waters of a coastal state, were capable of

[90] MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 685–86 (1962).
[91] *Id.* at 688.

being acquired by any state. But the need for the resources of the shelf, coupled with the development of techniques for exploiting those resources, dictated that this restrictive view would have to be modified. As we have seen, the search for an analogous theory of territorial acquisition led to increased confusion and controversy. In 1945 the Truman Proclamation was issued by the United States and the doctrine of the continental shelf, as we know it today, was born. In effect the doctrine provided that the resources of the continental shelf vest in the coastal state. A number of states, responding to the Truman Proclamation with decrees of their own, went far beyond the lead of the United States and sought to claim "sovereign" rights not only in the shelf but in the sea above the shelf as well. The Conference on the Law of the Sea convened in 1958 and resolved, among other things, to study these problems of the exploitation of the shelf in order that workable solutions could be reached. The Convention on the Continental Shelf which resulted from this study is in effect a codification of the doctrine of the continental shelf and provides us with what amounts to a consensus among the nations of the world as to the status of the resources of the shelf.

B. *CONCLUSION*

We have seen that the Convention achieved a compromise between a "fixed" and a "flexible" definition of the shelf. The Convention does not, however, compromise the basic principle that the integrity of the status of the high seas is paramount and must not be encroached upon, at least not in an unreasonable manner.

There can be little doubt that the Convention is a truly remarkable document. Seldom have we witnessed such a prompt and orderly disposition of a new area of international concern of such magnitude. While the Convention on the Continental Shelf provides a workable blueprint for exploring and exploiting the resources of the continental shelf, in an atmosphere relatively free from dispute and controversy, the area of the bed of the sea which falls within its purview is but the periphery of the vast treasure-laden bottom of the oceans. Modern technology is even now fashioning the keys which will unlock the door to this treasure house. As was the case with the continental shelf, the combination of the need for the resources of the deep ocean floor with the development of the technological capability to exploit those resources, will soon dictate that a new rule of law be fashioned under which mankind may peacefully enjoy this great bounty.

There are many lessons which have been learned from the development of the continental shelf doctrine which will be of considerable benefit to the creation of a doctrine of the deep ocean floor. Initially, it was learned that the exploitation of submarine mineral and petroleum resources is not incompatible with the integrity of the high seas, provided that reasonable safeguards are maintained. In the estimation of this writer, the greatest single lesson which can be gleaned from the development of the law relating to the continental shelf is that analogous rules of law, although often of great value, must not be permitted to obscure the necessity for fashioning new concepts to deal with new regimes. As Lauterpacht so aptly put it:

> Accordingly, while account must be taken of such law as there is on the subject, the latter is only one factor in the situation. The other, equally essential, test is that of legitimate interests of States, viewed in the light of reasonableness and fairness, and of the requirements of the international community at large.[92]

Just as it was found that analogous rules of acquisition of land territory were inapplicable to the problems of the continental shelf, so too will it be found that these rules are inapplicable to the deep ocean floor. It is also imperative that we accept the fact that much of the doctrine of the continental shelf does not and cannot apply to the deep ocean floor. The importance of the *proximity* of the coastal state to the continental shelf cannot be overemphasized. The doctrine of the shelf was, to a considerable extent, the recognition of the importance of this basic consideration. Consequently, a rule of law which was designed to implement the concept of the special interest which coastal states have over the *adjacent* shelf, is of limited application to areas of the bottom of the sea distant from the shore.

C. *RECOMMENDATIONS*

It is not within the scope of this article to presage the development of the law of the deep ocean floor. The recommendations of the author are not offered as *the* solution to the problem but are designed only to provide the reader with a focal point upon which to direct his critical analysis. With that clearly understood, the following thoughts are submitted: (1) It is recommended that article 1 of the Convention on the Continental Shelf be revised to provide that the "shelf" be defined as that part of the seabed which is located within a distance of 200 miles of the coastline and beyond that limit to a maximum depth of 1000 meters. This

[92] Lauterpacht, *supra* note 12, at 376.

recommendation would serve to provide the necessary concreteness to the presently vague guidelines laid down by the "depth of exploitability" criterion, without depriving any coastal state of its geological shelf and without jeopardizing any security considerations of coastal states having a limited geological shelf. There is, of course, nothing particularly sacred about 200 miles and 1000 meters, for they represent purely arbitrary delimitations. Nonetheless, some arbitrary distance—depth criteria is deemed to be essential, and 200 miles—1000 meters appears to be realistic. (2) It is further recommended that a conference be convened under the auspicies of the United Nations to develop a convention on the deep ocean floor. (3) Finally, it is recommended that this conference give serious consideration to placing the resources of the deep ocean floor under the exclusive control and jurisdiction of the United Nations * with a view toward developing a fair and equitable system of leasing submarine areas for the purpose of the exploitation of the resources contained therein.[93] It is also proposed that consideration be given to establishing a rent, royalty, or fee system for the leasing of such areas with the proceeds derived therefrom to be expended at the discretion of the General Assembly for the betterment of all mankind. And lastly, it is suggested that the granting of limited but compulsory jurisdiction to the International Court of Justice for the resolution of all disputes arising out of the exploitation of the deep ocean floor be a condition precedent to the participation of any state or other international body in such a program.

While these recommendations may appear to be radical or utopian, depending upon one's point of view, it is suggested that the alternatives open to us are rather restricted. Obviously, any system which would dictate that the resources of the deep ocean floor are not subject to any exploitation could not be tolerated. Any system which would depend upon the application of the "occupation" theory of acquisition would, in view of the very nature of the floor of the sea, have to be founded on some other concept than "effective" occupation. If some degree of exploration

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* *Editor.*—This same recommendation was made by the Commission to Study the Organization of Peace. The Commission's proposal was not known to the author until after completion of this article. For a discussion of the Commission Report, see Washington Post, 19 May 1966, § G–5, p. 5, col. 1.

[93] Such a concept is not without some precedent. See, for example, the resolution of the General Assembly regarding outer space wherein it is commended to all that outer space and celestial bodies are for the benefit of all nations and are not subject to national appropriation. See U.N. GEN. ASS. RES. No. 1721 (XVI) (20 Dec. 1961), U.N. Doc. No. A/5181.

and exploitation were to be the *sine qua non* of "occupation," then the bottom of the sea would become the arena of scrambling squatters with all of the hostility and disputes which are spawned by such a system. And it is submitted that continuity (or contiguity if you prefer) has no application beyond a distance of several hundred miles from shore. In the absence of proximity, the concept of continuity merges with that of the so-called sector theory,[94] and the application of the sector theory to this arena amounts to unlimited extension of the doctrine of the continental shelf. It is suggested that political reality alone is sufficient to doom this approach. It should not be too difficult to imagine how the community of nations would respond to a proposal which would carve up the wealth of the deep ocean floor among the coastal states in accordance with their geographical circumstance.

When viewed in light of the available alternatives, the idea of vesting the United Nations with "title" to the deep ocean floor becomes more plausible. While the foregoing recommendations may or may not be worthy of serious consideration, it is submitted that the community of nations can ill afford to permit confusion and uncertainty to reign much longer over the status of the resources beneath the sea. Mankind has far too much at stake to allow us to adopt the "wait and see" attitude suggested by McDougal and Burke.[95] Forty-two years ago Sir Cecil Hurst asked, "Whose is the Bed of the Sea?" [96] It is time that we answered that question.

[94] The so-called sector theory, which has found application primarily, if not solely, in polar areas, is a scheme whereby a baseline is drawn between the two extreme ends of a state's territory and from whence straight lines are extended outward until they intersect at a given point such as the north or south geographic pole, rendering all territory falling within such a pie-shaped sector the exclusive possession of the contiguous state. See BISHOP, INTERNATIONAL LAW 354–55 (2d ed. 1962).

[95] See *supra* note 91 and accompanying text.

[96] Hurst, *Whose is the Bed of the Sea?*, 4 BRIT. YB. INT'L L. 34 (1924).

THE SETTLEMENT OF ARMY MARITIME CLAIMS*

By Captain Thomas J. Whalen**

In 1951 Congress passed an act authorizing the Department of the Army to settle certain maritime claims. This article discusses the scope of the Army Maritime Claims statute and compares it with the scopes of the Suits in Admiralty Act and the Public Vessels Act.

I. INTRODUCTION

The Army Maritime Claims statute[1] was enacted by Congress in 1951 to enable the Secretary of the Army to compromise and settle certain claims arising out of the maritime activities of the Army.[2] Congress had concluded that many maritime claims in-

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* The opinions and conclusions expressed 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] 10 U.S.C. §§ 4801–04, 4806 (1964), as amended, 10 U.S.C. § 4802(c) (Supp. I, 1965).

[2] The normal maritime activities of the Army include: the transportation by water of personnel, stores, equipment and supplies to and from Army installations throughout this country and overseas; the handling in port, the loading on board and the discharging of cargo; the operation of various kinds of harbor craft and dredges; and the operation of port terminals, docking and pier facilities. See S. REP. No. 654, 82d Cong., 1st Sess. 2 (1951); U.S. DEP'T OF ARMY, FIELD MANUAL 55–58, TRANSPORTATION BOAT OPERATIONS (1965); U.S. DEP'T OF ARMY, FIELD MANUAL 55–57, TRANSPORTATION HARBOR CRAFT UNITS AND MARINE MAINTENANCE UNITS (1960); U.S. DEP'T OF ARMY, FIELD MANUAL 55–52, TRANSPORTATION TERMINAL BATTALION AND TERMINAL SERVICE COMPANY (1957); U.S. DEP'T OF ARMY, FIELD MANUAL 55–51, TRANSPORTATION TERMINAL COMMANDS THEATER OF OPERATIONS (1957). See also chapter XI, "Government Activity in Shipping," of GILMORE & BLACK, LAW OF ADMIRALTY 749 (1957).

In addition, the Army Corps of Engineers has statutory responsibilities involving navigable waters. It investigates and approves the construction of bridges, causeways, dams and dikes on navigable waters (60 Stat. 847 (1946), as amended, 33 U.S.C. § 525 (1964); 30 Stat. 1151 (1899), 33 U.S.C. § 401 (1964)); it investigates shore erosion (46 Stat. 945 (1930), as amended, 33 U.S.C. §§ 426, 426a (1964)); it clears channels and removes obstructions on navigable waters (50 Stat. 877 (1937), as amended, 33 U.S.C. § 701g (1964); 59 Stat. 23 (1945), 33 U.S.C. § 603a (1964)); and it participates in the investigation and improvement of rivers and harbors (32 Stat. 372 (1902), as amended, 33 U.S.C. § 541 (1964)). The Army Corps of Engineers also approves certain civil works projects affecting navigable waters. See 79 Stat. 1073, 1088 (1965), 42 U.S.C. §§ 1962d–5, 3142a (Supp. I, 1965).

volving the Army were being litigated for want of authority in the Department of the Army to settle them—claims which otherwise could have been settled without litigation and at a great saving to the government.[3]

The Army Maritime Claims statute, which Congress enacted, was, and is, only an authority to settle. It neither affects the substantive law governing the disposition of maritime claims, nor creates new claims in favor of or against the United States. It is simply an additional, often mandatory,[4] remedy available to claimants under the Suits in Admiralty Act[5] and the Public Vessels Act.[6]

II. BACKGROUND

A. *THE SUITS IN ADMIRALTY ACT AND THE PUBLIC VESSELS ACT*

To reverse the decline of the United States merchant marine (private United States vessel owners), Congress had enacted the Shipping Act of 1916,[7] which, in part, created a government agency (the predecessor of the present Federal Maritime Commission) and authorized it to form corporations to construct and operate vessels as government merchant vessels. Under section 9 of the Act, these vessels, "while employed as merchant vessels," were to be subject to "all laws, regulations, and liabilities governing merchant vessels."[8]

When the Supreme Court held that this provision extended to in rem[9] suits in admiralty,[10] the arrest and seizure of several gov-

[3] S. REP. NO. 654, 82d Cong., 1st Sess. 2–3 (1951).

[4] See notes 246–50 *infra* and accompanying text.

[5] 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741–51 (1964).

[6] 43 Stat. 1112 (1925), as amended, 46 U.S.C. §§ 781–90 (1964).

[7] 39 Stat. 728 (1916), as amended, 46 U.S.C. §§ 801–42 (1964).

[8] 39 Stat. 730 (1916), 46 U.S.C. § 808 (1964).

[9] In admiralty, there are generally two kinds of actions: in rem and in personam. The in personam suit is most akin to a claim under the Army Maritime Claims statute. It is a suit against a named natural or corporate person asserting a personal liability and seeking a money judgment. An in rem suit in admiralty is one based on a maritime lien. "Upon the occurrence of certain mishaps arising out of contract or status, the maritime law gives to the party aggrieved a right conceived of as a property interest in the tangible thing involved (usually but not always a ship) in the (often as yet unascertained) amount of the accrued liability. This right is called a maritime lien . . . ." GILMORE & BLACK, LAW OF ADMIRALTY 31–32 (1957). See Bensing & Friedman, *Law of Admiralty—A Primer*, 10 W. RES. L. REV. 21, 26–31 (1960). Incident to an in rem proceeding, the vessel or cargo upon which the lien is said to exist is seized and brought into the custody of the court. See New York Dock Co. v. Steamship Pozman, 274 U.S. 117 (1927); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900).

[10] See The Lake Monroe, 250 U.S. 246 (1919) (government vessel held subject to seizure by admiralty in rem process to satisfy claim for damages).

ernment merchant vessels followed. To remedy this embarrassing and burdensome situation,[11] Congress in 1920 enacted the Suits in Admiralty Act [12] which supplanted section 9 of the Shipping Act in most respects [13] and specifically prohibited the arrest and seizure of government merchant vessels through the in rem process.[14] Like the Shipping Act of 1916, the Suits in Admiralty Act dealt solely with claims arising out of the activities of vessels employed as "merchant vessel(s)." In section 2 it provided:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained . . ., a libel in personam [15] may be brought against the United States or against any corporation [government corporation as defined in section 1 of the Act], as the case may be, provided that such vessel is employed as a merchant vessel . . .[16]

At the time Congress was considering the Suits in Admiralty Act, it was proposed that the Act include "public vessels" as well as merchant vessels of the United States. Apparently fearing that such an extension would delay passage, the Suits in Admiralty Act was adopted with its provisions confined to "merchant vessels." [17]

In 1925, however, Congress reached "public vessels" through the passage of the Public Vessels Act.[18] In section 1, this Act provided that:

> a libel in personam in admiralty may be brought against the United States or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: . . .[19]

While both the Suits in Admiralty Act and the Public Vessels Act dealt with the consent of the United States to be sued in admiralty, the applicability of one Act rather than the other turned on whether the particular government vessel was a public

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[11] See Canadian Aviator Ltd. v. United States, 324 U.S. 215, 219–20 (1945); Prudential S. S. Corp. v. United States, 220 F.2d 655 (2d Cir. 1955).

[12] 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741–51 (1964).

[13] *Compare* 39 Stat. 730 (1916), 46 U.S.C. § 808 (1964), *with* Suits in Admiralty Act, ch. 25, § 2, 41 Stat. 525 (amended by 74 Stat. 912 (1960), 46 U.S.C. § 742 (1964)).

[14] See 41 Stat. 525 (1920), 46 U.S.C. § 741 (1964).

[15] See note 9 *supra*.

[16] Suits in Admiralty Act, ch. 25, § 2, 41 Stat. 525 (amended by 74 Stat 912 (1960), 46 U.S.C. § 742 (1964)).

[17] See Canadian Aviator Ltd. v. United States, 324 U.S. 215 (1945). See also American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

[18] 43 Stat. 1112 (1925), as amended, 46 U.S.C. §§ 781–90 (1964).

[19] 43 Stat. 1112 (1925), 46 U.S.C. § 781 (1964).

vessel or one employed as a merchant vessel.[20] This traditional dichotomy of vessels in admiralty suits against the United States was weakened in 1960 when Congress amended section 2 of the Suits in Admiralty Act and removed from its provisions the troublesome restriction that the vessel be employed "as a merchant vessel." [21] The effect of this amendment on the operation of the two Acts is not clear and has not been finally decided. It may be that the Suits in Admiralty Act alone will now be held to be a comprehensive waiver of sovereign immunity from suits in

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[20] Calmar S. S. Corp. v. United States, 345 U.S. 446 (1953); Eastern S. S. Lines v. United States, 187 F.2d 956 (1st Cir. 1951). See Prudential S. S. Corp. v. United States, 220 F.2d 655 (2d Cir. 1955). See also The Western Maid, 257 U.S. 419 (1922).

In maritime contract cases especially, whether the Court of Claims (see 28 U.S.C. § 1491 (1964)) or the district court sitting in admiralty had jurisdiction would often depend on whether a "merchant" vessel or public vessel was involved. If a contract claim arose involving a "merchant" vessel, jurisdiction was under the Suits in Admiralty Act because that Act was the exclusive remedy of all maritime causes of action (including contract causes) arising out of the possession and operation of government vessels employed as merchant vessels. Calmar S. S. Corp. v. United States, 345 U.S. 446 (1953); Johnson v. United States Shipping Bd. Emergency Fleet Corp., 280 U.S. 320 (1930); United States Shipping Bd. Emergency Fleet Corp. v. Rosenberg Bros. & Co., 276 U.S. 202 (1928); Eastern S. S. Lines v. United States, 187 F.2d 956 (1st Cir. 1951). See S. REP. No. 1894, 86th Cong., 2d Sess. (1960). *But see* Amell v. United States, 34 U. S. L. WEEK 4400 (U.S. 16 May 1966).

