Volume 153 Summer 1996

MILITARY LAW REVIEW

ARTICLES

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BOOK REVIEWS

Department of Army Pamphlet 27-100-153

DEPT OF ARMY PAMPHLET 27-100-153 MILITARY LAW REVIEW VOLUME 153 • 1996

MILITARY LAW REVIEW

Volume 153 **Summer 1996**

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ARTICLES

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Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-153, Summer 1996

MILITARY LAW REVIEW—VOLUME 153

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CITATION: This issue of the *Military Law Review* may be cited as 153 MIL. L. REV. (page number) (1996). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Second-class postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review,* The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781.

INDEXING:

* The primary *Military Law Review* indices are volume 81 (summer 1978) and volume 91 (winter 1981).
* Volume 81 includes all writings in volumes 1 through 80, and replaces all previous *Military Law Review* indices.
* Volume 91 includes all writings in volumes 75 through 90 (excluding volume 81), and replaces the volume indices in volumes 82 through 90.
* Volume 96 contains a cumulative index for volumes 92-96.
* Volume 101 contains a cumulative index for volumes 97-101.
* Volume 111 contains a cumulative index for volumes 102-111.
* Volume 121 contains a cumulative index for volumes 112-121.
* Volume 131 contains a cumulative index for volumes 122-131.
* Volume 141 contains a cumulative index for volumes 132-141.
* Volume 151 contains a cumulative index for volumes 142-151.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalogue of United States Government Publications; Index to United States Government Periodicals; Legal Resources Index;* three computerized data bases—the *Public Affairs Information Service, The Social Science Citation Index,* and *LEXIS;* and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review,* The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Authors also should submit electronic copies

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CONTINUUM CRIMES: MILITARY JURISDICTION OVER FOREIGN NATIONALS WHO COMMIT INTERNATIONAL CRIMES

MAJOR MICHAEL A. NEWTON*

Because the sentence against an evil deed is not executed speedily, the heart of the sons of men is fully set in them to do evil.[1]

I. Introduction

> The principle of personal liability is a necessary as well as a logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare. Of course, the idea that a state any more than a

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[1] *Ecclesiastes* 8:11 (New King James).

> corporation commits crimes is a fiction. Crimes are always committed only by persons.[2]

American military commanders do not have adequate means of punishing individuals who commit human rights abuses which may adversely affect military missions. In October 1993, cheering crowds of Somalis dragged the body of a United States soldier through the streets of Mogadishu.[3] The scene rippled through America's collective consciousness and conveyed the truth that soldiers often face enemy elements who ignore the rules of armed conflict. Presently, regional ethnic conflicts fueled by hatred, religious differences, and tribal rivalries create conditions in which the codified laws of war do not adequately restrain the conduct of the participants.[4]

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[2] 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 150 (Nuremberg, Germany, 1947) [hereinafter IMT] (quoting Justice Jackson's opening remarks at the Nuremberg Trials). Justice Jackson went on to note that, "[w]hile it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such legalism become the basis of personal immunity. The [London] Charter recognizes that one who has committed criminal acts may not take refuge in superior order nor in the doctrine that his crimes were acts of states." *Id.*

[3] Keith B. Richburg, *Somalia Battle Killed 12 Americans, Wounded 78*, WASH. POST, Oct. 5, 1993, at A1. President Clinton made the first post-Vietnam awards of the Congressional Medal of Honor to the widows of two soldiers involved in this action. Amy Devroy, *Medals of Honor Given to 2 Killed In Somalia*, WASH. POST, May 23, 1994, at A6. Master Sergeant Gary Gordon and Sergeant First Class Randall Shughart gave their lives in the streets of Mogadishu from a sense of duty and loyalty to their comrades. For a stunning account of the battle and its effect on United States policy in Somalia, see Rick Atkinson, *The Raid That Went Wrong: How an Elite U.S. Force Failed in Somalia*, WASH. POST, Jan. 30, 1994, at A1; Rick Atkinson, *Night of a Thousand Casualties: Battle Triggered U.S. Decision to Withdraw from Somalia*, WASH. POST, Jan. 31, 1994, at A1.

