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THE EFFECTIVE DETERRENCE OF ENVIRONMENTAL DAMAGE DURING ARMED CONFLICT: A CASE ANALYSIS OF THE PERSIAN GULF WAR

MAJOR WALTER G. SHARP, SR.*

I. Introduction

> *For the true servants of the Most Gracious are those who tread gently on the earth.*[1]

Postconflict periods always have been times for examining the international legal norms that govern the initiation and conduct of hostilities.[2] While this scrutiny is necessary for the law

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[1] AL QUR'AN 25:63, *reprinted in* WILLIAM M. ARKIN ET AL., ON IMPACT: MODERN WARFARE AND THE ENVIRONMENT—A CASE STUDY OF THE GULF WAR (forthcoming 1992) (manuscript at iii, on file with Greenpeace International, London, Eng.).

[2] *See* JOHN N. MOORE, LAW AND THE GRENADA MISSION 1-2, 3 n.3 (1984).

to mature,[3] assuming that the existing normative legal structure is weak—and therefore the cause of the conflict or of some atrocity committed during the conflict—is counterproductive.[4] The fallacy of this assumption is immediately apparent in recognizing that the United Nations Charter clearly prohibited,[5] but did not prevent, Saddam Hussein's invasion of Kuwait on August 2, 1990.[6] A thorough examination of the legal order that proscribes environmental damage during armed conflict therefore should look at the dynamics of deterrence, and should analyze qualitatively the proscriptive nature of applicable law.[7]

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[3] *See, e.g.*, James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, NAVAL WAR C. REV., Vol. XLV, No. 1, Winter 1992, at 61. Colonel Terry concludes in his study that an environmental protective regime that is too restrictive may prohibit the use of modern weapons that have some inherent incidental and collateral environmental impact. Such a regime not only would impair a nation's right to self-defense while offering no deterrence against aggression, but also would fail to protect the environment in the long term.

[4] *See* John N. Moore, Morality and the Rule of Law in the Foreign Policy of the Democracies (Nov. 5, 1991) (unpublished manuscript, on file with author at the University of Virginia School of Law) for an analysis of the causes of war that challenges traditional international thought. Professor Moore's thesis is that "a major causative model of the principal international wars in the twentieth century consists of a synergy between a non-democratic regime bent on the aggressive use of force for value extension and an overall system-wide failure to deter such aggression." *Id.* at 6. But see ARKIN ET AL., *supra* note 1, at 21-24, for a discussion which suggests that the laws of armed conflict are inadequate in controlling not only war but also the conduct of war.

[5] U.N. CHARTER art. 2, ¶ 4 provides "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *See also* United Nations Security Council Resolution 660 (Aug. 2, 1990) [hereinafter U.N. Doc. S/RES/660 (1990)], *reprinted in* THE KUWAIT CRISIS: BASIC DOCUMENTS 88 (E. Lauterpacht et al. eds. 1991) [hereinafter THE KUWAIT CRISIS]; JOHN N. MOORE, CRISIS IN THE GULF (forthcoming 1992, Oceana, Inc.) (manuscript at 21, on file with author at the University of Virginia School of Law) ("Iraq's blitzkrieg invasion and attempted annexation of Kuwait and related Iraqi actions in the Gulf crisis stand in profound opposition to the rule of law."); Jeffrey F. Addicott, *The United States of America, Champion of the Rule of Law or the New World Order?*, FLA. J. INT'L L., Fall 1992, at 63 ("The fact that Iraq was a member of the United Nations and bound by the principles relating to dispute settlement through means other than the use of force had no effect whatsoever on its activities").

[6] Interestingly, Saddam Hussein's invasion of Kuwait violated Islamic law as well. *See* A. An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317 (1987) (explaining that any war not designed to propagate Islam violates Islamic law.), *noted in* R. Peter Masterton, *The Persian Gulf War Crimes Trials*, ARMY LAW., June 1991, at 9 n.25.

[7] *See* Addicott, *supra* note 5, at 78 (asserting that authoritative words unsupported by effective power creates such a deterrence failure that "Iraq made no real attempt to even conceal, let alone justify, its violations of ... [international law]").

Saddam Hussein inflicted unprecedented environmental damage on the Persian Gulf region.[8] This extensive environmental damage was a focal point, if not a rallying cry, for various organizations to advocate a Fifth Geneva Convention—a convention founded on the assertion that the prohibitions under existing law are insufficient to protect the environment adequately from the effects of hostilities. This article will examine the need for this proposed convention. The recent Persian Gulf War and the subsequent response of the international community will serve as models for evaluating the adequacy and deterrent value of the existing legal framework that proscribes environmental damage during armed conflict. The propriety of recent proposals that purport to strengthen the international legal order also will be analyzed. These analyses provide the framework to conclude that the current legal order clearly proscribes environmental damage that is not justified by military necessity during armed conflict; equally clear, however, is that no institutionalized mechanism exists at the international level to strengthen deterrence by facilitating individual and state accountability for even the most flagrant violations of law. This study proposes a system to strengthen the ability of the international community to take action, and proposes a stronger role for the United States until the international system develops a more effective system of redress.

This article addresses only armed conflict of an international character. The scope is restricted for several reasons. First, the fundamental principles that prohibit environmental damage during armed conflict are those of the law of war, which generally apply only during international armed conflict and not internal conflicts.[9] Second, environmental damage during an internal conflict already is governed by the broader peacetime regime that protects the environment and governs transboundary pollution issues. This peacetime regime will govern the state within which an internal conflict occurs by limiting the state's conduct affecting the environment. The actions of the insurgent group then should be treated as a criminal matter under domestic law. In contrast, the part of this peacetime regime that relates to the kind of

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[8] See discussion, *infra* part VI.A, for a detailed account of the environmental damage. Although this study focuses on the proscription of environmental damage, it is not intended to belittle the Iraqi human rights violations. Actually, the environmental damage pales in comparison to the savage human rights violations. For a more detailed description of the Iraqi torture, maiming, rape, summary executions, and mass extrajudicial killings of men, women, children, and infants, see generally MOORE, *supra* note 5; ARKIN ET AL., *supra* note 1.

[9] *See* DOCUMENTS ON THE LAWS OF WAR 12 (Adam Roberts & Richard Guelff eds. 2d ed. 1989) [hereinafter LAWS OF WAR].

catastrophic environmental damage which occurred during the Persian Gulf War must be addressed separately. This regime is important because the applicability of peacetime norms is not terminated automatically by armed conflict.[10]

II. The Dynamics of Deterrence

> *The real lesson ... was not that "law" was ineffective, but rather that unenforced law is ineffective*[11].

A. The Critical Necessity for Deterrence

Twentieth century technology demands that we meet its potential destructive forces with overwhelming deterrents. The Persian Gulf War was unprecedented in its "intensity, precision, and lethality," and "in the amount of destruction inflicted on a nation with conventional weapons in so short a period of time."[12] If we do not actively seek to deter aggression and violations of the laws of armed conflict, or if we fail to condemn aggression and prosecute war crimes, then we merely invite future wars and war crimes. In confronting the potential destructive force of today's technology, this is a risk the international community should not be willing to hazard.

This study will not examine the illegality of the initial use of force by Iraq, or other violations of international law such as terrorism; however, the principles of deterrence are equally applicable to these issues. The conclusions and recommendations in this study therefore are transferable to a larger continuum of violations of international law than just environmental damage during armed conflict.

B. The Principles of Deterrence

The deterrent effect of principles is not coextensive with the principles of deterrence. Simply having a normative international legal order prohibiting environmental damage is insufficient to deter violations of those norms.[13] The existence of proscriptive norms that are not enforced actually undermines the value of the entire legal system. Even a brief discussion of deterrence and its

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[10] See *infra* part III.A.4, for a discussion supporting this proposition.

[11] Robert F. Turner, *Don't Let Saddam Escape Without Trial*, ATLANTA J./ATLANTA CONST., Aug. 31, 1991, at B2.

[12] ARKIN ET AL., *supra* note 1, at 5.

[13] *See* Addicott, *supra* note 5, at 76 ("words without corresponding force have little effect in the deterrence of unlawful activities").

relationship to all aspects of a national foreign policy is far beyond the scope of this study.

Effective deterrence within the context of a model legal system is comprised of three indispensable elements. First, the fundamental cornerstone of deterrence is a set of clear proscriptive norms. A qualitative analysis of the existing international legal framework proscribing environmental damage during armed conflict therefore is important. Second, these proscriptive norms must be built upon by an established mechanism that facilitates individual and state accountability for violations of those norms. Accordingly, discussing the existing international system, which provides for individual and state accountability, also is essential to the analysis. Third, the world community's demonstrated commitment to condemn all violations of these proscriptive norms consistently and unequivocally is the capstone that completes this deterrence structure. Without this capstone, proscriptive norms and organizations are without effect—that is, "unenforced law is ineffective."

The world community's response to the environmental damage during the Persian Gulf War is an appropriate model for examination of this deterrence structure. Because it reflected an unprecedented unification of world opinion, it should give insight into how the existing system works at its maximum potential. For instance, one response of the world community was to suggest that environmental damage is not proscribed adequately and that a new convention protecting the environment during armed conflict therefore is necessary. Accordingly, evaluating the propriety of this proposal also will provide some helpful insight. This article will conclude, however, that the best way to proscribe environmental damage during future armed conflicts is to strengthen the deterrence structure by creating a mechanism that facilitates condemnation and accountability.

III. The Existing Legal Framework Proscribing Environmental Damage During Armed Conflict

> *[N]ullum crimen sine lege—there is no crime unless there is a law*[14]

The "common will of States" is the only source of international law.[15] International conventions are the best evidence of the will of states, and thus are considered the primary

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[14] Wm. F. Buckley Jr., *Get Saddam Hussein*, NAT'L REV., May 27, 1991, at 62.

[15] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 21 (1987).

source of international law.[16] Although binding only on signatories,[17] conventions that receive long-standing and widespread acceptance may become customary international law, and thereby may become binding as customary law on states that are not signatories.[18] The secondary source of international law is "international custom, as evidence of a general practice accepted as law,"[19] and is applicable to all nations.[20] In the absence of applicable international conventions and customary international law, the general principles of law recognized by civilized nations are used to fill the gaps in international law.[21]

A. Relevant International Conventions

Although this study only addresses the proscription of environmental damage during armed conflict, it includes proscriptions that are drafted generally for peacetime situations. This is necessary because armed conflict does not terminate the obligations of a treaty during the conduct of hostilities automatically.[22] Each treaty must be looked at individually to determine its applicability during hostilities. Armed conflict, however, does invoke the parameters of certain norms that govern the conduct of hostilities that are not applicable during peacetime.[23] These

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[16] *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, T.S. No. 993 [hereinafter I.C.J. Statute]. Although article 38 is silent concerning the hierarchy of precedence of the sources of international law, the principles of customary international law found in the Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 [hereinafter V.C.T.], *reprinted in* OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF AIR FORCE, PAM. 110-20, SELECTED INTERNATIONAL AGREEMENTS, ch. 7, at 2 (1981) [hereinafter AFP 110-20], are instructive. Article 26 describes the obligation of *pacta sunt servanda*, which requires a state to follow treaties in force to which they are a party. Article 53 recognizes that treaties preempt conflicting customary international law except when the customary international law embodies a peremptory norm of general international law—the latter being the principle of *jus cogens*. V.C.T., *supra*. *See also*, JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 23 (2d ed. 1981) ("In the last century the situation has changed and it [customary international law] has been relegated to second place by the treaty").

[17] V.C.T., *supra* note 16, arts. 6-17, 24, 25, 34-37.

[18] North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.) 1969 I.C.J. 4; *see also* V.C.T., *supra* note 16, art. 38 ("Nothing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such").

[19] I.C.J. Statute, *supra* note 16, art. 38(1)(b).

[20] North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.) 1969 I.C.J. 4.

[21] I.C.J. Statute, *supra* note 16, art. 38(1)(c); Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22.

[22] See *infra* part III.A.4, for a discussion supporting this proposition.

[23] LAWS OF WAR, *supra* note 9, at 1. These laws apply during armed conflict regardless of whether the conflict is lawful or unlawful in its inception. *Id.*

norms, *jus in bello*, can be referred to interchangeably as the "laws of armed conflict" or the "laws of war."[24] The purpose of these laws "is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction."[25]

International humanitarian law of armed conflict generally has developed in two interrelated groups of conventions.[26] The first group consists of the Hague Conventions, which concern the rules relating to the methods and means of warfare. The second group consists of the Geneva Conventions that concern the victims of war.

Numerous international conventions pertain to the proscription of environmental damage during peacetime and armed conflict. The most significant of these conventions will be discussed in this study. The methodology of inquiry will be to describe the origin and purpose of the convention, and then to discuss to what extent, and in what manner, it proscribes environmental damage during periods of armed conflict. The convention's impact on limiting a state's ability to wage war, and its scheme, if any, to impose sanctions are also important considerations that will be addressed. Although the discussion at this phase of the study will be generic in nature, its scope will be limited to conventions applicable to the environmental damage during the Persian Gulf War.

1. The 1907 Hague Convention Number IV.—

(a) Historical Perspective.—The Hague series of conventions and declarations began in 1899 at the initiative of Tsar Nicholas II of Russia for the purpose of limiting armaments.[27] The "First Hague Peace Conference" resulted in the adoption of three conventions, which are still sound principles of international law, but have been superseded for the most part by later agreements.[28] The second of these three conventions—the 1899 Hague Convention Number II—concerned the laws and customs of war on land, and included a series of regulations annexed to it that was the first successful effort to codify existing customary laws of war.[29]

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[24] *Id.* at 1-2.

[25] OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.2 (1989) [hereinafter COMMANDER'S HANDBOOK (SUPP.)].

[26] AFP 110-20, *supra* note 16, ch. 3, at 1.

[27] LAWS OF WAR, *supra* note 9, at 35.

[28] *Id.* at 17, 43.

[29] *Id.* at 17, 35, 43.

The "Second Hague Peace Conference," which convened in 1907 at the initiative of President Theodore Roosevelt, resulted in the adoption of thirteen conventions.[30] One of these conventions—the 1907 Hague Convention Number IV—slightly revised and replaced the 1899 Hague Convention Number II, leaving the latter in force for contracting states that did not ratify the new convention.[31]

(b) Applicability.—Without question, the 1907 Hague Convention Number IV applies during international armed conflict; its entire negotiating history, text, and title clearly demonstrate that it applies during armed conflict between nations.[32] Article 2 of the 1907 Hague Convention Number IV, however, is a "general participation clause,"[33] which states that it does not apply "except between contracting Powers, and then only if all the belligerents are parties to the Convention."[34]

On October 18, 1907—the date of signature for the 1907 Hague Convention Number IV[35]—Iraq was still part of the Ottoman Empire and did not exist as an independent state.[36] The Ottoman Empire did not become a party state to the 1907 Hague Convention Number IV.[37]

As a result of the 1919 Paris Peace Conference, Iraq became a mandate entrusted to Britain and remained so until 1932.[38] A prerequisite condition to becoming an independent state and a

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[30] *Id.* at 43. The three 1899 Hague Conventions were revised during this conference. *Id.*

[31] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 4, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Convention No. IV], *reprinted in* LAWS OF WAR, *supra* note 9, at 44; *see also* LAWS OF WAR, *supra* note 9, at 43-44. Eighteen states that were parties to the 1899 convention did not become parties to the 1907 convention. These eighteen states remain bound by the 1899 convention. *Id.* at 44.

[32] LAWS OF WAR, *supra* note 9, at 42-59.

[33] *Id.* at 10.

[34] 1907 Hague Convention No. IV, *supra* note 31, art. 2.

[35] LAWS OF WAR, *supra* note 9, at 44.

[36] *Iraq*, 21 THE NEW ENCYCLOPEDIA BRITANNICA 899, 944 (15th ed. 1991). The area now known as Iraq long had been known as Mesopotamia, with civilized development recorded as early as 10,000 bc. It was the site of the world's first urban, literate civilization as early as 3500 bc. Later, in approximately 1750 bc, Mesopotamia developed into two regions known as Babylonia and Sumeria, where the world's first legal codes, the "Code of Hammurabi" of Babylonia and the "Code of Lipit-Ishtar" of Sumeria, were developed. After the Arab conquest in the Seventh Century, "Iraq" became a geographical expression for the flatlands between Baghdad and the Persian Gulf. After many years of strife in the Ottoman Empire and under British rule, Iraq became an independent state in 1932. *Id.* at 906-45.

[37] LAWS OF WAR, *supra* note 9, at 58-59.

[38] IRAQ: A COUNTRY STUDY 32 (Helen C. Metz ed. 4th ed. 1990).

member of the League of Nations on October 3, 1932, was for Iraq to make the following stipulation:

> Iraq considers itself bound by all the international agreements and conventions, both general and special, to which it has become a party, whether by its own action or by that of the mandatory Power acting on its behalf. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by Iraq throughout the period for which they were concluded.[39]

Great Britain, however, apparently never acceded to the 1907 Hague Convention Number IV on behalf of Iraq. Consequently, Iraq is not bound by that convention's provisions.[40]

Nevertheless, Iraq is bound by the customary law embodied in the 1907 Hague Convention Number IV. The International Military Tribunal at Nuremberg expressly held that the 1907 Hague Convention Number IV was declaratory of customary international law.[41]

(c) Environmental Proscriptions.—The text of the 1907 Hague Convention Number IV is short, consisting of a preamble and only nine articles.[42] The preamble states that the contracting parties intended "to diminish the evils of war, as far as military requirements permit," but did not intend that "unforeseen cases should ... be left to the arbitrary judgment of military commanders."[43]

The core of this convention is its regulations.[44] These regulations were a codification of the laws and customs of war on land as they existed in 1907. Furthermore, they were products of balancing the principles of proportionality and targeting discrimination against a hostile state's need to obtain the partial or complete submission of its enemy.[45] As a result of this balancing, some of the regulations clearly prohibit a given means or method. Article 23(a), for instance, states that "especially forbidden ... [is

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[39] THE KUWAIT CRISIS, *supra* note 5, at 45.

[40] LAWS OF WAR, *supra* note 9, at 58-9.

[41] *Id.* at 44.

[42] *See* 1907 Hague Convention No. IV, *supra* note 31.

[43] *Id.* preamble.

[44] Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Regulations].

[45] LAWS OF WAR, *supra* note 9, at 5. For a more in-depth discussion of the principles of proportionality and discrimination, and their corollary principles of military necessity, humanity, and chivalry, see the discussion *infra* part III.B.

t]o employ poison or poisoned weapons."[46] Other regulations require further balancing, such as article 23(e), which prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering."[47]

The regulations, consisting of fifty-six articles, are found in the Annex to the 1907 Hague Convention Number IV.[48] Three articles of the 1907 Hague Regulations are applicable to the proscription of environmental damage during armed conflict. The first two are found in the chapter that limits the means used to injure the enemy, and the third article is found in the chapter that governs the law of occupation.

Article 22 of the 1907 Hague Regulations codifies the customary principle that is the very foundation of all of the laws of war.[49] It states "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[50] This general principle is built upon by subsequent articles that place limits on sieges, bombardments, and specific means of injuring the enemy.[51]

Article 23 of the 1907 Hague Regulations states, in pertinent part:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden—
>
> ....
>
> (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering.
>
> ....
>
> (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; ....[52]

Although these provisions do not address environmental damage explicitly, they do protect the environment. Article 23(e) can be interpreted as prohibiting any destruction of the environment that will cause unnecessary suffering. As to protecting the environment, this provision is narrow in scope and offers limited protection under most circumstances.

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[46] 1907 Hague Regulations, *supra* note 44, art. 23(a).

[47] *Id.* art. 23(e).

[48] *See* 1907 Hague Regulations, *supra* note 44.

[49] *See* LAWS OF WAR, *supra* note 9, at 4.

[50] 1907 Hague Regulations, *supra* note 44, art. 22.

[51] *Id.* arts. 23-28.

[52] *Id.* art. 23.

Article 23(g) prohibits any destruction of the enemy's property that is not made imperative by the necessities of war. When one considers the environment in its component parts as property of the enemy,[53] this provision offers substantial environmental protection. This article employs the customary principles of military necessity and unnecessary suffering as tests for determining what means and methods of warfare are permissible. These two customary principles are discussed in greater detail later in this article.

Article 55 of the 1907 Hague Regulations specifically addresses the environment in its component parts. It states,

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the Hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.[54]

"Usufruct" means "the right of one state to enjoy all the advantages derivable from the use of property which belongs to another state."[55] Although article 55 allows an occupying state the right to use and benefit from public buildings, real estate, forests, and agricultural estates, it imposes upon the occupying state the obligation to protect the environment. This part of the Hague Regulations presupposes the existence of a state of occupation; therefore, it does not address military necessity. If an armed conflict occurs or reoccurs within occupied territory, destruction is permissible if demanded by military necessity.

(d) Sanctions.—Article 3 of the 1907 Hague Convention Number IV provides,

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[56]

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[53] See *infra* part III.C.1, for a discussion of the component parts of the environment.

[54] 1907 Hague Regulations, *supra* note 44, art. 55.

[55] Terry, *supra* note 3, at 66 n.5.

[56] 1907 Hague Convention No. IV, *supra* note 31, art. 3.

Articles 53 and 56 of the 1907 Hague Regulations also make very weak references to compensation required in the case of seizures of state-owned or personal property by an occupying state.[57]

Although this convention does not address individual criminal liability for a violation of its regulations, article 1 of the 1907 Hague Convention IV requires the contracting powers to train their armed land forces in the provisions of the 1907 Hague Regulations.[58] Article 1 of the 1907 Hague Regulations expressly imposes an obligation on the members of the land forces of contracting parties to follow the laws, rights, and duties of war.[59]

(e) Conclusions.—The 1907 Hague Convention Number IV and its annexed regulations embody the laws and customs of war on land. Accordingly, customary international law, as represented by this convention, is binding on all states during armed conflict between nation-states. Neither the 1907 Hague Convention Number IV, nor its annexed regulations, explicitly addresses damage to the environment as a factor to be considered in a determination of the means or methods that legally can be used by a belligerent to injure its enemy. It explicitly prohibits, however, actions that cause unnecessary suffering and the destruction of property that are not made imperative by the necessities of war. It also imposes on an occupying state the obligation to protect real estate, forests, and agricultural estates. These prohibitions require a balancing of any destruction with the military requirements at hand, and are broad enough to envision the use of any methods based on any existing or new technology. Furthermore, the 1907 Hague Convention Number IV imposes upon an occupying force the duty to safeguard all property within the occupied state, and requires compensation to be paid for seizures. The convention, however, does not provide for any criminal liability or any mechanism for enforcing its civil penalties. The determination of whether or not a given act is a violation of the convention requires a fact-intensive review on a case-by-case basis of the principles of unnecessary suffering and military necessity.

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[57] 1907 Hague Regulations, *supra* note 44, arts. 53, 56. Article 53 provides that property seized by an army of occupation "must be restored and compensation fixed when peace is made." *Id.* art. 53. Article 56 provides that "[a]ll seizure of, destruction or wilful damage done to institutions of this character [those dedicated to religion, charity and education] historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." *Id.* art. 56. A seizure of property "requires both an intent to take such action and a physical act of capture." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 395 (1956) [hereinafter FM 27-10].

[58] 1907 Hague Convention No. IV, *supra* note 31, art. 1.

[59] 1907 Hague Regulations, *supra* note 44, art. 1.

2. The Geneva Conventions.—

(a) Historical Perspective.—This series of conventions began in 1864 with the first Geneva Convention on the wounded.[60] Subsequent Geneva conventions and protocols in 1868,[61] 1906,[62] and 1929,[63] focused on humanitarian law. The 1929 Geneva Convention benefitted many during World War II but, overall, proved to be inadequate.[64] Consequently, out of a concern for more specific provisions to protect victims of war, four additional Geneva Conventions were signed in 1949 by sixty-four states.[65] These four conventions have been adhered to by more states than any other agreements on the laws of war, and deal with the wounded and sick in armed forces in the field; the wounded, sick, and ship-wrecked in armed forces at sea; the treatment of prisoners of war; and the protection of civilians.[66]

In 1977, two Protocols Additional to the Geneva Conventions of 12 August 1949 were opened for signature.[67] The purpose of these Protocols was to reaffirm the earlier 1949 Geneva Conventions, and to develop areas of the law appropriate for the conditions of contemporary hostilities.[68] While both protocols concern the protection of victims and were influenced by the law relating to human rights, the first regulates international armed conflicts and the second regulates noninternational armed conflicts.[69] The two conventions relevant to this study are the fourth of the 1949 Geneva Conventions concerning the protection of civilians,[70] and the first of the 1977 Protocols.[71]

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[60] LAWS OF WAR, *supra* note 9, at 169.

[61] *Id.* at 193. This convention, which never was ratified and did not enter into force, was intended to extend the protections of the 1864 Geneva Convention on the wounded to naval forces. *Id.*

[62] *Id.* at 170. The 1906 Geneva Convention greatly expanded and replaced the 1864 Geneva Convention. *Id.*

[63] *Id.* at 170. The 1929 Geneva Convention slightly revised and replaced the 1906 Geneva Convention. *Id.*

[64] *Id.* at 169.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 387.

[68] *Id.* After World War II, many hostilities were not defined neatly as international in character, and the increase in guerrilla warfare gave rise to questions concerning the traditional definition of combatants. These concerns were the changing conditions that provided the impetus for the 1977 Geneva Protocols. *Id.*

[69] *Id.* at 387-88, 447.

[70] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention No. IV], *reprinted in* LAWS OF WAR, *supra* note 9, at 272.

[71] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12,

(b) Applicability.—As is the case with the 1907 Hague Convention Number IV, the 1949 Geneva Convention Number IV and the 1977 Geneva Protocol I unquestionably apply during international armed conflict. The negotiating history, text, and title of both clearly demonstrate that they apply during armed conflicts between nations.[72] Unlike the Hague Convention Number IV, the Geneva Conventions do not contain a "general participation clause." Therefore, they are binding on parties engaged in a conflict even though one of the belligerents is not a party.[73]

Iraq acceded to the 1949 Geneva Convention Number IV on February 14, 1956.[74] This convention also is considered declaratory of customary international law.[75] Iraq did not, however, participate as a contracting state for the 1977 Geneva Protocol I.[76] Although currently in force for seventy-six states,[77] Iraq has not since acceded to the 1977 Geneva Protocol I.[78] Articles 35(3) and 55 of that protocol, however, "may be at least the best evidence of customary international law rules for the protection of the environment during wartime."[79]

(c) Environmental Proscriptions.—

(1) 1949 Geneva Convention Number IV.—Article 2 of the 1949 Geneva Convention Number IV states that it shall apply "to all cases of declared war or of any other armed conflict ... [and] to all cases of partial or total occupation ... even if the

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1977, 1125 U.N.T.S. 3 [hereinafter 1977 Geneva Protocol I], *reprinted in* LAWS OF WAR, *supra* note 9, at 389.

[72] LAWS OF WAR, *supra* note 9, at 169-337, 387-446. Although not relevant to the invasion of Kuwait by Saddam Hussein, a controversial provision of the 1977 Geneva Protocol I is its expanded definition of international armed conflict, which includes conflicts "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." *See id.* at 388.

[73] *Id.* at 10.

[74] *Id.* at 328.

[75] *Id.* at 170.

[76] *Id.* at 460. A contracting state "means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force." V.C.T., *supra* note 16, art. 2.1(f).

[77] LAWS OF WAR, *supra* note 9, at 462. Although the United States signed both protocols, subject to several understandings, on December 12, 1977, the United States never ratified either of them. *Id.* at 459-68.

[78] *Id.* at 460.

[79] MOORE, *supra* note 5, at 81; *see also* Paul C. Szasz, Remarks During a Panel Discussion: *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 215, 217 (concluding that "nature is no longer fair game in mankind's conflicts").

said occupation meets with no armed resistance."[80] Article 6 provides that the convention applies from the outset of any conflict to the general close of military operations and, in the case of occupied territory,

> the application of the present convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: ... 53 ....[81]

The applicable article in the 1949 Geneva Convention Number IV that protects the environment is article 53. Although this article does not mention the environment explicitly, it offers specific, concrete protection to the environment by prohibiting the destruction of property. Article 53 provides, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."[82] As did the 1907 Hague Convention Number IV, this article employs the customary principle of military necessity as a test for determining what means and methods of warfare are permissible. This customary principle is discussed in greater detail later in this article.

(2) 1977 Geneva Protocol I.—Article 3 of this protocol states that it was intended to supplement the 1949 Geneva Convention Number IV, and that its applicability is coextensive with the applicability of the 1949 Geneva Convention Number IV.[83] Two articles of the 1977 Geneva Protocol I are

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[80] 1949 Geneva Convention No. IV, *supra* note 70, art. 2. Iraq did make claims that Kuwait was actually its 19th Province. If these claims were valid, then the laws of occupation would not apply. Professor Moore, however, has concluded that the Iraqi claims are factually preposterous. *See generally* MOORE, *supra* note 5, at 201-223. The *New York Times* notes that "Iraq's claims to Kuwait have been repeatedly examined, and repeatedly dismissed by other Arab states, by the Soviet Union ... and by a host of qualified scholars, some even calling the claim frivolous." *The Big Lie About Kuwait*, N.Y. Times, Nov. 2, 1990, at A34, *noted in* MOORE, *supra* note 5, at 212, 243 n.62. Furthermore, United Nations Security Council Resolution 662 provided that the "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." United Nations Security Council Resolution 662 (Aug. 9, 1990), *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 90.

[81] 1949 Geneva Convention No. IV, *supra* note 70, art. 6.

[82] *Id.* art. 53.

[83] 1977 Geneva Protocol I, *supra* note 71, art. 3; see *supra* note 72, for a brief discussion on a controversial provision of the 1977 Geneva Protocol I that

applicable to the proscription of environmental damage during armed conflict. The first is found in the section that limits the methods and means used to injure the enemy; the second is found in the section that protects the civilian population and its objects. They both specifically mention the environment, although they do not define the environment.

The first is article 35(3) of the 1977 Geneva Protocol I. It prohibits states from "employ[ing] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[84] Most importantly, this provision prohibits "widespread, long-term and severe damage" to the environment regardless of the weapons used.[85] It does not, however, define "widespread, long-term and severe damage." The second is article 55. It provides,

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited.[86]

Neither of these articles set forth any workable standards for a commander in the midst of an armed conflict. Both articles are a prohibition of "widespread, long-term and severe damage," but neither specifically defines a threshold for prohibited environmental destruction. Article 55 states that care shall be taken to protect the natural environment, but fails to define what "care shall be taken" means. Moreover, "care shall be taken" sounds like a far less stringent standard than destruction "imperatively demanded by the necessities of war"[87] or "rendered absolutely necessary by military operations."[88] Article 57, however, provides that those in the attack shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the

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expands the definition of international armed conflict.

[84] 1977 Geneva Protocol I, *supra* note 71, art. 35(3).

[85] LAWS OF WAR, *supra* note 9, at 378.

[86] 1977 Geneva Protocol I, *supra* note 71, art. 55.

[87] *See* 1907 Hague Regulations, *supra* note 44, art. 23(g).

[88] *See* 1949 Geneva Convention No. IV, *supra* note 70, art. 53.

concrete and direct military advantage anticipated."[89] This latter provision incorporates the principle of military necessity into the 1977 Geneva Protocol I.

(d) Sanctions.—Article 147 of the 1949 Geneva Convention states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention.[90] Article 146 acknowledges criminal responsibility of individuals for any violation of the Convention, and article 148 acknowledges civil liability of the state for grave breaches of the Convention.[91] The 1977 Geneva Protocol I sets up a similar scheme.[92] Article 85 of the 1977 Geneva Protocol I defines breaches in great detail. Article 85.3 enumerates six acts that are grave breaches if they cause death or serious injury and are done wilfully in violation of Protocol I. One of the six examples of a grave breach listed in article 85.3 is "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects."[93] "Excessive loss" is defined in terms of military necessity and means a loss which is "excessive in relation to the concrete and direct military advantage anticipated."[94] Article 85.5 recognizes grave breaches as war crimes; article 86 imposes criminal liability on superiors for the failure to prevent grave breaches under certain circumstances; and article 87 imposes on commanders the duty to prevent, suppress, and report breaches of the Protocol, and to initiate disciplinary action when appropriate.[95] Civil liability and the obligation to pay compensation are recognized in article 91 for violations of the Protocol by a party state and members of its armed forces.[96]

(e) Conclusions.—During the conduct of the Persian Gulf War, Iraq was bound by its treaty obligations of the 1949 Geneva Convention Number IV, and by the customary international law, which the Convention codifies. Iraq is not a party to the 1977 Geneva Protocol I; therefore, it is not bound by its text.

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[89] 1977 Geneva Protocol I, *supra* note 71, art. 57.2(a)(iii).

[90] 1949 Geneva Convention No. IV, *supra* note 70, art. 147. A grave breach is one specified in article 147 of the convention. All other violations are considered to be simple breaches of the convention. The functional distinction is in the obligation of the states *vis-a-vis* the type of breach that has occurred. *Id.* arts. 146-47.

[91] *Id.* arts. 146, 148.

[92] *See* Terry, *supra* note 3, at 65.

[93] 1977 Geneva Protocol I, *supra* note 71, art. 85(3)(b).

[94] *Id.* art. 57.2(a)(iii).

[95] *Id.* arts. 85-87.

[96] *Id.* art. 91.

The provisions of the 1977 Geneva Protocol I, however, which apply to environmental damage, may be declaratory of customary law.

The 1949 Geneva Convention Number IV does not mention the environment explicitly; however, it adequately proscribes damage to the component parts of the environment when not rendered absolutely necessary by military operations. This prohibition requires a balancing of any destruction with the absolute necessities of military operations. The 1977 Geneva Protocol I does, however, explicitly address environmental damage. Applying the Protocol to the component parts of the environment in the context of the principle of military necessity also facilitates its analysis.

The 1949 Geneva Convention Number IV is broad enough to encompass the use of methods or means based on any existing or new technology. Article 35(3) of the 1977 Geneva Protocol I is not limited to existing methods and means, and therefore is broad enough to encompass the use of methods or means based on any new technology. Article 36 of the 1977 Geneva Protocol I, nevertheless, requires parties to consider compliance with Protocol I and all other rules of international law when developing or adopting new methods or means.[97] The determination of whether or not a given act violates the 1949 Geneva Convention Number IV and the 1977 Geneva Protocol I requires the same balancing required for the 1907 Hague Convention Number IV—that is, the questioned act must be viewed in light of military necessity.

3. The 1977 ENMOD Convention.—

(a) Historical Perspective.—The United States Senate passed a resolution in 1973 stating that the United States "should seek the agreement of other governments to a proposed treaty prohibiting the use of any environmental or geophysical modification activity as a weapon of war."[98] As a result of the negotiations that followed, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977 ENMOD Convention) was signed on May 18, 1977.[99] The 1977 ENMOD Convention is a short document consisting of a

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[97] *Id.* art. 36.

[98] LAWS OF WAR, *supra* note 9, at 377. The impetus for this resolution was the use of defoliation and weather manipulation techniques employed by the United States in Vietnam. *Id.*

[99] The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151 [hereinafter 1977 ENMOD Convention], *reprinted in* LAWS OF WAR, *supra* note 9, at 379. The United States ratified the 1977 ENMOD Convention on Jan. 17, 1980. *Id.* at 384.

preamble, ten articles, and a set of four understandings in an annex; its purpose is to prohibit the manipulation of the environment as a weapon.[100]

(b) Applicability.—The phrase "armed conflict" and the word "war" are not to be found in the 1977 ENMOD Convention. Instead, the convention uses a much broader term—"military or any other hostile use"—throughout. Article IV imposes on each party the obligation to take additional measures it considers necessary to prevent any violation of the provisions of the 1977 ENMOD Convention.[101] Taken together, the binding effect of the 1977 ENMOD Convention clearly is intended to govern conduct between nation states.

Iraq participated in the 1977 ENMOD Convention as a negotiating state and signed it on August 15, 1977; however, it has not ratified the convention.[102] Having signed the treaty, with no subsequent declaration of intent not to become a party, Iraq is bound by article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention) "to refrain from acts which would defeat the object and purpose" of the 1977 ENMOD Convention.[103] While a given act may be a violation of the object and purpose of the 1977 ENMOD Convention, the convention, in and of itself, does not impose any accountability on the responsible state or individual.[104] The 1977 ENMOD Convention is not declaratory of customary international law.[105]

(c) Environmental Proscriptions.—Article I of the 1977 ENMOD Convention provides,

> Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of

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[100] *See* LAWS OF WAR, *supra* note 9, at 377-83. Contrast this purpose with the purpose of the 1977 Geneva Protocol I, which prohibits damage to the environment, regardless of the weapon used. *Id.* at 378.

[101] 1977 ENMOD Convention, *supra* note 99, art. IV.

[102] LAWS OF WAR, *supra* note 9, at 384.

[103] *See* V.C.T., *supra* note 16, art. 18. Iraq is not a party to the Vienna Convention on the Law of Treaties. AFP 110-20, *supra* note 16, app. 1. The Vienna Convention on the Law of Treaties, however, is declaratory of customary international law. *See* SWEENEY ET AL., *supra* note 16, at 951.

[104] *See* Terry, *supra* note 3, at 64.

[105] Although no source concludes that the 1977 ENMOD Convention is customary international law, see Szasz, *supra* note 79, at 216-17, which concludes that the environmental protective principles in the 1977 ENMOD Convention are emerging principles of customary law.

> destruction, damage or injury to any other State Party.[106]

Significantly, this provision does not prohibit damage to the environment per se.[107] Rather, it prohibits a state from using the manipulation of the environment—which has widespread, long-lasting, or severe effects—as a method or means of warfare.[108] This clearly is supported by the language of the preamble and the text, which discuss methods and not damage. For example, the preamble contains the following language: "The States Parties to this Convention, Guided by the interests of ... halting the arms race ...complete disarmament ... and of saving mankind from the danger of using new means of warfare..."[109]

In addition to proscribing environmental modification as a means of warfare, article II is the closest that the 1977 ENMOD Convention comes to defining the term, "environment," itself. Article II defines the phrase "environmental modification techniques" as any technique for modifying "the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."[110] Thus, this convention encompasses animal and plant life, the earth's land mass, all the water on the earth's surface, and the atmosphere in the definition of environment.

One primary criticism of the 1977 ENMOD Convention is that the terms "widespread, long-lasting or severe" are too broad and vague.[111] These terms are defined in the first Understanding as follows:

> (a) "widespread": encompassing an area on the scale of several hundred square kilometers;
>
> (b) "long-lasting": lasting for a period of months, or approximately a season;
>
> (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.[112]

Although the definitions remain somewhat vague, this is a significant improvement over the approach of the 1977 Geneva

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[106] 1977 ENMOD Convention, *supra* note 99, art. I.1.

[107] *Id.* art. II.

[108] LAWS OF WAR, *supra* note 9, at 378.

[109] 1977 ENMOD Convention, *supra* note 99, preamble.

[110] *Id.* art. II.

[111] LAWS OF WAR, *supra* note 9, at 378.

[112] *Id.* at 377.

Protocol I, which prohibited "widespread, long-term and severe damage," but did not express any threshold for prohibited environmental destruction.[113] Furthermore, the environment is better protected by the 1977 ENMOD Convention because that convention requires the existence of only one of the three conditions, whereas the 1977 Geneva Protocol I requires the existence of all three.

The 1977 ENMOD Convention does not preempt the applicability of the customary principle of military necessity.[114] Instead, it sets an upper limit on environmental damage that cannot be overcome, regardless of the demands of military necessity. The convention flatly prohibits "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[115] To the extent that this flat prohibition is not exceeded, the 1977 ENMOD Convention recognizes the balancing of environmental damage with the customary principle of military necessity.

(d) Sanctions.—Article V of the 1977 ENMOD Convention sets up a procedure for consultation and cooperation between states with disputes, and allows a state to file a complaint with the United Nations Security Council, which then may investigate and issue a report.[116] If the report concludes that a state has been—or likely will be—harmed, the aggrieved state may request assistance from other parties.[117] These provisions have been criticized as being weak because of the possibility of a veto at the United Nations Security Council.[118] These criticisms arguably enjoy some support because none of the provisions within the 1977 ENMOD Convention refer to criminal or civil liability.

(e) Conclusions.—Although Iraq is bound to refrain from acts that would undermine the object and purpose of the 1977 ENMOD Convention, Iraq is not bound by its provisions. The convention is not declaratory of customary international law, and never was ratified by Iraq. The terms of the 1977 ENMOD Convention are broad enough to encompass any environmental modification technique yet to be developed. Its preamble specifically recognizes that "scientific and technical advances may open

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[113] *See supra* part III.A.2.c.

[114] *See* LAWS OF WAR, *supra* note 9, at 4.

[115] 1977 ENMOD Convention, *supra* note 99, art. I.1.

[116] *Id.* art. V.

[117] *Id.*

[118] LAWS OF WAR, *supra* note 9, at 378.

new possibilities with respect to modification of the environment."[119] The 1977 ENMOD Convention, however, does not prohibit damage to the environment. It only prohibits manipulation of the environment—and then, only if the manipulation results in widespread, long-lasting or severe effects. To determine whether or not a given act is a violation of this convention requires a subjective analysis. If the act modifies the environment with widespread, long-lasting, or severe effects, and the resulting modification of the environment is used to gain a military advantage, then a violation of the 1977 ENMOD Convention has occurred. In contrast, if the act results in widespread, long-lasting, or severe—but unforseen—environmental damage, then the environment itself is not being used as a weapon, and no violation of the 1977 ENMOD Convention has occurred.

4. The Peacetime Regime.—

(a) Applicability.—The conventions that share the primary function of governing the ramifications of environmental damage during peacetime play a critical role during armed conflict as well. This peacetime regime reinforces the legal foundation for civil liability for environmental damage established under the laws of war. Perhaps more importantly, when considering criminal responsibility, the peacetime regime also creates a context of international environmental law within which the principles of military necessity, unnecessary suffering, and proportionality can be evaluated properly. For example, if an act contemplated by a military commander was one that had never been the subject of international concern or a convention, then it would be of less legal interest than if the act had been addressed by a pervasive set of international conventions. Environmental damage, however, clearly falls into the category of acts that have been addressed by a pervasive set of international conventions. The peacetime regimes are particularly important when the military commander making the decisions is also the head of state and, therefore, familiar with international obligations.

Peacetime regimes continue to exist between countries during periods of armed conflict or war.[120] This is particularly true of multilateral agreements that establish rights and obligations as to states beyond the parties to the conflict. Although a state of war may give rise to other corresponding defenses for breaches of a peacetime regime, such as impossibility

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[119] 1977 ENMOD Convention, *supra* note 99, preamble.

[120] Actually, article 2 of the 1949 Geneva Convention No. IV provides that its provisions are "[i]n addition to the provisions which shall be implemented in peacetime." 1949 Geneva Convention No. IV, *supra* note 70, art. 2.

of performance[121] or military necessity,[122] these are issues pertaining to the factual consequences of war and are not relevant here. Rather, the real issue is whether a peacetime convention has the durability to protect the environment during an armed conflict between the parties.

No definitive answer under international law exists—either by a tribunal or by a convention—to the question of the effect of war on treaties.[123] The traditional view is that war annuls treaties of every kind between the states at war; the modern view, however, is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character."[124]

The modern view is consistent with the Vienna Convention on the Law of Treaties. Article 73 of the Vienna Convention states that "the present Convention shall not prejudge any question that may arise in regard to a treaty ... from the outbreak of hostilities between States."[125] This article clearly does not resolve the issue, but requires determinations based on individual analyses of each of the treaties involved. Other articles of the Vienna Convention shed light on this method of analysis.

If the treaty does not provide for termination or suspension during hostilities, then the nature of the treaty must be compared to the relationship of the states during war. Article 56 of the Vienna Convention states, "A treaty which contains no provision regarding its termination ... is not subject to denunciation or withdrawal unless ... a right of denunciation or withdrawal may be implied by the nature of the treaty."[126] The operative language of this article is "the nature of the treaty." If the nature of a treaty, for example, is to provide for military assistance and the sale of armaments, then such a treaty clearly would be terminated—or at least suspended—during the period of hostilities. Furthermore, a state of war breaks diplomatic relations and severs the ties of commercial transactions between enemy citizens.[127] In contrast, allowing a resident alien to inherit real property in the United States during a war with that resident

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[121] *See* V.C.T., *supra* note 16, art. 61 (discussing this defense).

[122] That any state unconditionally would give up its inherent right of self-defense in a treaty certainly is beyond the realm of argument.

[123] DEP'T OF ARMY, PAM. 27-161-1, LAW OF PEACE, VOLUME I, ¶ 8-34 (1979) [hereinafter DA PAM. 27-161-1].

[124] *Id.* ¶ 8-34.

[125] V.C.T., *supra* note 16, art. 73.

[126] *Id.* art. 56.

[127] DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, VOLUME II, at 38 (1962) (hereinafter DA PAM. 27-161-2).

alien's parent country would not necessarily be incompatible with the very nature of a treaty.[128] Similarly, even though a regime's object and purpose is to protect the environment, that object and purpose is not necessarily incompatible with the state of war. Two nations can be at war, and still follow norms that protect the environment. Actually, the laws of armed conflict protect the environment by a balancing test that invokes the principles of military necessity, unnecessary suffering, and proportionality. Therefore, a peacetime regime's commitment to protect the environment should not be considered per se inconsistent with a state of war.

If hostilities are considered as a fundamental change of circumstances, then article 62 of the Vienna Convention also offers guidance in determining the status of a treaty during armed conflict. This article sets forth, in the conjunctive, the following two requirements before the doctrine of fundamental change of circumstances can be invoked:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[129]

The changed circumstances in the inquiry of the effect of war on a convention is that a state of peace no longer exists between the parties. In the context of the first requirement of article 62, the existence of peace must have constituted an essential basis of consent. This analysis is intertwined with determining the nature of the agreement in article 56. An armed conflict clearly would vitiate conventions concerning diplomatic and consular relations, the sale of armament, military assistance programs, and collective defense. The existence of peace is indispensable for the application of these types of conventions. On the other hand, trying to visualize how a state of war would affect future obligations or the basis for consent under conventions concerning the protection of

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[128] *See* Clark v. Allen, 331 U.S. 503, 508-9 (1947).

[129] V.C.T., *supra* note 16, art. 62.

an endangered species or the protection of the ozone layer is perplexing. Logically, therefore, as a whole, *all* conventions that protect the environment are not inconsistent with the state of war.

The second requirement that must be satisfied before article 62 would permit armed conflict to be invoked as a fundamental change of circumstances is also difficult to satisfy when the convention concerns the protection of the environment. Armed conflict does not radically transform a state's obligations still to be performed under a treaty designed to protect an endangered species or the ozone layer. Consequently, armed conflict actually does not transform a state's obligations to protect the environment at all.

Armed conflict, therefore, arguably does not terminate a state's obligations under a bilateral convention that has the protection of the environment as its object and purpose. When only a portion of the parties to a multilateral agreement are at war, however, an even more compelling argument emerges. A multilateral treaty obligation of state *A*, with respect to other party states, is not changed merely because state *A* is at war with party State *B*. Nothing about a state of war between two parties affects their respective relationships with neutral states for these purposes. In addition to the contractual obligation imposed by the convention, a belligerent state has a duty under the laws of war to respect the rights of neutral states.[130] This duty will be most apparent after examining the applicability of peacetime environmental conventions to states at war. The following section, therefore, discusses the primary peacetime convention that is applicable to the type of environmental damage that occurred during the Persian Gulf War.

(b) The 1982 LOS Convention.—The United Nations Convention on the Law of the Sea[131] (1982 LOS Convention) does not address environmental concerns exclusively. The purpose of the 1982 LOS Convention was to establish a comprehensive regime "dealing with all matters relating to the law of the sea, ... bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole."[132] The 1982 LOS Convention is the end result of fourteen years of work by

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[130] FM 27-10, *supra* note 57, ¶ 512.

[131] United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter 1982 LOS Convention], *reprinted in* UNITED NATIONS, THE LAW OF THE SEA 1 (1983).

[132] Bernardo Zuleta, *Introduction* to UNITED NATIONS, THE LAW OF THE SEA, xix (1983).

over 150 different states;[133] the convention, however, has not yet entered into force.[134]

Iraq did participate as a negotiating and contracting state, ratifying the 1982 LOS Convention on July 30, 1985.[135] Having deposited its instrument of ratification, with no subsequent notice of withdrawal or denunciation, Iraq is bound, under article 18 of the Vienna Convention on the Law of Treaties, "to refrain from acts which would defeat the object and purpose" of the 1982 LOS Convention.[136] Furthermore, with the exception of the provisions concerning deep sea-bed mining and particular arrangements for settling disputes, most states consider the 1982 LOS Convention as declaratory of customary international law.[137] Although some provisions of the 1982 LOS Convention permit a temporary suspension of the rights of other states if essential for national security,[138] none of the provisions of the 1982 LOS Convention discuss the effect of armed conflict on the convention.

All of part XII of the 1982 LOS Convention concerns the "Protection and Preservation of the Marine Environment."[139] Article 192 imposes a general duty to protect and preserve the marine environment.[140] Article 194 is a lengthy provision that imposes an imprecise and subjective obligation to take all necessary measures to "prevent, reduce and control pollution of the marine environment from any source."[141] The more specific provisions that apply to the environmental damage in the Persian Gulf are found in article 207 for pollution from land-based sources,[142] article 210 for pollution by dumping,[143] article 211 for

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[133] *Id.*

[134] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1. Sixty instruments of ratification or accession must be deposited before the 1982 LOS Convention enters into force. 1982 LOS Convention, *supra* note 131, art. 308. Although 159 states (of approximately 170 total) signed the 1982 LOS Convention, as of March 1989, only 40 states have ratified the convention. *Id.* ¶ 1.1 n.3.

[135] *Id.* ¶ 1.1 table ST1-1.

[136] V.C.T., *supra* note 16, art. 18.

[137] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1 n.5.

[138] *See, e.g.*, 1982 LOS Convention, *supra* note 131, art. 25(3) (providing for the suspension of innocent passage when in the national security interests of the coastal state).

[139] *Id.* arts. 192-237.

[140] *Id.* art. 192.

[141] *Id.* art. 194.

[142] *See id.* art. 207 ("States shall take other measures as may be necessary ... to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment").

[143] *See id.* art. 210 ("[state] ... laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of [coastal and affected] States").

pollution from vessels,[144] and article 212 for pollution from or through the atmosphere.[145]

Three articles in the 1982 LOS Convention specifically provide for state accountability for damage. Articles 31 and 42(5) impose international responsibility for any damage to a state caused by a government ship or aircraft under that government's control in a noncommercial setting.[146] A much more comprehensive expression of liability is found in article 235. This article provides, in pertinent part, as follows:

> 1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law....
>
> ....
>
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate ....[147]

These provisions of the 1982 LOS Convention are unequivocal. They clearly indicate that, under a peacetime scenario, a state has an international obligation to protect and preserve the marine environment, and has international responsibility for any damage it causes. Although some provisions of the 1982 LOS Convention may be inconsistent with a state of hostilities,[148] a continuing duty under a multilateral convention and customary international law to protect the environment is not.

(c) Conclusions.—The peacetime obligations of a convention that are not inconsistent with a state of hostilities should be enforced by the international community. The 1982 LOS Convention is the principal peacetime convention that protects the environment. Others exist. The Convention on the High Seas[149]

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[144] *See id.* art. 211 (imposing a general duty to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels under their control).

[145] *See id.* art. 212 (imposing a general duty to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the airspace under its control).

[146] *See id.* arts. 31, 42(5).

[147] *See id.* art. 235.

[148] For example, an enemy warship passing through the territorial waters of a warring state no longer can claim, by definition, a right of innocent passage. *See id.* arts. 17-32.

[149] Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter 1958 Convention on the High Seas], *reprinted in* AFP 110-20, *supra* note 16, ch. 6, at 58.

has similar prohibitions to prevent marine pollution by oil; however, its provisions providing sanctions are weak.[150] The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters[151] and the Convention for the Prevention of Pollution of the Sea by Oil[152] are two other relevant conventions that are a part of international environmental law. Iraq is a party to the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, and a member of the Regional Organization for the Protection of the Marine Environment, which oversees oil spills in the Persian Gulf.[153] All of these conventions impose an obligation to prevent marine pollution.

These peacetime conventions form a very important subset of the legal norms that proscribe environmental damage during armed conflict. Although they may not govern the conduct of hostilities directly, they reinforce civil liability and help define criminal responsibility under the laws of war. These peacetime regimes also may provide for organizations responsible for effective clean-ups. Additionally, when international conventions fail to address a specific issue or are not binding on a state, and customary international law also fails to address the point, then these peacetime regimes can "fill the gap" as general principles of law recognized by civilized nations.[154]

B. International Custom

Customary international law of armed conflict has existed for thousands of years.[155] When conventions first began codifying custom in the 1850's,[156] those conventions clearly indicated that much of the law continued to exist as custom.[157] These provisions

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[150] *See id.* arts. 24-29.

[151] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

[152] Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3.

[153] SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS—GULF POLLUTION TASK FORCE, THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR ii (1992) [hereinafter THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR].

[154] *See supra* part III.

[155] Laws of War, *supra* note 9, at 2.

[156] *Id.* at 3-4.

[157] *Id.* at 4.

pervade modern international conventions, unequivocally evidencing that certain fundamental principles of customary international law are binding on all states.[158] An international convention that codifies existing international law merely provides another basis for binding its parties.[159]

A discussion of these longstanding customary principles appears later in this article. One principle of customary international law, however, clearly is developing—that is, "nature is no longer fair game in mankind's conflicts."[160] This emerging principle is embodied in a 1982 United Nations General Assembly Resolution, the "World Charter for Nature," that provides "nature is to be secured against degradation caused by warfare" and "military activities damaging to nature are to be avoided."[161]

1. Limited Means.—The very heart of all the laws of war is "that the right of belligerents to adopt means of injuring the enemy is not unlimited."[162] This principle is the very fabric of the laws of armed conflict and is incorporated explicitly in all of the laws of armed conflict because each one, by its very nature, limits the conduct of hostilities.[163] The principles of proportionality and discrimination are corollaries of this cardinal principle of limited means.[164]

2. Proportionality and Discrimination.—Two other key principles of customary law are proportionality and discrimination.[165] Proportionality is a very fact-specific concept that limits the use of force.[166] Discrimination restricts methods, weapons, and targets.[167] To make these two principles functional, they have been refined in military usage to the following three, interrelated customary principles of law.[168]

(a) Military Necessity.—The principle of military necessity states "*[o]nly* that degree and kind of force, *not otherwise prohibited* by the law of armed conflict, *required* for the partial or complete submission of the enemy with a *minimum expenditure* of

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[158] *Id.* at 4-6.

[159] *Id.* at 6.

[160] Szasz, *supra* note 79, at 217.

[161] *Id.* at 216-17.

[162] LAWS OF WAR, *supra* note 9, at 4.

[163] *See, e.g.*, 1907 Hague Regulations, *supra* note 44, art. 22.

[164] LAWS OF WAR, *supra* note 9, at 4-5.

[165] *Id.*

[166] *Id.* at 5.

[167] *Id.*

[168] *Id.*

time, life, and physical resources may be applied."[169] The proportionality aspect of military necessity does not require a state to limit its means and methods of warfare to a level equivalent to its enemy's weapons systems and force levels.[170] On the other hand, it does not bestow on a state, as the Germans contended during World War II, "the right to do anything that contributes to the winning of a war."[171] The emphasized language of the definition unequivocally states that constraints on this principle exist. Military necessity permits

> the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.[172]

This principle requires that the destructive act be connected to the submission of the enemy.[173]

The laws of armed conflict are not subject to, or restricted by, the principle of military necessity. Rather, the principle of military necessity is subject to, and restricted by, the laws of armed conflict.[174] One such restriction in customary international law is that only combatants and military objectives may be attacked.[175] Under customary international law, military objectives are "objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack."[176]

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[169] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2 (emphasis added). Military necessity is defined by the United States Army "as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." FM 27-10, *supra* note 57, ¶ 3.a.

[170] MOORE, *supra* note 5, at 158.

[171] DA PAM. 27-161-2, *supra* note 127, at 248.

[172] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2.

[173] *Id.*

[174] *Id.*

[175] *Id.* ¶ 8.1.1.

[176] *Id.* Military objectives are defined by the United States Army as

(b) Humanity.—The principle of humanity—also known as the principle of unnecessary suffering and destruction—states that "[t]he employment of any kind or degree of force *not* required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited."[177] Humanity prohibits, for example, the use of projectiles that cause superfluous injury or are undetectable by field x-ray equipment. Humanity also prohibits the use of indiscriminate weapons, such as the World War II German V-2 rockets that could not be directed against a military objective.[178]

The customary principles of military necessity and humanity are complementary in nature.[179] Whereas military necessity only permits the use of force toward a military objective, humanity prohibits force that "needlessly or unnecessarily causes or aggravates both human suffering and physical destruction."[180]

(c) Chivalry.—The principle of chivalry states that "[d]ishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden."[181] Chivalrous conduct is a broad concept that has lost its effectiveness as an independent principle that governs the conduct of war.[182] It is still valid, however, and is implemented through specific provisions of the law of armed conflict that concern perfidy and ruses of war.[183] Chivalry permits acts, such as espionage, that are misleading, but against which the enemy should protect itself.[184] In contrast, chivalry prohibits perfidy, which is a deception "designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence."[185]

"combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." FM 27-10, *supra* note 57, ¶ 40.c.

[177] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2. The United States Army incorporates article 23(e) of the 1907 Hague Regulations to define unnecessary suffering. Article 23(e) provides "it is especially forbidden ... to employ arms, projectiles, or material calculated to cause unnecessary suffering." FM 27-10, *supra* note 57, ¶ 34.

[178] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶¶ 9.1.1-9.1.2.

[179] *Id.* ¶ 5.2.

[180] *Id.*

[181] *Id.*

[182] *See* DA PAM. 27-161-2, *supra* note 127, at 15-16.

[183] *See* COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2; *id.* ch. 12; FM 27-10, *supra* note 57, ¶¶ 48-55.

[184] FM 27-10, *supra* note 57, ¶ 49.

[185] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 12.1.2. An act of

C. Key Definitions

1. Environment and Environmental Damage.—The environment is an intangible concept that is difficult to define. The 1977 ENMOD Convention implicitly defines the environment by its component parts.[186] If the environment is considered in its component parts—that is, property in various forms, such as animal and plant life, real estate, beaches, and oceans—then determining whether environmental damage exists is simple. Oil polluted beaches and dead wildlife are easy to identify. The environment best is defined in a very broad sense as anything that is not man-made. Therefore, in its most simplistic terms, environmental damage is any adverse, incremental change in the existing status of the environment.

The more difficult and contentious issue is determining the level of environmental damage that should be proscribed during armed conflict. Any attempt to proscribe environmental damage in terms of a fixed level of damage that cannot be exceeded would be impractical and would fail. The 1977 ENMOD Convention attempted to fix a level of damage that could not be exceeded, but it has been criticized for being too broad and too vague.[187] As previously discussed, the laws of war require an analysis of the principles of military necessity, unnecessary suffering, and proportionality. Creating an absolute standard could impair a state's inherent right of self-defense.[188] The military commander must be given the discretion to weigh the military necessity of an act with its corresponding environmental damage.

Defining "environment" or "environmental damage" further is unnecessary. The only reason for defining these terms more explicitly would be to attempt to place an absolute limit on environmental damage that cannot be exceeded by a military commander. The military commander should consider environmental damage as an important factor in balancing the laws of war. If a proper system of deterrence is in place, then the military

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perfidy prohibited by the principle of chivalry is feigning surrender to lure the enemy into a trap. *Id.*

[186] *See supra* part III.A.3.

[187] *See supra* part III.A.3.C.

[188] In the Laws of War, very few rules do not provide for an exception for circumstances of military necessity. One notable example of a rule without exception, however, is the absolute prohibition contained in the rule that proscribes the killing of prisoners of war. *See* COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2 n.5.

commander will be held accountable for his or her failure to consider adequately the environmental consequences of his or her military operations.

2. Armed Conflict and the Threshold of Application of the Laws of War.—A formal state of war is not required to invoke the norms of *jus in bello*.[189] They apply in all situations of international armed conflict and military occupation.[190] The important issues are determining what war is, what a formal state of war is, and whether war somehow is different than armed conflict or hostilities. In 1862, the United States Supreme Court defined war under the law of nations as "[t]hat state in which a nation prosecutes its right by force."[191] The conventions discussed so far have used the phrases "war," "armed conflict," "hostilities," and "military or other hostile use" as a period of time during which they proscribe conduct, but these conventions do not offer any definitions.

From recent usage, all of these terms apparently can be used interchangeably to refer to the period during which the laws of armed conflict apply.[192] Equally apparent is that one consequence of this broad usage is that it has lowered the threshold for determining when the laws of armed conflict apply.[193] This is a desirable result because it will protect the environment to the greatest extent possible by increasing the likelihood that the laws of armed conflict will apply, notwithstanding a state's creative renaming of a war, using terms such as "incident," "intervention," or "police action."[194] One consequence of lowering the threshold is that it clouds the issue of the applicability of the peacetime regime. As the discussion above demonstrates, however, laws of armed conflict are suited better to protect the environment when issues of military force, rather than peacetime issues—are being analyzed. The peacetime regime, although applicable in most armed conflict scenarios, does not account for environmental damage that results from legitimate self-defense. If states exercise good faith in applying the existing principles of the laws of armed conflict, then the environment will be protected. If states fail to exercise good faith, then the military commander should be held accountable.

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[189] LAWS OF WAR, *supra* note 9, at 1.

[190] *Id.* at 1, 12.

[191] The Prize Cases, 67 U.S. (2 Black) 635 (1862), *noted in* NATIONAL SECURITY LAW 71, 72-73 (Stephen Dycus et al. eds.) (1990).

[192] LAWS OF WAR, *supra* note 9, at 1.

[193] *See* NATIONAL SECURITY LAW 318 (John N. Moore et al. eds. 1990); LAWS OF WAR, *supra* note 9, at 1-2.

[194] NATIONAL SECURITY LAW, *supra* note 193, at 318.

The conclusion thus far is that the threshold of applicability should be low. The difficult issue remaining is determining the threshold at which coercive conduct between two states makes the laws of armed conflict applicable. Two resolutions of the Institute of International Law set the threshold very low in the case of forces under the control of the United Nations.[195] The laws of armed conflict traditionally have governed the conduct between nations, not organizations.[196] Consequently, a movement emerged to ensure that the laws of armed conflict applied to forces of the United Nations.[197] Part of this movement was the enactment of these resolutions,[198] which require the application of the laws of armed conflict to a state of hostilities.[199]

This definitional approach results in a circuitous argument, however, unless a factual analysis is used to determine a state of hostilities. Factually, the outer limits can be defined using a linear model of a state of hostilities by examining obvious examples. Because full diplomatic and consular relations would be a peaceful state of affairs, hostilities do not begin until after a deterioration in these relations. On the other hand, a declaration of war[200] or the use of military force clearly constitute hostile relations. What remains between these two examples is a gray area. Precisely when peace ends and hostilities begin within this gray area must be a very fact-intensive determination. If a prudent state has any question about whether the laws of armed conflict apply, it should presume they apply. In all cases, a military commander and his or her advisors should assume that they apply.

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[195] *See* Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Inst. of Int'l Law Res., Wiesbaden Sess. (Aug. 13, 1975) [hereinafter Condition of Application of Rules], *reprinted in* THE LAWS OF ARMED CONFLICTS 907 (Dietrich Schindler & Jiri Toman eds. 3d ed. 1988) [hereinafter LAWS OF ARMED CONFLICTS]; Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Inst. of Int'l Law Res., Zagreb Sess. (Sept. 3, 1971) [hereinafter Condition of Application of Humanitarian Rules], *reprinted in* LAWS OF ARMED CONFLICTS, *supra*, at 903.

[196] LAWS OF ARMED CONFLICTS, *supra* note 195, at 903.

[197] *Id.*

[198] *Id.*

[199] *See* Condition of Application of Rules, *supra* note 195, arts. 2, 4; Condition of Application of Humanitarian Rules, *supra* note 195, art. 2.

[200] *See* Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. 539, *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 57.

IV. Criminal Responsibility for War Crimes

"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[201]

A. Criminal Responsibility: Modern Beginnings

Individual criminal responsibility for violations of the laws of war is an undisputed part of customary international law.[202] Criminal responsibility can extend to individual combatants, government officials, and heads of state.[203] Furthermore, a recognized principle of international law is that "[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan."[204] A defendant convicted of a war crime may be sentenced to any punishment, including the death penalty.[205]

The trials following World War I were the first major international effort to punish war crimes.[206] These trials are referred to as the Leipzig trials, and were generally unsuccessful.[207] Consequently, the Allies took a different approach during World War II.

In 1942, the Allies signed, in London, a declaration that the punishment of war crimes would be one of the principal goals of their alliance.[208] Specifically to avoid a repeat of the Leipzig trials, the Allies signed the Moscow Declaration of October 30, 1943, which stated that suspected war criminals would be tried

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[201] *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, principle I, [1950] 2 Y.B. Int'l L. Comm'n 374 [hereinafter *1950 Nuremberg Principles*], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 923.