If the contract claim involved a public vessel, jurisdiction was believed to be in the Court of Claims, as the Public Vessels Act seemed to exclude those contract claims not expressly included, *i.e.*, contracts for towage and salvage. S. REP. No. 1894, 86th Cong., 2d Sess. (1960). The legislative history of the Public Vessels Act tends to support the belief that, except as to compensation for towage and salvage services, Congress considered within the Act only torts (especially collisions) by public vessels. See S. REP. No. 941, 68th Cong., 2d Sess. 11–16 (1925) (letters of Attorney General H. F. Stone and the Secretary of War). The Ninth Circuit has taken the position that other contract claims are within its purview. See Thomason v. United States, 184 F.2d 105 (9th Cir. 1950); United States v. Loyola, 161 F.2d 126 (9th Cir. 1947). See also Jentry v. United States, 73 F. Supp. 899 (S.D. Cal. 1947); Aliotti v. United States, 221 F.2d 598 (9th Cir. 1955). However, the broad view of the Public Vessels Act taken by the Ninth Circuit has not been universally accepted. See Sinclair Refining Co. v. United States, 129 Ct. Cl. 174, 124 F. Supp. 628 (1954). See also U. S. DEP'T OF NAVY, CONTRACT LAW § 1.32 (2d ed. 1959). Although the question appears open (see Calmar S. S. Corp. v. United States, 345 U.S. 446, 456 n.8 (1953)), the congressional view was that maritime contract claims (except for salvage and towage) involving public vessels were not within the scope of the Public Vessels Act. See S. REP. No. 1894, 86th Cong., 2d Sess. (1960). See also Eastern S. S. Lines v. United States, 187 F.2d 956, 959 (1st Cir. 1951).

[21] The jurisdictional difficulties (see note 20 *supra*), especially with respect to maritime contract claims, prompted Congress to permit transfer of admiralty causes between the Court of Claims and district court sitting in admiralty to save such causes from the statute of limitations. See 28 U.S.C.

admiralty against the United States. The Public Vessels Act, however, if only for historical purposes, remains relevant to the Army Maritime Claims statute. First of all, most claims within the Army statute, if not settled thereunder, have in the past been litigated under the Public Vessels Act. Secondly, the language of the Public Vessels Act is virtually incorporated into the Army statute.[22] In addition, like the Public Vessels Act, claims under the Army statute should be determined "according to the principles of law and the rules of practice" which govern admiralty suits between private parties (the in rem process excluded);[23] should be subject to setoffs arising out of the same subject matter or cause of action;[24] and should reflect "all the exemptions and limitations of liability accorded by law" to private vessel owners.[25]

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§§ 1406, 1506 (1964). In addition, however, it amended § 2 of the Suits in Admiralty Act to provide: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title." 41 Stat. 525 (1920), as amended, 46 U.S.C. § 742 (1964).

Though no cases seem to have considered the point to date (*but see* Amell v. United States, 34 U. S. L. Week 4400, 4402 (U. S. 16 May 1966)), the 1960 amendment appears to have weakened, if not eliminated, the traditional distinction between public and merchant vessels and may have rendered superfluous § 1 of the Public Vessels Act (43 Stat. 1112 (1925), 46 U.S.C. § 781 (1964)), with respect to the kind of claims to which the United States has waived its sovereign immunity. The distinction is retained as to venue. See 41 Stat. 525 (1920), as amended, 46 U.S.C. § 742 (1964), and 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964). However, *compare* 41 Stat. 526 (1920), as amended, 46 U.S.C. §§ 743, 745 (1964), *with* 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964); 41 Stat. 527 (1920), 46 U.S.C. § 746 (1964), *with* 43 Stat. 1113 (1925), 46 U.S.C. § 789 (1964); 41 Stat. 527 (1920), as amended, 46 U.S.C. § 749 (1964), *with* 43 Stat. 1113 (1925), 46 U.S.C. § 786 (1964); 41 Stat. 527 (1920), 46 U.S.C. § 746 (1964), *with* 43 Stat. 1113 (1925), 46 U.S.C. § 787 (1964); and 41 Stat. 528 (1920), as amended, 46 U.S.C. § 752 (1920), *with* 43 Stat. 1113 (1925), as amended, 46 U.S.C. § 790 (1964).

If a broad construction is given § 2 of Suits in Admiralty Act, as amended, it will have the desirable effect of bringing all maritime claims (tort and contract) against the United States into an admiralty forum. The transfer provisions will save suitors from the statute of limitations where they mistakenly determine a contract claim against the United States to be maritime or conversely non-maritime.

[22] See 10 U.S.C. § 4802(a) (1964).

[23] See 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964), incorporating 41 Stat. 526 (1920), 46 U.S.C. § 743 (1964). See also Eastern Transp. Co. v. United States, 272 U.S. 675 (1927); Blamberg v. United States, 260 U.S. 452 (1923); and Carroll v. United States, 133 F.2d 690 (2d Cir. 1943), upholding United States liability on in rem principles.

[24] 43 Stat. 1112 (1925), 46 U.S.C. § 783 (1964).

[25] 43 Stat. 1113 (1925), 46 U.S.C. § 789 (1964).

B. *THE NAVY MARITIME CLAIMS STATUTES*

Prior to 1910, neither the Secretary of War nor the Secretary of the Navy had statutory authority to consider for administrative settlement maritime claims arising out of the maritime activities of their departments. As the United States had not yet waived its sovereign immunity from most maritime claims against it, no general statutory remedy was available in the courts. Relief, if any, came from Congress itself through private bills, often with the advice of the Secretaries concerned.[26] In 1910, Congress authorized the Secretary of the Navy to "ascertain . . . and determine" the amounts due on all claims of $500 or less for damage "occasioned by collision" with naval vessels found to be responsible.[27] Under this Act, the Secretary was to report to Congress the amounts he determined due "for payment as legal claims out of appropriations that may be made by Congress therefore." [28] In 1922, Congress increased the Secretary of the Navy's jurisdiction, authorizing him to "ascertain . . . and determine" maritime claims of $3,000 or less, not only involving collision damage but other damage occasioned by naval vessels.[29] Although the Act did not specifically authorize the Secretary to "ascertain . . . and determine" claims in favor of the United States, as a matter of practice he did so.[30]

In 1944 and 1945 Congress passed acts which became the predecessors of the present Navy Maritime Claims statutes. Designed to be supplementary to the 1910 Act, the 1944 Act authorized the Secretary of the Navy to "consider, ascertain, adjust, determine, compromise, or settle claims for damages caused by vessels of the Navy or in the naval service, and for compensation for towage and salvage service, including contract salvage, rendered to such vessels, and to pay the amount of any claim so determined, compromised, or settled. . . ." [31]

Claims against the United States under the statute, settled by the Secretary in excess of $1,000,000, had to be certified to Congress.[32] If the net amount of the claim payable was $1,000 or less, the authority of the Secretary to settle could be exercised by a

[26] See Watts v. United States, 123 Fed. 105 (S.D.N.Y. 1903); St. Louis & Miss. Valley Transp. Co. v. United States, 33 Ct. Cl. 251, 264–65 (1898); Pope v. United States, 21 Ct. Cl. 50 (1886).
[27] Act of 24 June 1910, ch. 378, 36 Stat. 607.
[28] *Ibid.* See also the Act of 11 July 1919, ch. 9, 41 Stat. 132.
[29] Act of 28 Dec. 1922, ch. 16, 42 Stat. 1066.
[30] See H. R. REP. No. 1197, 79th Cong., 1st Sess. 2 (1945).
[31] Act of 3 July 1944, ch. 399, § 7, 58 Stat. 726.
[32] *Ibid.*

designated delegate or delegates.[33] Under this Act, the Secretary enjoyed a measure of independence from Congress, and to some extent, freedom from the technicalities of admiralty jurisdiction.[34] Although the Secretary was required to report to Congress all claims paid, the Secretary himself determined and settled them and, if the claim was settled at $1,000,000, or less, but exceeded $3,000, he paid the claimant out of the appropriation for "miscellaneous expenses, Navy." In addition, if the claim was within the terms of the statute, the Secretary could settle it, even though admiralty jurisdiction was absent.[35] The language of the Act had

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[33] Act of 2 Aug. 1946, ch. 739, 60 Stat. 803.

[34] For the grant of admiralty jurisdiction, see U. S. CONST. art. III, § 2; 28 U.S.C. § 1333 (1964). The Constitutional grant of admiralty jurisdiction to the federal judiciary does not have clearly marked boundaries (The Blackheath, 195 U.S. 361 (1904)), except that by "a fair and just construction of the words," admiralty jurisdiction must deal with "maritime concerns," and its scope must be consistent with the purposes of the grant, *i.e.*, to deal uniformly with the practices and transactions of the maritime commercial world. Meyer v. Tupper, 66 U.S. (1 Black) 522 (1862). Compare O'Donnel v. Great Lakes Dredge & Dock Co., 318 U.S. 35, 40 (1943); Detroit Trust Co. v. Barlum, 293 U.S. 21 (1934); Panama R. R. Co. v. Johnson, 264 U.S. 375 (1924).

In determining whether a case lies in admiralty, judicial precedent and acts of Congress dealing with maritime matters are the safest guides. *Ex parte* Easton, 95 U.S. 68 (1877). However, formulations such as that of Justice Story in De Lovio v. Boit, 7 Fed. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815), are helpful. In that case, Justice Story asserted "admiralty jurisdiction comprehends all maritime contracts, torts and injuries. The latter branch is necessarily bound by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations), which relate to the navigation, business or commerce of the sea." See also New England Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1871); *Ex parte* Easton, 95 U.S. 68 (1877).

The term "maritime" encompasses "waters" and "vessels." The "waters" must be waters navigable in fact in interstate or foreign commerce. The Robert W. Parsons, 191 U.S. 17 (1903). In most maritime cases, there must also be involved a "vessel," its cargo or personnel. Congress has defined a vessel to include "every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water." 1 U.S.C. § 3 (1964). See GILMORE & BLACK, LAW OF ADMIRALTY 30 n.105 (1957).

[35] The legislative history of the Navy Maritime Claims statutes indicates that Congress intended it to extend to claims within its terms even though not of admiralty cognizance. See H.R. REP. No. 1681, 78th Cong., 2d Sess. 3 (1944); S. REP. No. 602, 79th Cong., 1st Sess. 2 (1945). However, in the period between 1944–1945 (the dates of the Navy statutes) and the enactment of the Army statute in 1951, Congress enacted the Federal Tort Claims Act (FTCA) which provided that FTCA did not apply where the claimant had a remedy under the Public Vessels or Suits in Admiralty Acts. See 28 U.S.C. § 2680(d) (1964). When the Admiralty Jurisdiction Extension Act was passed in 1948 (62 Stat. 496 (1948), 46 U.S.C. § 740 (1964)), the scope of the Public

been derived from the Public Vessels Act with the exception that unlike the Public Vessels Act, the claim need not lie "in admiralty." [36]

Although Congress indicated in its report that claims in favor of the United States could be settled under the statute,[37] private tortfeasors questioned the authority of the Secretary to make a binding settlement and complete release.[38] Thus, in 1945 Congress specifically authorized the Secretary to settle maritime claims in favor of the United States.[39]

This Act closely paralleled the 1944 Act which dealt specifically with maritime claims against the United States with these differences: [40] (1) The 1945 Act related to "claims for damage cognizable in admiralty in a district court of the United States and all claims for damage caused by a vessel or floating object, to property of the United States under the jurisdiction of the Navy Department; [41] (2) the 1945 Act did not authorize the Secretary of the Navy to settle towage and salvage claims in favor of the United States. However, in 1948, Congress specifically authorized the Secretary of the Navy and his designees to settle any claims for salvage services, without limitation of amount.[42]

Until 1951, neither the Secretary of the Army nor the Secretary of the Air Force had the authority to settle or compromise maritime claims of the kind authorized by the Navy Maritime Claims

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Vessels and Suits in Admiralty Acts expanded to that extent into areas formerly reached by the Federal Tort Claims Act. However, the line was drawn between the admiralty waiver remedies and the FTCA remedy; and the Navy Maritime Claims statutes (and its progeny, the Army and Air Force statutes) should be considered to have lost jurisdiction of non-admiralty claims formerly within its scope to the FTC settlement act (28 U.S.C. § 2672 (1964)). When, in 1960, the Suits in Admiralty Act was amended, it again reached into areas of admiralty jurisdiction formerly within the FTCA.

[36] *Compare* 43 Stat. 1112 (1925), 46 U.S.C. § 781 (1964), *with* 10 U.S.C. §§ 7622, 4802 (1964).

[37] See H.R. REP. No. 1681, 78th Cong., 2d Sess. 3 (1944).

[38] See S. REP. No. 602, 79th Cong., 1st Sess. 2 (1945); H.R. REP. No. 1197, 79th Cong., 1st Sess. 2 (1945).

[39] Act of 5 Dec. 1945, ch. 555, §§ 1, 4, 59 Stat. 596, as amended, Act of 2 Aug. 1946, ch. 742, 60 Stat. 805.

[40] Compare the Act of 3 July 1944, ch. 399, § 9, 58 Stat. 726, as added, Act of 2 Aug. 1946, ch. 739, 60 Stat. 803, and the Act of 5 Dec. 1945, ch. 555, § 2, 59 Stat. 596, as added, Act of 2 Aug. 1946, ch. 712, 60 Stat. 805.

[41] Act of 5 Dec. 1945, ch. 555, § 1, 59 Stat. 596. See H.R. REP. No. 1197, 79th Cong., 1st Sess. 1 (1945).

[42] See Act of 7 May 1948, ch. 256, § 3, 62 Stat. 210. See also U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF OFFICE OF THE JUDGE ADVOCATE GENERAL [illegible] (1961).

statutes, except to a limited extent under the Foreign Claims Act, [43] the Military Claims Act, [44] and the Federal Tort Claims Act. [45]

The need for such statutory authorization became clear [46] and in 1951, the Army and Air Force Maritime Claims Act was enacted into law.[47]

In enacting this measure it was the intention of Congress to "vest in the Secretaries of the Army and of the Air Force . . . [the same authority to settle maritime claims] as that . . . vested in the Secretary of the Navy . . ., except that the limitation of the Secretary of the Navy's authority is $1,000,000, whereas the limit under the [1951 Act] is $500,000." [48]

When Title 10 was codified in 1956, all of the maritime claims statutes were repealed and new provisions with the same substantive effect were enacted.[49] It was Congress' express legislative purpose "to restate, without substantive change, the law replaced by those sections on the effective date of this act." [50] The several military maritime claims statutes were thus placed in sections of the Code dealing with the appropriate service organization.[51]

III. THE ARMY MARITIME CLAIMS STATUTE [52]

A. *GENERAL*

Under the provisions of the Army Maritime Claims statute, the

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[43] 10 U.S.C. § 2734 (1964).

[44] 10 U.S.C. § 2733 (1964).

[45] 28 U.S.C. §§ 1346(b), 2401–02, 2671–80 (1964), as amended, 28 U.S.C. §§ 2671–72, 2675, 2677–79 (1966 U. S. CODE CONG. & AD. NEWS 1850).

[46] See S. REP. No. 654, 82d Cong., 1st Sess. 1–5 (1951).

[47] See Act of 20 Oct. 1951, ch. 524, 65 Stat. 572.

[48] S. REP. No. 654, 82d Cong., 1st Sess. 3 (1951). See also H.R. REP. No. 300, 82d Cong., 1st Sess. 3 (1951).

[49] Act of 10 Aug. 1956, § 53, 70A Stat. 641, 655, 664, 674, 675, 677, 682.

[50] Act of 10 Aug. 1956, § 49(a), 70A Stat. 640; See S. REP. No. 2848, 84th Cong., 2d Sess. (1956).

[51] Army Maritime Claims statute: 10 U.S.C. §§ 4801–04, 4806 (1964), as amended, 10 U.S.C. § 4802(c) (Supp. I, 1965); Navy Maritime Claims statute: 10 U.S.C. §§ 7621–23, 7365 (1964), as amended, 10 U.S.C. § 7622(c) (Supp. I, 1965); Air Force Maritime Claims statute: 10 U.S.C. §§ 9801–04, 9806 (1964), as amended, 10 U.S.C. § 9802(c) (Supp. I, 1965).

Since the 1956 codification there have been two changes in these maritime claims statutes: (1) In 1960, Congress repealed the provision requiring the Secretaries of the Army, Navy and Air Force to report to Congress claims settlements made and paid by them. See Act of 29 June 1960, §§ (8)(A), (10)(A), (7)(A), 74 Stat. 246 (formerly 10 U.S.C. §§ 4805, 7624, 9805 (1958)); (2) In 1965, Congress authorized the several secretaries to delegate the settlement of maritime claims of $10,000 or less to proper persons designated by him. See 10 U.S.C. §§ 4802(c), 7622(c), 9802(c) (Supp. I, 1965). Formerly, such delegees could settle claims of only $1,000 or less.