[4] The term "laws of war" denotes a branch of public international law, and comprises a body of rules and principles observed by civilized nations for the regulation of matters inherent in, or incidental to, the conduct of a public war." Black's Law Dictionary, 1583 (6th ed. 1990). As used in this article, laws of war refer to that body of international law and custom that apply in the context of international armed conflicts. Army doctrine consistently refers to the "law of war" as applying "to cases of international armed conflict and to the forcible occupation of enemy territory." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 9 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. The core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59) [hereinafter Convention on Sick and Wounded]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371) [hereinafter Convention on Sick and Wounded at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021) [hereinafter Convention on Prisoners of War]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention].

Although regional ethnic conflicts seldom pose direct threats to American security, United States forces have a vital role in promoting collective security and protecting human rights around the world.[5] America requires her soldiers to comply with the laws of war anytime they deploy.[6] During peace operations, American forces often encounter opposing forces who are not bound by the laws of war[7] and who disregard applicable rules of humanitarian law.[8]

To a lesser extent, the supplemental protocols have evolved into customary international law. *See* Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex II, *reprinted in* 26 I.L.M. 561 (1987) [hereinafter Protocol II], *reprinted in* DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949 (1979) [hereinafter DA PAM 27-1-1 PROTOCOLS].

[5] William A. Stoft & Gary L. Guertner, *Ethnic Conflict: The Perils of Military Intervention*, PARAMETERS 30, 37 (Spring 1995) [hereinafter *Ethnic Conflict*].

[6] *See* DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, para. E(1)(a)(10 July 1979) [hereinafter DOD. Dir. 5100.77] (requiring that United States Armed Forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized*") (emphasis added). *See also* Joint Chiefs of Staff Memorandum, MJCS 0124-88, subject: Implementation of DOD Law of War Program (4 Aug. 1988) (stating that legal advisors will review all operations plans as well as rules of engagement to ensure compliance with the Department of Defense Law of War Program); DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 2-1g (3 Feb. 1995) (requiring The Judge Advocate General to review operations plans and rules of engagement for compliance with obligations under international law).

[7] The laws of war apply to all cases of declared war or any other conflict which may arise between the United States and other nations, even if one of the parties does not recognize the state of war. The customary law of war also applies to all cases of occupation of foreign territory by the exercise of armed force. FM 27-10, *supra* note 4, para. 8 (implementing and explaining the provisions of Article 2, common to the 1949 Geneva Conventions which restrict the application of the codified laws of war to international armed conflicts). *See also* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995) (stating that the Geneva Conventions were not "strictly speaking" applicable to United States operations inside Haiti) [hereinafter *Extraterritoriality of Human Rights Treaties*]; Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A34.

One operational distinction among many others is the extent to which United States forces undertake to disarm the civilian populace. During a war, of course, United States forces defeat their enemy on the battlefield, and then take the enemy weapons away if they refuse to lay them down voluntarily. During other operations, United States forces have repeatedly implemented programs to disarm the civilian population without using illegal force or upsetting the often delicate political balance of the operation. *See generally* Major General S.L. Arnold & Major David Stahl, *A Power Projection Army in Operations Other Than War*, PARAMETERS 4, 17 (Winter 1993-94) [hereinafter *Power Projection Army*] (describing the difficulties of disarming the Somali population during Operation Restore Hope and noting that "[a]ny future mission of this type must take into account the extraordinarily complex and difficult process of disarming the civilians of the country if that is part of the mission"); F.M. Lorenz, *Weapons Confiscation Policy During the First Phase of Operation Restore Hope*, *in* SMALL WARS AND COUNTERINSURGENCIES, 409, 421 (Winter 1994) (describing the early weapons policy in Somalia); Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139 (1994) (arguing that United Nations

United States forces have conducted operations in areas where the foreign government either cannot or will not enforce international law against its citizens.[9] As a result, deployed commanders confront gaps in compliance between their forces and foreign nationals who violate clear principles of international law.

American commanders have authority to convene a general court-martial or a military commission to punish foreign nationals who violate the laws of war during an international armed conflict.[10] This article argues that Congress should modify the Uniform Code of Military Justice (UCMJ) to give deployed commanders the authority to prosecute foreign nationals who commit international crimes during operations other than war.