[202] LAWS OF WAR, *supra* note 9, at 12.

[203] *1950 Nuremberg Principles*, *supra* note 201, principles III, IV.

[204] Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411, *extracts reprinted in* LAWS OF WAR, *supra* note 9, at 155.

[205] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.7.

[206] LAWS OF WAR, *supra* note 9, at 11.

[207] DA PAM. 27-161-2, *supra* note 127, at 222. Germany refused the Allied extradition request for 896 suspected German war criminals. Instead, 45 names were chosen to be tried by the Criminal Senate of the Imperial Court of Justice of Germany. Of these 45, only 12 were tried. Six of these 12 were acquitted, and the other six received light sentences. *Id.* at 221-22.

[208] LAWS OF WAR, *supra* note 9, at 11.

"by the people and at the spot where the crime was committed."[209] The Moscow Declaration also stated that crimes with no specific geographic setting would be the subject of a later joint decision.[210] On August 8, 1945, an agreement[211] was signed by the Allies, establishing an International Military Tribunal to try Germans whose alleged crimes had no situs.[212] Annexed to the 1945 London Agreement was the Charter of the International Military Tribunal.[213]

The International Military Tribunal at Nuremberg conducted one trial of twenty-four German defendants.[214] Additionally, Allied agreements provided for the prosecution of defendants beyond the jurisdiction of the International Military Tribunal.[215] Pursuant to these provisions, the United States tried twelve cases with multiple defendants by military tribunals.[216] The overwhelming majority of the war crime prosecutions after World War II, however, were tried by national courts or military occupation courts.[217] United States military commissions tried 489 cases, involving 1672 accused, at Dachau, Germany, alone.[218]

The International Military Tribunal for the Far East based its jurisdiction initially on the Potsdam Declaration of July 26, 1945, issued by the United States, the United Kingdom, and China.[219] On April 3, 1946, the Allied Far Eastern Advisory Committee issued a policy decision upon which twenty-five defendants were tried and convicted.[220] Although states have prosecuted their own nationals for violations of the law of armed

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[209] DA PAM. 27-161-2, *supra* note 127, at 222.

[210] *Id.*

[211] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter 1945 London Agreement], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 911.

[212] DA PAM. 27-161-2, *supra* note 127, at 223-24.

[213] Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1545, 82 U.N.T.S. 280 [hereinafter 1945 Charter of the IMT], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 913.

[214] DA PAM. 27-161-2, *supra* note 127, at 224. Of the 24 defendants, 19 were convicted of at least one of the four counts alleged, and three were found not guilty. One defendant committed suicide before trial, and one was not tried because of old age. *Id.* at 226.

[215] *Id.* at 224.

[216] *Id.* at 226-27.

[217] LAWS OF WAR, *supra* note 9, at 6; *see also* DA PAM. 27-161-2, *supra* note 127, at 224.

[218] DA PAM. 27-161-2, *supra* note 127, at 235. Of these 1672 accused, 1416 were convicted. *Id.*

[219] *Id.* at 233.

[220] *Id.* at 234.

conflict, war crimes trials of enemy personnel generally have been avoided by states since World War II.[221]

B. The Legal Framework: An Ad Hoc Approach

All nations have an obligation to enact legislation to punish grave breaches of international law, to search for persons accused of grave breaches, and to bring them to trial before its own courts.[222] The most sensible option available to the world community to try war criminals, however, is an international tribunal created under the cognizance of the United Nations. Such a tribunal would serve to strengthen the role of the United Nations in the rule of law, and would be consistent with the purposes of the United Nations.[223]

Articles 29, 39, and 41 of the United Nations Charter collectively authorize the Security Council to establish an ad hoc international tribunal to try violations of the laws of armed conflict.[224] All member states of the United Nations must recognize any judgment of this ad hoc tribunal pursuant to the requirements of articles 25, 48, and 49 of the United Nations Charter.[225] In creating an International Military Tribunal for the Persian Gulf, for instance, the Security Council could rely upon the Charter of the International Military Tribunal created by the 1945 London Agreement (1945 Charter of the IMT),[226] which organized the trials at Nuremberg. The 1945 Charter of the IMT established the constitution, jurisdiction, general principles, powers, and procedures of the tribunal; created a committee for

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[221] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶¶ S6.2.5.2-S6.2.5.3.

[222] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention No. I], *reprinted in* LAWS OF WAR, *supra* note 9, at 171; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention No. II], *reprinted in* LAWS OF WAR, *supra* note 9, at 194; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention No. III], *reprinted in* LAWS OF WAR, *supra* note 9, at 216; 1949 Geneva Convention No. IV, *supra* note 70, art. 146; 1977 ENMOD Convention, *supra* note 99, art. IV.

[223] *See* U.N. Charter art. 1 (setting forth the purposes of the United Nations).

[224] *See* U.N. Charter arts. 29, 39, 41; John N. Moore & Robert F. Turner, *Apply the Rules of Law*, INT'L HERALD TRIB., Sept. 12, 1990, at 12.

[225] *See* Moore, *supra* note 5, at 306; Moore & Turner, *supra* note 224, at 12.

[226] 1945 Charter of the IMT, *supra* note 213, art. 1.

the investigation and prosecution of war criminals; and outlined the requirements ensuring a fair trial for the defendants.[227]

The Security Council also has the option of using a regional arrangement or group to conduct Persian Gulf war crimes trials.[228] A logical choice would be a tribunal composed of the Coalition Forces. In delegating this authority, the Security Council could offer as much, or as little, mandate or guidance as it desired. This option still would be under the cognizance of the United Nations, and would continue to enforce the role of the United Nations in world peace.[229]

C. Trial in Absentia

Article 12 of the 1945 Charter of the IMT granted the Nuremberg tribunal jurisdiction over defendants in absentia.[230] One defendant at the Nuremberg trials was tried in absentia and sentenced to death by hanging.[231] In 1946, the General Assembly of the United Nations unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[232]

Obtaining in personam jurisdiction over a defendant clearly is preferable to a trial in absentia.[233] A trial in absentia, however, conducted in a fair manner, also supports deterrence and the rule of law by demonstrating the world community's commitment to condemn violations of the laws of armed conflict. A defendant who has been convicted—or at least indicted—could not travel outside a state refusing extradition without fear of arrest.[234] An indictment also would make a defendant subject to custody by coercive action or abduction.[235]

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[227] *Id.* arts. 1-30.

[228] *See* U.N. CHARTER art. 53, ¶ 1.

[229] Other options of prosecuting Persian Gulf war criminals are discussed *uinfra* part VIII.

[230] 1945 Charter of the IMT, *supra* note 213, art. 12.

[231] DA PAM. 27-161-2, *supra* note 127, at 226.

[232] *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), 1st Sess., pt. 2, (Dec. 11, 1946), *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 921.

[233] MOORE, *supra* note 5, at 305.

[234] *Id.* at 299.

[235] Louis R. Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L.J. 127, 129 (1991). No statute of limitations for war crimes exists. *See* COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.3.

V. State Responsibility and Reparation

"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[236]

State responsibility and reparation are complementary doctrines that are accepted universally in international law.[237] Reparation is the liability under customary international law to pay compensation for a violation of any of the laws of armed conflict.[238] Compensation can be made in the form of a formal apology, restitution in kind, a monetary payment, or some combination of these forms.[239] The monetary payment, depending on the circumstances, may be for the value of the property at the time of the taking; interest to the date of payment; and compensation for medical expenses, loss of earnings, pain and suffering, and mental anguish.[240]

Holding states responsible for deterring future violations of the laws of war is imperative.[241] During the conduct of hostilities, the methods for obtaining reparations are limited. One of the few effective methods—if not, the only practical one—during hostilities is to seize assets of the offending state for distribution by a claims tribunal. After the hostilities are over, reparations can be made by a program determined by the agreement ending the hostilities, or by an international tribunal set up under the authority of the Security Council of the United Nations. The latter could be done pursuant to the authority given the Security Council in articles 39 and 41 of the United Nations Charter.

In addition to seeking reparations, a wronged state has many other methods to encourage compliance with the laws of armed conflict. It could "[p]ublicize the facts with a view toward influencing world public opinion against the offending nation," and it could "[s]eek the intervention of a neutral party."[242] Under appropriate circumstances, the International Court of Justice and national courts could settle a dispute concerning reparations.

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[236] Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17, *quoted in* Robert F. Turner, *Justice: What Iraq Owes Its Victims*, Wash. Post, Mar. 3, 1991, at C4.

[237] *See* Turner, *supra* note 236, at C4.

[238] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 6.2.

[239] DA PAM. 27-161-1, *supra* note 123, ¶ 7-22.

[240] *Id.*

[241] MOORE, *supra* note 5, at 285 ("To meaningfully contribute to the deterrence of such crimes, the rule of law must impose genuine costs on their perpetrators").

[242] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 6.2.

Unilateral or collective embargoes and trade sanctions also can be used to encourage compliance with the laws of armed conflict.

Although ensuring compensation to victimized parties is very important, the corresponding effect of reparations on the offending state also should be considered.[243] Excessive reparations can cripple the compensation scheme, impoverish the people of the offending state, and destroy the economic viability of the offending state.[244]

VI. The Adequacy of the Prohibitions Contained in the Existing Legal Order: A Case Analysis of the Environmental Destruction in Kuwait

"To witness the fire and smoke of the burning oil fields was to glimpse the apocalypse."[245]

A. The Environmental Destruction in Kuwait

The Iraqi invasion of Kuwait on August 2, 1990, resulted in "the most momentous and destructive war in modern history ... [and] unprecedented environmental ruin."[246] This environmental damage was caused primarily by the torching of oil wells, the flooding of oil into the Persian Gulf, and the incidental damage caused by military bombing and maneuvers.

During its retreat, the Iraqi Army intentionally dynamited 732 producing oil wells in Kuwait.[247] Over 650 of these oil wells caught fire,[248] causing oil laden clouds as high as 22,000 feet.[249] Some of the blazes reached 200 feet into the air, while the eighty-two dynamited wellheads that did not catch fire continuously poured oil into the countryside.[250] At the peak of destruction, the fires burned about five million barrels of oil daily, generated more

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[243] MOORE, *supra* note 5, at 286-87.

[244] *Id.* at 287.

[245] *Id.* at 351.

[246] ARKIN ET AL., *supra* note 1, at 5.

[247] *See* Donna Abu-Nasr, *Winds Prolong Fires in Kuwait*, WASH. TIMES, Nov. 4, 1991, at 7; Thomas Y. Canby, *After the Storm*, NAT'L GEOGRAPHIC, Aug. 1991, at 2-4.

[248] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at ii. Some controversy continues over the precise number of wells which caught fire. The *Washington Times* reported that only 640 caught fire. *See* Abu-Nasr, *supra* note 247, at 7.

[249] Canby, *supra* note 247, at 5.

[250] *See* Abu-Nasr, *supra* note 247, at 7; Canby, *supra* note 247, at 2-4.

than half a million tons of aerial pollutants per day,[251] and consumed 100 million dollars of oil daily.[252]

These fires have created enormous smoke-related health problems. Bronchial and asthma cases, and upper-throat infections have increased markedly; researchers are very concerned about the carcinogens in the atmosphere; reduced sunshine may cause deficiencies in vitamins D and E.; and air pollutants ultimately enter the milk of sheep and diary cattle.[253] One expert estimates that the air pollution levels in Kuwait could cause 1000 excess deaths annually and increase the prewar mortality rate by as much as twenty percent.[254] The United States Environmental Protection Agency reported that the oil well fires in Kuwait "may represent one of the most extraordinary manmade environmental disasters in recorded history."[255] The *New York Times* reported that these fires were believed to be one of the world's "gravest air pollution disasters," and just two days after the fires began, Iran reported that "black rain" had fallen on its lands.[256] One observer reported, "The overpowering stench of burning oil turns the stomach. Greasy black soot soon coats eyeglasses, collects on surgical masks used to protect the lungs, clings to the skin and soils clothing."[257] The last oil well fire was not extinguished until November 1991—eight months after the Iraqi retreat.[258]

The intentional flooding of the oil into the Persian Gulf was equally disastrous. Oil spills estimated at four to six million barrels covered some 600 square miles of the sea surface of the Persian Gulf and 300 miles of its coastline.[259] The enormous oil slick created by this flooding irreparably has damaged a unique ecosystem full of marine life.[260] The destruction of this food source will be felt for generations, and the seeping oil could taint the groundwater supply.[261] Thousands of migratory birds have

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[251] Canby, *supra* note 247, at 2. Some of these pollutants settled as far as 1500 miles south of Kuwait. *Id.*

[252] Ronald A. Taylor, *"Blue Skies are Back" in Kuwait*, WASH. TIMES, Nov. 5, 1991, at 1.

[253] Canby, *supra* note 247, at 2-3.

[254] John Horgan, *The Danger from Kuwait's Air Pollution*, SCI. AM., Oct. 1991, at 103.

[255] ARKIN ET AL., *supra* note 1, at 17.

[256] *Id.* at 16-17.

[257] *Id.* at 17.

[258] Abu-Nasr, *supra* note 247, at 7.

[259] Canby, *supra* note 247, at 2-4. In comparison, the *Exxon Valdez* spill was only about 260,000 barrels. Matthew Nimetz & Gidon M. Caine, *Crimes Against Nature*, Amicus J., Summer 1991, at 8.

[260] Canby, *supra* note 247, at 4.

[261] *Id.* at 7.

perished, mistaking the oil lakes for water.[262] The toxic metals released by the oil slicks and torched wells that will enter the food chain can cause brain damage and cardiovascular disorders in humans.[263]

Incidental damage to the environment was caused by the bombing of chemical factories and weapons stockpiles.[264] The Director of the United Nations Environmental Programme reported that heavy off-road vehicles destroyed vegetation and disrupted the soil surface.[265]

B. Environmental Restoration—A Global Effort

Twenty-eight teams from ten countries[266] joined in "history's biggest fire fight."[267] These teams exceeded ten thousand workers[268] from the United States, Canada, Britain, China, Iran, France,[269] Hungary,[270] the Soviet Union, Romania, and Kuwait.[271]

The last oil well fire ceremoniously was sealed on November 6, 1991.[272] The total cost for the operation to put out the fires was estimated to be almost two billion dollars.[273] The next step in the clean-up was to begin to drain the twenty-five to fifty million barrels of oil in the hundreds of lakes that dot the Kuwaiti countryside.[274] Total reconstruction and rehabilitation is estimated to cost twenty-two billion dollars.[275] In contrast to its prewar oil production of two million barrels daily, Kuwait was

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[262] Jennifer Parmelee, *Kuwaiti Emir Snuffs Out Last Iraqi-Lit Oil Fire*, WASH. POST, Nov. 7, 1991, at A1.

[263] Canby, *supra* note 247, at 7.

[264] ARKIN ET AL., *supra* note 1, at 17.

[265] *Id.* at 18-19; *see also* Canby, *supra* note 247, at 2 ("Thousands of military vehicles ... have violently altered the soil structure").

[266] Taylor, *supra* note 252, at 1.

[267] Parmelee, *supra* note 262, at A1.

[268] *Id.*

[269] Donna Abu-Nasr, *Oil Fires Nearly Out; Harm Lingers*, WASH. TIMES, Oct. 30, 1991, at 10.

[270] Taylor, *supra* note 252, at 1.

[271] Deborah Hargreaves, *Towering Inferno is Quenched*, LONDON FIN. TIMES, Nov. 6, 1991, at 13.

[272] Samia Nakhoul, *Last Oil Fire out in Kuwait*, WASH. TIMES, Nov. 7, 1991, at 10.

[273] *Id.*

[274] Parmelee, *supra* note 262, at A1.

[275] *Id.*

able only to produce 300,000 barrels daily in November 1991.[276] Full production will not return until 1993, at the earliest.[277]

C. Delineating the Environmental Crimes

1. Military Necessity.—The principle of military necessity is the controlling factor in all of the applicable conventions that proscribe the environmental damage that occurred during the Persian Gulf War. The customary law embodied in the 1907 Hague Convention Number IV forbids a state to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[278] As evidence of customary law, this restriction is binding on Iraq.[279]

Iraq is a party state to the 1949 Geneva Convention Number IV, which prohibits destruction during occupation that is not "rendered absolutely necessary by military operations."[280] The 1977 Geneva Protocol I, which prohibits attacks that cause excessive damage "in relation to the concrete and direct military advantage anticipated," is strong evidence of customary law and therefore would be binding on Iraq.[281]

Iraq has not ratified the 1977 ENMOD Convention, and the convention is not declaratory of customary law. Iraq, however, as a contracting state, is obligated to refrain from acts that would defeat the object and purpose of the convention.[282] Although this convention does not permit "widespread, long-lasting or severe" environmental damage, it recognizes the principle of military necessity.[283]

The following sections will analyze the environmental damage caused by Iraq in the Persian Gulf to determine whether or not that damage was justified by military necessity and to determine what crimes, if any, occurred.[284] On August 2, 1990,

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[276] Nakhoul, *supra* note 272, at 10.

[277] *See* Taylor, *supra* note 252, at 1.

[278] *See* discussion *supra* part III.A.1.c.

[279] *See* discussion *supra* part III.

[280] *See* discussion *supra* part III.A.2.b-c(1).

[281] *See* discussion *supra* parts III.A.2.b, c(2).

[282] *See* discussion *supra* part III.A.3.b.

[283] *See* discussion *supra* part III.A.3.c.

[284] This discussion will focus only on the flooding of oil into the Persian Gulf and the torching of the oil wells. Incidental combat damage, however, is subject to the same type of analysis. The determination of whether or not a particular act was justified by military necessity is a very fact-intensive inquiry. The detailed facts necessary to analyze these issues in much greater detail could not be located. Remarkably, none of the authorities found during research contended

Saddam Hussein began threatening that he would turn Kuwait into a graveyard if anyone came to Kuwait's aid.[285] These previous threats to destroy Kuwait undermine any argument that the environmental damage was justified by military necessity.

2. The Flooding of Oil into the Persian Gulf.—On January 25, 1991, Iraq dumped several million barrels of oil from the crude oil tanker loading terminal at Sea Island, drained five oil tankers in the port of Mina al Ahmadi, and pumped oil from storage tanks ashore into the Persian Gulf.[286] Based upon an assessment of the circumstances at the time, the United States Department of State characterized the deliberate spill as "indiscriminate environmental war."[287]

The military advantage to Iraq in dumping the oil into the Persian Gulf was estimated to be minimal.[288] A small portion of the flooding of oil appears to have been incidental to legitimate military operations. During the battle for Al Khafji, for example, Iraqi artillery ruptured oil tanks, which released oil into the Persian Gulf.[289] Whether these tanks were intentionally targeted or inadvertently damaged is not known. The great bulk of the oil spill, however, was caused by the intentional releases at the Sea Island terminal and the anchored tankers—both of which were unrelated to any immediate military objective.[290]

The following three theories may explain Iraq's motivation for dumping the oil: "creation of a defensive barrier against

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that the dumping of the oil or the torching of the wells was justified by military necessity.

[285] *Iraq Invades Kuwait, Soldiers Surge into Oilfields*, BOSTON GLOBE, Aug. 3, 1990, at 1.

[286] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DEP'T OF NAVY, THE U.S. NAVY IN "DESERT SHIELD"—"DESERT STORM" app. A, 20 (1991) [hereinafter THE U.S. NAVY IN "DESERT STORM"]. On January 26, 1991, the spill from Sea Island Terminal had reached 120 million gallons of oil. The United States successfully bombed the pipelines feeding Sea Island Terminal, thereby stemming the flow, on January 27. The flow from Sea Island Terminal finally stopped on January 28, after dumping approximately 460 million gallons into the Persian Gulf. *Id.* app. A, at 21-22.

[287] *Id.* app. A, at 20-21.

[288] *See* Canby, *supra* note 247, at 3; *Saddam's Ecoterror*, NEWSWEEK, Feb. 4, 1991, at 36; *A War Against the Earth*, TIME, Feb. 4, 1991, at 32.

[289] Canby, *supra* note 247, at 4.

[290] *See id.* Had not Kuwaiti technicians secretly closed valves that were unknown to the Iraqi soldiers and marked others "open" when they actually were closed, the oil spill could have been three times larger. *Id.* Military necessity does permit environmental damage under certain circumstances. For example, during World War II, the United States sunk the entire Japanese tanker fleet. In the vast and relatively clean Pacific Ocean of the 1940's, however, the environmental damage was only transitory. *See* Gwynne Dyer, *War, the Gulf and the Environment*, WASH. TIMES, Oct. 22, 1991, at F4.

amphibious assault, environmental terrorism to dispirit public opinion, and a tactical probe seeking to test allied forces and possibly disrupt them."[291] Of these three theories, only the first and last might be justified by military necessity. Iraq's initial threats to destroy Kuwait, however, as well as its past use of oil spills as terrorism in the Iran-Iraq War, highlight that the motivation was improper and illegal environmental terrorism.[292]

3. The Torching of the Oil Wells.—The extensive planning to destroy all of Kuwait's producing wells began immediately after the invasion.[293] Petroleum engineers packed almost every wellhead with thirty to forty pounds of Russian-made plastic explosive, and wired those wellheads with an electric detonation system backed-up by mechanical detonators.[294] On February 22, 1991, Iraq "systematically and deliberately destroyed" approximately one hundred oil wells, tanks, export terminals and other installations in Kuwait in its "scorched-earth policy" to destroy the entire oil production of Kuwait.[295] Iraq continued, on February 23, to destroy another one hundred oil wells, as well as additional oil facilities and shipping terminals.[296] A total of 732 producing oil wells in Kuwait were set on fire or damaged.[297]

The military advantage to Iraq in torching the wells was estimated to be minimal.[298] The vindictiveness was emphasized by the fact that Iraq also damaged or destroyed all twenty-six gathering centers that were designed to separate the oil, gas, and water from one another—a process that is essential for oil production.[299] Iraq also destroyed all the technical specifications for each well.[300] Neither of these latter acts had any justification under the principle of military necessity. The Science Adviser to King Hussein of Jordan stated, "Strategically it was senseless.... The only casualty was the environment."[301] The *New York Times*

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[291] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 4.

[292] *Id.*

[293] *Id.* at 5.

[294] *Id.*

[295] THE U.S. NAVY IN "DESERT STORM", *supra* note 286, app. A, at 37.

[296] *Id.* app. A, at 38.

[297] *See* Abu-Nasr, *supra* note 247, at 7; Canby, *supra* note 247, at 2-4.

[298] *See* Canby, *supra* note 247, at 3; *Saddam's Ecoterror*, NEWSWEEK, Feb. 4, 1991, at 36; *A War Against the Earth*, TIME, Feb. 4, 1991, at 32.

[299] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 6.

[300] *Id.*

[301] Canby, *supra* note 247, at 5.

referred to the torching of the wells as "an act of insane vindictiveness."[302]

During hearings of the United States Senate Gulf Pollution Task Force on October 16, 1991, legal scholars agreed that "Iraq's actions were militarily disproportionate, wantonly destructive of civilian assets, and had unnecessarily destroyed property."[303] An international conference in Canada "On the Use of the Environment as a Tool of Conventional Warfare," held during July 1991, also concluded that the environmental damage was not supported by military necessity.[304] The Deputy Legal Adviser of the Department of State stated that the principle of military necessity "was repeatedly and wantonly violated by Iraq in the Gulf War."[305] The Senate Gulf Pollution Task Force made an excellent summary in the following statement:

> Yet the vastness of the destruction and the disproportionate impact of Iraq's acts on the civilian population of its enemies would appear to contradict any claim that all the well fires and oil spills were impelled by immediate and proper military considerations. The combined adverse effects of the oil spills and well fires on the civilian population, through environmental contamination and destruction of resources, were immediate and obvious, while any military advantage would appear to have been remote and speculative.[306]

To the extent that the Iraqi actions in the flooding of oil into the Persian Gulf, the torching of the oil wells, and the incidental combat damage was not justified by military necessity, violations of the 1949 Geneva Convention Number IV and the customary laws of armed conflict occurred.

4. Drafting the Charges.—A draft indictment has been prepared by the Commission for International Due Process of Law and submitted to the Secretary-General of the United Nations.[307] With respect to environmental damage, the following two charges were drafted:

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[302] Nimetz & Caine, *supra* note 259, at 8.

[303] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 4.

[304] SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS—GULF POLLUTION TASK FORCE, EXECUTIVE SUMMARY AND RECOMMENDATIONS, THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR 5 (1992).

[305] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 75.

[306] *Id.* at 74-75.

[307] Luis Kutner & Ved P. Nanda, *Draft Indictment of Saddam Hussein*, 20:1 DENV. J. INT'L L. & POL'Y 91 (1991).

> CHARGE I: That the Defendants, Saddam Hussein and his military, political and economic advisors and other unnamed Defendants, did commit violations, *see* Amnesty International, *Iraq/Occupied Kuwait—Human Rights Violations Since August 2, 1990*, MDE 14/16/90, December 1990, of the laws of war contained in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, T.I.A.S. 3365, to which Iraq acceded on February 14, 1956, and of customary laws of war, by carrying out the invasion and subsequent occupation of Kuwait, to wit:
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> ....
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> > Specification 10: In that, the Defendants, in violation of Article 53 of this Convention, destroyed the real and personal property of protected persons and the State of Kuwait; this destruction was not absolutely necessary to military operations and occurred for the most part after military operations had ceased ....
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> ....
>
> CHARGE V: That in violation of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977, 31 U.S.T. 333, T.I.A.S. Number 9614, which Iraq signed on August 15, 1977, the Defendants deliberately released millions of gallons of crude oil into the Persian Gulf for the express purpose of gaining military advantage while creating effects extremely harmful to human welfare.[308]

Although this indictment is an excellent draft, a few corrections are necessary with respect to charging environmental crimes. First, while Charge I initially refers to the 1949 Geneva Convention Number IV and customary laws of war, Specification 10 cites only to a violation of article 53 of the 1949 Geneva Convention Number IV. This specification should be modified to allege a violation of the convention and the customary laws of war. Even though the 1949 Geneva Convention Number IV embodies customary law, this modification would clarify that the charges allege violations of both. This is important because customary laws of war are broader in scope than the subset of customary law codified in article 53 of the 1949 Geneva Convention Number IV.

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[308] *Id.* at 92-93, 95.

Second, the violations described in specification 10 refer only to the destruction of real and personal property. While this allegation is broad enough to encompass the torching of the oil wells, the flooding of oil into the Persian Gulf, and incidental combat damage not justified by military necessity, the factual basis for the pleadings found in the Amnesty International document incorporated in Charge I appear to include only human rights violations. The reference used to plead the facts must include all facts that give rise to the environmental damage.

Third, while Charge V appears to be well drafted, it fails to state an offense with respect to Iraq. Iraq participated in the 1977 ENMOD Convention as a contracting state and signed it on August 15, 1977, as alleged. Iraq, however, has not ratified the convention.[309] Accordingly, Iraqi defendants cannot be held accountable for environmental damage strictly as a violation of this convention.[310] Furthermore, prosecution under this convention is even more tenuous because it does not provide, within its text, for criminal liability.[311]

D. Seeking Individual Criminal Responsibility

The members of the world community universally have condemned the environmental damage during the Persian Gulf War, Iraq's illegal aggression, and its wholesale violations of the laws of armed conflict. They also have agreed that the torching of the oil wells and the dumping of the oil into the Persian Gulf violated the laws of armed conflict. No tribunal, however, has been established to try Iraqi war criminals.[312]

Prior to the coalition defensive response on January 17, 1991, twelve United Nations Security Council resolutions had resulted from the Iraqi invasion of Kuwait.[313] Of these twelve, two Security Council resolutions reaffirmed criminal responsibility established under the existing conventions and customary law discussed above by stating,

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[309] LAWS OF WAR, *supra* note 9, at 384.

[310] Terry, *supra* note 3, at 64.

[311] *See* discussion *supra* part III.A.3.d.

[312] In considering the horrendous damage inflicted on the Persian Gulf region by Iraq, a sad comment on the mettle of the international community is manifest—that is, even a year after the war, the public crier has yet to call a court to order. That Iraqi officials have not been held accountable for their unconscionable and incomprehensible human rights violations is unforgivable.

[313] *See* THE KUWAIT CRISIS, *supra* note 5, at 88-98.

> [T]he Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches....[314]

Security Council Resolution 674 also attempts to facilitate later trials by encouraging states to collect evidence of grave breaches and "*Invit*[ing] States to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq ... and to make this information available to the Security Council."[315] Yet, over one year after the end of the Persian Gulf War, the Security Council has not established a war crimes tribunal.[316]

After the coalition defensive response on January 17, 1991, the Security Council received letters from the Foreign Minister of Iraq agreeing to comply with all twelve of the earlier Security Council resolutions.[317] This resulted in the thirteenth resolution concerning the Persian Gulf crisis—Security Council Resolution 686, adopted on March 2, 1991—which declared a formal cease fire and demanded Iraq to "[a]ccept in principle its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."[318]

In addition to the United Nations resolutions, the members of the international community have asserted an almost universal call for war crimes trials.[319] In September 1990—just six weeks after the invasion of Kuwait—international law scholars were calling for war crimes trials.[320] In April 1991, the foreign

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[314]United Nations Security Council Resolution 670 (Sept. 25, 1990) [hereinafter U.N. Doc. S/RES/670 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 94-95; United Nations Security Council Resolution 674 (Oct. 29, 1990) [hereinafter U.N. Doc. S/RES/674 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 95-97.

[315]U.N. Doc. S/RES/674 (1990), *supra* note 314.

[316]The only authority within the United Nations to establish a war crimes tribunal is the Security Council. U.N. CHARTER art. 11, ¶ 2; MOORE, *supra* note 5, at 324 n.33.

[317]*See* United Nations Security Council Resolution 686 (Mar. 2, 1991), 30 I.L.M. 568 [hereinafter U.N. Doc. S/RES/686 (1991)].

[318]*Id.*

[319]*But see* Russell W. Goodman, *Think Twice About Trying Saddam*, ARMED FORCES J. INT'L, Apr. 1991, at 28 (arguing that, by forcing such trials, coalition leaders such as George Bush could trample the sensibilities of people in that volatile region).

[320]Moore & Turner, *supra* note 224, at 12.

ministers of the European Community nations and members of the United States Senate declared support for the establishment of a war crimes tribunal under the cognizance of the United Nations.[321] On February 25, 1991, Saudi Arabia announced that it would convene an international criminal tribunal for trials of captured Iraqis accused of war crimes.[322] Finally, the United States Senate, the United States House of Representatives, and the House of Delegates of the American Bar Association strongly advocate war crimes trials.[323]

The United States Department of Defense has collected evidence for war crimes trials and has submitted evidence of grave breaches to the Security Council, as required by Security Council Resolution 674.[324] The Department of State, however, is opposed to trials in absentia and the convening of international tribunals prior to the custody of any defendants.[325] The rationale for this position is the Department of State's belief that the "rule of law is best advanced through proceedings where the defendant is present and represented by counsel."[326]

To strengthen the deterrent value of the existing laws, proceeding with war crimes trials as soon as possible is very important. If custody of the defendants cannot be obtained, then a tribunal should be convened and, at the very minimum, it should issue indictments by name for all of the defendants. A defendant that has been indicted could not travel or move about freely without fear of arrest.[327] If required to commence with a defendant in absentia, the trial still could proceed, through prosecution, holding the defense presentation in abeyance until the defendant actually is in custody. This would, at least, preserve the evidence of the crimes. Another option would be for the tribunal to appoint a defense team to ensure the appearance of a fair trial, even in the absence of the defendants.

War crimes trials should be initiated for several reasons. First, all nations have an obligation to search for persons accused

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[321] MOORE, *supra* note 5, at 298.

[322] Jordan J. Paust, Remarks During a Panel Discussion: *The Gulf War: Collective Security, War Powers, and Laws of War*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 1, 14.

[323] Turner, *supra* note 11, at B2.

[324] Letter from Edwin D. Williamson, The Legal Adviser, U.S. Department of State, to Professor Robert F. Turner, Chairman, American Bar Association Standing Committee on Law and National Security (Aug. 23, 1991) (on file with addressee at the University of Virginia School of Law).

[325] *Id.*

[326] *Id.*

[327] *See* MOORE, *supra* note 5, at 298-99.

of grave breaches and to bring them to trial.[328] Second, if the international community fails to continue the precedent of war crimes trials, then the practices of states—through their contributions to the development of customary international law—may erode the authority to prosecute offenders.[329] Third, Security Council resolutions and the pronouncements of world leaders will be of no deterrent value in the future if the flagrant violations of Iraq go unpunished.[330]

Several arguments, however, advocate that war crimes trials should not proceed now that a cease fire has been called. Most of these arguments derive from political supposition and are not based in the law. For example, one of the principal arguments against war crimes trials is that they would encourage Saddam Hussein to remain in power by discouraging him from leaving Iraq.[331] This argument is based on an invalid assumption because Saddam Hussein already has been discouraged from leaving Iraq by its concession to abrogate its duty to prosecute or extradite him.[332]

Another concern is that war crimes trials may "interfere with international relations or exacerbate regional tensions."[333] This argument obviously springs from the political considerations involved in balancing the effect of war crimes trials with any adverse impact they may have on international relations. The crimes at issue, however, manifestly are not minor infractions. Iraq has committed incredible environmental war crimes of unprecedented proportions. Enforcing the rule of law is worth taking some risks of strained international relations.[334]

Others are concerned that war crimes trials could be used as a political weapon that could be turned against the United States and the coalition forces.[335] The coalition, however, "need not fear the rule of law; it is a major objective of their foreign policy," and politicized trials should be rejected for the exhibitions that they are.[336] Finally, the concern over trials of defendants in absentia persists.[337] Even if that concern were substantially founded,

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[328] *See* discussion *supra* part IV.B; *see also* MOORE, *supra* note 5, at 299.

[329] LAWS OF WAR, *supra* note 9, at 16.

[330] *See* MOORE, *supra* note 5, at 301.

[331] *Id.* at 302.

[332] *Id.*

[333] *Id.* at 303.

[334] *See id.*

[335] *See id.* at 304.

[336] *Id.*

[337] *Id.* at 304-05.

however, the failure to proceed with war crimes trials—even in absentia—would undermine deterrence significantly. Nevertheless, the concern over such trials is exaggerated tremendously because a trial in absentia actually can be conducted in a fair manner with an aggressive defense presented by assigned counsel. Perhaps most important, trying a defendant in absentia would support the rule of law, would promote effective deterrence, and most certainly would be a far better alternative than having to resort to the Security Council to again use force in response to continued Iraqi aggression.

E. Seeking Civil Reparations

Total Iraqi liability for damages that are a direct consequence of its invasion of Kuwait has been estimated to be from one hundred to nine hundred billion dollars.[338] Five of the thirteen Security Council resolutions adopted on or before March 2, 1991,[339] reaffirmed the civil responsibility of Iraq established under the existing conventions and customary law discussed above. A clear example of such affirmation is Security Council Resolution 674, of October 29, 1990, which "[r]*eminds* Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."[340] Additionally, Security Council Resolution 661 created an obligation on all states to freeze Iraqi assets within their territories.[341] By freezing assets, this resolution established one source of funds from which a national or an international commission could satisfy claims.

United States domestic courts have jurisdiction to enforce international law for claims against assets frozen in the United States. The Alien Tort Statute authorizes federal courts to adjudicate civil claims by aliens alleging acts in violation of the

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[338] *Id.* at 288.

[339] United Nations Security Council Resolution 666 (Sept. 13, 1990) [hereinafter U.N. Doc. S/RES/666 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 91-92; United Nations Security Council Resolution 667 (Sept. 16, 1990) [hereinafter U.N. Doc. S/RES/667 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 92-93; U.N. Doc. S/RES/670 (1990), *supra* note 314; U.N. Doc. S/RES/674 (1990), *supra* note 314; U.N. Doc. S/RES/686 (1991), *supra* note 317; *see also* discussion *supra* part VI.D.

[340] U.N. Doc. S/RES/674 (1990), *supra* note 314.

[341] *See* United Nations Security Council Resolution 661 (Aug. 6, 1990) [hereinafter U.N. Doc. S/RES/661 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 88-89. An exception was made for payments "exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs." *Id.*

law of nations when the defendant is found in the United States.[342] The violation of the law of nations can be proscribed either by convention or customary law.[343] Congress has the authority under the United States Constitution to enact further statutes, creating specialized claims courts for frozen Iraqi assets.[344]

Iraq's civil liability under international law for any direct "damage, including environmental damage and the depletion of natural resources," was reaffirmed again on April 3, 1991, when the Security Council adopted its fourteenth resolution concerning the Persian Gulf crisis—Security Council Resolution 687.[345] Security Council Resolution 687 created the Compensation Commission to administer claims paid from a fund generated by Iraqi oil sales after April 2, 1991.[346] All revenue from these sales would be received by an escrow account, with thirty percent allocated to the compensation fund, and seventy percent allocated to Iraq for food, medicine, and other items for essential needs.[347] The current scheme is to recover approximately forty billion dollars over the next ten years.[348] A claimant's state may assert consolidated claims of up to $100,000 per person for death, personal injury, or property damage during the Iraqi invasion and occupation to substantiate its pro rata share of the available funds.[349] The claims commission is formulating additional criteria for other categories of claims that will include environmental damage and loss of natural resources.[350]

In response to Security Council Resolution 687, the Minister for Foreign Affairs of Iraq made the following statement in identical letters to the Secretary-General and the President of the Security Council:

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[342] Beres, *supra* note 235, at 134 n.23. The federal circuits are split on the issue of whether or not United States citizens have a private right to sue for violations of the law of nations. *Id.*

[343] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *noted in* Beres, *supra* note 235, at 134 n.23.

[344] *See* U.S. CONST. art. I, § 8, cl. 10; Beres, *supra* note 235, at 134 n.23.

[345] Marian Nash (Leigh), *Contemporary Practice of the United States Relating to International Law*, 86 AM. J. INT'L L. 109, 113, 117 (1992).

[346] *Id.* at 113, 118. The cognizance of the Compensation Commission was delimited further by Security Council Resolution 692. *Id.* at 118. Using Iraqi oil resources for indemnification first was suggested just six weeks after the invasion. *See* Moore & Turner, *supra* note 224, at 12.

[347] Nash, *supra* note 345, at 118.

[348] Philippe Sands, Remarks During a Panel Discussion: *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 214, 228.

[349] Nash, *supra* note 345, at 113-16.

[350] Id. at 114.

> Further evidence of the resolution's biased and iniquitous nature is that it holds Iraq liable for environmental damage and the depletion of natural resources, although this liability has not been established; on the other hand, it makes no mention of Iraq's own right to obtain compensation for the established facts of damage to its environment and the depletion of its natural resources.
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> ....
>
> These provisions partake of a desire to exact vengeance and cause harm, not to give effect to the relevant provisions of international law. The direct concrete consequences of their implementation will affect the potential and resources of millions of Iraqis, and deprive them of the right to live in dignity.[351]

On August 15, 1991, the Security Council authorized sales of up to $1.6 billion of Iraqi oil over a period of six months.[352] Despite the starvation and lack of humanitarian supplies in Iraq, Saddam Hussein refuses to sell any oil.[353] Saddam Hussein has vowed that "Iraq would withstand U.N. sanctions for the next 20 years rather than accede to foreign control."[354]

F. Conclusions

The environmental destruction during the Persian Gulf War was a "glimpse of hell."[355] The unified response of the international community was as unprecedented as the environmental destruction itself. The outrage of the world has yielded a widespread demand for reparations and war crimes trials. The Security Council has done a superb job in seeking civil reparations, but it has not started any process to indict or prosecute Iraqi officials.

A clear legal basis and historical precedent exists to prosecute Saddam Hussein and other Iraqi defendants. International law clearly proscribes the atrocities afflicted on the Persian Gulf region, and Iraqi officials violated that law. Nevertheless,

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[351] MOORE, *supra* note 5, annex 8, at 497, 502.

[352] Nash, *supra* note 345, at 118.

[353] Richard C. Hottelet, *It's Not Too Late to Try Saddam*, CHRISTIAN SCI. MONITOR, Oct. 16, 1991, at 22. Saddam Hussein and the Iraqi elite are suffering little hardship. *Id.*

[354] Lee M. Katz, *Iraq Gets OK to Sell $1.6 Billion in Oil*, USA TODAY, Oct. 16, 1991, at 10.

[355] Hargreaves, *supra* note 271, at 13.

the abhorrence manifested by the world community has effected no action. This inaction is attributable to the politicized decision-making process that has filled the void created by the lack of a permanent and apolitical judicial mechanism with the duty to prosecute international crimes.

Although they were not able to establish a standing tribunal, the drafters of the 1949 Geneva Conventions recognized the inability of an ad hoc system to enforce sanctions.[356] The Gulf War has reinforced the importance of a permanent mechanism for determining criminal responsibilities. Notwithstanding the axiom, "there is always room for improvement," this article's examination of the legal issues created by the Gulf War reveals two observations. First, the current legal order proscribes environmental damage that is not justified by military necessity. Second, the environmental damage during the Persian Gulf War was the result of a fundamental failure of deterrence—that is, no mechanism actually enforces the existing prohibitions. As discussed above, the memorialization of proscriptive words alone is an insufficient deterrent.

VII. Is A New Convention Required?

"We all must keep in mind that international law lives in the practice of states and that the adoption of any single document is not going to be the definitive exposition of what international law is."[357]

A. A Proposed Convention: Underlying Fallacies

The environmentalist group, Greenpeace International, announced in March 1991, that the Persian Gulf War demonstrated a need for a "Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict" (proposed Geneva Convention Number V).[358] To discuss the merits of a proposed convention, Greenpeace International sponsored a round table conference in London on June 3, 1991.[359] The perceived need for a

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[356] *See* Comment, *Punishment for War Crimes: Duty or Discretion?*, 69 MICH. L. REV. 1312 (1971).

[357] Geoffrey Greiveldinger, Remarks During a Panel Discussion: *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 223, 224.

[358] *Greenpeace Wants to Outlaw Making War on Environment*, N.Y. TIMES, Mar. 11, 1991, at A9.

[359] Greenpeace International, "Round Table Conference on a Fifth Geneva Convention on the Protection of the Environment in Time of Armed Conflict," Mar. 1991, at 1-2 (conference announcement).

proposed Geneva Convention Number V is based on the assumption that "[t]here is little in international law to protect the environment from the effects of war. What protection exists is limited and always of a lower priority than military objectives."[360] This assumption, quite simply, is wrong. As this article has explained, the 1907 Hague Convention Number IV, the 1949 Geneva Convention Number IV, the 1977 Geneva Protocol I, and customary international law all proscribe the type of environmental damage which occurred during the Persian Gulf War.

Military necessity, as Greenpeace International suggests, does not always place environmental damage at a lower priority than military objectives. Quite the contrary, military necessity allows "[o]nly that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources."[361] Military necessity permits only the destruction of property that is imperatively demanded by the necessities of war.[362] The destruction of property includes environmental damage.[363]

The concept of the proposed Geneva Convention Number V assumes that a weakness in the existing legal order is the cause of environmental damage during armed conflict. This concept, however, overlooks fundamental principles of deterrence and assumes that just one more convention would prevent environmental damage during a future conflict.[364] Saddam Hussein's atrocities were not caused by a failure of the existing legal order to proscribe environmental damage effectively; rather, the cause was Saddam Hussein's perception that the international community would not have the mettle to enforce the existing legal order. Greenpeace acknowledges these conclusions in its conference announcement by stating, "It is generally agreed, moreover, that Iraq, in deliberately creating the World's largest ever oil slick and in setting fire to almost all of Kuwait's oil wells, acted contrary to customary international law and bears responsibility as a state for compensating those who have suffered loss as a result."[365] Nevertheless, Greenpeace International continues to advocate a new convention to protect the environment.

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[360] Greenpeace International, "Greenpeace Calls for a Geneva Convention for the Environment," Mar. 1991, at 1 (press release).

[361] *See* discussion *supra* part III.B.2.a.

[362] *See* discussion *supra* part III.B.2.a.

[363] *See* discussion *supra* part III.C.1.

[364] *See supra* note 4 and accompanying text.

[365] Greenpeace International, *supra* note 359, at 1.

B. Basic Requirements of a New Convention

Greenpeace International sets forth five basic requirements for its proposed Geneva Convention Number V.[366] The first two are the requirements that military interests may not overrule environmental protection, and that no environmental damage of a third-party state is permissible. These two requirements are simply untenable. They are based on the proposition that "there is a supreme international interest beyond the extreme national interest."[367] They place no threshold below which environmental damage is permissible, and they destroy a state's inherent right of defense recognized in article 51 of the United Nations Charter. Such absolute prohibitions do not permit incidental or de minimis damage, regardless of the imperatives of military necessity. Furthermore, such requirements would impermissibly restrict a state's right to self-defense and offer no deterrence against aggression.[368]

The third requirement states that military action is to be ruled out if the environmental consequences are unknown or expected to lead to severe damage. Such a vague standard offers no workable guidelines for the dynamics of warfighting. Supporters of the proposed convention might argue that this requirement imposes an obligation on the military commander to formulate an environmental impact statement prior to commencing any attack or defensive action. On the other hand, a more reasonable interpretation requires only that the commander consider the environmental damage during the conduct of hostilities. If the latter is the proper interpretation, however, then the requirement actually offers no new criteria for balancing, and the commander is back to balancing existing considerations to meet the standard of military necessity.

Furthermore, the language, "or expected to lead to severe damage," contained in the third requirement, suggests that some environmental damage that is not severe is permissible. This is contrary to the first two absolute requirements that no environmental damage is permissible. This apparent contradiction makes the Greenpeace initiative unclear. Specifically, the language of the proposed convention fails to express whether its purpose is to prohibit all environmental damage or its intent is to accept some level of damage if required by military necessity. Consequently,

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[366] Greenpeace International, *supra* note 360, at 2.

[367] Sebia Hawkins, Remarks During a Panel Discussion: *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 220, 221.

[368] *See supra* note 3 (Colonel Terry's conclusions).

interpreting the provision leads to a requirement that is absurd or to a requirement that will add no new environmental protections to the ones that already exist.

The last two requirements are that the environment needs to be protected in all armed conflicts—not just in a war, to which the Geneva Conventions apply. In addition, each party is responsible for the environmental damage it causes. These two requirements simply restate current international law. International law clearly establishes a responsibility to pay compensation for a violation of the law of armed conflict. Actually, the international community has done a superb job in holding Iraq accountable for the environmental damage that resulted from its actions during the Persian Gulf War. Furthermore, the existing laws of armed conflict apply in all situations of international armed conflict and military occupation. These two requirements add nothing to the current state of international law.

C. The Need for Reform: An Appraisal

As discussed above, the United Nations Charter clearly prohibits aggression,[369] yet Saddam Hussein still invaded Kuwait. To believe that another piece of paper that restates the existing law would prevent any further intentional environmental damage—such as the damage suffered in Kuwait—is naive, if not, absurd. Creating another convention proscribing environmental damage only adds to one element of the deterrence structure. What the international community must do is precisely what the proposed Fifth Geneva Convention fails to do—that is, it must reinforce the remaining two elements of deterrence. A criminal justice system which sets forth laws, but does not condemn and punish illegal acts, is ineffective. Similarly, an international norm that is not enforced defiles the legal order and undermines respect for the system. Consequently, changing the legal order by way of the proposed Geneva Convention Number V will not accomplish effective deterrence.

The legal order needs to prevent future destruction by sending a clear message that such behavior will be punished. The Greenpeace proposal does not accomplish this objective. The goal of Greenpeace International is certainly laudable; however, the only workable requirements of the proposed Geneva Convention Number V merely restate existing international law. Interestingly, one of the conclusions of the London Round Table Conference, sponsored by Greenpeace, was that "the rules of

[369] *See supra* note 5.

[international humanitarian law] currently in force could substantially limit environmental damage, providing they are correctly complied with and fully respected."[370]

VIII. Strengthening Deterrence: Proposed Mechanisms

> The way to peace in this turbulent age is to ... work with all our might for the establishment of a structure of law that will be reliable and just to all nations. For though law alone cannot assure world peace, there can be no peace without it. Our national power and all the energies should operate in the light of that truth.[371]

A. The Duty of the International Community

In his 1982 Annual Report of the United Nations, the Secretary-General stated that one of the greatest problems of the United Nations is a lack of respect for its decisions.[372] Certainly, Saddam Hussein's invasion of Kuwait and his refusal to comply with one Security Council resolution after another has proved the former Secretary-General correct. Furthermore, if the Security Council and the international community does not demonstrate a commitment to enforcing its decisions, then it effectively encourages blatant defiance.

Members of the Iraqi ruling elite are not suffering the hardships of the Iraqi people, and Saddam Hussein has demonstrated that he does not care that his own people are suffering. To the extent that economic sanctions, frozen assets, Iraqi oil revenues in escrow, and claims commissions can be effective, the Security Council has made a superb effort in seeking civil reparations. The only method to deter Saddam Hussein's sadistic misconduct, however, is to get his attention in a personal way. Effective deterrence demands that someone prosecute Saddam Hussein and the other Iraqi war criminals.

This conclusion raises the obvious issue over the mechanism—or "structure of law," as referred to by Ambassador Goldberg—that should be employed to bring the Iraqi war criminals to trial. Article 146 of the 1949 Geneva Convention Number IV imposes the following obligation on all nations:

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[370] Antoine Bouvier, *Protection of the Natural Environment in Time of Armed Conflict*, 285 INT'L REV. OF THE RED CROSS 567, 570 (Nov.-Dec. 1991).

[371] MOORE, *supra* note 2, at 83.

[372] *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, Supp. No. 1, U.N. Doc. A.37/1 (1982), *reprinted in* NATIONAL SECURITY LAW, *supra* note 193, at 287, 290.

> [S]earch for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[373]

The 1949 Geneva Conventions, however, do not provide for a forum; they provide only for criminal liability.

Many forums that can try Iraqi war criminals are available. The preferred tribunal would be a permanent international court under the cognizance of the Security Council. If the international community fails to demonstrate its ability to work together to form an international tribunal, however, then article 146 of the 1949 Geneva Convention Number IV imposes an obligation on all states to prosecute Iraqi war criminals in their own national courts.

B. An International Tribunal

The international community should convene a tribunal that is above reproach "to document ... charges precisely and incontrovertibly so that they are not diluted or trivialized by Saddam and his apologists."[374] Considerable precedent for convening an international criminal court exists.

The very first international criminal court may have occurred in Germany in 1474, when twenty-seven judges of the Holy Roman Empire convicted Peter von Hagenbach for violations of the "laws of God and Man."[375] World War II interrupted the League of Nations in its attempt to create an international criminal court.[376] After World War II, the international tribunals at Nuremberg and Tokyo successfully prosecuted war criminals.[377]

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[373] 1949 Geneva Convention No. IV, *supra* note 70, art. 146. The following common provisions of the other three 1949 Geneva Conventions also impose the same duty: 1949 Geneva Convention No. I, *supra* note 222, art. 49; 1949 Geneva Convention No. II, *supra* note 222, art. 50; 1949 Geneva Convention No. III, *supra* note 222, art. 129.

[374] Hottelet, *supra* note 353, at 22.

[375] Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991), *noted in* Benjamin R. Civiletti, *Preliminary Report to the House of Delegates*, 1991 A.B.A. TASK FORCE ON AN INT'L CRIM. CT. 3.

[376] Civiletti, *supra* note 375, at 3.

[377] *See* discussion *supra* part IV.

United Nations General Assembly Resolution 95(I), unanimously adopted in 1946, affirmed the principles of international law recognized by the Charter and Judgment of the International Military Tribunal at Nuremberg.[378] In 1948 the General Assembly first considered the possibility of an international criminal court.[379] In 1978, the American Bar Association advocated an international criminal court with jurisdiction limited to certain crimes of a terrorist nature.[380] Over the years, however, formative issues concerning the composition of the court, its jurisdiction, its procedural rules, applicable law, enforcement, and political complications have prevented the creation of an international criminal tribunal.[381]

The Persian Gulf War has rekindled the world's interest in establishing an international criminal court.[382] In 1990, the 101st Congress passed House Concurrent Resolution 66, which stated in part that "[i]t is the sense of Congress that ... the United States should explore the need for the establishment of an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions."[383] The House resolution required the President to report his efforts to establish an international criminal court, and required the Judicial Conference of the United States to report on the feasibility of, and the relationship to the Federal judiciary, of an international criminal court.[384] In 1991, the American Bar Association created a task force to explore the establishment of an international criminal court.[385] In addition, several movements are afoot to initiate an international criminal court after the blatant war crimes of the Persian Gulf War.

Several variations of an international tribunal are available.[386] The Security Council could create an international

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[378] *See* LAWS OF WAR, *supra* note 9, at 9.

[379] *See id.*

[380] *See* Stuart H. Deming, Committee Insights, *International Criminal Law*, INT'L LAW., vol. 25, no. 4, Winter 1991, at 1105.

[381] *See generally* Civiletti, *supra* note 375.

[382] *See* Deming, *supra* note 380, at 1105.

[383] *See id.* at 1106.

[384] *Id.*

[385] *Id.* at 1106-07.

[386] A detailed discussion of these options, and their respective advantages and disadvantages, is far beyond the scope of this article. A tremendous number of issues, such as court composition, jurisdiction, procedural rules, applicable law, and enforcement mechanisms, are involved in the creation of an international criminal court. An even more complex topic is the political facets and complications of each option. These variations are listed and discussed briefly in

criminal court that has the coercive authority of the Security Council to enforce its judgments.[387] This option could be accomplished by expanding the jurisdiction of the current International Court of Justice, or by creating a separate court. If a new court were created, it could be a permanent court, or it could be an ad hoc court for the limited purposes of trying war crimes that arose out of the Persian Gulf War.

Although both a permanent and an ad hoc court would serve as deterrents, a permanent court would be more effective because it would facilitate future prosecutions. A permanent court and its investigative committee[388] would be an established mechanism that could begin to investigate, indict, and prosecute—as appropriate—upon the report of an offense. It would not depend upon the political convictions at the time. The ad hoc option is too dependent upon the political climate for success. To serve the objectives of deterrence effectively, an institutionalized international criminal court should be in place to transcend daily political oscillation.

C. A Role for the United States?

Without the leadership of the United States, the creation of an international tribunal to prosecute Iraqi officials for war crimes is unlikely.[389] Actually, even with the initiative of the United States, the likelihood that such a tribunal would succeed is low. In October 1990, President George Bush publicly threatened Saddam Hussein with war crimes trials once the Persian Gulf War was over.[390] President Bush stated, "What is at stake is whether the nations of the world can take a common stand against aggression or whether Iraq's aggression will go unanswered, whether we live in a world governed by the rule of law or by the law of the jungle."[391] The United States has taken a stand against Iraqi aggression and was instrumental in freeing Kuwait from the horror of the Iraqi occupation. The task of strengthening the rule of law, however, is not yet complete.

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this study to give the reader an overview of the available options.

[387] *See* discussion *supra* part IV.B (discussing the authority of the Security Council to create an international criminal court).

[388] An investigative committee was set up under the Charter of the International Military Tribunal for Nuremberg to serve as the prosecutorial arm of the court. *See* 1945 Charter of the IMT, *supra* note 213, arts. 14-15.

[389] Turner, *supra* note 11, at B2.

[390] Dan Balz, *President Warns Iraq of War Crimes Trials*, WASH. POST, Oct. 16, 1990, at A19.

[391] *Id.*

In the absence of the world community's ability to create a permanent international criminal court or to initiate the ad hoc requirements to begin war crimes trials, the United States should take an active surrogate role. The United States currently has two options. First, the United States and the coalition forces could create an ad hoc international tribunal similar to the International Military Tribunal at Nuremberg or Tokyo.[392] This tribunal could be convened by an agreement drawn up between the states willing to go forward with war crimes trials, but would not be created under the authority of the Security Council. Second, the United States can prosecute suspected Iraqi war criminals in its own national courts under three bases of jurisdiction. Pursuant to article 18 of the Uniform Code of Military Justice, general courts-martial have jurisdiction to try "any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[393] Article 21 of the Uniform Code of Military Justice recognizes the concurrent jurisdiction of general courts-martial with military tribunals established by the law of war.[394] Article 21 provides as follows:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[395]

Title 18 of the United States Code, section 3231, also confers broad jurisdiction on domestic federal courts. Specifically, 18 U.S.C. § 3231 grants jurisdiction in the federal district courts over "all offenses against the laws of the United States."[396]

Several interpretations of 18 U.S.C. § 3231 would allow jurisdiction to federal district courts over violations of the law of war without any further legislation.[397] These interpretations, however, apparently are not widely held positions. A textual

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[392] *See supra* part IV (discussing the historical basis and legal authority for the creation of a tribunal by the coalition forces).

[393] UCMJ art. 18.

[394] COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.3 & n.74.

[395] UCMJ art. 21 (1988).

[396] 18 U.S.C. § 3231 (1988).

[397] *See* Paust, *supra* note 322, at 1, 13, 15; Henfield's Case, C.C.Pa. 1793, Fed. Cas. No. 6,360 (federal judiciary, in the absence of legislation by Congress, has jurisdiction over an offense against the law of nations, and may proceed to punish the offender according to the common law).

reading of these provisions and title 18 clarify that federal district courts would not have jurisdiction for extraterritorial violations of the laws of war. Under the current statutory scheme, federal district courts would have jurisdiction only over violations of the laws of war if such infractions also violated some other federal law within the territory of the United States. Because Congress has the power to define and punish offenses against the Law of Nations,[398] enacting implementing legislation would be a prudent first step, should the United States decide to prosecute war crimes in federal district courts.

The Security Council and the International Court of Justice also can be employed to facilitate war crimes trials in United States domestic courts. The United States could request extradition of Iraqi war criminals. If Iraq refuses to either prosecute or to extradite, then Iraq could be brought before the International Court of Justice for a breach of its obligation to prosecute or extradite under article 146 of the 1949 Geneva Convention Number IV. Although the International Court of Justice is not a criminal court, it has jurisdiction to settle disputes concerning the interpretation of a treaty. If the International Court of Justice rules that Iraq has breached its duty to prosecute or extradite, then article 94 of the United Nations Charter could be invoked to seek enforcement of that court's ruling. Article 94 of the United Nations Charter provides,

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[399]

This article would permit the Security Council to refer to chapter VII of the United Nations Charter to enforce the ruling of the court.[400]

If the International Court of Justice cannot obtain jurisdiction over Iraq, then the United States can apply directly to the Security Council to enforce Iraq's obligation to prosecute or extradite. Prior to any enforcement action, the Security Council would have the option of requesting an advisory opinion from the International Court of Justice.[401]

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[398] U.S. CONST. art. I, § 8, cl. 10.

[399] U.N. CHARTER art. 94, ¶ 2.

[400] D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 227 (1963).

[401] *See* U.N. CHARTER art. 96, ¶ 1.

Once again, the preferred option is prosecution by a tribunal under the cognizance of the Security Council. If that is not possible, then the United States should be the moving force behind an international ad hoc tribunal convened in a manner similar to the tribunal convened at Nuremberg. If both of these options fail, then the United States should prosecute suspected Iraqi war criminals in its own domestic courts.

IX. Conclusions and Recommendations

"Choice of forum, not absence of forum, and the desirability of in absentia prosecution, not absence of law, appear as the current legal issues on war crimes trials."[402]

Armed forces clearly are capable of inflicting an impermissible level of environmental damage that goes beyond what the international legal and moral conscience otherwise would permit during armed conflict. This impermissible level of environmental damage is defined by the principle of military necessity. To deter future environmental damage effectively, the world community aggressively must seek condemnation for all environmental damage not justified by military necessity.

If the international community does not enforce the rule of law now, it will have undermined the deterrent effect of the existing rules of armed conflict significantly. Despite the pronouncements and resolutions of the world community, a tribunal to prosecute Iraqi officials for the intentional and unnecessary damage that occurred in Kuwait has not been convened. This failure to hold Iraqi officials accountable should be attributed to the lack of a formal, institutionalized mechanism, such as an international judiciary or coercive commission that has the obligation to investigate and pursue criminal action and the authority to enforce the law effectively.

Protecting the environment during armed conflict is a particularly vexing dilemma because of the inherent destructive nature of war. The existing legal order, however, proscribes environmental damage that occurs during armed conflict when it is not justified by military necessity. If unenforced, a new convention that proscribes environmental damage during armed conflict would be of no more deterrent value than the existing regime.

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[402] THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at v.

The massive and vindictive environmental destruction by Iraq during the Persian Gulf War was a clear violation of the existing laws of armed conflict. International law supports criminal responsibility and state accountability. Effective deterrence demands criminal responsibility and state accountability. The United Nations has done a superb job in demanding and actively seeking reparations. Determining the actual obstacle to war crimes trials apparently is elusive.

The quote at the beginning of this part taken from the report of the United States Senate accurately identifies the essence of the stumbling block. The issue is not whether a forum having jurisdiction is available; rather, the issue is over which forum to employ. Similarly, the issue is not over whether offenses have occurred; rather, the issue is whether or not to try the Iraqi officials in absentia. The quote, however, implicitly identifies the crux of the problem. The issue actually is over who is to make the decision as to forum selection and as to proceeding to trial of war crimes defendants in absentia.

The essence of the problem is that the international community should have an apolitical, judicial mechanism to make these decisions. Such a mechanism would establish a forum and would ensure that the decisions it makes actually reflected the international community's sense of equity and conscience. Some believe, however, that if the United States does not take the lead, no war crimes trials will occur.

With or without the lead of the United States, the establishment of a permanent international judicial mechanism that has the authority to take coercive action against a sovereign over that sovereign's objection seems unlikely in this politically egocentric world. Until the international community agrees to establish such a mechanism, the United States should take a lead role in establishing an effective deterrent by convening an ad hoc international or national tribunal to obtain indictments and prosecute aggressively all violators—in absentia, if necessary.

Although the focus of this article has been the proscription of environmental damage during armed conflict, the recommendation to establish a permanent international tribunal—and, in the alternative, an ad hoc international, a regional, or a national tribunal—is equally applicable for the prosecution of all other international criminal acts. Quite simply, a law that is not enforced does not demand or deserve respect.

THE PHILIPPINE BASES AND STATUS OF FORCES AGREEMENT: LESSONS FOR THE FUTURE

RAFAEL A. PORRATA-DORIA, JR.*

I. Introduction

Formal talks on the renegotiation of the Philippine Bases and Status of Forces Agreement[1] (Philippines SOFA or current Agreement) commenced in mid-September of 1990.[2] The term of the current Agreement, which is the agreement pursuant to which the United States government maintains its military facilities at Clark Air Base, Subic Bay, and other minor locations in the Philippines,[3] expired on September 21, 1991.[4] On August 27, 1991, the Philippines and the United States signed an agreement renewing the current Agreement.[5] This agreement was rejected by the Philippine Senate on September 9, 1991.[6] As of the date of this writing, Clark Air Force Base has been closed[7] and Subic Naval Base is in the process of being evacuated, with its facilities being turned over to the Philippine government.[8] A number of the activities that occupied Subic Bay Naval Base apparently are being transferred to Singapore.[9]

The renegotiation of the Philippine SOFA was an extremely difficult endeavor. The bases covered by the Philippines SOFA are

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[1]Agreement Concerning Military Bases, Mar. 14, 1947, U.S.-Phil., 61 Stat. 4019, T.I.A.S. No. 1775 [hereinafter Bases Agreement].

[2]Preliminary negotiations on the renegotiation of the current Agreement were scheduled to commence in mid-April of 1990. *New Talks on U.S. Bases in Philippines Set for Mid-April*, L.A. TIMES, Mar. 9, 1990, at 28. These preliminary talks actually commenced in May and were characterized by the press as "angry." *Subic Bay Journal, Where American Might is a Bit High and Mighty*, N.Y. TIMES, Aug. 4, 1990, at A2. Further negotiations commenced on September 17, 1990, and recessed soon thereafter. *Time for Taps in Manila*, NEWSWEEK, Oct. 1, 1990, at 44.

[3]Bases Agreement, *supra* note 1, art. I; *id.* art. 1, annex A.

[4]Amendment to Bases Treaty, Sept. 16, 1966, U.S.-Phil., 17 U.S.T. 1212, T.I.A.S. No. 6084 [hereinafter 1966 Amendment].

[5]U.S. Dep't of State, Office of the Assistant Secretary/Spokesman, *Statement on U.S. Philippine Treaty*, Aug. 27, 1991.

[6]*Philippine Panel: No U.S. Bases*, PHILA. INQUIRER, Sept. 10, 1991, at A3.

[7]*U.S. Bids Farewell to Base*, PHILA. INQUIRER, Nov. 27, 1991, at A5.

[8]*Goodbye Subic Bay*, WALL ST. J., Nov. 19, 1991, at A20.