[52] This statute also includes claims arising out of the activities of the Corps of Engineers. *But see* Army Reg. No. 27–26, para. 12 (20 May 1966), in

Secretary of the Army may settle[53] claims against the United States for "damage caused by a vessel of, or in the service of, the Department of the Army;" or for "compensation for towage and salvage service, including contract salvage, rendered to a vessel of, or in the service of, the Department of the Army."[54] Claims against the United States, settled for $500,000 or less, may be paid by the Secretary;[55] claims against the United States settled in excess of $500,000 must be certified to Congress for payment.[56] The Secretary may also settle and receive payment for claims in favor of the United States for damage to property under the jurisdiction of the Army if the claim is justiciable in admiralty in the district courts of the United States, or is for damage caused by a vessel or floating object and the amount to be received is not more than $500,000.[57] Claims in favor of the United States in excess of $500,000 may not be settled under this statute.[58] Where a claim in favor of or against the United States is meritorious, in the amount of $10,000 or less, the Secretary may delegate his authority to settle it to a designated person in the Department of the

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respect to certain claims in favor of the United States. In 1910, Congress authorized the Chief of Engineers, subject to the approval of the Secretary of War, to adjust and settle claims arising out of the collision of a "vessel belonging to or employed by the United States engaged upon river or harbor work." Act of 25 June 1910, ch. 382, § 4, 36 Stat. 630, 676. This settlement statute was repealed in 1943 upon the passage of the Military Claims Act. See 10 U.S.C. § 2733 (1964). Congress apparently assumed that claims under the 1910 statute would be reached by the Military Claims Act. Payment of claims under the Military Claims Act, however, is not as a matter of right, as in the case of claims under the Federal Tort Claims Act or the Public Vessels-Suits in Admiralty Acts, but are essentially gratuities. See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-162, CLAIMS 77-79, 97 (1962). The 1951 Army Maritime Claims statute, based as it was upon statutory rights of action given to claimants to sue under the Public Vessels—Suits in Admiralty Acts (or in rare cases under the special dredging damage statute giving jurisdiction to the Court of Claims, 28 U.S.C. § 1497 (1964)), superseded the Military Claims Act to that extent and brought within its scope claims like those arising from the maritime activities of the Corps of Engineers. See S. REP. No. 654, 82d Cong., 1st Sess. 2 (1951). Army Reg. No. 27-21, paras. 5*n*, 6 (20 May 1966), reflect the areas in which the Military Claims Act has been preempted. That the 1951 Act was designed to be "supplementary" to existing settlement acts (Act of 20 Oct. 1951, ch. 524, § 1, 65 Stat. 572), does not effect the substantive content Congress brought into the Army Maritime Claims Statute.

[53] Under the Act, settle means "consider, ascertain, adjust, determine and dispose of a claim, whether by full or partial allowance or by disallowance." See 10 U.S.C. § 4801 (1964).

[54] 10 U.S.C. § 4802(a) (1964).

[55] 10 U.S.C. § 4802(b) (1964).

[56] *Ibid.*

[57] 10 U.S.C. § 4803(a) (1964).

[58] See Army Reg. No. 27-26, para. 11 (20 May 1966).

Army.[59] Payments accepted in settlement of a maritime claim under the statute, either in favor of or against the United States, are "final and conclusive" on the parties; [60] and the Secretary is authorized to execute a release on payment of claims in favor of the United States. [61] Claims by the United States for salvage services performed by the Department of the Army are *sui generis* under the statute. Unlike the settlement of other claims, the Secretary may settle salvage service claims in favor of the United States in any amount,[62] and the provision making acceptance of payment final and conclusive on the parties does not specifically apply.[63]

B. *VESSEL OF, OR IN THE SERVICE OF, THE DEPARTMENT OF THE ARMY*

Just as it was important to determine whether a public vessel or a vessel employed as a merchant vessel was involved, in order to apply either the Public Vessels Act or the Suits in Admiralty Act, it is crucial to the application of the Army Maritime Claims statute to define the "vessels" to which it applies.

Unlike the Navy Maritime Claims statute, the Army statute offers no definition of "vessels of, or in the service of the Department of the Army." [64] However, as the Army statute was constructed and based upon the Navy statutes,[65] the Navy definition, especially the earlier 1944 version, is helpful in determining what vessels are within the Army statute. Superimposing the earlier 1944 Navy definition [66] upon the Army statute, a vessel is within

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[59] 10 U.S.C. §§ 4802(c), 4803(c), (1964), as amended, 10 U.S.C. § 4802(c), 4803(c) (Supp. I, 1965).

[60] 10 U.S.C. § 4806 (1964).

[61] 10 U.S.C. § 4803(b) (1964).

[62] See 10 U.S.C. § 4804 (1964).

[63] See 10 U.S.C. § 4806 (1964).

[64] *But see* Army Reg. No. 55-19, para. 3b (3 Aug. 1965), where an Army vessel is defined as: "All vessels operated (manned, supplied, and maintained) by the Army and all unmanned vessels owned by the Army are Army vessels for purposes of this regulation . . . ."

[65] See Part II.B, *supra*.

[66] 10 U.S.C. § 7621 (1964) provides:

> "(a) In this chapter 'vessel in the naval service' means—(1) any vessel of the Navy, manned by the Navy, or chartered on bareboat charter to the Navy . . . ."

This definition is a codified version of the definition of the 1944 Act providing for the settlement of naval maritime claims. The 1944 Act provided that vessels of the Navy and in naval service "*shall* include, . . . in addition to all vessels of the Navy, . . . all vessels manned by the Navy, . . . and all vessels chartered in bareboat charter to the Navy . . . ." Act of 3 July 1944, ch. 399, § 3, 58 Stat. 724. (Emphasis added.) When Title 10 was codified, it

the statute if it is owned by the United States,[67] accountable to the Army, or bareboat chartered to the Army.[68]

Under a bareboat or demise charter, the charterer assumes control and possession of the vessel, mans it and uses it for his own purposes.[69] The charterer becomes the special owner or owner *pro hac vice*. Where, however, the vessel is hired under a voyage or time charter, the charterer does not become a special owner, with the attendant liabilities.[70] The vessel is in effect in control of the shipowner (general owner) for the use or purposes of the charterer. While a voyage or time charter to the Army might not confer public vessel status under the Public Vessels Act,[71] the vessel should qualify as an Army vessel for purposes of the Army Maritime Claims statute where it is actually "in the service of the De-

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was expressly provided that no substantive change was intended. See notes 49–50 *supra* and accompanying text. Thus the older definition, being more explicit, provides greater assistance in determining the "vessels" within the Army statute.

[67] See The Western Maid, 257 U.S. 419 (1922); Bradey v. United States, 151 F.2d 742 (2d Cir. 1945), *cert. denied*, 326 U.S. 795 (1946); Roeper v. United States, 85 F. Supp. 864 (E.D.N.Y. 1949); Moran Towing & Transp. Co. v. United States, 80 F. Supp. 623, 635 (S.D.N.Y. 1948). See also Canadian Aviator Ltd. v. United States, 324 U.S. 215 (1945); The Westfield, 149 F.2d 907 (2d Cir. 1945).

An Army vessel retains its status as an Army vessel even if bareboat chartered to a private concern. Atlantic Coast Line R. R. Co. v. United States, 128 Ct. Cl. 747, 120 F. Supp. 917, *cert. denied*, 348 U.S. 872 (1954); Schnell v. United States, 166 F.2d 479 (2d Cir.), *cert. denied*, 334 U.S. 833 (1948); Sinclair Refining Co. v. United States, 129 Ct. Cl. 474, 124 F. Supp. 628 (1954). See The Lake Monroe, 250 U.S. 246 (1919); Waterman S. S. Corp. v. United States, 129 Ct. Cl. 460, 124 F. Supp. 634 (1954), *cert. denied*, 348 U.S. 971 (1955). *But see* United States v. Caffey, 141 F.2d 69 (2d Cir.), *cert. denied*, 323 U.S. 750 (1944). The Army vessel might still be accountable on in rem principles. See note 23 *supra*. Sometimes vessels owned by the United States are operated by private concerns under general agency agreements. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949); Smith v United States, 346 F.2d 449 (4th Cir. 1965).

[68] The Western Maid, 257 U.S. 419 (1922); Eastern S. S. Lines, Inc. v. United States, 187 F.2d 956 (1st Cir. 1951); The Zeller No. 10, 66 F. Supp. 447 (S.D.N.Y. 1946); see Calmar S. S. Corp. v. United States, 345 U.S. 446 (1953). Sometimes vessels are bareboat chartered to the United States, but operated by the shipowner as general agent. Norman Bridge, 290 Fed. 575 (S.D.N.Y. 1922).

[69] See Guzman v. Pichirilo, 369 U.S. 698 (1962); United States v. Shea, 152 U.S. 178 (1894).

[70] See GILMORE & BLACK, LAW OF ADMIRALTY 170–219 (1957).

[71] See Calmar S. S. Corp. v. United States, 345 U.S. 446 (1953); The Everett Fowler, 151 F.2d 662 (2d Cir. 1945); Polar Companion De Navegacion v. United States, 129 Ct. Cl. 471, 124 F. Supp. 625 (1954).

partment of the Army." [72] Unlike general or special ownership by the Army,[73] it would be necessary under a time or voyage charter to show that the vessel was in fact "in service of the Department of the Army."

Thus where a vessel, voyage or time chartered to the U.S. Army "in the service of the Department of the Army," causes damage or injury, the vessel should be considered a vessel within the Army Maritime Claims statute, and the claim open for settlement under it, even though the underlying justiciability of the claim springs from the Suits in Admiralty, rather than the Public Vessels Act. In this regard two points are worthy of mention. First of all, United States liability for claims arising from "Army vessels" which are time or voyage chartered to the U.S. Army usually will be extremely limited under the charter party (contract); and, secondly, the Army statute does not require a claimant to specify on which of the two underlying admiralty waiver acts he bases his claim.

IV. CLAIMS AGAINST THE UNITED STATES UNDER THE ARMY MARITIME CLAIMS STATUTE

The Army Maritime Claims statute speaks of claims against the United States in virtually the same language found in section 1 of the Public Vessels Act. The major differences between the two statutes are: (1) The Army statute omits the phrase "in admiralty"; and (2) the Army statute deals with "vessels of, or in the service of the Department of the Army" rather than "public vessels." The first difference is no longer significant,[74] and the second has already been discussed in a prior section of this article.[75] Thus as suggested earlier, the Public Vessels Act and the

[72] See Byonnes & Son v. United States, 298 Fed. 123 (S.D.N.Y. 1923) (dictum) (L. Hand, J.). In *Calmar*, a vessel chartered for hire by the United States for the shipment of war material was held "undoubtedly operated . . . for the United States." Calmar S. S. Corp. v. United States, 345 U.S. 446, 447 (1953). While the liability of the United States under a voyage or time charter would not be great, it would usually be liable for "war risks." The general owner usually assumes marine risks. Where the vessel in the service of the Army is damaged by war risks assumed by the United States, the Secretary should be able to settle the claim notwithstanding its contractual basis. See Reybold v. United States, 82 U.S. 202 (1872); New Orleans-Belize Royal Mail & Cent. Am. S. S. Co. v. United States, 239 U.S. 202 (1915). *But see* U.S. DEP'T AIR FORCE, MANUAL No. 112–1, *para.* 134a(1)(c) (1963).

[73] While under such ownership, the purpose for which a public vessel was used might be determinative of whether suit should be brought under the Public Vessels Act or Suits in Admiralty Act (see Eastern S. S. Lines, Inc. v. United States, 187 F.2d 956 (1st Cir. 1951); The Jeanette Skinner, 258 Fed. 768 (D. Md. 1919); The Nishmaha, 263 Fed. 959 (D. Ore. 1920)), it is irrelevant in terms of settlement under the Army statute.

[74] See note 35 *supra.*

[75] Part III.B. *supra.*

cases decided under it are a sound basis on which to determine what maritime claims against the United States are within the Army statute.

While the same principles of admiralty law govern claims where the government is a party,[76] not all admiralty claims are within the terms of the Public Vessels Act or the Army Maritime Claims statute. However, more claims are within the Army statute than would appear at first. For example, with only a slight variance,[77] the phrase "for damages caused by a public vessel of the United States" has been incorporated in the Army statute. This language has been held to encompass damage claims resulting from the negligence [78] of the personnel of a public vessel in its operation and maintenance or from the unseaworthiness [79] of the

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[76] See 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964), incorporating 41 Stat. 526 (1920), 46 U.S.C. § 743 (1964).

[77] The Army statute (10 U.S.C. § 4802(a)(1) (1964)) uses the term "for damage caused," while the Public Vessels Act speaks of "for damages caused." See 43 Stat. 1112 (1925), 46 U.S.C. § 781 (1964). The Supreme Court indicated a distinction between the terms "damage" and "damages" (America Stevedores, Inc. v. Porello, 330 U.S. 446, 450 n.6 (1947)), suggesting a narrower construction of the Army's statute.

[78] "The use of the phrase 'caused by a public vessel' constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this court . . . ." Canadian Aviator Ltd. v. United States, 324 U.S. 215, 224 (1945). However, the Supreme Court also said that the Public Vessels Act imposed upon the United States the same liability (apart from seizure or arrest under a libel in rem) as was imposed on the private shipowner. *Id.* at 228. See Weyerhaeuser S. S. Co. v. United States, 372 U.S. 597 (1963); Allen v. United States, 338 F.2d 160 (9th Cir. 1964). See also Sterling, *United States Responsibility in Admiralty*, 35 TEXAS L. REV. 573 (1957).

To the extent contract claims against vessel owners are outside the Public Vessels Act, this proposition would be too broad. In addition, the Supreme Court based its conclusion upon other provisions of the Public Vessels Act not incorporated into the Army Maritime Claims statute (see 43 Stat. 1112 (1925), 46 U.S.C. §§ 782, 783 (1964)), nor was this conclusion necessary to the decision of the *Canadian Aviator*. It seems clear also that, at least before the 1960 amendments to the Suits in Admiralty Act, some maritime tort claims were outside the reach of both the Suits in Admiralty Act and the Public Vessels Act. See Indian Towing Co. v. United States, 350 U.S. 61 (1955); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Baltimore, Crisfield & Onancock Line, Inc. v. United States, 140 F.2d 230 (4th Cir. 1944). For an admiralty tort claim justiciable in the Court of Claims, see 28 U.S.C. §1497 (1964) (damage to oyster beds from dredging operations).

[79] Unseaworthiness of vessel comprehends a defect in the vessel, or its appurtenances or its lack of a competent crew so that it is not reasonably fit for its intended use. See Gutierrez v. Waterman S. S. Corp., 373 U.S. 206 (1963); Morales v. City of Galveston, 370 U.S. 165 (1962); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

vessel.[80] This broad construction of the Act is significant in determining what vessel and cargo damage claims and what personal injury claims are within the Army statute.

In the following sections, the various claims against the United States within the Army statute are discussed.[81] Those claims in favor of the United States within the statute are discussed in Part V.

A. *VESSEL DAMAGE CLAIMS*

Among the claims Congress intended to reach by the Army statute [82] were claims for damage arising from a collision between vessels under private control or ownership (hereafter referred to as the non-military vessel) and Army vessels. Liability in such cases is based on fault which is the proximate cause of the damage.[83] Where a collision occurs and fault cannot be attributed to either vessel, each vessel must bear its own loss or damage, and

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[80] Shenker v. United States, 322 F.2d 622 (2d Cir. 1963); Pedersen v. United States, 224 F.2d 212 (2d Cir. 1955). See American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947). The lower court decision in the companion case, based in part on the unseaworthiness of the vessel, was affirmed (Lauro v. United States, 330 U.S. 446 (1947)), although the question of unseaworthiness under the Public Vessels Act was not certified to the Supreme Court. See also West v. United States, 361 U.S. 118 (1959), where the Court assumed *sub silentio* that recovery for unseaworthiness came under the act, but held the vessel involved did not carry the warranty of seaworthiness.

If the injury to cargo or personnel was attributable, however, to the unseaworthiness of the Army vessel, it should be said to have been "caused" by the Army vessel within meaning of the Act though recovery for unseaworthiness (at least as to personal injury) is really a species of liability without fault. See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[81] This article does not attempt to treat comprehensively the substantive law of admiralty which will govern the disposition of claims under the Army statute. Certain basic principles are discussed, however, to clarify the nature of the claims that are within the scope of the statute. Judge advocates in the field ordinarily would not be called upon to determine the validity of a claim under admiralty, but a knowledge of admiralty law, particularly of damages recoverable in admiralty, would be necessary to insure that marine casualty investigating officers report the significant facts necessary for the proper disposition of a claim. U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 187 (1962), lists many admiralty texts which will be of use.

[82] Congress intended to cover: "claims arising out of collision between vessels, or between vessel and shore structure, personal injury and death to civilian seamen, harbor workers, passengers and other persons, damage to Army . . . cargo carried on commercial vessels and salvage and towage services rendered by or to Army . . . vessels or cargo . . . ." S. REP. NO. 654, 82d Cong., 1st Sess. 1–2 (1951).

[83] See The James Gray, 62 U.S. (21 How.) 184, 194 (1859); Sturgis v. Boyer, 65 U.S. (24 How.) 110 (1860); The Perseverance, 63 F.2d 788 (2d Cir. 1933). See also P. Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1953).