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peacekeeping operations are not currently covered by the laws of war and that "[p]eacekeeping forces are left to wander in a legal twilight zone, where they have no clear guidance on exactly what type of mission they are involved in, let alone what the law and the rules of engagement permit. Unless the international community is willing to forego such values as military certainty, adherence to humanitarian norms, and the prevention of future wars, peacekeeping law must be clarified."); *But cf.* 1971 *Zagreb Resolution on the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*, 54 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 465-70 (1972), *reprinted in* 66 AM. J. INT'L L. 465-68 (1972); DOCUMENTS ON THE LAWS OF WAR 371-375 (Adam Roberts & Richard Guelff eds., 1982) (noting that although the United Nations is not a party to any international agreements on the laws of war, the humanitarian law of war applies to all UN operations "as of right").

[8] *See, e.g.*, Major Paul D. Adams, *Rules of Engagement: The Peacekeeper's Friend or Foe?*, MARINE CORPS GAZETTE, Oct. 1993, at 21 (opining that the rules restricting United States forces are ignored and utilized by their opponents to "stack against" American military efforts); John Lancaster, *Mission Incomplete, Rangers Pack Up: Missteps, Heavy Casualties Marked Futile Hunt in Mogadishu*, WASH. POST, Oct. 21, 1993, at A1 ("We played by our rules and he doesn't play by our rules . . . . He surrounds himself with women and children and stays in the most crowded part of the city."); David Wood, *U.S. Heads into New War Era-Chronic Violence*, CLEV. PLAIN DEALER, Apr. 3, 1994, at A4 (asserting that the prohibitions of the Geneva Conventions "counted for little in Somalia").

International humanitarian law is defined as the branch of international law dealing with the protection of victims of armed conflict. Jovica Patrnogic, *Human Rights and International Humanitarian Law* 1, *in* UNITED NATIONS CENTRE FOR HUMAN RIGHTS, BULLETIN OF HUMAN RIGHTS 91/1 (1992). Human rights law and international humanitarian law are distinct fields that converge in places to share a common goal of protecting human beings from suffering. *Id.* at 5. Although the two disciplines overlap in purpose to some degree, they each have a different history, focus, and implementing mechanism. *Id.* at 7.

[9] *See generally* F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS 27 (Winter 1993-94) (describing the conditions faced by United States forces deployed to Somalia). For a description of the conditions in Panama prior to the United States invasion in December 1989, see John E. Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991). The United States cited four grounds for the invasion of Panama. The United Nations General Assembly criticized the invasion as "a flagrant violation of international law and the independence, sovereignty, and territorial integrity of states." G.A. Res. 44/240, U.N. GAOR, 44th Sess., Agenda Item 34, at 1, U.N. Doc. A/RES/44/240 (1989).

[10] 10 U.S.C. §§ 818, 821 (1995).

By its very nature, international criminal law evolved from interactions between sovereign states. International law codifies specific offenses through treaties[11] and also recognizes crimes based upon violations of customary international law.[12] Just as the laws of war originated from military practices developed over time,[13] inter-

[11] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention]. One scholar counted 315 international instruments which cover twenty-two categories of offenses. The categories of offenses, which derive from multilateral or regional sources, and which often derive from multiple international agreements are: aggression, war crimes, crimes against humanity, unlawful use of weapons, genocide, apartheid, slavery and slave related activities, torture, unlawful human experimentation, piracy, aircraft hijacking, threat and use of force against diplomats and other protected persons, taking of civilian hostages, international drug trafficking, international traffic in obscene materials, destruction or theft of nuclear materials, unlawful use of the mails, interference with submarine cables, falsification and counterfeiting, and bribery of foreign public officials. M. Cherif Bassiouni, *Policy Considerations on Interstate Cooperation in Criminal Matters*, 4 PACE Y.B. OF INT'L L. 123, 125 n.8 (1992) [hereinafter *Interstate Cooperation in Criminal Matters*]. *See also* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: DIGEST INDEX OF INTERNATIONAL INSTRUMENTS, 1815-1986 (2 vols. 1986) (The three post-1985 treaties are the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Servicing Civil Aviation, adopted by the International Civil Aviation Association, Feb. 24, 1988, *reprinted in* 27 I.L.M. 627 (1988); Convention and Protocol From the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15, *reprinted in* 27 I.L.M. 668 (1988); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, U.N. Doc. E/CONF. 82/13, *reprinted in* 28 I.L.M. 293 (1989)). *See infra* notes 178-191 and accompanying text for a description of the international crimes defined by the Convention on the Safety of United Nations and Associated Personnel.