[9]*U.S. Will Transfer Naval Force to Singapore from Subic Bay Base*, WALL ST. J., Jan. 6, 1992, at A4; *Singapore Welcomes U.S. Navy*, PHILA. INQUIRER, Jan. 4, 1992, at A3.

quite extensive[10] and have been viewed as performing a number of essential strategic missions in the complex security environment of the South China Sea.[11] Furthermore, the eighty-two million dollars in wages paid to Filipino workers employed in the bases constituted the second largest payroll in the Philippines in 1987.[12]

In Manila, however, the continuation of the Agreement has been a highly controversial topic. Many educated Filipinos consider the bases a vestige of colonialism and an infringement on Philippine sovereignty; they therefore wanted to see the termination of the Agreement.[13] These critics also felt that the bases were a "magnet" for nuclear attack; that their existence only fueled the twenty-year-old communist insurgency in the Philippines and that they were responsible for a number of social ills that have proliferated in the communities near the bases.[14] Furthermore, these critics felt that, if the Agreement was renewed, the United States military and economic aid rendered to the Philippines in exchange for the use of the bases should be increased drastically.[15]

On the other hand, the United States government had indicated that, although it was interested in renewing the current Agreement, it would agree to do so only on mutually acceptable terms. The United States further indicated that it was exploring the possibility of nonrenewal and military withdrawal from the Philippines.[16] Some American commentators actually argued that the United States should close its bases in the Philippines and reestablish them somewhere else in the area.[17]

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[10]The Subic Bay facilities constitute one of the largest naval bases in the world, covering approximately 62,000 acres. The three major wharves in the complex have a total depth of 6000 feet, with berthing space at depths that can accommodate the largest aircraft carriers in the United States Navy. These installation are estimated to be worth $1.2 billion, exclusive of land value. GREGOR & AGANON, ETHICS AND PUBLIC POLICY CENTER, THE PHILIPPINE BASES: U.S. SECURITY AT RISK 34 (1987). Clark Air Base, headquarters of the Thirteenth Air Force, is the largest American military facility outside the continental United States. Significant numbers of fighter aircraft, transports, support aircraft and helicopters are assigned to this facility. The reservation on which Clark Air Base is located covers approximately 131,000 acres. *Id.* at 37-38.

[11]*Id.* at 20-32.

[12]*"People Power" and Pacific Security: The United States-Philippine Alliance After the 1986 Philippine Constitution*, 17 GA. J. INT'L & COMP. L. 569, 587, n.94 (1987).

[13]*See, e.g.* SIMBULAN, THE BASES OF OUR DISCONTENT 79 (1985); *Phase-Out Predicted for U.S. Bases at Clark and Subic*, L.A. TIMES, Feb. 10, 1990, at A18.

[14]*Id.*

[15]*Id.*

[16]*Philippine Base Talks Likely to be Combative*, L.A. TIMES, Feb. 12, 1990, at A20.

[17]*See, e.g.*, O'Leary, *Time to Pack up and Leave*, THE WASH. TIMES, Feb. 11,

As this article will discuss,[18] the status of allied military forces in a foreign territory, and the impact of an agreement providing for the stationing of those forces, represent complex and controversial issues in international law.[19] In addition, the defense relationship between the United States and the Philippines has had a long and sometimes stormy history.[20] These factors made the task of the parties seeking to renegotiate the current Agreement a difficult, daunting, and ultimately unsuccessful one.

The Philippine SOFA is a highly unusual document. Its terms, and the negotiations prior to its adoption, constitute important lessons on how *not* to draft such an agreement.[21] Furthermore, the issues that arose out of the renegotiaton of the Philippine SOFA are typical examples of issues that can appear in the negotiation of any such agreement. Thus, an examination of the Philippine SOFA experience provides valuable lessons for the future.

This article will analyze a number of the principal issues and problems that arose in the context of the present Agreement. It also will examine several issues and problems that arose during prior negotiations over the Phillipines SOFA. Accordingly, Part II of this article will examine the United States-Philippine defense relationship by describing the history of the passage of the current Agreement and by analyzing its major provisions. It then will examine the major provisions of the current Agreement. Part III of this article will discuss and analyze a number of the principal issues that have arisen in the context of the current Phillipines SOFA and that have arisen during prior negotiations thereon—issues that had to be resolved in the current negotiations. This part also will enumerate a number of recommendations for dealing with those issues. Finally, Part IV will conclude

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1990, at F1:

> The time has come for the United States to abandon its military bases in the Philippines and look elsewhere in the Far Pacific because a combination of Filipino nationalism, increasing instability and avarice is creating more problems for the American armed forces than the bases are worth.

Mr. O'Leary has suggested that Guam, Singapore, and the Caroline Islands may be acceptable substitutes for the Philippine bases.

[18] *See infra* notes 118-21 and accompanying text.

[19] For an excellent discussion of the controversy and complexity in this area of law, see Mark Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 82-91 (1988).

[20] For an excellent history of the defense relationship between the Philippines and the United States and of the implementation and renegotiations of the Philippine SOFA, see BERRY, U.S. BASES IN THE PHILIPPINES 69-305 (1989) 69-305.

[21] *See infra* notes 22-88 and accompanying text.

this article by summarizing the principal lessons that can be learned from the Philippine SOFA experience.

II. The United States-Philippines Defense Relationship

A. The Adoption of the Current Agreement

The discussions and negotiations that culminated in the signing of the current Agreement took place at the same time that the United States and the Phillipines negotiated postindependence trade relations between their countries.[22] Concurrently, United States-Philippine discussions on the terms of rehabilitation assistance to the Philippines[23] were underway.[24]

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[22] These negotiations culminated in the adoption of the Philippine Trade Act of 1946, 60 Stat. 141 (1946), which dealt with postindependence trade between the Philippines and the United States. BERRY, *supra* note 20, at 5-6. This statute provided for free trade between the two countries for a period of eight years from the time it went into effect until July 4, 1954. Thereafter, a graduated tariff would be applied over the next 25 years until full tariff duties would go into effect in 1974. *Id.* at 6.

The Trade Act was highly controversial, especially in the Philippines. The quota and parity clauses in this statute appeared to be the most objectionable to Filipinos. The quota provisions established quotas on several Philippine exports to the United States, and if these quotas were exceeded, full tariffs would be charged on the excess. No quotas were placed on American goods exported into the Philippines. *Id.* The parity provisions allowed American nationals the same rights as Filipinos to develop natural resources and own public utilities in the Philippines. The parity provision conflicted with the Philippines Constitution of 1935 and its implementation required an amendment thereto. *Id.* at 7.

[23] Rehabilitation assistance was needed because the Philippines were ravaged during World War II by the Japanese occupation and subsequent liberation therefrom. The country essentially lay destitute at the end of the war. BERRY, *supra* note 20, at 1. The Philippines Rehabilitation Act of 1946, 40 Stat. 128 (1946), was signed at the same time as the Philippine Trade Act and provided for $620 million worth of assistance to be divided among several programs. From the Philippine perspective, the advantages of this legislation were negated by section 601 of the Philippines Rehabilitation Act, which directly tied the rehabilitation assistance provided for therein to the Philippines' acceptance of the parity clause in the Trade Act. *Id.* at 9-10. In Professor Berry's own words:

> Reportedly, [United States High Commissioner] McNutt was responsible for this provision because he wanted to tie the two Acts together.
>
> Whatever his motivation, it is not difficult to comprehend the anger and frustration in the Philippines in having this assistance, which most Filipinos believed was justifiably deserved based on Roosevelt's promises and the damages incurred during the war, held hostage to the acceptance of the parity clause and amendment of the Constitution. *Id.* at 10.

As this article explains, the timing and conduct of the negotiations surrounding the adoption of the current Agreement also led a number of Filipinos to believe that acceptance of the terms thereof was a "condition" of independence because all of these agreements appeared to be presented to the people of the Philippines as one, interrelated "package."

[24] Actually, a difference of opinion existed regarding the timing and conduct of the negotiations. Secretary of State Edward Stettinius recommended to

As the negotiations commenced, the American negotiators believed that the primary reasons presented for retaining the bases in the Philippines were their potentials to contribute to future Asian regional stability and to protect the Philippines from armed attack.[25] On the Philippine side, President Sergio Osmena and his successor, Manuel Roxas, perceived two benefits from the retention of United States bases. First, the presence of American troops in the Philippines would protect the Philippines, which did not have the resources available to provide for its own defense from external attack. Secondly, the presence of United States troops and installations in the Philippines would focus American concern and interest in the Philippines as the United States assumed a more dominant international position, with far greater responsibilities than ever before.[26]

The first negotiations on military bases in the Philippines took place on May 14, 1945, in Washington, D.C.,[27] between Presidents Truman and Osmena.[28] These meetings resulted in the execution of a preliminary agreement that provided the United States government with extensive privileges in the Philippines while the final agreement was being negotiated.[29] Formal negotiations on a permanent agreement commenced shortly thereafter and continued through December of 1946.[30]

President Truman that the base negotiations be conducted separately from any discussions relating to independence matters so that it would not appear that independence was related directly to retention of the bases. Senator Millard Tydings, a key Truman advisor on Philippine matters, recommended that a base agreement be finalized before the granting of independence to the Philippines. BERRY, *supra* note 20, at 14.

[25] *Id.* at 13.

[26] *Id.* at 15-16.

[27] *Id.* at 16.

[28] President Truman was authorized to negotiate an agreement concerning military bases in the Philippines by Joint Resolution No. 93 (June 29, 1944). President Osmena, received similar authority by Joint Resolution No. 4, 41 PHIL. OFF. GAZETTE 349 (July 28, 1945). *See* BERRY, *supra* note 20, at 19.

[29] This document is known as "Preliminary Statement of General Principle Pertaining to the United States Military and Naval Base System in the Philippines to be Used as a Basis for Detailed Discussions and Staff Studies." BERRY, *supra* note 20, at 16. The document, *inter alia*, gave the United States government practically unlimited authority to build as many military facilities as it desired in almost any location in the Philippines. Movement between bases was to be unrestricted, and no limit was placed on the number of military personnel that could be assigned to the bases. *Id.* at 19.

[30] *Id.* at 19-32. Initially, the State Department had hoped that an agreement on the bases could be concluded by the time of Philippine independence. The slow pace of the negotiations, however, made clear that such a timetable could not be met. *Id.* at 21. Accordingly, the United States and the Philippines proceeded to enter into the treaty by which the United States relinquished its sovereignty over the Philippines and recognized Philippine independence, but which contained no agreement on the bases. *See* Treaty of General Relations between the United

The principal controversy in those negotiations revolved around the issue of criminal jurisdiction. In the first draft of the current Agreement, the United States—at the urging of the War and Navy Departments—attempted to give the military practically unlimited jurisdiction over service personnel, both on and off the bases.[31] This position was very controversial in the Philippines for two reasons. First, the Philippines Supreme Court, in two controversial decisions, endorsed the principle of the extraterritoriality of United States military forces in the Philippines and a number of Filipinos viewed this endorsement as a surrender of Philippine sovereignty.[32] Secondly, the conduct of some service personnel who were involved in frequent traffic accidents with Filipinos caused increased tension between the military forces and many Filipinos. These tensions sometimes

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States of America and the Republic of the Philippines, July 4, 1946, T.I.A.S. 1568 [hereinafter Treaty of General Relations]. The unresolved issue of the bases was addressed with in Article I thereof, which provided that:

> The United States of America agrees to withdraw and surrender ... all rights of possession ... or sovereignty ... in and over the territory and people of the Philippine Islands, *except the use of such bases, and rights incident thereto, which the United States of America, by agreement with the Republic of the Philippines, may deem necessary to retain for the mutual protection of the United States of America and the Philippine Republic.*

Id. (emphasis added).

[31] BERRY, *supra* note 20, at 21.

[32] *Id.* at 22. These decisions were Raquiza v. Bradford, 75 Phil. Rep. 50 (1945), and Tubb & Tedrow v. Greiss, 78 Phil. Rep. 249 (1947). In *Raquiza* the Court upheld a December 1944 Proclamation by General MacArthur that authorized United States military officials to apprehend Filipinos who were suspected of being security risks because of their alleged cooperation with or assistance to the Japanese during the occupation. *See Raquiza*, 75 Phil. Rep. at 50. In *Tubb & Tedrow*, two American citizens working as civilians for the United States Army in the Philippines were arrested by military authorities and charged with misappropriating military property. They appealed to the Philippine Supreme Court for a writ of habeas corpus, arguing that they were subject only to Philippine jurisdiction because they were civilians and martial law no longer was enforced. The Court held that the defendants voluntarily had submitted to military law while performing their duties as specified in each of their contracts, and that the military authorities were authorized to exercise jurisdiction over military personnel in peacetime. *See Tubb & Tedrow*, 78 Phil. Rep. at 249. The dissent in *Tubb & Tedrow* argued,

> In this case, the abdication of judicial power is aggravated by the surrender of the sovereignty of the Filipino people. Without the benefit of ambassadorial negotiations, of senatorial ratification, or even a scrap of treaty or convention, the majority, in fact, accept and recognize extraterritoriality.
>
> ... No dissent is vigorous enough against such judicial attitude.

Id. at 258-59. These decisions of the Philippine Supreme Court clearly supported the hardline positions on jurisdiction espoused in the first draft of the current Agreement. BERRY, *supra* note 20, at 25. As the dissent in *Tubb & Tedrow* noted, however, to many Filipino observers, this position represented an unacceptable surrender of Philippine sovereignty.

resulted in public demonstrations.[33] Because of the publicity these incidents received in the Philippine press, accepting the principle of off-base criminal jurisdiction for the military became very difficult for the Philippine negotiators.[34]

Actually, as more incidents involving military personnel and Filipinos occurred during August and September of 1946, opposition to the United States' retention of the bases grew.[35] In spite of a tentative compromise between the negotiating parties on the issue of criminal jurisdiction, President Roxas advised the American delegation that he did not believe it would be wise to submit the agreement to the Philippine Senate at the same time that the parity clause in the Philippine Trade Act and the constitutional amendment needed to implement it were being debated.[36]

The current Agreement finally was signed by President Roxas and High Commissioner McNutt on March 14, 1947.[37] The Agreement then was presented to the Philippine Senate for ratification three days later.[38] The principal opposition to the ratification of the Agreement in the Senate was asserted by Senator Tomas Confessor, who combined the parity clause of the Philippine Trade Act with the Agreement and concluded,

> These two agreements compliment each other. In the first, we deliver into the hands of the nationals of the United States the natural resources of the country. In the second, we relinquish the sovereign rights over practically every portion of the Philippines, to the end that the United States may properly protect the investments of her citizens in this country.[39]

In spite of Senator Confessor's opposition, the Philippine Senate ratified the Agreement on March 26, 1947, by a vote of eighteen to zero, with three senators absent.[40]

Several observations flow from this brief description of the process resulting in the negotiation and adoption of the current Agreement. First, nothing indicated that retention by the United States of its military bases in the Philippines or the adoption of

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[33] BERRY, *supra* note 20, at 25-26.

[34] *Id.* at 26, n.75.

[35] *Id.* at 28.

[36] *See supra*, note 23 and accompanying text.

[37] BERRY, *supra* note 20, at 32.

[38] *Id.*

[39] *See* Phil. Cong. Rec., 1st Cong., 2d Sess. 215-16, *noted in* BERRY, *supra* note 20, at 35-36.

[40] BERRY, *supra* note 20, at 35-36.

the current Agreement were actually conditions of Philippine independence.[41] On the other hand, the fact that the base negotiations took place at about the same time as the independence, trade, and rehabilitation aid negotiations; the "tying together" of Philippine acceptance of the Trade and Rehabilitation Acts; and the reservation of United States sovereignty over its military bases in the Philippines in the Independence Act, could—and did—lead Filipino observers to believe that all of these agreements were part of the same "package"—a package that represented the price of independence.

Secondly, the current Agreement and the retention by the United States of military bases in Philippine territory clearly represented an extremely controversial topic for Filipinos. As noted above,[42] the controversy revolved around the perception that the bases constituted an unacceptable invasion of Philippine sovereignty. This perception was heightened by the incidents between service personnel and Filipinos that occurred at the time of the negotiations on the current Agreement. Furthermore, the extraterritoriality cases decided by the Philippine Supreme Court and the original United States proposal on the issue of criminal jurisdiction during the negotiations on the current Agreement added to this perception.

Furthermore, the United States, as the party granting independence to the Philippines, had significant negotiating leverage over the terms under which independence would be granted. The Filipinos feared that the United States would use this leverage in an abusive fashion. Unfortunately, the extremely one-sided terms of several sections of the Trade Act[43] reinforced, in the eyes of many Filipinos, the perception that the United States could—and would—abuse its negotiating position to impose onerous treaty terms as the "price of independence." Lastly, as shall be seen below, the Agreement, as originally drafted, was highly favorable to the United States. This fact added further to this perception of "unfairness."[44]

Unfortunately, these perceptions have become reality to many Filipinos. The controversies that arose at the time of the adoption of the current Agreement still are unresolved, and form the principal issues that had to be dealt with in its renegotiation.

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[41] Actually, the United States government in 1946 seriously considered withdrawing all United States military forces from the Philippines. *Id.* at 29-31.

[42] *See supra* notes 31-36 and accompanying text.

[43] *See supra* notes 22, 23 and accompanying text.

[44] *See infra* notes 46-59 and accompanying text.

B. The Current Agreement

The current Agreement contains twenty-nine articles and two annexes.[45] The current Agreement is an unusual agreement because it is *both* a "bases agreement" providing for the use of certain lands in the Philippines by the United States for the purpose of maintaining military installations *and* a "status of forces agreement" relating to the status of—and the conditions under which—the United States can station military forces in the Philippines.

Article I of the current Agreement grants the United States the right to retain the use of the sixteen bases in the Philippines that were listed in Annex A thereto.[46] This article also grants to the United States, if "required by military necessity," the right, upon notice to the government of the Philippines, to use the seven bases listed in Annex B.[47] In addition, Article X gives the United States the right to retain and maintain United States military cemeteries and sites of historical significance that may be agreed upon with the government of the Philippines.[48]

Article III grants to the United States, both within the bases and within the territorial waters and air space adjacent thereto, extensive "rights, power and authority ... which are necessary for the establishment, use, operation and defense thereof."[49] Article

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[45] Bases Agreement, *supra* note 1.

[46] *Id.* art. I, § 1, annex A.

[47] *Id.* art. I, § 2, annex B. Furthermore, Article XXII of the current Agreement requires the Philippine government to prosecute expropriation or condemnation proceedings whenever necessary to acquire, by condemnation, any real property located on the bases named in annexes A and B, "to carry out the purposes of this Agreement." *Id.* art. XXII.

[48] *Id.* art. X.

[49] *Id.* art. III(1). These rights include, *inter alia*,

> (1) the right to construct, operate, maintain use, occupy, garrison, and control the bases;
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> (2) the right to improve, construct, or maintain harbors, channels, entrances, anchorages, roads, or bridges affording access to the bases;
>
> (3) the right to control anchorages, moorings, takeoffs, landings, and other movement of vehicles in the air, sea, or land comprising, or in the vicinity of, the bases;
>
> (4) the right to acquire, as may be agreed upon with the government of the Philippines, such rights of way as may be required for military purposes;
>
> (5) the right to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, vessel, or vehicle that may be requisite or appropriate.

Id. art. III(2). Other articles of the current Agreement extend these rights. For example, Article XVII gives the United States the right to remove any buildings, structures, improvements, equipment, or facilities. *Id.* art. XVII. Article XX

IV,[50] and Articles VI through IX,[51] grant to the United States extensive rights of navigation, passage, and use throughout the land area, territorial waters, and airspace of the Philippines.[52] Articles V, XI, and XII[53] exempt the United States and members of its military forces from customs and other duties, immigration requirements, and local taxes.[54] Articles XVI and XVIII[55] allow the United States to establish postal facilities, commissaries, post exchanges, and social clubs on the bases.[56] The criminal jurisdiction provisions of the current Agreement are set forth in Articles XIII and XIV[57] and are modeled closely after the criminal jurisdiction provisions of the North Atlantic Treaty Organization (NATO) stationing agreement, which govern the stationing of troops in the territory of the NATO alliance.[58] These provisions,

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requires the Philippine government to commence expropriation or condemnation proceedings to obtain any privately owned land that forms part of the bases described in annexes A and B to the current Agreement. *Id.* art. XXII.

[50] *Id.* art. IV.

[51] *Id.* arts. VI-IX.

[52] Article IV accords United States vessels, aircraft, and government-owned vehicles—including armored vehicles—free access to, and movement between, ports and United States bases throughout the Philippines. This includes movement through territorial waters—by land, air, and sea—free of pilotage and toll charges. *Id.* art. IV. Article VI provides that the United States shall have the right, subject to previous agreement with the Philippine government, to use land and coastal areas of appropriate size and location for periodic maneuvers, staging areas, bombing and gunnery ranges, or intermediate airfields. *Id.* art. VI. Article VII provides that the United States may employ for military use all public utilities, airfields, ports, harbors, roads, highways, railroads, bridges, canals, rivers, and streams in the Philippines under conditions no less favorable than those applicable to the armed forces of the Philippines. *Id.* art. VII. Article VIII gives the United States the right, subject to agreement with the appropriate Philippine authorities, to construct wells, water catchment areas, or dams to ensure an ample supply of water for all bases and operations. Similarly, this article allows the United States to take steps—as agreed upon by the appropriate Philippine authorities—to improve health and sanitation in areas contiguous to the bases, including the right to enter and inspect privately owned property. *Id.* art. VIII. Article IX gives the United States, after appropriate notification to the Philippine government, the right to make topographic, hydrographic, coast, and geodesic surveys, as well as aerial photographs, in any part of the Philippines and adjacent waters. *Id.* art. IX.

[53] *Id.* arts. V, XI, XII.

[54] *Id.*

[55] *Id.* arts. XVI, XVIII.

[56] Article XVI gives the United States the right to establish and maintain United States post offices on its bases for the use of United States nationals who are employed on the bases. Furthermore, Article XVI gives the United States the right to regulate and control all communications within, to, and from the bases. *Id.* art. XVI. Article XVIII gives the United States the right to establish and operate commissary, mess, and post exchange facilities free of all licenses, fees, taxes, duties, and inspections by Philippine authorities. *Id.* art. XVIII.

[57] Bases Agreement, *supra* note 1, arts. XIII, XIV; *see infra*, notes 61-71 and accompanying text.

[58] Agreement between the Parties to the North Atlantic Treaty Regarding

as originally drafted,[59] differed greatly from the present criminal jurisdiction provisions and generated great controversy in the Philippines.[60]

Article XIII of the current Agreement, as amended, provides that criminal jurisdiction is based on the status of the offender, regardless of the location of the offense. Specifically, the current Agreement gives the United States military authorities the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses—including offenses relating to its security—punishable by the law of the United States, but not by the law of the Philippines.[61] On the other hand, the Philippines has exclusive jurisdiction over members of the United States armed forces, their dependents,

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the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846) [hereinafter NATO SOFA].

[59] Article XIII as originally drafted provided that the United States had the right to exercise criminal jurisdiction over three types of offenses in time of peace: (1) offenses committed on the bases when the offender and the offended parties were Philippine citizens or the offense was against the security of the Philippines; (2) offenses committed outside the bases when both the offender and the offended parties were members of the armed forces of the United States (*inter se* offenses); and (3) offenses committed off of the bases against the security of the United States by members of the armed forces of the United States. *See* Bases Agreement *supra* note 1, art. XIII, § 1. In time of war, the United States had the right to exercise exclusive jurisdiction over any offense committed by a member of the armed forces of the United States in the Philippines. *Id.* art. XIII, § 6. In either case, if the United States elected not to exercise jurisdiction over any of these offenses, the Philippine authorities then could exercise criminal jurisdiction over the offense. *Id.* art. XIII, § 3.

The Philippines, on the other hand, had the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States, *id.* art. XIII, § 2, with two exceptions: (1) offenses committed while engaged in the actual performance of military duties; or (2) during periods of national emergency. *Id.* art. XIII, § 4. The Philippine authorities, however, had the right to determine—through a proceeding initiated by a local, fiscal, or prosecuting attorney—whether or not an off-base offense occurred while the offender was engaged in the performance of military duty or during a period of national emergency. *Id.*

[60] These differences between the original criminal jurisdiction provisions in the current Agreement and the provisions in the NATO SOFA created a perception in the Philippines that the latter provisions constituted an agreement negotiated among equals, while the former was imposed upon the Philippines by the United States and granted the United States sweeping rights and authority that were subject to abuse. BERRY, *supra* note 20, at 61-64. This perception was strengthened in 1953 when the United States entered into a status of forces agreement with Japan that closely resembled the NATO SOFA. Administrative Agreements under Article II of the Security Treaty between the United States of America and Japan, Feb. 28, 1952, T.I.A.S. 2492 (entered into force Apr. 28, 1952). A number of disputes over criminal jurisdiction arose in the late 1950's and early 1960's. These disputes spurred Filipino demands for revisions to the Philippine SOFA based on the NATO SOFA model. *See* BERRY, *supra* note 20, at 61-65.

[61] Amendment to Bases Treaty, Aug. 10, 1965, U.S.-Phil., 22 U.S.T. 1469, T.I.A.S. No. 7160, art. XIII(2)(b) [hereinafter 1965 Amendment].

and members of the civilian components for offenses punishable by Philippine law, but not by the law of the United States.[62] In all other cases, the right to exercise criminal jurisdiction is concurrent.[63]

In concurrent jurisdiction situations, Article XIII sets forth criteria for determining which state shall have the primary right to exercise criminal jurisdiction over an individual. The authorities of the United States shall have the primary right to exercise criminal jurisdiction in cases involving offenses solely against its property or security, solely against the person or property of another member of its military force or civilian component, or arising out of any act or omission done in the performance of official duty.[64] In all other cases, the Philippines shall have the primary right to exercise criminal jurisdiction.[65] The commanding officer of the alleged offender is charged with making a determination of whether the alleged offense arose out of an act or omission done in the performance of an official duty. Any disputes regarding whether an offense arose out of an act or omission committed in the performance of an official duty would be resolved by diplomatic negotiations between the governments of the United States and the Philippines.[66]

Furthermore, the current Agreement, as amended, explicitly forbids the military authorities of the United States from exercising any criminal jurisdiction over nationals of the Philippines, unless those individuals are part of the military forces of the United States.[67]

The current Agreement also provides that the authorities of the United States and the Philippines *shall* assist each other in the investigation into alleged offenses, and in the collection and production of evidence relative to those offenses.[68] Moreover, custody of an accused member of the military forces of the United States over which the Philippines was to exercise jurisdiction would, if he or she were in the hands of the United States, remain in United States custody until charged by the courts of the Philippines.[69]

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[62] *Id.* art. XIII (2)(A).
[63] *Id.* art. XIII(1).
[64] *Id.* art. XIII(3)(a).
[65] *Id.* art. VII(3)(b).
[66] *Id.*, Agreed Official Minutes, para. 3.
[67] *Id.* art. XIII(4).
[68] *Id.* art. XIII(5)(a).
[69] *Id.* art. XIII(5)(c).

Article XIV provides that no arrest shall be made and no process—civil or criminal—shall be served within the borders of any base, except with the permission of the commanding officer of that base.[70] In the event that permission is refused, the base commander is required by this article—except in situations in which the United States has jurisdiction under Article XIII—to take the necessary steps to arrest the charged person and surrender him or her to the proper Philippine authorities, or to serve the process.[71]

Article XXIII requires the United States to pay claims resulting from property damage, personal injury, or death that is caused by United States forces.[72] This article also provides a one-year statute of limitations for these claims.[73] Article XXV forbids the Philippines from granting to any third party any rights, power, or authority concerning the bases without prior consent of the United States.[74] Lastly, Article XXIX provides that the current Agreement shall be in effect for a period of twenty-five years from September 16, 1966. After that date, the Agreement would be subject to termination by either party upon one year's notice, unless it is extended for a longer period by mutual agreement.[75] Under the terms of this section, the current agreement was due to expire on September 16, 1991.[76]

Since its adoption, the current Agreement has been amended fourteen times. The first nine of these amendments, which were adopted between July of 1947 and June of 1953, concerned the transfer of real property between the United States and the Philippines and other similar administrative matters.[77]

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[70] Bases Agreement, *supra* note 1, art. XIV.

[71] *Id.*

[72] *Id.* art. XXIII.

[73] *Id.*

[74] *Id.* art. XXV.

[75] Amendment to Bases Treaty, Sept. 16, 1966, U.S.-Phil., 17 U.S.T. 1212, T.I.A.S. No. 6084 [hereinafter 1966 Amendment]. Originally, the term of the current Agreement was 99 years from its inception. *See* Bases Agreement, *supra* note 1, art. 29.

[76] This is a matter of some controversy because the Philippine negotiators apparently interpreted Article XXIX as providing that the current Agreement *expired* in 1991 and therefore must be replaced by a new treaty. To the contrary, the American interpretation of this provision is that, after September 16, 1991, the current Agreement continues to exist but is subject to termination upon one year's notice by either party. *See* GREENE, THE PHILIPPINE BASES: NEGOTIATING FOR THE FUTURE 15-16 (1988).

[77] *See* Amendment to Bases Treaty, July 1-Sept. 12, 1947, U.S.-Phil., 3 U.S.T. 457, 458, T.I.A.S. No. 2406 (change of category of Leyte-Samar Naval Base); Amendment to Bases Treaty, Oct. 12, 1947, U.S.-Phil., 3 U.S.T. 458, T.I.A.S. No. 2406 (transfer of Mariveles Quarantine Reservation to the Philippines); Amendment to Bases Treaty, Dec. 23-24, 1947, U.S.-Phil., 3 U.S.T.

The tenth amendment, which was adopted in 1965,[78] replaced the original criminal jurisdiction provisions of Article XIII of the Agreement with the current provisions.[79] As noted above, the eleventh amendment, adopted in 1966,[80] changed the term of the Agreement. The twelfth amendment, adopted in 1979,[81] affirmed that the bases made subject to the Agreement are Philippine military bases under Philippine sovereignty, required a Philippine commander at each base, and gave the United States effective command and control over certain facilities and areas within the bases where United States operations were being conducted.[82] Furthermore, the amendment required a "complete and thorough" review and reassessment of the Agreement every five years until its termination.[83] The thirteenth amendment, adopted in 1983,[84] required that the operational use of the bases for military combat operations, with certain exceptions, may take place only upon prior consultation with the government of the Philippines.[85] The fourteenth amendment to the current Agreement, adopted in 1988 as part of the five-year review process adopted in 1979,[86] reaffirmed the mutual security relationship between the United States and the Philippines; reiterated the obligation of the United States to procure Philippine goods and services for use on the bases to the maximum extent possible; committed the parties to review the Base Labor Agreement of May 27, 1968; stipulated that no United States military personnel with acquired immune deficiency

476, 479, T.I.A.S. No. 2406 (transfer of land near Nichols Field to the Philippines); Amendment to Bases Treaty, Jan. 2-3, 1948, U.S.-Phil., 3 U.S.T. 480, T.I.A.S. No. 2406 (transfer of islands surrounding Corregidor to the Philippines); Amendment to Bases Treaty, Feb. 19-29, 1948, U.S.-Phil., 3 U.S.T. 482, 483, T.I.A.S. No. 2406 (retention of Corregidor Military Cemetery by the United States); Amendment to Bases Treaty, Mar. 31-Apr. 1, 1948, U.S.-Phil., 3 U.S.T. 485, 487, T.I.A.S. No. 2406 (relinquishment of right to use United States Military Cemetery No. 2, San Francisco del Monte, Rizal); Amendment to Bases Treaty, May 14-May 16, 1948, U.S.-Phil., 63 Stat. 2660, T.I.A.S. No. 1963 (relinquishment and transfer of certain military reservations); Implementation Agreement, Dec. 29, 1952, U.S.-Phil., 3 U.S.T. 5334, T.I.A.S. No. 2739 (exemptions from certain Philippine taxes for United States military agencies); Implementation Agreement, May 29-June 17, 1953, U.S.-Phil., 4 U.S.T. 1693, 1696, T.I.A.S. No. 2835 (exemption from currency control requirements for United States military agencies).

[78] 1965 Amendment, *supra* note 61.

[79] *See supra* notes 61-69 and accompanying text.

[80] 1966 Amendment, *supra* note 75.

[81] Amendment to Bases Treaty, Jan. 7, 1979, U.S.-Phil., 30 U.S.T. 863, T.I.A.S. No. 9224.

[82] *Id.*

[83] *Id.*

[84] Amendment to Bases Treaty, June 1, 1983, U.S.-Phil., T.I.A.S. No. 10699.

[85] *Id.*

[86] Memorandum of Agreement, Military Bases, Oct. 17, 1988, U.S.-Phil., DEPT. OF STATE BULL., Dec. 1988, at 24-27.

syndrome would be assigned to the Philippines; and mandated that the storage or installation of nuclear or nonconventional weapons and their components in Philippine territory would be subject to the approval of the government of the Philippines.[87]

III. Issues for Renegotiation

Almost every word of the current Agreement appeared to be the topic of controversy.[88] A number of threshold issues revolving around the "bases" portion of the Agreement arose, which were crucial to the ability of the negotiating parties to reach a new agreement on the bases. The current Agreement also brought out some threshold issues that naturally can arise from any treaty dealing with the issues of access to military bases and status of military forces. These threshold issues can best be stated as follows:

> (1) Is the maintenance by the United States of *any* military bases in the Philippines necessary or desirable? If so, should the United States military presence in the Philippines remain at present levels or should it be reduced?
>
> (2) Does the current Agreement or any renegotiated Agreement infringe on Philippine national sovereignty? If so, what can be done to protect the sovereignty of the Phillipines?
>
> (3) What should be the *format* of the new Agreement?
>
> (4) What compensation should be paid by the United States for the use of its bases in the Philippines and what form should this compensation take?
>
> (5) What treatment should be given to nuclear weapons in a renegotiated Agreement?

These threshold issues will be discussed below. In addition, because of the severity of the controversy that has arisen over a number of proposals to change the criminal jurisdiction provisions of the current Agreement,[89] these proposals also will be discussed below.

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[87] *Id.*

[88] For an excellent discussion of many of these issues, see GREENE, *supra* note 76, at 3-65.

[89] *See supra* notes 31-36, 60 and accompanying text.

A. The Necessity of the Bases

The question of whether the bases covered by the current Agreement are necessary for the national defense of the United States is ultimately a geopolitical and strategic question whose answer is beyond the scope of this article. It is an important question, however, for the purpose of determining the negotiating posture and strategy of the parties and the structure of any future Agreement.

As was noted above, the Philippine bases constitute two of the largest military facilities in the world.[90] The traditional argument supporting the retention of these bases has been that they are necessary for the national defense of the United States because they serve as a counterweight to increased Soviet naval presence in the Pacific.[91] Furthermore, these bases, and the military forces that they support, introduce a significant measure of stability in the complex security environment of the Western Pacific, which is plagued by a number of regional claims and potential conflicts.[92] Lastly, the bases facilitate the United States' capacity to conduct military operations in the South China Sea, Indian Ocean, and Persian Gulf.[93]

Another traditional argument supporting the United States' retaining these bases has been that they are essential to American national security interests because no alternative sites[94] are feasible—either economically or militarily.[95]

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[90] See *supra* note 13 and accompanying text.

[91] GREGOR & AGANON, *supra* note 10, at 19-20.

[92] *Id.* at 22-31.

[93] For example, Clark Air Base can serve as a transit point for the airlift of troops bound for the Persian Gulf. Furthermore, present strategic planning calls for equipment and ordnance prepositioned at the Indian Ocean island of Diego Garcia to be supplied to combat troops airlifted from the United States via Clark Air Base. *Id.* at 21. Whether Clark Air Base has served as a transit point for the airlift of troops bound for the Persian Gulf as part of Operations Desert Shield and Desert Storm is unknown. Press reports, however, indicated that equipment and ordnance prepositioned at Diego Garcia was supplied to troops deployed as part of Operations Desert Shield and Desert Storm. *See Marine Corps Completes Mideast Deployment*, AVIATION WEEK AND SPACE TECH., Sept. 17, 1990, at 24.

[94] Gregor and Aganon identified the following three possible options should the United States decide to close the Philippine bases: (1) transfer the facilities to other existing United States bases; (2) build new facilities in the Marianas and Micronesia; and (3) negotiate with one or more new host nations to establish new bases. GREGOR & AGANON, *supra* note 10, at 71.

[95] Gregor and Aganon persuasively argued that all three alternatives to the retention of the Philippine bases were inadequate—primarily because no comparable air or naval facilities exist in the area and because the cost of replicating the extensive facilities in the Philippines would be prohibitively expensive. *Id.* at 71-78. Furthermore, because many of the alternative sites are geographically distant from Southeast Asia and the Indian Ocean, relocation from the Philippines would involve—at least initially—a considerable loss in United

These arguments chiefly are based, however, on a strategic situation in which the primary threat to peace and to United States strategic interests is an aggressive and expanding Soviet naval presence and capability in the Western Pacific.[96] This strategic situation, however, has changed drastically in the last two years. In Europe, the Soviet Union has ceased to exist and the military threat represented by the former Soviet Union's military forces has diminished to the point at which political leaders and commentators are speculating on the continued survival and future mission of the NATO alliance.[97] Although the Russian Republic has cut back its presence in the Western Pacific,[98] it still retains significant naval, air, and ground forces in the area.[99] However, given the former Soviet Union's economic crisis[100] and its effect on the former Soviet military forces,[101] further Russian naval expansion in that area apparently will not occur in the near future. In view of this situation, the issue of United States troop withdrawals from overseas locations, including the Philippines, has become extremely important and is being discussed in Department of Defense, congressional, and other circles.[102] Furthermore, both Clark Air Base and Subic Bay Naval Station suffered extensive damage from the recent Mount Pinatubo volcano eruptions, which initially rendered the installations barely operational and almost uninhabitable.[103] Accordingly, the principal strategic mission for the Philippine bases may have disappeared.

States operational effectiveness. *Id.* at 74-75.

[96] *Id.* at 18-20.

[97] *See, e.g., A New Role for NATO*, NEWSWEEK, July 16, 1990, at 28-30; *In Search of Enemies: The Atlantic Alliance Struggles to Find a New Mission*, U.S. NEWS & WORLD REP., July 9, 1990, at 31-32; *Losing Out in Europe?*, NEWSWEEK, May 14, 1990, at 26-27. Actually, the Warsaw Pact's viability as a threat apparently has deteriorated to the point at which a request to include Warsaw Pact officers in United States military training courses as part of the International Military Education and Training Program is under consideration. *U.S. May Offer Training to Armies of Warsaw Pact*, PHILA. INQUIRER, Nov. 5, 1990, at A6.

[98] *See, e.g., Breaking Ice in the Pacific*, NEWSWEEK, June 18, 1990, at 24, 25.

[99] For example, the former Soviet Pacific Fleet of 77 ships and 120 submarines has access—in addition to its own facilities in Vladivostok—to ports in North Korea and at a permanent base in Cam Rahn Bay, Vietnam. Furthermore, in spite of promised troop withdrawals from Soviet Asia and Mongolia, at least 600,000 Russian and other former Soviet ground troops would remain along the Soviet border with China and in the former Japanese territories seized at the end of World War II. *Ripples in the American Lake*, TIME, Mar. 5, 1990, at 16-17.

[100] *See, e.g., The Gorbachev Effect*, U.S. NEWS & WORLD REP., July 9, 1990, at 29-30.

[101] *See, e.g., A Bitter Homecoming*, NEWSWEEK, July 3, 1990, at 26-27.

[102] *See, e.g., Breaking Ice in the Pacific, supra* note 98, at 25.

[103] *See Chaos Curbs Talks on US Presence in Philippines*, ARMY TIMES, July 16, 1991, at 20.

This different strategic scenario, and its implication of a greatly reduced threat in the Western Pacific, presents a number of intriguing possibilities. First, the Philippine bases and the massive concentrations of troops that they are intended to support no longer may be required to defend the Western Pacific against aggression. Secondly, existing United States bases in Guam, Japan, and Korea might be sufficient—with or without some expansion of their facilities—to support a reduced American military presence in the Western Pacific. Thirdly, if any new facilities were needed to replace the Philippine bases, smaller, newer, and potentially less expensive facilities in the Marianas, Singapore, or Thailand might serve as perfectly adequate support bases for a smaller United States military presence.[104]

This changed strategic scenario and the possibilities discussed above made the United States government's seeking to renew the status quo ante in negotiating the current Agreement highly unlikely. Actually, two possible scenarios remained as the basis for the posture and strategy of the United States renegotiators of the current Agreement. The first—and also the more extreme—scenario would arise out of a determination that the Philippine bases are not necessary to the defense of the United States and should not be retained.[105] Under this scenario, the issues for negotiation would revolve around the timing of the withdrawal of all United States troops from the bases, while the ownership of any remaining equipment would be reconciled by making appropriate compensation payable to the United States, the Philippines, or any of their nationals. This was the position taken by President Aquino of the Philippines when she called for an "orderly withdrawal" of all United States troops from the Philippine bases in a September 1990 television broadcast.[106] In the end, this became the actual scenario that was imposed on the United States by the failure of the Philippine Senate to ratify the

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[104] Gregor and Aganon found these alternatives unacceptable because they would be unable to duplicate the Philippine facilities, which they considered necessary for the accomplishment of the United States military mission in the Western Pacific. GREGOR & AGANON, *supra* note 10, at 75-81, 91-92. Actually, an agreement granting access by United States military ships and aircraft to existing bases in Singapore was signed on November 13, 1990. *See Singapore Agrees to Raise Military Access for U.S.*, PHILA. INQUIRER, Nov. 14, 1990, at A13. After the closing of Subic Bay, Singapore appears to be the location of choice for the United States naval presence in the area. *See supra* note 13 and accompanying text.

[105] This was the position that Philippine Foreign Minister Raul Manglapus took in remarks to the United States-Asia Institute at the United States Department of State on Sept. 16, 1988. Fed. Info. Sys., Sept. 16, 1990, *available on* LEXIS, Nexis Library, FEDNEW File [hereinafter Manglapus Remarks].

[106] *Aquino Calls for Orderly Pullout of U.S. Forces*, L.A. TIMES, Sept. 18, 1990, at A1.

renegotiated treaty.[107] Presently, the timing of this withdrawal from Subic Bay is being negotiated.[108]

The second scenario—and the negotiating tactic actually taken by the United States renegotiators—involved a determination that a scaling-down or a reduction of the American military presence in the Philippines and a retention of at least some use of the bases was both feasible and in the best interests of the United States. This determination was based on an analysis of the United States' actual and prospective defense needs in the area. A variation of this scenario actually was presented by the United States negotiating team when the base negotiations reconvened in September 1990.[109]

Under this scenario, the renegotiation of the current Agreement was rather complex. Clearly, an agreement in the form, and with the coverage, of the current Agreement would not be adequate. Once the parties had agreed on the desirability of this scenario, time-consuming negotiations of issues such as the number of troops to be reduced and the timing of these reductions; the possibility of, and the implementation mechanism for, an increase in troop strength assigned to the bases in the event of a military emergency; the places where these troops would be quartered; access by United States military forces to the bases, or parts thereof, and the duration of this access; ownership of any equipment or installations on the bases; compensation for United States use of the bases; and access to the bases by the armed forces of any other nation. The complexity of these negotiations is the reason why the renegotiation of the current Agreement took more than a year to complete.

The major problem with this scenario clearly was that the Philippines apparently manifested no consensus about its desirability. As noted above, many Filipinos viewed the current Agreement, the bases it covers, and the American military presence in their country as infringements of Philippine sovereignty[110] and President Aquino appeared to have favored the

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[107] *Philippine Panel: No U.S. Bases*, *supra* note 6; *Aquino Gives U.S. 3 Years to Leave Philippines*, PHILA. INQUIRER, Oct. 3, 1991, at A19.

[108] *See U.S. to Keep Air Access at Subic Bay*, PHILA. INQUIRER, Mar. 16, 1992, at F2.

[109] Specifically, the United States negotiators proposed a "phase down" of American military presence in the Philippines involving a reduction of about two-thirds of present troop strength over the next ten to twelve years and "access" to the bases for American forces through the next period. One negotiator described this proposal as "[trading] presence for access." *U.S. Seeks Reduced Philippine Military Presence*, L.A. TIMES, Sept. 20, 1990, at A8. Thus far, the exact meaning of the term "access" in this proposal remains unclear.

[110] *See supra* notes 35-40 and accompanying text; *infra* notes 123-24 and

"orderly withdrawal" of United States troops from the bases.[111] Furthermore, a renegotiated Agreement that provided for a United States military presence in the Philippines might not have gained final approval because the Philippine Senate, which would—under the Philippine Constitution—have had to ratify it,[112] reportedly was opposed to any American military presence in the Philippines.[113] Nevertheless, a vigorous debate over such an Agreement occurred on the floor of the Philippine Senate because one influential Senator, former Defense Secretary Fidel Ramos, indicated support for an extension of the current Agreement.[114] In spite of this debate, however, the renegotiated agreement was defeated in the Philippine Senate by a vote of twelve to eleven.[115]

B. The Present Agreement and Philippine Sovereignty

The traditional definition of sovereignty in international law is very broad and implies absolute control and exclusive jurisdiction by a nation-state over its territory and internal affairs.[116] Customary international law, however, allows a sovereign voluntarily to waive the exercise of a part of that exclusive territorial jurisdiction, as a valid exercise of its sovereignty, to allow the troops of a friendly foreign power to pass through or be stationed in its territory.[117]

Two important issues arise in this situation. The first issue is the relationship between the troops of the friendly foreign power and the instrumentalities of the state in which those forces

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accompanying text.

[111] *See supra* note 106 and accompanying text.

[112] PHIL. CONST. art. XVIII, § 25.

[113] *U.S. Talks of Reducing Troops in Philippines*, N.Y TIMES, Sept. 18, 1990, at A3.

[114] *Defense Secretary says Philippines Needs U.S. Bases*, UPI, Sept. 17, 1990, *available on* LEXIS, Nexis Library, UPI File.

[115] *Philippine Panel: No U.S. Bases*, *supra* note 6.

[116] A noted treatise defines sovereignty as excluding dependence from any other authority and, in particular, from the authority of any other state. Sovereignty is independence—external independence as to the liberty of action of a state within its borders and internal independence as to the liberty of action of a state within its borders. As it comprises the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty is territorial supremacy. I. OPPENHEIM, INTERNATIONAL LAW 254; *see also* I. Brownlie, PRINCIPLES OF INTERNATIONAL LAW 250 (3d ed. 1976).

[117] The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 136-39 (1812), *noted in* Welton, *supra* note 19, at 83.

are stationed—a controversial issue under customary international law.[118] The apparent solution to this issue has been the clarification of this relationship by means of an agreement in which the conditions of the relationship are fully set forth.[119] This type of agreement is what has come to be known as a "status of forces agreement."

The second issue is whether the presence of a foreign state's *armed* military forces in the territory of another is per se a violation of that nation's sovereignty. The concept of a sovereign freely and voluntarily agreeing to permit the armed forces of a friendly power to remain in its territory seems to be rooted on a notion that all nations of the world have "equal rights and equal independence," and therefore may deal with another country freely and voluntarily.[120] This notion is not necessarily correct in the modern international system, in which all nations clearly are not equal—neither in the military, nor in the political or economic, sense.[121] Accordingly, because a militarily stronger

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[118] Welton defines this issue as one that involves

> a basic conflict between two sovereign interests: the sending state's control, particularly through the exercise of jurisdiction, over its official instrumentalities (here, military forces), and the receiving state's control over activities occurring within its territory. In an international system based upon the sovereign equality of states, the dilemma arises of deciding which sovereign interest will prevail over the other.

Welton, *supra* note 19, at 82-83. For an excellent discussion of this problem, which has been described as "one of the most controversial issues in international law," see S. LAZAREFF, STATUS OF MILITARY FORCES UNDER INTERNATIONAL LAW 11 (1971), *noted in* Welton, *supra*, at 86 n.23; *see also*, Welton, *supra*, at 82-87.

[119] Welton, *supra* note 19, at 87.

[120] *The Schooner Exch.*, 11 U.S. at 136. Welton describes this as

> an assumption that the two states involved in this case are equal in the legal and political senses, *i.e.*, that the territorial sovereign has the legal status to consent to the introduction of foreign forces into its territory, and sufficient power to use force or any other means to oppose those forces or subject them to its jurisdiction if it so chooses.

Welton, *supra* note 19, at 84.

[121] Welton argues quite persuasively that, in the postwar international system, sovereignty must be considered in a much different perspective from that of Chief Justice Marshall in *The Schooner Exchange*. Welton illustrates this point with an analysis of the French decision to withdraw from the NATO alliance in the 1960's. *See* Welton, *supra* note 19, at 87-89. As part of his analysis, he quotes the following passage from a contemporary commentator:

> As a matter of fact, the emergence of the two super-powers has created a situation of basic inequality, and their global confrontation has reduced the sovereignty and independence of the nation-states both East and West of the Iron Curtain.... [NATO has] institutionalized this situation, marked by the position of the United States as the 'core leader' or 'leader state.' ... [T]he stationing of foreign troops in France ... was an intolerable infringement on French sovereignty, even though based on international agreements

nation can impose its will on a militarily weaker nation, the voluntary character of an agreement entered into by those two nations may become suspect.

If one follows this line of argument, agreements by which one nation or group of nations stations military forces in another nation's territory seem to be particularly suspect for another reason—that is, they imply that the nation in whose territory these forces are stationed is unable to carry out the critical duty of a "sovereign" and "independent" nation to provide for its own national defense.[122] The inevitable conclusion to this line of argument would be that only "sovereign" and "independent" nations of approximately equal military power "voluntarily" can enter into an agreement in which one of the parties will allow the other to station military forces in its territory. Any other such agreement would be "coercive" and, therefore, a violation of the sovereignty of the nations in whose territory the troops are stationed.

This is precisely the argument raised by Filipino critics of the current Agreement. They essentially argue that, because the Philippines was a colony of the United States—and therefore powerless at the time the Agreement was negotiated—it was not a "sovereign" and "independent" nation and therefore could not consent to "waive" part of its sovereignty voluntarily by agreeing to the presence of United States bases and troops in its territory.[123] Furthermore, even if the Philippines had been "sovereign" and "independent" at the time the Agreement was negotiated, the disparity of military power between the Philippines and the United States clearly created a situation in which the United States could—and arguably did—"coerce" the Philippines into permitting the establishment of military bases in its territory.[124]

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or decisions to which France was a party.

Stein & Carreau, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization*, 62 AM. J. INT'L L. 577, 602-03 (1968), *noted in* Welton, *supra*, at 88-89.

[122] Welton, *supra* note 19, at 88-89; *accord* Simbulan, *supra* note 13, at 75; Manglapus Remarks, *supra* note 105, at 5.

[123] Welton, *supra* note 19, at 88-89. Further evidence of this "lack of sovereignty"—and, therefore, lack of voluntary consent to the current Agreement—is the assertion that government officials in the Philippines at the time the current Agreement was signed "admitted" that the Philippines was "unable" to conduct its own national defense and, therefore, was not a "sovereign and independent" nation. Simbulan, *supra* note 13, at 75.

[124] Simbulan points out the "one-sidedness" of the Agreement by extensively listing the extremely beneficial rights, benefits, and privileges granted to the United States in connection with its military bases. Simbulan, *supra* note 13, at 76-79. He implies that no "rational" nation "voluntarily" would agree to grant

This line of reasoning manifests another corollary that must be considered in the context of the Philippine Agreement. When a troop stationing agreement is "tainted" by having been "imposed" on the receiving state, no extension or renegotiation truly can erase that "taint" because the receiving state actually cannot act "voluntarily" on this matter. This is because the presence of large numbers of the sending state's troops—who presumably can enforce their collective will on the much weaker armed forces of the receiving state—in the territory of the receiving state creates a threat that the sending state will use force against the receiving state if the receiving state seeks to remove them from its territory. This argument does seem to have surfaced in the context of Filipino commentary regarding the desirability of the Agreement.[125]

What is the response to this dilemma? Clearly, the concept of sovereignty discussed above is based on a system of territorially well-defined, equally powerful, independent nation-states that exclusively control every portion of their territories.[126] The term "sovereignty" actually is equivalent to "total independence."[127] Under this absolute concept of sovereignty, to be sovereign, a nation-state must control its territory by being able to defend it against all others.[128] A sovereign nation would have no need for, and would not likely to agree to, the stationing of another sovereign's troops in its territory. Therefore, any agreement purporting to allow the stationing of one nation's troops in the territory of another would be a pact that no rational sovereign voluntarily would contemplate. Accordingly, any such agreement would be "imposed" by a stronger party over another and would be a negation of the weaker party's "independence" and "sovereignty."

The world that requires this absolutist notion of sovereignty, however, no longer exists. As noted above, the modern postwar

such extensive privileges to another nation without gaining comparative benefits for itself.

[125]Simbulan argues that the United States bases in the Philippines serve as an "infrastructure for intervention" by the United States in the Philippine internal affairs. *See* Simbulan, *supra* note 13, at 170-89. His thesis is that the military bases in the Philippines serve as the instrument by which the United States controls the Philippines. *Id.* at 24-29. His book's conclusion urges Filipinos to struggle for national independence and sovereignty and implies that, but for the presence of the bases, the Philippine people already would have achieved full "sovereignty." *See id.* at 277-81. The issue of "intervention" in international law and in the Philippines is beyond the scope of this article. For an excellent discussion of the interrelationship between sovereignty and intervention in international law, see BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 105-18 (1989).

[126]*See supra* notes 116-117 and accompanying text.

[127]OPPENHEIM, *supra* note 116, at 114-15.

[128]*See supra* note 118 and accompanying text.

international system seems to be composed of nation-states of varying degrees of military and economic power that increasingly are growing more and more interdependent.[129] In this interdependent world, nations *voluntarily* can band together for common defense[130] and for other purposes while still being recognized as sovereign entities.[131] Accordingly, either very few nations in the modern world are "sovereign" in reality, or the concept of "sovereignty" must be restated or rethought. Perhaps "sovereignty" can be analyzed only in a specific national context, with unique legal and political ramifications in each situation.[132] Perhaps "sovereignty" is simply another way of recognizing the power of a nation-state freely to agree or to disagree with the legal imposition of external restrictions on the exercise of state authority.[133] Consequently, perhaps the only way of measuring whether a nation-state in the modern world is truly "sovereign" is to examine whether or not that state truly is able to refuse to enter into a transaction that imposes such restrictions on its exercise of state authority.[134]

In the context of the Philippines, a significant body of Philippine public opinion views the existence of *any* agreement allowing the United States to maintain bases and to station troops in the country, no matter what its terms, as an infringement of Philippine independence.[135] While many Filipinos view the Agreement as an imposition on the Philippines,[136] however, others believe that only a significant revision to the

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[129] *See supra* note 120 and accompanying text.

[130] *See, e.g.*, North Atlantic Treaty, 68 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S. 243, Apr. 4, 1949 (establishing the North Atlantic Treaty Organization, an organization dedicated to the mutual defense of the North Atlantic region).

[131] *See, e.g.*, Treaty Establishing the European Economic Community, U.N.T.S. 11, Jan. 1, 1958. The eleven signatories to this treaty voluntarily have given up significant authority over their internal affairs, such as the power to set and levy custom duties and tariffs, *id.* arts. 12-29, the right to control immigration and emigration in their territories, *id.* arts. 48-58, and the right to restrict the movement of capital in their territories, *id.* arts 67-73. France, an original signatory to this treaty, *id.* at 11, apparently drew a distinction between giving up significant authority over its internal affairs pursuant to one treaty—which was not an "affront" to its sovereignty—and the stationing of foreign troops in its territory pursuant to another treaty—which was an "affront" to its sovereignty. The distinction appears to be that the former treaty was entered into "voluntarily" but the latter treaty was not.

[132] Welton, *supra* note 19, at 89.

[133] *Id.*; *see also supra* notes 116-121 and accompanying text.

[134] Welton postulates that France's ability to withdraw from the NATO alliance—which it voluntarily had entered into—reflects its "sovereignty" because it shows France's power to terminate its prior consent to any restraints on its exercise of a state's traditional authority. *Id.* Therefore, "sovereignty" perhaps is simply a state's "power to say no" to any proposed international acts.

[135] *See supra* notes 14-15, 31-35, 40, 41-42, 123-125 and accompanying text.

[136] *See supra* notes 38-41 and accompanying text.

present Agreement—to make it "more balanced" and "less unfair"—will result in a document that reflects a voluntary, and therefore "sovereign," exercise of Philippine state authority.[137] Significantly, no matter what the content of a renegotiated Agreement, a significant body of public opinion in the Philippines will continue to view it as an affront to Philippine sovereignty.

This concern over Philippine sovereignty in the context of a renegotiated Agreement was, in the author's opinion, greatly ameliorated in two ways. First, the Philippines clearly has the power to terminate the Agreement and that the United States will respect and abide by such a Philippine termination is equally clear.[138] Therefore, the Philippines could not be "coerced" into a new agreement. Secondly, under Philippine law, the ratification of a new Agreement not only would require the advice and consent of the Philippine Senate, but also could necessitate an additional affirmative vote in a national referendum.[139] Accordingly, the terms of a new agreement would be scrutinized and discussed thoroughly and, quite possibly, a majority of the Philippine electorate would have had to find all of the terms acceptable to its citizens before such an agreement could have been deemed to be ratified. Such an agreement truly would have reflected the will of the Filipino people and hardly could have been considered as interfering with the voluntary exercise of national power. Nevertheless, the Philippine Senate's failure to ratify the renegotiated agreement made this issue academic.

Consequently, to avoid charges of "infringement of national sovereignty," any such agreement clearly must be "voluntary" on the part of the receiving state. Furthermore, it must be clear that *either* party can terminate the pact under mutually agreed upon terms, and that the other party will respect and abide by such a termination. Clearly, this has happened in the case of the Philippine SOFA.

C. The Format of the Agreement

The present Agreement and all of its amendments[140] are drafted in the form of an "executive agreement"—a format which, under United States law, does *not* require the ratification of the United States Senate to become valid.[141]

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[137] GREENE, *supra* note 76, at 6-7.

[138] Richard Armitage, the chief United States negotiator in the base talks has stated, "If you ask us to leave, leave we shall." NEWSWEEK, Feb. 18, 1991, at 41.

[139] PHIL. CONST. art. 18, § 25.

[140] *See* Bases Agreement, *supra* note 1; *supra* notes 75-87 and accompanying text.

[141] OPPENHEIM, *supra* note 116, at 801 n.1.

The Philippine Constitution of 1986 requires that any renegotiated Agreement be cast in the form of a "treaty" concurred to by the Philippine Senate.[142] This "treaty" could, if the Philippine Congress so requires, be subject to direct ratification by the people of the Philippines in a national referendum.[143] Furthermore, this constitutional provision requires that such a "treaty" must be "recognized as a treaty by the other contracting state."[144] The apparent reason for the requirement that any new agreement be "recognized as a treaty" was to ensure that the United States Senate, by being required to ratify this document—which presumably would include all compensation arrangements[145]—thereby would become bound by its terms.[146] This would mean, according to some Filipinos, that the failure of the United States Congress to appropriate and deliver in a timely fashion the sums agreed upon in a new agreement would be tantamount to a treaty violation, allowing the Philippines to abrogate the pact.[147]

The United States sharply disagreed with this position because it believed that a unilateral stipulation by one state in its constitution, which defined the method by which another state is to put a bilateral agreement into effect, was unprecedented and unacceptable.[148]

The Philippines clearly has no alternative but to submit any revised agreement to its own Senate for ratification. Furthermore, the Philippine constitutional provision described above does not bind the United States unilaterally. The United States can, however, agree to submit such an agreement to the Senate for ratification. Given the strong feelings expressed by the United States on this issue, however, that outcome remains unlikely.[149]

Does the United States, however, possess a political mechanism by which it can "recognize as a treaty" a revised Agreement without having to submit it to the Senate for ratification? The author believes such a mechanism exists.

Customary international law defines a "treaty" as a written agreement by which two or more states or international entities create a relationship between themselves.[150] This definition is

[142] PHIL. CONST. art. 18, § 25.

[143] *Id.*

[144] *Id.*

[145] GREENE, *supra* note 76, at 21-22.

[146] *Id.*

[147] *Id.* at 22.

[148] *Id.*

[149] *See* notes *infra* notes 168-184 and accompanying text.

[150] MCNAIR, THE LAW OF TREATIES 3-4 (1961).

extremely broad, and international law does not prescribe any particular form or procedure for treaties.[151] A treaty is not binding on its parties until it is "ratified."[152] Similarly, customary international law does not identify or require a specific form of ratification. Ratification actually can be given tacitly.[153]

In the United States, Article II, section 2 of the Constitution provides that the President shall have the power to make "treaties," but requires for their validity the advice and consent of the Senate by a vote of two-thirds of the senators present.[154] These treaties are declared by the Constitution to be the "supreme law of the land."[155] The United States, however, clearly may enter into binding agreements with other nations without undergoing the formalities required by the Constitution, and these agreements can be—and regularly are—recognized under domestic law.[156] Unfortunately, Congress has not been consistent in distinguishing between Article II treaties and other forms of international agreements in federal legislation.[157]

The United States Supreme Court, however, has recognized executive agreements as "treaties" for many purposes of United States law.[158] In particular, the Supreme Court's decision in *Weinberger v. Rossi*[159] is especially important in the context of the renegotiation of the Philippine Agreement. In *Rossi*, the Court considered the Philippine Base Labor Agreement,[160] which is an "executive agreement" that regulated the employment of Filipino citizens at United States military facilities in the Philippines.[161] The Court specifically considered the issue of whether the Base Labor Agreement, even though denominated as an "executive agreement" and not ratified by the Senate, was a "treaty" for the purposes of a statute that prohibited employment discrimination against United States citizens on military bases overseas unless

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[151] *Id.* at 6; *accord* OPPENHEIM, *supra* note 116, at 808.

[152] OPPENHEIM, *supra* note 116, at 813. "Ratification" of a treaty is, in customary international law, the final confirmation and agreement given to a treaty by the parties thereto. Ratification usually includes the exchange of documents embodying the agreement. *Id.* at 813.

[153] *Id.* at 818.

[154] U. S. CONST. art. II, § 2, cl. 2

[155] *Id.* art. 6.

[156] Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1981); *accord*, MCNAIR, *supra* note 150, at 64-65.

[157] *Rossi*, 456 U.S. at 31; *accord* B. Altman & Co. v. United States, 224 U.S. 583 (1912).

[158] *Rossi*, 456 U.S. at 30; *accord* United States v. Pink, 315 U.S. 194 (1941); United States v. Belmont, 301 U.S. 324 (1936).

[159] *Rossi*, 456 U.S. at 30.

[160] May 27, 1968, 19 U.S.T. 5982, T.I.A.S. No. 6542.

[161] *Rossi*, 456 U.S. at 26-27.

such discrimination was permitted by "treaty."[162] The *Rossi* Court held that the executive agreement was such a "treaty."[163] The Court has reached the same conclusion in a number of other cases.[164] Accordingly, under United States law, an international agreement that has not been submitted to the Senate for ratification under Article II, section 2 of the Constitution can be considered a "treaty" for a number of purposes.

The United States renegotiators of the Agreement, therefore, could argue with some justification that the United States government can enter into international agreements that are recognized as valid under domestic law without requiring Senate ratification and that these agreements can be recognized as "treaties" for certain purposes under United States law.[165] Because the Philippine Constitution does not require a "treaty ratified by the United States Senate," a renegotiated Agreement in the form of an executive agreement would have been valid and recognizable as a United States treaty and thereby would have been consistent with the Philippine desire for a "treaty." Actually, even though the renegotiated Agreement was in the form of an executive agreement, it was called a "treaty" by the parties.[166] The press release announcing the signing of the renegotiated agreement resolved the apparent controversy over the characterization of the parties' recognition of the Agreement by noting, "This is a solemn undertaking under international law. The two sides agreed that the manner in which the parties will bring this agreement into legal force under their respective domestic systems is a matter of sovereign prerogative for each."[167]

D. Compensation for the Use of the Facilities

The Agreement did not provide for any payments by the United States to the Philippines for the use of the bases. Instead, the Agreement provided, and has provided since 1979, a commitment that the United States government would endeavor to seek from Congress the appropriation of certain levels of "security assistance" for the Philippines without indicating that

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[162] *Id.* at 26.

[163] *Id.* at 36.

[164] United States v. Pink, 315 U.S. 203 (1941); United States v. Belmont, 301 U.S. 324 (1936); B. Altman & Co. v. United States, 224 U.S. 583 (1912).

[165] Clearly, an Article II, section 2, "treaty," which is recognized as the "supreme law of the land," is different and has a different "hierarchy" under United States law from an "executive agreement," which is not so recognized. *See* MCNAIR, *supra* note 150, at 3-4.

[166] *Statement on U.S. Philippine Treaty*, *supra* note 5.