There are certain standards of correct action by which fault may be meas-

no claim would arise either for or against the United States.[84] Where a collision of vessels is attributable to the fault of one of them, that vessel must bear its own damage and loss and compensate the other(s) as well.[85] Where the fault of both vessels causes the collision, the damages are divided so that each bears half the total damage.[86]

Thus, depending on the allocation of fault and the extent and kind of damages sustained in the collision, a claim may arise against the United States which can be settled under the statute. Where the vessel is lost, the vessel owner is entitled to full indemnity based on the value of the vessel before the collision and pending freight,[87] subject to each vessel owner's right to limit his liability.[88] Where the vessel is damaged, the vessel owner is en-

ured: (1) the Regulations for Preventing Collisions at Sea, 77 Stat. 194 (1963), 33 U.S.C. §§ 1061–94 (1964), effective 1 Sept. 1965, and generally applicable to the high seas; The Great Lakes Rules, 28 Stat. 645 (1895), as amended, 33 U.S.C. § 241–95 (1964); The Western Rivers Rules, Rev. Stat. § 4233 (1875), as amended, 33 U.S.C. § 301–56 (1964) (generally applicable to the Mississippi and its tributaries); The Inland Rules, 30 Stat. 96 (1887), as amended, 33 U.S.C. §§ 154–232 (1964) (generally applicable to all other navigable waters). See the Cayuga, 81 U.S. (14 Wall.) 270 (1872); The Pennsylvania, 86 U.S. (19 Wall.) 125 (1874); (2) other statutes and regulations having the force of law: The Stand By Act, 26 Stat. 425 (1890), 33 U.S.C. §§ 367–68 (1964); The Wreck Removal Act, 30 Stat. 1152, 1154 (1899), 33 U.S.C. §§ 409, 414 (1964); Pilot Rules for Inland Waters, 33 C.F.R. §§ 80.01–.36 (1962), as amended, 33 C.F.R. 80.16a, 80.17 (Supp. 1965); Pilot Rules for the Great Lakes, 33 C.F.R. 90.01–.24 (1962), as amended, 33 C.F.R. 90.03, 90.15 (Supp. 1965); Pilot Rules for Western Rivers, 95.01–.45 (1962), as amended, 95.02, 95.31, 95.35, 95.36, 95.38 (Supp. 1965). See 74 Stat. 259 (1960), 46 U.S.C. §§ 216–16a (1964); (3) local customs and regulations: see The Resolute, 68 U.S. (1 Wall.) 682 (1863); The James Gray, 62 U.S. (21 How.) 184 (1859); and (4) a general standard of good seamanship and due care, *e.g.*, posting of a lookout: see Smith v. Condry, 42 U.S. (1 How.) 28 (1843); The Clara, 102 U.S. 200 (1880).

[84] The Morning Light, 69 U.S. (2 Wall.) 550 (1865). This encompasses cases where the collision occurred as a result of an inevitable accident, *i.e.*, one which occurs when both parties without fault have endeavored by every means in their power, with care and caution and proper display of nautical skill to prevent it (see The Pennsylvania, 65 U.S. (24 How.) 307 (1861); Stainback v. Rae, 55 U.S. (14 How.) 532 (1852)), or where fault, though necessarily present, cannot be located (so-called inscrutable fault). See Lockwood v. The Schooner Grace Girdler, 74 U.S. (7 Wall.) 196 (1869).

[85] The Clara, 102 U.S. 200 (1880); The Clarita, 90 U.S. (23 Wall.) 1 (1875); The City of Hartford v. Rideout, 97 U.S. 323 (1878).

[86] See Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855); The Sapphire, 85 U.S. (18 Wall.) 51 (1874). See also Weyerhaeuser S. S. Corp. v. United States, 372 U.S. 597 (1963); Carraway, *Maritime Collision—Defenses and Distribution of Damages*, 19 JAG J. 127 (1965).

[87] The Baltimore, 75 U.S. (8 Wall.) 377 (1869); Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146 (1925); Ozanic v. United States, 165 F.2d 738 (2d Cir. 1948).

[88] REV. STAT. §§ 4281–89 (1875), as amended, 46 U.S.C. §§ 181–89 (1964); 43 Stat. 1113, 46 U.S.C. § 789 (1964).

titled to claim, *inter alia*, as damages, the loss of her use while laid up for repairs (demurrage),[89] the cost of repairs[90] and loss of freight.[91] Collision damage claims may arise from participation (by Army vessels) in salvage[92] or towage[93] operations, from injury to the subject of the salvage,[94] other salvors, to a towed vessel and/or a towboat;[95] or it may arise from ordinary terminal operations in which injury was sustained by other vessels or shore structures[96] or aids to navigation.[97] Whether certain vessel dam-

[89] The Potomac, 105 U.S. 630 (1882); Williamson v. Barrett, 54 U.S. (13 How.) 101 (1851).

[90] The Granite State, 70 U.S. (3 Wall.) 310 (1866); The Baltimore, 75 U.S. (8 Wall.) 377 (1869).

[91] See The Cayuga, 81 U.S. (14 Wall.) 270 (1872).

[92] See discussion on salvage, Part IV.D. *infra*.

[93] See discussion on towage, Part IV.D. *infra*.

[94] See Geerston v. United States, 223 F.2d 68 (3d Cir. 1955); P. Dougherty Co. v. United States, 207 F.2d 626, 637 (3d Cir. 1953) (Biggs, C. J., dissenting).

[95] Notwithstanding the fact that for purposes of the state and federal regulatory legislation the towing vessel may be common carrier (see discussion, Part VI.D. *infra*), the towing vessel is not the insurer of the tow. Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959). Nor are the tow and the towing vessel (together called a flotilla) considered as an entity so that the negligence of the towing vessel is imputed to the tow. Only the vessel that is in control of the operation, usually the towing vessel, will suffer the consequences of fault in the navigation of the flotilla. The Steamer Webb, 81 U.S. (14 Wall.) 406 (1872); The Galatea, 92 U.S. 439 (1876); The Clarita, 90 U.S. (23 Wall.) 1 (1875). This common law obligation on the part of the towing vessel to its tow may not be contracted away so as to absolve the towing vessel from liability for its negligence. Boston Metals Co. v. Winding Gulf, 349 U.S. 122 (1955); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). However, to the extent there is fault on the part of the tow, *e.g.*, violation of one of the rules of navigation, the tow may be liable (see The Westchester, 254 Fed. 576 (2d Cir. 1918); The Sif, 266 Fed. 166 (2d Cir. 1920)), and obligated to pay damages to the towing vessel or contribute to the total damages suffered by the application of the divided damages rule. Thus where an Army vessel is at fault in towing a nonmilitary vessel, and the towed vessel suffers damage, a claim arises which may be settled under the Act, as "caused by the Army vessel." 10 U.S.C. § 4802(a)(1)(1964). Where the tow suffers damage in a collision between the towing vessel and the Army vessel, the tow has a claim against either or both of the colliding vessels as joint tortfeasors in the event of mutual fault. The James Gray, 62 U.S. (21 How.) 184 (1859); The Alabama, 92 U.S. 695 (1876).

[96] 62 Stat. 496 (1948, 46 U.S.C. § 740 (1964). Although it has been suggested that this statute was an unconstitutional extension by Congress of admiralty jurisdiction, courts which have considered the question have considered the question have held it constitutional. See GILMORE & BLACK, LAW OF ADMIRALTY 432–34 (1957); United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953); American Bridge Co. v. The Gloria O, 98 F. Supp. 71 (E.D.N.Y. 1951). See also Gutierrez v. Waterman S. S. Corp., 373 U.S. 206 (1963); Fematt v. City of Los Angeles, 196 F. Supp. 89 (S.D. Cal. 1961).

[97] Where an Army vessel damages an aid to navigation, the owner of the structure has an action in admiralty. The Blackheath, 195 U.S. 361 (1904).

age claims lie against the United States and come within the authority of the statute may depend upon whether the fault can be attributed to personnel of an Army vessel for *respondeat superior* purposes. Thus, where a non-military pilot [98] is taken on board the Army vessel, and through his fault damage is caused to a non-military vessel, the Army vessel will be liable if the pilot was voluntarily accepted; [99] where an independent contractor's fault causes the damage, the Army vessel will probably not be liable. [100]

There need not be a collision or actual impact for damage to be caused by the Army vessel or its personnel.[101] Thus, within the scope of the Act are claims [102] arising from oil pollu-

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[98] A pilot is a person taken on board to conduct a ship through a river, or channel from or into a port. The Hope, 35 U.S. (10 Pet.) 108 (1836).

[99] Congress has the power to enact pilot laws but has generally left such regulation to the states. Cooley v. Board of Wardens of the Port of Pennsylvania, 53 U.S. (12 How.) 299 (1851); Wilson v. McNamee, 102 U.S. 572 (1881); Smith v. Alabama, 124 U.S. 465 (1888). *But see* 74 Stat. 259 (1960), 46 U.S.C. § 216–16i (1964). Except as to certain kinds of vessels exempted, these regulations appear to be respected and adhered to by the United States, although no decision has been discovered squarely holding whether this amounts to compulsory pilotage. See 16 OPS. ATT'Y GEN. 647 (1879); Ayers v. Knox, 7 Mass. 360 (1911). *But see* Standard Oil Co. v. United States, 27 F.2d 370 (S.D. Ala. 1928). Where these laws and regulations "compel" the Army vessel to accept a licensed pilot, who causes damage, the United States will not be responsible under *respondeat superior* principles. Homer Ramsdell Transp. Co. v. Campagnie Generale Transatlantique, 182 U.S. 406 (1901). See The China, 74 U.S. (7 Wall.) 53 (1869). However, the United States may be liable on the in rem principle that the vessel in whosoever hands she lawfully is, is herself considered as the wrong-doer liable for the tort. The China, 74 U.S. (7 Wall.) 53 (1869); Logue Stevedoring Corp. v. The Dalzellance, 198 F.2d 369 (2d Cir. 1952); *cf.* Eastern Transp. Co. v. United States, 272 U.S. 675 (1927). See Hall, *The Commanding Officer and Negligent Pilotage-Liability Aspects*, 17 JAG J. 123 (1963). Where the Army vessel voluntarily accepts a pilot, as will most generally be the case, the United States can be liable on *respondeat superior* principles. The Maren Lee v. Lee Towing Line, Inc., 278 Fed. 918 (2d Cir. 1922); South Carolina State Highway Dep't v. United States, 78 F. Supp. 598 (E.D.S.C. 1948); *cf.* Homer Ramsdell Transp. Co. v. Campagnie Generale Transatlantique, 182 U.S. 406 (1901); GILMORE & BLACK, LAW OF ADMIRALTY 429–30 (1957). In addition, under the terms of the certain pilotage contracts, the pilot taken on board may be deemed servant of the vessel. Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932).

[100] See West v. United States, 361 U.S. 118 (1959); Allen v. United States, 178 F. Supp. 21 (E.D. Pa. 1959). *But see* Smith v. United States, 346 F.2d 449 (4th Cir. 1965).

[101] See United States v. Ladd, 193 F.2d 929 (4th Cir. 1952).

[102] "In addition to collisions and cases of actual physical contact with another vessel or a shore structure, the following are examples of damage that may be caused by a naval vessel: (1) wave wash or swell damage, (2) damage to fish nets or traps, lobster pots, oyster beds or clam flats, (3) . . ., (4) . . ., (5) damage resulting from oil spills, paint spray, blowing tubes, (6)

tion [103] paint spray; [104] fire on board; [105] wave wash or swell damage;[106] damage to fish nets or traps, or damage to oyster beds;[107] and damage or loss of a vessel chartered to, or under the control of, the United States.[108]

Certain vessel damage claims attributable to some fault on the part of the Army are not within the scope of the statute. Where, for example, there is negligent operation of a port or terminal facility causing a vessel to go aground or sustain damage, [109] the damage claim would be outside the terms of the statute (though clearly the vessel owner is not remediless), [110] since the damage was not caused by an Army vessel. For the same reasons, damage claims, like the following, could not be settled under the statute: damage caused by the Army's failure to remove a wreck; [111] by

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damage to third parties resulting from fire or explosion on a naval vessel." U.S. DEP'T OF NAVY, JAG MANUAL, sec. 1201b (1961) (as changed, 5 Nov. 1965).

[103] See Oil Pollution Act, 1924, 43 Stat. 604 (1924), 33 U.S.C. §§ 431–37 (1964); Pollution of the Sea by Oil Act, 75 Stat. 402 (1961), 33 U.S.C. §§ 1001–15 (1964) ("ships for the time being used as naval auxiliaries" are exempt from the penal sanctions of the statutes, but may still have to answer in admiralty for damages); Stubbs, *Oil Pollution: Penalty and Damage Aspects*, 16 JAG J. 140 (1962).

[104] Motors Ins. Co. v. United States, 239 F. Supp. 121 (S.D.N.Y. 1965).

[105] See United States v. Standard Oil Co. of Ky., 217 F.2d 539 (6th Cir. 1954); Cardinale v. Union Oil Co. of Cal., 136 F. Supp. 487 (N.D. Cal. 1956).

[106] United States v. Ladd, 193 F.2d 929 (4th Cir. 1952); Neilson-Moran Marine Corp. v. United States, 239 F. Supp. 94 (E.D.S.C. 1965); Williamson v. The Carolina, 158 F. Supp. 417 (E.D.N.C. 1958).

[107] Beacon Oyster Co. v United States, 105 Ct. Cl. 227, 63 F. Supp. 761 (1946); Schroeder Besse Oyster Co. v. United States, 95 Ct. Cl. 729 (1942); Radel Oyster Co. v. United States, 78 Ct. Cl. 816 (1934). See 28 U.S.C. § 1497 (1964); Carr v. United States, 136 F. Supp. 527 (E.D. Va. 1955); Hahn v. United States, 218 F. Supp. 562 (E.D. Va. 1963).

[108] Oliver J. Olson & Co. v. United States, 108 Ct. Cl. 581, 71 F. Supp. 355 (1947); *cf.* C. F. Harms Co. v. Erie R. R. Co., 167 F.2d 562 (2d Cir. 1948). See The Roah Hook, 64 F. Supp. 288 (E.D.N.Y. 1945). Compare Eastern S. S. Lines v. United States, 187 F.2d 956 (1st Cir. 1951).

[109] See Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[110] He may sue or settle under the Suits in Admiralty Act, 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741–51 (1964). See Part VI *infra*.

[111] See Wreck Removal Act, 30 Stat. 1152, 1154 (1899), 33 U.S.C. §§ 409–414 (1964); United States v. Travis, 165 F.2d 546 (4th Cir. 1947) (non-government sunken vessel). Whether claims for damages arising from collision with unmarked sunken public vessel is "damage caused by a public vessel" is not clearly answered. The Supreme Court in the early life of the Public Vessels Act and Suits in Admiralty Act would have considered the vessel still a "public vessel" though sunken, or out of navigation. Eastern Transp. Co. v. United States, 272 U.S. 675 (1927); James Shewan & Sons v. United States, 266 U.S. 108 (1924). A more recent decision indicated that such an action could not be brought. See Somerset Seafood Co. v. United States, 193 F.2d 631, 634 (4th Cir. 1951) (dictum). *Accord:* Baltimore,

the negligence of Army shore personnel; [112] by a collision at sea with floating objects which are not Army vessels or parts thereof, nor put afloat negligently by an identifiable Army vessel; [113] or for damage to a non-military vessel due to negligent loading or unloading by Army stevedores.[114]

In addition, although the Act itself does not exclude damage claims arising from "combatant activities," [115] the Army and Air Force in their implementing regulations and manual provisions have determined such claims not cognizable under the Act. [116] The Navy regulations and manual provisions do not expressly make such an exclusion. [117] While the Army and Air Force exclusion from claims arising out of combatant activities cannot be derived from the Army and Air Force Maritime statutes, it is within the authority of the Secretary to decide that as a matter of policy, he or his designees will not settle such claims. The statute does not compel settlement, but leaves to the Secretary an informed discretion to settle or not to settle.

Since the "combatant activities" exclusion of the Federal Tort Claims Act has not been incorporated into either the Public Vessel Act or the Suits in Admiralty Act, claimants may *sue* for damages resulting from combatant activities. [118] Whether the United

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Crisfield & Onancock Line Inc. v. United States, 140 F.2d 230 (4th Cir. 1944). It was dictum in *Somerset*, as the vessel in question, though a public vessel in 1911 when it was sunk, had been "abandoned to" the United States as "administrator of" The Wreck Act. The wreck in question stood in the same position as any other wreck and the United States was held liable under the Federal Tort Claims Act for failure to mark it.

[112] See United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960); Moran v. United States, 102 F. Supp. 275 (D. Conn. 1951); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947).

[113] Otness v. United States, 178 F. Supp. 647 (D. Alaska 1959).

[114] *Cf.* United States v. The Bull S. S. Line, 274 F.2d 877 (2d Cir. 1960).

[115] Combatant activities "include not only physical violence, but activities both necessary to and in direct connection with actual hostilities. The Act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a 'combat activity,' but this fact does not make necessary a conclusion that all varied activities having an incidental relation to some activity directly connected with previously ended fighting in active war fronts must, under the terms of the Act, be regarded as and held to be a 'combatant activity' . . . ." Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948), construing 28 U.S.C. § 2680 (1964) of the Federal Tort Claims Act.

[116] See Army Reg. No. 27–26, para. 5*a* (20 May 1966). See also 32 C.F.R. § 842.65(a) (1966); U. S. DEP'T OF AIR FORCE, MANUAL No. 112–1D, para. 135a (1963).

[117] See 32 C.F.R. §§ 752.1–.3 (1962); U. S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF THE JUDGE ADVOCATE GENERAL 41–62 (1961).

[118] See 28 U.S.C. § 2680(d), (j) (1964).

States will be held accountable in such a case is not clear,[119] as a true "combatant activities" tort case has never been litigated. Of course, where the injured party has some contractual relationship with the United States contemplating recovery for injury or damage from combatant activities,[120] or where there exists an international agreement obligating the United States to respond for this kind of damage, liability would undoubtedly follow in a proper case. Otherwise, the law in this area is so uncertain that marine casualty investigating officers should be careful to develop the circumstances surrounding the marine incident so that a finding may be made that the damage was, or was not the result of combatant activities.