[12] The clearest instances of customary international crimes are piracy and war crimes. The Charter of the International Military Tribunal of August 8, 1945 annexed to the Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, 59 Stat. 1544, 3 Bevans 1238, 82 U.N.T.S. 279, *entered into force* August 8, 1945 [hereinafter London Charter], recognized that the substantive crime termed "crimes against humanity" proscribed by Article 6(c) arose from "general principles of law recognized by civilized nations." *See also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 101(2)(1986) [hereinafter RESTATEMENT] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); Roger S. Clark, *Crimes Against Humanity*, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 177, 190-94 (George Ginsburgs & Vladimir N. Kudriavstsev eds., 1990).

[13] Jeffrey F. Addicott & William A. Hudson, *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 177 (1993) [hereinafter *My Lai Lessons*] (describing aspects of ancient Hebrew Law which prohibited torturing persons, mistreating women and children, or harming surrendering foes). This is an important teaching point for lawyers charged with teaching the laws of war to soldiers and officers. The laws of war are not the product of lawyers trying to "stay busy." The rules regulating armed conflict evolved from the practices which commanders throughout history developed and refined. *See generally* William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 3 (1982) [hereinafter *Command Responsibility*] (noting the author's perception that soldiers developed the laws of war as the cornerstone of military professionalism, and lamenting that:

> Prior to World War II, legal standards for commanders were the practical articulation of the accepted practice of military professionals. This customary international law expressed soldiers' standards which were

national criminal law defines offenses as "a result of universal condemnation of those activities and general interest in cooperating to suppress them."[14] Accordingly, any state has jurisdiction to punish international crimes.[15]

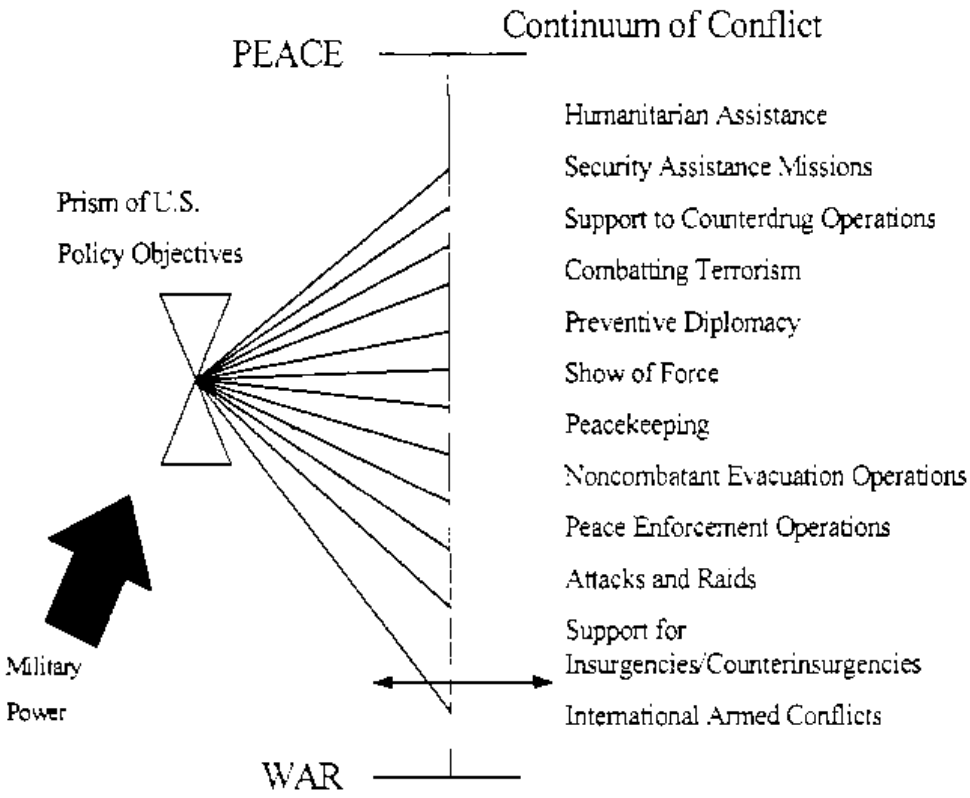

Figure 1

Figure 1 illustrates the range of operational deployments. As Figure 1 shows, the political objective diffuses raw military power into defined, and often overlapping, roles and missions.