[167] *Id.*

these sums constitute payment for the use of the bases.[168] The level of this funding for the two fiscal years beginning on October 1, 1989, was $962 million.[169]

This arrangement was extremely desirable for the United States. First, it gave Congress great flexibility by allowing it to decide on a yearly basis the amounts to be paid to the Philippines, the categories of assistance to be provided, and the restrictions, if any, that would be attached to this assistance.[170] More importantly, it allowed the United States to reduce or to legally withhold assistance to the Philippines without technically breaching the Agreement.[171]

Not surprisingly, the Philippine government preferred to receive fixed annual payments, payable automatically and unconditionally, as rent for the use of the bases.[172] Such an arrangement would have enabled the Philippines to escape the vagaries and complexities of the system of congressional appropriations and would have emphasized that any failure to make these payments on time would constitute a breach of the Agreement.[173] Furthermore, an "automatic rental" provision would have ensured that neither Congress, nor the Executive, would have been able to "tie" these payments to any desired behavior of the Philippine government.[174] Lastly, the designation of payments as "rent" for the bases would have created a situation in which the Philippines would have been able to differentiate these payments from

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[168] Specifically, these commitments appear as a "related note" to the actual amendment to the current Agreement. For example, attached to the 1979 Amendment to the current Agreement is a letter from President Carter to President Marcos stating that "the Executive Branch of the United States Government will, during the next ... fiscal years make its best effort to obtain appropriations for the Philippines of the following amounts of security assistance ...." Amendment to Bases Treaty, *supra* note 81, at 886. The type of assistance covered in this note are foreign military sales credits, military assistance grants, and either security supporting assistance or economic support funds. *Id.*; GREENE, *supra* note 76, at 47.

[169] This sum includes "security assistance, development and community assistance, and housing investment guarantees" in the following amounts:

Military Assistance Program	$400 million
Economic Support Fund	$320 million
Development Assistance & Food Aid	$192 million
Housing Investment Guarantees	$ 50 million.

Memorandum of Agreement, *supra* note 86, at 27.

[170] During the early 1980's, a significant part of this assistance was shifted from military to nonmilitary in response to congressional concerns about the corruption of the Marcos regime. GREENE, *supra* note 76, at 46-47.

[171] *Id.*

[172] *Id.* at 48.

[173] *Id.*

[174] *Id.*

regular development assistance payments, presumably allowing it to make separate requests for the latter.[175]

The "rent" proposal by the Philippine government strongly was opposed by the United States. In part, this opposition stemmed from the thought that, if the defense relationship between the two countries were to become a mere "business deal," it would deteriorate to the point at which the United States would not be able to depend on the Philippines as a "reliable" ally.[176] Secondly, Congress has shown an extreme reluctance to accept as binding any multiyear undertakings of this sort.[177] Lastly, this type of arrangement would serve as a precedent that seriously could have affected future negotiations regarding United States military bases with other countries.[178]

The most important economic issue to be renegotiated was the amount of the payments for the use of the bases. The Philippines felt that the sums paid by the United States were grossly inadequate. The Philippine government therefore sought a significant increase in this compensation.[179] The United States, however, facing its budget crunch and the need to control its national debt, likely would not have agreed to any increases.[180] The parties eventually agreed on an arrangement that called for the United States to abandon Clark Air Base; that allowed the United States to use Subic Bay Naval Base for a period of ten years for the sum of $203 million a year, which apparently would be designated as rent; and that required the United States to pay the Philippines an additional $800 million a year in compensation, trade concessions, and other assistance.[181]

Developing a mutually acceptable compensation package for an agreement of this type in the future likely will be tricky. The contents of this package clearly will depend on the time period of any arrangement, the restrictions set on the use of any payments, the mechanisms by which payments will be made, and the

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[175] *Id.*

[176] *Id.* at 49.

[177] *Id.* at 47.

[178] *Id.* at 49, 54.

[179] *Id.* at 51-53. As comparative examples, Greene notes that the Philippines generally point to the extensive (and much higher) United States military aid to Israel, Egypt, and Pakistan—countries that do not provide base facilities to the United States. Furthermore, many Filipinos assert that the United States has been far more economically generous in its base treaties with Spain and Turkey than it has been with the Philippines. Specifically, they argue that, given the "special relationship" between the United States and the Philippines, this disparity is unfair. *Id.*

[180] *Id.* at 46.

[181] *See Philippine Panel: No U.S. Bases*, *supra* note 6; *Statement on U.S. Philippine Treaty*, *supra* note 5.

minimum amounts that are acceptable to both governments.[182] Clearly, a number of creative compensation packages and strategies can be devised for a SOFA, should the parties so desire.[183]

E. Nuclear Weapons

The present Philippine Constitution sets forth a "policy of freedom from nuclear weapons" in the Philippines.[184] In 1987, a bill that precluded the storage of nuclear weapons in, and the transit of nuclear weapons through, Philippine territory was introduced and passed in the Philippine Senate.[185] Even though the Philippine House of Representatives apparently has never acted on these proposals and this legislation has never been enacted,[186] its passage indicates a strong antinuclear sentiment in the Philippine Senate.[187] Furthermore, this antinuclear sentiment does not appear to be confined to the Philippine Senate.[188] Because the Philippine Senate is required by Philippine law to approve any renegotiated Agreement,[189] the Philippine negotiators likely would have attempted to insert into such an Agreement a provision severely limiting or prohibiting the storage or transportation of nuclear weapons in Philippine

[182] GREENE, *supra* note 76, at 53. For example, as the time periods for the arrangements become shorter and the restrictions on the use of the funds become fewer, the sum acceptable to the United States government becomes lower. On the other hand, controlling and designating economic assistance over an extended period of time presumably would increase the amount of acceptable compensation. *Id.* at 53-54. Furthermore, if the renegotiated agreement greatly reduces the size or use of the bases by the United States, a corresponding reduction in compensation is likely.

[183] For an excellent discussion of several of these alternatives, see *id.* at 53-57.

[184] PHIL. CONST. art. 2, § 8.

[185] BERRY, *supra* note 20, at 289-90. This bill would: (1) prohibit the storage of nuclear weapons in the United States bases; (2) prohibit the transit, port calls, stationing and servicing of nuclear armed, powered, or capable ships, submarines, and aircraft in the Philippines; and (3) create a monitoring commission with the authority to inspect visiting ships and aircraft to ensure that these vessels are not carrying nuclear weapons. *Id.*

[186] *Id.* at 290-91.

[187] The bill passed by a vote of 20 to 3. *Id.* The overwhelming support could be attributed to a concern that the presence of nuclear weapons at United States facilities in Philippines territory may make it a target for a nuclear attack against the United States. For an excellent discussion of this issue, see GREENE, *supra* note 76, at 28-39.

[188] Simbulan, for example, dedicates an entire chapter in his book to the question of the presence of nuclear weapons in the Philippines and argues quite strongly that the deployment of these weapons threatens the Philippines with nuclear annihilation. Simbulan, *supra* note 13, at 216-27.

[189] *See supra* text accompanying note 139.

territory. No such provision apparently was included in the renegotiated agreement.[190]

In future negotiations on the subject of base rights or the stationing or passage of troops, the host, or "receiving," nation likely would propose a severe limitation or outright prohibition on the storage or transportation of nuclear devices within their territory by United States troops. Such a proposal likely would be opposed strongly by the United States, which has established as a general principle of its security responsibilities a world-wide policy of neither confirming nor denying nuclear deployments.[191] Actually, receiving state's insistence on such a limitation or prohibition probably would have doomed any such proposed agreement—just as Philippine insistence on such a provision would have caused the United States to terminate any renegotiation of the Agreement.[192] The United States government likely would agree to a provision similar to that in the current Agreement in which the United States' installing nuclear or nonconventional weapons or their components in Philippine territory would be subject to approval by the government of the Philippines.[193] Given the concern over the proliferation of nuclear weapons present in today's world, host nations negotiating bases of troop stationing agreements with the United States almost certainly will insist on some limitation on the storage and transportation of nuclear weapons within their territory by United States troops. The current Agreement provision discussed above probably will be the most acceptable to the United States government.

F. Criminal Jurisdiction

In the renegotiation of the current agreement, the United States appears to have taken the position that, because the criminal jurisdiction sections of the Agreement are essentially identical to the NATO Stationing Agreement guidelines, no issues remained to be resolved by the parties.[194] The Philippine government negotiators disagreed and proposed several

[190] Nothing appears to indicate that such a provision was included in the renegotiated agreement. *See Statement on U.S. Philippine Treaty*, *supra* note 5.

[191] GREENE, *supra* note 76, at 9.

[192] Such a position would threaten the future utility of the bases from the United States' military perspective. BERRY, *SUPRA* NOTE 20, AT 287; *ACCORD* GREENE, *supra* note 76, at 9, 24, 26.

[193] Memorandum of Agreement, *supra* note 86, at 25. The 1988 Amendment does make clear, however, that overflights or visits by United States aircraft or ships in Philippine territory shall not be considered "storage or installation." *Id.*

[194] GREENE, *supra* note 76, at 44; *see supra* notes 26-31 and accompanying text.

changes.[195] The first proposed change would have required that Philippine courts make the final determination on whether or not an offender was acting within the scope of military duty when the offense was committed.[196] The second proposed change would have required that the United States guarantee that both civilians and military personnel who were subject to charges under Philippine law would not leave the country before the completion of their cases.[197] Lastly, the Philippines had requested open access to American facilities to execute process-serving activities.[198]

The United States disagreed with these proposed changes and made a number of counter proposals. First, the United States suggested that the criminal jurisdiction provisions be amended to include primary United States jurisdiction over civilians acting in their official capacities or to require a preliminary review of cases involving official duty actions of United States civilians.[199] Furthermore, the United States suggested a limit of one year on its commitment to "hold" United States military personnel charged with criminal offenses.[200] Lastly, the United States sought a redefinition and clarification of the criminal jurisdiction

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[195] GREENE, *supra* note 76, at 44.

[196] *Id.* The original criminal jurisdiction provisions, in cases involving Filipinos and Americans, set the location of the crime as the principal determinant of jurisdiction. The decision as to whether or not an offender was engaged in the performance of a military duty remained in the hands of local Philippine authorities. *See supra* notes 58-69 and accompanying text. The current provision makes the question of whether or not the offender was engaged in the performance of a military duty the principal determinant of jurisdiction and leaves this determination to the offender's commander. *See supra* text accompanying note 61. Any dispute regarding this determination then is settled by diplomatic negotiations. Accordingly, the Philippines no longer has the power to make this important determination. *Id.* Clearly, the Philippines would prefer more than parity with the NATO stationing agreements on this issue. *See* GREENE, *supra* note 76, at 44.

[197] *See* GREENE, *supra* note 76, at 44. Presently, the United States guarantees only that military personnel will not leave the country pending the disposition of their cases. For civilians, the United States guarantees only that an accused will not be permitted to depart on military transportation. The United States argues that it cannot order an American civilian to remain in the Philippines. *Id.*

[198] *Id.* Present practice requires clearance through U.S. military channels and is implemented by escorting the Philippine official on and off the premises. *See supra* notes 70-71 and accompanying text.

[199] *See* GREENE, *supra* note 76, at 44. To the United States, these changes would help control the large number of groundless legal actions against civilian United States government employees. One category of these cases involves the dismissal of Philippine employees, who then seek a remedy in Philippine courts. *Id.* at 45.

[200] *Id.* This change attempted to obviate the extreme length of time required to resolve the average Philippine criminal case. The present system could require that military personnel be held in the Philippines for an extremely lengthy period of time. Negotiators felt that this was an unduly burdensome requirement. *Id.*

provisions to clarify that the United States has primary jurisdictions over all *inter se* cases.[201] How these proposals and counter-proposals were resolved is unclear.[202] The proposals and counter-proposals regarding the criminal jurisdiction provisions, however, illustrate the kinds of problems that likely will arise in the negotiation of any bases or status of forces agreement because the NATO Stationing Agreement guidelines' criminal jurisdiction provisions apparently serve as the model for United States negotiators. Accordingly, drafters of future bases or status of forces agreements need to consider and resolve these issues.

IV. Conclusion

The renegotiation of the Philippine Bases and Status of Forces Agreement proved to be an extremely difficult endeavor. To begin with, the current Agreement was a somewhat unusual one and always has remained highly controversial in the Philippines.[203] Furthermore, these negotiations commenced at a time when many of the strategic assumptions upon which the United States based its presence in the Philippines have changed drastically[204] and when the United States was struggling to deal with a budget deficit.[205] At the same time, the Philippines was undergoing a period of severe political and economic stress and turmoil.[206] Not surprisingly, almost every word of the current Agreement appeared to be in controversy. As discussed and analyzed above, the parties were able to renegotiate the current agreement, but the Philippine Senate failed to ratify it.

Nevertheless, the Philippine SOFA renegotiation experience yielded a number of lessons for negotiators of future bases and status of forces agreements negotiators.

Perhaps the major lesson to be learned from the Philippine SOFA experience is that any such agreement probably will meet the argument that it infringes the "host" or "receiving" nation's national sovereignty. As discussed above, this issue is highly

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[201] The Philippine government argued that the provision in the current Agreement that gives the United States primary jurisdiction over offenses in which all the parties are American did not include cases involving "chastity and honor." The Philippine government claimed primary jurisdiction in these cases, even when all the parties were American. *Id.* Furthermore, the press release announcing the negotiated agreement did not make any mention of the criminal jurisdiction provision. *See Statement on U.S. Philippine Treaty*, *supra* note 5.

[202] *Id.*

[203] *See supra* notes 15-17, 23-39, 45, 58-61, 123-125 and accompanying text.

[204] *See supra* notes 90-102 and accompanying text.

[205] GREENE, *supra* note 76, at 46.205.

[206] *Id.* at 9-14.

complex—chiefly because the concept of "sovereignty" and "independence" in the modern international system apparently is evolving faster than the customary international law on the subject. Furthermore, the *sui generis* and unusual nature of status of forces agreements in international law contributes to the complexity of this issue. Moreover, the perception by the receiving state that the process by means of which such an agreement was created was tainted by coercion represents another a major stumbling block to be overcome.

How can these problems be resolved? To avoid charges of infringement of national sovereignty, any status of forces or bases agreement clearly must be voluntary on the part of both the sending and receiving states. One key indication of voluntariness is the lack of overreaching by any one party to the agreement. Provisions that appear to give one party excessive or unbalanced advantages over the other party should be avoided. Furthermore, the negotiations and the text of the agreement itself must clarify that *either* party can terminate it under mutually agreed-upon terms, and that the nonterminating party will respect and abide by such a termination.

Clearly, the Philippine experience shows that combining a "bases" agreement with a "status of forces" agreement—each with a different subject matter—is not wise because it links matters that should not necessarily be linked. For example, when a status of forces provision, allowing the sending state's troops certain extraterritorial rights in the receiving state's territory, is included in a bases agreement—as was the case in the Philippines—the "price" for the use of the bases appears to rise to an unacceptable level for the receiving state's nationals, which may give rise to cries of oppression. This confusion should be avoided.

Another lesson to be learned from the Philippine SOFA experience is that the format of such an agreement can be extremely controversial. The designation of any such agreement by the United States as a treaty subject to ratification by the advice and consent of the Senate, or as an executive agreement—which is not subject to such a process, but still is considered a treaty under international law—can have far-reaching consequences and should be negotiated carefully.

A controversy likely to arise in the negotiation of future agreements is the issue of the prohibition or limitation of the transport and storage of nuclear weapons by United States forces within the territory of the receiving state. The increasing popularity of the nuclear nonproliferation movement world-wide, and United States policy of neither confirming nor denying

nuclear deployments, likely will conflict. The Philippine SOFA solution to this issue appears to be both workable and acceptable.

Furthermore, the Philippine SOFA experience illustrates the necessity of specifying the type and amount of compensation to be given for the use of any facilities in a manner acceptable to both parties.

Lastly, the Philippine SOFA renegotiations brought to light a number of issues relating to the criminal jurisdiction provisions of the NATO Stationing Agreements, which apparently are the United States standards on the subject. Negotiators of future status of forces agreements will have to consider and resolve these issues.

THE COURT-MARTIAL PANEL SELECTION PROCESS: A CRITICAL ANALYSIS

MAJOR STEPHEN A. LAMB*

> [I]t is proper that you should understand what I deem the essential principles of our government, and consequently those which ought to shape its administration.... Equal and exact justice to all men ... and trial by juries impartially selected—these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.... They should be the creed of our political faith ... the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and regain the road which alone leads to peace, liberty, and safety.[1]

I. Introduction

This statement, taken from Jefferson's first inaugural address, highlights the importance of trial by jury to the American system of government. The civilian system of criminal justice has been very protective of an individual's right to a jury trial. Prior to and since Jefferson's first inaugural address, the Constitution, the Bill of Rights, case law, and federal statutes have insisted that juries be drawn fairly and impartially from a cross-section of society, and not be the result of the deliberate inclusion or exclusion of particular individuals or classes.[2]

The military system of criminal justice has not been so protective. Although many of the constitutional values espoused

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[1]Thomas Jefferson, *First Inaugural Address*, Mar. 4, 1801, *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON, OFFICIAL PAPERS 321-22 (Albert E. Bergh ed. 1907).

[2]*See infra* part IV.A.

by the civilian system of justice are present in the military, they are tempered by the premise that the Sixth Amendment right to jury trial is not applicable to the military.[3] Certainly the court-martial panel, the military's corollary to a jury, is vastly different from a civilian jury in both substance and structure. Referred to as "*the* major difference between military and civilian practice,"[4] the court-martial panel and the method for its selection are frequent sources of criticism.[5]

The Uniform Code of Military Justice[6] (UCMJ or Code) employs a method for selecting court-martial panel members which differs greatly from the method used by the federal courts for selecting jurors.[7] Although the UCMJ recognizes, through case law, the right of every accused service member to a fair and impartial jury, it does not accede to the majority of rights conferred by and inferred through the Sixth Amendment.[8]

This article assesses the current method for court-martial panel member selection. The article begins by exploring the historical background to the jury trial and, concomitantly, jury selection. The employment of the jury as a means of determining culpability and the methods for selecting the jury will be examined from the Greco-Roman jury system to the current federal jury system. The historical background of the court-martial panel also will be reviewed, from its early origins and inception in this country under the Articles of War to its present format under the Code.

The present method of court-martial panel member selection then will be examined in relation to the present federal model and the American Bar Association Standards for Criminal Justice.[9] The article then will discuss the constitutional considerations and judicial reaction to the present system of court-martial panel member selection. Finally, the article will review numerous problems with the present system and propose a revision of the UCMJ.

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[3] *See infra* parts IV.A-B.

[4] Joseph W. Bishop, Jr., JUSTICE UNDER FIRE 27 (1974).

[6] *See, e.g.*, Phyllis W. Jordan, *Navy Justice: A conflict of interest?*, Va. Pilot, Sept. 22, 1991, at A1, A8 ("Commanding officers can decide ... who may sit on the military jury. The jurors and witnesses are invariably under his command, creating opportunities for subtle or sometimes blatant and unlawful pressure").

[5] UCMJ arts. 1-146.

[7] *See* 28 U.S.C. §§ 1861-1878 (1988).

[8] *See infra* part IV.B.

[9] STANDARDS FOR CRIMINAL JUSTICE, Standard 15 (A.B.A. 2d ed., 1986 Supp.) (Trial by Jury) [hereinafter ABA STANDARDS].

II. Historical Background to the Right to a Jury Trial

The exact origin of the jury trial as a system for administering justice is uncertain. The earliest recorded examples of jury trial, however, bear little resemblance to the current federal model. The concept of a fair and impartial jury composed of a cross-section of society actually has been established within the last few centuries. The purpose for examining the historical foundation of the jury is to allow a valid comparison between past practice, the current federal model, and the present system for court-martial panel member selection.

A. The Greco-Roman Tradition

1. The Greeks.—The first jury trial was recorded over 3000 years ago by Aeschylus in his play *Euminides*.[10] This jury consisted of twelve citizens of Athens who voted six for conviction and six for acquittal in the matricide prosecution of Orestes.[11] Pallas Athena, as judge, cast the deciding vote for acquittal.[12]

Euminides is significant in several respects. First, it reflects that early juries were not composed of a cross-section of society. The requirements for citizenship in Athens were quite rigorous.[13] Only property owners who were capable of serving the army as either a cavalryman or a hoplite—that is, a heavily armed troop—qualified as citizens.[14] Second, the trial of Orestes reveals that early jury trials were not encumbered by the principle of unanimity of verdict as a requirement. Finally, it places the judge, Pallas Athena, as the tie-breaker and a voting member.

By the sixth century B.C., Solon had arranged the jury into a standing body of fifty-one citizens of the highest class of Athens.[15] Known as the *Areopagus*, this tribunal heard cases and decided outcomes by majority vote.[16] No set number of jurors were required for any given case, although the number of jurors rose with the relative importance of the case.[17]

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[10] LLOYD E. MOORE, THE JURY 1 (1973).

[11] *Id.*

[12] *Id.*

[13] WILL DURANT, THE LIFE OF GREECE 110 (1939).

[14] *Id.*

[15] MOORE, *supra* note 10, at 2.

[16] DURANT, *supra* note 13, at 116.

[17] MOORE, *supra* note 10, at 2.

More importantly, Solon began to open up the eligibility for jury duty before the general assembly to all Athenian citizens.[18] The general assembly was the appellate body to which all appeals from the decision of the *Areopagus* were sent.[19] Again, the general assembly, which ranged in size from 200 to 1500 members, decided by majority vote.[20]

Toward the latter part of his administration, Solon reconstituted the *Areopagus* into the *Heliaea*, a body of 6000 jurors drawn from all classes of citizens by lot.[21] The *Heliaea*, in turn, was composed of ten 500-man jury panels, or *Dykasteries*, and a one-hundred-man reserve pool of jurors.[22] The decision of a *Dykast* was by majority vote, and was not subject to appeal to the general assembly.[23]

By the time of the *Heliaea*, significant efforts were made to make the *Dykast* more representative of the population. Although citizenship was still a requirement, all classes of citizens were eligible and were drawn by lot. This represented a conscious intent to ensure that partisanship did not play any part in jury membership. Additionally, the judge was replaced by a magistrate who did not vote or decide issues of law.[24]

2. The Romans.—The origins of the Roman jury system can be traced to roughly 450 to 451 B.C.[25] During this period, the Decemvirs returned from Athens, where they had been sent to investigate the laws of Solon.[26] The Roman jury, or *Judex*, was similar to the Greek *Dykast* in that its membership was limited strictly to Roman citizens of the highest social order.[27] Originally, only senators were eligible to serve on a *Judex*.[28] During the consulship of Gaius Gracchus, membership briefly was extended to the equestrian class, which consisted of merchants and landowners. Lucius Cornelius Sulla, however, returned it to the sole province of the senatorial class less than forty years later.[29]

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] DURANT, *supra* note 13, at 116.

[22] JOHN PROFATT, TRIAL BY JURY 6 (1877).

[23] MOORE, *supra* note 10, at 2.

[24] PROFATT, *supra* note 22, at 6-7.

[25] MOORE, *supra* note 10, at 3.

[26] *Id.*

[27] *Id.*; PROFATT, *supra* note 22, at 8; ROBERT VON MOSCHZISKER, TRIAL BY JURY 12 (n.d.).

[28] DURANT, CAESAR AND CHRIST 114 (1944).

[29] *Id.* at 116, 126.

Unlike the *Dykasteries*, the Roman *Judices* were supervised by a *Praetor*, or judge, who ruled on issues of law and instructed the jury.[30] Like the *Dykast*, the *Judex* determined its verdict on the basis of a majority vote.[31] To prevent undue influence from other jury members, the *Judex* employed secret balloting.[32] This was accomplished by placing each member's vote in an urn, to be counted by the *Praetor*.[33]

The *Judex* was chosen by *the* Comitia, the general assembly of the Senate, for a period of one year.[34] The Judex numbered eighty-one members.[35] Both prosecution[36] and defense were accorded fifteen challenges each, leaving a far smaller jury than the *Dykast*.[37] Although each member of the jury was sworn to perform his duties in a fair and impartial manner,[38] bribery, intimidation and even an occasional murder of a jury member were not uncommon.[39]

B. The British Tradition

Popular theory is that the origin of the British jury system was introduced to the island by the Romans during the consulship of Claudius, between 41 and 50 A.D.[40] There is no compelling evidence of a jury system similar to the Greco-Roman system employed on the British Isles until after the Norman Conquest in 1066.[41] Before this time, trial by ordeal, compurgation, and combat were the preferred methods for determining criminal culpability.[42]

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[30] MOORE, *supra* note 10, at 3.

[31] DURANT, *supra* note 28, at 403.

[32] *Id.*

[33] *Id.*

[34] MOORE, *supra* note 10, at 3; MOSCHZISKER, *supra* note 27, at 12.

[35] MOORE, *supra* note 10, at 3.

[36] The Romans did not employ public prosecutors, but instead allowed private citizens to prosecute each other. *See* DURANT, *supra* note 28, at 403.

[37] MOORE, *supra* note 10, at 3.

[38] PROFATT, *supra* note 22, at 9.

[39] DURANT, *supra* note 28, at 178.

[40] MOORE, *supra* note 10, at 3.

[41] PROFATT, *supra* note 22, at 41. Some writings have referred to a jury system existing amongst the Triads of Dyneval Moelmud—which is now Wales—circa 450 B.C. Additionally, King Morgan Mwynvawr of Glamorgan—a region that is also now in Wales—appointed twelve men to hear cases at his request in the sixth century A.D. *See generally* CHARLES P. DALY, THE COMMON LAW 61-66 (1894).

[42] *See* MOORE, *supra* note 10, at 23-45; PROFATT, *supra* note 22, at 15-62; MOSCHZISKER, *supra* note 27, at 23-62. Trial by ordeal involved the accused undergoing a test administered by clergy to determine guilt. A popular test was to

Shortly after the Norman Conquest, an accused began to receive the option of a jury trial.[43] The jury was selected from freemen by the local sheriff, earl, or perhaps even the king.[44] Although trial by jury remained optional, a distinct incentive—known as *prison forte et dure*—allowed the accused to opt for jury trial over trial by ordeal, compurgation, or combat.[45] *Prison forte et dure* was a statute passed in 1219 that allowed the local sheriff to imprison any accused who decided against electing a jury trial.[46] The imprisonment included severe forms of torture, which resulted in either reconsideration by the accused, or death.[47]

By 1340, the jury had developed into a body of twelve members.[48] The jury always was selected by agents of the crown—usually the local sheriff.[49] All members of the jury were freemen, and a trial jury often included knights and other noblemen who had been on the original accusing jury.[50] The defendant was allowed thirty-five challenges.[51] Because the jury was selected by an agent of the crown, the prosecution was not allowed any challenges.[52] For many years, the verdict was

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grasp a rock from a pot of boiling water. If, after three days, the hand was not infected, the accused was deemed not guilty. MOORE, *supra* note 10, at 31. Trial by compurgation involved an accused bringing forth witnesses to attest to their beliefs that the accused was truthful in his denial of wrongdoing. Generally, twelve freemen were required, although an earl was viewed as equivalent to six freemen. *Id.* at 29-30. Trial by combat involved the accused challenging his accuser to mortal combat, the outcome of which determined culpability. The accused was given the option to determine the type of trial he desired to forego. *Id.* at 36, 44.

[43] PROFATT, *supra* note 22, at 41.

[44] *See* MOORE, *supra* note 10, at 42; MOSCHZISKER, *supra* note 27, at 26-27. Freemen were men entitled to own land. Freemen were divided further into earls and churls. Earls were considered noblemen and were valued at a rate of one-to-six in relation to churls in resolving legal disputes. MOSCHZISKER, *supra* note 27, at 26-27.

[45] MOORE, *supra* note 10, at 54-55.

[46] *Id.*

[47] *Id.*

[48] *See id.* at 49-57. *See id.* at Legal historians generally believe that the Magna Charta, issued by King John on June 15, 1215, guaranteed trial by jury. The number twelve was originally the number of the accusing jury—the forerunner to the grand jury. The membership of the accusing jury was comprised exclusively of knights and other predominant noblemen. The trial jury, or petit jury, came to be numbered at twelve as a result of the practice of the accusing jury. Members of the accusing jury often were placed on the trial jury. *Id.*

[49] *Id.* at 55-58.

[50] *Id.*

[51] *Id.*

[52] *Id.*

determined by the majority vote of the jury.[53] In 1367, a statute required unanimous verdicts.[54]

By 1705, jury membership was extended from freemen to include peers or equals.[55] A peer was any male person who was between the age of twenty-one and seventy, not outlawed or a convict, and not an alien.[56] Although the list of prospective jurors was maintained by the sheriff, jurors were selected randomly for each case by lot.[57]

C. The American Tradition

The British brought their system of jury trial to the American colonies.[58] Both the Massachusetts Bay Colony and the Colony of Virginia had provisions for jury trial in a serious criminal case.[59] By the time of the drafting of the Constitution and the Bill of Rights, the right to a jury trial in criminal cases was well established. Two events in English history—the Star Chamber trials in the sixteenth and seventeenth centuries,[60] and *Penn's Case*[61]—served to imbue the colonists with a very strong belief that the right to a jury trial in criminal cases was a fundamental right of the highest importance.

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 68.

[56] *Id.*

[57] *Id.* at 69.

[58] *Id.* at 97.

[59] *Id.*

[60] *See id.* at 72-76; PROFATT, *supra* note 22, at 57-60. The Star Chamber trials were a series of decisions by a court, appointed by the crown, that overturned numerous jury decisions. More importantly, jurymen who were found to have decided against what the court deemed to be the weight of evidence often were punished with fines and imprisonment. MOORE, *supra* note 10, at 72-76.

[61] Penn and Mead's Case, 6 How. State Tr. 951 (1670). William Penn was tried at Old Bailey in 1670 for the offenses of unlawful assembly and disturbance of the peace by preaching and speaking to an assemblage at the Parish of St. Bennet Grace-Church. After returning a guilty verdict for "speaking," the court refused to dismiss the jury until it had returned a proper verdict, to include the words "unlawful assembly." After several instructions by the judge and subsequent obdurate refusals to comply by the jury, the jury finally returned a verdict of not guilty to all charges. The jury members were fined 40 marks each and Penn was fined for contempt. Bushell, the jury foreman, filed a writ of habeas corpus because he was imprisoned for refusal to pay the fine. Chief Justice Baughan ordered Bushell's release and held that a jury could not be punished for returning a verdict that was not consistent with the court's instructions. MOORE, *supra* note 10, at 86-89; PROFATT, *supra* note 22, at 56.

The Constitution[62] and the Bill of Rights[63] both contain guarantees of the right to a jury trial in criminal cases. Although disagreement existed about the necessity for language guaranteeing the jury trial in civil cases[64] before enactment of the Seventh Amendment,[65] the right to a jury trial in criminal cases was never in question. The staunchest opponent to a constitutional provision guaranteeing civil jury trials actually admitted that, in relation to criminal cases, the right to a jury trial was to be viewed as either a "valuable safeguard to liberty [or] ... the very palladium of a free government."[66]

The Supreme Court has viewed the right to a jury trial—as guaranteed under Article III, section 2, clause 3, of the Constitution and the Fifth and Sixth Amendments of the Bill of Rights—as applying differently to the federal government than to the states. Although the right to a fair and impartial jury trial applies to the states under the Fourteenth Amendment,[67] the requirements under federal law that the jury consist of twelve members and reach a unanimous verdict do not apply to the states.[68]

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[62] U.S. CONST. art. III, § 2, cl. 3, states,

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[63] *Id.* amends. V, VI, provide, in part,

> Amendment V — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ....
>
> Amendment VI—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

[64] *See* THE FEDERALIST No. 83 (Alexander Hamilton) (C. Rossiter, ed. 1961) (arguing against the need for a constitutional amendment protecting the right to a jury trial in civil cases).

[65] U.S. CONST. amend. VII provides,

> Amendment VII — In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[66] *See* THE FEDERALIST No. 83, *supra* note 64.

[67] Duncan v. Louisiana, 391 U.S. 145 (1968).

[68] Williams v. Florida, 399 U.S. 78 (1970) (holding that a six-person jury was

Although the Court has not required the states to implement the federal model for jury selection,[69] it has scrupulously required both the states and the federal government to maintain a jury system that meets the "impartial jury" requirement of the Sixth Amendment.[70] This is done by requiring the selection of jury members to be the result of a procedure that seeks a fair cross-section of the community[71] and does not deliberately include or exclude particular individuals and classes of society.[72]

While the courts have required a procedure that seeks a fair cross-section of the community, they have not required a procedure that uses random selection. Although historically, random selection was commonly used in America to select the actual jury venire, the jury pool often was selected by means that were far from random.[73] Common sources for determining the jury pool included voter lists, telephone books, city directories, tax rolls, and "key men."[74] "Key men" were prominent individuals in the community selected by the clerk or jury commissioner to nominate suitable persons in the community who filled the requisite qualifications.[75]

Before 1948, federal law required that jurors be selected for duty in the district courts using the same method employed by the local state courts.[76] In 1942, the Knox Committee set out the ideal standard for qualified jurors:

> [J]urors to serve in the district courts of the United States should be drawn from every economic and social group of the community without regard to race, color, or politics, and that those chosen to serve as jurors should

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sufficient in all but capital cases; referring to the federal twelve-member jury as "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance"); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding nine-to-three vote for conviction); Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding ten-to-two vote for conviction).

[69] *See* 28 U.S.C. §§ 1863, 1864 (1988).

[70] U.S. CONST. amend. VI.

[71] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (testing for systematic exclusion of significant, distinct group in community to determine whether fair cross-section requirement was met).

[72] *Id.*; Batson v. Kentucky, 476 U.S. 79 (1986) (applying cross-section requirement to peremptory challenge of black; requiring prosecutor to provide racially neutral explanation for peremptory challenge).

[73] WILLIAM C. MATHES & EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS 1-5 (1965); *see also* ABA STANDARDS, *supra* note 9, Standards 15.32-15.36.

[74] MATHES & DEVITT, *supra* note 73, at 1-5.

[75] *Id.*

[76] *Id.* at 1.

> possess as high degree of intelligence, morality, integrity, and common sense, as can be found by the persons charged with the duty of making the selection.[77]

Before 1968, both the federal courts and state courts commonly employed the "key man" system to select the jury pool.[78]

The federal practice of jury selection now is governed by statute.[79] The current practice is based on the premise that the membership of the jury is "selected at random from a fair cross section of the community."[80] This proscribes the use of the "key man" system to select the jury pool. Any person is qualified for jury service unless he or she: (1) is not at least eighteen years old, is not a citizen of the United States, and has not resided within the judicial district for the past year; (2) is unable to speak, read, write, and understand English; (3) is mentally or physically incapable of performing jury duty; or (4) has a state or federal criminal charge pending that carries the possibility of imprisonment for more than one year.[81]

Statutory exclusions and exemptions for jury service exist. Volunteer safety personnel—such as firefighters and members of rescue and ambulance squads—are excused upon individual request.[82] Active duty members of the military, firemen, policemen, and public officers of the United States are barred from jury service.[83] Other groups and classes may be excused upon individual request only when the district court finds that jury service imposed upon a specific group or class would impose "undue hardship or extreme inconvenience."[84] No citizen can be excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status.[85]

The exact mechanics of jury selection are not prescribed by statute; however, guidelines and specific requirements exist. For example, each district court must develop a written plan that not only does not discriminate against any citizen, but also meets the objective of the representational cross-section requirement through random selection of both the jury pool and the jury

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[77] *Id.* at 5.

[78] *Id.*

[79] 28 U.S.C. § 1863 (1964) (amended 1968, 1972, 1978, 1988); *id.* § 1864 (amended 1968, 1988).

[80] 28 U.S.C. § 1861 (1988).

[81] *Id.* § 1865.

[82] *Id.* § 1863(b)(5)(B).

[83] *Id.* § 1863(b)(6).

[84] *Id.* § 1863(b)(5)(A).

[85] *Id.* § 1862.

venire.[86] In addition, the United States Attorney General must approve the plan.[87] The plan also must employ either a voter registration list or the list of actual voters within the district or subdivision as a source from which the initial pool of jurors are to be randomly selected.[88] Final selection of the jury venire must be by a jury wheel or other random lot selection process.[89] The jury commission or clerk of court manages the jury selection system.[90]

III. Historical Background to the Court-Martial Panel

The origin of the court-martial panel is even less certain than the origin of the jury trial. The concept of a court-martial itself traces to the Roman legions.[91] At that time, it was customary for the tribune of the legion to administer justice through a *magistri militum*.[92] The *magistri militum* consisted of either the tribune acting as judge or with the assistance of a council chosen by the tribune.[93]

A. The Earliest Courts-Martial

The early Germanic tribes, the French, the Swedes, and the Anglo-Saxons all maintained a system of military discipline. The German courts-martial, or *militargerichts*, were established by the year 1487.[94] The *militargerichts* were presided over by either the Duke, a military chief, or his designated priests, who accompanied the army.[95] The French *conseils de guerre* were established by 1655 and were an instrument of command.[96]

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[86] *Id.* §§ 1863(a), 1861, 1862.

[87] *Id.* § 1863(a).

[88] *Id.* § 1863(b)(2).

[89] *Id.* § 1863(b)(4).

[90] *Id.* § 1863(b)(1).

[91] The historical background of the court-martial panel is restricted in this article to land forces. *See generally* EDWARD M. BYRNE, MILITARY LAW 2-6 (3d ed. 1981) (providing a synopsis of the origins of naval military law). Until the passage of the UCMJ in 1950, the United States Navy operated first under the Rules for the Regulation of the United Colonies in 1775 and later under the Articles for the Government of the Navy. Both of these documents had provisions for courts-martial similar to the provisions in the Articles of War. *Id.*; *see infra* parts III.C.1-3 (discussing the early development of the court-martial in the United States Army).

[92] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 45 (2d ed. 1920 reprint); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 12 (2d ed. 1987).

[93] WINTHROP, *supra* note 92, at 45; SCHLUETER, *supra* note 92, at 12.

[94] SCHLUETER, *supra* note 92, at 13.

[95] WINTHROP, *supra* note 92, at 45.

[96] *Id.* at 18; SCHLUETER, *supra* note 92, at 13.

The Anglo-Saxons, under William the Conqueror, brought the Court of Chivalry to the British Isles in 1066.[97] The Court of Chivalry originally consisted of chevaliers, appointed by the King, to act as an arbiter on matters of discipline and honor amongst his peers.[98] Later, it evolved into a court composed of the commander of the royal armies as lord high constable, assisted by the earl marshal and three doctors of civil law.[99]

King Gustavus Adolphus of Sweden was the first ruler to employ a court-martial panel more closely resembling a modern court-martial panel. In 1621, he established two separate courts-martial.[100] The first was a regimental court-martial, composed of the regimental commander and members elected from the regiment.[101] The second was a standing court-martial composed of the commanding general and high-ranking officers selected by him.[102]

The Code of Adolphus affected the British court-martial system. In 1642, Lord Essex's Code established a military commission of a commanding general and fifty-six officers to administer military justice.[103] A court was formed by a quorum of twelve or more members.[104] In 1686, the court-martial was refined by James II in "English Military Discipline."[105] This document established the court-martial at regimental level, presided over by the regimental commander and consisting of at least seven officers.[106] This document specified that all members should be at least the rank of captain. If not enough captains or higher ranking officers were available, "inferior" officers would be allowed to sit as members.[107] The decision of the court was by simple majority.[108]

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[97] WINTHROP, *supra* note 92, at 46.

[98] SCHLUETER, *supra* note 92, at 13.

[99] *Id.* at 16; WINTHROP, *supra* note 92, at 46.

[100] SCHLUETER, *supra* note 92, at 14-15.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 19.

[104] *Id.*

[105] ENGLISH MILITARY DISCIPLINE (1686), *reprinted in* WINTHROP, *supra* note 92, at 919.

[106] *Id.*

[107] *Id.*

[108] *Id.*

B. The British Mutiny Act

In 1689, the first British Mutiny Act was passed by Parliament.[109] The act applied to all officers and soldiers in the Army accused of mutiny, sedition, or desertion.[110] It conferred authority to convene courts-martial to officers of the rank of colonel or higher if commissioned to do so by either the crown or the general of the army.[111] The court-martial panel was to number at least thirteen officers, all of whom were to be at least the rank of captain.[112] The decision of the court was by simple majority, unless the death sentence was to be rendered, in which case at least nine of the thirteen officers had to vote for death.[113]

C. Courts-Martial in America

1. Courts-Martial in the Early Colonies.—By its terms, the first Mutiny Act remained in effect from April 12, 1689, until November 10, 1689.[114] Excepting the period from 1698 to 1701, successive mutiny acts, subsequently referred to as articles of war, were passed by Parliament until 1879.[115] This system of courts-martial was brought to the colonies and incorporated into the Massachusetts Articles of War[116] passed by the Provisional Congress of the Massachusetts Bay Colony on April 5, 1775.[117]

2. Courts-Martial During the Revolutionary War.—At the beginning of the Revolutionary War, the then existing British Articles of War[118] differed significantly from the Massachusetts Articles of War in how they treated courts-martial. The British Articles of War provided for both general and regimental courts-martial.[119] The general courts-martial were to be composed of not less than thirteen officers; the regimental courts-martial were of unspecified size.[120] Field grade officers were not to be tried by

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[109] 1 W. & M. 5, *reprinted in* WINTHROP, *supra* note 92, at 929-30.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] SCHLUETER, *supra* note 92, at 21.

[116] The Massachusetts Articles of War, *reprinted in* WINTHROP, *supra* note 92, at 947-52.

[117] SCHLUETER, supra note 92, at 22.

[118] The British Articles of War of 1765, *reprinted in* WINTHROP, *supra* note 92, at 941-46.

[119] The British Articles of War of 1765, § XV, arts. I-V, *reprinted in* WINTHROP, *supra* note 92, at 942.

[120] *Id.*

courts-martial composed of officers who were not at least the rank of captain.[121] For the first time, neither court-martial could be presided over by the commanding officer.[122]

The Massachusetts Articles of War retained the requirement that the general court-martial consist of at least thirteen officers, but added the requirement that they all be at least the rank of major.[123] The regimental court-martial was to consist of at least five members when available, but never less than three.[124] The commanding officer would not preside over the regimental court-martial, but he had to approve any sentence adjudged by majority vote of the court.[125]

The American Articles of War of 1776[126] retained the thirteen-member general court-martial and extended the prohibition against the convening authority presiding over regimental courts-martial to general courts-martial.[127] The Articles of War also retained the requirement that field grade officers be tried by courts-martial composed of officers of the rank of captain or higher.[128]

3. Courts-Martial After the Revolutionary War.—In 1786, the Articles of War were revised significantly as to the composition of the courts-martial.[129] The membership of the general court-martial was reduced to a minimum of five when operational requirements prevented convening a court-martial of thirteen officers.[130] In turn, regimental courts-martial were reduced to three officers.[131] Authority to convene this form of court-martial—

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[121] *Id.*, § XV, art. IX, *reprinted in* WINTHROP, *supra* note 92, at 943.

[122] *Id.*

[123] The Massachusetts Articles of War, art. 32, *reprinted in* WINTHROP, *supra* note 92, at 950.

[124] Massachusetts Articles of War, art. 37, *reprinted in* WINTHROP, *supra* note 92, at 950.

[125] *Id.*

[126] American Articles of War of 1776, *reprinted in* WINTHROP, *supra* note 92, at 961-71.

[127] *Id.*, § XIV, art. 1, *reprinted in* WINTHROP, *supra* note 92, at 967.

[128] *Id.*, § XIV, art. 7, *reprinted in* WINTHROP, *supra* note 92, at 968.

[129] American Articles of War of 1786, *reprinted in* WINTHROP, *supra* note 92, at 972-75.

[130] *Id.*, art. 1, *reprinted in* WINTHROP, *supra* note 92, at 972. The Rules and Regulations for the Government of the United States Navy had a similar provision allowing for a five-member general court-martial when sufficient officers could not be obtained. The Navy rules provided for only the general court-martial; no lower form of court-martial was authorized. The Rules and Regulations of the United States Navy, 23 April 1800, art. XXXV, *reprinted in* JAMES E. VALLE, ROCKS AND SHOALS 285, 291 (1980).

[131] American Articles of War of 1786, art. 3, *reprinted in* WINTHROP, *supra* note 92, at 972.

referred to as a garrison court-martial—was extended to officers commanding separate garrisons, forts, barracks, or posts consisting of soldiers from different corps.[132] In addition, officers were to be tried only by general courts-martial and by officers of equivalent rank or higher.[133]

4. Courts-Martial During and After the Civil War.—While the Union Army operated under the Articles of War of 1806,[134] the Confederate Army operated under a separate provision passed by the Congress of the Confederate States of America on October 9, 1862.[135] The Confederate Congress established a court-martial system similar to the one in existence under the Code of Adolphus. Courts-martial were convened by the President, consisted of three permanent members holding the rank of colonel of the cavalry, and were assigned down to the separate army corps level.[136] A quorum of two members was required for the court to hear cases.[137] This court-martial system was unique in that it was independent of the command to which it was assigned.

In 1874 the Articles of War were amended, to include a major revision to the composition of courts-martial.[138] A field officer court-martial was added. In time of war, every regiment was to have a field officer detailed as a one-man court-martial to handle all offenses by soldiers within the regiment.[139] No regimental or garrison courts-martial were to be convened when a field officer from the regiment could be detailed as the court-martial.[140] Congress virtually eliminated the regimental and garrison courts-martial in 1890, when it established the summary court.[141] The summary court replaced the regimental and garrison courts-martial in time of peace.[142] It was a one-man

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[132] *Id.*

[133] *Id.*, art. 11, *reprinted in* WINTHROP, *supra* note 92, at 973.

[134] American Articles of War of 1806, arts. 64-66, 75, *reprinted in* WINTHROP, *supra* note 92, at 982-83. The Articles of War of 1806 did not alter the composition of courts-martial. *Id.*

[135] An Act to organize Military Courts to attend the Army of the Confederate States in the field and to define the Powers of said Courts, *reprinted in* WINTHROP, *supra* note 92, at 1006-07.

[136] *Id.*

[137] *Id.*

[138] American Articles of War of 1874, *reprinted in* WINTHROP, *supra* note 92, at 986-96.

[139] *Id.*, arts. 62, 80, *reprinted in* WINTHROP, *supra* note 92, at 991, 993.

[140] *Id.*

[141] Act of Oct. 1, 1890, Establishing the Summary Court, *reprinted in* WINTHROP, *supra* note 92, at 999.

[142] *Id.*

court, consisting of the second-highest-ranking line officer on the post, station, or command.[143]

In 1916, Congress further amended the Articles of War and provided for the three separate forms of courts-martial still in existence today: the general court-martial; the special court-martial; and the summary court-martial.[144] All officers, to include Marine Corps officers detached for service with the Army, were eligible to serve on courts-martial.[145] General courts-martial were to be composed of from five to thirteen officers; special courts-martial were to be composed of from three to five officers; and summary courts-martial were to be composed of a single officer.[146]

General courts-martial could be convened by the President, and down the chain of command to a separate brigade or district commander; special courts-martial could be convened by a commander of a detached battalion or other command; and summary courts-martial could be convened by a commander of a detached company or other detachment.[147] Though Article 5 still required general courts-martial to be composed of thirteen officers whenever this would not create "manifest injury to the service,"[148] the 1917 version of the *Manual for Courts-Martial* (*1917 Manual*) noted that the convening authority's decision is discretionary, and not subject to further review.[149] The *1917 Manual* also noted a continuing duty of subordinate commanders to "keep in touch with the business before general courts-martial ... and from time to time ... mak[e] recommendations to the appointing authority as to relieving or adding new members ... or appointing a new court ...."[150] The *1917 Manual* did not indicate whether this provision was meant to allow the convening authority to take "corrective action" if the panel adjudicated undesired results, or if this provision was designed to ensure that new members were rotated through panel-member duty.[151]

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[143] *Id.*

[144] Articles of War of 1916, art. 3, *reprinted in* WAR DEPARTMENT COMMITTEE ON EDUCATION AND SPECIAL TRAINING, A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION 8-33, at 10 (West 1919) [hereinafter WAR DEP'T SOURCE-BOOK].

[145] *Id.*, art. 4, *reprinted in* WAR DEP'T SOURCE-BOOK, *supra* note 144, at 11.

[146] *Id.*, arts. 5-7, *reprinted in* WAR DEP'T SOURCE-BOOK, *supra* note 144, at 11.

[147] *Id.*, arts. 8-10, *reprinted in* WAR DEP'T SOURCE-BOOK, *supra* note 144, at 11.

[148] *Id.*, art. 5, *reprinted in* WAR DEP'T SOURCE-BOOK, *supra* note 144, at 11.

[149] MANUAL FOR COURTS-MARTIAL, United States, para. 7(a) (1917).

[150] *Id.*

[151] *See infra* part IV.B.3. (discussing the reaction of the court to a convening

5. Courts-Martial After World War I.—World War I spawned the Ansell-Crowder dispute, which challenged whether the purpose of the Articles of War should be to promote discipline or to administer justice.[152] Although this era resulted in a significant increase in due process rights for soldiers,[153] it did not create a more liberal court-martial panel selection process. When Congress revised the Articles of War in 1920 it actually reduced the number of officers required to sit on most courts-martial and, for the first time, specified qualifications for service on courts-martial panels that resulted in a clear preference for panels composed primarily of senior officers.[154]

The Articles of War of 1920 deleted the requirement that the convening authority detail thirteen officers to a general court-martial whenever this would not cause "manifest injury to the service."[155] Instead, it merely required all general courts-martial to consist of no less than five officers,[156] special courts-martial to consist of not less than three officers,[157] and summary courts-martial to consist of one officer.[158] Additionally, Article 8 required that one of the members of a general court-martial be a "law member"—preferably a judge advocate.[159] The 1921 version of the *Manual for Courts-Martial (1921 Manual)* noted that "it is not expected that appointing authorities will usually detail on a general court-martial many more members than required by the statute."[160] Furthermore, the *1921 Manual* recommended no more than nine members, clearly evincing a preference for smaller panels.[161] More importantly, however, Article 4 specified,

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authority who improperly relieved a standing court-martial panel to achieve harsher sentences); United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991).

[152] *See* Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987). *See generally* Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

[153] *See* SCHLUETER, *supra* note 92, at 30. Perhaps the most significant change was General Order No. 88, which required a convening authority to accept a court-martial panel's findings of not guilty. Previously, the accepted practice was for a convening authority to return a panel for deliberations when he did not agree with its findings. War Dep't, Gen. Orders No. 88 (14 Jul. 1919).

[154] The Articles of War of 1920, arts. 4-7, *reprinted in* MANUAL FOR COURTS-MARTIAL, United States, app. 1, at 494 (1921) [hereinafter 1921 MANUAL].

[155] *Id.*, art. 5, *reprinted in* 1921 MANUAL, *supra* note 154, app. 1, at 494.

[156] *Id.*

[157] *Id.*, art. 6, *reprinted in* 1921 MANUAL, *supra* note 154, app. 1, at 494.

[158] *Id.*, art. 7, *reprinted in* 1921 MANUAL, *supra* note 154, app. 1, at 494.

[159] *Id.*, art. 8, *reprinted in* 1921 MANUAL, *supra* note 154, app. 1, at 495.

[160] 1921 MANUAL, *supra* note 154, para. 7(a) n.1.

[161] *Id.*

> When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.[162]

This provision was adopted by Congress at the urging of The Judge Advocate General of the Army, Major General Enoch H. Crowder, and the Kernan Board of the War Department.[163] The *1921 Manual* further specified that staff judge advocates were responsible for advising convening authorities of the qualifications for service on courts-martial pursuant to Article 4.[164]

6. Courts-Martial After World War II.—During World War II, approximately two million courts-martial were convened.[165] Numerous examples of harsh punishments and extremely abbreviated due process were reported to Congress.[166] After the war, Congress was deluged by demands for reform of the court-martial system from organizations such as the American Bar Association (ABA) and the American Legion.[167] The ABA made two recommendations to Congress that directly related to the court-martial selection process.[168] First, the ABA recommended that enlisted members be placed on courts-martial.[169] Second, it recommended that the power to convene courts-martial be removed from the province of the commander.[170]

The first recommendation became part of the Elston Act[171] and was incorporated into Article 4 of the Articles of War.[172] Specifically, Congress amended Article 4 to allow an enlisted soldier to request a court-martial panel composed of at least

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[162] Articles of War of 1920, art. 4, *reprinted in* 1921 MANUAL, *supra* note 154, app. 1, at 494.

[163] 1921 MANUAL, *supra* note 154, para. 6(c) n.1.

[164] *Id.*, para. 6(c) n.2.

[165] Cox, *supra* note 152, at 11.

[166] *See* WALTER T. GENEROUS, JR., SWORDS AND SCALES 14-21 (1973).

[167] Cox, *supra* note 152, at 12.

[168] *Armed Services Comm., Subcommittee Hearings on H.R. 2575, to Amend the Articles of War*, 80th Cong., 1st Sess. 2002 (1947).

[169] *Id.*

[170] *Id.*

[171] Elston Act, 62 Stat. 604, 627-44 (1948).

[172] The Articles of War of 1948, *reprinted in* MANUAL FOR COURTS-MARTIAL, United States, app. 1, at 273 (1949) [hereinafter 1949 MANUAL].

one-third enlisted members.[173] As with officers, the convening authority was directed to select enlisted persons with at least two years of service and who were best qualified by reason of age, experience, training, and judicial temperament.[174]

The second recommendation—to take the process for selecting members out of the hands of the commander—was not incorporated into the Elston Act, because it was far too radical. Specifically, "[n]o commander would conceive of surrendering to some lawyer the power to decide whether a court-martial best suited the interests of his outfit's discipline."[175] Interestingly, this view was not held widely by staff judge advocates. At least one staff judge advocate believed that convening authorities customarily left matters of courts-martial referral to the discretion of the staff judge advocate.[176]

Although Congress did not enact the ABA recommendation that the power to convene courts-martial be removed from the province of the commander, it was not insensitive to the problem of command influence over courts-martial. Congress's response to the problem was to enact Article 88, which prohibited the convening authority and all commanders from censuring, reprimanding, admonishing, coercing, or unlawfully influencing any member in reaching the findings or sentence in any case.[177]

7. The Development of the Uniform Code of Military Justice.—The Articles of War of 1948, created by the Elston Act, were short-lived. The Elston Act did not apply to the Navy, and because of drafting problems, whether it applied to the Air Force

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[173] *Id.*, art. 4, *reprinted in* 1949 MANUAL, *supra* note 172, app. 1, at 275-76.

[174] *Id.*

[175] GENEROUS, *supra* note 166, at 28.

[176] ROBERT L. SONFIELD, A GUIDE FOR THE ADMINISTRATION OF MILITARY JUSTICE 25 (1945). Paragraph 61 of Sonfield's guide states in part:

> Theoretically the charges and allied papers are referred to the officer exercising general court-martial jurisdiction. He then refers such charges to his Staff Judge Advocate for appropriate recommendations and the Staff Judge Advocate thereafter makes his recommendations to his commanding officer. However, as a matter of practical application, when the charges are received at the headquarters of such officer, they are referred directly to the Staff Judge Advocate for appropriate action. It is customary in many commands for the commanding officer to permit the Staff Judge Advocate to make the decision with respect to each case and refer it for trial by General Court-Martial, inferior court-martial or take such other appropriate action as in his judgement may be deemed proper.

Id. At the time this was written, Lieutenant Colonel Sonfield was the Staff Judge Advocate, United States Army Infantry School, Fort Benning, Georgia. *Id.* at 1.

[177] The Articles of War of 1948, art. 88, *reprinted in* 1949 MANUAL, *supra* note 172, app. 1, at 296.

was unclear.[178] By the beginning of the 1949 session, Congress sought to create a system of military justice that would encompass all services. The Morgan Committee,[179] established by Secretary of Defense James V. Forrestal and chaired by Harvard Law Professor Edmund M. Morgan, introduced legislation that resulted in the Uniform Code of Military Justice.[180]

Once again, the ABA sought to remove commanders from the process of convening courts-martial.[181] This time, Mr. George Spiegelberg, testifying on behalf of the ABA, recommended that the task of appointing members for courts-martial be transferred from the commanders to each of the Judge Advocate Generals and their designated representatives.[182] To support his recommendation, Mr. Spiegelberg noted a recent independent commission report by the Vanderbilt Committee, that sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts."[183]

Professor Morgan responded to the ABA recommendation by calling it both "impracticable" and "unthinkable that [the Judge Advocate General] could be permitted to dictate to the commanding officer the assignment of [court-martial] duties of officers under his command."[184] The ABA's recommendation was not endorsed by the Morgan Committee and received a cool reception from both the House and Senate subcommittees of their committees for armed services.[185] In addition to Professor Morgan's opposition, the subcommittee likely was swayed substantially by the statement of Colonel Frederick Bernays Wiener, a noted former judge advocate who asserted,

> There is a suggestion on the panel system that has now been watered down. The suggestion is that the Judge

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[178] GENEROUS, *supra*, note 166, at 31-33.

[179] *See id.* at 34-53 (excellent recounting of the workings of the Morgan Committee).

[180] 64 Stat. 198 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1988)).

[181] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee of Armed Services, House of Representatives*, 81st Cong., 1st Sess. 715-31 (1949) [hereinafter *Hearings on H.R. 2498*] (statement of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association) ; *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Committee on Armed Services, United States Senate*, 81st Cong., 1st Sess. 60-85 (1949) (statement of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association).

[182] *Hearings on H.R. 2498*, *supra* note 181, at 717-23.

[183] *Id.* at 719.

[184] *Id.* at 723.

[185] *Id.* at 717-23.

> Advocate General select the court from the panel. Who selects the panel? The commanding general. Why shouldn't he select the court? In practice, and I speak from experience in four jurisdictions, the court is picked by the staff of the Judge Advocate General. He finds out who is available and he knows the officers at headquarters who have the experience and who have the proper judicial temperament, which the Fourth Article of War requires, and he tries to get the ablest and most experienced people possible.[186]

Articles 22, 23, and 24 of the UCMJ retained provisions giving commanders the authority to convene courts-martial as previously had existed in Articles 8, 9, and 10 of the Articles of War of 1948.[187] Article 25 of the UCMJ incorporated Articles 4 and 16 of the Articles of War of 1948.[188] Article 25 expanded the Elston Act provisions by making any member of an armed force eligible to sit on a court-martial of a member of another armed service.[189] Additionally, Article 25(c)(1) allowed a convening authority to convene a court-martial composed solely of officer members, over the objection of the accused, whenever "physical conditions or military exigencies" prevented detailing enlisted members to the court.[190] The qualifications to be considered by the convening authority when selecting members were amended to "age, education, training, experience, length of service, and judicial temperament."[191] Education was added as a factor from the Articles of War of 1948, and length of service was substituted for the previous requirement of two years of service.

Article 25 mirrored previous Article 4 of the Articles of War of 1948 by making accusers and witnesses for the prosecution ineligible to sit as members.[192] In addition, Article 25 made investigating officers and counsel ineligible to sit as members.[193] Finally, it specified a preference for panels senior in grade or rank to the accused.[194]

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[186] *Id.* (statement of Col. Frederick B. Wiener, Washington, D.C.) at 782-83.

[187] UCMJ arts. 22 (1958) (amended 1986); *id.* art. 23; *id.* art. 24.

[188] *Id.* art. 25 (amended 1968, 1983, 1986).

[189] *Id.*

[190] *Id.* art. 25(c)(1) (amended 1968, 1986).

[191] *Id.* art. 25(d)(2).

[192] *Id.*

[193] *Id.* Previously, serving as an investigating officer or counsel was not a statutory ground for a challenge, but was a recognized ground for a causal challenge. 1949 MANUAL, *supra* note 172, para. 58e.

[194] UCMJ art. 25(d)(1) (1958).

The final provision of the UCMJ to affect the selection and composition of the court-martial panel was Article 26.[195] Article 26 replaced the law member of Article 8 of the Articles of War of 1948 with the law officer.[196] Unlike the law member, the law officer was required to be an attorney certified by the Judge Advocate General of the respective armed service.[197] Additionally, the law officer was more like a judge, and was not allowed either to deliberate or to vote with the members.[198]

Again, although Congress did not enact the ABA recommendation, it was sensitive to the problem of command influence over courts-martial. Its response was to enact Articles 37 and 98.[199] Article 37 mirrored the language of Article 88 of the Articles of War of 1948, but included language prohibiting the convening authority from influencing the law officer or counsel.[200] Article 98 made the knowing and intentional violation of Article 37 an offense under the Code punishable by court-martial.[201]

Since the enactment of the UCMJ in 1950, it has undergone major revisions in both 1968[202] and 1983.[203] Neither of these major revisions had a significant effect on the selection of court-martial panel members.[204] Once again, a recommendation was made in 1983 to remove the power to convene courts-martial from commanders.[205] This recommendation, presented by Mr. Steven

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[195] *Id.* art. 26 (amended 1968, 1983).

[196] *Id.*

[197] *Id.* art. 26(a) (amended 1968, 1983).

[198] *Id.* art. 26(b) (amended 1968).

[199] *Id.* art. 37 (amended 1968); *id.* art. 98.

[200] *Id.* art. 37 (amended 1968).

[201] *Id.* art. 98(2).

[202] 82 Stat. 1335 (1968).

[203] 97 Stat. 1400 (1983).

[204] In 1968, Articles 16 and 26 were amended, changing the law officer to a military judge and allowing for trial by military judge alone in both general and special courts-martial. In this sense, the accused was offered a completely new option of whether to be tried by a panel or by judge alone. UCMJ art. 16 (1958) (amended 1968, 1983); *Id.* art. 26 (amended 1968, 1983). Article 25 also was amended in 1983 to include a provision allowing the convening authority's staff judge advocate, legal officer, or principal assistant to excuse a member before the court-martial is assembled, subject to the delegation by the convening authority and service regulations. *Id.* art. 25(e) (amended 1983).

[205] *The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate*, 97th Cong., 2d Sess. 277-89 (1982) [hereinafter *Hearings on S. 2521*] (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York); *The Military Justice Act of 1983: Hearings on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services, United States Senate*, 98th Cong., 1st Sess. 44-45 (1983) (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military

Honigman on behalf of the Association of the Bar of the City of New York, suggested that "the commander should be relieved an additional administrative burden, that of personal selection of members of the courts-martial jury [sic] under article 25(d)(2)."[206] Although Mr. Honigman did not specify the preferred method for selecting court-martial panel members, he did "recommend that members of courts-martial be chosen at random from a pool of eligible individuals."[207] As with the recommendation that the ABA made in 1949, Mr. Honigman's recommendation received little serious attention.[208]

III. Current Court-Martial Panel Member Selection Practice

A. Present Code Provisions Affecting Court-Martial Panel Member Selection

1. Types and Composition of Courts-Martial.—Article 16 specifies three types of courts-martial—general, special, and summary.[209] It further specifies the following two forms of general court-martial: (1) a judge presiding over a panel of not less than five members; and (2) a judge alone determining both findings and sentence, upon the request of the accused.[210] Article 16 specifies three forms of special court-martial: (1) a panel of not less than three members; (2) a judge presiding over a panel of not less than three members; and (3) a judge alone determining both findings and sentence, upon the request of the accused.[211] The summary court-martial consists of one commissioned officer.[212]

2. Convening Authority.—Articles 22, 23, and 24 establish the authority to convene courts-martial.[213] Although the President or service secretary can designate any officer, general court-martial convening authorities usually are general or flag officers, but almost always are of the rank of colonel or higher (captain or higher in the Navy or Coast Guard) and in command of a separate brigade, wing, station, or larger unit.[214] Similarly,

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Affairs of the Association of the Bar of the City of New York).

[206] *Hearings on S. 2521*, *supra* note 205, at 278.

[207] *Id.*

[208] *Id.* at 277-89.

[209] UCMJ art. 16 (1988).

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.* arts. 22, 23, 24.