B. *CARGO DAMAGE CLAIMS*

Many cargo damage claims are not settled under the Army Maritime Claims statute because the damage occurred at the pier and "was not caused by an Army vessel." Others are not settled simply because the Army is not responsible under law. Where, for example, an Army vessel is itself a carrier of cargo for a priavte shipper,[121] the cargo owner or shipper has only limited grounds for recovery for damage to his cargo. While at one time a shipper could recover from the carrier vessel for such damage,[122] today recovery is denied except in a few instances. The statutes which effected this change, the Harter Act and the Carriage of Goods By Sea Act,[123] largely govern the extent to which a cargo damage

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[119] See Moran Towing & Transp. Co. v. United States, 80 F. Supp. 623 (S.D.N.Y. 1948) (dictum). See also Bradey v. United States, 151 F.2d 742 (2d Cir. 1945), *cert. denied*, 326 U.S. 795 (1946).

[120] See note 72 *supra*.

[121] See O. F. Nelson & Co. v. United States, 149 F.2d 692 (9th Cir. 1945).

[122] See The Atlas, 93 U.S. 302 (1876).

[123] The Harter Act, 27 Stat. 445 (1893), 46 U.S.C. §§ 190–96 (1964), and the Carriage of Goods by Sea Act (COGSA), 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300–15 (1964). The Harter Act was in great part supplanted by the Carriage of Goods by Sea Act, but Harter still applies to domestic carriage, *i.e.*, to bills of lading covering shipments by water from one port of the United States to another, and to the period, even in foreign trade during which the carrier has custody of the cargo, before it is loaded on the ship and after it is unloaded from the ship. See 27 Stat. 445 (1893), 46 U.S.C. §§ 190–91, 193 (1964). COGSA applies only in foreign trade, from the time when goods are loaded to the time when they are discharged from the ship. See 49 Stat. 1207–07 (1936), 46 U.S.C. §§ 1300–01 (1964). Under COGSA, the carrier is liable to the cargo owner where the cargo was damaged or lost because the carrier failed to exercise due diligence: to make the ship seaworthy, to properly man, equip and supply the ship and make the holds in which the cargo is to be carried, suitable for carriage or where he failed to properly load, handle, stow, care for, and discharge the cargo. See 49 Stat. 1208 (1936), 46 U.S.C. § 1303 (1964). The carrier is not responsible where the damage to or

claim may be settled under the Army statute.[124] However to the extent cargo on a non-military vessel is damaged or jettisoned [125] because of a collision caused by the fault of an Army vessel, the owner of the cargo has a claim which may be settled under the Act.[126] It is otherwise where cargo is jettisoned from the Army vessel to save the vessel and other cargo from peril for which the Army vessel is not responsible. In such a situation, the claim for general average is outside the statute, as it is not for damage "caused by" an Army vessel.[127] Where the cargo on a non-military vessel is damaged in a collision between the non-military and an Army vessel through their mutual fault, the owner of the cargo has a claim against the United States [128] which may be settled under the Act. However, the settlement of a cargo claim, as other claims (*e.g.*, personal injury), under these latter circumstances must be made with caution. There should be clear evidence that there was fault on the part of the Army vessel and that the settlement was a reasonable one.[129] Should the non-military carrier ves-

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loss of cargo result from, *inter alia*, fault of the master or crew in the navigation or management of the ship, perils of the sea, an act of God, an act of the shipper and any other cause arising without the actual fault and privity of the carrier. Both COGSA and the Harter Act apply to carriage from or to United States in foreign trade. See 49 Stat. 1212 (1936), 46 U.S.C. § 1312 (1964); Alaska Native Indus. Co-op. Ass'n v. United States, 206 F. Supp. 767 (W.D. Wash. 1962).

[124] *But see* Dep't of Defense Directive No. 5160.10, sec. VIII E 12 (28 May 1956), discussed in note 225 *infra*.

[125] General average contribution made with the non-military-carrying vessel may be recovered by the cargo owner against the Army vessel at fault. See Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394 (1935). The right to general average, "resting not merely on implied contract between parties to the common adventure, but rather in the established law of the sea" (Ralli v. Troop, 157 U.S. 386 (1895)), is based on the principle that what is given for the general benefit of all shall be made good by the contribution of all. Burnard v. Adams, 51 U.S. (10 How.) 270 (1850). See also Exec. Order No. 10614, 20 Fed. Reg. 3699 (1955), which authorized the reimbursement of military and certain civilian employees of the government where in the shipment of household goods, they were liable for general average.

[126] See The Beaconsfield, 158 U.S. 303 (1895); The Atlas, 93 U.S. 302 (1876).

[127] See The Irrawaddy, 171 U.S. 187 (1898); *cf.* The Jason, 225 U.S. 32 (1912).

[128] United States v. Atlantic Mut. Ins. Co., 343 U.S. 236 (1952); Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394 (1935); Canada Malting Co. v. Paterson S. S., Ltd, 285 U.S. 413 (1932); The Ira M. Hedges, 218 U.S. 264 (1910); Erie R. R. Co. v. Erie & W. Transp. Co., 204 U.S. 220 (1907); The Chattahoochee, 173 U.S. 540 (1899); The New York, 175 U.S. 187 (1899); The Juniata, 93 U.S. 337 (1876).

sel and the United States litigate their liability (or for that matter settle it and it be found (or stipulated) that the collision occurred through the mutual fault of both vessels, in the equation of damages for purposes of the application of the "divided damages" rule,[130] the United States must prove that the "damages" of the settlement were necessarily incurred. The United States must assume the anomalous role of proving that it was in fact liable to the cargo owner, and that its settlement was a reasonable one.

C. *PERSONAL INJURY, WRONGFUL DEATH, SURVIVAL CLAIMS*

Claims for personal injury and wrongful death "caused by" an Army vessel are also within the Army statute.[131] Before the Ad-

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[129] The Hattie M. Spraker, 29 Fed. 457 (S.D.N.Y. 1886). There is a dearth of authority on the effect of a settlement by the shipowner of one vessel with a claimant for purposes of recovery over from a tortfeasor in contribution under the divided damages rule. In Erie R. R. Co. v. Erie & W. Transp. Co., 204 U.S. 220 (1907) (Holmes, J.), the Court held that the rule of divided damages was an exception to the common law rule of no contribution among tortfeasors, and that the non-carrier vessel, forced to pay cargo damage inflicted on the carrier vessel, could recover one-half of the cargo damage (paid to the shipper) from the carrier by the application of the divided damages rule. See The Ira M. Hedges, 2118 U.S. 264 (1910). This liability arises "not as *res judicata* but as one of the consequences of a joint tort from which it could not escape, and which its fellow wrongdoer was bound to contemplate." The Ira M. Hedges, *supra* at 277.

Where liability is clear and a reasonable settlement of a cargo claim ensues under these circumstances, the United States should be able to plead the settlement as part of the damages it sustained "as one of the consequences of a joint tort from which it could not escape." Analogously, where a stevedore injured on the S. S. Fairland concluded a settlement with the owners of the vessel for $7,000 (who advised the stevedore company of the settlement), the owners were allowed to recover against the stevedore company the $7,000 under an indemnity contract. The court held the shipowners showed "a potential liability" to the stevedore, fault upon the stevedore company and that the settlement was reasonable. California Stevedore & Balast Co. v. Pan-Atlantic S. S. Corp., 291 F.2d 252 (9th Cir. 1961). See also Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *affirmed sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet, 274 F.2d 875 (9th Cir. 1960); Lilleberg v. Pacific Far East Line, Inc., 167 F. Supp. 3 (N.D. Cal. 1958).

[130] Even though the cargo owner could not recover from his carrier on collisions due to negligence in the navigation of the vessel, his carrier will ultimately pay one-half of these damages by the application of the divided damages rule. Thus, in a collision between carrier A and non-carrier B, where each suffer hull damage of $7,000, and cargo owner recovers $1,000 for cargo damage from B—by the application of the divided damages rule, B may recover $500 from A. See The Chattahoochee, 173 U.S. 540 (1899).

[131] American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

miralty Jurisdiction Extension Act,[132] whether a tort was within the admiralty jurisdiction of the United States depended upon the maritime character (vessel or navigable waters) of the locality where the consummation of the injury occurred.[133] Thus, personal injuries sustained on land caused by a Navy vessel being unloaded *would not have been a tort of admiralty cognizance, although it* would have been within the Navy statutes.[134] On the other hand, personal injuries sustained by shipboard visitors, passengers and seamen on board would have been a maritime tort cognizable in admiralty.By virtue of the 1948 Extension Act, claims for personal injuries caused by a vessel on navigable waters, even if consummated on land, now lie in admiralty. It is significant, however, whether a personal injury claim is maritime or not, since maritime torts are governed by general maritime principles as modified by Congress,[135] not common law principles. For example, at common law contributory negligence is generally a bar to recovery, whereas, under maritime principles, it has the effect of reducing recovery.[136]

Among the claims within the scope of the Army statute are claims for personal injury to shipboard visitors,[137] business invitees,[138] passengers,[139] and other persons lawfully on board who are injured through the fault or negligence of the Army vessel.[140]

Seamen and longshoremen have additional remedies. Before the Jones Act, seamen could not recover from the shipowner for neg-

[132] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damages or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964). See notes 35, 96, *supra.*

[133] The Plymouth, 70 U.S. (3 Wall.) 20 (1866); Johnson v. Chicago & Pac. Elevator Co., 119 U.S. 388 (1886). See Admiral Peoples, 295 U.S. 649 (1935).

[134] See notes 35, 36, *supra* and accompanying text.

[135] See Chelentis v. Luckenbach S. S. Co., 247 U.S. 372 (1918); The Lafayette, 269 Fed. 917 (2d Cir. 1920); New York & Long Branch Steamboat Co. v. Johnson, 195 Fed. 740 (3d Cir. 1912). See also Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); Yarrut, *Conflict in State-Federal Jurisdiction Maritime Matters*, 20 FED. B. J. 202 (1960).

[136] The Max Morris, 137 U.S. 1 (1890).

[137] See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 *(1959); Thornton, Shipboard Accidents, 16 JAG J. 97 (1962).*

[138] The Max Morris, 137 U.S. 1 (1890); Leathers v. Blessing, 105 U.S. 626 (1882); Roeper v. United States, 85 F. Supp. 864 (E.D.N.Y. 1949).

[139] The Steamboat New World v. King, 57 U.S. (16 How.) 469 (1853); Admiral Peoples, 295 U.S. 649 (1935).

[140] This includes cases where persons on the non-military vessel are injured by collision with the Army vessel. See New York & Long Branch Steamboat Co. v. Johnson, 195 Fed. 740 (3d Cir. 1912).

ligence on the part of the crew or master.[141] Under the Jones Act,[142] however, there is a right of action for damages for the personal injury and death of a seaman where it occurs in the course of his employment through the negligence of his employer.[143] In addition, the seaman has the right to maintenance and cure[144] and an action for damages against the vessel owner for injuries caused by the unseaworthiness of the vessel.[145]

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[141] The Osceola, 189 U.S. 158 (1903).

[142] 38 Stat. 1185 (1915), as amended, 46 U.S.C. § 688 (1964). The Act incorporates parts of the Federal Employees' Liability Act, 35 Stat. 65 (1908), as amended, 45 Stat. §§ 51–60 (1964). Status as "member of crew" is essential to applicability of act. Swanson v. Marra Bros. Inc., 328 U.S. 1 (1946).

[143] Even when the injuries occur on shore (Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1959); Senko v. Lacrosse Dredging Corp., 352 U.S. 370 (1957); O'Donnell v. Great Lakes Dredging & Dock Co., 318 U.S. 36 (1943)); and even where he was performing non-seamen duties in the course of his employment. Braen v. Pfeifer Oil Transp. Co., *supra*.

[144] Maintenance and cure is an obligation imposed by the general maritime law upon the shipowner and the vessel, independent of fault, and arising out of the employment relationship. This obligation begins when the seaman signs his articles (which is in substance a contract of employment) and lasts until he is discharged. By virtue of this right to maintenance and cure, a seaman who falls ill or is injured without gross or willful misconduct on his part is entitled to (1) wages to the end of the period for which he was hired; (2) food and lodging (maintenance); and (3) proper care including nursing and medical treatment, until the point of maximum cure is attained (cure)—even if that point extends beyond the term of employment set forth in the articles. The right is not limited to injury or illness "arising out of" or causally related to his duties but seems to encompass all types of injuries and illnesses common to seamen abroad and consistent with their "predisposition ashore." Calmar S. S. Corp. v. Taylor, 303 U.S. 525 (1938); Aguilar v. Standard Oil, 318 U.S. 724 (1943); Warren v. United States, 340 U.S. 523 (1951); Farrell v. United States, 336 U.S. 511 (1949).

[145] The shipowner is liable for unseaworthiness (see also notes 79, 80, *supra*), regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended, and this liability extends to seamen, longshoremen, and others who work aboard the vessel, "in the ship's service." Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S. S. Co., 321 U.S. 96 (1944); Morales v. City of Galveston, 370 U.S. 165 (1962). This warranty apparently extends to painters, cleaners, carpenters, and others working "in ship's service" (see Annot., 2 L. Ed. 2d 1764 (1959); *but see* United N. Y. & N. J. S. H. Pilots Ass'n v. Halecki, 358 U.S. 613 (1959)), as long as the vessel is not out of navigation and in control of shipowner or charter. Roper v. United States, 368 U.S. 20 (1961); Wester v. United States, 361 U.S. 118 (1959). See also The Osceola, 189 U.S. 158 (1903).

There is a distinction between unseaworthiness and negligence, and though in a given case a negligent act may render the vessel unseaworthy by creating a dangerous or unseaworthy condition, the distinct nature of the remedies require that they not be merged beyond recognition. Mitchell v. Trawler Racer, 362 U.S. 539 (1960); Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960). See Thompson v. Calmar S. S. Corp., 331 F.2d 657, 663 (3d Cir. 1964) (Hastie, J., dissenting from a denial of a petition for rehearing).

A longshoreman also has three remedies. He may recover from his employer compensation for injury and death either under state workmen's compensation laws,[146] or under the federal Longshoremen's and Harbor Workers' Compensation Act,[147] when only one is clearly applicable.[148] However, where the Longshoremen's Act encompasses an injury, recovery may be made under that Act even where the injury is also within the constitutional reach of a state workmen's compensation law.[149] In addition, the longshoreman may recover from the vessel owner for injuries sustained through the negligence of its agents, crew or master under general maritime law principles; [150] or he may recover for injuries incurred because of the unseaworthiness of the vessel,[151] but he is not entitled to maintenance and cure.[152]

As at common law, there was no action under general maritime law for wrongful death.[153] However, today wrongful deaths caused by "wrongful act, neglect or default occurring on the high seas beyond a marine league" from shore, are actionable in admiralty.[154] Within a marine league (state waters), state wrongful death statutes will be enforced in admiralty.[155]

If the state statute encompasses recovery for death due to unseaworthiness, a wrongful death action will lie in admiralty on that ground.[156] The federal Act also reaches such an action based

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[146] Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); *cf.* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[147] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–50 (1964). Section 3 of the Act provides: "(a) Compensation shall be under this chapter in respect of disability and death of an employee, but only if the disability or death results from any injury occurring upon navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ." 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1964).

[148] This is to say, when the case does not lie in "a twilight zone" where the applicability of state law is extremely difficult to determine, a presumption arises in favor of the claimant's choice of remedy. Davis v. Department of Labor & Industries of Wash., 317 U.S. 249 (1942). See GILMORE & BLACK, LAW OF ADMIRALTY 344–53 (1957).

[149] Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).

[150] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Leathers v. Blessing, 105 U.S. 626 (1882); The Max Morris, 137 U.S. 1 (1890).

[151] See note 145 *supra;* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Morales v. City of Galveston, 370 U.S. 165 (1962).

[152] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[153] See The Harrisburg, 119 U.S. 199 (1886).

[154] See Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 761–68 (1964).

[155] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[156] The Tungus v. Skovgaard, 358 U.S. 588 (1959).

on unseaworthiness.[157] Seamen are treated differently. Actions based on the wrongful death of seamen within state waters may be brought only under the Jones Act and not state wrongful death acts,[158] and as the Jones Act is the exclusive remedy within state waters, the action may be based only on negligence, not unseaworthiness.[159] Presumably, where the death of the seaman is caused through negligence, under circumstances bringing the claims within the Death on the High Seas Act and the Jones Act, both would apply.[160]

Under general maritime law, actions for personal injury, whether based on negligence or unseaworthiness, do not survive the death of the injured party.[161] Where a state survival statute exists and the injury occurs in state waters, the action will survive if the state statute encompasses negligence and/or unseaworthiness.[162] However the Jones Act injury claim does survive[163] as does to some extent a claim for maintenance and cure.[164] Under the Death on the High Seas Act there is no provision for survival actions,[165] and it may be argued that Congress in enacting it, pre-empted the application of state survival statutes as well. However, the more desirable view is that the Death on the High

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[157] Chermesino v. Vessel Judith Lee Rose, Inc., 211 F. Supp. 36 (D. Mass. 1962), *affirmed*, 317 F.2d 927 (1st Cir. 1963). See *Skovgaard*, where the Third Circuit determined that the language of the New Jersey Wrongful Death Statute (the same as in the federal statute), encompassed an action based on unseaworthiness. Skovgaard v. The Tungus, 252 F.2d 14 (3d Cir. 1957), *affirmed*, 358 U.S. 588 (1959).

[158] Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Lindgren v. United States, 281 U.S. 38 (1930).

[159] *Ibid.*

[160] See Civil v. Waterman S. S. Corp., 217 F.2d 94 (2d Cir. 1954); The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947). See GILMORE & BLACK, LAW OF ADMIRALTY 301–08 (1957). However, it seems more desirable that the Jones Act, where it applies, should be regarded as the exclusive remedy for the wrongful death of seamen due to negligence. See Gillespie v. United States, 379 U.S. 148 (1964); *contra*, Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958) (dictum). Where, however, the death of a seaman occurs on the high seas because of unseaworthiness (to which the Death on the High Seas Act would apply), the seaman's representative should have an action under that act. See note 157 *supra*. As the beneficiaries under these acts are not in the same priority, it may be necessary to determine whether the cause of the death was unseaworthiness or negligence or both.