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born on the battlefield and not standards imposed upon them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and enforced. . . . Modern law of war is driven by an idealistic internationally minded community. The soldier sees his iron law of war sweetened, lawyerized, politicized, third world-ized, and made much less practical.

[14] RESTATEMENT, *supra* note 12, § 404 cmt. a.

[15] *Id.* For a fascinating case illustrating the practical application of this principle, see *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579-83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993). When United States courts exercise criminal jurisdiction on the basis of universal jurisdiction, they act for all nations and the nationality of the offender or victim, as well as the location of the offense, are irrelevant. *Id.* at 583. *See also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (upholding jurisdiction over a Lebanese citizen who hijacked a Jordanian airliner in Tunisia).

Enforcing international law standards in American military courts is not simply an aspirational goal unrelated to the accomplishment of military objectives. Military doctrine maintains its focus on winning the nation's wars, but it also contemplates deployments across a broad array of operations short of war.[16]

The necessity for a commander to "direct every operation toward a clearly defined, decisive, and attainable objective" is fundamental to American military doctrine.[17] Wartime objectives can be simply stated. During the Gulf War, for example, the Chairman of the Joint Chiefs of Staff proclaimed, "First, we're going to cut it [the Iraqi Army] off, and then we're going to kill it."[18]

On the other hand, peace operations employ military power with discrete discipline designed to create or sustain the conditions under which political or diplomatic activities may proceed.[19] Peace operations require commanders to use military force in a restrained manner to complement diplomatic, informational, economic, and humanitarian efforts designed to achieve the ultimate political objective.[20] By the same token, commanders must consider prosecutions of foreign nationals only in light of overall operational objectives. Army *Field Manual 100-23* recognizes that "settlement, not victory is the ultimate measure of success, though settlement is

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[16] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) [hereinafter FM 100-5]; DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (14 Dec. 1994) [hereinafter FM 100-23].

[17] FM 100-5, *supra* note 16, at 2-4. The ultimate purpose of war is to destroy the enemy's forces and will to fight. The ultimate objectives of operations other than war might be more difficult to define, yet doctrine states that "they too must be clear from the beginning." *Id. Field Manual 100-5* restates the critical importance of defining and pursuing the overall operational objective during operations other than war:

> The linkage between objectives of war at all levels of war is crucial; each operation must contribute to the ultimate strategic aim. The attainment of intermediate objectives must directly, quickly, and economically contribute to the operation. Using the analytical framework of mission, enemy, troops, terrain, and time available (METT-T),commanders designate physical objectives such as an enemy force, decisive or dominating terrain, a juncture of lines of communication (LOCs), or other vital areas essential to accomplishing the mission. These become the basis for all subordinate plans. Actions that do not contribute to achieving the objective must be avoided."

Id.

[18] Tom Post et al., *A Commanding Presence: Colin Powell Reassures Jittery Americans-and Psyched out the Iraqis*, NEWSWEEK SPECIAL ISSUE, Spring/Summer 1991, at 83.

[19] Brigadier General Morris J. Boyd, *Peace Operations: A Capstone Doctrine*, MIL. L. REV. 20 (May-June 1995).

[20] DEP'T OF ARMY, FIELD MANUAL 100-7, DECISIVE FORCE: THE ARMY IN THEATER OPERATIONS 8-1 (31 June 1993). The manual reminds commanders that operations other than war build on an in-place diplomatic structure which requires special sensitivity and coordination with nonmilitary organizations. As a result, operational-level command and unity of command "may be clouded." *Id.* at 8-5.

rarely achievable through military efforts alone."[21] Thus, enforcing international humanitarian law can be an integral part of the commander's overall mission.