[214] *Id.* art. 22.

although service secretaries can designate any officer, special court-martial convening authorities usually are colonels (captains in the Navy and Coast Guard), but almost always are of the rank of lieutenant colonel or higher (commander or higher in the Navy or Coast Guard) and in command of a detached battalion, separate squadron, naval vessel, or larger unit.[215] Finally, although service secretaries again can designate any officer, summary court-martial convening authorities usually are lieutenant colonels (commanders in the Navy and Coast Guard), but almost always are of the rank of major or higher (lieutenant commander or higher in the Navy or Coast Guard) and in command of a detached company, detached squadron, or larger unit.[216]

3. Criteria for Selection.—Article 25 specifies the criteria for selection of panel members.[217] All active duty service members are eligible to sit as members.[218] Only commissioned officers, however, may sit on panels for courts-martial at which the accused is a commissioned officer.[219] In addition, no member will be junior to the accused when this can be avoided.[220] If the accused is enlisted, he or she can request a panel comprised of at least one-third enlisted members, provided no physical conditions or military exigencies prevent empaneling enlisted members.[221]

Article 25(d)(2) directs the convening authority to detail members to a court-martial who are, "in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[222] Accusers, witnesses for the prosecution, investigating officers, and counsel are ineligible to sit as members.[223]

4. Challenges and Excusal of Members.—The Government or the accused can challenge any member or the military judge for cause.[224] The military judge rules on challenges for cause.[225] In a special court-martial without a military judge, the members vote on the challenged member.[226] Majority vote determines the

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[215] *Id.* art. 23.
[216] *Id.* art. 24.
[217] *Id.* art. 25.
[218] *Id.*
[219] *Id.*
[220] *Id.* art. 25(d)(1).
[221] *Id.* art. 25(d)(2).
[222] *Id.*
[223] *Id.*
[224] *Id.* art. 41.
[225] *Id.*
[226] *Id.* arts. 41, 52.

outcome of the challenge, with a tie vote resulting in disqualification of the member.[227] Furthermore, the Government and the accused are entitled to one peremptory challenge.[228]

The convening authority can excuse any member before the court is assembled.[229] This authority may be delegated to the staff judge advocate, legal officer, or principal assistant.[230]

5. Voting Procedure.—Findings of guilty are determined by a vote of at least two-thirds of the members[231] by secret written ballot.[232] If the panel finds the accused guilty, it normally determines the sentence by two-thirds vote.[233] The rendition of more severe sentences, however, requires the concurrence of a greater number of panel members. For instance, a sentence to life imprisonment or to confinement for more than ten years requires the concurrence of three-fourths of the members. Similarly, in a case in which the law authorizes capital punishment, condemnation requires that all members concur on the finding of guilty and on the determination to impose the death sentence.[234] Finally, in a case in which law mandates the death penalty, the members must return a unanimous verdict of guilty to convict.[235]

6. Prohibitions Against Command Influence.—Article 37 prohibits convening authorities and commanding officers from censuring, admonishing, or reprimanding any member, judge, or counsel about the findings, sentence, or other function of the court-martial.[236] It also prohibits any person subject to the Code from attempting to coerce or otherwise unlawfully influence the action of any court-martial or convening, reviewing, or approving authority.[237]

Finally, Article 37 prohibits the consideration of either a member's performance during a court-martial—or a counsel's zealous representation of an accused—in the preparation of any

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[227] *Id.* art. 52(c).

[228] *Id.* art. 41(b).

[229] *Id.* After the court is assembled, no member can be excused unless ordered by the military judge under Article 41 or by the convening authority for good cause. Whenever the court-martial membership is reduced below a quorum, new members may be detailed by the convening authority. *Id.* art. 29.

[230] *Id.* art. 29.

[231] *Id.* art. 52(a)(2).

[232] *Id.* art. 51(a).

[233] *Id.* art. 52(b)(3).

[234] *Id.* art. 52(b)(1), (2).

[235] *Id.* art. 52(a)(1).

[236] *Id.* art. 37.

[237] *Id.*

report that might affect promotion, transfer, or assignment.[238] Article 98 makes the knowing and intentional violation of Article 37 an offense punishable by court-martial.[239]

B. Mechanics of Court-Martial Panel Member Selection

While the UCMJ clearly establishes the various types of courts-martial,[240] the levels of command that can convene a particular court-martial,[241] and the factors that the convening authority must consider when selecting members to sit on courts-martial,[242] it does not prescribe the mechanics for selecting members.

A common method for court-martial member selection[243] begins with a memorandum from the office of the staff judge advocate to the major subordinate commanders. The memorandum requests nominations—usually by grade and number—of potential members for consideration by the convening authority.[244] This memorandum includes the criteria for selection from Article 25(d)(2) and other allowable factors that the convening authority thinks are appropriate.[245] The memorandum

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[238] *Id.*

[239] *Id.* art. 98.

[240] *Id.* art. 16.

[241] *Id.* arts. 22, 23, 24.

[242] *Id.* art. 25.

[243] Apparently, no current empirical data reflects the common methods of selecting panels. Actually, because convening authorities change command routinely, any study would have limited value. This example is taken from two articles that recommend procedures for the selection of general and special courts-martial panels by a general court-martial convening authority. *See* Craig S. Schwender, *One Potato, Two Potato ... A Method to Select Court Members*, ARMY LAW., May 1984, at 12; Karen V. Johnson, *"In His Opinion—A Convening Authority's Guide to the Selection of Panel Members*, ARMY LAW., Apr. 1989, at 43.

A 1972 article in the *Military Law Review* surveyed staff judge advocates to determine the most common methods of panel member selection. This survey reflected that over 87% of all convening authorities rely on a process by which the initial recommendations are received from staff elements (predominantly the G-1) within the command. *See* R. Rex Brookshire, II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 114 (1972).

[244] An example from a typical Army brigade might be as follows: three Lieutenant Colonels; eight Majors; 15 Captains; 30 Lieutenants and Warrant Officers; three Sergeant's Major; 10 Master Sergeants; 15 First Sergeants; 20 Staff Sergeants; 20 Sergeants; and any other soldier in the rank of corporal or lower who meets the specified criteria for selection. *See* Schwender, *supra* note 243, at 19.

[245] *Id.* Other allowable criteria would include factors such as a prerequisite that all nominees not be in a leave or temporary duty status for the prescribed period. *Id.* at 13.

also designates the period the members would serve as a standing panel.[246]

Once the nominations are received from the major subordinate commanders, the staff judge advocate presents these to the convening authority for his selection.[247] Commonly, the convening authority receives, for his or her review, the officer record briefs of the officers and personnel folders of the enlisted members.[248] Also common is the practice of providing the convening authority with a copy of the complete roster of the unit,[249] should he or she elect to choose someone not on the list of nominees.

Once the convening authority makes the selections, the appropriate convening order is prepared and copies are distributed to the panel members to put them on notice of their impending duty. Normally, the convening authority delegates authority to excuse court-martial members to the staff judge advocate, pursuant to Article 25(e) and Rule for Courts-Martial 505.[250]

C. Comparison of Court-Martial Panel Selection Process to Federal Practice and ABA Standards for Criminal Justice

The federal practice of jury selection[251] is, in many respects, the paradigm of the model system for jury selection advocated by the American Bar Association.[252] The current practice of selecting court-martial panel members differs from the federal practice and ABA standards in many respects. In some areas, it falls short of the protection guaranteed an accused under federal practice and the ABA standards. In a few areas, it provides more protection to an accused than do either the federal practice or the ABA standards.

1. Types and Composition of Courts-Martial.—Federal practice makes jury trial available to any accused who faces the

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[246] *Id.* at 19. The UCMJ does not specify how long a panel may sit. The length of time generally is at the discretion of the convening authority. The convening authority may have a panel sit for an individual case, or the convening authority may select a panel to sit for a period of months. This will vary by unit and mission requirements. *Id.* at 16-17.

[247] *Id.* at 13.

[248] *Id.*

[249] This roster commonly is referred to in the Army as the "Alpha Roster," which is comprised of all personnel in the unit who are eligible to perform recurring duties on a rotational basis.

[250] UCMJ art. 25(e); MANUAL FOR COURTS-MARTIAL, United States (1984), R.C.M. 505 [hereinafter MCM].

[251] 28 U.S.C. §§ 1861-78 (1988).

[252] ABA STANDARDS, *supra* note 9.

prospect of serving more than six months in confinement.[253] The ABA standards would extend the right to jury trial to any accused who faces any prospect of confinement.[254] The UCMJ meets the ABA standards. The UCMJ provides greater protection to an accused than the federal practice because an accused has a right to a panel at a special court-martial. Although no right to a panel exists at a summary court-martial—a court that can impose up to thirty days of confinement—the accused can decline a summary court-martial and thereby retain the right to a panel at a higher level court-martial.[255]

The federal practice is for juries to consist of twelve persons.[256] The ABA standards call for twelve jurors, unless the potential for confinement is limited to six months, in which case six jurors are sufficient.[257] The present courts-martial practice does not meet either the federal practice or the ABA standards.

Federal practice and the ABA standards allow an accused to waive jury trial only with the consent of the prosecutor.[258] The UCMJ gives the accused the right to waive a panel and be tried by judge alone; it does not require the consent of the trial counsel.[259] Although the military judge may hear argument from trial counsel in opposition to the accused's election to be tried by judge alone, the request routinely is granted.[260]

2. Convening Authority.—The federal practice and ABA standards have no real corollary to the powers of the convening authority.[261] Federal practice and the ABA standards do not mandate a particular method for jury selection.[262] In this vein, the UCMJ is consistent with federal practice and the ABA standards. This is, however, the only similarity.

Federal practice and the ABA standards mandate a selection procedure that not only is random, but also employs either an

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[253]Baldwin v. New York, 399 U.S. 66 (1970).

[254]ABA STANDARDS, *supra* note 9, Standard 15-1.1.

[255]MCM, *supra* note 250, R.C.M. 1303.

[256]Thompson v. Utah, 170 U.S. 343 (1898) (holding that federal jury must consist of twelve members).

[257]ABA STANDARDS, *supra* note 9, Standard 15-1.1.

[258]FED. R. CRIM. P. 23(a); Singer v. United States, 380 U.S. 24 (1965); ABA STANDARDS, *supra* note 9, Standard 15-1.2.

[259]UCMJ art. 16,; MCM, *supra* note 250, R.C.M. 903(b)(2).

[260]*Id.*, R.C.M. 903(b)(2)(B); *id.*, discussion.

[261]This article is limited to the selection and composition of courts-martial panel members and does not delve into the areas of preferral and referral. A federal corollary to these functions is found in the indictment procedures by grand jury and by information.

[262]28 U.S.C. §§ 1863, 1864 (1988); ABA STANDARDS, *supra* note 9, Standard 15-2.1.

impartial jury commission or the clerk of the district court as the jury official.[263] In the military, the convening authority is the "jury official."

3. Criteria for Selection.—Federal practice and the ABA standards list minimum qualifications for jury service.[264] In contrast, the UCMJ directs the convening authority to select those individuals, who are "best qualified."[265] A goal of both the federal practice and the ABA standards is to achieve a jury pool comprising a cross-section of the community.[266] The UCMJ has no such goal and Article 25(d)(2) often is used to justify panels that are comprised solely of high ranking officers or noncommissioned officers.[267]

4. Challenges and Excusal of Members.—Federal practice and the ABA standards direct that, once a jury is drawn, only the judge can excuse a juror through either a challenge for cause or a peremptory challenge.[268] Peremptory challenges are determined by statute.[269] Military practice allows the convening authority to excuse any member, or even completely change the panel, before arraignment.[270] Additionally, the convening authority can delegate the authority to excuse members to his staff judge advocate.[271]

Military practice is similar to federal practice in relation to causal challenges. Court-martial procedures for peremptory challenges, however, are quite different from federal practice, even though they are statutory.[272] Both trial counsel and defense counsel are allowed one peremptory challenge.[273] Because courts-martial vary in size, peremptory challenges encourage both defense counsel and trial counsel to engage in a "numbers game."

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[263] 28 U.S.C. §§ 1863, 1864 (1988); ABA STANDARDS, *supra* note 9, Standard 15-2.1.

[264] 28 U.S.C. § 1865 (1988); ABA STANDARDS, *supra* note 9, Standard 15-2.1.

[265] UCMJ art. 25(d)(2).

[266] ABA STANDARDS, *supra* note 9, Standard 15-2.1.

[267] *See infra* parts IV.B.2-3.

[268] 28 U.S.C. § 1870 (1988); ABA STANDARDS, *supra* note 9, Standard 15-2.6.

[269] 28 U.S.C. § 1870 (1988); ABA STANDARDS, *supra* note 9, Standard 15-2.6.

[270] UCMJ art. 25(e). *But see* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991); *infra* part IV.B.3.

[271] UCMJ art. 25(e). This power over the selection process has led Judge Cox to state that "[t]he Government has the functional equivalent of an unlimited number of peremptory challenges." United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988).

[272] UCMJ art. 41(b).

[273] *Id.*

Specifically, peremptory challenges often are exercised to achieve a tactical advantage in relation to the size of the panel.[274]

5. Voting Procedure.—Military practice differs greatly from both federal practice and the ABA standards in relation to voting procedure. Federal practice and the ABA standards require unanimous verdicts.[275] Although courts-martial do employ secret written balloting, unanimous verdicts are required in only one instance—a capital case.[276]

6. Prohibitions Against Command Influence.—Although federal statutes prohibit jury tampering,[277] Articles 37 and 98 are unique in their applications to convening authorities.

IV. Judicial Reaction to the Court-Martial Panel Member Selection Process

A. The Supreme Court

Although the Supreme Court has not addressed the applicability of the Sixth Amendment to the court-martial panel member selection process directly, it has indicated clearly, in dicta, that it does not consider the process to be constrained by the Sixth Amendment. In *Ex parte Milligan*, while holding that military commissions organized during the Civil War lacked jurisdiction to try civilians while the local courts were open, operating, and not in a state of occupation, the Court noted that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."[278]

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[274]Because at least two-thirds of the members must cast a vote of guilty to obtain a conviction, panel size can increase or decrease the overall odds of conviction. On a panel of five members, four must vote guilty (80%) to obtain a conviction; on a panel of six members, four must vote guilty (66.7%); on a panel of seven members, five must vote guilty (71.4%); on a panel of eight members, six must vote guilty (75%); on a panel of nine members, six must vote guilty (66.7%); on a panel of ten members, seven must vote guilty (70%); on a panel of eleven members, eight must vote guilty (72.7%); and so on. For this reason, defense counsel would prefer a panel of five, whereas trial counsel would prefer a panel of six, nine, or twelve.

[275]*See, e.g.*, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); ABA STANDARDS, *supra* note 9, Standard 15-1.1.

[276]UCMJ art. 52.

[277]*See, e.g.*, 42 U.S.C. § 1985(2) (1988) (conspiracy to interfere with civil rights: obstruction of justice; intimidating party, witness, or juror); 18 U.S.C. § 201 (1988) (bribery of public officials and witnesses); *id.* § 1503 (influencing or injuring officer or juror); *id.* § 1504 (influencing juror by writing).

[278]71 U.S. (4 Wall.) 2, 123 (1866).

In a concurring opinion, four justices went even further by asserting that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth *or any other amendment*."[279] Although this latter assertion has not been adopted by the Court,[280] the former has been embraced fully.

Despite the divergence of opinions evidenced by *O'Callaghan v. Parker*[281] and *Solorio v. United States*,[282] all of the justices agree on one issue—that is, the Sixth Amendment right to a jury trial does not apply to the court-martial process. In his spirited dissent to the demise of the service-connection rule created by *O'Callaghan v. Parker*, Justice Marshall accepted this as fact.[283] Justice Marshall actually elevated the dicta in *Ex parte Milligan* by conceding that "the Court has held ... [that the Fifth Amendment] exception [to the grand jury requirement is] applicable to the Sixth Amendment right to trial by jury as well."[284]

Although the Court never has articulated clearly why it is "doubtless"[285] that the Sixth Amendment does not apply to courts-martial, the Court fully has accepted this as true.[286]

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[279] *Id.* at 138 (emphasis added).

[280] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) (applying Fifth Amendment due process analysis to vagueness challenge against punitive article of UCMJ); Goldman v. Weinberger, 475 U.S. 503 (1986) (finding the military interest in uniformity sufficiently important to override service member's First Amendment right to practice religion by wearing yarmulke).

[281] 395 U.S. 258 (1969) (creating "service connection" requirement for jurisdiction over service members).

[282] 483 U.S. 435 (1987) (abandoning "service connection" requirement and looking to status of service member at time of the offense).

[283] *Solorio*, 483 U.S. at 453-54 (Marshall, J., dissenting) (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1867)); *see also Ex parte* Quirin, 317 U.S.1 (1942); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[284] *Solorio*, 483 U.S. at 453-54 (Marshall, J. dissenting) (citing *Milligan*, 71 U.S. (4 Wall.) at 123).

[285] *Milligan*, 71 U.S. (4 Wall.) at 122.

[286] Justice Harlan, in his dissent in *O'Callaghan v. Parker*, relied considerably on Hamilton's rationale for a virtually unlimited power of Congress to prescribe rules for the government of the military pursuant to Article I, section 8, clause 13, of the Constitution. Harlan averred, "Congress' power to prescribe rules for the government of the armed forces 'ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them.'" 395 U.S. 258, 277 (1969) (quoting THE FEDERALIST No. 23 (Alexander Hamilton)).

Harlan's reliance on Hamilton is interesting in light of the manner in which Hamilton attacked the need for the Seventh Amendment, which guarantees civil jury trials. Hamilton stated,

> The mere silence of the Constitution in regard to *civil causes* is represented as an abolition of the trial by jury ... extending not only

B. The Military Appellate Courts

The Court of Military Appeals uniformly and consistently has rejected any claim that the Sixth Amendment right to a jury trial is applicable to courts-martial.[287] Neither the Court of Military Appeals nor the courts or boards of military review, however, ever have contended that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth *or any other amendment*."[288]

Actually, the Court of Military Appeals long has recognized the applicability of the due process and equal protection guarantees of the Fifth Amendment.[289] The military appellate courts have been especially watchful of the impact that the court-martial panel member selection process has on the fairness and impartiality of panels,[290] with special emphasis placed on an accused's right to a panel comprised of members properly selected under statutory criteria.[291] In addition, when issues of command influence under Article 37 have arisen, the courts have been quick to condemn the practice and order remedial measures.[292] Although vigilant, however, the military appellate courts have

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> to every civil but even to *criminal causes*. To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the *existence* of *matter* ....
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> ....
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> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon trial by jury; or if there is any difference in them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

THE FEDERALIST No. 83, at 495, 499 (Alexander Hamilton) (C. Rossiter ed. 1961). *See generally* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957). Henderson notes that many of the provisions, such as speedy trial and the confrontation clauses, are applicable to the military. Henderson's opinion is that the only rational explanation for the failure of the Framers to exclude the military from the Sixth Amendment guarantee of a jury trial is simple oversight. Even Henderson is uncomfortable with this position, but claims that "the documents recording the evolution of these amendments support this view." Henderson does not specify which documents. *Id.*

[287] United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986); United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973); United States v. Crawford, 35 C.M.R. 3, 6 (C.M.A. 1964); *see also* United States v. Santiago-Davila, 26 M.J. 380, 386 (C.M.A. 1988) (discussing how the Sixth Amendment requirement that the jury be drawn from a cross-section of the community is inapplicable to courts-martial); United States v. Carter, 25 M.J. 471, 473 (C.M.A. 1988) (same).

[288] *Milligan*, 71 U.S. (4 Wall.) at 138.

[289] *Crawford*, 35 C.M.R. at 6.

[290] *See infra* part IV.B.1.

[291] *See infra* part IV.B.2.

[292] *See infra* part IV.B.3.

been extremely deferential to the process, refusing to use their supervisory powers to alter the process.[293]

1. The Right to a Fair and Impartial Panel.—The courts long have recognized that the accused has the right to a fair and impartial panel. In *United States v. Sears*, the Court of Military Appeals reversed the convictions of two airmen because it found that the convening authority "assigned lawyers to the court to neutralize any attempt by individual counsel to influence the court to rule in favor of the accused."[294] Specifically, the court found that the appointment of three Air Force judge advocates, after one of the accused elected civilian defense counsel, "smack[ed] of court packing."[295]

In *United States v. Hedges*, the Court of Military Appeals affirmed the Navy Board of Review's order that a rehearing be held because the law officer erred in denying a motion for change of venue.[296] Marine Corps Private Hedges was faced with a panel on which seven of the nine members were involved in some aspect of crime prevention, control, or detection.[297] In particular, the president of the panel was a lawyer and two members were provost marshals.[298] The court noted that, while "neither a lawyer nor a provost marshall is *per se* disqualified .... [T]he appearance of a hand-picked court was too strong to be ignored."[299]

Although neither *Sears* nor *Hedges* were decided expressly on Fifth Amendment due process grounds, the Court of Military Appeals specifically referred to both of these cases later in *United States v. Crawford* when it noted that:

> Constitutional due process includes the right to be treated equally with all other accused in the selection of

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[293] United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973); *see also* United States v. Carter, 25 M.J. 471 (C.M.A. 1988) (unwillingness of Judge Cox and Judge Sullivan to use the court's supervisory power to direct that an accused is entitled to another peremptory challenge whenever new members are detailed because the panel has not maintained a quorum).

[294] 20 C.M.R. 377, 384 (C.M.A. 1956).

[295] *Id.* at 384. The court also noted that, by appointing three judge advocates to the special court-martial panel, the convening authority was assured to have one judge advocate remaining after challenges. This is precisely what happened because the court denied all challenges for cause and the coaccuseds used their respective peremptory challenges on two of the judge advocates. The court further noted that the remaining judge advocate became a de facto law officer when he began slipping notes to the president of the panel, directing him how to rule on objections. *Id.*

[296] 29 C.M.R. 458, 459 (C.M.A. 1960).

[297] *Id.*

[298] *Id.*

[299] *Id.* at 459.

> impartial triers of fact. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge.[300]

The courts also have applied due process analysis in resolving issues about challenges and the fluctuating size of a panel. In *United States v. Carter*, the Court of Military Appeals grappled with the problem of whether an accused was entitled to additional peremptory challenges to new panel members when the panel had been reduced to below a quorum because of previous challenges.[301] Although all the judges did not agree as to whether an accused was entitled to additional peremptory challenges,[302] they did agree that "the accused does possess a due-process right to a fair and impartial factfinder."[303]

Both peremptory challenges and challenges for cause have been strictly scrutinized by the courts to ensure that the accused receives a fair and impartial panel. The Court of Military Appeals applied the Supreme Court's holding in *Batson v. Kentucky*[304] to courts-martial in *United States v. Santiago-Davila*.[305] In so doing, it recognized that an accused has an equal protection right, through the due process clause of the Fifth Amendment, to be tried by a panel from which no cognizable racial group has been excluded.[306] The right to a fair and impartial panel also requires the court to order a rehearing on sentencing when a challenge for cause is denied on a member who exhibits an inelastic attitude toward sentencing.[307]

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[300] United States v. Crawford, 35 C.M.R. 3, 6 (C.M.A. 1964) (citing United States v. Hedges, 29 C.M.R. 458 (C.M.A. 1960); United States v. Sears, 20 C.M.R. 377 (C.M.A. 1956)).

[301] 25 M.J. 471 (C.M.A. 1988).

[302] *Id.* at 474-75, 478-79. Former Chief Judge Everett is of the opinion that Article 41(b) should be read to entitle an accused a peremptory challenge any time additional members are added to the panel because of a lack of a quorum. Chief Judge Sullivan and Judge Cox are of the opinion that the granting of an additional peremptory challenge is discretionary on the part of the military judge. Judge Cox does not feel that peremptory challenges rise to the level of constitutional protection under due process and would resolve the issue based on "fundamental fairness in military jurisprudence." Although Judge Cox did not find that the military judge abused his discretion in disallowing an additional peremptory, he would have granted one in this instance. *Id.*

[303] *Id.* at 473 (citing United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987)).

[304] 476 U.S. 79 (1986).

[305] 26 M.J. 380, 390-93 (C.M.A. 1988).

[306] *Id.* at 390.

[307] United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Barrios, 31 M.J. 750, 754 (A.C.M.R. 1990).

Although the courts are willing to apply the equal protection prong of the due process clause, its application is limited to the actual process of selecting court members. In *United States v. Wolff*[308] and in *United States v. Montgomery*,[309] the argument that a five-member panel violated equal protection under *Ballew v. Georgia*[310] was rejected. In *Ballew*, the Court struck down a five-member Georgia jury. The Court relied on a series of studies which suggested, *inter alia*, that reducing the jury size from six to five might fail to provide an adequate cross-section of the community and would impair effective group deliberation.[311] In *United States v. Guilford*, the Army Court of Military Review rejected a *Ballew* argument that a court-martial of seven members, which required only five to convict, was a denial of due process or equal protection.[312]

2. The Right to Have a Panel Comprised of Members Properly Selected Under Statutory Criteria.—The courts scrupulously have demanded that convening authorities adhere to the statutory selection criteria in Article 25. In particular, they have noted that paragraphs (a), (b), and (c) of Article 25 make all ranks eligible for membership on courts-martial and that rank is not included as one of the six factors the convening authority is to consider under Article 25(d)(2) when selecting those "best qualified."[313] The courts, however, have shown considerable deference to convening authorities and have, through their interpretations of Article 25(d)(2), both allowed and commended convening authorities who consistently do not select lower ranking officers and enlisted persons.

In *Crawford*, the Court of Military Appeals noted that systematic exclusion of lower ranking enlisted persons is contrary to Article 25.[314] The court, however, refused to accept the appellant's assertion that systematic exclusion was established by the Army's not having a single panel member below the grade of E-4 from 1959 through 1963.[315] While recognizing that Article 25 and Congress clearly intended that all enlisted members were eligible to serve on courts-martial, the court noted that adherence

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[308] 5 M.J. 923, 924-25 (N.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979).

[309] 5 M.J. 832, 834 (A.C.M.R. 1978).

[310] 435 U.S. 223 (1978) (striking down a state statute that established five-member juries in misdemeanor trials).

[311] *Id.* at 231-33 nn.10-11.

[312] 8 M.J. 598, 602 (A.C.M.R. 1979).

[313] UCMJ art. 25.

[314] 35 C.M.R. 3, 8 (C.M.A. 1964).

[315] *Id.*

to the statutory eligibility requirements naturally will result in panels comprised primarily of the senior ranks.[316]

By recognizing that "there is a vast and vital difference between the list of prospective court members submitted by the staff judge advocate and the actual selections by the convening authority," the court held that the UCMJ does not require convening authorities to select members from all ranks.[317] Rather, the UCMJ merely requires that the convening authority not deliberately and systematically exclude the lower enlisted ranks.[318]

In *United States v. Greene*, the Court of Military Appeals found deliberate and systematic exclusion of officers below the rank of lieutenant colonel.[319] The panel in *Greene* consisted of three colonels and six lieutenant colonels.[320] The convening authority selected these officers from a list of nominees that included, at the direction of his staff judge advocate, only officers of the rank of lieutenant colonel and above.[321] Upon a motion for appropriate relief from defense counsel, the military judge recessed the court and gave the trial counsel the opportunity to determine, for the record, whether or not the convening authority had considered all officer grades in selecting the panel.[322]

Upon reconvening, the trial counsel informed the judge that the convening authority had considered only the names on the list.[323] In a herculean display of patience, the judge explained to the trial counsel that, although the convening authority could select whomsoever he desired, he "should not exclude consideration of any officers except colonels and lieutenant colonels."[324] During the following recess, a new list of nominees, which consisted of all ranks from second lieutenant to colonel, was forwarded to the convening authority. The convening authority then promptly rejected it with the instruction that the list include only lieutenant colonels and colonels.[325]

After additional inquiry by the judge, trial counsel finally stated for the record that the convening authority had

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[316] *Id.* at 8-12.
[317] *Id.* at 10.
[318] *Id.*
[319] 43 C.M.R. 72, 78-78 (1970).
[320] *Id.* at 73.
[321] *Id.* at 74-75.
[322] *Id.* at 74.
[323] *Id.* at 75.
[324] *Id.* at 75.
[325] *Id.*

reconsidered the matter and decided that the original panel was best qualified under Article 25.[326] The accused then requested to be tried by judge alone, noting for the record his desire for a panel that contained some lower ranking personnel.[327] Stating that "we are not convinced that an improper standard was not used for the selection of the members of this court,"[328] the court reversed and directed that a rehearing may be held.[329]

Greene is an important case because it highlights the degree of deference given to the convening authority by the trial judge, the Air Force Court of Military Review, and the Court of Military Appeals. Although the Court of Military Appeals reversed the lower court, it did so simply because the record was unclear—because of the convoluted machinations between the judge and the trial counsel—as to whether the convening authority truly had considered all grades of officers in selecting the panel.

In *United States v. Daigle*, the Court of Military Appeals held that, although the convening authority may request panel nominees by rank, excluding all lieutenants and warrant officers is not permissible.[330] The court further noted that this process, which also failed to consider the statutory qualifications at either the nomination or selection phase, "was identical to that condemned in *Greene*."[331] The Army Court of Military Review struck down a similar selection process that excluded all company grade officers from consideration when the accused was a promotable first lieutenant.[332]

The Court of Military Appeals began to chip away at the general prohibition against using rank as a factor in panel member selection in *United States v. Yager*.[333] In *Yager*, the court was faced with a convening authority who employed random selection but excluded all soldiers below the rank of private first class.[334] As private in the grade of E-1, Yager contested this practice, citing *Daigle* and *Greene* as authority.[335]

The two-member court[336] affirmed Yager's conviction, reasoning that the disqualification was reasonably related to the

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[326] *Id.* at 75-76.

[327] *Id.* at 76.

[328] *Id.* at 78.

[329] *Id.* at 79.

[330] 1 M.J. 139, 141 (C.M.A. 1975).

[331] *Id.* at 141.

[332] United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985).

[333] 7 M.J. 171 (C.M.A. 1979).

[334] *Id.*

[335] *Id.* at 172.

[336] *Id.* at 173. Chief Judge Fletcher did not participate in the decision. Judge

statutory requirements enumerated in Article 25.[337] Specifically, Judge Cook conceded that all privates in the grade of E-2, as well as privates in the grade of E-1 having a date of rank preceding Yager's, would have been excepted from the restriction of Article 25(d)(1).[338] He noted, however, that Article 25(d)(1) still would exclude many privates in the grade of E-1, and that those exclusions—when coupled with the exclusions mandated by Article 25(d)(2)—actually would prevent the vast majority of all privates from serving on the panel.[339]

The courts consistently have taken corrective action[340] when the panel member selection process deliberately and systematically excluded certain ranks. As long as the convening authority "considered" all ranks before making the selection, however, the actual composition of the court-martial panel is irrelevant.[341] The courts have reinforced the deference given a convening authority in the selection process by according a presumption of regularity, legality, and good faith to the process.[342]

The Army Court of Military Review began to push this premise to its outer limits by distinguishing the improperly "handpicked" court in *Hedges*[343] from a properly "handpicked" court in *United States v. Carman*.[344] *Carman* involved a special court-martial panel composed of five lieutenant colonels and one

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Cook wrote the opinion; Judge Perry concurred in the result. *Id.* at 171, 173.

[337] *Id.* at 173.

[338] *Id.* at 172 n.4.

[339] *Id.* at 173.

[340] When the accused has pleaded guilty, the court will not reverse the findings, but will order a rehearing on the sentence. *See, e.g.*, United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

[341] United States v. Delp, 11 M.J. 836, 838 (A.C.M.R. 1981) (finding the fact that no junior enlisted personnel were on the panel "is permissible so long as the criteria are applied evenhandedly and not used as a device to exclude lower ranking enlisted personnel").

[342] United State v. Livingston, 7 M.J. 638, 640 (A.C.M.R. 1979); United States v. Carman, 19 M.J. 932, 936-37 (A.C.M.R. 1985); United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (burden of proof on appellant); United States v. Hodge, 26 M.J. 596, 599-600 (A.C.M.R. 1988) (burden of proof on appellant by clear and convincing evidence; no evidence of discriminatory intent when no black member was on panel, despite overall population of Army was over 10% black).

[343] United States v. Hedges, 29 C.M.R. 458 (1960) (seven of nine members had law enforcement duties); *see supra* text accompanying notes 296-99.

[344] 19 M.J. 932 (A.C.M.R. 1985); *see also* United States v. Firmin, 8 M.J. 595, 597 (A.C.M.R. 1979) (holding that "it is not improper for a convening authority in his selection process to look *first* to officer and enlisted personnel of senior rank because they are more likely to be best qualified by reason of age, education, training, experience, length of service and judicial temperament").

major.[345] Although the court recognized that "prejudice results when the composition of the court gives the appearance that a convening authority has 'handpicked' the members to favor the prosecution,"[346] it found no prejudice in this case.[347] When requesting nominees from the adjutant general's personnel records section, the staff judge advocate requested nominees from all the officer ranks and from the enlisted ranks, from sergeant major down to and including sergeant.[348]

When the list of nominees was presented to the convening authority, he was informed by the staff judge advocate of the criteria of Article 25(d)(2)[349] and that he could consider any person in the command.[350] The court accepted this as evidence that the convening authority "considered" all ranks.[351] Furthermore, the court found that the selection of higher ranking officers was consistent with Article 25(d)(2):

> In today's Army, senior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates. The military continuously commits substantial resources to achieve this. Additionally, those officers selected for highly competitive command positions in the Army have been chosen on the "best qualified" basis by virtue of many significant attributes, including integrity, emotional stability, mature judgment, attention to detail, a high level of competence, demonstrated ability, firm commitment to the concept of professional excellence, and the potential to lead soldiers, especially in combat. These leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member.[352]

The court went even further in *United States v. Cunningham*, finding that the criteria of Article 25(d)(2) are virtually synonymous with the characteristics of a good commander.[353] In *Cunningham*,

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[345] *Carman*, 19 M.J. at 935.

[346] *Id.* at 936 (citing *Hedges*, 29 C.M.R. at 458 (seven of nine members had law enforcement-related duties)).

[347] *Id.* at 936-37.

[348] *Id.* at 935.

[349] *Id.* at 935.

[350] *Id.* at 935 n.3.

[351] *Id.* at 936.

[352] *Id.*

[353] 21 M.J. 585, 586-87 (A.C.M.R. 1985).

> The stipulated testimony of the convening authority indicate[d] that *duty assignment was a primary consideration in selecting court membership*. He believed that commanders were most in touch with "what was going on" with soldiers and the command and most aware of the needs of the soldiers as well as commands, that qualification for command and court membership had much in common, that commanders were more concerned with caring for soldiers than punishing them and that he tried to select the fairest court he could.[354]

After citing favorably from *Carman*, the court held that "the preference for and intentional inclusion of those in leadership positions as court members [does] not invalidate the selection process."[355]

Carman and *Cunningham* marked the demise of any likelihood of a successful court-packing challenge on the basis of the members' duty positions,[356] absent a showing of an inelastic attitude toward sentencing or other bias toward the accused.[357] The courts have been similarly unimpressed with statistical evidence purporting to show a systematic exclusion of lower ranking personnel.[358]

In addition to allowing the deliberate inclusion of commanders—even though command is not a criteria in Article 25(d)(2)—the courts have been willing to accept other forms of deliberate inclusion. In *Crawford*, the Court of Military Appeals held that the deliberate inclusion of a black member on the panel of the accused was not a violation of equal protection.[359] Interestingly, the court noted that including a black member was designed to "[obtain] a fair representation of a substantial part of the community."[360]

Apparently, although the accused has no right to a representative cross-section of the community and Article 25

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[354] *Id.* at 586 (emphasis added).

[355] *Id.* at 587.

[356] *See also* United States v. Nixon, 30 M.J. 1210 (A.C.M.R. 1990) (en banc) (court accepted convening authority's enlisted panel selection of three command sergeants major, one sergeant major, and two master sergeants as being based on the criteria in Article 25(d)(2)).

[357] *Cunningham*, 21 M.J. at 588.

[358] *See, e.g.*, United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (lack of lieutenants or warrant officers on panels for past year does not prove systematic exclusion).

[359] Crawford v. United States, 35 C.M.R. 3, 13 (C.M.A. 1964).

[360] *Id.* at 13. Judge Ferguson dissented on this point, finding race to be "an impermissible criterion for selection of jurors." *Id.* at 30.

actually "contemplates that a court-martial panel will not be a representative cross-section of the military population,"[361] the convening authority appropriately may consider this factor in making his or her selection. This is strange, considering that courts strongly rely on the phrase "best qualified" to support the notion that senior officers, senior enlisted persons, and commanders are natural selections based on the statutory criteria. The numerous attributes so diligently listed by the court in *Carman* at least have a logical relation to the six criteria specified in Article 25(d)(2).[362]

The desire to have a representative cross-section of the military community cannot be inferred logically from the criteria in Article 25(d)(2). Actually, if taken literally, the rationale of the *Carman* and *Cunningham* courts would lead to the conclusion that the convening authority in *Yager* was derelict. Specifically, the *Yager* convening authority was derelict because, by instituting a system of random selection, he failed to adhere to the statutory guidance to select those "best qualified."[363]

Regardless of arguments to the contrary, the courts clearly feel that the convening authority has the prerogative to consider the attainment of a representative cross-section of the community when selecting a panel. The convening authority, however, must act in good faith.[364] When the convening authority sought to appoint females to a panel to achieve a representative cross-section of the community—but only in cases involving sex offenses—the good-faith requirement was not met.[365]

3. The Right to Have a Panel Selected That Is Free From Unlawful Command Influence.—In 1955, the Air Force Board of Review first recognized that the involvement of a trial counsel in the court-martial panel member selection process can result in a violation of Article 37.[366] In *United States v. Cook*, the staff judge advocate of Ellington Air Force Base prepared the request for appointment of court members for a general court-martial panel.

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[361] United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

[362] United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985).

[363] *See supra* notes 333-39 and accompanying text; *see also* United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973) ("the convening authority's denial of the accused's request for a truly random selection of court members *established his awareness of his responsibility*, for in that denial he declared his desire 'to continue to follow the spirit of Article 25(d)(2), UCMJ.'") (emphasis added)).

[364] United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988).

[365] *Id.* at 250-51. Judge Cox wrote a separate concurring opinion. Judge Cox noted that he did not feel that "women are more likely to empathize with the victim of a sex crime." Judge Cox's concurrence was based on his belief that trial counsel impermissibly became a part of the selection process. *Id.* at 251-52.

[366] United States v. Cook, 18 C.M.R. 715, 717 (A.F.B.R. 1955).

In that request, however, the staff judge advocate also asked the convening authority to detail him as trial counsel.[367] The court found this to be a clear violation of Article 37.[368]

Since *Cook*, the courts have condemned the practice of allowing trial counsel to have anything other than ministerial involvement in the panel selection process.[369] While the courts have recognized for many years that the convening authority is entitled to have the assistance of staff and subordinate commanders in selecting court members,[370] this area has caused a considerable amount of appellate activity in recent years.

In *United States v. Marsh*, the Court of Military Appeals clarified under what circumstances a judge advocate is precluded from involvement in the panel selection process.[371] In *Marsh*, the court noted that the trial counsel, as a partisan advocate, can play no role in the selection process.[372] The court, however, recognized that trial counsel perform several ministerial duties in relation to the selection process.[373] These "ministerial responsibilities, such as notifying members of the scheduled trial date and reporting matters concerning their availability to the convening authority," are not prohibited.[374] Furthermore, the court refused to accept appellant's contention that the chief of the criminal law division is barred per se from making recommendations in the selection process.[375]

The court also rejected the contention that the staff judge advocate should not be involved in the panel selection process.[376]

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[367] *Id.* at 716-17.

[368] *Id.* at 717.

[369] United States v. Crumb, 10 M.J. 520, 527 (A.C.M.R. 1980) (Jones, S.J., concurring) (finding chief trial counsel's involvement in "culling" process of replacing court members improper); United States v. Beard, 15 M.J. 768, 772 (A.F.C.M.R. 1983) (actions of assistant trial counsel, who was also the chief of military justice, in making recommendations as to court membership constituted reversible error); United States v. Cherry, 14 M.J. 251, 253 (C.M.A. 1982) (dicta agrees with Senior Judge Jones' concurring opinion in *Crumb*); United States v. Marsh, 21 M.J. 445, 447-48 (C.M.A. 1986) (establishing that trial counsel are not per se disqualified; allowing exception for ministerial duties such as contacting members to determine their availabilities); United States v. Smith, 27 M.J. 242, 250-51 (C.M.A. 1988) (plurality opinion of Chief Judge Everett finding trial counsel nominated "hardcore" female panel members to court-martial involving sex offense for impermissible purpose of influencing court).

[370] United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

[371] *Marsh*, 21 M.J. at 445.

[372] *Id.* at 447 (citing *Cherry*, 14 M.J. at 251).

[373] *Id.* at 447.

[374] *Id.*

[375] *Id.* at 448.

[376] *Id.*

While noting several comments from the appellate bench which contended that the staff judge advocate and convening authority were prosecution-oriented, the court stated,

> Nonetheless, the Code has entrusted selection of court members to the convening authority, and military precedent has allowed the staff judge advocate to make recommendations for selection. In the absence of a particular showing of partisan advocacy, we cannot see why the staff judge advocate or a member of his staff, whatever his title, should be *per se* excluded from making these recommendations.[377]

Less than two months after deciding *Marsh*, the court issued its opinion in *United States v. McClain*.[378] *McClain* highlighted a staff judge advocate's panel member selection recommendations to his convening authority, which the court found to be "intended to exclude junior members because ... [the staff judge advocate] believed they were more likely to adjudge light sentences."[379] In finding that this conduct violated Article 37, the court ordered a rehearing on sentencing.[380]

In his concurring opinion,[381] Judge Cox reiterated that the convening authority should be given great deference and that normally the presumption of regularity will overcome an inference of impropriety.[382] Judge Cox was constrained by the trial judge's finding that the staff judge advocate did, "as a matter of fact, ... recommend[] selection based upon the concerns that the sentence might be too lenient."[383] Constrained by this factual finding by the trial judge, Judge Cox begrudgingly acknowledged the appropriateness of reversing the sentence because no evidence existed to show that the convening authority did not follow this advice.[384]

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[377] *Id.*

[378] United States v. McClain, 22 M.J. 124 (C.M.A. 1986). The opinion in *Marsh* was issued on March 31, 1986. *See* United States v. Marsh, 21 M.J. 445 (C.M.A. 1986). The opinion in *McClain* was issued on May 5, 1986. *See McClain*, 22 M.J. at 124.

[379] *McClain*, 22 M.J. at 130.

[380] *Id.* at 132-33.

[381] Both *Marsh* and *McClain* were decided by the Court of Military Appeals when it had only two sitting judges—Chief Judge Everett and Judge Cox. *See Marsh*, 21 M.J. at 445; *McClain*, 22 M.J. at 124.

[382] *McClain*, 22 M.J. at 133.

[383] *Id.* (Judge Cox inferred that he was not convinced that the staff judge advocate actually made his recommendations to the convening authority for this purpose).

[384] *Id.*

This is curious, considering that the trial judge made the specific finding that the convening authority "adhered to the standards of Article 25 in making his selection, ... and therefore ... [did] not find that this selection was tainted or in violation of Article 25."[385] Given the presumption of regularity accorded a convening authority, Judge Cox's opinion is unclear as to why he felt compelled to accept the trial judge's finding of fact regarding the staff judge advocate,[386] but not regarding the convening authority. Apparently, if the staff judge advocate had used his position improperly to recommend nominees who he thought would be less lenient, and this motive was not revealed to the convening authority, the presumption of regularity would overcome the staff judge advocate's actions.[387]

The Court of Military Appeals rejected this extension of the convening authority's presumption of regularity in *United States v. Hilow*.[388] *Hilow* involved a situation in which, unbeknownst to the convening authority, a subordinate staff officer purposefully assembled nominees for court-martial duty "who were commanders and supporters of a command policy of hard discipline."[389] The Army Court of Military Review found a violation of Article 37 in the subordinate's actions, but affirmed the conviction

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[385] *Id.* at 127 (quoting the trial judge).

[386] *Id.* at 126. The basis for the trial judge's findings relating to the staff judge advocate was a stipulation of expected testimony of the staff judge advocate that stated, in part,

> I have been the Staff Judge Advocate for HQ, VII Corps since July, 1980. During this period of time, *I have observed that there have been a variety of unusual sentences ... and some very lenient sentences....*
>
> There were repeated rumors that many of these seemingly unusual sentences stemmed from young officers and young enlisted members who had little experience in the military.
>
> ....
>
> At the time I presented LTG Livsey with the list of nominees ... I advised him of the criteria that was to be used in making his selection, i.e., those who were the best qualified by reason of age, education, training, length of service, and judicial temperament.
>
> I further reminded him of the nature of the information that had come to my attention and indicated that the junior officers and enlisted members did not possess these qualifications and that he should consider this information at the time he made his selections. *I recommended that he give preference to selecting those individuals who were older and had been in the service longer, over those who were relatively junior in age and experience. LTG Livsey specifically asked me whether such action was lawfully within his discretion and I advised him that it was if he determined that such a selection was appropriate under the criteria* [in Article 25].

Id. (emphasis added).

[387] *Contra* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

[388] *Id.*

[389] *Id.* at 440.

because "any taint ... had clearly dissipated by the time of the convening authority's final selection of the members."[390]

The majority opinion of the Court of Military Appeals reversed, citing *Greene* as an example in which a harmless error ruling was far more appealing, yet the court had reversed because it "w[as] simply not convinced that proper selection criteria were employed."[391] The court ordered a rehearing on sentencing because it found that, although appellant pleaded guilty and elected to be tried by a judge alone, no competent evidence existed to show that this decision was not made because of the composition of the panel.[392] In his partial dissent, Judge Cox strongly condemned this aspect of the court's opinion, noting that the court should have required the appellant to claim, under oath, that his decision to be tried by judge alone was made because of the severity of the panel.[393]

The most recent example of command influence over the court-martial panel member selection process is *United States v. Redman*.[394] In *Redman*, the convening authority chose a new court-martial panel to replace the standing panel when he became concerned because of "unusual results."[395] Specifically, the convening authority was not satisfied with the sentences being adjudged by the panel because "'we were going through the court-martial process and we were winding up with Article 15 punishments.'"[396]

The convening authority made his decision to change the panel after consulting with his staff judge advocate, who informed him,

> [I]t would be permissible for him [the convening authority] to review the qualifications of the members

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[390] *Id.* at 442.

[391] *Id.* (citing United States v. Greene, 43 C.M.R. 72, 78 (C.M.A. 1970)). The court noted that, in *Greene*, the convening authority was "fully apprised of improper panel-selection procedures employed by his subordinate, reconsidered his decision and, citing Article 25(d), adhered to his original selections." *Id.*

[392] *Id.* at 443. The majority opinion notes that the appellant, in his posttrial submission, claimed that the decision to elect trial by judge alone was made because the panel was viewed as a "severe" one. Conversely, the staff judge advocate's posttrial recommendation noted that the election was made as a *sub rosa* inducement by the defense to attain the Government's consent in the offered pretrial agreement. Because neither document was under oath, it was not competent evidence and therefore not "considered." *Id.*

[393] *Id.* at 445 n.2 (Cox, J., dissenting on separate grounds).

[394] 33 M.J. 679 (A.C.M.R. 1991).

[395] *Id.* at 681.

[396] *Id.* at 681, n.4 (quoting from a transcript of testimony taken by an officer appointed to investigate alleged unlawful command influence in a different court-martial).

> to insure himself as to whether he had, in fact, picked people that [sic] he believed to be best qualified, essentially viewing that as a continuing duty on his part as opposed to a one time matter.[397]

A subsequent investigation directed by the Eighth Army Staff Judge Advocate, and conducted by a member of the trial judiciary, found that the convening authority and staff judge advocate "reconstitute[d] the court-martial panels so as to achieve heavier sentences."[398] As a result of this finding, the Commander, Eighth Army, withdrew that commander's courts-martial convening authority.[399]

Despite finding a violation of Articles 25 and 37,[400] the court affirmed both the findings and sentence adjudged.[401] The court distinguished *Redman* from *Hilow* by noting that the appellant in *Redman* had been aware of the improper command influence and had waived it by accepting trial by the original court-martial panel.[402]

V. Conclusions

The process for selecting both juries and court-martial panels has changed considerably over time. Early juries, such as the one that judged Orestes and the Roman *Judex*, were the precursors to the modern era blue ribbon jury.[403] The concept of random selection and the principle that a jury should be selected in a manner calculated to obtain a cross-section of the community have their roots in the Greek *Heliaea*.[404] Random selection and the cross-section requirement, however, are relatively modern developments to the American jury selection process.[405]

Until recently, American jury pools often were not representative of a cross-section of the community. Although the jury

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[397] *Id.*

[398] Memorandum, Third Judicial Circuit, U.S. Army Judiciary, subject: Inquiry into Selection of Court-Martial Members in the 2d Infantry Division (11 May 1990).

[399] United States v. Redman, 33 M.J. 679, 682 (A.C.M.R. 1991).

[400] *Id.* at 683 (disagreeing with the investigating officer, who concluded that no violation of Articles 37 or 98 occurred because the panel that was to be replaced actually never was replaced, and the panel members never were informed of their pending replacements or why they were to be replaced).

[401] *Id.*

[402] *Id.*

[403] *See supra* note 10 and accompanying text.

[404] *See supra* text and accompanying notes 22-24.

[405] *See supra* note 80 and accompanying text.

venire was selected randomly, the jury pool often was determined using the "key man" system, coupled with subjective criteria, such as those established by the Knox Committee in 1942—intelligence, morality, integrity, and common sense.[406] Within the last few decades, the Supreme Court has held that an accused has a fundamental right to a jury selection procedure that seeks representation from a fair cross-section of the community.[407] Since 1968, the federal courts have required random selection of both the jury pool and the jury venire as the means to guarantee that the cross-section requirement is met.[408]

As originally introduced in the United States, the court-martial panel member selection process was largely left to the discretion of the commander authorized to convene the court-martial. Its history, however, was a dynamic one that changed frequently until the inception of the UCMJ in 1950. Initially, the only statutory conditions placed on a convening authority's power to convene a general court-martial under the Massachusetts Articles of War were that it be composed of not less than thirteen officers and that all members be at least the rank of major. Although the Articles of War of 1776 dropped the requirement that all members be at least the rank of major, this early preference for senior officers was to resurface over two centuries later.[409]

The original requirement that all general courts-martial be comprised of not less than thirteen officers was retained until 1786.[410] From 1786 until 1920, the Articles of War required thirteen-member general courts-martial unless the requirement would cause "manifest injury to the service" because of military exigencies.[411] In 1920, the convening authority was given the first subjective criteria to apply in the selection process.[412] Article 4 of the Articles of War of 1920 directed the convening authority to appoint officers who, "in his opinion are best qualified for the duty by reason of age, training, experience, and judicial temperament."[413] This precursor to the Article 25(d)(2) criteria strikingly resembled the 1942 Knox Committee's criteria of intelligence, morality, integrity, and common sense.[414]

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[406] *Supra* notes 73-78 and accompanying text.

[407] *Supra* note 71 and accompanying text.

[408] *Supra* notes 78-79 and accompanying text.

[409] *See supra* parts III.C.1, III.C.2.

[410] *See supra* part III.C.3.

[411] *See supra* parts III.C.3, III.C.4.

[412] *See supra* part III.C.5.

[413] *Supra* note 162 and accompanying text.

[414] *See supra* note 77 and accompanying text.

The statutory basis for the court-martial panel member selection process has not changed much since 1950. The UCMJ adopted provisions that were intended both to broaden the base of court-martial membership and to eliminate unlawful command influence.[415] Neither of these goals has been met entirely.[416]

Judicial opinions have steered convening authorities more and more toward selecting panels composed primarily of senior ranking officers and noncommissioned officers. The courts have done this while concomitantly assailing the practice when its intended purpose is to attain a stiffer sentence.[417] By doing this, however, the courts are distinguishing between a "stacked panel" and a "blue ribbon panel." The former is impermissible because its selection is predicated on an intended result—that is, a stiffer punishment. The latter not only is acceptable, but also is laudatory because it is predicated on the statutory criteria—age, education, experience, training, length of service, and judicial temperament.[418] "Best qualified" has been interpreted to mean considering commanders and senior personnel first.[419]

These judicial developments have resulted in an application of panel selection criteria that elevates form over substance. Neither an accused, nor the public, can distinguish or appreciate the difference between being hammered—that is, receiving a stiff sentence—by a blue ribbon panel and being hammered by a stacked panel. In effect, the military courts have reverted to a panel member selection process that is remarkably similar to the Roman *Judex*, with commanders and senior personnel representing the senatorial class of the military.[420]

Additionally, the convening authority, who must appoint panel members using the subjective criteria under Article 25(d)(2), effectively employs subordinate commanders and staff officers as "key men."[421] The result is a panel selected by the commander in much the same manner as the sheriff's jury in fourteenth-century England.[422] A major difference between a sheriff's jury and a modern court-martial is the scheme for peremptory challenges. The defendant facing a sheriff's jury was allowed up to thirty-five peremptory challenges; the king's

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[415] UCMJ art. 37; *id.* art. 98. No reported cases involve Article 98 and the court-martial panel member selection process.

[416] *See supra* part IV.B.

[417] *See supra* part IV.B.3.

[418] UCMJ art. 25(d)(2).

[419] *See supra* notes 344-55 and accompanying text.

[420] *See supra* part II.A.2.

[421] UCMJ art. 25(d)(2).

[422] *See supra* text accompanying notes 46-51.

representative was allowed none, under the theory that the sheriff had selected the jury in his capacity as an agent of the crown.[423] On the other hand, a military accused and the Government each are entitled to but one peremptory challenge.[424] Accordingly, the trial counsel essentially possesses veto authority over one of the convening authority's selections. This is peculiar, considering Professor Morgan's adamant opinion during the Code hearings that it was "unthinkable" that the Judge Advocate General be allowed to "dictate" to the commanding officer which members in his command would serve as court-martial panel members.[425]

Convening authorities generally are selecting senior members for courts-martial. Courts have acknowledged that commanders have made—or their command subordinates have facilitated—such selections in efforts to obtain stiffer sentences.[426] Moreover, at least one convening authority actually admitted explicitly that he had selected senior members because he was tired of seeing "Article 15 punishment" and "unusual results" adjudged at courts-martial.[427] In *Nixon*, however, Senior Judge Kucera categorically rejected the premise that a panel composed of higher ranking members has a higher propensity to return a stiff sentence than a panel composed of soldiers from the lower ranks.[428]

How judges and convening authorities could have such radically different views of the sentencing proclivities of senior officers and noncommissioned officers is inexplicable. A convening authority, as a commander who evaluates and interacts with senior officers and noncommissioned officers on a daily basis, should have a far better perspective of the sentencing philosophy of the personnel he or she selects to sit as panel members than the perspective held by a judge.

With each case that comes before the courts, the judges register surprise at the actions taken by both convening authorities and staff judge advocates alike. Judge Cox summed up the appellate point of view when he stated,

> The only concern the staff judge advocate should have had was *fairness*. Whether the sentence is lenient or

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[423] *See supra* text accompanying notes 46-51.

[424] *See supra* note 228 and accompanying text.

[425] *See supra* note 184 and accompanying text.

[426] *See supra* notes 378-84, 389-90, 394-402 and accompanying text.

[427] *See supra* note 396 and accompanying text.

[428] United States v. Nixon, 30 M.J. 1210, 1213, n.3 (A.C.M.R. 1990) (en banc).

> harsh is subjective and properly the concern of: (1) the court-martial; and (2) the convening authority exercising clemency—otherwise Congress would have authorized the convening authority to pick those members he thought most likely to award the harshest sentences. If staff judge advocates and convening authorities would carry out their pretrial and post-trial duties in accordance with the law and entrust what happens during the trial to the military judge and the court-martial members, we would not have to resolve allegations of tampering with the outcome of the trial.[429]

This would be a fair criticism to level at convening authorities and staff judge advocates if the courts were sending a clear signal as to what they expected of convening authorities and staff judge advocates during the panel selection process. Unfortunately, the signal being transmitted is garbled and distorted. Two paragraphs before his general remonstration of convening authorities and staff judge advocates, Judge Cox wrote,

> The deliberate selection or exclusion of a certain class of servicepersons for the purpose of increasing the severity of the sentence is wrong. A proper concern, however, is the selection of servicepersons who will adjudge a sentence that is fair and just, considering the circumstances of the case.[430]

This paragraph gives staff judge advocates and convening authorities nonsensical guidance similar to the instructions given to Alice by many of the characters she encountered in her travels through Wonderland.[431] The first sentence reiterates the basic

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[429] United States v. McClain, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J., concurring).

[430] *Id.* at 133.

[431] LEWIS CARROL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS, *reprinted in* THE ANNOTATED ALICE (M. Gardner ed., 1960). The staff judge advocate and convening authority faced with a standing panel that continues to adjudge "Article 15 punishment" for serious offenses may feel as though they are lost in the woods, much in the same manner as Alice felt when she encountered Tweedledum and Tweedledee. In response to her "thinking" of a way out of the woods, Tweedledum and Tweedledee offered this guidance: "'I know what you're thinking about,' said Tweedledum; 'but it isn't so, nohow.' 'Contrariwise,' continued Tweedledee, 'if it was so, it might be, and if it were so, it would be; but as it isn't, it ain't. That's logic.'" *Id.* at 230-31. The Duchess was equally helpful to Alice, cautioning her to "'Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise that what you had been would have appeared to them to be otherwise.'" *Id.* at 122. In considering Judge Cox's contradictory guidance, the staff judge advocate and convening authority well might consider the tactful approach taken by Alice when the Mad Hatter confused her with his nonsensical diatribe about watches. "Alice felt dreadfully puzzled. The Hatter's remark

premise continuously espoused by the court—that is, the convening authority cannot select members to achieve stiffer sentences. The second sentence implies that the convening authority appropriately may consider a nominee's sentencing philosophy.[432] This completely contradicts the underlying predicate of the first sentence—that the panel member selection process cannot be subverted to a procedure designed to attain more severe sentences.

A convening authority may have an opinion as to what is a "fair and just" sentence that differs radically from the opinion held by Judge Cox. Consider the convening authority who personally has a draconian sentencing philosophy. According to the second sentence of Judge Cox's guidance, such a convening authority justifiably could appoint only like-minded draconian members to sit on the panel. This would result in a panel more likely to render stiff sentences than a panel selected by a more lenient-minded convening authority. According to the first sentence of Judge Cox's guidance, however, a convening authority cannot select members in a manner intended to produce a panel that would render stiff punishments. Paradoxically, these two approaches, which Judge Cox attempts to distinguish, exhibit no functional differences because they both result in stiff sentences. To suggest otherwise is to engage in semantic gymnastics.

Furthermore, if a convening authority can consider sentencing philosophy by "selecting servicepersons who will adjudge a sentence that is just and fair,"[433] arguably nothing should prohibit a convening authority from evaluating a standing panel using the same criteria. Under this same rationale, a convening authority reasonably may consider Article 25(d)(2) as a "continuing duty"—a duty that the convening authority carried out in *Redman*[434] when he relieved a panel for meting out Article 15 punishments for serious offenses. Consequently, a convening authority arguably has the authority to relieve a panel because he or she no longer believes the panel "will adjudge a sentence that is fair and just."[435]

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seemed to her to have no sort of meaning in it, yet it was certainly in English. 'I don't understand you,' she said as politely as she could." *Id.* at 97.

[432] Perhaps Judge Cox equates "judicial temperament" to "sentencing philosophy." "Judicial temperament" never has been defined by either Congress or the courts. "Judicial" means "inclined to make or give judgments; critical; discriminating." THE RANDOM HOUSE COLLEGE DICTIONARY 724 (rev. ed. 1980). "Temperament" is defined as an "unusual personal attitude or nature as manifested by peculiarities of feeling, temper, action; see disposition." *Id.* at 1352.

[433] *McClain*, 22 M.J. at 133 (Cox, J. concurring).

[434] United States v. Redman, 33 M.J. 679, 681 (A.C.M.R. 1991).

[435] *McClain*, 22 M.J. at 133 (Cox, J., concurring).

Certainly a staff judge advocate could read Judge Cox's opinion in *McClain* and believe that, based upon the interests of fairness and justice, the convening authority can replace the panel.[436] Furthermore, the convening authority's actions will be legitimate as long as the convening authority does not consider the facilitation of stiffer sentences as an objective.

The courts have bestowed a protective envelope of appropriate command control over the convening authority's discretion by according a presumption of regularity, legality, and good faith to the selection process.[437] The obvious ambiguity in Judge Cox's concurring opinion in *McClain*, however, encourages staff judge advocates and convening authorities to push the envelope of appropriate command control in the selection process by repeatedly referring to the interests of fairness and justice. This is precisely what the convening authority and staff judge advocate attempted to do in *Redman*.

The convening authority in *Redman* continuously insisted that he did not relieve the panel to achieve stiffer sentences.[438] He actually stated repeatedly that his purpose was to "get more experienced people on the board [sic]"[439] and to correct a "flagrant unfairness."[440] Additionally, the staff judge advocate denied any desire to "obtain harsher sentences,"[441] claiming that the purpose was to "insure that what we were doing here was having fair trials by making sure that the convening authority had the best qualified members in his own mind."[442] Ironically, the staff judge advocate acknowledged Judge Cox's guidance when he said, "I know from looking, for instance, at the *McClain* case that the purpose in what the SJA does something for [sic] is important and there's no getting around that."[443]

Arguably, the commander in *Redman* simply could have chosen not to refer many of the then pending cases to court-martial until after the panel's term of detail expired. This possibility makes the *Redman* decision's effect on the future actions of staff judge advocates and convening authorities

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[436]For the original version of Dorothy's attempts to return home, see L. FRANK BAUM, THE WIZARD OF OZ (17th ed., Ballantine 1991).

[437]*Supra* note 342 and accompanying text.

[438]Memorandum, *supra* note 398, tr. at 52 (testimony of convening authority).

[439]*Id.* at 50.

[440]*Id.* at 49.

[441]*Id.* at 14 (testimony of staff judge advocate).

[442]*Id.* at 22.

[443]*Id.*

somewhat predictable. Specifically, the courts should not necessarily be surprised to see future convening orders with open-ended dates.

As long as the military courts effectively encourage blue ribbon panels, while condemning stacked panels, the armed forces will continue to see creative staff judge advocates and convening authorities. As long as the court-martial system encourages convening authorities and staff judge advocates to push the limits of appropriate command control over the selection process, the services always will have a few who go over the edge.

The root of the problem does not lie in invidious and sinister staff judge advocates and convening authorities. To the contrary, the convening authorities and staff judge advocates in both *McClain* and *Redman* were not attempting to influence a particular case. Rather, they were attempting to influence all cases. On its face, the latter may appear to be worse than the former; in actuality, however, it is not.

In *Redman*, the convening authority was concerned with the effect the panel was having on his remaining 14,000 good soldiers in the division.[444] As the commander, he was responsible for everything his troops did or failed to do. He was responsible for the administration of military justice within his command. He had the responsibility to ensure that all infractions were handled appropriately, justly, and fairly.[445]

If a soldier is court-martialed and receives a severe sentence, the convening authority has the authority, *inter alia*, to remit, suspend, or mitigate any portion of that sentence.[446] The convening authority not only has the discretion to reduce a sentence, but also—as the commander—has the duty to do so when it is too severe. To do otherwise would be to allow injustice. On the other hand, when a soldier receives "Article 15 punishment" from a court-martial panel for a serious offense, the commander can do nothing. Both of these cases affect the morale and discipline of the command. Perhaps one "unusual result" will not break down unit cohesion, but a pattern certainly will.

Discipline is bred from training and maintained with the fair administration of justice. Obedience is the result of discipline, and "there is nothing *in War* which is of *greater importance than*

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[444] *Id.* at 42 (testimony of convening authority).

[445] *See* ARMED FORCES INFORMATION SERVICE, DEP'T OF DEFENSE, THE ARMED FORCES OFFICER 122-28, 173-77 (1975).

[446] MCM, *supra* note 250, R.C.M. 1107, 1108.

obedience."[447] If a commander is powerless to ensure that justice is administered fairly and justly throughout his command, his command will be useless as a fighting force.[448]

Both convening authorities in *McClain* and *Redman* asked their respective staff judge advocates whether the action they took was permissible under the UCMJ. This clearly reflects that, while convening authorities will not "knowingly and intentionally"[449] violate Article 37,[450] they will do anything they can to ensure that the system administers justice fairly. The reason they feel compelled to do so is because no built-in equanimity "control valve" exists in the present system of court-martial sentencing.

Under the present court-martial sentencing structure, two coaccuseds, with equal levels of culpability, acceptably may receive two radically different sentences. If the sentences are too severe, the convening authority has a control valve. The convening authority has the discretion, *inter alia*, to remit, suspend, or mitigate any portion of the sentence that is too severe.[451] That control valve, however, regulates the flows in only one direction. If the sentences are too lenient, the convening authority is powerless.

Commanders are imbued with a deep sense of responsibility for the administration of justice. Before General Order No. 88 in 1919, a convening authority dissatisfied with either the findings or sentence adjudged by a court-martial could return a panel for deliberations.[452] As the convening authority, a commander still has power over the composition of the court. Under the present system, the only way the commander can ensure that justice is administered fairly to all members of the unit is to ensure that, as convening authority, only members who share the commander's sentencing philosophy are selected to serve on panels. The convening authority must select a panel that is the alter ego

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[447] CARL VON CLAUSEWITZ, ON WAR 259 (A. Rapoport ed., 1968).

[448] *See, e.g.*, SUN TZU, THE ART OF WAR 129 (S. Griffith trans. 1963) ("If a general indulges his troops but is unable to employ them; if he loves them but cannot enforce his commands; if the troops are disorderly and he is unable to control them, they may be compared to spoiled children, and are useless"); FREDERICK THE GREAT, ON THE ART OF WAR 77 (J. Luvaas trans. & ed., 1966) ("the men still are worth nothing if they are undisciplined. An Army, if one wishes to accomplish anything with it, must obey and be in good discipline").

[449] UCMJ art. 98 ("Any person subject to this chapter who ... knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct").

[450] *Id.* art. 37.

[451] MCM, *supra* note 250, R.C.M. 1107, 1108.

[452] War Dep't, Gen. Orders No. 88 (14 Jul. 1919).

of the commander. The convening authority must do this to ensure that fairness is achieved "in his opinion"—not to increase the sentences adjudged.