[161] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932).

[162] Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

[163] *Ibid.*

[164] See Sperbeck v. A. L. Burbank & Co., 190 F.2d 449 (2d Cir. 1951); Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958) (dictum).

[165] 41 Stat. 537 (1920), 46 U.S.C. § 761–68 (1964).

Seas Act is purely a wrongful death statute, and state survival statutes may be extended into the high seas.[166]

This examination of the remedies available to persons injured by an Army vessel is circumscribed by the fact that those rights and remedies are not available to military personnel injured incident to their service,[167] or to persons entitled to compensation under the Federal Employees' Compensation Act.[168] Thus whether a personal injury or wrongful death claim may be settled under the Army statute will depend upon: (1) whether the claim is within the scope of the admiralty remedies above discussed; (2) whether the claimant is an eligible claimant, *e.g.*, not a member of the military injured incident to his service; and (3) whether the claim for damages is against the United States, within the scope of the Army statute, and caused by an Army vessel.

Two particular problems are worthy of mention. In claims arising out of unseaworthiness, the unseaworthy condition is often "caused" by a third party. However, the vessel owner will still be liable for breaching his warranty of seaworthiness to the injured party.[169] Notwithstanding the "cause" of the condition, the failure of the Army to present a seaworthy vessel should be enough to bring the claim within the statutes as "caused by" an Army vessel.[170] If the Army actually did not bring about the unseaworthy condition, it will no doubt have a remedy against the negligent or defaulting third party.[171]

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[166] See The Hamilton, 207 U.S. 398 (1907); Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959).

[167] See Feres v. United States, 340 U.S. 135 (1950). The doctrine was applied in Johansen v. United States, 343 U.S. 427 (1952); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928). See also Army Reg. No. 27-26, para. 5*b* (20 May 1966).

[168] 39 Stat. 742 (1916), as amended, 5 U.S.C. §§ 751-56, 757-81, 783-91, 793 (1964). See Johansen v. United States, 343 U.S. 427 (1952); Army Reg. No. 27-26, para. 5*c* (1966). See also Patterson v. United States, 359 U.S. 495 (1959).

[169] See Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Alaska S. S. Co. v. Petterson, 347 U.S. 396 (1954) (Burton, J., dissenting); Grillea v. United States, 232 F.2d 919 (2d Cir. 1956). See note 145 *supra.*

[170] Shenker v. United States, 322 F.2d 622 (2d Cir. 1963); Pedersen v. United States, 224 F.2d 212 (2d Cir. 1955).

[171] See Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Waterman S. S. Co. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. Joachim Hendrick Fisser, 358 U.S. 423 (1959); Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124 (1956); American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947). See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd, 369 U.S. 355 (1962).

Claims for maintenance and cure may arise from injuries sustained on shore and in no way caused by the Army vessel or its personnel.[172] Such a claim would appear outside the Army statute unless the injury or disease giving rise to the claim could be attributed somehow to the vessel or its personnel.[173]

D. *COMPENSATION FOR TOWAGE AND SALVAGE SERVICES*

The Army Maritime Claims statute, like the Public Vessels Act, reaches specifically only two kinds of contract claims against the United States: "compensation for towage and salvage services, including contract salvage, rendered to a vessel of, or in the service of, the Department of the Army."[174] As the statute speaks of "service rendered," the claim against the United States must be based on performance, or at least partial performance, by the non-military claimant to fall within section 4802(a)(2). Thus a claim against the United States for nonperformance by the Army of a contract for salvage and towage would be outside the statute—unless the failure to perform by an identifiable Army vessel caused damage thus bringing the claim within section 4802(a)(1).

Salvage is the compensation allowed to persons, by whose voluntary assistance, a vessel or cargo at sea have been saved from actual peril or loss.[175] A salvage award traditionally requires the presence of the following elements:[176] (1) the presence of peril or distress, not caused by the salvor;[177] (2) the voluntari-

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[172] See note 144 *supra*.

[173] *Cf.* United States v. Loyola, 161 F.2d 126 (9th Cir. 1947).

[174] 10 U.S.C. § 4802(a)(2) (1964).

[175] The Blackwall, 77 U.S. (10 Wall.) 1 (1870); The Sabine, 101 U.S. 384 (1880); The Steamship Jefferson, 215 U.S. 130 (1909); The Clarita, 90 U.S. (23 Wall.) 1 (1875). Until 1912, salvors of human life were entitled to no compensation, but now by statute such salvors are entitled to compensation where the ship or cargo were also saved from the same peril. 37 Stat. 242 (1912), 46 U.S.C. § 729 (1964).

[176] The Clarita, 90 U.S. (23 Wall.) 1 (1875); The Sabine, 101 U.S. 384 (1880).

[177] The peril need not arise from the sea in the strict acceptance of these words (The Steamship Jefferson, 215 U.S. 130 (1909)), but may arise elsewhere and threaten the vessel and its cargo, as, for example, from fire communicated from the shore (The Steamship Jefferson, 215 U.S. 130 (1909)); from fire caused on the vessel itself (The Blackwall, 77 U.S. (10 Wall.) 1 (1870)); from capture by pirates or the enemy (Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)); or from the incompetence of the master (The Pendragon Castle, 5 F.2d 56 (2d Cir. 1924)).

ness of the salvor's act;[178] and (3) the success in saving the property.[179] For this kind of salvage, "pure salvage," compensation is dependent upon success, and the amount to be received is determined either by agreement between the salvors and the owner(s) of the salvaged property, or by the court who makes a salvage award.[180] Among those entitled to share in salvage compensation are the vessel owner, and master and crew;[181] and the salving vessel owner may not contract away by settlement the crew's right to salvage compensation.[182] Contract salvage is that type of salvage service undertaken pursuant to a contract between the salvors and the owners of the imperiled property, fixing a compensation which may or may not be dependent upon success.[183] When such a contract is concluded, compensation will generally be governed by the terms of the contract, though in cases of contracts made *in extremis*, the court will closely examine the compensation terms for over-reaching by the salving party.[184]

The Army statute speaks of salvage service (including contract salvage) rendered to an Army vessel, and some have interpreted

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[178] Generally, seamen and masters cannot be salvors of their own vessel since they have a duty to rescue it from peril. The Hope, 35 U.S. (10 Pet.) 108 (1836). However, despite a statutory duty of a master of a vessel to give assistance to persons found at sea in danger of being lost, the master may be entitled to salvage. 37 Stat. 242 (1912), 46 U.S.C. § 728 (1964); GILMORE & BLACK, LAW OF ADMIRALTY 451 (1957). See The Shreveport, 42 F.2d 524 (E.D.S.C. 1930).

[179] The Sabine, 101 U.S. 384 (1880); The Blackwall, 77 U.S. (10 Wall.) 1 (1870).

[180] See NORRIS, THE LAW OF SALVAGE § 159 (1958). In fixing the amount of the salvage award, the following factors have been considered: (1) the labor expended by the salvors in rendering the salvage service; (2) the promptness, skill, and energy displayed; (3) the value of the property and the danger to which such property was exposed; (4) the risk incurred by the salvors; (5) the value of the property saved; (6) the degree of danger from which the property was rescued; and (7) the damage or loss to the salving vessel. The Blackwall, 77 U.S. (10 Wall.) 1 (1870).

[181] The Blackwall, 7 U.S. (10 Wall.) 1 (1870), The Shreveport, 42 F.2d 524 (E.D.S.C. 1930), The Olockson, 281 Fed. 690 (5th Cir. 1922). See Petition of United States, 229 F. Supp. 241 (D. Ore. 1963); Greene v. United States, 106 F. Supp. 682 (S.D.N.Y. 1952); Burke v. United States, 96 F. Supp. 335 (S.D.N.Y. 1951).

[182] REV. STAT. § 4535 (1875), 46 U.S.C. § 600 (1964).

[183] See The Elfrida, 172 U.S. 186 (1898); The Camanche, 75 U.S. (8 Wall.) 448 (1869). The government often enters into contracts with private salvors on a no cure, no pay basis. See U.S. DEP'T OF AIR FORCE, MANUAL No. 112-1, para. 134b(2)(d) (1963).

[184] The Elfrida, 172 U.S. 186 (1898); The Torado, 109 U.S. 110 (1883); GILMORE & BLACK, LAW OF ADMIRALTY 476-77 (1957).

this to exclude compensation for salvage of government cargo.[185] Although the issue does not seem to have been raised in decisions under the Public Vessels Act (or colorably within its terms),[186] this restrictive construction, if valid at all, should not reach situations where the cargo salvaged was actually aboard the (salved) vessel within the Army statute. However, the more practicable and advantageous view should be that the salvage of cargo of an Army vessel, wherever it is found (in sea, on the vessel, beneath the sea), is salvage service to an Army vessel, as bailee of its cargo.[187]

Though not always distinguishable in fact, towage is distinguishable in law from salvage by the absence of peril.[188] It is the employment of one vessel to expedite the voyage of another by supplying power to draw or pull it.[189] Towage is rendered either pursuant to a formal contract of towage[190] or under an informal agreement, where, for example, a vessel comes upon or is called to aid another vessel in need of towage.[191] Compensation for towage services rendered to an Army vessel will be determined according to the terms of the contract, if a formal contract was executed, and the compensation agreement was not unconscionable.[192] Where towing vessels qualify as common carriers under rate regulatory legislation, rates may be fixed by law and incorporated into the contract. However these regu-

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[185] See U.S. DEP'T OF ARMY, PAMPHLET 27–162, CLAIMS 182 (1962); U.S. DEP'T OF AIR FORCE, MANUAL 112–1, para. 134(b)(2)(a) (1963).

[186] See Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2d Cir. 1965); Greene v. United States, 106 F. Supp. 682 (S.D.N.Y. 1952). See also Atlantic Transport Co. v. United States, 70 Ct. Cl. 33, 42 F.2d 583 (1930). *Cf.* Huasteca Petroleum Co. v. United States, 27 F.2d 734 (2d Cir. 1928); Kimes v. United States, 207 F.2d 60 (2d Cir. 1953); Baretich v. United States, 97 F. Supp. 600 (S.D.N.Y. 1951); 30 Stat. 1154 (1899), 33 U.S.C. §§ 414, 415 (1964).

[187] See The Beaconsfield, 158 U.S. 303 (1895); The Chattahoochee, 173 U.S. 540 (1899).

[188] Waterman S. S. Co. v. Shipowners & Merchants Towboat Co., 199 F.2d 600 (9th Cir. 1952); La Rue v. United Fruit Co., 181 F.2d 895 (4th Cir. 1950).

[189] Stevens v. The Vessel White City, 285 U.S. 195 (1932); Sacramento Navigation Co. v. Salz, 273 U.S. 326 (1927).

[190] See Washington *ex rel.* Stimson Lumber Co. v. Kuykendall, 275 U.S. 207 (1927); The Transmarine Barge No. 100, 62 F.2d 252 (2d Cir. 1932).

[191] See Sun Oil Co. v. Dalzell Towing Co., 55 F.2d 63 (2d Cir.), *affirmed*, 287 U.S. 291 (1932); Sause v. United States, 107 F. Supp. 489 (D. Ore. 1952); The Atkins Hughes, 114 Fed 410 (E.D. Pa. 1902).

[192] Dilkes v. Jansen, 263 Fed. 44 (4th Cir. 1919); The Sophia Hanson, 16 Fed. 144 (E.D.N.Y. 1883).

latory rates are probably not binding on the United States.[193] Other vessels (non-common carriers), private and non-regulated, are usually not restricted to certain rates, but because of the superior bargaining position of the towing vessel, excessive rates may be invalidated.[194]

Even though the regulated rates are probably not applicable to Army vessels contracting for towage, the rates themselves may represent a standard of reasonable and customary compensation for towage services, which may be increased according to the difficulty and extra services involved in the towing.[195] The facts surrounding the service may even qualify it as a low grade of salvage.

Towage contracts should also be distinguished from contracts of affreightment which is a contract essentially for the transport of goods even if it involves some towage.[196] Compensation for services rendered under such a contract is outside the scope of the Army statute, although if cargo is damaged under such a contract, the damage claim is within the statute.[197]

A pilotage contract is one for the safe conduct of ships and vessels in and out of harbors, or up and down navigable waters,[198] and a claim for pilotage, as such, where no towage is involved, is not within the act. Often a towage contract involves pilotage, and a pilotage clause is inserted in the contract.[199] As the pilot service is designed to expedite the towage service and insure

[193] State regulated rates for towage services (Washington *ex rel.* Stimson Lumber Co. v. Kuykendall, 275 U.S. 207 (1927)) are probably not binding on the Army vessel. Mayo v. United States, 319 U.S. 441 (1943). See Paul v. United States, 371 U.S. 245 (1963). Federal law may fix rates for towage services performed by common carriers in interstate commerce under the Interstate Commerce Act (54 Stat. 929, 931 (1940), 49 U.S.C. §§ 902(c), (d), 903(f)(1), (2)). Cornell Steamboat Co. v. United States, 321 U.S. 634 (1944); Southwestern Sugar & Molasses Co. v. River Term. Corp., 360 U.S. 411 (1959). However, those rates are not binding on the Army vessel. 24 Stat. 387 (1887), as amended, 49 U.S.C. § 22 (1964).

[194] Dilkes v. Jansen, 263 Fed. 44 (4th Cir 1919); The Sophia Hanson, 16 Fed. 144 (E.D.N.Y. 1883).

[195] See Curtis Bay Towing Co. of Pa. v. Luckenbach S. S. Co., 54 F. Supp. 988 (E.D. Pa. 1943), *affirmed*, 142 F.2d 257 (3d Cir. 1944). See also The Viola, 52 Fed. 172 (E.D. Pa. 1892), where the court indicated that in determining the compensation for a towage service the following factors may be considered: the value of the towing vessel and the cargo; the risk incurred; the fact that the vessel was not intended to be adapted for towing service; the chance of endangering the towing vessel's insurance; the time spent in deviating from her course; and the relative danger involved.

[196] Sacramento Navigation Co. v. Salz, 273 U.S. 326 (1927).

[197] See Part IV.B. *supra.*

[198] BENEDICT, ADMIRALTY § 99 (6th ed. Knauth 1940).

[199] Sun Oil Company v. Dalzell Towing Co., 287 U.S. 291 (1932).

its success, a claim against the United States under such a contract should be within the statute.[200]

The Ninth Circuit's view notwithstanding,[201] other contract claims against the United States should not be considered within the scope of the statute. Where, however, there is damage "caused by" an Army vessel in the negligent performance of the contract, as in the case of damage to a towed vessel under a contract for towage, the designation of the claim as contractural, rather than tortious,[202] should not in itself defeat the Secretary's authority to settle it under the statute.

In the administration of contract towage or salvage claims, an apparent conflict of remedies exists for the contractor, whether he should pursue his remedy under the contract or his settlement "remedy" under the Army statute. The rule of government contract law that the contractor exhaust his administrative remedies [203] requires that the contractor pursue his remedy under the contract. This remedy is set forth in the "Disputes Clause" of the contract which provides that the contracting officer decides "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement." [204] The pursuit of this remedy by the contractor, wherever it may take him,[205] does not curtail or nullify the independent statutory authority of the Secretary of the Army to settle with finality a claim under the Army statute—whether it be viewed as a dispute arising under the contract, or a claim for breach of contract.[206] The language of the clause, "which is not disposed of by agreement," contemplates settlement as a course of terminating the dispute.[207] Thus, it appears that the contractor must pursue his contract

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[200] See U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF OFFICE OF THE JUDGE ADVOCATE GENERAL 58–59 (1961).

[201] See note 20 *supra*.

[202] *Compare* Blanchard v. St. Paul Fire & Marine Ins. Co., 341 F.2d 351 (5th Cir. 1965), *and* Aleutco Corp. v. United States, 244 F. 2d 674 (3d Cir. 1957), *with* Atlantic Carriers, Inc. v. United States, 131 F. Supp. 1 (S.D.N.Y. 1955), *and* American President Lines, Ltd, 208 F. Supp. 573 (N.D. Cal. 1961).

[203] See United States v. Joseph A. Holpuch Co., 328 U.S. 234 (1946).

[204] See, *e.g.*, Armed Services Procurement Reg. § 7–103.12 (1 April 1966), 41 C.F.R. § 1–16.901–32, cl. 12 (1965); Moran Towing & Transp. Co. v. United States, 192 F. Supp. 855 (S.D.N.Y. 1960).

[205] See Speidel, *Exhaustion of Administrative Remedies in Government Contracts*, 38 N.Y.U.L. REV. 621 (1963).

[206] See Utah Constr. & Mining Co. v. United States, 168 Ct. Cl. 522, 339 F.2d 606 (1964), *rev'd in part*, 34 U.S.L. WEEK 4440 (U.S. 6 June 1966).

[207] However, Spiedel views "the agreement" contemplated by the clause as an agreement with the contracting officer. Speidel, *supra* note 205, at 623. *But cf* Army Reg. No. 55–19, para 29*a* (3 Aug 1965).

remedy to protect his right to suit, in the event settlement with the Secretary of the Army is not concluded.