Two examples from Operation Uphold Democracy illustrate the opportunity and the danger of using military courts to enforce international humanitarian law. On 31 July 1994, Security Council Resolution 940 authorized United Nations member states to form a multinational force and "use all necessary means" to end the military dictatorship inside Haiti and to allow the legitimate authorities to return to power.[22] United States forces deployed to Haiti with the explicit mission to "establish and maintain a stable and secure environment."[23]

On 20 September 1994, Haitian police and militia beat protesting Haitian citizens in full view of American soldiers. At least one person died as a result of the beatings, and the American news media widely publicized the soldiers' failure to intervene.[24] Well before this incident, however, American commanders had identified the problem of controlling serious crimes and had requested a change to the rules of engagement. The modified rules would have allowed soldiers to use necessary force against "persons committing serious criminal acts."[25] The approved modification to the rules of engagement allowed soldiers to use necessary force to detain persons committing homicide, aggravated assault, arson, rape, and robbery.[26] Unfortunately, the troops did not receive the revised rules until 21 September 1994. The media widely reported that the beatings forced the change.[27]

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[21] FM 100-23, *supra* note 16, at iv.

[22] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994) [hereinafter Res. 940].

[23] *Id.* ¶ 4.

[24] *See* Judy Keen & Paul Hoverstein, *Signs of "Mission Creep" Could Raise Stakes: Another Somalia Feared*, USA TODAY, Sept. 22, 1994, at A3; T.J. Milling, *Haitian Police Savagely Club Demonstrators; Man Beaten to Death at Port: Disgusted G.I.s Forced to Watch*, HOUSTON CHRON., Sept. 21, 1994, at A1; Julian Beltrame, *U.S. Troops Watch as Haitians Beaten; At Least One Killed*, N.Y. TIMES, Sept. 21, 1994, at A1; Mark Matthews, *U.S. Forces Failure to Intervene in Haitian-on-Haitian Violence Raises Questions*, BALTIMORE SUN, Sept. 21, 1994, at A1.

[25] *See infra* notes 396-98 and accompanying text for a discussion of the rules of engagement considerations inherent to enforcing standards of international law.

[26] Operation Uphold Democracy Rules of Engagement Card (21 Sept. 1994) (pocket cards issued to soldiers on the ground) (copy on file with the author).

[27] Greg McDonald, *Clinton Looses the Leash: U.S. Forces Can Protect Haitians*, HOUSTON CHRON., Sept. 22, 1994, at A1; Douglas Farah, *U.S. Warns Haitian Leaders on Abuses; GI Patrols Stepped Up to Stop Civilian Beatings*, WASH. POST, Sept. 22, 1994, at A1; T.J. Milling, *U.S. Troops Cleared for Deadly Force*, HOUSTON CHRON., Sept. 23, 1994, at A1; Geordie Greig & James Adams, *Sleeping with the Enemy*, SUN. TIMES, Sept. 25, 1994.

In this situation, clear jurisdiction to punish foreign citizens under the UCMJ could have helped prevent the human rights abuses by the Haitian police. Protecting peacefully demonstrating citizens probably would have advanced the commander's mission to establish a stable and secure environment. Human rights treaties establish rights and duties between governments and their citizens and therefore do not require third parties to prevent abuses.[28] Nevertheless, the commander on the ground should have the discretion to intervene based on his assessment of mission requirements. In appropriate situations, the commander could substitute the power of criminal deterrence for the use of military force. Echoing Justice Oliver Wendell Holmes, the mission statement would become the commander's articulation of the "circumstances in which the public force will be brought to bear upon men through the courts."[29]

At the other extreme, soldiers can be so focused on investigating and remedying alleged human rights violations that they fail to execute their military mission. On the evening of 30 September 1994, an American counterintelligence officer left his place of duty on a self-appointed humanitarian mission.[30] Captain Lawrence Rockwood feared that Haitian police inside the National Penitentiary were abusing, killing, and torturing Haitian prisoners.[31] Captain Rockwood based his fears solely on speculation. By going to the penitentiary, Captain Rockwood diverged from the stated mission of establishing a "stable and secure environment"[32] and pursued his own agenda rather than that of his commander.