This convoluted process will result in continued criticism from the public for using blue ribbon panels. The military justice system not only must be fair and impartial, but also must be perceived as being fair and impartial. Without a positive public opinion of the military justice system, the armed forces, in general, will not enjoy a positive public opinion; without a positive public opinion of the armed forces, the national will suffers; and, without a strong national will, the United States cannot expect to succeed in a protracted war.[453]

As noted earlier, the armed forces' system for selecting court-martial panel members is "*the* major difference between military and civilian practice."[454] Judge Cox recognized the quandary into which that system puts convening authorities when he noted in his concurring opinion in *Smith*,

> Those responsible for nominating court members should reflect upon the importance of this task. It is a solemn and awesome responsibility and not one to be taken lightly or frivolously. It is a responsibility that Congress has entrusted to convening authorities and has not required some other method of selection, such as random choice. Even so, *it is the most vulnerable aspect of the court-martial system; the easiest for critics to attack*. A fair and impartial court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges. There is a duty to nominate only fair and impartial members.[455]

The true beauty of the present system for selecting panel members is that it is statutory and subject to few constitutional constraints; therefore, it is highly adaptable to changing needs. Before 1950, the court-martial panel member selection process was a dynamic one, subject to frequent change. At the time of the enactment of the UCMJ, the criteria under Article 25(d)(2)[456] were consistent with the model criteria for federal jury selection espoused by the Knox Committee.[457] That consistency, however,

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[453] *See* VON CLAUSEWITZ, *supra* note 447, at 25-54; HARRY G. SUMMERS, JR., ON STRATEGY 11-32 (1982).

[454] BISHOP, *supra* note 4, at 27.

[455] United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (emphasis added).

[456] UCMJ art. 25(d)(2).

[457] *See supra* note 77 and accompanying text.

has diminished over the past forty years. Whereas the federal process for jury selection has remained dynamic and has adapted to reflect the principle of a representational cross-section of the community by using random selection, the court-martial panel member selection process has become static and has remained mired in a 1950's time warp.

The Constitution does not require the military to change its system of court-martial panel member selection so that it conforms with its civilian counterpart. Nevertheless, the public's acceptance of the federal criminal justice system has depended largely on that system's success at responding to evolving constitutional concepts of due process and society's notions of fairness. Accordingly, the public's acceptance of the military justice system would appear to be related substantially to the military's ability to make its criminal justice provisions comport as closely as possible to corresponding federal provisions. Public opinion is a critical component of national will, without which no military can prosecute a war effectively. Although the federal system—with its random selection of both the jury pool and the jury venire—is not feasible for operational reasons, the military can and should implement a procedure that seeks to obtain a representational cross-section of the military community on court-martial panels.

VI. Recommendations

Although this article will address each recommendation separately, all of the recommendations are interrelated. No single recommendation or group of recommendations has any merit standing alone. The recommended draft amendments to the applicable UCMJ articles appear in the appendix.

The goal of these recommendations is to attain a process that seeks a representational cross-section of the community for panel membership. The recommendations propose the employment of a random selection process for the actual selection of the panel, but not for the selection of the pool of nominees.[458] Random selection of the nominee pool is not recommended for two reasons. First, random selection of the nominee pool is not necessary to ensure that the selection process meets the

[458] For a proposed system in which the convening authority would be removed completely from the nomination process, see R. Rex Brookshire, II, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972); Charles W. Schiesser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice*, 7 TEX. TECH. L. REV. 559 (1976).

representational cross-section requirement. Even the federal jury selection system recognizes that random selection is merely a means to achieve a goal; random selection is not a goal in and of itself.[459] Second, random selection of the nominee pool is not feasible for operational considerations. Only the commander can determine whether a service member is available for duty. This aspect of military service is recognized tacitly by the fact that active duty military members are barred from federal jury service.[460]

A. Eliminate the Variable Number of Members Who Sit on Courts-Martial

First, the military should seek to change the number of members on courts-martial to six for general courts-martial and to three for special courts-martial. The variability in the number of members on courts-martial panels adversely impacts the selection process at the *voir dire* and challenge stages of the proceedings. A specified number of members would remove any incentive on the part of either defense counsel or trial counsel to play the "numbers game" with peremptory challenges. This feature of the court-martial system denigrates the solemnity of the proceedings by creating a carnival atmosphere during *voir dire* and by inducing counsel to "play the odds" in making their challenges.

Removing the incentive to exercise a peremptory challenge against a panel member for absolutely no reason other than percentages would alleviate many *Batson* and *Santiago-Davila* issues.[461] Although the variable number of members endemic to the courts-martial system has survived both due process and equal protection challenges, the function benefits accrued by not requiring a set number of members in every case are minimal. Because the military justice system requires a two-thirds vote for any conviction, the number of members should be divisible by three. Accordingly six members should comprise a general court-martial and three members should comprise a special court-martial.

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[459] *See supra* part II.C.

[460] *See supra* text accompanying note 83.

[461] Batson v. Kentucky, 476 U.S. 79 (1986); United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988) (giving military accused equal protection right to be tried by a panel from which no cognizable racial group has been excluded). Given the present system, with its variable number of court-martial members, the trial counsel has an incentive to use the peremptory challenge to gain a tactical numerical advantage. *See supra* note 274.

B. Repeal the Subjective Criteria Under Article 25(d)(2)

Second, Congress should repeal the selection criteria presently found under Article 25(d)(2). Instead of selecting members, the convening authority should become the individual responsible for nominating members, with the sole criterion for nomination being "expected availability, based on mission requirements and operational readiness." The convening authority should be required to nominate all ranks, excluding general officers, second lieutenants, warrant officers in the grade of W-1, and privates in the grades of E-1 through E-3. These excepted ranks should not be eligible for court membership, which is consistent with the rationale in *Yager*.[462]

In addition, the convening authority should be required to nominate an equal number of nominees by rank. This recommended provision is designed to attain representational cross-sections—of the general military community and of commanders—in the nominee pool. An exception could be granted by the respective Judge Advocate General in units in which the rank structure is so "top heavy" that senior ranks actually outnumbered junior ranks. Although this situation is hard to imagine at the general court-martial convening authority level, it is possible at the special court-martial level.

C. Repeal the Prerogative of an Enlisted Panel

Third, Congress should repeal the portion of Article 25(c)(1) that allows an enlisted person to request a court-martial panel comprised of at least one-third enlisted members. Under this proposal, an enlisted person would be trading the "guarantee" of a panel of one-third enlisted members for a system that not only seeks a representational cross-section of soldiers and commanders for its nominee pool, but also employs a fairly random method for the selection of the panel. Although it is not completely random, it does guarantee at least equal representation of eligible enlisted

[462] 7 M.J. at 172-73. It is also consistent with the *ABA Standards*, which predicates jury eligibility on both United States citizenship and one year's residency within the geographical district in which the court is convened. This standard excludes both resident aliens and individuals who have not established residency in the district. It implies that an individual should not become a juror until he or she has become established in his or her area and has become familiar with the community in which the individual lives. In the military, second lieutenants, warrant officers (W-1), and privates (E-1 through E-3) are in entry-level status and neither have established themselves in the military, nor have become familiar with the values of the unit because they are all recently assigned. Of course, this is inapplicable to individuals who have prior service experience, but these would be relatively small numbers. *See* ABA STANDARDS, *supra* note 9, Standard 15-2.1; *see supra* text accompanying note 81.

persons in the member nominee pool. Under the present proposal, an accused possibly could face either an all-enlisted or an all-officer panel, although such uniformity is statistically improbable.

D. Establish a Neutral Panel Commissioner and Randomly Select the Panel

Fourth, the convening authority should be required to detail a panel commissioner. The panel commissioner should be a member of the trial judiciary, a duly certified inspector general, or another individual with the approval of the Judge Advocate General. The convening authority would submit all nominees to the panel commissioner. The panel commissioner then would choose members to serve on courts-martial using a method of random selection.

Upon receiving notification of a referral, the panel commissioner would draw the members necessary to comprise the court-martial. Members would sit for only one court-martial.[463] Regardless of whether an individual actually sits on a court-martial or is excused, once that individual is selected, he or she would be removed from the panel member pool. This would ensure that panel member duty does not fall on a small portion of the military community or on a limited number of commanders. Concurrently, it ensures that the nominee pool reflects a representational cross-section. An additional benefit of this provision is that it would eliminate any future issue involving the premature relief of a panel.

The panel commissioner would draw four alternates for a general court-martial and three alternates for a special court-martial. The convening authority or military judge could direct that more alternates be drawn if a need was anticipated in a given case. The selection should be open and public. The panel commissioner or his representative would be responsible for notifying court members and their commanders of the date, uniform, time, and location of the court-martial.

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[463] This provision may be criticized on the ground that it will be logistically unmanageable. The provision, however, actually would not increase the number of man-hours required for court-martial membership. Rather, it would alleviate the problem of having a few individuals performing all of the duty. Under the present system, military units often have very senior personnel expending a great deal of time performing court-member duties. The benefits of this proposal are twofold: (1) it could be managed much the same way as a duty roster; and (2) it would expose more individuals to the military justice system in general, and courts-martial in particular.

Once selected by the panel commissioner, no member could be excused except by order of the panel commissioner or the military judge. The panel commissioner will excuse any member when any convening authority certifies in writing that excusal is necessary for mission requirements, operational necessity, or personal hardship. The next alternate, in order of drawing, will become a member and the panel commissioner will draw an additional alternate.

E. Seat Both Primary and Alternate Members During Voir Dire

Fifth, the military judge should seat all members and alternates during the first session with members. All members and alternates would be subject to *voir dire*. The trial counsel and defense counsel each would receive one peremptory challenge. After all challenges have been ruled on by the military judge, excused members would be replaced by alternates, in the order selected by the panel commissioner. If a quorum is not present after the successfully challenged members have been dismissed, the military judge will recess until the panel commissioner provides additional alternates.

The military judge may, at his or her discretion, require alternates to be seated with the panel during the proceedings. Alternates will not take part in deliberations until and unless they are required to replace members. After arraignment, only the military judge can excuse a member.

F. Establish Minimum Sentences

Finally, military sentencing guidelines should be enacted.[464] Sentencing guidelines should specify minimum sentences for each offense under the Code. The panel never should be informed of the minimum sentence facing a particular accused. The military judge would determine and announce the minimum sentence after findings, in open court, with the members absent. After sentencing evidence and argument by counsel, the panel would deliberate on a sentence.

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[464] A comprehensive analysis of sentencing guidelines and minimum sentences is beyond the scope of this article. For further discussions in this area, see Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990); Johnathon E. Scharff, *Federal Sentencing Guidelines Due Process Denied*, 33 ST. LOUIS U. L.J. 1049 (1989).

Any sentence that was lower than the minimum sentence would be a considered a recommendation to the convening authority. Sentences adjudged by the panel that exceed the minimum sentence would become the upper limit of punishment the convening authority could approve. In all cases, the convening authority could approve at least the minimum sentence. This proposal would ameliorate the impact of a panel that adjudged "Article 15 punishment" for serious offenses.

Minimum sentences are necessary to eliminate the incentive the convening authority now has to manipulate the system. They are also essential to ensure fairness from a systemic perspective. Minimum sentences—in conjunction with the convening authority's discretionary power to reduce sentences—would serve as a *two-way* equanimity "control valve" and would allow the convening authority, as suggested by Judge Cox, to "entrust what happens during the trial to the military judge and the court-martial members."[465]

These recommendations are designed to bring military justice in line with the federal system of criminal justice. Their intent is to facilitate a panel selection system that will seek a fair representational cross-section of the military community and concomitantly will reduce a convening authority's incentive to exert improper influence over courts-martial.[466] Implementing these proposals will do much to promote the principles of fairness and justice that convening authorities must adhere to under the military justice system.

APPENDIX

Recommended Changes to the Uniform Code of Military Justice

(*denotes change)

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

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[465] United States v. McClain, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J., concurring).

[466] Critics undoubtedly will contend that the proposed system is not logistically tenable, especially in time of war. Nothing could be more inaccurate. Actually, given a set six-member general court-martial and a set three-member special court-martial, total man-hours should be reduced significantly. In addition, by prescribing minimum sentences, the convening authority will not feel compelled to detail commanders as panel members. This would be especially beneficial during wartime, when unit commanders need to concentrate fully on commanding their units.

(1) general courts-martial, consisting of —

* (A) a military judge and six members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with the defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of —

* (A) three members; or

* (B) a military judge and three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 825. Art. 25. Who may serve on courts-martial

* (a) Any commissioned officer on active duty in the grade of O-2 or higher is eligible to serve on all courts-martial for the trial of any person who may be lawfully brought before such courts for trial.

* (b) Any warrant officer on active duty in the grade of W-2 or higher is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who lawfully may be brought before such courts for trial.

* (c) (1) Any enlisted member of an armed force on active duty in the grade of E-4 or higher who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but never a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial, any member of which is junior to him in rank or grade.

* (2) When convening a general or special court-martial, the convening authority will detail a panel commissioner to select members. The panel commissioner will be either a member of the trial judiciary, officially certified under applicable service regulations as an inspector general, or such other person who has been detailed by the convening authority with the prior approval of the Judge Advocate General.

* (3) Convening authorities will submit nominees for court-martial membership to the panel commissioner. Nominees will be obtained by the convening authority without regard to any consideration other than the availability of the nominated member due to mission requirements or operational readiness. The convening authority will nominate those numbers of nominees that the convening authority feels will be required, given the anticipated caseload. Nominees for the pool will be evenly distributed by rank. A lower rank will not be underrepresented in the member nominee pool in relation to a higher rank. An exception may be granted to this requirement by the Judge Advocate General for units with a disproportionate number of higher ranking personnel to lower ranking personnel. Nominees will be submitted to the pool for a specified period of availability for duty, as designated by the convening authority.

* (e) (1) The panel commissioner will, upon notification of referral, draw by random selection the members for any given court-martial. Any member drawn who does not meet the requirements of (c)(1) and (d)(1) above will be placed back in the member pool. Six members and four alternates will be empaneled for a general court-martial. Three members and three alternates will be empaneled for a special court-martial. The military judge or convening authority can direct that more alternates be empaneled, as warranted by a particular case. Once members are empaneled for any particular case, they are removed from the member nominee pool until the nominee pool is expended and they are again nominated by the convening authority.

(2) The drawing of panel members will be open for public observation. The panel commissioner will notify all empaneled members of the uniform, date, time, and location of the court-martial. The panel commissioner will relieve any panel member from duty before arraignment if any commander designated as a convening authority in sections 822, 823, or 824 [UCMJ articles 22, 23, or 24] certifies in writing that relief is necessary due to physical disability, mission requirements, or operational readiness.

§ 829. Art. 29. Absent and additional members.

* (a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause. All members and alternates will be subject to *voir dire* after arraignment. Any member excused as a result of a challenge will be replaced by the next alternate in order of selection by the panel commissioner.

* (b) Whenever a general court-martial composed of members is reduced below a quorum of six members, the next alternate in order of selection by the panel commissioner will be empaneled. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

* (c) Whenever a special court-martial composed of members is reduced below a quorum of three members, the next alternate in order of selection by the panel commissioner will be empaneled. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides if a verbatim record is available. If no verbatim record is available, the trial shall proceed as if no evidence has been received.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816(1)(B) or (2)(C) of this title [UCMJ article 16(1)(B) or (2)(C)], after the detail of a new military judge, as if no evidence had previously been introduced, unless a verbatim record or a stipulation of the evidence previously introduced is read in court in the presence of the new military judge, the accused, and counsel for both sides.

THE TWENTY-FIRST ANNUAL KENNETH J. HODSON LECTURE SCIENTIFIC EVIDENCE IN CRIMINAL PROSECUTIONS*

PAUL C. GIANNELLI**

It is an honor to have been invited to give the Kenneth J. Hodson Lecture in Criminal Law. I had the privilege of serving under General Hodson while on active duty. My talk today is about scientific evidence, and it is based on my research in this area.

I. Increased Use of Scientific Evidence

Scientific and expert evidence is playing an ever-increasing and far more important role in criminal prosecutions than in the past.

A. Notorious Trials

A quick look at well-publicized trials over the past decade illustrates this point. In his book on the Claus von Bulow prosecution, Alan Dershowitz wrote, "At bottom the case against Claus von Bulow was a scientific case. It would have to be refuted by scientific evidence."[1] Similarly, the trial of Ted Bundy, the serial killer, involved the use of hypnotically-refreshed testimony and bite mark evidence.[2] Fiber evidence proved critical in the trial of Wayne Williams for the murder of two of the thirty young black males killed in Atlanta in the late 1970's.[3] Pathology and serology

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*This article is a transcript of a lecture delivered by the author to members of the Staff and Faculty, their distinguished guests, and officers attending the 40th Graduate Course and the 127th Judge Advocate Officers Basic Course, at The Judge Advocate General's School, Charlottesville, Virginia, on March 26, 1992. The Kenneth J. Hodson Chair of Criminal Law was established on June 24, 1971. Major General Hodson was The Judge Advocate General, U.S. Army, from 1967 to 1971, and was a member of the original Staff and Faculty of The Judge Advocate General's School at Charlottesville, Virginia.

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[1]A. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE 105 (1986); *see also* State v. von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

[2]Bundy v. State, 471 So. 2d 9, 18-19 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); Bundy v. State, 455 So. 2d 330, 348 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986); *see also* R. LARSEN, BUNDY: THE DELIBERATE STRANGER (1986); S. MICHAUD & H. AYNESWORTH, THE ONLY LIVING WITNESS (1983).

[3]Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1984); *see also* Deadman,

testimony played a pivotal role in the trial of Jean Harris for the murder of Dr. Tarnower, the Scarsdale Diet doctor.[4] The forensic analysis of physical evidence was "at the core of the case" against Dr. Jeffrey MacDonald at Fort Bragg.[5] In addition, "fingerprint, shoeprint, and ballistics evidence" was admitted in the "Night Stalker" serial murder prosecution.[6]

More recent examples can be taken from the December 23, 1991, issue of *Time* magazine. One article on the assassination of President Kennedy, sparked by the movie *JFK*, discussed the "magic-bullet" theory—a theory which questioned whether the same bullet could have struck both President John F. Kennedy and Texas Governor John Connally. The article states that "[n]eutron activation tests indicate that the fragments in Connally's wrist did come from the bullet in question."[7]

Another story in the same issue concerned the recent Florida trial of William Kennedy Smith for rape. The article pointed out that during the investigation, the victim "passed two polygraph tests and a voice-stress analysis."[8] That article, however, neglected to mention that most courts exclude polygraph evidence as unreliable, and virtually every reported case on voice-stress analysis has rejected it as invalid.[9]

Fiber Evidence and the Wayne Williams Trial (Part I), 53 F.B.I. L. ENFORCEMENT BULL. 12 (Mar. 1983); Deadman, *Fiber Evidence and the Wayne Williams Trial (Conclusion)*, 53 F.B.I. L. ENFORCEMENT BULL. 10 (May 1984).

[4]People v. Harris, 84 A.D.2d 63, 445 N.Y.S.2d 520 (1981), *aff'd*, 456 N.Y.2d 694, 442 N.E.2d 1205 (1982), *cert. denied*, 460 U.S. 1047 (1983). Eight pathologists testified; 20% of the trial was devoted to cutaneous histology. *See* Ackerman, *The Physician as Expert Witness: Is Peer Review Needed?*, I GENERICS 37, 52 (Dec. 1985) ("The role of cutaneous histology in the trial of Jean Harris and its implications for medicine and the law in America should be of concern to the community of physicians"); TIME, Mar. 1, 1982, at 90 ("At the trial of Jean Harris last year [the expert] tried to persuade the jury—unsuccessfully—that blood marks jibed with Harris's claim that the shooting of Dr. Herman Tarnower occurred accidentally during a struggle"); *see also* S. ALEXANDER, VERY MUCH A LADY: THE UNTOLD STORY OF JEAN HARRIS AND DR. HERMAN TARNOWER (1983); J. DAVID, SCARSDALE MURDER (1981).

[5]J. MCGINNISS, FATAL VISION 264 (1983). MacDonald was convicted for killing his wife and two children. *See* United States v. MacDonald, 456 U.S. 1 (1982); United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); United States v. MacDonald, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986).

[6]Harris, *Night Stalker Convicted of 13 Murders*, U.P.I., Sept. 21, 1989.

[7]Corliss, *Who Killed J.F.K.?*, TIME, Dec. 23, 1991, at 68; *see also* Weisburg v. U.S. Dep't of Justice, 438 F. Supp. 492, 499-503 (D.D.C. 1977) (Freedom of Information Act request for lab results on Kennedy assassination).

[8]Booth, *Palm Beach Trial: The Case That Was Not Heard*, TIME, Dec. 23, 1991, at 38.

[9]*See* P. GIANNELLI & IMWINKELRIED, SCIENTIFIC EVIDENCE, ch. 8 (1986).

B. Lack of Scientific Evidence

Indeed, reliance on scientific proof has become so common that its *absence* in a particular case becomes noteworthy. A 1990 news account of the Central Park jogger case commented, "Among the defense's strongest points in attacking the prosecution's case was the surprising absence of physical evidence—no weapons, no blood stains, no strands of hair, no pieces of skin, no footprints link any of the teenagers to the crimes."[10]

Another illustration is the recent acquittal of El Sayyid Nosair for the assassination of Rabbi Meir Kahane, the founder of the Jewish Defense League. Apparently, nobody saw the actual shooting. Witnesses, however, saw the defendant with a gun in the same room where the shooting occurred, heard at least one shot, and saw the defendant run from the scene. When the defendant was shot and apprehended nearby, a gun was found next to him. All this occurred within minutes of the shooting. Most prosecutors would consider this a powerful case. An alternate juror explained the jury's reasoning as follows:

> [Two shots were heard] but only one bullet was found and it was not tested for hair, blood or other indications that it had passed through the rabbi's neck, the fatal wound.
>
> ... [T]he prosecution had offered no evidence of Mr. Nosair's fingerprints on the gun, no paraffin tests that might have shown Mr. Nosair fired it, and no evidence showing the bullet's trajectories.[11]

C. Variety of Techniques

We are not only using scientific proof more, but also relying on a wider variety of techniques. Neutron activation, atomic absorption, electrophoretic blood testing, scanning electron microscopy, mass spectrometry, and gas chromatography are but a few of the techniques now used in criminal prosecutions. Other examples include sound spectrometry (voiceprints), psycholinguistics, remote electromagnetic sensing, and horizontal gaze nystagmus. Even fingerprint identification has moved into the high-tech age with laser technology for visualizing latent prints and computers for far more powerful searching capability. In addition, the last decade

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[10] Sherman, *Technology Emotion Key in Jogger Case*, NAT'L L.J., Aug. 20, 1990, at 8; *see also* N.Y. TIMES, Aug. 20, 1990, at B4 ("The youths claimed not to have penetrated the jogger, and there was no clear physical proof that they had").

[11] McFadden, *For Jurors, Evidence in Kahane Case Was Riddled With Gaps*, N.Y. TIMES, Dec. 23, 1991, at B1, col. 2.

has seen an increased reliance on social science research—often called syndrome evidence. For example, evidence of battered wife syndrome, rape trauma syndrome, and child sexual abuse accommodation syndrome now frequently is admitted at trial.

II. Reasons for This Development

Several factors may have contributed to this increased use of scientific evidence.

A. Research Funding

At one time, funding for forensic science research was substantial. The creation of the Law Enforcement Assistance Administration (LEAA) in 1968 undoubtedly played a significant role. In the 1970's, the LEAA underwrote a number of research projects designed to encourage the forensic application of scientific knowledge; the admissibility of some techniques can be traced directly to this research. Voiceprint analysis is the best example.[12] Other funded projects dealt with blood analysis,[13] blood flight characteristics,[14] trace metal detection,[15] and polygraphy.[16] Currently, the Federal Bureau of Investigation (FBI) is spending a considerable amount of resources on the forensic application of deoxyribonucleic acid (DNA).

B. Supreme Court Influence

Several writers have found a different reason. They attribute the expanded use of scientific evidence to Supreme Court decisions of the 1960's, in which the Warren Court severely restricted the acquisition of evidence for criminal cases via traditional crime-solving techniques, such as interrogations and lineups.[17] For example, commentators have written "*Miranda, Gideon, Escobedo,*

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[12] NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, VOICE IDENTIFICATION RESEARCH (1972) (submitted to LEAA by Michigan State Police) [hereinafter VOICE IDENTIFICATION RESEARCH].

[13] B. CULLIFORD, THE EXAMINATION AND TYPING OF BLOODSTAINS IN THE CRIME LABORATORY (1971).

[14] NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, TRACE METAL DETECTION TECHNIQUE IN LAW ENFORCEMENT (Oct. 1970).

[15] D. RASKIN ET AL., VALIDITY AND RELIABILITY OF DETECTION OF DECEPTION (1978).

[16] *Id.*

[17] *See* Kelley, *Foreword* to R. FOX & C. CUNNINGHAM, CRIME SCENE SEARCH AND PHYSICAL EVIDENCE HANDBOOK at iii (1973); Fong, *Criminalistics and the Prosecutor, in* THE PROSECUTOR'S DESKBOOK 547 (P. Healy & J. Manak eds. 1971).

and several other cases of similar import, indirectly created an entirely new approach to criminal investigation. This has been particularly true with regard to the use and application of the various forensic sciences...."[18] In 1972, an appellate judge wrote, "In this day and age ... where recent decisions of the United States Supreme Court establish stringent guidelines in the investigative, custodial and prosecutional areas a premium is placed upon the development and use of scientific methods of crime detection."[19]

There is some suggestion in the Supreme Court's cases that supports this view. For example, in one case the Court wrote, "Modern community living requires modern scientific methods of crime detection lest the public go unprotected."[20] In *Escobedo* the Court wrote,

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[21]

Interestingly, while the Court was erecting constitutional barriers to the use of confessions and lineups, it was removing Fourth and Fifth Amendment obstacles to the use of scientific evidence. The most important case was *Schmerber v. California*.[22] The Court, in an opinion by Justice Brennan, held that the privilege against compulsory self-incrimination applied only to testimonial evidence, and not to physical evidence. Therefore, the police could extract blood from Schmerber for blood-alcohol analysis without violating the Fifth Amendment privilege. This ruling also meant that law enforcement officials could compel a suspect to provide handwriting exemplars, fingerprints, and voice exemplars—and now biological samples for DNA testing—without running afoul of the Self-Incrimination Clause.[23]

Several Fourth Amendment cases also had an impact on the use of scientific evidence. In *Warden v. Hayden*[24] the Supreme Court overruled its prior cases, which had prohibited the seizure of

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[18] Fox et al., *The Criminalistics Mission: A Comment*, *in* LEGAL MEDICINE ANNUAL 1 (C. Wecht ed. 1972).

[19] Worley v. State, 263 So. 2d 613, 616 (Fla. Dist. Ct. App. 1972) (concurring opinion).

[20] Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

[21] Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).

[22] 384 U.S. 757 (1966).

[23] *See* P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, ch. 2.

[24] 387 U.S. 294 (1967) (Brennan, J.).

"mere evidence." Under the "mere evidence" rule, the police could seize only contraband, instrumentalities of a crime, or fruits of a crime. Most scientific evidence would have been "mere evidence" and thereby excluded under this rule.

The Warren Court also was the first Court to sanction stop-and-frisk procedures by the police.[25] Later, in *Davis v. Mississippi*,[26] Justice Brennan suggested that the seizure of a person, on less than probable cause, for the purpose of obtaining fingerprints may not violate the Fourth Amendment under certain circumstances.[27] This dictum led to the adoption in a number of jurisdictions of what are known as "nontestimonial identification" procedures. Under these provisions, a suspect judicially may be ordered to provide handwriting, voice, and fingerprint exemplars—and perhaps biological samples for DNA testing—based on reasonable suspicion, rather than on probable cause.[28]

C. The Technological Age

I am not sure, however, that either of these reasons—research funding or Supreme Court decisions—explains fully the increased use of scientific evidence. The answer may be more basic. That a society so dependent on science and technology should turn to such knowledge as a method of proof should not be very surprising. With computer technology running our businesses, magnetic resonance imaging aiding medicine, and the marvel of twentieth-century technology—*Nintendo*—captivating our kids, no one should be very surprised to see DNA evidence in the courtroom.

D. Reliability

In addition, it is the perceived reliability of scientific proof that makes it so attractive and explains its increased use. Fingerprints are simply more reliable than many eyewitness identifications. Lawyers and juries know this. A 1974 survey of

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[25] Terry v. Ohio, 392 U.S. 1 (1968).

[26] 394 U.S. 721, 727 (1969); *see also* Hayes v. Florida, 470 U.S. 811 (1985) (noting the *Davis* dictum).

[27] Later cases by the Court also facilitated the use of scientific evidence. In United States v. Dionisio, 410 U.S. 1 (1973), and United States v. Mara, 410 U.S. 19 (1973), the Court held that physical characteristics, such as handwriting and the sound of a person's voice, fell outside the Fourth Amendment's protection against unreasonable searches and seizures. The Court also held that the compelled production of voice and handwriting exemplars pursuant to a grand jury subpoena did not constitute a seizure of the person within the meaning of the Fourth Amendment.

[28] P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, ch. 2.

1363 judges and lawyers throughout the United States found that "[s]eventy-five percent ... stated that they believed judges accord scientific evidence more credibility than other evidence, and 70 percent believed that juries also find scientific evidence more credible."[29] A more recent survey of jurors reported, "About one quarter of the citizens who had served on juries which were presented with scientific evidence believed that had such evidence been absent, they would have changed their verdicts from guilty to not guilty."[30]

III. Novel Scientific Evidence

The first article that I wrote on scientific evidence concerned the admissibility of novel scientific evidence—that is, scientifically-based evidence that had not yet been admitted in court.[31] That article critiqued the two major evidentiary tests on the issue. The first test is based on *Frye v. United States*[32] and requires the basis of expert testimony to be generally accepted by the scientific community. Under this standard, it is not enough that a qualified expert—or even several experts—testifies that a particular technique is valid. *Frye* imposes a special burden—"general acceptance" in the field.

The alternative approach is what I have described as the relevancy test, which can be traced to Professor McCormick.[33] Under this test, the evidence need not be "generally accepted." It need only be relevant, which in this context means reliable. The critical difference between these two tests is that *Frye* is more conservative—something its detractors lament and its supporters applaud.

This issue remains critical today in the DNA cases. A recent Second Circuit opinion, *United States v. Jakobetz*,[34] in January 1992, rejected the *Frye* test and admitted DNA. Interestingly, five months earlier, the Fifth Circuit not only had reaffirmed *Frye* in *Christophersen v. Allied-Signal Corp.*,[35] but also had applied it in

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[29] M. SAKS & R. VAN DUIZEND, THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION 5-6 (1983).

[30] Peterson et al., *The Uses and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. FORENSIC SCI. 1730, 1748 (1987).

[31] Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980).

[32] 293 F. 1013 (D.C. Cir. 1923).

[33] C. MCCORMICK, EVIDENCE 363-64 (1954).

[34] United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992).

[35] 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992).

a civil case; this was a major expansion.[36] A proposed amendment to Federal Evidence Rule 702, which is presently under consideration, would adopt a compromise position, requiring expert testimony to be based on information that is "reasonably reliable."

In my article, I criticized both tests; but then I proposed an alternate, yet restrictive, test. In a criminal case, the prosecution should be required to satisfy a high burden of proof when offering novel scientific evidence. Some examples illustrate why.

A. The Paraffin Test

The paraffin test is a gunshot residue (GSR) test designed to detect the presence of nitrates on the hands of a person suspected of firing a rifle or handgun. Nitrates come from smokeless powder—the propellant in modern ammunition—and often are deposited on the hand from the backblast of gases that escape during discharge. Paraffin was used to remove the residues. Knowing whether someone had recently fired a weapon is often significant in suspected suicides, self-defense, and other cases.

The "paraffin test" first was introduced into this country in the 1930's and was adopted quickly by law enforcement agencies.[37] A 1935 article in the *F.B.I. Law Enforcement Bulletin* spoke of the "current widespread use" of this test.[38] The first reported case admitting evidence based on the paraffin test was decided in 1936,[39] and other cases followed this precedent.[40]

The first comprehensive study of the paraffin test, however, was not published until 1967—thirty years after the first court case.[41] From that study, we learned that many common substances other than gunshot residues contain nitrates. "[R]ust,' colored fingernail polishes, residue from evaporated urine, soap and tap water" all tested positive.[42] In short, the test was nonspecific.

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[36] 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 853 (1977) ("The *Frye* standard ... is rarely applied in civil litigation").

[37] Matthews, *The Paraffin Test*, 102 AMERICAN RIFLEMAN 20 (1954).

[38] *Diphenylamine Test for Gun Powder*, 4 F.B.I. L. ENFORCEMENT BULL. 5 (1935). Diphenylamine was the reagent used in the test.

[39] Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1936).

[40] *See* P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, at 413 (listing cases).

[41] An earlier but smaller study was published in 1955. Turkel & Lipman, *Unreliability of Dermal Nitrate Test for Gunpowder*, 46 J. CRIME, CRIMINOLOGY & POLICE SCI. 281, 282 (1955).

[42] Cowan & Purdon, *A Study of the "Paraffin Test,"* 12 J. FORENSIC SCI. 19, 23 (1967).

Why did so much time pass before conducting this study? Why did courts continue to admit this evidence, even after the publication of this study?

B. Voiceprints

My second example is voiceprint evidence, which confronted the courts in the 1970's. A voiceprint was used to identify a speaker's tape-recorded voice by means of sound spectrometry. Voiceprint evidence was admitted readily after the publication of a 1972 Michigan State University study, which was funded by the Law Enforcement Assistance Administration.[43] In that study, 34,992 experimental trials, involving 250 male speakers and twenty-nine examiners were conducted over a two-year period. False identifications occurred in approximately six percent of the trials that most closely resembled the forensic situation. The error rate is reduced to approximately two percent if the trials in which the examiners expressed "uncertainty" about their conclusions are eliminated.

Dr. Oscar Tosi, who supervised this study, testified that the error rate would be "negligible" in a real-life situation.[44] Based on this study, many courts admitted voiceprint evidence. Other courts disagreed, and a war over admissibility was waged for most of the decade.[45] In 1979, the National Academy of Sciences published its report on the subject. The report raised significant doubts about voiceprint identifications. One passage stated,

> Estimates of error rates now available pertain to only a few of the many combinations of conditions encountered in real-life situations. These estimates do not constitute a generally adequate basis for a judicial or legislative body to use in making judgments concerning the reliability and acceptability of aural-visual voice identification in forensic applications.[46]

As with the paraffin test, the court cases came first and *then* the independent scientific report followed.

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[43] VOICE IDENTIFICATION RESEARCH, *supra* note 12.

[44] People v. Law, 40 Cal. App. 3d 69, 78, 114 Cal. Rptr. 708, 713 (1974).

[45] P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, at 322-23 (listing cases).

[46] NATIONAL ACADEMY OF SCIENCES, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION 60 (1979).

C. Hypnotically-Refreshed Testimony

In the 1980's, the major dispute involving the admissibility of scientific evidence concerned the testimony of witnesses whose memories had been refreshed by hypnosis. Finding the evidence reliable, numerous courts admitted hypnotically-refreshed testimony.[47] Some of these courts said that hypnosis was merely another way to refresh memory. Other courts, however, rejected this evidence, holding that its use is so fraught with danger that a witness becomes *incompetent* once hypnotized.[48]

In 1985, the American Medical Association issued a report that seriously questioned the accuracy of this type of testimony. The report stated,

> Review of the scientific literature indicates that when hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. When the third condition results, the individual is less likely to be able to discriminate between accurate and inaccurate recollections. There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information.[49]

Again, the same pattern reappears. Long after the battle over admissibility had erupted in the courtroom, an independent group of experts issued a report on the subject. Should not the report come *before* the admission of the evidence?

IV. Reliability of Routine Procedures

Now I would like to turn to expert testimony based on "routine" procedures.

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[47] *See* P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, ch. 12 (listing cases).

[48] *Id.*

[49] American Medical Association Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1921 (1985).

A. Fingerprints

As illustrated by several fingerprint cases, even the most basic techniques are subject to error. For example, in *Imbler v. Craven*,[50] the expert failed to observe an exculpatory fingerprint in a murder case in which the death penalty was imposed. In another murder case, *State v. Caldwell*,[51] the court wrote, "The fingerprint expert's testimony was damning—and it was false."[52]

B. Firearms Identification

In February 1989, the Los Angeles Police arrested Rickey Ross for the murder of three prostitutes. An expert who was the head of the Department's Firearms Identification Division made a *positive* identification after comparing the murder bullets and a bullet fired from Ross's nine-millimeter Smith & Wesson. One of the defense attorneys later admitted, "I suppose I was like the average citizen. They said it was a match, I thought it was like a fingerprint."[53] Based on the same evidence, however, a defense expert reached the opposite conclusion—that is, Ross's gun could *not* have fired the fatal bullets. Two independent experts came to yet another conclusion—namely, insufficient evidence existed to draw any conclusions. The case against Ross was dropped.

This was not the first time that the Los Angeles crime laboratory had stumbled. A prior misidentification occurred in the investigation of Sirhan Sirhan for the assassination of Bobby Kennedy.

> In [*People v. Sirhan*,] seven independent examiners were appointed by the presiding judge of the Superior Court of Los Angeles County to reexamine the purported firearms bullet comparison post trial. The examiners were unanimous in their findings that the identification testified to at the grand jury indictment and in the trial were misrepresented in that the purported identification of bullets lodged in victim Kennedy ... with Sirhan's gun

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[50] 298 F. Supp. 795 (C.D. Cal. 1969), *aff'd*, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970).

[51] 322 N.W.2d 574 (Minn. 1982).

[52] *Id.* at 586; *see also* Starrs, *A Miscue in Fingerprint Identification: Causes and Concerns*, 12 J. Police Sci. & Admin. 287 (1984).

[53] Baker & Lieberman, *Faulty Ballistics in Deputy's Arrest; Eagerness to "Make" Gun Cited in LAPD Lab Error*, L.A. Times, May 22, 1989, at 1, col. 1; Freed, *LAPD Probing What Went Wrong With Ballistics Tests on Ross' Gun*, L.A. Times, May 16, 1989, at 26, col. 1.

> were nonexistent. In both of these cases discovery and cross examination were lacking.[54]

In a third case, *In re Kirschke*,[55] the firearms identification expert made a conclusive identification. On appeal, the court concluded that the expert had "negligently presented false demonstrative evidence in support of his ballistics testimony."[56]

C. Proficiency Testing

Unfortunately, these cases do not represent isolated mistakes. A limited, but nevertheless revealing, survey of lawyers and scientists associated with the American Academy of Forensic Sciences identified "competency" as the most significant ethical problem in the field.[57] Other problems considered significant in the survey included "the failure of scientists to express both the strengths and weaknesses of their data, giving opinions which exceed the limits of their data, and a failure to remain objective in their evaluation of evidence and delivery of testimony."[58]

Moreover, proficiency test results of many common laboratory examinations are disturbing. Seventy-one percent of the crime laboratories tested provided unacceptable results in a blood test, 51.4% made errors in matching paint samples, 35.5% erred in a soil examination, and 28.2% made mistakes in firearms identifications.[59] A review of five handwriting comparison proficiency tests showed that, at best, "[d]ocument examiners were correct 57% of the time and incorrect 43% of the time."[60] One of the authors of a major proficiency test commented,

> In spite of being a firm advocate of forensic science, I must acknowledge that a disturbingly high percentage of laboratories are not performing routine tests competently .... The startling conclusions from that research led to some efforts to improve conditions in the laboratories,

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[54] Bradford, *Forensic Firearms Identification: Competence or Incompetence*, 5 FORUM 14 (1978).

[55] 53 Cal. App. 3d 405, 125 Cal. Rptr. 680 (1975), *cert. denied*, 429 U.S. 820 (1976).

[56] *Id.* at 408, 125 Cal. Rptr. at 682.

[57] Peterson & Murdock, *Forensic Sciences Ethics: Developing an Integrated System of Support and Enforcement*, 34 J. FORENSIC SCI. 749, 751 (1989).

[58] *Id.* at 752.

[59] J. PETERSON ET AL., CRIME LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM 251 (1978).

[60] Risinger et al., *Exorcism of Ignorance as a Proxy For Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 748 (1989).

> but these encounter institutional inertia against reform.[61]

Consequently, "[a]t present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[62] In a recent article on crime laboratories, Professor Jonkait concluded,

> All available information indicates that forensic science laboratories perform poorly.... Current regulation of clinical labs indicates that a regulatory system can improve crime laboratories.... [F]orensic facilities should at least be required to undergo mandatory, blind proficiency testing, and the results of this testing should be made public.[63]

This information about the reliability of routine tests should affect a number of legal issues—for example, (1) whether our current rules on pretrial discovery are adequate,[64] and (2) whether laboratory reports should be admitted into evidence in lieu of expert testimony.[65]

V. Fraud, Perjury, and Misconduct

A. Experts

In a number of cases, experts have gone beyond negligence. For example, a surprising number of expert witnesses have lied about their credentials.[66] In one case, an FBI serologist testified that he had a master's degree in science, "whereas in fact he never

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[61] *Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599, 645 (1984) (remarks of Professor Joseph Peterson). For a more detailed discussion of proficiency testing, see Saks, *Prevalence and Impact of Ethical Problems in Forensic Science*, 34 J. FORENSIC SCI. 772, 775-78 (1989) (reviewing proficiency testing results) ("Perhaps the major lessons to be drawn from this are that errors are indeed made and that there is a wide range of interlaboratory variation").

[62] Lander, *DNA Fingerprinting On Trial*, 339 NATURE 501, 505 (1989).

[63] Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J. L. & TECH. 109, 191 (1991).

[64] *See* Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791 (1991).

[65] Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671 (1988).

[66] *See* Saks, *Prevalence and Impact of Ethical Problems in Forensic Science*, 34 J. FORENSIC SCI. 772 (1989) (listing other cases); Annotation, *Perjury or Wilfully False Testimony of Expert Witness as Basis for New Trial on Ground of Newly Discovered Evidence*, 38 A.L.R.3d 812 (1971).

attained a graduate degree."[67] In another case, the death penalty was vacated when evidence was discovered that a prosecution expert, who "had testified in many cases," had lied about her professional qualifications. "[S]he had never fulfilled the educational requirements for a laboratory technician."[68] Other examples include a serologist who testified falsely about his academic credentials;[69] a psychologist who was convicted of perjury for claiming, during the Ted Bundy trial, that he had a doctorate degree;[70] an arson expert who testified falsely about his academic credentials;[71] a lab technician convicted of perjury for misrepresenting his educational background;[72] and a lab analyst who pleaded guilty to eight counts of falsification for misstating his academic credentials.[73]

Perhaps the most striking illustration is a firearms expert who took some credit for "the development of penicillin, the 'Pap' smear, and to top it all off, the atomic bomb."[74] Professor Starrs, who has examined these cases in depth, has proposed discovery as the remedy for this type of fraud.[75]

Another type of misconduct is illustrated by the "Maguire Case" in Great Britain. The Maguires were accused of possessing an explosive as part of the Irish Republican Army's terrorism campaign. The prosecution relied on scientific evidence. Professor Starrs has provided us with the following summary:

> The government built its case on the traces of [nitroglycerine] under the fingernails of six of the defendants and on the plastic gloves belonging to Mrs. Maguire. "The evidence was almost entirely scientific." ... The prosecution made much of the fact that [thin layer chromatography] will identify [nitroglycerine] to the exclusion of other substances, explosive and non-explosive. The tests were said to be as conclusive and irrefutable as fingerprints. The entire underpinnings for

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[67] Doepel v. United States, 434 A.2d 449, 460 (D.C. App.), *cert. denied*, 454 U.S. 1037 (1981).

[68] Commonwealth v. Mount, 435 Pa. 419, 422, 257 A.2d 578, 579 (1969).

[69] Maddox v. Lord, 818 F.2d 1058, 1062 (2d Cir. 1987).

[70] Kline v. State, 444 So. 2d 1102 (Fla. Dist. Ct. App. 1984).

[71] People v. Alfano, 95 Ill. App. 3d 1026, 1028-29, 420 N.E.2d 1114, 1116 (1983).

[72] State v. Elder, 199 Kan. 607, 433 P.2d 462 (1967).

[73] State v. DeFronzo, 59 Ohio Misc. 113, 116, 394 N.E.2d 1027, 1030 (C.P. 1978).

[74] Starrs, *Mountebanks Among Forensic Scientists*, *in* 2 FORENSIC SCIENCE HANDBOOK 1, 7, 20-29 (R. Saferstein ed. 1988).

[75] *Id.* at 31.

> this assertion was proved not only to be scientifically false but also known to be so by all concerned parties and scientists by the trial's eleventh hour discovery of an intra-[lab] memorandum dated six months prior to the Maguires' arrest.[76]

Another example occurred in 1970, when a federal grand jury in Chicago investigated the deaths of Black Panther leaders in a police raid. The grand jury report noted that the "testimony of the firearms examiner that he could not have refused to sign what he believed was an inadequate and preliminary report on pain of potential discharge is highly alarming. If true, it could undermine public confidence in all scientific analysis performed by this agency."[77]

B. Attorneys

Attorneys also have misused expert and scientific evidence. Perhaps the most flagrant abuse was the prosecutor in *Miller v. Pate*.[78] A prosecution expert had testified that stains on underwear shorts were type-A blood, which matched the defendant's blood type. The prosecutor waived the "bloody" shorts in front of the jury in closing argument. Later proceedings established that the stains were paint—not blood—and that the prosecutor knew this fact at the time of trial.

Another type of prosecutorial misconduct involves improper attempts to pressure experts into changing or modifying their opinions. In a recent case involving a federal grand jury, the Supreme Court noted that the "District Court further concluded that one of the prosecutors improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the government."[79]

A different type of misconduct is illustrated by the controversial Sacco and Vanzetti case. Sacco and Vanzetti were charged with murder during a payroll robbery in 1921. Many believe their executions resulted more from their foreign statuses and "radical" beliefs than from the cogency of the evidence presented against

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[76] Starrs, *The Forensic Scientist and the Open Mind*, 31 J. Forensic Sci. Soc'y 111, 141-42 (1991) (citing May et al., Interim Report on the Maguire Case, London: HMSO (12 July 1990)).

[77] Bradford, *Problems of Ethics and Behavior in the Forensic Sciences*, 21 J. Forensic Sci. 763, 767 (1976) (quoting U.S. Dist. Ct., N.D. Ill., E. Div., *Report of January 1970 Grand Jury* 121).

[78] 386 U.S. 1 (1967).

[79] Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

them. Firearms identification evidence was critical. Professor Morgan has commented on this issue.

> On October 23 Captain Proctor made an affidavit indicating that he had repeatedly told [the prosecutor] that he would have to answer in the negative if he were asked whether he had found positive evidence that the fatal bullet had been fired from Sacco's pistol. The statement which Proctor made on the witness stand was: "My opinion is that it is consistent with being fired by that pistol."[80]

If this passage is true, then the prosecution intentionally misled the jury.

VI. Problem Areas

In researching scientific evidence issues, a number of recurring problems have tended to surface. I will mention several such issues, though I am sure more exist.

A. Technology Transfer

One of the attacks on DNA evidence has focused on the issue of "technology transfer"—that is, DNA has been used in scientific research for a number of purposes, but not for the purpose for which it is being used in criminal trials. The argument is quite simple. Specifically, just because DNA is valid for some purposes does not necessarily mean that it is valid for a different purpose.

This is a recurring issue in the forensic sciences. For example, the American Medical Association had recognized hypnosis as an accepted medical technique for psychotherapy, treatment of psychosomatic illnesses, and amnesia.[81] In this context, hypnosis can be "therapeutically useful, [and yet] it need not produce historically accurate memory."[82] The use of hypnosis to refresh recollection at trial is a very different thing because its use depends on whether it can produce accurate memory.

Similarly, the initial research on rape trauma syndrome was developed to aid rape victims. "[R]ape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event—*i.e.*, whether, in fact, a rape in the legal sense occurred—

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[80] L. Joughin & E. Morgan, The Legacy of Sacco & Vanzetti 15 (1948).

[81] Council on Mental Health, *Medial Use of Hypnosis*, 168 JAMA 186 (1958).

[82] State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).

but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselor's clients or patients."[83]

This research still, however, may be useful in a criminal trial. Rape trauma syndrome evidence may be helpful if the defendant suggests to the jury that the conduct of the victim after the incident—such as a delay in reporting the assault—is inconsistent with the claim of rape. In this situation, "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of ... popular myths."[84]

B. Subjectivity

A number of routine forensic techniques are essentially subjective. Firearms identification is an example. Even though based on objective data—such as striation marks on a bullet—the conclusion about a match comes down to the examiner's subjective judgment. Questioned documents, bite marks, and even fingerprints fall into the same category.

Subjectivity also may be a problem when instrumentation is used. For example, the polygraph technique—although employing an instrument—involves a large dose of subjectivity. Indeed, some courts have rejected polygraph results because of this factor. According to one court, the polygraph technique "albeit based on a scientific theory, remains an art with unusual responsibility placed on the examiner."[85] Another court spoke of the "almost total subjectiveness surrounding the use of the polygraph and the interpretation of the results."[86] The use of DNA evidence also involves subjectivity if a "match" is declared based only on "eyeballing" the autorads.[87]

I do not equate "subjective" with "bad" or "invalid." As I noted before, fingerprints are—in this sense—subjective, but they are also very reliable. Subjectivity, however, necessarily means that

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[83] People v. Bledsoe, 36 Cal. 3d 236, 249-50, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984).

[84] *Id.* at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

[85] People v. Anderson, 637 P.2d 354, 360 (Colo. 1981).

[86] People v. Monigan, 72 Ill. App. 3d 87, 98, 390 N.E.2d 562, 569 (1979).

[87] *See* Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 88 (1989) ("There are currently no formal standards for determining what constitutes a match between two DNA prints. Whether a match is declared between two prints is a subjective judgment for the forensic expert").

room for disagreement exists—specifically, the greater the subjectivity, the greater the chance for error.

C. Statistical Evidence

In contrast to the "subjective" techniques, a number of techniques are based upon statistics. As one commentator has noted, "The results of forensic tests are often meaningful only if they are accompanied by statistical data."[88] Neutron activation, electrophoretic blood testing, and DNA are examples.

Often, this type of evidence can be misused. If, for example, the expert testifies that the perpetrator and the defendant share a blood type found in five percent of the population, a juror might conclude that a ninety-five-percent chance exists that the defendant is guilty.[89] Such a conclusion would not be warranted. If a million people lived in the city where the crime occurred, 50,000 people would share this blood type. Can the defense then argue that the probability of guilt is therefore one in 50,000? This is also misleading.[90]

These are relatively easy issues compared to the problems with DNA evidence, over which some scientists argue that the loci used in the analysis have not been proved to be independent. If they are not independent, then the product rule cannot be used to compute an overall probability.

Let me simply conclude first by saying that lawyers must understand probabilistic reasoning, and second by citing an article by Professor McCord, entitled "A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: *People v. Collins* and Beyond."[91]

D. Misleading and Ambiguous Conclusions

Pay close attention to an expert's conclusion. As mentioned earlier, the firearms identification expert in the Sacco and Vanzetti case testified that the bullet was "consistent with" having been fired by Sacco's gun. Apparently, the defense counsel and judge

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[88]Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 LAW & CONTEMP. PROBS. 9 (1989).

[89]*Id.* at 25.

[90]*Id.* at 31.

[91]McCord, *A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases:* People v. Collins *and Beyond*, 47 WASH. & LEE L. REV. 741 (1990); *see also* Mark & Workman, *Pitfalls of Statistics, Part I*, 6 SPECTROSCOPY 42 (1991).

believed that a positive identification was being made. It was not. Hundreds or thousands of weapons may have fired that bullet.

Experts in the neutron activation cases have testified that (1) samples "were of the same type and same manufacture";[92] (2) hair samples "came from the same source";[93] (3) blood analysis revealed a "match of the materials";[94] (4) samples had a "common origin or source";[95] and (5) hair samples "were identical and probably came from the same person."[96] What does this testimony mean? Might not a jury believe that a positive identification is being made?

E. Destruction of Evidence and Chain of Custody

In researching cases on chain of custody issues, I came across a surprising number of cases in which evidence was lost or destroyed. A review of the cases reveals that drugs, bullets, blood, urine, and trace metal detection results, as well as physical evidence of arson, rape, and homicide, have not been preserved for examination or retesting.[97]

Perhaps the most bizarre illustration is *People v. Morgan*,[98] in which a severed fingertip was found at the scene of a homicide. It was not the victim's. Through insightful police work—that is, looking for someone with a missing fingertip—Morgan *sans* fingertip became a suspect. The defense moved pretrial to examine the fingertip. The fingertip, however, could not be located. Accordingly, the Colorado Supreme Court held that the prosecution could not use the fingertip evidence at trial. The court does not tell us what happened, but a news report does. The refrigerator in which the evidence was stored apparently was not cold enough to prevent decay and the police refused to move the fingertip to the refrigerator in which they stored their "brown bag lunches." Accordingly, "someone—the police haven't been able to determine who—threw the fingertip away."[99]

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[92] United States v. Stifel, 433 F.2d 431, 436 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[93] People v. Collins, 43 Mich. App. 259, 264, 204 N.W.2d 290, 293 (1972).

[94] State v. Stout, 478 S.W.2d 368, 368 (Mo. 1972).

[95] State v. Coolidge, 109 N.H. 403, 421, 260 A.2d 547, 560 (1969), *rev'd on other grounds*, 404 U.S. 443 (1972).

[96] Ward v. State, 427 S.W.2d 876, 884 (Tex. Crim. App. 1968).

[97] *See* P. GIANNELLI & E. IMWINKELRIED, *supra* note 9, at 108-09 (collecting cases).

[98] 199 Colo. 237, 606 P.2d 1296 (1980).

[99] Moya, *The Case of the Missing Fingertip*, NAT'L L.J., Dec. 21, 1981, at 11.

VII. Conclusion

In conclusion, let me make two points. First, despite my criticisms today about how scientific evidence often is misused in the courtroom, I am a strong proponent of scientific proof. It is often better than eyewitness testimony and credibility battles—the "he said, she said" testimony often encountered in rape trials. Moreover, an innocent person may be exonerated because of scientific evidence.

Second, problems with experts are not new. In 1843, an English judge wrote that "skilled witnesses come with such a bias in their minds to support the case in which they are embarked that hardly any weight should be given to their evidence."[100] In 1899, the Minnesota Supreme Court observed that "[t]here is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'expert.'"[101]

[100]Tracy Peerage Case, 10 Cl. & F. 154, 191 (1984).

[101]Keegan v. Minneapolis & St. Louis R.R. Co., 76 Minn. 90, 95, 78 N.W. 965, 966 (1899).

INTERNATIONAL KIDNAPPING IN A VIOLENT WORLD: WHERE THE UNITED STATES OUGHT TO DRAW THE LINE

SCOTT S. EVANS*

I. Introduction

On Thursday, November 14, 1991, the United States handed down indictments against Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah, two Libyans, for their parts in the December 21, 1988, bombing of *Pan Am Flight 103* over Lockerbie, Scotland, which killed 270 people.[1] The next day, the White House said that the act would not go unpunished. President Bush refused to rule out any action against the Libyan State or the individuals involved.[2] Although not specifically mentioned, one of the possible actions the President may authorize is the forcible abduction of the two Libyans from their home state.[3] The purpose of the abduction would be to try these individuals in the United States for the murder of American citizens who were aboard the flight. This article addresses the ramifications of such a potential action. The topic has become increasingly important during the past year and has been before the Supreme Court of the United States.[4]

The legality of state-sanctioned international kidnapping is one of the foremost concerns in domestic national security and international law. The ultimate question is as follows: When may the United States properly sponsor the rendition of an individual

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[1]Ironically, the indictments were announced by then-acting Attorney General William Barr, who authored the current administration's legal position, which allows abduction of individuals from foreign soil. Barr is now the Attorney-General.

[2]Tom Post et al., *Who Paid for the Bullet?*, NEWSWEEK, Nov. 25, 1991, at 26.

[3]*FBI Authority to Seize Suspects Abroad: Hearing Before the Subcommittee on the Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 100th Cong., 1st Sess. 35 (1989) [hereinafter *House Hearing*].

[4]In United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), the Supreme Court held that, even though a forcible abduction may violate international law, it does not prohibit the United States from trying the abducted individual. This article was written before the Court's decision in *Alvarez-Machain* and, therefore, without the benefit of the Court's opinon. The decision, however, was based on grounds other than international law. *See also* United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992) (remanding case for further consideration in light of *Alvarez-Machain*).

from foreign soil when the United States does not have consent for the abduction from the foreign sovereign? Some commentators suggest that a complete bar to kidnapping exists, while others seek to justify it under almost any circumstance. These extreme positions ignore both practical and rule of law concerns. This article attempts to set out a middle ground that is comfortable to both sides of the debate.

The United States' answer to the above question will affect fundamental issues such as national security, world order and human rights. The competing interests are substantial and create a myriad of problems. At the very root of this issue is the United States' interest in enforcing its laws—especially in the areas of terrorism and narcotics trafficking—and its need to provide security for American citizens as they travel through a world of interrelated policies and economies. Against these security concerns, the rights of individuals must be balanced against the rights of states. The United States must address these concerns while playing the role of world policeman and, simultaneously, while trying to guide the world legal standard to the rule of law. Internally, of course, the three branches of government—the executive, the legislative, and the judicial—always will compete to assert their interests. The most important competing interests in this area, however, derive from the common issue that defines this area of controversy—that is, determining the practical limitations, if any, on a nation's adhering to the rule of law and in a complex and often unfriendly world. Thomas Jefferson commented on this issue in the following manner:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[5]

Jefferson's logic is sound, but a difficulty still lies in determining exactly where to draw the line between the "high" duty of observing the rule of law, and the "higher obligation" of national self-preservation and necessity.

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[5]Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), *in* XII WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION 418 (Lipscomb ed. 1903) (emphasis added). The quintessential example of this is the dilemma of what one would do if he or she could get at the devil by striking down the rule of law.

If the United States is to take the lead in promoting universal values in a new world order,[6] it must decide what is just. In a coherent world in which the rule of law[7] is controlling, however, domestic and international laws must be consistent and predictable. Any good legal system therefore must have the characteristics of consistency and predictability.

This article will attempt to specify where and how the United States should "draw the line" in the area of international kidnapping. It first will discuss two examples of the abduction of a foreign citizen by the United States.[8] The article then will turn to the current state of international and domestic law and how it developed.[9] Next, it will examine the general concerns over abducting foreign nationals.[10] Finally, this article will analyze the application of the rules that have developed and will propose a set of circumstances under which an abduction might be consistent, both with a nation's practical concerns and with the rule of law.[11]

II. The Setting

A. The Capture of Fawaz Yunis

Fawaz Yunis[12] was a citizen and resident of Lebanon. On the morning of June 11, 1985, Yunis and four associates boarded a

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[6]Despite the abductions occurring during his administration, President Bush defines and supports the new world order in this way: "[The] new world order [is] an order in which no nation must surrender one iota of its own sovereignty; an order characterized by the rule of law rather than the resort to force; the cooperative settlement of disputes, rather than anarchy and bloodshed; and an unstinting belief in human rights." President George Bush, The United Nations in a New Era, Address before the U.N. General Assembly (Sept. 23, 1991), *in* DISPATCH, Sept. 30, 1991, at 720.

[7]For a discussion and application of the rule of law in a related context see JOHN NORTON MOORE, LAW AND THE GRENADA MISSION 1 (1984). "Law, however, is vitally important. Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and perceptions about lawfulness can profoundly influence both national and International support for particular actions." *Id.*

[8]*See infra* part II.

[9]*See infra* part III.

[10]*See infra* part IV.

[11]*See infra* part V.

[12]Fawaz Yunis was the subject of several federal district court rulings which held that individuals are not empowered to enforce extradition treaties and that constitutional due process protections apply to aliens abroad. United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988). The Supreme Court has held that, under many circumstances, an individual may not enforce an extradition treaty. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (*Verdugo I*). *But see* United States v. Rauscher, 119 U.S. 407 (1886). The Court, however, also has held that, in some circumstances, the Constitution does not apply to aliens abroad. *Verdugo I*, 494 U.S. at 259 (holding that the Constitution does not prohibit unlawful searches of alien premises abroad).

Royal Jordanian Airlines Boeing B-727 aircraft at the Beirut International Airport. The plane's destination was Amman, Jordan. The hijackers, armed with grenades and assault rifles, demanded to be taken to Tunis, where a summit of the Arab League was in progress. Once in the air, the Tunisian government twice refused the hijacked plane permission to land. The plane stopped to refuel in Larnaca, Cyprus, and in Palermo, Sicily. It eventually returned to Beirut. Once back in Beirut, Yunis and his associates released the crew and passengers[13] and wired the plane with explosives. Yunis then read a statement demanding the expulsion of Palestinians from Lebanon. The hijackers fired their weapons at the plane and it exploded. No one was injured.

Although Yunis was not the most nefarious of terrorists wanted by the United States government,[14] he was living openly in Beirut and was considered an important player in the Middle East terrorism network. He therefore was considered a "viable target."[15] As a result, Yunis was charged with hostage taking, hijacking, and the destruction of a plane.[16] The United States then began to formulate a plan to capture and bring Yunis to the United States to stand trial. The goal, according to one official, was to "teach them a lesson far beyond what the threat of force could convey. We will get [the terrorists] on our turf: On the law."[17] The plan became known as "Operation Goldenrod."[18] Planning of the operation involved a number of agencies and was coordinated through the White House Sub-Group on Terrorism. In early 1987, Oliver Revell, an Executive Assistant Director of the Federal Bureau of Investigation (FBI) and representatives from the Department of Defense, the Department of State, and the Department of Justice began to devise the plan to capture Yunis without the aid of any other state.[19] The FBI took the lead role in the planning of the operation and solicited the help of Jamal Hamdan. Hamdan was a friend of Yunis who subsequently had become a United States government informant. The lure to catch Yunis was a lucrative narcotics deal.

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[13]Three of the passengers were United States citizens.

[14]At the time, other terrorists had achieved greater notoriety, including those involved in the killing of a wheelchair-bound American tourist aboard the *Achille Lauro*, and the murder of a United States Navy diver after the Beirut Airport attack on *TWA Flight 847*.

[15]Steven Emerson & Richard Rothschild, *Taking on Terrorists*, U.S. NEWS AND WORLD REP., Sept 12, 1988, at 26, 28.

[16]The relevant statutes are 18 U.S.C. §§ 1203(b); *id.* §§ 32(a), (b).

[17]Emerson & Rothschild, *supra* note 15, at 26.

[18]United States v. Yunis, 681 F. Supp. 909, 911 (D.D.C. 1988).

[19]*Id.* at 912.

The location of this drug deal was to take place concerned United States officials for two reasons. First, officials were concerned about the violation of territorial sovereignty and questions that the violation would raise abroad and in American courts. The concern stemmed from United States agent's exercising their law enforcement powers on foreign soil.[20] The second, more functional concern, was that any action on foreign soil might involve the sovereign government.[21] If the foreign government became involved, the United States might lose Yunis to that state's jurisdiction, thereby depriving the United States of the force of the message it was attempting to send to international terrorists.[22] The intended message was, "We can get you anywhere."[23] Consequently, to avoid involving another nation, United States officials planned to abduct Yunis in international waters.

On the morning of September 13, 1987, Hamdan and Yunis left the coast of Cyprus on a small boat. They rendezvoused with a larger yacht, the *Skunk Kilo*, in international waters. Yunis and Hamdan were welcomed aboard the yacht and given a beer by an undercover FBI agent. Yunis was escorted to the stern of the yacht and upon a prearranged signal, two FBI officers grabbed Yunis's arms, kicked his feet out from under him, and handcuffed him. The "take down" fractured both of Yunis's wrists, although medical personnel did not diagnosis or treat the injuries until much later.[24] Yunis then was strip-searched, placed in a harness, handcuffed, and shackled in leg irons. An agent fluent in Arabic advised Yunis of the charges against him, but did not advise him of his rights.[25]

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[20] Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L. L. 444, 445 (1990).

[21] For instance, one of the strategies that the United States ruled out was using a commercial charter to bring Yunis back to the United States because the charter would have had to land and take off on foreign soil. This problem was encountered with the apprehension of some of the hijackers of the *Achille Lauro* who had surrendered to Egyptian authorities. The Egyptians had planned to fly the hijackers to Tunisia, but with the help of Lieutenant Colonel Oliver North and the Israelis, American fighter planes intercepted the flight and forced it to land at a North Atlantic Treaty Organization base in Italy. Once the plane was in Italy, the Italian government insisted on trying the hijackers and refused to turn them over to the United States, even though the hijackers had brutally killed the wheelchair-ridden American tourist, Leon Klinghoffer. The Italian authorities somehow allowed the ringleader, Mohammed Abbas, to escape.

[22] For a list of terrorist incidents in which no arrests resulted, see Emerson & Rothschild, *supra* note 15, at 30. The list leads to the inescapable conclusion that, prior to the Yunis affair, terrorists could not help but believe that they committed their crimes with immunity.

[23] Brian Jenkins, a terrorist expert with the Rand Institute, predicted that the Yunis capture would "have a chilling effect." *Id.* at 27.