An apparent conflict of authority to settle claims also appears in section 71, Title 31, of the Code which provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.[208]

The Comptroller General regards this statute as vesting in him and the General Accounting Office authority "to settle and adjust all claims and demands, whether liquidated or unliquidated, of the United States or against it, except where it has been specifically provided otherwise by statute with reference to a particular claim or class of claims." [209] A strong argument has been been made that executive departments have implied authority, in the administration of contracts they are empowered to make, to settle claims arising thereunder.[210] This has been rejected in practice,[211] and the Comptroller General continues to assert his authority to settle such claims even though he has no adjudicative machinery to hold hearings and take evidence to determine unliquidated claims.[212]

In the case of Military Sea Transportation Service (MSTS) contracts,[213] however, the Comptroller General has left for administrative disposition the settlement of claims arising under such contracts, except where the legal questions involved have not been resolved by him or conclusively settled by the courts.[214] The decisions delegating this restricted authority to the Military Sea Transportation Service seem in their factual context to have dealt with claims which could not be settled with finality under he Navy Maritime Claims statutes. Where, however, a statute like the Army Maritime Claims statute gives specific authority to an executive department to settle specific claims, the Comptroller General may not interdict himself to set aside or interfere with the settlement under section 71 of Title 31 of the U.S.

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[208] REV STAT. § 236 (1875), as amended, 31 U.S.C. § 71 (1964).

[209] 4 COMP. GEN. 404, 405 (1924).

[210] Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959).

[211] Speidel, *supra* note 205, at 647. This refers to a non-cognizable dispute under the "disputes clause."

[212] See Ms. Comp Gen. B–141586, 23 Mar. 62.

[213] See U.S. DEPT OF NAVY, CONTRACT LAW § 1.26–1.32 (1959); Dep't of Defense Directive No. 5160.10, sec. VIII E 12 (28 May 1956).

[214] See 34 COMP GEN. 676 (1955); 36 COMP GEN. 745 (1957).

Code. His authority under section 71 in such cases is post-auditing at most.[215]

It therefore appears that whatever remedies the claimant may have under a contract for towage or salvage service, they do not affect the authority of the Secretary of the Army to settle the claim under the Army Maritime Claims statute. Failure of settlement, however, may deprive the claimant of suit on the claim, if he has not exhausted his remedies under the contract. As between the authority of the Comptroller General and the Secretary of the Army, the Secretary may settle without interference from the Comptroller General, although, should settlement negotiations fail, the Comptroller General might ultimately confront the contractor in his pursuit of the administrative remedy under the contract.

V. CLAIMS IN FAVOR OF THE UNITED STATES

Claims in favor of and against the United States are not treated equally under the statute. Damage claims against the United States are within the Army statute if there is "damage caused" by an Army vessel.[216] Claims in favor of the United States are within the Army statute, if they are claims for damage to property within the admiralty jurisdiction of the district courts or for damage caused by a vessel or floating object.[217] This "damage to property" condition precedent to an affirmative government claim under section 4803(a)(1)(A) excludes claims for damages sustained for nonperformance of a contract where there is no attendant destruction of, or damage to, property, unless it could be said to have been caused by a vessel or floating object. Thus, a claim for compensation for towage services rendered is not "property damage" within admiralty jurisdiction under section 4803(a)(1)(A) or "damage caused by a vessel" and, unlike a towage service claim against the United States under section 4802(a)(2), there is no statutory provision for the settlement of towage claims in favor of the United States. The Army Regulation 27–26 omits reference to "damage to property," so that a reading of the regulation erroneously suggests that all claims in favor of the United States arising from Army maritime activities and within the admiralty jurisdiction of the district courts may be settled under the Act. [218]

[215] See 4 COMP GEN. 404, 405 (1924). See also Globe Indemnity Co. v. United States, 291 U.S. 476 (1934).
[216] See 10 U.S.C. § 4802(a) (1964).
[217] See 10 U.S.C. § 4803(a) (1964).
[218] Army Reg. No. 27-26, para. 10 (20 May 1966).

In its context and strictly construed however, the statute covers only claims of physical damage to tangible property. Thus neither "quasi-subrogated" personal injury claims,[219] contract compensation claims not in the nature of "damage to property" nor indemnity claims against third parties[220] are within the statute. The statute does reach admiralty claims arising from damage inflicted by stevedoring companies,[221] wharf[222] and shore personnel and general average claims[223] which conversely could not be reached under section 4802, if the claim were against the United States. While the statute was probably intended as a tort settlement statute,[224] as a matter of statutory construction, vessel and cargo damage claims, even if arising out of a contract, are within the Army statute.[225] Instances may arise, however, where a private claimant may have a claim which the Secretary may not settle under the statute, but which the government can set off with a claim of its own arising out of the same transaction, and within the authority of the Secretary to settle under the statute.[226] Where the Secretary is unable to settle the whole transaction, a desirable policy in such cases would be to refer the claim to an agency which is empowered to settle the entire

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[219] The United States may recover from third party tortfeasors the reasonable value of the care and treatment furnished to employees or persons in military service. 76 Stat. 593 (1962), 42 U.S.C. §§ 2651–53 (1964).

[220]. See note 228 *supra* and accompanying text.

[221] See United States v. Bull S. S. Line, 274 F.2d 877 (2d Cir. 1960).

[222] See City Compress & Warehouse Co. v. United States, 190 F.2d 699 (4th Cir. 1951). See also Smith v. Burnett, 173 U.S. 430 (1899).

[223] *Cf.* note 125 *supra*.

[224] U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF THE JUDGE ADVOCATE GENERAL 48 (1961).

[225] While Congress intended to reach claims for cargo damage upon commercial vessels (see note 82, *supra*), Dep't of Defense Directive No. 5160.10, sec. VIII E 12 (28 May 1956), has indirectly altered this. This Directive places within the authority of the Secretary of the Navy, as "single manager of ocean transportation," the processing and settlement of claims by or against commercial carriers arising out of contracts for ocean transportation of personnel, cargo and mail. Through section VIII E 9 of the Directive, cargo for ocean transport when stowed is brought under the responsibility of the MSTS and thus is taken from the scope of section 4803 as "property under the jurisdiction of the Department of the Army or property for which the Department has assumed an obligation to respond for damage." 10 U.S.C. § 4803(a) (1964); see DEP'T OF AIR FORCE, MANUAL NO. 112–1, para. 138 (1963).

[226] For example, where a stevedore company seeks compensation against the government, this claim would be outside the Army statute. If in performance of those services, the stevedores damaged government cargo, the claim in favor of the United States could be settled under the statute.

claim.[227] To dispose of a claim by settlement even by setoff, where the authority to settle the two claims was not clear, would cast doubt on the finality of the whole transaction.

In this regard, the complete settlement of a *common* maritime incident appears to be beyond the authority of the Secretary under a strict construction of the term "damage to property" in section 4803(a)(1)(A). Cases arise where a longshoreman is injured because of the unseaworthiness of the vessel and the vessel owner seeks indemnity against the stevedore company for breach of its warranty to perform in a workmanlike manner.[228] However, in this situation the Secretary could settle the personal injury claim, since the two claims are easily severable.

It may be said, however, that virtually any damage claim which may be *settled against* the United States, and which could conceivably be *sustained by* the United States, may be settled in favor of the United States.[229]

Salvage and towage claims in favor of the United States deserve particular discussion. The history of the Navy Maritime Claims statutes [230] indicates that the Navy counterpart to affirmative salvage claim section (section 4804) was enacted as part of more comprehensive legislation dealing with the use of naval salvage facilities to private parties.[231] When it was incorporated into the Army statute, it was accorded separate treatment. There was no limitation on the amount the Secretary could settle and the finality section of the Army statute (section 4806) did not apply to section 4804. However, a section 4804 claim should be accorded finality upon settlement and payment.[232]

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[227] The Justice Department, under the provisions of the Public Vessels Act, could settle the whole claim. 43 Stat. 1113 (1925), 46 U.S.C. § 786 (1964).

[228] See Armed Services Procurement Reg. § 7–1002.20 (1 Dec. 1965); American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947); Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124 (1956); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Crumady v. Joachim Hendrick Fisser, 358 U.S. 423 (1959); Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

[229] Claims against third party tortfeasors for the reasonable value of medical services furnished government employees and persons in military service would appear to be the only exception. See note 219 *supra*.

[230] See Part II.B. *supra*.

[231] 10 U.S.C. § 7361–67 (1964). See Act of 4 May 1948, ch. 256, 62 Stat. 209; 32 C.F.R. § 754.1–.2 (1962); Navy Buships Instruction No. 4740.4, ser. 108–5 (1 Sept. 1961).

[232] One reason for not according such settlement finality has apparently been met by departmental instructions to claims settlement officials. In cases where the salvage service is performed by the government to non-military

Under the law of salvage,[233] the vessel owner who risks his vessel in performing salvage service merits a liberal compensation for his successful efforts, not simply *quantum meruit*.[234] The United States, however, seldom seeks such salvage awards,[235] but limits its salvage service claims to the cost of the salvage operation.[236] The crews of Army vessels who participate in salvage operations are generally entitled to compensation from the salved parties,[237] even if their service was rendered to another government vessel.[238] However, in the latter situation where crews on Army vessels perform salvage services under orders (thus not voluntarily) to save government property, salvage compensation has been denied.[239]

The same objection that has been made under section 4802(a)(2) in respect to the coverage of claims for the salvage of cargo

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vessels carrying government cargo, the vessel may assert a general average claim against the cargo with the possible result that the government pays to salvage its own cargo. Reopening the settlement agreement would be desirable in such cases. However, instructions have been issued that in such cases, the settlement agreement of the salvage claim precludes the vessel owner from asserting a general average claim. See U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF OFFICE OF THE JUDGE ADVOCATE GENERAL 56–57 (1961). See also U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 183–84 (1962).

[233] See discussion in Part IV.D. *supra*.

[234] The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1870). See Burke v. United States, 96 F. Supp. 335 (S.D.N.Y. 1951).

[235] See The Omaha, 71 F. Supp. 314 (D.P.R. 1947), *modified sub nom.*, Hamburg-American Line v. United States, 168 F.2d 47 (1st Cir. 1948). See also U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF OFFICE OF THE JUDGE ADVOCATE GENERAL 56–57 (1961); U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 183–84 (1962).

[236] See Army Reg. No. 27–26, para. 10*b* (20 May 1966); U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 183–84 (1962); 32 C.F.R. §§ 754.1–754.2 (1962); The Impoco, 287 Fed. 400 (S.D.N.Y. 1922).

[237] The Olockson, 281 Fed. 690 (5th Cir. 1922) (dictum as to crews of public vessels); The Omaha, 71 F. Supp. 314 (D.P.R. 1947), *modified sub nom.*, Hamburg-American Line v. United States, 168 F.2d 47 (1st Cir. 1948). The Army apparently does not object to crews of Army vessels filing salvage claims at least against non-governmental parties. See U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 184–85 (1962). Navy personnel, however, are precluded by administrative policy from maintaining suit for salvage performed while in naval service. See U.S. DEP'T OF NAVY, ORGANIZATION AND FUNCTIONS OF OFFICE OF THE JUDGE ADVOCATE GENERAL 56 (1961).

[238] Kimes v. United States, 207 F.2d 60 (2d Cir. 1953); The Olockson, 281 Fed. 690 (5th Cir. 1922); United States v. Aslaksen, 281 Fed. 444 (6th Cir. 1922).

[239] Spivak v. United States, 203 F.2d 881 (3d Cir. 1953); *cf.* Baretich v. United States, 97 F. Supp. 600 (S.D.N.Y. 1951).

not on a vessel would probably also be made under section 4804.[240] The rejection of such a position is desirable in both cases. Also, in light of the distinction in law between salvages and towage, except in the case of towage in the nature of salvage,[241] the suggestion by the Army and the Air Force in their regulations[242] that affirmative towage claims are within their respective settlement statutes should likewise be rejected.

VI. ADMINISTRATION OF THE ARMY MARITIME CLAIMS STATUTE

When a marine casualty occurs involving the Army, a marine casualty investigating officer of the command, terminal or installation conducts an investigation.[243] If the casualty involves a pending or potential claim under the Army Maritime Claims statute, he is required, within 60 days, to submit a report (or interim report) to the Chief, United States Army Claims Service, at Fort Holabird, Maryland.[244] The Claims Service examines the report, and if it finds a meritorious claim in favor of the United States, a demand for payment is made[245] and negotiations for possible settlement commence. However, before the settlement of claims "for damage caused by" an Army vessel may be commenced under the Army statute, a written claim must be presented to the Department of the Army (in accordance with paragraph 28 of Army Regulation No. 55–19 of 3 August 1965.[246] The presentation of this written claim for "damage claims" is a prerequisite to the initiation of suit under the Admiralty Waiver statuees.[247] It does not toll

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[240] Section 4802(a) (2) speaks of "salvage, rendered to a vessel" while § 4804 states "salvage services performed . . . for any vessel." 10 U.S.C. §§ 4802 (a) (2), 4804 (1964).

[241] See NORRIS, LAW OF SALVAGE § 16 (1958); see Army Reg. No. 55–19, para. 29 (3 Aug. 1965).

[242] See 32 C.F.R. § 842.68 (1966) (Air Force); Army Reg. No. 27–26, para. 10*b* (20 May 1966).

[243] Army Reg. No. 55–19 (3 Aug. 1965). This regulation comprehensively covers all marine incidents whether or not claims arising therefrom may be settled under the Army Maritime Claims statute.

[244] See Army Reg. No. 55–19, paras. 18–25 (3 Aug. 1965).

[245] See Army Reg. No. 27–26, para. 14 (20 May 1966).

[246] See 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964); Hahn v. United States, 218 F. Supp. 562 (E.D. Va. 1963).

[247] Claims against the United States for towage and salvage service are also filed in accordance with Army Reg. No. 55–19 (3 Aug. 1965). However, 46 U.S.C. § 740 does not apply to such claims so that the six months waiting period, discussed above, does not apply. *Cf.* Army Reg. No. 27–26, para. 8*a*, *b* (20 May 1966).

the statute of limitation,[248] and the claimant[249] may not file suit until six months after the presentation of this written claim.[250] The two year statute of limitations governing the Public Vessels Act,[251] and the Suits in Admiralty[252] is therefore misleading, for the time passing between the incident and the presentation of the claim in writing plus six months reduces the period for filling a timely libel.

Both the Public Vessels Act and the Suits in Admiralty Act have additional provisions for the compromise and settlement of claims. Under the Suits in Admiralty Act, the Secretary of the Army is authorized to settle claims, in an unlimited amount, arising under that Act[253] before suit is filed.[254] Thus where a vessel of the Army may be characterized as a " merchant vessel" according to the purpose for which it was employed,[255] the Secretary of the Army may settle the claim even if it falls outside the Army Maritime Claims statute. If the claim also falls within the Army

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[248] See Army Reg. No. 27–26, para. 8 (20 May 1966); Hahn v. United States, 218 F. Supp. 562 (E. D. Va. 1963); States Marine Corp. of Del. v. United States, 283 F.2d 776 (2d Cir. 1960); Williams v. United States, 228 F. 2d 129 (4th Cir. 1955).

[249] Insurance carriers and other subrogees are proper claimants under the Act. Army Reg. No. 27-26, para. 7 (20 May 1966); Defense Supplies Corp. v. U.S. Lines Co., 148 F.2d 311 (2d Cir. 1945). Whether assignees can be proper claimants is not finally decided. Claims which are within the Suits in Admiralty Act have been held to be assignable, clear of violation of the Anti-Assignment Act (REV. STAT. § 3477 (1875), as amended, 31 U.S.C. § 203, (1964)), because of the repealing section of the Suits in Admiralty Act. Seaboard Fruit Co. v. United States, 73 F. Supp. 732 (S.D.-N.Y. 1946); Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951) (dictum); *contra*, Ozanic v. United States, 83 F. Supp 4 (S.D.N.Y. 1949). The strong argument by Judge Rifkind in the latter case seems more in harmony with the Anti-Assignment Act and United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949). It would seem therefore, notwithstanding authority to the contrary, the Secretary of the Army should not consider assigned claims, unless within the scope of the exceptions to the Anti-Assignment Act. In addition, where the claimant is another United States agency, the claim will be waived under a policy of Interdepartmental Waiver unless the claim will be covered by commercial insurance carrier. See U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 184 (1962); Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945); 25 COMP. GEN. 49 (1945).

[250] 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

[251] See 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964).

[252] 41 Stat. 526 (1920), as amended, 46 U.S.C. § 745 (1964).

[253] See 41 Stat. 527 (1920), as amended, 46 U.S.C. § 749 (1964).

[254] This is the position taken by the author of chapter VIII on "Maritime Claims," in U.S. DEP'T OF ARMY, PAMPHLET NO. 27–162, CLAIMS 177 (1962). This view is correct, since once a libel is filed, the cause is transferred to the Department of Justice. *Compare* 41 Stat. 627 (1920), as amended, 46 U.S.C. § 749 (1964), *with* 43 Stat. 1113 (1925), 46 U.S.C. § 786 (1964).

[255] See note 73 *supra*.

statute, the Secretary may be governed by his authority under the Suits in Admiralty Act to settle it in an unlimited amount, even though it might be argued that he should adhere to the specific act dealing with the settlement of the claim (the Army statute), rather than the more general one. [256]

Where a claim lies under the Public Vessels Act, the Attorney General has authority to settle it either before or after a libel is filed. [257] Thus if a claim lies under the Public Vessels Act and the Army statute, both the Attorney General and the Secretary of the Army have authority to settle it. In practice, the Justice Department leaves to the Secretary and his designees the settlement of claims where a libel has not been filed. [258] Once a libel is filed, however, the Secretary may not settle the claim without the consent of the Attorney General. [259] Under the Army statute, the Secretary may settle and pay (or receive payment for) a claim of $500,000 or less in favor of or against the United States. [260] Where the claim (either in favor of or against the United States) is within the statute, and the amount to be received is less than $10,000, it may be settled by the Army Claims Service, the designee of the Secretary of the Army under the Act. [261] In the case of a claim (except a claim for salvage services) in favor of the United States which is found meritorious in an amount exceeding $500,000, the Secretary may not settle it. [262] If the claim is against the United States, the Secretary may settle it in any amount, but if the amount determined due exceeds $500,000, the Secretary may not pay it. [263] He must certify it to Congress for payment. [264] If the Secretary settles it, and Congress does not pay it, the claimant may sue in the Court of Claims, [265] as the settlement agreement is in the nature of a non-maritime contract. [266] Upon acceptance

[256] See Bulova Watch Co. v. United States, 365 U.S. 753 (1961).