[24] Actually, his broken wrists were not diagnosed correctly or treated until he reached Washington, D.C.

[25] Yunis finally was advised of his rights several days later, upon his arrival

The *Skunk Kilo* then sailed for the United States' supply ship, the *U.S.S. Butte*. While boarding the munitions ship, Yunis became nauseous and experienced several dry heaves. On board the *Butte*, Yunis was detained in an eight-by-ten-foot room that normally was used to store the mail. The room had no windows or functioning ventilation system, and was described by one of the attending physicians as "uncomfortably warm."[26] On board the *Butte*, Yunis was questioned frequently for periods ranging from thirty minutes to over two hours. During the first interview, Yunis was told that he had all the rights of a United States citizen,[27] and was read the standard "advice of rights" form.[28] This was the only time that Yunis was advised of his rights.

After five days at sea, the *Butte* rendezvoused with the aircraft carrier, the *U.S.S. Saratoga*. Yunis was sedated, put on a helicopter, and taken to Andrews Air Force Base, Maryland. He then was taken to, and arraigned before, a United States magistrate in Washington, D.C. With that appearance, Yunis became the first overseas terrorist to be brought to the United States to stand trial.[29] More importantly, Yunis's appearance in federal court demonstrated that the United States was willing to exercise self-help measures to combat terrorism.

B. The Kidnapping of Rene Martin Verdugo-Urquidez

Rene Martin Verdugo-Urquidez (Verdugo)[30] was a citizen and resident of Mexico[31] who was alleged to have been the leader of an operation in Mexico that smuggled narcotics into the United States. Verdugo[32] also was a suspect in the torture and murder of United States Drug Enforcement Agency (DEA) agent Enrique

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in the United States.

[26]*Id.* at 914.

[27]Yunis, of course, ultimately was not given all of the rights of a United States citizen because he had no standing to challenge the jurisdiction of the court to try him.

[28]United States v. Yunis, 681 F. Supp. 909, 914 (D.D.C. 1988).

[29]Emerson & Rothschild, *supra* note 17, at 26.

[30]Rene Martin Verdugo-Urquidez was the subject of a Supreme Court decision which held that the provisions in the Fourth Amendment of the United States Constitution regarding searches and seizures do not apply to searches and seizures conducted by agents of the United States of property owned by a nonresident foreign national in a foreign country. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[31]Verdugo did possess, however, a United States alien registration "green card."

[32]Interestingly, "Verdugo" is the Spanish translation of the word, "executioner."

Camarena in February of 1985.[33] In August of 1985, the DEA filed a complaint against Verdugo on the basis of a tip from an informant that Verdugo intended to smuggle several tons of marijuana into the United States. A warrant was issued for his arrest by the United States District Court for the Southern District of California. On January 24, 1986, Verdugo was apprehended in Mexico, at the request of the United States government, "by several individuals"[34]—six Mexican police officers.[35] Some confusion has arisen as to how the consent of the Mexican officers was obtained and exactly what role the United States played in the abduction.[36] Apparently without Mexico's consent, however, Verdugo was placed face down in the back of the officers' unmarked vehicle and transported to the United States. Once in the United States, United States marshals placed him under arrest and later turned him over to agents of the DEA.

On January 25, 1986, DEA agents and the local commandant of the Mexican Federal Judicial Police searched Verdugo's residence in Mexicali and his beach house in San Felipe. The search disclosed a tally sheet that indicated that Verdugo actually was involved in smuggling narcotics into the United States. This information became a large part of the evidence used to convict Verdugo, and the United States Supreme Court later found that its acquisition was constitutional.[37]

Although the Supreme Court ruling on the extraterritorial application of the Fourth Amendment was important, it did not address the manner by which Verdugo was brought before the

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[33] Dr. Humberto Alvarez-Machain was brought to justice for the murder of Camarena in the United States. Like Verdugo, he too was kidnapped despite the protestations of the Mexican government. "Dr. Mengale," as the DEA agents called him, allegedly gave Camarena drugs to revive him after he was tortured so the captors could interrogate him further. He was abducted by plain clothed individuals, put aboard a private plane, and flown to El Paso, Texas, where he was arrested by DEA agents. The Mexican government apparently would not extradite Machain or prosecute him. The Mexican government accused the United States of sponsoring and arranging the abduction and issued a formal protest claiming that the abduction violated Mexico's sovereignty. The United States denied the allegations. Both sides claimed that officials in the other's government participated in the abduction. Clearly, money passed hands and some sort of covert deal may have been struck between the two governments. *See Andreas Lowenfeld, Kidnapping by Government Order: A Follow-up*, 84 AM. J. INT'L. L. 712 (1990).

[34] United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 2986 (1992) (vacating judgment) (*Verdugo II*).

[35] Lowenfeld, *supra* note 20, at 448 (1990). The question as to exactly who these individuals were, and in what capacity they acted, was remanded by the Ninth Circuit Court of Appeals. *Verdugo II*, 939 F.2d at 1362.

[36] *Id.*

[37] *Verdugo I*, 856 F.2d at 1214. *See generally* United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992).

court. On March 16, 1988, a federal grand jury indicted Verdugo on the charges, which led him to challenge the legality of his abduction.[38] Specifically, Verdugo filed a motion to dismiss, claiming that his arrest violated the extradition treaty between the United States and Mexico[39] because the individuals who arrested him in Mexico were acting on behalf of the United States government.[40] The district court did not hold an evidentiary hearing on this issue, notwithstanding the existence of a dispute over the identity of the abductors. Instead, the court held that even if the appellant's allegations were true, they did not warrant dismissal.[41] Subsequently, a jury convicted the Verdugo of all of the charges proffered against him.[42] The court sentenced him to four, consecutive sixty-year terms to run concurrently with a life sentence.[43]

Verdugo raised twenty-one issues on appeal,[44] but the court considered only the jurisdictional issue.[45] On July 22, 1991, the United States Court of Appeals for the Ninth Circuit held that the United States could not forcibly remove, or cause to be removed, a foreign national from another nation in violation of an extradition treaty between the United States and that nation. Furthermore, the Ninth Circuit held that if the other nation objects to the removal of the foreign national, that individual successfully may object to the court's exercise of jurisdiction over his or her person.[46]

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[38]The federal grand jury returned a five-count second, superseding indictment that charged Verdugo with, among other crimes, the murder of Special DEA Agent Enrique Camarena-Salazar. *Verdugo II*, 939 F.2d at 1343.

[39]Extradition Treaty Between the United States of America and the United Mexican States, Jan. 5, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[40]In a letter of protest by the Mexican government, the individuals were described as Mexican police officers hired by the DEA to kidnap Verdugo, while the State Department merely suggested that the officers only acted in cooperation with American authorities. *Verdugo II*, 939 F.2d at 1343.

[41]The district court relied on Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952), in reaching its decision. The court stated that "an abduction does not violate an extradition treaty." *Verdugo II*, 939 F.2d at 1343.

[42]United States v. Jesus Felix-Guterrez, Raul Lopez-Alvarez, Rena Martin Verdugo-Urquidez, et al., No. CR 87-422(A)-ER (C.D. Cal. June 20, 1988) (unpub.).

[43]*Verdugo II*, 939 F.2d at 1343.

[44]Jurisdiction in the circuit court of appeals was proper pursuant to 28 U.S.C. § 1291 (1988).

[45]"If a court lacks jurisdiction over a party, then it lacks 'all jurisdiction' to adjudicate the party's rights." *Verdugo II*, 939 F.2d at 1344 (quoting Rankin v. Howard, 633 F.2d 844, 848 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981)).

[46]*Id.* The Supreme Court effectively overturned this decision in *Alvarez-Machain*, 112 S. Ct. at 21881. *See supra* note 4.

III. The Law

To determine the legality of abducting individuals from foreign soil, abduction itself must be defined. This article is concerned with the following two forms of abduction: (1) kidnapping or forcible abduction; and (2) informal rendition.[47] Kidnapping or forcible abduction involves action taken by a state[48]—the forum state—that seeks the individual in the state that harbors the individual—the asylum state.[49] In addition, to constitute an actual kidnapping, the forum state must take that action without the knowledge or acquiescence of the asylum state. Informal rendition, on the other hand, involves the acquisition of the individual with some degree of complicity from the asylum state. Informal rendition circumvents the formal extradition process if one exists. In particular, because the United States has extradition treaties with over one hundred countries,[50] a circumvention of the extradition process almost always will occur incident to informal rendition. Informal rendition, however, also can arise under circumstances in which no such treaty is in effect.

A. International Law

International abduction or irregular rendition involves the potential for three distinct violations of international law. First, abduction involves an infringement on the territorial integrity and sovereignty of another state. Second, abduction and irregular rendition violate the seized individual's basic human rights. Finally, abduction and irregular rendition create a disruption in world public order. Although the second violation never may be remedied totally by a countervailing consideration, certain

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[47] Several other forms of gaining an individual for trial in the forum state also exist. One form is disguised extradition. This involves the host country's placing the individual in a situation in which that individual becomes subject to the jurisdiction of the forum state. An example of this occurs when a country uses its immigration laws to expel or deport an individual. All of these methods are accomplished outside of the limits of any extradition treaty or may be used when no treaty exists, depending on the cooperation of the involved states. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 121-45 (1974).

[48] Action taken by the state also includes instances in which the state sponsors individuals to carry out an abduction. Some questions have arisen concerning the legality of the conduct if the action is taken by purely volunteer actors under no direction from the forum state. This question is explored more fully *infra* part IV.A.

[49] Nothing should be read into the term, "asylum" in this context. It is merely definitional and is not intended to imply any complicity in the relationship between the individual and that state.

[50] This is more than any other country. John G. Kester, *Some Myths About United States Extradition Law*, 76 GEO. L.J. 1441, 1454 (1988).

circumstances may arise in which seizing an individual in a foreign country would be permissible—the most notable circumstance being when the forum state is acting in self-defense. The principle of self-defense is a bedrock principle of international law and is necessary for the maintenance of world public order. Therefore, it clearly is one of a nation's primary concerns when it considers international abduction as a remedy.[51]

1. Sovereignty.—A state, through its agents, legally may not go into another state without that other state's permission and snatch an individual residing in that other state. The *Restatement (Third) of the Foreign Relations Law of the United States* puts this proposition in unambiguous terms by stating, "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."[52] Accordingly, the forum state may not arrest an individual in an asylum state and bring him or her back to the forum state without the asylum nation's consent. To do so would violate a principal rule of international law, which states that a nation is absolutely sovereign within the boundaries of its own territory. "[I]t is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that its nationals are entitled to use and enjoy their territory and property without interference from an outside source."[53] Furthermore, states have the "the obligation ... to refrain from performing jurisdictional acts within the territory of other states except by virtue of general or special permission."[54] "Performing jurisdictional acts" includes sending agents into foreign territories to apprehend persons accused of having committed a crime.

The United States has accepted this position on more than one occasion. In 1876, Canadian authorities seized a Canadian fugitive in Alaska and returned him to Canada. United States Secretary of State Fish protested the action, stating that "a violation of the sovereignty of the United States has been committed." In another case, the Canadian government abducted two individuals from the United States and returned them to Canada to stand trial. The United States protested the abduction,

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[51] *See infra* part II.A.4; for a discussion of the application of this rule, see *infra* part IV.D.

[52] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1986).

[53] 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 183 (1965).

[54] 1 INTERNATIONAL LAW 487-88 (E. Lauterpacht, ed. 1970).

to which Canada responded by apologizing and offering to return the two individuals.[55]

Some commentators have argued that the amount of participation by the forum state is material when considering whether the abduction was a violation of international law.[56] Accordingly, an abduction carried out by purely volunteer actors would not be considered state action. Because international law is designed to control the conduct of states in the international arena, and not necessarily the conduct of individuals,[57] a state may take internal action against the offending individual pursuant to domestic law, but no international law violation occurs.

Justifying this line of thinking, however, is difficult for several reasons. First, states that wish to avoid the extradition process could locate actors who wish to act in their private capacities. Second, simply determining if an individual was acting privately or at the behest of a state may be prohibitively difficult. For example, a bounty hunter who is acting at the behest of those who set the bounty arguably could be working in a private or state capacity.[58] The argument over this line of thinking ultimately leads to squabbling over definitions and encourages disrespect for extradition procedures and national sovereignty. Additionally, it does not solve the problems arising from the potential abuse of the sought-after individual's basic human rights nor the threat to international world order brought about by territorial violations essentially sanctioned by the forum state.

2. Human Rights.—The second potential violation of international law concerns damage to the abducted individual's basic human rights. Actions taken by the state to abduct or informally render an individual involve not only the state itself, but also the liberty of the abducted person.[59] While none of the international human rights conventions explicitly have stated that kidnapping or irregular rendition is a violation of international human rights law,[60] both the United Nations Charter and the Universal

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[55] *See House Hearing*, *supra* note 3, at 33 (prepared statement of Abraham D. Sofaer, the Legal Advisor, U.S. Department of State).

[56] *See* Dickenson, *Jurisdiction Following Seizure of Arrest in Violation of International Law*, 28 AM. J. INT'L. L. 231 (1934).

[57] Increasingly, United States courts have demonstrated a willingness to recognize that a treaty can confer powers and rights on the individual above and beyond those granted to the state. *See generally* United States v. Rauscher, 119 U.S. 407 (1886); Sohn, *The New International Law: The Protection of Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

[58] *See infra* part IV.A.

[59] II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 173 (1965).

[60] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (1986).

Declaration on Human Rights prohibit this conduct. The character of the protected rights are not in question. They are the rights to liberty, security, due process of law, and protection from arbitrary arrest.

The United Nations Charter refers to a respect for human rights in Articles 1(3), 13(1)(b), 55(c), 62(2) and 76(c). Furthermore, Article 56 requires member states to promote and respect human rights as set forth in Article 55.[61] While the United Nations Charter sets out the obligation of nations to respect human rights, the Universal Declaration of Human Rights,[62] approved by the United States at its adoption in 1948 by the General Assembly of the United Nations, is more specific on the issue of arbitrary arrests. This declaration is taken to be a "restatement of customary international law."[63] Specifically, Article 3 states that "everyone has the right to life, liberty and security of person," and Article 9 states that "no one shall be subjected to arbitrary arrest." Arguably, an arrest that fails to satisfy the conditions precedent to the exercise of jurisdiction and that contravenes interests protected by territorial sovereignty is arbitrary and, therefore, in violation of international law.

3. World Public Order.—Finally, abduction is a potential violation of international law because it jeopardizes world public order. Abduction violates world public order in three distinctly dangerous ways. First, a forum state poses a threat to the internal security of the asylum nation when that forum state violates the asylum nation's territory. Second, because it necessarily requires states to circumvent formal extradition procedures, abduction tends to foster disrespect for international law. Third, it encourages other states to carry out similar actions in other states.

Forcible abduction of an individual clearly can threaten the security of an asylum state. "The most serious consequences can

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[61]Article 55 states:

> With a view to the creation of conditions of stability and well being, which are necessary of peaceful and friendly relations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:
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> ....
>
> (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

[62]G.A. Res. 217A (III), 3(1) U.N. GAOR Resolutions 71, U.N. Doc. A10 (1948).

[63]Ruth Wedgwood, *The Argument Against International Abduction of Criminal Defendants Amicus Curiae Brief Filed by the Lawyers Committee for Human Rights in* United States v. Humberto Alvarez-Machain, 6 AM. U. J. INT'L L. & POL'Y 537, 540 (1991).

result from such practice on the peaceful relations of the respective states and are a threat to world public order."[64] When an extradition treaty is in force between states, and the forum state forcibly seizes a foreign national for whom the asylum state has refused extradition, the threat is especially substantial. That threat actually may cause the asylum state to react violently.

A threat to world public order also arises when a fugitive is abducted because the circumvention of extradition procedures undermines the process of international law and fosters its disrespect. The United States currently is attempting to foster an international climate in which the rule of law is respected and basic human rights are honored. When a state holds itself out to the world community as a defender of justice, and resorts to practices that are not acceptable even within its own borders encourages others to act with similar lawlessness. According to one scholar,

> The paradox is quite interesting in that states on the one hand seek to curb terrorism which includes kidnapping, yet condone it when committed by their agents or by "private volunteers" when it is to their benefit. This dual standard is all too evident and only leads to further disregard of international law which after all relies on voluntary compliance.[65]

Similarly, world public order also is disrupted when an asylum country attempts to bring the abductors to justice. These individuals, whom the forum state sent into the asylum state's territory, would have violated the asylum state's laws by abducting someone from within the asylum state's territory. Accordingly, the asylum state might, in essence, attempt to kidnap the kidnappers. This tautology of responses inevitably could destabilize the relationship between the two countries.

4. Self-Defense.—Notwithstanding the predominant view that abduction is disruptive to world order, circumstances may arise in which the abduction would be permitted by international law. Although Article 2(4) of the United Nations Charter prohibits the use of force against the territorial integrity of a member nation, that prohibition is not absolute. Article 51 of the United Nations Charter recognizes the right of every state to self-defense.[66] The

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[64] M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 13 (1968).

[65] BASSIOUNI, *supra* note 47, at 127.

[66] Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual of collective self-defense if an armed attack occurs against

actions taken in self-defense must, of course, be proportional, made in good faith, and taken out of necessity.[67] According to the Legal Advisor to the United States Department of State this includes "the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens."[68] The United States relied on this reasoning to support Israel's 1976 raid on Entebbe, which violated Ugandan territorial integrity. "[G]iven the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impractical."[69] Therefore, when a state is legitimately threatened, and that threat stems from aggression that is ongoing and sustained, it may use commensurate force to protect itself and its citizens.[70]

5. The Eichmann Case as an Example.—As an illustration, the Eichmann case demonstrates many of the concerns noted here. On June 2, 1960, the government of Argentina was informed by the government of Israel that "Jewish volunteers," among them some Israelis, had found Adolph Eichmann, had abducted him, and had brought him to Israel. Eichmann, "the person principally responsible for the extermination of the Jews of Europe," had been hiding under an assumed name in Argentina when he was seized.[71] Allegedly, Eichmann willingly came with the volunteers to stand trial in Israel. The abduction, however, angered Argentina, even though the two countries had maintained friendly relations and the Israeli government had claimed that it did not sponsor the abduction. The government of Argentina reacted to Eichmann's apprehension by declaring that it

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> a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[67] *See* MCDOUGAL & FELICIANO, *Conditions and the Expectation of Necessity*, *in* LAW AND MINIMUM WORLD PUBLIC ORDER 231-41 (1961).

[68] *House Hearing*, *supra* note 3, at 35 (prepared statement of Abraham D. Sofaer, the Legal Advisor, U.S. Department of State).

[69] *Id.* at 35 (statement by the United States representative to the United Nations).

[70] For a discussion of one of the primary points—that is, exactly when a state may invoke article 51 to justify a kidnapping—see *infra* part IV.C.

[71] Dispatch No. 799, American Embassy, Tel Aviv, Israel, to the Department of State, June 8, 1960, MS. Dep't of State, file 662.0026/6-860 (official translation of text of Israel communication of June 4, 1960, to Argentina explaining the circumstances of Eichmann's capture), *reprinted in* THE JERUSALEM POST, June 8, 1960.

> ... cannot help wondering whether consideration should not have been given to the obligation to show respect for the sovereignty of a friendly State with which Israel maintains the most cordial relations—a respect which is intrinsically bound up with the principle of equality prescribed by the United Nations Charter and forming the basis of international law.[72]

Because of this transgression, Argentina appealed to the United Nations Security Council.

> It is necessary to adduce further considerations in order to underline the gravity of the resulting situation. The illicit and clandestine transfer of Eichmann from Argentine territory constitutes a flagrant violation of the Argentine State's right of sovereignty, and the Argentine Government is legally justified in requesting reparation. That right cannot be qualified by any other considerations, even those invoked by the Government of Israel with regard to the importance attaching to the trial of a man accused of exterminations in concentration camps, although the Argentine Government and people understand those reasons to [their] full [value]. Any contrary interpretation would be tantamount to approving the taking of the law into one's own hands and the subjecting of international order to unilateral acts which, if repeated, would involve undeniable dangers for the preservation of peace.[73]

The Security Council responded by publishing a resolution which acknowledged that Eichmann's abduction violated Argentina's sovereignty; admonished all states that future actions of this nature could endanger international peace and security; requested Israel to make reparations to Argentina; and expressed hope that

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[72]Text of the Argentine note of June 8, 1960, as transmitted in a letter of June 10, 1960, from the Representative of Argentina, addressed to the President of the Security Council, 5/4334, June 10, 1960. The note went on to state,

> the Argentine Government, in presenting to Israel its most explicit protest against the act committed in the face of one of the fundamental rights of the Argentine State, hopes that Israel will make the only appropriate reparation for this act, namely, by returning Eichmann within the current week and punishing the persons guilty of violating our national territory; we are confident that this request will be complied with immediately.

[73]U.N. Doc. 5/4336, June 15, 1960.

the episode's resolution would advance the friendly relations between Israel and Argentina.[74]

The government of Israel tried Eichmann[75] and apologized for the transgression. Argentina accepted the apology. Clearly, even with a criminal of such notoriety, the disruption of world order and territorial sovereignty are substantial. Equally clear is that the world arena saw Eichmann's abduction as a violation of international law, notwithstanding Argentina's acceptance of the Israeli apology.

B. The History of Court Treatment in the United States

The issue of whether or not the United States or its agents legally may abduct a foreign national from foreign soil for criminal prosecution in the United States has been the subject of

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[74]The full text of the resolution was as follows:

The Security Council,

Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic,

Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations,

Having regard to the fact that reciprocal respect for and the mutual protection of the sovereign rights of States are an essential condition for their harmonious coexistence,

Noting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace,

Mindful of the universal condemnation of the persecution of the Jews under the Nazis, and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused,

Noting at the same time that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused,

1. *Declares* that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security,

2. *Requests* the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law,

3. *Expresses the hope* that the traditionally friendly relations between Argentina and Israel will be advanced.

See U.N. Doc. S/4349, June 24, 1960.

[75]Israel based its jurisdiction on universal jurisdiction over crimes against humanity. Additionally, several forms of jurisdiction are available for nations to exercise in bringing fugitives to justice. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 178 (1991).

considerable debate for over one hundred years.[76] Early decisions focused on the implications the abduction had on the Due Process Clause of the Fifth Amendment.[77] More recently, because of the incredible growth in the number of extradition treaties into which the United States has entered,[78] courts have supplemented—and, when an extradition treaty has existed, actually have supplanted—the due process issue with principles of modern contract law.[79] Courts often have avoided due process and contract law concerns by holding that no treaty applies.[80] Other courts have struggled with the question of whether or not the alien can invoke a treaty when a treaty does apply.[81] Both concerns merit an historical examination.

1. Does an Extradition Treaty Apply?—The United States Supreme Court first considered the question of whether or not an alien defendant could be prosecuted in the United States after being abducted from a foreign country in *Ker v. Illinois*.[82] Ker was a citizen of the United States who fled to Peru to escape larceny charges in Illinois.[83] Henry Julian, a private detective in Peru, received extradition papers from the United States government.[84] Instead of executing those papers, Julian kidnapped Ker and placed him on a vessel bound for the United States.[85] Peru never objected to this abduction.[86] Ker, however, protested his abduction

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[76] *See generally* Lowenfeld, *supra* note 20, at 448; Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L. J. 427 (1957).

[77] *See, e.g.*, Ker v. Illinois, 119 U.S. 436 (1886) (even if the defendant was denied due process in his apprehension, he would receive it in the courts of the United States); Frisbie v. Collins, 342 U.S. 519 (1952) (reaffirming *Ker* in a domestic setting).

[78] The United States is a party to over 100 extradition treaties. Kester, *supra* note 50, at 1454.

[79] *See, e.g.*, *Verdugo II*, 939 F.2d at 1352 ("treaties are in the nature of contracts between nations"); United States v. Caro-Quintero, 745 F. Supp. 599, 610 (C.D. Cal. 1990) (discussing the "unilateral[] abduction[]" of a national from a "contracting partner"); United States v. Toro, 840 F.2d 1221, 1225 (5th Cir. 1988) (either party may object to an abduction after it has occurred, implying contract principles).

[80] *See supra* note 12 and accompanying text.

[81] *See, e.g.*, Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th cir. 1985) (an individual lacks standing to invoke the rule of speciality); United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981) (extradition treaties are for the benefit of governments and not individuals); *see also* Cook v. United States, 288 U.S. 102, 121 (1933) (a vessel's owner may invoke some treaty rights).

[82] *Ker*, 119 U.S. at 436.

[83] *Id.* at 438.

[84] *Id.*; Yvonne G. Grassie, Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U.L.Q. 1205, 1210 (1986).

[85] *Ker*, 119 U.S. at 438.

[86] *Caro-Quintero*, 745 F. Supp. at 610. The government of Peru actually

and challenged the jurisdiction of the state court on two grounds. Specifically, he claimed that his abduction violated his due process rights and violated the extradition treaty between Peru and the United States.[87] The Court rejected the second claim holding that no state action was involved and that, therefore, the treaty was not invoked.[88] The Court rejected the first claim, holding that the trial itself satisfied the requirements of due process notwithstanding the "irregularities in the manner in which [Ker was] brought into the custody of the law."[89]

Ker was interpreted and expanded in *Frisbie v. Collins*.[90] The proposition that these cases expounded came to be known as the *Ker/Frisbie* doctrine. In the words of the Court,

> The Court has never departed from the rule announced in Her, that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of forcible abduction.... There is nothing in the Constitution that requires a court to permit a guilty person to escape justice because he was brought to trial against his will.[91]

The *Frisbie* case, however, did not involve a question of foreign abduction. The defendant was abducted in Illinois and returned to Michigan, where he faced murder charges.[92] The Court again found that due process was satisfied if the government informs the defendant of the charges and receives a fair trial.[93] Courts have applied the *Ker/Frisbie* doctrine with regularity and as recently as 1991 in the *Verdugo* case.[94]

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could have objected to the abduction and could have sought an extradition of Julian to answer for his abduction of Ker. *Ker*, 119 U.S. at 444. The Peruvian administration, however, was largely a token government because the country was in revolution and much of Peru was occupied by Chilean forces. Accordingly, Julian's failure to use the proper extradition papers may have been caused by his inability to locate an effective and legitimate government. *See generally* Kester, *supra* note 50, at 1451; *Caro-Quintero*, 745 F. Supp. at 610-12.

[87] *Ker*, 119 U.S at 439.

[88] *Id.* at 441-43.

[89] *Id.* at 440.

[90] 342 U.S. 519 (1952).

[91] *Id.* at 522 (citations omitted).

[92] *Id.* at 519.

[93] *Id.* at 522.

[94] *See, e.g.*, Gernstein v. Pugh, 420 U.S. 103, 119 (1975) ("Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent detention."); United States v. Crews, 445 U.S. 463, 474 (1980) (same); Stone v. Powell, 428 U.S. 465, 485 (1976) ("judicial proceedings need not abate when the defendant's person is unconstitutionally seized"); Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) ("the 'body'

Nevertheless, courts gradually have narrowed the *Ker/Frisbie* doctrine.[95] Perhaps the most notorious decision limiting the broad reading given to *Ker* was the decision reached in *United States v. Toscanino*.[96] Toscanino was convicted of conspiracy to import narcotics into the United States after he was brutally abducted from Uruguay and brought to the United States.[97] The court held that if a defendant was subjected to conduct that shocks the conscience and if the conduct was carried out with complicity of the United States, a due process violation occurred thereby prohibiting a trial.[98] Left open to interpretation was what, exactly, would constitute conduct that shocked the conscience.[99] The court even suggested that when this vision of due process conflicted with the *Ker/Frisbie* doctrine, "the *Ker/Frisbie* version must yield."[100] Toscanino's revised notion of due process likely was the result of the decisions handed down in *Rochin v. California*[101] and *Mapp v. Ohio*.[102] In those cases the Court had retreated from the reading of due process best exemplified by *Pennoyer v. Neff*,[103] in which the Court ruled that the "foundation of jurisdiction was physical power."[104] The Court's ruling in *Ker* is reconcilable with the infant stage of the due process doctrine that was applied to the states via the Fourteenth Amendment—an amendment that had been added only eighteen years before the *Ker* decision.[105] *Toscanino*, on the other hand, arguably incorporated almost a century of enlightened reading of the due process doctrine. The Supreme Court declined certiorari in *Toscanino*; therefore, the Court did not face the question of how contemporary notions of the Fifth Amendment Due Process Clause would apply in this situation. Some courts have

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or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest"); United States v. Sobell, 142 F. Supp. 515, 523 (2d Cir. 1956) (the rule [of international law] is that a seizure of a fugitive on foreign soil in violation of international law will not deprive the courts of the offending State of jurisdiction over the person of the fugitive when he is brought before them").

[95] *See generally* Charles Fairman, Comment, Ker v. Illinois *Revisited*, 47 AM. J. INT'L. L. 678 (1953).

[96] 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

[97] *See* Lowenfeld, *supra* note 20, at 467.

[98] *Toscanino*, 500 F.2d at 274-75.

[99] Judge Mansfield left a broad range of conduct open for censure. "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *Id.* at 274.

[100] *Id.* at 275.

[101] 342 U.S. 165 (1952).

[102] 367 U.S. 643 (1961). *See generally* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Lowenfeld, *supra* note 20, at 468.

[103] 95 U.S. 714 (1877).

[104] McDonald v. Mabee, 243 U.S. 90, 91 (1917) (Holmes, J.).

[105] Kester, *supra* note 50, at 1450.

followed *Toscanino*;[106] some have read it narrowly only to include cases of torture;[107] others have retreated from its proposition;[108] and still others have rejected it completely.[109] Consequently, how notions of due process will apply to similar situations in the future is unclear.

Whether or not due process considerations prohibit abduction as a method of bringing a fugitive to justice in the United States, a United States court must consider whether a treaty may have an effect on the case before it. Commentators disagree over whether or not a treaty is invoked when an United States agent ignores an extradition treaty and kidnaps a fugitive.[110] In essence, this was the basis for the Supreme Court's answer to Ker's second claim—that is, no violation of an extradition treaty could have occurred if the treaty never was invoked.[111] While the facts in *Ker* indicate that Julian acted on his own accord in kidnapping Ker,[112] the kidnappers in several cases apparently were agents of the United States.[113] Even in those cases, however, the government has argued that, because no formal extradition procedures were initiated, the treaty never was invoked.[114] Furthermore, the government has argued that when no specific prohibition of forcible abduction appears in an extradition treaty, the treaty's silence implies that abduction implicitly is permitted.[115] In other words, "international law permits that which it does not forbid."[116]

In *Rauscher v. United States*,[117] decided on the same day as *Ker*, the Court held that an implied term that limited the power of the state over the extradited individual could be read into an

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[106] *E.g.*, United States v. Marzano, 537 F.2d 257, 271-72 (7th Cir. 1976), *cert. denied*, 429 U.S. 038 (1977) (implying that the court would not follow *Toscanino*).

[107] *E.g.*, United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (torture not shown and the *Ker* rule applied).

[108] *E.g.*, United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) ("Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process").

[109] United States v. Winter, 509 F.2d 975 (5th Cir. 1975), *cert. denied*, 423 U.S. 825 (1976).

[110] *See generally* Garcia-Mora, *supra* note 76, at 430-33.

[111] *Ker*, 119 U.S. at 441-43.

[112] This was precisely why the treaty was not invoked. *Id.*

[113] For an extensive listing of these cases, see United *Caro-Quintero*, 745 F. Supp. at 611-12.

[114] *Id.* at 609.

[115] *Verdugo II*, 939 F.2d at 1349. This essentially was the holding in *Alvarez-Machain*.

[116] Robert Turner, Verdugo II *Reconsidered: The Law and Policy of Rendition*, INTELLIGENCE REPORT, Summer 1991, at 3.

[117] 119 U.S. 407 (1886).

extradition treaty.[118] In *Rauscher*, the Court enunciated what would come to be known as the "rule of speciality"[119]—that is, an extradited individual may be tried only for those charges for which he or she specifically was extradited.[120] Even though this was not an express term of the treaty in *Rauscher*,[121] the Court stated that such a term must be implied to give effect and meaning to the treaty.[122]

Perhaps the most basic reason nations enter into extradition treaties is to protect their sovereignty.[123] An extradition treaty is based upon reciprocity.[124] The United States recognizes no independent right of foreign nations to exercise their police powers on American soil.[125] Furthermore, the exercise of law enforcement authority by one sovereign, in the territory of another, long has been recognized as a violation of international law.[126] In one case, the Supreme Court actually held specifically that "the principles of international law recognize no right to extradition apart from treaty."[127] Those international principles are a part of United States law,[128] as are treaties[129]—especially when they are not preempted by our federal law.[130] Similarly, under *Rauscher*, if a nation feels compelled to abduct a fugitive, the abducted individual will not have been "extradited" on any specified charge; therefore, the abducting state actually could not try the fugitive for any specified crime. Accordingly, extradition treaties do not necessarily facilitate the orderly return of fugitives, nor do they necessarily

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[118] *Id.*

[119] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1987).

[120] Kester, *supra* note 50, at 1466.

[121] It is now an express provision of most extradition treaties. *Id.* at 1467.

[122] *Rauscher*, 119 U.S. at 422-23; *see also* Cook v. United States, 288 U.S. 102, 121-22 (1933).

[123] *See generally* Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Y. Dinstein ed. 1989), *cited in* Lowenfeld, *supra* note 20, at 472; 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE, ch. 5, § 2, at 194 (2d ed. 1987).

[124] Garcia-Mora, *supra* note 76, at 427.

[125] "[T]he Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 DEP'T STATE BULL. 251 (1948).

[126] *See, e.g.*, U.N. CHARTER art. 2, para. 4 (United Nations prohibition from the use of force against the territorial integrity of a state); 15 U.N. SCOR (868th mtg. 1, U.N. Doc. s/p.v. 868 (1960)) (United Nations condemns kidnapping of Adolph Eichmann from Argentina by Israel).

[127] Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

[128] The Paquette Habana, 175 U.S. 677, 700 (1900).

[129] U.S. CONST. art. VI, § 2.

[130] *Paquette Habana*, 175 U.S. at 700.

prevent the discretionary exercise of police power on foreign soil.[131] Instead, they often do no more than complicate the justice process by creating another unnecessary, yet formal, condition precedent to a state's exercise of criminal jurisdiction.

The debate continues today over whether or not an extradition treaty has any bearing on a defendant who has been kidnapped from a foreign state and brought to trial in the United States. In one instance, how the defendant is brought before the court may be unimportant and, in another, the extradition treaty may not apply because it never was invoked.

2. Can a Defendant Invoke the Extradition Treaty if it Applies?—When the courts have held that an extradition treaty does apply, they have struggled with two subsequent questions. First, does the circumvention of the treaty by the forcible abduction of an alien on foreign soil destroy the court's personal jurisdiction? Second, does the individual defendant have standing to raise the jurisdictional issue if it is applicable? While these questions focus more on the contractual relations between parties than they do on due process issues, due process considerations are always present.[132]

Before the United States government criminally can prosecute a person, the court must establish jurisdiction over that individual.[133] As a general matter, the court has personal jurisdiction over an individual when that individual physically appears within the territorial jurisdiction of the court.[134] Again, due process questions may defeat the exercise of jurisdiction in some cases. To return to *Ker*, the method by which the defendant was brought before the court may be insufficient to defeat jurisdiction.[135] The *Ker* rule, however, is limited by *Rauscher*, which states that the Court has no jurisdiction over the individual to decide charges for which the individual was not extradited.[136] In the *Ker* line of cases, in which

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[131] As an historical note, part of the impetus behind extradition treaties is to protect political fugitives. Allowing kidnapping would circumvent this desired protection. *See* Grassie, *supra* note 84, at 1210.

[132] Obviously, when a treaty is invoked, the parties are engaged in a contract—that is, a status. The way in which a defendant is brought into court, however, always implies a process.

[133] For purposes of this article, only personal jurisdiction will be considered. The court also must have subject matter jurisdiction over the accused. Several principles allow subject matter jurisdiction in cases such as the ones considered here, including, "objective territoriality," the "protective" principle, the "nationality" principle, the "passive personality" principle, and the "universality" principle. *See generally* Grassie, *supra* note 84, at 1210.

[134] Pennoyer v. Neff, 95 U.S. 714 (1877); Burnham v. Superior Court of Cal., 495 U.S. 604 (1980) (presence is enough to establish personal jurisdiction).

[135] *Ker*, 119 U.S. at 440.

[136] *Rauscher*, 119 U.S. at 424.

a treaty is not invoked, the issue of jurisdiction cannot be separated from the issue of due process.

A more important jurisdictional issue, however, is raised by the *Rauscher* line of cases, which do involve the application of a treaty.[137] Stated broadly, this issue concerns the separation of powers doctrine and the political question doctrine. Often the United States government uses kidnapping as a measure of last resort when normal channels fail.[138] In these cases, the political branch of the government essentially makes a decision to avoid, or to go beyond, an existing extradition treaty. A court's decision not to exercise jurisdiction over the individual not only might infringe upon the executive branch's authority to conduct foreign policy in contravention of the separation of powers doctrine,[139] but also may present a nonjusticiable political question that involves "initial policy determination[s] of a kind clearly for nonjudicial discretion."[140] In general, "a case can be made that neither the courts nor the Congress should deny the executive branch flexibility in this area."[141]

On the other hand, the courts determined questions of jurisdiction and justiciability as early as 1886, in *Rauscher*. Courts also have ruled often on the legality of government actions.[142] Review is a fundamental tenet of the separation of powers doctrine, and it does not necessarily infringe upon the government's exercise of discretion. Furthermore, Congress has delegated the regulation of the process of extradition of United States residents to foreign states to the judicial branch.[143] One commentator has suggested that by interpreting these doctrines as prohibiting judicial review of government actions, the courts merely avoid the problem. "Certainly, the essential nature of the problem cannot be hidden by an attempt to separate the jurisdiction of the courts from the competence of the State in matters of international concern. These are manifestations of indivisible governmental power."[144] Finally,

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[137] See *supra* notes 50-54 and accompanying text.

[138] *Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess., at 81 (1985) (statement of Abraham Sofaer, Legal Advisor to the State Department).

[139] *See Verdugo II*, 939 F.2d at 1356-57.

[140] Baker v. Carr, 369 U.S. 186, 217 (1962).

[141] Turner, *supra* note 116, at 6 (Professor Turner makes the case for executive control, especially when the asylum state wishes to keep its consent secret).

[142] *Verdugo II*, 939 F.2d at 1355.

[143] 18 U.S.C. § 3184 (1988).

[144] Garcia-Mora, *supra* note 76, at 433.

at least one court[145] has framed the debate in terms of whether the treaty is self-executing[146] or executory.[147] That court held that because extradition treaties are self-executing,[148] the courts have the power to enforce them without implementing legislation,[149] thereby giving them jurisdiction.

The second proposition with which the courts have struggled is whether the extradition treaty confers standing upon the individual to challenge jurisdiction.[150] Ordinarily, only a state may make a claim that a treaty has been violated.[151] Similarly, courts have held that only a sovereign may rely on an extradition treaty violation as a basis for objecting to the manner by which a forum state procures an individual's presence before that forum state's courts.[152] These holdings largely rely on a treaty's character as a contract between signatory nations, and not between a nation and an individual.[153]

Some jurisdictions, however, have allowed an exception to this general rule. The exception first was demonstrated in the *Rauscher* case.[154] In *Rauscher*, the Court permitted the defendant to challenge jurisdiction on a count for which he had been charged, but not extradited. The *Rauscher* Court, therefore, created an exception to the rule of speciality.[155] This exception falls neatly into the laws of contract. Arguably, when an individual is subjected to the extradition process, he or she has become a party to the contract and has agreed with the nations involved to subject himself or herself only to specific charges in the forum state.[156]

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[145] *Caro-Quintero*, 745 F. Supp. at 599.

[146] "A self-executing treaty is federal law that must be enforced in federal court unless superseded by other federal law." *Id.* at 606.

[147] "[A]n executory treaty is not enforceable until Congress has enacted implementing legislation." *Id.*

[148] 1 BASSIOUNI, *supra* note 123, ch. 2, § 4.1, at 71-72; *id.*, ch. 2, § 4.2, at 74.

[149] *Caro-Quintero*, 745 F. Supp. at 606.

[150] *See generally*, Kester, *supra* note 50, at 1464-68.

[151] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, comment a (1987).

[152] United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) ("[e]ven where a treaty provides certain benefits for nationals of a particular state.... individual rights are only derivative through the states"); *cf.* Kester, *supra* note 50, at 1465 ("For extradition treaties in the United States, however, this rule [that individuals have no rights under a treaty] has always been different").

[153] United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981).

[154] 119 U.S. 407 (1886).

[155] "[T]he lone exception to the general rule is that the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty." *Id.* at 421-22.

[156] *See Verdugo II*, 939 F.2d at 1356.

This theory is limited, however, by the fact that the individual really has no bargaining power and is subject to the whims of his asylum nation.[157] Accordingly, that the circuit courts are split over whether an individual has standing to raise the rule of speciality as a bar to jurisdiction is not surprising.[158]

The contract analogy also gets support from the cases that address how the asylum nation deals with the abduction of one of its own residents. Some courts have used this analogy, coupled with the reasoning applied in the rule of speciality cases, to hold that the asylum nation's protest of the abduction gives the defendant standing to challenge personal jurisdiction.[159] This view also holds that unless the nation from which the defendant was abducted protests, that nation has waived its right to invoke the extradition treaty.[160] As in cases in which a defendant is tried on charges for which he or she was not extradited, a nation from which a defendant is kidnapped has the following three options: (1) it can protest;[161] (2) it can acquiesce; or (3) it can do nothing at all. The courts are not in agreement at all as to which of these then would grant the individual the right to raise a jurisdictional argument based upon the rule of speciality.[162] The general rule in abduction cases, however, seems to be that if the asylum nation acquiesces or does nothing at all, the defendant may not raise an objection.[163] The general rule when an asylum nation protests the abduction, seems to be moving toward allowing the defendant to raise lack of personal jurisdiction as a defense.[164] Yet, this offers the individual very little protection because the success of his or her objection is dependant upon the asylum nation's willingness to

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[157] It also is limited because the rule merely addresses the scope of the prosecution, and not the prosecution itself. Another reason that the courts may allow jurisdictional challenges by the individual in this limited case, is that by allowing the challenge the court does not void the entire case, whereas a general challenge to jurisdiction would have the more egregious effect of letting the prisoner free. *Caro-Quintero*, 745 F. Supp. at 607.

[158] For example, in Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985), the court held that the individual did not have the right to invoke the rule of speciality. This was allowed in United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1985), *cert. denied*, 479 U.S. 1009 (1986); *see also* Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989) (collecting cases); *Verdugo II*, 939 F.2d at 1355 n.13 (dividing circuits and describing their positions).

[159] *Caro-Quintero*, 745 F. Supp. at 608.

[160] *Id.*

[161] Note that the protest may be mere pretext.

[162] *See generally* Kester, *supra* note 50, at 1467-68.

[163] United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975).

[164] *Caro-Quintero*, 745 F. Supp. at 599; *Verdugo II*, 939 F.2d at 1358.

protest and the forum nation's willingness to surrender the defendant or to construe the treaty to allow such challenges.[165]

The debate continues today over what rights an individual defendant, who has been abducted contrary to an extradition treaty, enjoys in attempting to assert the defense of lack of personal jurisdiction. In some instances, the forum court will deny any challenges to personal jurisdiction, while in others, it will deny the defendant standing to raise the issue.

3. Verdugo II.—The Ninth Circuit's decision in *Verdugo II*[166] is the most recent and most clear case study of the law in the United States; therefore, discussing its reasoning in some depth will be helpful. In an opinion that draws heavily from both due process concerns and principles of contract law, the United States Court of Appeals for the Ninth Circuit held that the district court erred in its failure to hold an evidentiary hearing to determine if the United States "sponsored or authorized" Verdugo's kidnapping.[167] Although the court properly refrained from making this determination, and gave the district court little guidance on what exactly constituted a government "sponsored or authorized" kidnapping, it held that if such a determination affirmatively was made, Verdugo successfully could challenge the court's personal jurisdiction over him. The holding also relied on the determination that the Mexican government had protested the abduction.[168] The only remedy for such a situation would be repatriation.[169] Additionally, the court was able to reach its holding by stating that the treaty did apply and that it did matter very much how Verdugo came before the court. Moreover, the entire opinion seems to pay attention to the possible ramifications of its ruling toward American citizens abroad, the "emerging 'new world order,'" and the necessity of "holding our own government to its fundamental legal commitments."[170]

The court began the substance of its holding by examining the *Ker/Frisbie* doctrine. The court noted that "courts, commentators, and politicians" were over-broad in their interpretations of the doctrine.[171] They generally interpret *Ker* to hold that how a defendant was brought before a court was not relevant to a jurisdictional challenge. *Ker*, however, can be distinguished in that

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[165] Garcia-Mora, *supra* note 76, at 437-38; *supra* note 129 and accompanying text.

[166] *Verdugo II*, 939 F.2d at 1341. *But see supra* note 4.

[167] *Id.* at 1343.

[168] *Id.* at 1359.

[169] *Id.* at 1360.

[170] *Id.* at 1362.

[171] *Id.* at 1345.

it was not a case of authorized abduction, and that "*Ker* only stands for the proposition that a private kidnapping does not violate an extradition treaty."[172] The second distinguishing feature of *Ker* is that the Peruvian government never protested Ker's abduction. The protest of the government of the asylum country was essential because "extradition treaties are principally designed to further the sovereign interests of nations, and therefore any rights they confer on individuals are derivative of the rights of nations."[173]

The court then proceeded to distinguish *Frisbie* from the case at hand. *Frisbie* did not involve an extradition treaty. Rather, it was concerned with domestic issues, and any remedy would have been "an exercise in futility."[174]

The court took one final shot at the *Ker/Frisbie* doctrine, holding that "[i]t is manifestly untrue that a court may never inquire into how a criminal defendant came before it."[175] The court relied on the proposition expounded in *Rauscher* to expel the broad reading of *Ker*. *Rauscher* involved a treaty and its application to certain proceedings, which were barred because an implied condition of the treaty was violated.[176]

The court then examined the underlying principles of extradition treaties. It found treaties to be reciprocal in nature and designed to protect the sovereignty of nations.[177] The court found an inconsistency in the notion that a nation would have an extradition treaty and all of its attendant provisions, yet could circumvent that treaty by a simple abduction. The court paid particular attention to the rule of speciality first articulated in *Rauscher*. This rule, which was implied in the treaty in question in *Rauscher*, was an express term in the United States-Mexican agreement and would have been rendered moot if the government were allowed to abduct an alien and try him or her for any crime it chose. Furthermore, although the treaty in question was silent on the issue, the court found that it implicitly prohibited kidnapping because the treaty not only assumed, but also required, such a

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[172] *Id.* at 1346. The court supported its principle of a narrow reading of *Ker*, by citing Ford v. United States, 273 U.S. 593 (1927), which rejected the plaintiff's contention that an illegal seizure by the government, in contravention of a treaty, would not have prohibited the jurisdiction of the court.

[173] *Verdugo II*, 939 F.2d at 1350.

[174] *Id.* at 1347.

[175] *Id.* at 1348.

[176] *Id.* The court also relied on Cook v. United States, 288 U.S. 102 (1933), in which questioned whether a court could rely on the fruits of a private seizure when the government itself would have lacked the power to seize.

[177] *See supra* notes 120-128 and accompanying text.

proscription to give it any "sense as a purposive document."[178] The silence of the treaty, therefore, was not dispositive.

The court then analogized the treatment of the treaty to private contract law. It held that a court could waive the terms of the treaty not only before, but also after, a government apprehends a foreign national.[179] The court concluded its discussion of the applicability of the treaty by stating that, for the treaty to have any practical relevance, the abduction of an individual from an asylum nation that has not consented in some fashion, is a breach of the extradition treaty.[180]

The court next turned its attention to the issue of individual standing to challenge the court's personal jurisdiction. It held that an individual does not have standing to challenge the court's jurisdiction when he or she was abducted in violation of an extradition treaty, unless the asylum nation has filed a protest. The court found precedential support for this proposition in *Rauscher* and the rule of speciality.[181] The court likened the rational behind the rule of speciality to the rational behind giving standing to challenge jurisdiction in cases of unauthorized abduction. In both cases the government registers an objection, both involve a violation of the treaty, both "touch upon the foreign relations of the United States and the other signatory to the treaty," both involve a contract between nations in which the individual is not a party, and both involve actions to which the individual defendant objects.[182] Additionally, the injury to the asylum nation and individual defendant is more serious in the case of abduction than it is in the case of the expansion of charges. Finally, the court found inconsistency in allowing the defendant to invoke the question of personal jurisdiction in rule of speciality cases when the United States invoked the treaty, and not in abduction cases when the asylum nation invoked the treaty by way of official protest.[183]

The court also held that conferring standing upon the individual did not jeopardize the separation of powers doctrine or raise a nonjusticiable political question.[184] It found its precedential

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[178] *Verdugo II*, 939 F.2d at 1350-51.

[179] *Id.* at 1352.

[180] *Id.* at 1355.

[181] *Id.* "[W]ere Verdugo's complaint grounded in a violation of the rule of speciality, there would be no doubt that he would have standing to raise the Treaty violation as a bar to personal jurisdiction." *Id.* The court found additional support in United States v. Najohn, 785 F.2d 1420 (9th Cir. 1985) (per curiam), *cert. denied*, 479 U.S. 1009 (1986).

[182] *Verdugo II*, 939 F.2d at 1355-56.

[183] *Id.* at 1356.

[184] *Id.* at 1357.

support in *Rauscher* and *Baker v. Carr*. Generally, the courts had decided such questions in the past, and these decisions did not involve issues that required nonjudicial discretion. Therefore, conferring standing upon the individual was within the power of the court.[185]

Finally, the court stated that the proper remedy, if the district court found that the United States government played a role in Verdugo's abduction, would be repatriation. Only in this manner would Verdugo and Mexico be restored "to the position in which [they] would have been had the United States complied with the treaty...."[186] The court also noted that if Mexico refused to accept the repatriation of Verdugo, it would be tantamount to a withdrawal of its protest.[187] The court concluded with the following admonition:

> Although the principle of pacta sunt servanda (agreements must be obeyed) has not always been scrupulously followed in the affairs of this and other nations, if we are to see the emergence of a "new world order" in which the use of force is to be subject to the rule of law, we must begin by holding our own government to its fundamental legal commitments.[188]

The circuit court's decision in *Verdugo II* is fairly consistent with the body of prior case law and illustrates some of the potential concerns. Three issues that the court did not address directly, however, likely will arise in the future. The first two are technical. First, the court did not address what standard is to be used in determining if the abduction was carried out with the complicity of the government. Second, the court ignored the possibility that nations may not be forthcoming in presenting fugitives to the United States or in trying them themselves. The third issue is procedural. Although it took steps in the right direction, the Ninth Circuit did not recognize the extent to which fundamental human rights are involved in cases such as *Verdugo II*.

The court stated that the lower court must determine whether the United States "authorized or sponsored" Verdugo's kidnapping.[189] The Ninth Circuit, however, gave its lower courts no guidance as to exactly what level of involvement was required to constitute a government sponsored kidnapping. In this case,

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[185] *See supra* notes 135-146 and accompanying text.

[186] *Verdugo II*, 939 F.2d at 1360.

[187] *Id.* at 1362.

[188] *Id.*

[189] *Id.*

Mexican officials conducted the abduction and may have been paid by the DEA. Whether this type of arrangement is sufficient to constitute government involvement, or even consent, is questionable. Perhaps the fact that Mexican officials participated constituted sufficient evidence to prove circumstantially that the United States must have acted officially to solicit the Mexican government's cooperation. Rarely are the facts clear,[190] but the court gives no indication of a threshold of involvement that ought to be required. This gap in the court's opinion is puzzling—especially considering that this was the central issue directed back on remand.[191] Clearly, however, the issue will have to be addressed at some point.

The second issue that the court did not address was the practical question concerning what recourse the government should be allowed if the asylum nation refuses extradition and does not try the fugitive itself.[192] Extradition treaties normally have clauses that give the asylum country a certain amount of discretion in determining whether or not to extradite an individual. Initially, these provisions were intended to protect political prisoners.[193] Today, the concern—at least in the case of the United States—is not with political fugitives, but with terrorists and drug lords.[194] As was the case in *Verdugo II*, the asylum government may not wish to extradite someone whom the forum nation has a legitimate reason for trying because issues of national security actually may be involved.[195] A court best leaves these issues to the decisional authority of the political branches of government. Oddly, however, the court severely restricted what the government could do, while it claimed that it did not enter the realm of political discretion.[196]

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[190] *See* Lowenfeld, *supra* note 33, at 716 (noting the difficulty in defining the term "agent" and telling a story of deals made "under the table").

[191] This should not be misinterpreted as a suggestion that the circuit court should be the fact-finder. Without being a fact-finder per se, the circuit court still may set some sort of standard for the lower courts to follow and by which it can review its lower courts' decisions on appeals.

[192] The extradition treaty provides these options under article 9. Extradition Treaty Between the United States of America and the United Mexican States, Jan. 5, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656. Perhaps the government next will try to assert that the failure to extradite or prosecute constitutes a waiver of the treaty. Another alternative the government has when it cannot extradite an individual it desires is to start a war and capture the individual. Perhaps this is what the United States did recently in Panama.

[193] *See* Garcia-Mora, *supra* note 76, at 447.

[194] *See generally* Grassie, *supra* note 84, at 1207; Lowenfeld, *supra* note 20, at 449-50, 487. On the other hand, the United States does harbor political refugees and it has no desire to allow foreign agents into its sovereign territory to kidnap these political refugees. Garcia-Mora, *supra* note 76, at 446.

[195] For example, the government may be aware of a known terrorist or drug lord who may be jeopardizing the life of an important governmental official.

[196] *See supra* notes 180-181 and accompanying text.

Finally and most importantly, although the court began to touch upon the third issue, it said very little about the application of due process and fundamental human rights to the situation in *Verdugo II*. For instance, even though it addressed reciprocity and mutuality,[197] the court asserted that under certain conditions an individual legally may be kidnapped. Moreover, it made that assertion notwithstanding the government's and the courts' condemnations of such practices when American nationals are the subjects. Similarly, the notion that the offended nation formally must protest before the individual may challenge jurisdiction goes against the common sense notion of personal jurisdiction. Specifically, the individual—not the asylum nation—must face trial and the subsequent consequences. A scenario in which a defendant loses his or her rights because of a political "power-play" between nations is not hard to imagine. Succinctly put,

> The emphasis in both U.S. courts and in the administrations' various statements on the lack of protest by foreign states when the suspects are abducted from their territory is disquieting. For one thing, the states that do not protest tend to be, if not client states, at any rate states that have various reasons not to make formal protests. For another, even when silence can be fairly interpreted as consent—which, as we have seen, is often hard to tell—such consent cannot extend to violation of the rights of the accused.[198]

Given this observation and the court's dicta concerning a "new world order," the Ninth Circuit surprisingly did not follow the trend in international law by prohibiting forcible abduction based on the theories of state sovereignty and human rights.[199] The *Verdugo II* court's application of contract theory is useful, but to get to the court's final goal of the "new world order" and mutuality, it not only must recognize that individual human rights are affected, but also must realize how important human rights actually are.[200] Furthermore, to achieve that goal, due process concerns must become paramount. In this vein, the court could have adopted a posture closer to Judge Mansfield's in *Toscanino*, in which he stated, "... the Fifth Amendment guarantee of due process .... refers to and protects 'people' rather than 'areas,'... or

[197] Justice Brennan, in his dissent, stated "[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them." *Verdugo*, 110 S. Ct. at 1071 (Brennan, J. dissenting).

[198] Lowenfeld, *supra* note 20, at 489.

[199] *See, e.g.*, U.N. CHARTER arts. 1(3), 13(1)(b), 55(c), 62(2) (provisions referring to respect for human rights as an international obligation of all states).

[200] *See supra* part II.A.2.

'citizens.'"[201] The Supreme Court finally got an opportunity to restrict *Ker* and adopt *Toscanino* when it reviewed the companion case.[202]

IV. Concerns

Although *Verdugo II* points out many of the concerns that must be addressed, it does not address all of them, nor does it discuss the ones it does address in sufficient depth. Nevertheless, four particular issues or concerns that a nation may have should be addressed comprehensively before any guidelines are drawn to determine when a forum state may conduct an abduction or an informal rendition. The first concern is who has the authority to make the decision to take such action and to determine if it was carried out properly. This concern naturally involves the doctrine of the separation of powers.[203] The second concern involves the interpretation of extradition treaties. Questions in this context include a treaty's silence on kidnapping, and the treaty's conferral of rights on someone or something. The third concern is applying the doctrine of due process to the abducted individual while remaining sensitive to the interests of the asylum state. Questions in this context naturally involve issues of jurisdiction and human rights. The final concern regards whether a state has an obligation to exercise reasonable control over its own citizens.

A. Separation of Powers

Perhaps the most important issue is determining who has the authority to order a forcible abduction or to effect an informal rendition. If the executive has the authority and it is exclusive, then making the decision to take such an action will involve mostly policy concerns. If, on the other hand, the authority to rule on the legality of such actions vests solely with the courts, then the concerns will be a mixture of law and policy.

Both Congress and the executive have spoken on the issue of abduction. In 1976, Congress adopted an amendment to the Foreign Assistance Act of 1961 in response to concerns raised by a report by Senator Mike Mansfield on the activities of DEA agents

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[201] *Toscanino*, 500 F.2d at 280.

[202] *See supra* note 4. *Verdugo II* was remanded on certiorari to be reconsidered, consistent with the holding in *Alvarez-Machain*.

[203] The United States Constitution is founded upon the principle of the separation of powers, whereas this doctrine is not as prevalent in other states. Many of the issues concerning separation of powers, however, apply universally.

in Thailand.[204] The Mansfield Amendment read, "Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts."[205] President Ford vetoed this legislation when it first was passed by Congress, stating that it would "seriously obstruct the exercise of the President's constitutional responsibilities for the conduct of foreign affairs."[206] In adopting the amendment, the Senate Foreign Relations Committee sought to reconcile the competing aims of compelling foreign governments to cooperate in the effort to stop the flow of drugs from their country and of prohibiting the United States from interfering excessively in the internal affairs of those countries.[207] Additionally, the committee defined United States police action as action either in which American agents were involved directly or in which they were involved as participants.[208] Finally, Congress demonstrated its concern for the rights of the individual in a 1978 amendment to the Mansfield Amendment, which required the written consent of the arrestee if he or she was a United States citizen arrested on foreign soil.[209] The Mansfield Amendment was revised several times and was changed significantly in 1986.[210] The 1986 change allowed the Secretary of State to waive the prohibition concerning the participation of United States agents in an arrest if the prohibition "would be harmful to the national interest of the United States."[211] A 1989 revision to the 1986 change required the approval of the United States chief of mission in the asylum state when United States agents were assisting the foreign officers in making the arrest.[212] Additionally,

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[204] The amendment also closely followed the decisions in *Toscanino*, *Lujan*, and *Lira*.

[205] *See* 22 U.S.C. § 2291(c) (1988); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 504(b), 90 Stat. 764.

[206] 12 WEEKLY COMP. PRES. DOC. 828 (May 7, 1976). The language was accepted by President Ford in a revised Arms Export Control Act. According to one commentator, "[t]here is no indication that this view pertained to the Mansfield Amendment." Lowenfeld, *supra* note 20, at n.175.

[207] *Senate Comm. on Foreign Relations, Internal Security Assistance and Arms Export Control Act, Report on S.2662*, S. REP. No. 605, 94th Cong., 2d Sess. 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1378.

[208] *Id.*

[209] Pub. L. No. 95-384, § 3, 92 Stat. 730 (1978). Note that this requirement does not apply to foreign nationals who have been arrested, and applies only to interrogations at which United States agents are present. Nothing prevents this individual safeguard from applying to any individual who is to be brought before the courts of the United States.

[210] 22 U.S.C. § 2291(c)(1)-(6) (1988); Pub. L. No. 99-570, § 2009, 100 Stat. 32 (1986).

[211] 22 U.S.C. § 2291(c)(2) (1988).

[212] *Id.* § 2291(c)(2); Pub. L. No. 101-231, § 15, 103 Stat. 1954, 1963-64 (1989).

several attempts to repeal the amendment or to rob it of its force were defeated.[213] The history of the Mansfield Amendment, therefore, clearly demonstrates Congress's continuing concern for the exercise of law enforcement abroad—especially in light of the implications enforcement has on national sovereignty.[214]

The executive branch also has been concerned with the issue of abductions. The most recent commentary on the position of the executive was outlined by then-Assistant Attorney General William Barr and the legal advisor to the Department of State, Abraham Sofaer, on November 8, 1989.[215] This opinion reversed an opinion issued and released in 1980, under the Carter administration.[216] The 1980 opinion held that an abduction would be a violation of international law.[217] It also asserted that involvement by the FBI in an abduction may violate the enabling statute of the FBI[218] because the violation of international law may make such an FBI-sponsored operation unreasonable.[219] Additionally, the 1980 opinion relied on the *Schooner Exchange*[220] case by interpreting it to state that the de jure authority of the United States is limited by the sovereignty of other nations.[221] The opinion predicated its argument on the assumption that the asylum state would issue a protest, and held that such a protest would be pivotal.[222] The opinion also stated its concerns that an abduction would give the dangerous signal that the United States did not respect international law.[223] It concluded by stating that "[o]nly if foreign

[213] *See, e.g.*, 131 CONG. REC. 56145 (daily ed. May 15, 1985) (Senator DeConcini's attempt to replace the prohibitions in the amendment by broad language which would allow direct police action by United States agents on foreign soil, thereby taking the "shackles off our drug enforcement agents in foreign countries").

[214] Lowenfeld, *supra* note 20, at 479.

[215] *House Hearing*, *supra* note 3. The hearing was in response to a legal memorandum written by Barr on June 21, 1989, for the Department of Justice. The memorandum never was released.

[216] 4B Op. Off. Legal Counsel 543 (1980). The opinion was written by Assistant Attorney-General John Harmon.

[217] The opinion concluded that it would not be a violation of international human rights law nor a violation of an existing extradition treaty. *Id.* at 549.

[218] 28 U.S.C. § 533 (1988).

[219] 28 U.S.C. § 533 provides no geographical limitation on the FBI's jurisdictional authority to carry out its mission to detect and prosecute crimes against the United States. However, "[a] conventional statutory construction rule regarding the scope of an official's authority states that where a statute imposes a duty, it authorizes by implication all reasonable and necessary means to effectuate such duty.... [T]he reasonableness of the operation is questionable if it violates international law or United States law." 4B Op. Off. Legal Counsel at 552 (emphasis added).

[220] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

[221] 4B Op. Off. Legal Counsel at 552-53.

[222] *Id.* at 556.

[223] *Id.*

nationals, without U.S. direction or compensation, deposited the fugitive on American soil would the legal problems in this memorandum be obviated by their presence."[224]

The 1989 opinion took a much different tack. Although the Bush administration stressed that the new opinion did not change United States policy because it did not advocate kidnapping,[225] it clearly constituted a major shift in the administration's view regarding the legality of such conduct.[226] The 1989 opinion stated that the executive power to authorize abductions came from three sources.[227] The first source of power is derived from the Take Care Clause in Article II of the Constitution, which obliges the Executive to "take Care that the Laws be faithfully executed."[228] The second source of power is derived from the traditional broad authority extended to the Executive in the area of foreign affairs.[229] Finally, the opinion based its overall premise that such abductions were not prohibited on the theory that the Executive has the authority to override customary international law.[230] These three sources of authority gave the Executive the power to abduct an individual from an asylum state and bring him to trial in the United States—especially in light of the growing menace of terrorism and narcotics

[224] *Id.* at 557.

[225] *House Hearing*, *supra* note 3, at 5 (statement by William Barr).

[226] *Id.*; *see also* Lori Santos, *FBI Can Make Arrests Overseas*, UPI, Oct. 13, 1989, *available in* LEXIS, Nexis Library, UPI File ("reverses a policy established during the Carter administration"); Ronald J. Ostrow, *FBI Gets OK for Overseas Arrests*, L.A. TIMES, Oct. 13, 1989, at A1 ("reversing a ruling dating back to the Carter Administration"); Neil A. Lewis, *U.S. Officials Clash at Hearing on Power to Seize Fugitives*, N.Y. TIMES, Nov. 9, 1989, at A10 ("amended a 1980 legal opinion"); Michael Isikoff, *U.S. 'Power' on Abductions Detailed; Controversial Justice Dept. Memo Asserts Authority to Act Overseas*, WASH. POST, Aug. 14, 1991, at A14 ("the opinion vigorously challenges a 1980 opinion").

[227] Although the author was not able to obtain a copy of the confidential memorandum, both *The Washington Post* and *The Los Angles Times* did so. The term, "opinion" used herein refers to the revelations in these news sources and statements made before the House Subcommittee on Civil and Constitutional Rights.

[228] U.S. CONST. art. II, § 3; *House Hearing*, *supra* note 3, at 9 (prepared statement of William Barr).

[229] *House Hearing*, *supra* note 3, at 9-10 (prepared statement of William Barr). Barr relied on *In re* Neagle, 135 U.S. 1 (1890), in stating "the President's power in the area of foreign affairs is one area in which he enjoys considerable inherent presidential power to authorize action independent of any statutory provision." *Id.*

[230] *House Hearing*, *supra* note 3, at 8 (prepared statement of William Barr) ("the President has recognized authority to override customary international law"). Barr relied on Garcia-Mir v. Meese, 788 F.2d 1146 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986), in which the Attorney-General's indefinite detention of aliens was binding upon the court, even though it was in violation of international law. *But see* Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 883-885 (1987) (nothing supports the notion that the President can disregard international law to further his or her own agenda).

trafficking and the need for self-help in these areas.[231] Judge Sofaer took a decidedly different tone in the hearings in which the government's position was outlined. While he indicated that Congress and the Executive were not bound by international law,[232] he emphasized the dangers of violating territorial sovereignty of other states.[233] He also emphasized the inherent right of each nation to self-defense and suggested that "the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense."[234]

While Congress, the Executive, and the Judiciary each clearly has a stake in the debate on the legality of forcible abductions, what is not as clear is the role that the Judiciary should play—if any at all—in developing the rules. The primary concern is that the courts will become too deeply involved in a matter that is primarily the domain of the other branches of government. Traditionally, the power of the President is most broad in the area of foreign affairs.[235] In addition to the implied powers that the President possesses,[236] the Constitution explicitly gives the President the power to make treaties.[237] According to the United States government, "the violation of a treaty is normally a matter for diplomatic resolution between the signatory States, and 'it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.'"[238] Actually, the government of the United States feels that this issue is a subject of concern only for the political branches and not "fit for judicial resolution."[239] The government also argues that the issue is one in

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[231] *House Hearing*, *supra* note 3, at 9 (prepared statement of William Barr). President Reagan reportedly sanctioned the notion of self-help by issuing a classified intelligence directive in 1986, giving the Central Intelligence Agency broad authority to investigate terrorist acts and the perpetrators, and to bring them to justice in the United States. *See* Emerson & Rothschild, *supra* note 17, at 27.

[232] *House Hearing*, *supra* note 3, at 5 (prepared statement of Abraham Sofaer).

[233] *Id.* at 6.

[234] *Id.* at 12.

[235] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[236] These implied powers extend from the Vesting Clause of the Constitution. U.S. CONST. art. II, § 1.

[237] *Id.* art. II, § 2.

[238] Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petition for Petitioner United States of America at 20, United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) (No. 91-670) (quoting United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988)) [hereinafter Petition]. The Supreme Court heard this case for review with United States v. Alvarez-Machain, 946 F.2d 1467 (9th Cir. 1991).

[239] Petition, *supra* note 238, at 21; *cf.* The Chinese Exclusion Case, 130 U.S. 581, 602 (1889) ("The question whether our government is justified in disregarding its engagements with another nation is not one for the determination

which the courts should divest themselves because it gives rise to political questions that call for "initial policy determination[s] of a kind clearly for nonjudicial discretion."[240] The government feels this way primarily because it believes that judicial resolution of the issue will tie the hands of the Executive in making foreign policy decisions.[241]

Upon closer scrutiny, however, the separation of powers doctrine and the political question doctrine are not persuasive arguments. They are not persuasive because the courts long have held that "judicially discoverable and manageable standards [are available] for resolving" the question presented.[242] In the speciality cases such as *Rauscher*, the Supreme Court has acted even though the government argued that no treaty was involved.[243] Even when treaties explicitly are involved, the courts are required to interpret them because the extraditions have occurred for the specific purpose of bringing the subject before the court in a criminal prosecution. Additionally, Congress explicitly has "delegated to the courts the responsibility for determining whether an individual within the United States may be extradited to another nation pursuant to a treaty" in its enactment of 18 U.S.C. § 3184.[244] The Judiciary, therefore, has exercised its power and jurisdiction in extradition matters for over a century even though the government now claims that to do so impermissibly encroaches upon the power of the Executive.[245]

Likewise, the political question argument fails. *Baker v. Carr* stated that "it is error to suppose that every case or controversy

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of the courts").

[240] *Id.* (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[241] *Id.* at 22.

[242] *Baker*, 369 U.S. at 217.

[243] Rauscher v. United States, 119 U.S. 407 (1886). In *Rauscher*, the Court allowed the individual to challenge standing even though this permitted the Court to exercise its power in a matter involving international relations. Additionally, other treaty rights have been enforceable in the courts by individuals. *See* Cook v. United States, 288 U.S. 102 (1933) (allowing Cook to, raise the treaty as a defense to the seizure of his vessel in international waters violated a treaty between the United States and Great Britain, and was therefore unlawful); Clark v. Allen, 331 U.S. 503 (1947) (allowing the individual to assert inheritance rights under a treaty with Germany).

[244] *Verdugo II*, 939 F.2d at 1357.

[245] A similar argument involves the right of the courts to exercise their supervisory powers to invalidate jurisdiction on the theory that doing so is necessary in cases that shock the conscience as a "means to preserve judicial integrity and to prevent the courts from aiding government Impropriety." Kristin T. Landis, *The Seizure of Noreiga: A Challenge to the* Ker-Frisbie *Doctrine*, 6 AM. U. J. INT'L L. & POL'Y 571, 591 (Summer 1991) (arguing that any violation of international law shocks the conscience). This discretionary authority is less important because a court can exercise its power in such a matter in a more direct fashion.

which touches foreign relations lies beyond judicial cognizance."[246] Although the courts generally may not review decisions involving presidential discretion on issues of foreign policy,[247] the courts often have scrutinized the actions taken by the government when an individual comes before a court in a criminal matter.[248] As the court in *Verdugo II* pointed out,

> the government concedes that an extradition treaty which expressly states that a government authorized or sponsored kidnapping breaches the treaty and bars prosecution of the kidnapped individual would confer standing on an individual to raise an objection to personal jurisdiction based on a kidnapping. Of course, the foreign policy implications of a kidnapping in violation of an extradition treaty are precisely the same in the case in which the treaty contains an express provision for standing as in a case in which it does not.[249]

Actually, whenever a foreigner is brought to trial in the United States, the trial itself touches upon foreign relations; and, yet, the trial is the sole province of the judiciary.

Finally, a court may invoke an extradition treaty because it is self-executing and enforceable without the aid of implementing legislation.[250] A self-executing treaty is federal law and it must be enforced in the federal courts unless the treaty is superseded by federal law.[251] If the treaty were an executory treaty, any infraction "becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress."[252]

B. Extradition Treaty Interpretation

An issue that is as important as the application of the separation of powers doctrine is the question as to whether an

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[246] *Baker*, 369 U.S. at 211.

[247] Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[248] *See Verdugo*, 484 U.S. at 259 (the Court examined the question of the applicability of the Fourth Amendment to an illegal search conducted by officials of the United States in Mexico).

[249] *Verdugo II*, 939 F.2d at 1358.

[250] 1 BASSIOUNI, *supra* note 123, ch. 2, § 4.1, at 71-72; *id.*, ch. 2, § 4.2, at 74.

[251] *Caro-Quintero*, 745 F. Supp. at 606.

[252] Head Money Cases, 112 U.S. 580, 598-99 (1884). *See generally* RESTATEMENT, (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

extradition treaty can be invoked if it does not prohibit kidnapping specifically. The contention by many, including the Government in *Verdugo II*, was that because most extradition treaties do not forbid kidnapping expressly, a kidnapping does not violate or even invoke the extradition treaty.[253] Stated broadly, this position is proclaimed by the maxim "international law permits that which it does not forbid."[254] Accordingly, because no treaty violation occurs, an individual has no recourse to the courts for an act that the United States committed at its own discretion other than a civil rights claim.[255] Additionally, if no treaty violation occurs, repatriation, which is the remedy normally associated with the breach of an extradition treaty, is not available.[256]

Contrary to the Government's argument, courts long have held that an implied term can be read into a treaty. The Supreme Court did this explicitly in *Rauscher*. In that case, even though the treaty did not specifically prohibit the forum state from trying the individual on charges for which he was not extradited, the Court read such a prohibition into the document.[257] The *Rauscher* Court implied the term into the treaty[258] because of its notions of justice and its recognition of the purposes for which nations enter into extradition treaties.[259] Specifically, without extradition treaties, states would be under no obligation to surrender residents.[260]

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[253] *See* Petition, *supra* note 238, at 14 (arguing that the Court of Appeals erred in holding that a government-sponsored kidnapping violated the extradition treaty between the United States and Mexico). This position was accepted by the Supreme Court in *Alvarez-Machain*. *See supra* note 4.

[254] Turner, *supra* note 116, at 3 (citing S.S. Lotus Case, P.C.I.J., ser. A, no. 10, 2 Hudson, World Ct. Rep. 20 (1927).

[255] 40 Op. Off. Legal Counsel 543 (1980). Assistant Attorney General Harmon argued that a potential for a civil rights claim exists, although the success of such a suit is dubious. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating a right similar to 42 U.S.C. § 1983 (1988), whereby an individual may receive a damage remedy for constitutional violations at the hands of federal officials).

[256] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432, comment c (1986) (stating that, under appropriate circumstances, the reparation to the asylum state for a government-sponsored kidnapping is repatriation). Even in the absence of an extradition treaty, this remedy is appropriate under international law. As a practical matter, however, it carries greater force when the contract of an extradition treaty has been breached.

[257] Additionally, if a treaty signatory brought an individual to the forum state by kidnapping, he or she would not have been extradited properly for any offense, and therefore could not be tried.

[258] This rule of speciality now is written explicitly into most extradition treaties.

[259] *Rauscher*, 119 U.S. at 412.

[260] 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727-28 (1968); *see also* Bassiouni, *supra* note 64 ("extradition is a matter of favor or comity rather than a legal duty").

Extradition treaties, however, create this obligation[261] with certain exceptions.[262] In particular, these treaties provide the means by which states may ensure international cooperation, while protecting their interests in their own sovereignties.[263] Extradition treaties are contracts designed to ensure mutual respect for agreed upon principles and reciprocal promises.

A general allowance of kidnapping as a means of obtaining fugitives would frustrate the purpose extradition treaties serve. First, the language of a typical treaty indicates that the extradition process is to be the sole method of obtaining fugitives.[264] For example, extradition treaties provide detailed instructions outlining when extradition is or is not permissible. The treaties leave a good deal of discretion with the government of the asylum state on whether or not to deliver that individual.[265] Reserving this authority makes no sense if the forum nation, after its request for extradition is denied, then simply could kidnap the individual. The asylum nation, in essence, reserves the right not to extradite an individual and to prosecute him or her in its own courts. These provisions would be mere formalities with no real meaning if the forum state were allowed to disregard the treaty and simply

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[261] *See* Extradition Treaty Between the United States of America and the United Mexican States, Jan. 5, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, art. I. This treaty was invoked in the *Verdugo* cases to attempt to establish an "Obligation to Extradite." *Rauscher*, 119 U.S. at 412.

[262] Extradition is limited to offenses outlined in most treaties. 6 WHITEMAN, *supra* note 260, at 727-28. Generally, political offenses are not offenses that require extradition. European Convention on Extradition, Dec. 13, 1957, Council of Europe, Eur. T.S. no. 24, art. 3.

[263] *See Verdugo II*, 939 F.2d at 1350 ("The requirements extradition treaties impose constitute a means of safeguarding the sovereignty of signatory nations, as well as ensuring the fair treatment of individuals.")

[264] *Id.* ("As a general matter, the rules governing extradition procedures set forth in treaties only make sense if they are understood as requiring each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation").

[265] An example of this is article 9 of Extradition Treaty Between the United States of America and the United Mexican States, Jan. 5, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656.

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

kidnap the sought individual.[266] Senator Moynihan brings this issue to light in an ironic comment.

> And now Vice President Quayle, as I read in the press, finds himself in the unfamiliar—awkward is the term used by Ann Devroy in the *Post* this morning—[position] of being, and I quote "embraced by the Soviets for statements he made Saturday that suggested the Soviet armies' round up of Lithuanian deserters as acceptable to the United States." Well, if they didn't say, they—say how could they do it, the Soviets just say "We weren't rounding up deserters, we were simply kidnapping these people." Well, that's different, oh, all right, kidnapping, okay.[267]

Second, stating that kidnapping is a legitimate alternative to an extradition treaty is mere puffing because a kidnapping is generally a violation of international law;[268] accordingly, taking such action presumably would be prohibited as a violation of a state's territorial integrity.[269] The fact that kidnapping is understood as a clear violation of international law makes it an implied term of the treaty and superfluous to the explicit terms of the treaty.[270]

Finally, because the treaty is a contract between nations, the nations reserve the right to waive the terms of the contract and allow extradition outside of the parameters specified in the treaty. The Government argues that because "it is common for treaty nations voluntarily to deliver an individual to the United States without a formal extradition request, and that such an approved removal does not bar prosecution, even though extradition procedures were not followed," an extradition treaty is not the only

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[266] *See id.* art. 5 (stating that extradition is not permissible for a military or a political offense); *id.* art. 8 (stating that an individual need not be extradited based on an offense for which he or she may be subject to the death penalty when he or she would not be subjected to it in the asylum nation).

[267] Senator Patrick Moynihan, Address at the Press Club Luncheon, Fed. Info. Sys. Corp., Mar. 28, 1990, *available in* LEXIS, Nexis Library, Fed. News Serv. File). Senator Moynihan went on to state, "But did anybody notice that as soon as we announced that we were going to kidnap people abroad, the Iranian Parliament adopted a law authorizing its officials to kidnap Americans anywhere in the world? ... It is helpful to keep in mind that the rights we assert for ourselves can be claimed by others."

[268] *See supra* part II.A.

[269] *See* 1 BASSIOUNI, *supra* note 123, ch. 5, § 2, at 194 (extradition treaties are "designed to protect the sovereignty and territorial integrity of states, and *to restrict impermissible state conduct*") (emphasis added).

[270] *See also Rauscher*, 119 U.S. at 421 (upon ruling that a court may not try an individual for crimes for which he or she was not extradited specifically, based on the rule of speciality, that individual "can only be taken under a very limited form of procedure").

means by which a fugitive may be brought before a forum court.[271] This point becomes meritless when the treaty is viewed as a contract, the terms of which may be waived by the asylum nation.[272] The asylum nation can waive the formal procedures in two ways. First, it can deliver the individual in any manner apart from the treaty.[273] Second, it may waive the treaty obligations implicitly by its failure to protest a kidnapping.[274] In both instances, however, the asylum state initiates the waiver of the treaty. On the other hand, in the case of a kidnapping, the forum state simply unilaterally breaches the contract without consulting the asylum state.[275] This breach of contract may give the individual the right not to be tried in the forum state's courts.

C. Toward Due Process

Aside from the protests the asylum nation may register on behalf of itself or the abducted individual, the individual may have certain rights that he or she may assert. Broadly speaking, those rights come under the penumbra of due process.[276]

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[271] Petition, *supra* note 238, at 17, n.10; *see also* United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) ("To hold that extradition treaties forbid foreign nationals to return criminal defendants except in accordance with the formal procedures they contain, would ... represent a novel interpretation of those treaties").

[272] *Caro-Quintero*, 745 F. Supp. at 610:

> The government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of speciality), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crime it chooses is patently absurd.

[273] For instance, the asylum state simply may grant a forum state's informal request or it may informally render the individual to the forum state. *See, e.g.*, *Cordero*, 668 F.2d at 37 ("nothing in the treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so"); *Caro-Quintero*, 745 F. Supp. at 612 (collection of cases).

[274] This was the holding in *Verdugo II*. See also United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65-67 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) ("the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred").

[275] Of course, this argument does not consider the rights of the individual that the treaty may or may not grant. *See infra* part III.C. Additionally, even in cases in which the asylum state has cooperated, either by waiver or consent, the individual may be able to avoid trial in the forum state's courts if the manner in which he or she was brought before the court was "shocking to the conscience." *Toscanino*, 500 F.2d at 267.

[276] The rights asserted may be both substantive due process and procedural due process protections. They will not be considered separately.

Although international law generally recognizes that only states themselves can enforce rights granted by treaty,[277] forcible abduction obviously implicates human rights concerns.[278] To date, none of the human rights conventions proscribes government-sponsored kidnapping as a violation of international human rights laws.[279] Nevertheless, despite the emphasis on the rights of the state, the post-World War II era has focused more attention on the rights of the individual that are at stake.[280] Similarly, scholars are more willing to suggest that, because kidnapping is a violation of international human rights, any individual brought before a court as a result of government-sponsored kidnapping should be released.[281] Several international treatises take this position as well.[282] The human rights these treatises invoke include the right to "life, liberty, and security of persons"[283] and freedom from "arbitrary arrest [and] detention."[284] These protections—although they do not generally create a private cause of action[285]—are the same type of due process concerns United States' courts hear in many cases when the violation involves a domestic law.[286] Given

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[277] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, comment a (1986) ("Ordinarily, claims of a violation of an international obligation may be made only by the state to whom the obligation is owed"); *Lujan*, 510 F.2d at 65 ("Even where a treaty provides certain benefits for nationals of a particular state ... individual rights are only derivative through the states"); *Cordero*, 668 F.2d at 38 ("it is the contracting foreign government, not the defendant that would have the right to complain about a violation"). *But see Toscanino*, 500 F.2d at 267 (giving the defendant the ability to challenge jurisdiction due to conduct that shocks the conscience during arrest and detention).

[278] *See generally* Wedgwood, *supra* note 63.

[279] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432, Reporters' note 1 (1986).

[280] LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 31 (1950); Grassie, *supra* note 84, at 1215.

[281] Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 1952, at 279 (1953).

[282] Article 9 of the Universal Declaration of Human Rights, passed by the United Nations General Assembly, G.A. Res. 217A(III), 3(1) U.N. GAOR 71, U.N. Doc. A/810 (1948), forbids the arbitrary arrest of any individual, and many consider government-sponsored kidnapping arbitrary. Additionally, in 1981, the Human Rights Committee of United Nations, under the International Covenant on Civil and Political Rights, held that the abduction of an Uruguayan refugee from Argentina by Uruguay constituted an arbitrary arrest. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432, Reporters' note 1 (1986).

[283] U.N. CHARTER art. 3.

[284] *Id.* art. 9.

[285] *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 374, 374 (7th Cir. 1985) (stating that the human rights provisions of the United Nations Charter are not a basis for a private suit).

[286] Two potential claims an abductee may assert are grounded in Bowers v. Hardwick, 478 U.S. 186 (1986) (claiming that a fundamental right was violated), and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,

the United States' commitment to the rule of law,[287] and the notion that "international law is a part of our law,"[288] these human rights provisions should be read to include such due process rights and should be enforced. If the United States is to advocate the support of human rights by other countries, it should not advocate potential abuses within the United States under the banner of expediency.

Even if the courts could find no other reason to enforce international human rights requirements, the courts should look toward the expanding concept of due process and inquire how a defendant came before the court. The holding in *Ker*, decided over one hundred years ago, construed the Fourteenth Amendment Due Process Clause during its infancy in the same sense in which it construed *Pennoyer v. Neff*,[289] in which physical power provided the foundation for jurisdiction.[290] The expansion of the due process doctrine was noted in *Toscanino*, in which the court recognized that the defendant's due process rights would be violated if he was kidnapped and then tortured.[291] Although the Court recently has held that certain procedural due process claims cannot be the subject of challenges by noncitizens,[292] the due process protection from extinguishing an individual's liberty by force remains. Simply put, "[d]ue process for purposes of jurisdiction over the person ... is an entirely different issue from that of due process that refers to standards of fairness in procedure and limits the manner in which government may use force against individuals."[293]

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403 U.S. 388 (1971) (creating a right similar to 42 U.S.C. § 1983 (1988), by which an individual may receive a damage remedy for constitutional violations at the hands of federal officials). The success of such a claim is in doubt, given various sovereign and official immunities. *See* 48 Op. Off. Legal Counsel 549 (1980).

[287] *See supra* note 6 and accompanying text.

[288] *Paquette Habana*, 175 U.S. at 700 (recognizing the limitations of the rule, especially when a "controlling act" is performed at the highest levels of government).

[289] 94 U.S. 714 (1877).

[290] McDonald v. Mabee, 243 U.S. 90, 91 (1917) (Holmes, J.).

[291] *Toscanino* has been limited in some instances, and not followed at all in others.

[292] *Verdugo I*, 494 U.S. at 259 (the Fourth Amendment of the United States Constitution regarding searches and seizures does not apply to searches and seizures conducted by agents of the United States of property owned by a nonresident foreign national in a foreign country).

[293] Kester, *supra* note 509, at 1450 (comparing Mapp v. Ohio, 367 U.S. 643 (1961) (due process denied by use of evidence obtained in violation of fourth amendment), with Rochin v. California, 342 U.S. 165 (1952) (due process denied by police conduct that "shocks the conscience")).

D. Reasonable Control

The final concern over forcible abduction and informal rendition is the issue as to the amount of responsibility that a state should assume for acts committed by its nationals. For example, if a terrorist or drug lord constantly breaks the laws of a forum state, either with the consent or the indifference of the asylum nation, the asylum state arguably has some responsibilities to the forum state and the international community. Furthermore, if an asylum nation possesses such responsibilities, and fails to satisfy them, the forum state should have some legitimate means of recourse. Naturally, if the conflict is between states, the dispute is resolved by the political processes within, and diplomacy among, those states. If, however, an asylum state is responsible for the acts of its citizens, or has an affirmative duty to control lawless nationals and fails to remedy a continuing problem, the forum state may have the justification to abduct the fugitive. States, however, apparently have no such affirmative duty, and a foreign state's territory still must be considered sovereign. Consequently, kidnapping should be prohibited by the courts, with certain exceptions addressed in the following section.

V. Applications

Once the concerns outlined above have been recognized and developed, their principles must be applied to potential situations. Dividing the situations into categories depending on how the fugitive is brought into the forum state not only aids in exploring the concerns, but also helps provide guidelines for what actions a state may take and what actions are prohibited. This, in turn, fosters respect for the rule of law.

A. Bounty Hunters

The first hypothetical involves what a court should do when a fugitive is brought to the forum state by a bounty hunter or an individual acting completely on his or her own behalf. This type of case poses facts similar those in *Ker*.[294] If a third person acts independently of any state sanction, no treaty is invoked.[295] This is the typical bounty-hunter scenario. If the state has publicized a reward, however, that minor involvement alone may be enough to

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[294] Recall that in *Ker*, an agent of the United States went to Peru with the intention of presenting extradition papers to the government of Peru and, upon finding no functioning government, proceeded on his own to kidnap the fugitive.

[295] *Ker*, 119 U.S. at 442-43.

consider the action state sponsored.[296] Although no treaty would be involved directly,[297] all of the human rights concerns would still be present. Additionally, the forum state could not invoke the self-defense doctrines as justification for its acquiring the fugitive.

Allowing the trial of a fugitive, who has been brought to the forum state for the sole purpose of trying him or her in that state's courts, would create perverse incentives. The forum government—especially if it is a wealthy country capable of posting tremendously high rewards—may use this method to circumvent extradition procedures, thereby raising a broad spectrum of problems. The practice also would tend to encourage international vigilantism. Furthermore, if a bounty hunter brought a fugitive to justice in the forum state, the forum state likely would be forced to act in one of three ways. First, the forum state might choose to render the bounty hunter to the asylum state to face charges of kidnapping.[298] Second, the forum state might feel compelled to protect that individual and refuse extradition on the theory that the bounty hunter performed a valuable service for that state.[299] Finally, the forum state might refuse extradition of the bounty hunter and the asylum state might choose to kidnap the bounty hunter and bring him or her to justice on charges of kidnapping. Under either of the two latter scenarios, the international implications to world order could be grave. Imagining a scenario of endless, circular kidnapping would not be difficult. Additionally, the states involved would be encouraging lawlessness.

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[296] A similar circumstance was presented in the Humberto Alvarez-Machain kidnapping, in which DEA agents paid the Mexican abductors $20,000 for their roles in the abduction. This payment, in part, helped establish state responsibility. *Caro-Quintero*, 745 F. Supp. at 609.

[297] No treaty would be involved unless the asylum state sought extradition of the bounty hunter from the forum state pursuant to a treaty between the states.

[298] *See* Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) (two American bounty hunters seized a fugitive in Canada who had jumped bail and brought him back to the United States; the bounty hunters themselves then were extradited). Arguably, this type of action would be an adequate remedy, meaning that the initially abducted fugitive need not be returned. By not returning the initially kidnapped fugitive, however, the forum state arguably fails to carry out its human rights obligations. On the other hand, the asylum state may not request the initially abducted individual's return. The human rights concerns then would have to be weighed against the practical concerns of the states.

[299] For example, in the Eichmann case, although the state of Israel did not officially participate in the abduction, it protected the kidnappers.

B. Foreign Ejectment

Foreign ejectment[300] presents several difficulties that are different from the ones presented when a bounty hunter kidnaps an individual. Foreign ejectment, like individual acts of abduction, also circumvents the applicable extradition treaty and, therefore, does not invoke it. In other words, the countries effectively have waived the terms of the extradition contract. The principal characteristic of foreign ejectment, however, is that the asylum state willfully and intentionally turns over the individual. In a sense, this is the scenario that would have transpired in *Frisbie*[301] had the defendant been "repatriated" to the state within the United States.[302]

When a state voluntarily ejects an individual at its own initiative or at another party's behest, the concerns revolving around the violation of territorial sovereignty are not present. Additionally, absent outrageous conduct by the asylum state,[303] there are few human rights concerns. Because no violation of international law occurs, the arrest is not arbitrary,[304] and the individual enjoys all of the due process rights accorded to citizens and prisoners of the forum state.[305] Because the extradition

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[300] Recall that foreign ejectment or disguised extradition is a process by which the asylum nation, effectively revokes the citizenship of some individual residing in the asylum nation and places him or her within the jurisdiction of the forum state. Even if the forum state requests foreign ejectment apart from extradition procedures, this process still is disguised extradition if the asylum state alone deposits the fugitive in the territory of the forum state. *See supra* note 46 and accompanying text.

[301] *Frisbie* did not involve an extradition treaty between states, but the acquisition of a fugitive by one state within the United States from another state within the United States.

[302] The Court did not require this repatriation, largely because to do so merely would have resulted in the "asylum" state's returning the subject to the "forum state."

[303] An interesting dilemma arises when a defendant actually can prove conduct that shocks the conscience by the asylum state in his or her apprehension. In such a case, due process concerns, as well as human rights concerns, may arise. The remedy is an even more intractable problem. If the defendant is returned to the asylum state he or she well may face the kind of unconscionable treatment received prior to his or her ejectment. On the other hand, if the individual stands trial in the forum state, the forum state would be exercising jurisdiction despite a violation of his or her due process and human rights. Moreover, the international community may view the forum state, by its exercise of jurisdiction over the individual, as sanctioning the kind of conduct that brought the individual to the forum state.

[304] *See supra* notes 58-62 and accompanying text.

[305] The due process rights accorded to the defendant in the United States are substantial. In other states, however, procedures are more draconian. This presents a particular problem that needs to be addressed as a matter of policy by the state that wishes to deliver up an individual for trial in such a state.

procedures often are long and cumbersome,[306] and no rights are infringed, this type of action ought to be supported.[307]

C. United States-Sponsored Rendition

United States-sponsored rendition involves the forcible abduction by the forum state without the asylum state's formal consent or acknowledgement, but requires some sort of informal rendition or complicity by the asylum state.[308] Ignoring reality, however, by suggesting that United States-sponsored rendition is always impermissible is impractical and unwise. In particular, the forum state may violate the territory of the asylum state, and not violate international law, if the forum state is acting in self-defense. The following section sets out the conditions under which invoking the self-defense doctrine would be permissible and the problems encountered in invoking it. Significantly, the doctrine only permits state action; it does not ameliorate many of the concerns surrounding the issue of international abduction. Most importantly, notwithstanding the employment of the self-defense doctrine to justify United States-sponsored rendition, any nation that decides to kidnap an individual triggers human rights concerns.

As a preliminary matter, however, discussing the point at which a state may invoke the self-defense doctrine would be useful.[309] The right to use self-defense against aggression[310] is

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[306] Critics suggest that if extradition by treaty were the sole method of gaining a fugitive, the system would be so cumbersome that it would be unworkable. Landis, *supra* note 245, at 602-03; 1 BASSIOUNI, *supra* note 123, at 189.

[307] This is with the caveat that this type of action is supported only when the asylum state observes the individual's basic rights. Once an asylum state abuses this process, it ought to be disallowed as a matter of policy, if not, as a law.

[308] These two forms of irregular rendition are treated as a pair because, in both cases, the formal extradition process is avoided and the forum state is acting—to some degree—covertly. These two forms clearly can be distinguished from disguised extradition or foreign ejectment, by which the sovereign state is acting completely on its own free will.

[309] No bright-line rule dictates when force specifically is permissible. "Representatives of nation-states engaged in the enterprise of defining aggression conceive of too many implications, real and unreal, for national security to permit much consensus either on any particular proposed verbalization of the conception of aggression or even on the utility of attempts at definition." MCDOUGAL & FELICIANO, *The Debate about Definitions*, *supra* note 67, at 143.

[310] The United Nations defines aggression, in part, as follows:

> Article 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.
>
> Article 2. The first use of armed force by a state in

enumerated specifically in Article 51 of the United Nations Charter.[311] Acts of self-defense must be necessary and must be proportionate to the aggression.[312]

The doctrine of defense must be considered in conjunction with the targeted aggression when examining actions taken in the international community. Actually, permitting—and even encouraging—defensive action is consistent with the goal of world order. Defensive action also is a necessary requisite for effective deterrence against aggression. Consequently, it is one of the cornerstones of international law. To preserve world order, states not only must react against aggression, but also must support other states' defenses against aggressions. In this vein, a defensive use of force is not the same as the offensive use of force. Unfortunately, the defensive use of force often is condemned with equal, if not more, vigor than the offensive use of force.[313] At best, this mistreats the problem; at worst, this increases the incentives for aggression. "It is largely the differential between the treatment of aggression and the treatment of defense that measures the degree of effectiveness of the legal system in contributing to the

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contravention of the Charter shall constitute prima facie evidence of an act of aggression.

Article 3. Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State ... of another State or part thereof;

....

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and airfleets of another state;

(e) The use of armed forces of one State ... in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

....

(g) The sending by on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Definition of Aggression, G.A. Res. 3314, 29 GAOR Supp. 31, U.N. Doc. A/9631, at 142.

[311] *See supra* note 65 and accompanying text.

[312] *See supra* note 66 and accompanying text.

[313] "Within this intellectual tradition, the role of the international lawyer has been seen as one of seeking to reduce the lawful use of force, thus progressively constraining the defensive response and increasingly treating both the aggressive attack and the defensive response as equivalent offenses against rational opportunities for diplomacy and thirdparty legal settlement." John Norton Moore, Low-Intensity Conflict and the International Legal System, A Paper Prepared for the Low-Intensity Conflict Symposium, The Naval War College, Jan. 30-Feb. 1, 1992, at 2 (draft of Sept. 20, 1991, on file at the Center for National Security Law at the University of Virginia School of Law).

deterrence of aggression—not the degree to which the use of force is outlawed."[314]

While this problem has been prevalent for the past several decades, during which the primary concern of states was defense against full-scale aggression, the problem has been exacerbated by the modern world trend of using low-intensity aggression as a political tool. To deter this type of aggression, the defense against it must be viewed as essential and commensurately different than the aggression itself. To achieve a lasting peace, low-intensity aggression must be dealt with quickly and effectively. "Indeed, if we are serious about peace in our time, it is as incumbent upon the international system as a whole to ensure effective deterrence against the low-intensity spectrum ... [as it is to deter full scale attacks.]"[315] The United Nations Charter provides a framework under Article 51 for a system of law that can accomplish this task. Accordingly, under the appropriate circumstances, international abduction can be a justified response to aggression.

D. Types of Conflict to Determine Permissibility

1. Full-Scale War.—The first type of conflict to consider in which an individual may be abducted is a full-scale war.[316] If the forum nation is not the preliminary aggressor, if it is acting in self-defense, and if it is responding with the requisite necessity and proportionality, a breach of the asylum state's territorial sovereignty to abduct an individual would not be a violation of international law that would divest the forum state of jurisdiction. In addition, the abduction itself probably would meet the test of necessity and proportionality. Another justification the forum state could resort to would be the protection of its nationals.

2. Low-Intensity Conflict.—A better use of the justification of the protection of nationals can be employed in the context of the second type of conflict—that is, low-intensity conflict. Low-intensity conflicts may include acts such as terrorism and drug trafficking. These conflicts may either invoke the doctrine of self-defense or may fall below the threshold of United Nations Charter Article 2(4) prohibitions against the use of force.

(a) Terrorist activities.—The level of terrorist activities in the modern world has reached a point at which it poses a serious

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[314] *Id.* at 4 (emphasis added).

[315] *Id.* at 6.

[316] For a discussion on the issue of when a state can respond in self-defense to an act of aggression see John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986).

threat to individual states and world public order. In a very real sense, terrorist attacks often appear as military attacks perpetrated against foreign nationals and states. Additionally, in many instances, the terrorism is state sponsored, thereby making it a state action. In these cases especially,[317] a forum state has justification to root out the offenders and bring them to justice. Additionally, as a practical matter, the states most apt to sponsor terrorism are the least likely to have entered into extradition treaties.[318] In these cases, abducting terrorists who have committed egregious acts is lawful as a necessary and proportionate response of self-defense, not only to protect nationals, but also to deter against further aggression.[319]

(b) Narcotics trafficking.—Narcotics trafficking also has threatened countries, including the United States. Although the more sophisticated drug cartels employ armies and have weapons any small country would envy, their threats to forum states are less immediate and less measurable. In most cases, the principal threat is to the moral, economic, and physical health of a country.

> In normal times, criminal activity operates at the margins in most societies.... [D]rug cartels have long since crossed over those margins, feeding the country's economy and gaining in return some support from the public. As a result, they are now locked in a power struggle not merely for marketing territory against another drug gang, but for national political power and authority against the country's established government.[320]

Like certain states that sponsor or condone terrorism,[321] some states have either been unwilling or unable to control the flow of narcotics from their territories. Without a direct and tangible threat to the forum state, however, determining the requisite necessity and proportionality to claim that a breach of territorial integrity and subsequent abduction is a legitimate self-defense

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[317] The case is much more difficult if the terrorism is not state sponsored and the forum state attempts to violate the territorial integrity of the asylum nation. If this is the case, the forum state should pursue extradition. If the terrorism is state sponsored, however, extradition is unlikely.

[318] *E.g.*, Iran, Syria, Libya.

[319] Some argue that even an anticipatory defensive action is lawful as a preventive act of self-defense under certain stringent requirements. *See* Mallison, *The Disturbing Questions*, 63 FREEDOM AT ISSUE 9, 10, 11 (Nov.-Dec. 1981) (discussing the Israeli attack on Iraq's nuclear facilities).

[320] *House Hearing*, *supra* note 3, at 35 (statement by Judge Sofaer).

[321] Many narcotics traffickers apparently are trained in terrorist tactics.

measure is difficult.[322] Similarly, dealers and users often can buy drugs on a veritable free market in the forum state. Accordingly, the notion that an abduction of a drug trafficker was executed to protect nationals is unpersuasive because a state hardly can justify a breach of international law by claiming that it was protecting its nationals from themselves.[323] Nevertheless, when the drug trafficking does meet the requisite conditions of an aggressive action—that is, when it is ongoing and sustained—abducting drug traffickers not only may be permitted, but also may be required as a practical matter.

3. Individual Acts.—Finally, an individual may pose some threat to the forum nation or its nationals.[324] In abducting such an individual, the forum state may not claim self-defense as a justification for its violating the territorial integrity of the asylum state. Allowing such a claim would frustrate the purpose of extradition treaties by permitting any state to circumvent the proscribed procedures of the contract unilaterally, at any time.[325]

E. Toward the Future

In applying these concerns, courts carefully should weigh the implications of human rights concerns against the practical needs for justice and deterring future aggressive conduct. Only in laying out the ground rules will the rule of law be enunciated, and only through adherence to the rule of law can the international community establish a new world order in which peace is the prevailing condition.

As a starting point, kidnapping should be prohibited. Courts should deny jurisdiction when a fugitive is obtained by means other than the extradition treaty when the asylum state actually objects to the abduction. Some examples of scenarios that would warrant a court's denying jurisdiction include kidnapping by bounty hunters and, in some circumstances, state-sponsored kidnapping. Under these circumstances, human rights concerns—

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[322] *But see* Andrew K. Fletcher, Note, *Pirates and Smugglers: An Analysis of the Use of Abductions to Bring Drug Traffickers to Trial*, VA. J. INT'L L. (forthcoming 1992) (arguing persuasively that drug traffickers legally may be abducted, comparing them with traditional authority over pirates).

[323] A different situation may occur when the drug lords murder individuals, such as in the Camarena case. Even so, when the act was not state sponsored, the threat comes from an individual or group of individuals, and not the state. Therefore, arguing that the forum state lawfully violated the asylum state's sovereignty is difficult.

[324] Note that both terrorist acts and narcotics traffickers may fall under this final type of conflict.

[325] *See supra* part IV.A.

as well as the danger to world order posed by the violation of international law—simply outweigh the practical political concerns of expediency. Furthermore, prosecuting in the wake of an otherwise illegal abduction very plainly would send the wrong message to the world community.

Under some circumstances, however, the forcible apprehension of a fugitive falls within the acceptable limits of international law and the exercise of jurisdiction over that fugitive comports with the rule of law. For instance, a state may obtain jurisdiction over an individual outside of the terms of an extradition treaty if doing so in response to aggression. Such a response not only is a legitimate defense to the aggression, but also promotes a deterrent function. The action, however, must be proportional and necessary. More importantly, it must be in response to an ongoing and sustained aggression. This last requirement ensures that the aggression to which the state is responding is a state or state-sanctioned action. Accordingly, when an asylum state is the actual aggressor, the human rights concerns are alleviated,[326] and the asylum state can be viewed as waiving its rights to invoke the treaty.[327]

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[326] When an individual or group of individuals participate in aggression and that aggression is ongoing and sustained, thereby giving it the character of an action taken under the color of state law, those actions are generally fairly egregious. Accordingly, such a person may forfeit his or her rights to a certain level of protection as an individual. Furthermore, because the actors actually are state sponsored, they would lose the protections of the cloak of rights that the state normally grants to an individual. As a practical matter, states that sponsor such acts of aggression are states that apparently provide few rights to their residents, and the actions they take are directed against states that afford quite broad rights. Accordingly, only a state that affords such broad protections typically will be able to satisfy the last requirement delineated in the accompanying text. By satisfying that requirement, however, the abducted individual almost certainly will arrive in a forum in which his or her human rights are observed diligently. That a totalitarian state would be able to satisfy this requirement in justifying an abduction from a democracy—thereby transferring an individual from a state in which human rights are protected carefully to a state in which they are ignored—would be almost inconceivable. Accordingly, this requirement substantially reduces concerns over human rights and the fear that other states would satisfy this requirement to justify the kidnapping of an individual from a country such as the United States. The notion that totalitarian states provide rights protections to their residents that are even remotely equivalent to the protections afforded by democratic states is preposterous. *See* R. RUMMEL, LETHAL POLITICS: SOVIET GENOCIDES AND MASS MURDERS SINCE 1917 (1990).

[327] A state enters into a treaty with the assumption that the other signatories will act in good faith in all international dealings that the treaty addresses. When the action becomes state sanctioned, the treaty becomes less effective in a hostile climate. As a practical matter, two states that have an antagonistic relationship likely will not have an operative extradition treaty. Moreover, even if such a treaty existed, breaking it would have little effect when the states already are hostile to one another because of their ongoing aggression.

To ensure that a state does not claim self-defense as a mere pretext for avoiding extradition requirements, the courts of a forum state should require the Government to show that, before it abducted the defendant in response to ongoing aggression, the forum state notified the United Nations Security Council. The forum state should describe the aggression and notify the Security Council of its intent to respond if the aggression continues or if the situation is not remedied by the asylum state. This notification is a legal prerequisite to a state's taking defensive action under Article 51 of the Charter. The notification requirement does not compel the state to enunciate the specifics of its anticipated response.[328] Rather, the requirement not only ensures that the self-defense claim is not pretextual, but also serves three additional purposes. First, it creates an awareness in the world community of the nature of the aggression and its unlawfulness. Second, it signals that the abduction is a response to aggression, and not aggression itself. Finally, it signals that the state is acting in conformity with the rule of law, thereby encouraging adherence to it.

VI. Conclusion

The forcible abduction by a forum state of an individual residing in an asylum state poses several substantial issues. Concerns of territorial integrity, human rights, justice, the rule of law, and world order are implicated. Generally, these abductions should be prohibited as a matter of policy. Under most circumstances, they also should compel courts to divest themselves of jurisdiction, if for no other reason, than to preserve judicial integrity and respect for the rule of law.[329] Some circumstances, however, make a forum state's abduction of an individual legally permissible. The most notable of these circumstances occurs when an asylum state has sponsored some sort of aggression. Recognizing that certain egregious conditions inure to a justification for such abductions also is a sensible, pragmatic policy. Nevertheless, the resolution of the most important issues concerning international kidnapping in a violent world—including where to draw the line—perhaps requires all nations to consider Senator Arlen Specter's reply to a question posed by Judge Sofaer when the Judge was the Legal Advisor to the State Department. Senator Specter responded rhetorically, "[H]ow would we feel if some foreign nation ... came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, ... because we refused through normal channels of international, legal communications, to extradite that individual?"[330]

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[328] Moore, *supra* note 313, at 10.

[329] 1 BASSIOUNI, *supra* note 123, at 190 (allowing nations to benefit from the product of an illegal abduction "encourages further violations and erodes voluntary observance of International laws").

[330] *House Hearing*, *supra* note 3, at 63 (1985) (statement of Abraham Sofaer, Legal Advisor to the State Department).

BOOK REVIEWS

SOLDIERS OF THE SUN*

REVIEWED BY MAJOR FRED L. BORCH**

Well-written and informative, *Soldiers of the Sun* tells the fascinating story of the Imperial Japanese Army. In its brief existence from 1868-1945, this fighting force earned a reputation for dogged courage in battle. In World War II, for example, Allied soldiers "surrendered at the rate of one prisoner for every three dead." The Japanese, however, had one prisoner of war (POW) for every 120 dead. They also performed extraordinary acts of heroism almost as a matter of routine. Yet, along with this reputation for fighting spirit, the Imperial Japanese Army also earned a reputation for cruelty and barbarism second to none. Japanese soldiers starved, tortured, and executed Allied POWs. They did experiments in biological warfare on thousands of human beings. The "Rape of Nanking" was an *Army-authorized* orgy of burning, looting, gang rape and systematic murder in which thousands of Chinese civilians perished. It, and the "Bataan Death March," remain infamous examples of violations of the law of war.

Soldiers of the Sun is the first major Western attempt to explore this "extreme paradox." It seeks to explain how "an organization displaying the highest of soldierly qualities could possess such a capacity for barbarism." The book will appeal to judge advocates for at least two reasons. First, military lawyers will find the legal and moral issues raised by the conduct of the Imperial Japanese Army fascinating. To teach and advise American soldiers on the law of war successfully, a judge advocate should use historical examples of violations of the law of war. True-to-life illustrations add meaning to any discussion of the rules governing the conduct of soldiers in combat. Consequently, *Soldiers of the Sun* is worth reading for its detailing of how and why Japan violated the Hague and Geneva Conventions.

Military lawyers should read the book for a second reason. Japan now seems poised to send troops in its Self-Defense Force (SDF) overseas for the first time since 1945. If this occurs,

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*MEIRION HARRIES & SUSIE HARRIES, SOLDIERS OF THE SUN (Random House 1991); 569 pages; $30.00 (hardcover).

**Judge Advocate General's Corps, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army.

understanding the role the Army historically has played in Japanese society will become increasingly important. The Imperial Japanese Army no longer exists, and the SDF is a much difference fighting force. Nonetheless, will the use of the SDF outside Japan's national borders lead to a resurgence of militarism in Japan? Should Japan rearm? If it does, is that in America's best interests? Although these issues are not of immediate importance to judge advocates, Japan is and likely will remain our principal ally in the Pacific. If the Japanese SDF deploys overseas, it undoubtedly will have increased operational contact with our American armed forces.

Army lawyers who read *Soldiers of the Sun* will better understand the place the military traditionally has had in Japanese society. This knowledge may make judge advocates more effective in any future dealings with the SDF. Additionally, the Far East will continue to be a possible assignment for military attorneys. Service members stationed in Japan at Camp Zama or on Okinawa will learn much about Japanese history from *Soldiers of the Sun*. Similarly, given the role that Japan has played in Korean history, judge advocates in Korea may find the book equally helpful in understanding Korean attitudes towards Japan.

Soldiers of the Sun traces the rise and fall of the Imperial Japanese Army. The book first examines the Army's samurai roots and its formal creation in 1868. The authors detail the Army's victories, beginning with the Sino-Japanese War of 1894-95. They then focus considerable attention on the Army's great victory against a "Western" power in the Russo-Japanese War of 1904-05. The bulk of the book, however, concentrates on Japanese aggression in the Pacific from 1937 to 1945.

Judge advocates will find the chapters devoted to Japanese war crimes especially interesting. What is illuminating, however, is not so much where, when, or how violations of the law of war occurred, but *why* they happened. *Soldiers of the Sun* rejects the "crass but common racist assumption that the Japanese are somehow cruel by nature." Rather, the huge number of atrocities reflected a combination of cultural and societal factors. First, the Japanese soldier, like the Japanese civilian, did not have "a transcendent moral authority—comparable to God in the Judeo-Christian system—to guide the individual's action." The Japanese do distinguish between what is "right" and what is "wrong," but "right" tended "to be what was deemed right by the group in a particular situation." In sum, "no absolute moral values" either guide or judge *individual* actions. In this context, the concept of an individual conscience is meaningless. Because an order from a

superior was tantamount to an order from the Emperor, the only possible course of action was immediate obedience. This factor, combined with "the lack of an overriding moral authority, meant that there was little resistance to orders to commit atrocities." It also meant that the defense of "acting on superior orders" was a legally valid defense in terms of the ethical system in which the Imperial Japanese Army operated. A Japanese soldier "had no moral imperatives outside the orders of his superiors and the ethic of the group." Anglo-American jurisprudence, however, absolutely rejects this ethical tenet, as the Japanese were to learn at war crimes trials held in Tokyo after World War II.

Soldiers of the Sun stresses two other factors in explaining Japanese war crimes. Japanese culture emphasized the hierarchical nature of the world, and the superiority of Japanese society. The Shinto religion "insisted on the unique and divine origins of the Japanese race." This meant that "all other races [were] inferior," and made it easier to enslave, torture, and murder "decadent races [such as the Chinese]." The Japanese military also encouraged a "mental attitude that bordered on psychopathy." This attitude included a belief in death "as sublime and beautiful," like "the fall of a cherry blossom." Surrendering was "the ultimate dishonor, a belief whose corollary was total contempt for the captive." This military psychopathy also included a special "reverence for the sword, inherited directly from the samurai, which gave beheading as a punishment a special mystical significance." Japan was a signatory to the Geneva Convention, but these cultural and societal factors meant that there "were no constraints on the methods the army might use to secure its ends." Japanese soldiers wore enemy uniforms, booby-trapped enemy dead "for the benefit of stretcher parties," and lured "enemy troops into ambushes with the white flag of surrender." One battalion even developed flag signals in which waving a white flag above the head meant the unit was to "attack *suddenly*." Against this background, the *institutional* aspect of Japanese war crimes emerges. This partly explains why so many Japanese soldiers committed atrocities.

Soldiers of Sun also reveals some fascinating details about Japanese warfighting. For example, in planning for war, the Army "placed all its emphasis on the attack." Moreover, the Japanese "were not comfortable with defense; it was not part of the ethos of the officer corps." Consequently, Japanese commanders not only neglected defensive principles, but also "sometimes found it hard to anticipate" or even understand American and British defense tactics. As long as the Imperial Japanese Army advanced in Asia,

this shortcoming was of academic importance only. When Generals MacArthur, Slim, and Stilwell were on the offensive, however, the Imperial Japanese Army was unable to win a "war of defense, and a war of attrition." These discussions of battlefield doctrine make *Soldiers of the Sun* even more interesting.

The shortcomings in *Soldiers of the Sun* appear to be few. A reviewer in *The New York Times* believes that the book would have been "enriched" had it included a "comparative view of other armies." This is a valid point, but also arguably beyond the scope of the book. Certainly, a look at the American, British, French, and German models for warfighting would have been interesting. Such an examination, however, would have blurred the book's focus on the imperial Japanese war machine. *Soldiers of the Sun* is meticulously researched. The authors, Meirion and Susie Harries, are first-class historians and their analysis is thought provoking and insightful. Judge advocates will enjoy reading this fine book.

EFFECTIVE NEGOTIATION: A GUIDE TO DIALOGUE MANAGEMENT AND CONTROL*

REVIEWED BY MAJOR GENERAL (RET.) LAWRENCE H. WILLIAMS**

Dr. Ramundo, a negotiation practitioner and specialist, has drawn upon his more than forty-five years of negotiating and training experience to elaborate a definitive negotiating guide. His work is both comprehensive and innovative. He dares to suggest that a single approach to negotiation can be used to manage and control all interest-oriented dialogues, whatever their form or substance. The approach is quite simple—any dialogue with an interest dimension can be managed and controlled by effective negotiation.

Effective Negotiation has other unique features which include: the concept of a negotiating universe, consisting of three basic negotiating environments—the private, intraorganizational, and international; emphasis on the "think-negotiation" mindset and mind-game essence of the negotiation process; development of consensus through friendly and pressured persuasion; treatment of

*BERNARD A. RAMUNDO, EFFECTIVE NEGOTIATION: A GUIDE TO DIALOGUE MANAGEMENT AND CONTROL (Quorum Books 1992).

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"win-win" as a tactic or ploy, rather than as a general approach to negotiation; focus on the negative impact of careerism on the negotiator-principal relationship; and application of effective negotiation to professional and personal relationships at and away from the workplace (including decision making and fulfillment of the tasks of management).

Dr. Ramundo convincingly demonstrates that effective negotiation, based on dialogue management and control, provides the best means of goal realization for individuals, organizational entities, and nation states. To reap the benefits of the ability to manage and control dialogues in competitive situations, Ramundo presents a conceptualized approach that is far more persuasive than the various others encountered in the relatively stereotyped literature in the field. His concept of effective negotiation extends dialogue recognition, management, and control to any formal or informal dialogue with an interest or competitive implication. The result is an approach that enhances the effective handling of all the situations implied by the "negotiation is everywhere" principle.

Effective Negotiation focuses on the "mind-game" essence of negotiation process and the "think-negotiation" mindset, both of which are keys to effective negotiation. The author emphasizes friendly and pressured persuasion through the manipulation of perceptions, uncertainty, expectations, and apprehension; and he limits the operational role of "win-win" in the negotiation universe. Dr. Ramundo explains the three basic negotiating environments and the bargaining reality of the staffing process in organizational activities. His coverage of the mechanics of dialogue management and control, with special emphasis on offensive and defensive action, is highlighted by the detailed treatment of tactics, ploys, and presentational techniques. He concludes that effective negotiators are not born; they are the result of focused training and application.

Dr. Ramundo's work is rich with examples that broaden the experience base of the would-be negotiator. In addition, the guidance he provides is easy to understand and apply. *Effective Negotiation* is intended for professional users, such as practitioners and instructors, as well as nonprofessionals who choose to confront an important everyday reality—that is, negotiation is everywhere and involves everyone. Its coverage of the bargaining reality of organizational staffing, foreign policy formulation, and diplomacy broadens the user groups that can benefit from its analytical, pragmatic approach. *Effective Negotiation* is a welcome addition to the literature in the field because it is user friendly and greatly enhances understanding of the negotiation process.

REPEALING THE WAR POWERS RESOLUTION*

REVIEWED BY MAJOR WALTER G. SHARP, SR.**

If we kill 15 Marines, the rest will leave.

Moslem militia
October, 1983

This intercepted radio message between two Moslem militia units sadly brings home the central theme of Professor Robert F. Turner's newest book, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*. Within weeks of the intercept, a terrorist bombing of the Marine barracks at Beirut Airport killed 241 marines and sailors. Professor Turner's meticulous analysis documents the War Powers Resolution as the unconstitutional lynch pin of deterrence failure that encourages such terrorist attacks.

Professor Turner discusses the origins of the resolution, the constitutional issues that it raises, and its practical effects on military operations. He documents that the War Powers Resolution was created under the shroud of the myth that Congress had no role in committing United States forces in Vietnam; that the Resolution weakens the deterrent value of, and actually endangers, United States military forces; that the Resolution is unconstitutional; and that the Resolution has been used by Congress for political expediency.

The War Powers Resolution contains mostly internal congressional housekeeping procedures. Professor Turner, however, painstakingly reviews historical and legal precedent to confirm that parts of the War Powers Resolution fail to recognize the President's independent constitutional authority as Commander in Chief.

Section 2(c) of the War Powers Resolution purports to restrict the constitutional powers of the President to introduce United States military forces into hostilities or imminent involvement in hostilities to three circumstances. These three circumstances are a declaration of war; specific statutory authorization; or in defense of an attack upon the United States, its territories or possessions, or

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*ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (Brassey's (U.S.), Inc. 1991); 206 pages; $25.00.

**U.S. Marine Corps. International Law Division, Office of the Judge Advocate General, U.S. Navy.

its armed forces. This section, however, fails to recognize the independent constitutional authority of the President to rescue endangered Americans and to deploy the military as he or she deems necessary.

Section 3 of the Resolution requires the President to consult with Congress in every possible instance before introducing military forces into hostilities or imminent hostilities. This section is an impermissible attempt to compel the President to consult Congress about matters reserved by the Constitution to the President. Similarly, section 4 attempts to compel the President to provide detailed reports of ongoing hostilities. Section 4 also uses a threshold standard of "imminent involvement in hostilities" that is unconstitutionally overbroad.

Section 5 of the War Powers Resolution most clearly encroaches on presidential authority. Section 5(b) requires congressional authorization to maintain United States forces abroad beyond a sixty-day period when "imminent involvement in hostilities is clearly indicated by the circumstances." This sixty-day period can be extended for another thirty days if the President certifies to Congress that additional time is necessary for the safety of the deployed forces. This section is a blatant attempt by Congress to seize control of the Commander in Chief's authority to deploy United States forces. Section 5(c) is a legislative veto provision similar to the one that the Supreme Court held unconstitutional in *Immigration and Naturalization Service v. Chadha*, and is an usurpation of the authority vested in the Commander in Chief by the Constitution.

Significantly, Professor Turner does not advocate that the President is free to deploy the military as he or she desires. The author is very quick to point out that the President must consult informally and cooperate with Congress. To sustain any political course of action, the President needs the "understanding and support of Congress, so he has an incentive to cooperate and keep the legislative branch informed."

Congress passed the War Powers Resolution under the ruse of protecting the American public from "adventuristic presidents" who drag this nation "kicking and screaming into foreign conflicts against the will of Congress and the American people." Yet, less than a decade earlier, Congress passed the Gulf of Tonkin Resolution virtually unanimously, with a vote of 88-to-2 in the Senate and 416-to-0 in the House of Representatives. Nevertheless, Congress would have those who came in late, or those who were not paying any attention, believe that it had no role in committing United States forces in Vietnam.

In reality, members of Congress were the first to advocate committing combat troops to Vietnam, criticizing the "too little, too late" diplomatic policies of the Kennedy administration, and continued to fund the war year after year. Professor Turner points out that the War Powers Resolution—had it been enacted a decade earlier—would not have prevented United States military involvement in Vietnam. Instead, the strong congressional support for the war would have left the War Powers Resolution on the shelf collecting dust.

In developing his argument that the War Powers Resolution should be repealed, Professor Turner begins with a superb historical foundation, describing similar failures of deterrence intended to ensure peace. The Munich Conference of 1938 pressured Czechoslovakia to give Hitler the Sudetenland to secure "peace for our time." This conciliation in the face of armed aggression was part of the failure of deterrence that contributed to World War II.

The neutrality laws of the United States in the 1930's were intended by Congress to keep the United States out of World War II by tying the President's hands. Professor Turner has done an excellent job collecting numerous congressional debates and writings by historians which conclude that the neutrality laws reduced deterrence and actually accelerated World War II. Following World War II, Congress acknowledged the dangers of its prewar isolationist attitude when its members strongly supported the Truman Doctrine.

Similarly, Professor Turner argues that the War Powers Resolution reduces the deterrent value of United States military forces. The War Powers Resolution purports to limit, as a matter of law, the President's authority as Commander in Chief during hostilities to a maximum period of ninety days. After this limited period, Congress then decides whether or not United States military involvement is right or wrong and can start to micromanage American military involvement. If Congress cannot decide, then the War Powers Resolution assumes "as a matter of law that the president is wrong." Furthermore, the War Powers Resolution endangers United States military forces. A terrorist or hostile force merely needs to kill a few American service members to trigger the clock of the War Powers Resolution, potentially limiting further United States military involvement.

Under the United States' constitutional scheme of separation-of-powers, the Founding Fathers gave the President the exclusive responsibility for conducting relations with the external world because the effective management of those relations required the

qualities of secrecy, unity of plan, speed, and dispatch. The Constitution provides for checks to protect against presidential abuse by allowing the Senate to veto a negotiated treaty and by allowing either house of Congress to veto the decision to initiate a war.

This distribution of powers was observed by Congress and the President for two hundred years—until the enactment of the War Powers Resolution in 1973. Congress has recognized the power of the President to deploy United States forces during times of peace without any further law or congressional support. One of the earliest examples cited was the use of the United States Navy against the Barbary pirates. The debates in Congress were not concerned about an adventuristic President, but of how to show support for the President without the implication that he needed congressional authority to use American armed vessels as convoys. The Korean War is a more recent example. Although a few criticized President Truman's failure to seek congressional approval, constitutional scholars in Congress "staunchly defended the president's power to commit troops to combat without legislative sanction."

Professor Turner also cites numerous scholars such as Thomas Jefferson, Alexander Hamilton, and James Madison to explain the allocation of national security and war powers between the President and Congress. This division of powers is summarized by Professor Turner as follows:

> Congress was given the task of raising and supporting armies, and the very important role of rejecting (or vetoing) an executive plan to initiate an offensive war against a foreign state. But once a military force was created, it belonged to the president to deploy and employ it to best protect the interests of the nation, and that included the power to fight a defensive war in the event of foreign aggression. Congress was given no control over these discretionary executive decisions, which required for their success the executive qualities of unity of plan, secrecy, speed, and dispatch.

Professor Turner explains that the congressional power to declare war is limited to aggressive war, which is now outlawed by article 2(4) of the United Nations Charter. He does a brilliant job in supporting his already convincing argument with congressional statements. The Senate Committee on Foreign Relations report that accompanied the Senate's ratification of the United Nations Charter stated that:

> Preventive or enforcement action by ... [United Nations] forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war.

Senator Vandenberg, former Chairman of the Senate Committee on Foreign Relations, stated in 1948 that:

> There is a general constitutional power resident in the President of the United States as commander in chief which has been exercised a hundred or a hundred and twenty-five times in the last 150 years, to use the armed forces of the United States externally for the protection of American life and property and the national interest without the direct license and direction of the Congress of the United States.

Professor Turner's comparison of similar deterrence failures and an examination of two centuries of historical precedent presents a convincing argument that the War Powers Resolution is unwise and unconstitutional.

If the historical and legal precedent discussed in his book does not convince the die-hard supporters of the War Powers Resolution to doubt the legality of their beliefs, the last part of Professor Turner's book should be their undoing. His examination of sixteen years of implementation of the Resolution demonstrates that Congress has used the War Powers Resolution for reasons of "political expediency rather than constitutional principle."

Professor Turner aptly points out that the War Powers Resolution does not provide for mechanisms for implementation. Who is the President to consult with, and how? Should the President address the Congress as a whole or individually, or would consultation with committee chairmen and party leaders be sufficient? More importantly, how is Congress to treat the reports made by the President? Are they to be good faith estimates based on a fluid political situation or legally binding commitments that, if broken, subject the President to accusations of lying or breaking the law?

The Continental Congress under the Articles of Confederation proved itself unable to deal with international discourse. Similarly, the last sixteen years have proven that today's Congress is equally incapable of dealing in foreign affairs. Attempts by the President to consult have failed miserably. In 1975, President Ford tried to consult with Congress concerning the evacuation of Da Nang, South Vietnam; however, key members of Congress were in five

foreign countries and twelve locations in the United States, making consultation impossible.

In 1986, President Reagan discussed the pending air strike on Libya with key members of Congress. Immediately upon leaving the White House, one Senator told the press that he could not discuss the substance of the meeting, but that "the president would make an important address to the nation at 9:00 p.m. which would explain everything." This information was broadcasted along with military movements in Europe, and could have resulted in an advance warning to Libya. Professor Turner's point is two-fold. First, the larger the group that is included in the planning of sensitive military operations, the more likely a leak will occur. Second, if Congress is to be consulted, then its members must learn to be more discreet.

For the President to consult with Congress as required by the War Powers Resolution is practically impossible. In any time sensitive situation, the President must act without consultation if he or she is to act at all. If the military operation is successful, Congress applauds. If the operation is unsuccessful or unpopular, then Congress can condemn the President for not seeking its sage advise. Even if a situation is urgent, but not critically time-sensitive, Congress has the full opportunity to debate, without ever acting until it can predict success and public opinion. Sadly, the lesson readers learn from Professor Turner's frank analysis is that this congressional method of checking the water before going for a swim undermines the effectiveness of the operation. Sometimes, as in Beirut, this will cost the lives of American service members sworn to uphold the same Constitution that the War Powers Resolution corrupts.

Professor Turner criticizes Congress for using the War Powers Resolution to disavow responsibility for unsuccessful or unpopular military operations. Given several examples of presidential use of the military that violated the requirements of the War Powers Resolution, congressional reaction accurately can be predicted by the success of the operation and public opinion. When military actions such as the *S.S. Mayaguez* rescue operation and the Grenada operation were successful and garnered public support, the President was praised without any mention of the War Powers Resolution. In contrast, when operations such as the rescue attempt of the American hostages in Iran failed, the President was condemned for violating the War Powers Resolution.

The Grenada operation is perhaps the clearest example of congressional fervor oscillating in the breezes of public opinion. Many congressmen immediately accused the President of violating

the War Powers Resolution while rescuing endangered Americans in Grenada. The House Foreign Affairs Committee even demanded urgent hearings to examine the legal issues raised by the operation. Once the American public demonstrated political and moral support for the operation, however, Congress "reconsidered" the legal principles embodied in the War Powers Resolution and decided that the President was fully justified in his conduct of Operation Urgent Fury. The Grenada operation is but one of many examples that the author cites of Congress attempting to avoid responsibility.

Repealing the War Powers Resolution is an interesting and well-written text on the War Powers Resolution. Professor Turner objectively identifies the arguments on both sides of the constitutional issues. The author, however, most effectively argues that the War Powers Resolution is unconstitutional and should be repealed. This book is a scholarly work that is rounded out by the personal experiences of the author.

Professor Turner is one of the foremost experts on the War Powers Resolution, and is uniquely qualified to pass judgment on the legality of the War Powers Resolution. Professor Turner served in Vietnam twice with the United States Army. For the first five years after Congress passed the War Powers Resolution, Professor Turner served as senior national security adviser to a member of the Senate Foreign Relations Committee and was the last congressional staff member to leave South Vietnam during the April 1975 evacuation. In later years, he served as Special Assistant to the Undersecretary of Defense for Policy, as principal Deputy Assistant Secretary of State for Legislative and Intergovernmental Affairs, and as the first president of the congressionally established United States Institute of Peace.

Robert F. Turner currently teaches law at the University of Virginia, chairs the American Bar Association's Standing Committee on Law and National Security, and serves as Associate Director of the Center for National Security Law at the University of Virginia. He previously has served as Chairman of the Committee on Executive-Congressional Relations of the American Bar Association Section of International Law and Practice.

Professor Turner's analysis of one of the most controversial pieces of legislation of our country's history demonstrates that the War Powers Resolution is both unwise and unconstitutional. His documentation provides clear and convincing evidence that the War Powers Resolution should be repealed. The perceptive reader cannot avoid the inescapable conclusion that anyone who still adheres to the belief that the War Powers Resolution is

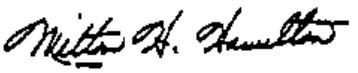
constitutional is acting out of visceral partisanship. While recognizing that congressional attitudes are as much to blame as the War Powers Resolution, the repeal of the Resolution would recognize political disagreements between equal branches of the government for what they are—a difference of opinion.

Professor Turner argues that the repeal of the War Powers Resolution would facilitate a working relationship between the President and Congress based on mutual respect and comity. This relationship is required by political realities, but cannot be required by law. This book presents a compelling argument against those who believe that Congress is asserting a proper constitutional role in the field of national security affairs when it invokes the War Powers Resolution.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



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