[257] 43 Stat. 1113 (1925), 46 U.S.C. § 786 (1964).

[258] See S. REP. No. 654, 82d Cong., 1st Sess. (1951).

[259] See 43 Stat. 1113 (1925), 46 U.S.C. § 786 (1964); Army Reg. No. 27–26, paras. 5*e*, 8*b* (20 May 1966).

[260] 10 U.S.C. § 4802–03 (1964), as amended, 10 U.S.C. § 4802 (1) (Supp. I, 1965).

[261] *Ibid.*

[262] 10 U.S.C. § 4803 (1964). Under 10 U.S.C. § 4804 (1964), the Secretary may settle and receive payment for salvage claims in favor of the United States in any amount. Other claims in excess of $500,000 can be settled by the Department of Justice. See Annot., 5 U.S.C. §§ 124–33 (1964).

[263] 10 U.S.C. § 4802 (1964), as amended, 10 U.S.C.A. § 4802(c) (Supp. 1965). Apparently, *contra*, U.S. DEP'T OF ARMY, PAMPHLET No. 27–162, CLAIMS 177 (1962).

[264] 10 U.S.C. § 4802(b) (1964).

[265] 32 C.F.R. § 752.2(a) (1962) (Navy).

[266] Mulvaney v. Dalzell Towing Co., 90 F. Supp 259 (S.D.N.Y. 1950).

of payment, however the settlement becomes final and conclusive upon the parties.[267]

The Secretary of the Army (as have the Secretaries of the Navy and Air Force)[268] has promulgated regulations for the administration of the Army statute.[269] In most respects, they are harmonious with the Army statute and co-extensive in breadth. Where they limit the scope of the statute, they should be regarded as statements of policy that the Secretary will not settle such claims though not prohibited by the statute from doing so.[270] Where they are broader than the statute, the Secretary's authority to that extent must be circumspect.[271]

The Army Maritime Claims statute is worldwide in its application, though subject to some extent to the principle of international law that the public vessels of a state (used in the international law sense), absent consent of the sovereign, are immune from local jurdisdiction.[272] Many states have waived their sovereign immunity to a greater or lesser degree, and the Secretary of the Army is authorized to settle a claim against an Army vessel by a foreign national, if, under similar circumstances, a citizen of the United States could sue the state of the foreign national.[273] However, claims which fall within North Atlantic Treaty Organization Status of Forces Agreement are settled thereunder, and not under the Army Maritime Claims statute.[274] Where the "Knock-for-Knock" agreements are in force between the United States and a foreign state, claims between the two states will be

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[267] 10 U.S.C. § 4806 (1964).

[268] See 32 C.F.R. §§ 752.1–.3, 754.1 (1962) (Navy); 32 C.F.R. §§ 842.61–.69 (1966) (Air Force).

[269] See Army Reg. No. 27–26 (20 May 1966). See also Army Reg. No. 55–10 (1 May 1963).

[270] See Army Reg. No. 27–26, para. 5*a* (20 May 1966). Combat activities are discussed in Part IV.A. *supra*.

[271] See Army Reg. No. 27–26, para. 10*a*, *b* (20 May 1966). Affirmative towage claims and the "damage to property" limitation are discussed in Part V. *supra*.

[272] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); see Compania Espanola De Navegacion Maritima, S.A. v. Spanish S. S. Navemar, 303 U.S. 68 (1938); COLOMBOS, INTERNATIONAL LAW OF THE SEA §§ 280–84 (5th ed. 1962); BRIERLY, THE LAW OF NATIONS 191 (5th ed. 1955); U.S. DEP'T OF ARMY, PAMPHLET NO. 27–161–1, 1 INTERNATIONAL LAW 71 (1964); *cf.* Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926).

[273] 43 Stat. 1113 (1925), 46 U.S.C. § 785 (1964). See Nicolas Eustathiou & Co. v. United States, 154 F. Supp. 515 (E.D. Va. 1957); *cf.* United States v. Australia Star, 172 F. 2d 472 (2d Cir. 1949).

[274] 10 U.S.C. §§ 2734a, 2734b (1964); 32 C.F.R. § 842.65(g) (1966) (Air Force).

waived.[275] Provisions in the nature of "Knock-for-Knock" agreements are also contained in North Atlantic Treaty Organization Status of Forces Agreements.[276]

Where the Secretary is authorized to settle such a foreign claim, foreign law governs the disposition of the claims under the same conflict of law principles,[277] that would govern liability between

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[275] Agreement with the United Kingdom of Great Britain and Northern Ireland on Certain Problems of Marine Transportation and Litigation, 4 Dec. 1942, 56 Stat. 1780, E.A.S. No. 282, as amended, 7 May 1946, 60 Stat. 1915, T.I.A.S. No. 1558; Agreement with Canada on Waiver of Claims Arising as a Result of Collisions Between Vessels of War, 25–26 May 1943, 57 Stat. 1021, E.A.S. No. 330, as clarified, 3 Sept., 11 Nov. 1943, 57 Stat. 1301, E.A.S. No. 366. See also Agreement with Norway on Certain Problems of Marine Transportation and Litigation, 29 May 1945, 59 Stat. 1541, E.A.S. No. 471; Petition of Panama Transport Co., 172 F.2d 351 (2d Cir. 1949).

[276] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, art. VIII, [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

[277] For example, it is almost universally accepted under international law, and accepted by the United States, that the law of the flag governs the internal management and discipline of a vessel, "where it affects only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port" in whose waters she may rest. Mali v. Keeper of Common Jail, 120 U.S. 1, 12 (1887). See Lauritzen v. Larsen, 345 U.S. 51 (1953). Thus, where the law of the flag applies to a claim in which an Army vessel, cargo or personnel are involved, United States law will govern. See Skiriotes v. Florida, 313 U.S. 69 (1941); Defense Base Act, 55 Stat. 622 (1941), as amended, 42 U.S.C. §§ 1651–54 (1964). Where the law of the flag does not govern, and the tort occurs in territorial waters, the territorial law governs. Smith v. Condry, 42 U.S. (1 How.) 28 (1843); Mali v. Keeper of Common Jail, 120 U.S. 1 (1887). See also The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); Cunard S. S. Co. v. Mellon, 262 U.S. 100 (1923). Where an injury to cargo, person or vessel occurs on board, on the high seas, and does not affect another vessel, the law of the flag governs. United States v. Flores, 289 U.S. 137 (1933); Mali v. Keeper of Common Jail, 120 U.S. 1 (1887); 2 BEALE, THE CONFLICT OF LAW 1329 (1935); CHESHIRE, PRIVATE INTERNATIONAL LAW 258 (7th ed. 1965); RABEL, THE CONFLICT OF LAWS 340 (2d ed. 1960). Where two vessels collide or inflict injury on another, flying the same flag or whose countries have the same law, the law common to the vessels applies. The Eagle Point, 142 Fed. 453 (3d Cir. 1906); RESTATEMENT, CONFLICT OF LAWS § 410(a) (1934); RABEL, *op. cit. supra* at 347–49. Where two vessels collide flying different flags and whose countries are governed by different law, no general rule may be formulated (RABEL, *op. cit. supra* at 348–49), though in the United States (where an American vessel is involved), the law of the forum seems to be most often applied. The Scotland, 105 U.S. 24 (1882); RESTATEMENT, CONFLICT OF LAWS § 410(b) (1934). Where a United States or foreign vessel is involved and the incident is governed by foreign law, it may still petition for limitation of liability under United States law, in respect to claims of United States persons or property (The Titanic, 233 U.S. 718 (1914), except in case of claims for death by wrongful act on the high seas. See 41 Stat. 537 (1920), 46 U.S.C. § 764 (1964). See The Vestris, 53 F.2d 847 (S.D.N.Y. 1931). No general rule may be formulated

private parties.[278] However, treaties and conventions to which the United States and other countries are parties have relieved conflict of laws problems to some extent by bringing some uniformity to the law of the sea.[279]

The Army Maritime Claims statute also bears a relationship with other claims statutes. Where a claim is within the Suits in Admiralty Act and Public Vessels Act, it may not be settled under the Federal Tort Claims Act.[280] Where a claim is not in admiralty, the Secretary should decline to settle it under the Army statute, as it is probably correct that the passage of the Federal Tort Claims Act and the administrative settlement provisions of that

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when the *lex fori*, *lex loci contractus*, or *lex loci solutionis* will govern maritime contracts. EHRENZWEIG, CONFLICT OF LAWS 537 (1962). An emerging trend is to apply to the contract the law the parties intended. See Lauritzen v. Larsen, 345 U.S. 571 (1953); Watts v. Camors, 115 U.S. 353 (1885); Liverpool & Great W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397 (1889). See also Yntema, *"Autonomy" In Choice of Law*, 1 AM. J. COMP. L. 341 (1952); Vita Food Products, Inc. v. Unus Shipping Co., Ltd, [1939] A.C. 277 (P.C.). Where the parties' real intent does not appear, the "presumed intent," drawn from the circumstances surrounding the making of the contract, is applied. See CHESHIRE, PRIVATE INTERNATIONAL LAW 185–200 (7th ed. 1965); Sinclair, *Conflicts of Law Problems in Admiralty*, 15 SW. L. J. 207 (1961). See also United States v. Guaranty Trust Co., 293 U.S. 340 (1934); 37 COMP. GEN. 485 (1958).

[278] See 41 Stat. 526 (1920), 46 U.S.C. § 743 (1964); 43 Stat. 1112 (1925), 46 U.S.C. § 782 (1964).

[279] Brussels Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, 23 Sept. 1910, 37 Stat. 1658, T.S. No. 576. This "Convention was taken as codifying American salvage law with a few minor exceptions as to which American law was conformed to the Convention by the Salvage Act of 1912 [37 Stat. 242 (1912), 46 U.S.C. §§ 727–31 (1964)]." GILMORE & BLACK, LAW OF ADMIRALTY 445 (1957); Brussels Convention for the Unification of Certain Rules Relating to Bills of Loading for the Carriage of Goods by Sea, 23 June 1925, 51 Stat. 233, T.S. No. 931 (effective 29 Dec. 1937). See Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300–15 (1964); International Convention for the Safety of Life at Sea, 10 June 1948 [1952] 2 U.S.T. & O.I.A. 3450, T.I.A.S. 2495 (effective 19 Nov. 1962); 70 Stat. 151 (1956), 46 U.S.C. §§ 390–90g, 404, 526f (1964); International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954 [1961] 3 U.S.T. & O.I.A. 2989, T.I.A.S. 4900 (effective 8 Dec. 1961)); 75 Stat. 402 (1961), 33 U.S.C. §§ 1001–15 (1964). See also Stubbs, *Oil Pollution: Penalty and Damage Aspects*, 16 JAG J. 140 (1962); Convention on the High Seas, 29 April 1958 [1962] 2 U.S.T. & O.I.A. 2312, T.I.A.S. 5200 (effective 30 Sept. 1962); International Convention for the Safety of Life at Sea, 17 June 1960 [1965] 1 U.S.T. & O.I.A. 185, T.I.A.S. 5780 (effective 26 May 1965); 77 Stat. 194 (1963), 33 U.S.C. §§ 1051–94 (1964); Newbould, *New International Rules of the Road*, 19 JAG J 135 (1965); Bromberg, Radar Under the Revised Rules of the Road, April 1966 (unpublished thesis at The Judge Advocate General's School).

[280] 28 U.S.C. § 2680(d) (1964); Army Reg. No. 27–22, para. 9 (20 May 1966).

Act cut off the non-admiralty claims otherwise within Army statutes.[281] Army Regulation 27–26 properly excludes from its scope claims under the Federal Employees' Compensation Act,[282] and Military and Civilian Personnel Claims Act.[283] Where either the Foreign Claims Act[284] or Military Claims Act[285] apply to a claim, as well as the Army Maritime Claims statute, the latter claims settlement authority is preferred.[286]

VII. CONCLUSION

This review of the Army Maritime Claims statute, its implementing regulations, and the various judicial remedies available to maritime claimants against the United States, suggests several deficiencies in the present statutory scheme of administrative and judicial remedies.

Although courts have tended to read the Public Vessels Act and the Suits in Admiralty Act as a comprehensive waiver of sovereign immunity from admiralty claims against the United States, some doubt still exists: (1) whether the Public Vessels Act can be read to impose upon the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed on the private shipowner; (2) whether maritime contract claims involving public vessels (other than for towage or salvage) are within the Act, as the Ninth Circuit has held; (3) whether the 1960 amendments, by eliminating the language "employed as a merchant vessel" has rendered superfluous section 1 of the Public Vessels Act.

Though the Army statute was intended to authorize the Secretary of the Army to settle claims arising out of the maritime activities of the Army, it is clear that certain maritime claims are outside the scope of the statute. In addition, there are problems of construction: whether vessels time or voyage chartered to the Army are Army vessels within the statute; whether the exemption of "combatant activities" should be read into the Army statute;

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[281] 28 U.S.C. § 2672 (1964) as amended, 28 U.S.C. § 2672 (1966 U.S. CODE CONG. & AD. NEWS 1850). See note 35 *supra*.

[282] 39 Stat. 742 (1916), as amended, 550 U.S.C. [1]§§ 51–756, 757–81, 783–91, 793 (1964); Johansen v. United States, 343 U.S. 427 (1952).

[283] 10 U.S.C. § 2732 (Supp. I, 1965). See Army Reg. No. 27–26, para. 6*a* (20 May 1966).

[284] 10 U.S.C. § 2734 (1964).

[285] 10 U.S.C. § 2733 (1964).

[286] Settlement under Maritime Claims statute is preferred over the Foreign Claims Act. See Army Reg. No. 27–26, para 6*b* (20 May 1966). It is also preferred to the Military Claims Act. See Army Reg. No. 27–21, paras. 5*n*, 6*a* (20 May 1966), and note 52 *supra*.

whether all maintenance and cure and cargo salvage claims are covered; and what is the breadth of the "damage to property" language in section 4803.

The overlapping and confusing statutory grants of authority to settle certain maritime claims have been discussed. Often the claimant against the Army must decide who, among the Secretary of the Army, Comptroller General, and Secretary of the Navy as Manager of the MSTS, has the authority to settle his claim. The Secretary of the Army's authority is unclear in a sufficient number of instances to thwart the purpose of the statute. Claimants will not settle where their settlement may be challenged by the Comptroller General and the tortfeasor will not settle where there is some doubt that the Secretary can execute a complete release.

Congressional action would greatly relieve this situation. By repeal of the Public Vessels Act, a single comprehensive admiralty waiver statute would remain, the Suits in Admiralty Act. By the repeal of 28 U.S.C. section 1497 (which places certain oyster bed damage claims in the Court of Claims) virtually all admiralty actions against the United States will have been withdrawn. From the Court of Claims into an admiralty forum.[287] Where Congress desires to except certain activities of public vessels, these exceptions could be grafted upon the statute. A single settlement statute should be enacted in the language of the parent statute (as in the case of the settlement provisions of the Federal Tort Claims Act), giving the head of each department authority to settle claims against or in favor of the United States up to specific amounts involving vessels, property or persons of that department. No reason exists to distinguish contract claims under such a settlement statute. The "Disputes Clause" itself contemplates settlement.

In the administration of the settlement act by the armed services, a centralized maritime claims service should be formed under the aegis of the Department of the Navy, staffed by representatives of the Army, Navy and Air Force who are experienced in maritime law and practice.

This service would advise the various armed forces Secretaries in respect to settlement under the act. The investigation and gathering of evidence would remain in the field with the marine investigating officers or teams of the three services. The important role played by these marine investigating officers suggests that the Department of the Navy or other qualified agency should

[287] *But see* Amell v. United States, 34 U.S.L. WEEK 4400 (U.S. 16 May 1966.)

undertake a program of training for these officers available to the three services.

A single statutory waiver of sovereign immunity from suits in admiralty, a comprehensive authority in the heads of the various departments to settle them, and a centralized maritime claims service in the armed services to expedite their disposition would greatly alleviate the deficiencies in the existing system.

ANNUAL INDEX

1966 MILITARY LAW REVIEW

(Volumes 31 through 34)

References are to volume numbers and pages of *Military Law Review*, Volumes 31 through 34 (DA Pams 27–100–31 through 27–100–34). For an example, reference to "32/43" is a reference to the article or comment beginning on page 43 of Volume 32 (i.e., the article cited as 32 MIL. L. REV. 43). For a cumulative index for Volumes 1 through 22 (1 MIL. L. REV. through 22 MIL. L. REV.), see 22 *Military Law Review* 173 (DA Pam 27–100–22, October 1963). For the 1964 annual index for Volumes 23 through 26 (23 MIL. L. REV. through 26 MIL. L. REV.), see 26 *Military Law Review* 145 (DA Pam 27–100–26, October 1964). For the 1965 annual index for Volumes 27 through 30 (27 MIL. L. REV. through 30 MIL. L. REV.), see 30 *Military Law Review* 125 (DA Pam 27–100–30, October 1965).

TABLE OF LEADING ARTICLES AND COMMENTS—AUTHORS

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SUBJECT WORD INDEX

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