The commander convened a general court-martial against Captain Rockwood for being absent from his place of duty without leave and disobeying a lawful order.[33] After the prosecution proved the case, the court-martial convicted Captain Rockwood because he could produce no witnesses to support his contentions. Captain

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[28] *See* Richard B. Lillich, *Human Rights, in* JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 671, 720 (1990).

[29] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

[30] Francis X. Clines, *American Officer's Mission for Haitian Rights Backfires*, N.Y. TIMES, May 12, 1995, at A1; Charley Reese, *Americans, Don't Tolerate Injustice Done to Fine U.S. Serviceman*, ORLANDO SENTINEL, Jan 5, 1995, at 12.

[31] *Id.*

[32] Res. 940, *supra* note 22, ¶ 4.

[33] *Id. See also* Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 151 MIL. L. REV. 145 (1996). Other charges included a second charge of absence without leave, disrespect to a superior commissioned officer, and conduct unbecoming an officer and a gentleman. Except for the conduct unbecoming charge, the other charges arose from Captain Rockwood's conduct on 1 October 1994. *Id.*

Rockwood admitted at trial that he had no information about human rights abuses before he arrived at the prison.[34]

At the time of the misconduct, the situation in Haiti was tense. Colonel (Retired) Richard Black described the potential consequences of Captain Rockwood's misconduct by telling Congress that "the potential for a widespread outbreak of violence was substantial. A misstep at that moment might have set in motion a chain of events leading to the loss of American lives and the collapse of the entire mission."[35] Ironically, the day before Captain Rockwood left his place of duty, someone killed sixteen Haitians by throwing a hand grenade into a crowd.[36] Instead of obeying his superior's orders to collect intelligence on the incident that had genuine potential to destabilize the mission, Captain Rockwood embarked on a solitary effort to accomplish his own goals. The logical corollary is that, while prosecuting international crimes in military courts could be a valuable tool, commanders must link prosecution to the overall objectives of the operation.

Prosecution of suspected criminals is one way in which the commander orchestrates military force to accomplish the mission.[37] Between the extremes of ignoring gross abuses on the one hand and recklessly chasing phantom abuses on the other, commanders should have another tool to help achieve national objectives. Statutory authority to prosecute selected cases could be a valuable option that is currently unavailable.

Part II of this article describes the shortcomings of the current UCMJ in punishing violators of international law. Part III details the functions that expanded military jurisdiction over foreign nationals could serve in the context of modern military doctrine. Part IV reviews the international and domestic grounds for expanding the role of military courts. Part V analyzes the scope of presently developed international legal authority. International law criminalizes conduct across the full spectrum of military operations. The term continuum crimes describes the class of offenses that violate

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[34] Bob Gorman, *The Media and Capt. Rockwood*, WATERTOWN DAILY TIMES, Dec 3, 1995, at F6-F7 (reporting the facts of the case, describing the widespread media attention given to the case, and relating that as he left for the penitentiary Captain Rockwood left a note reading "[n]ow you cowards can court-martial my dead body.").

[35] *Human Rights Violations at the Port-au-Prince Penitentiary: Hearing Before the Subcomm. on the Western Hemisphere of the House of Representatives Comm. on International Relations*, 104th Cong., 1st Sess. 27 (1995) [hereinafter *Human Rights Hearings*], *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 342 (1995). *See infra* note 424 and accompanying text for analysis of the lack of affirmative duties imposed on commanders to remedy human rights abuses.

[36] Gorman, *supra* note 34, at F7.

[37] *Human Rights Hearings*, *supra* note 35.

international law across the spectrum of conflict. To further the operational objectives, commanders should have the authority to convene military tribunals to prosecute foreign nationals who commit continuum crimes.

Amending the UCMJ would not create new international crimes. To the contrary, clear authority to prosecute continuum crimes would give United States policy makers a venue in which to enforce existing jurisdictional rights. Continuum crimes include the range of international criminal offenses across the spectrum of conflict. War crimes are thus a subset of the class of continuum crimes. Part VI discusses the mechanisms available for punishing continuum crimes. Military commissions are the only viable forum for prosecuting continuum crimes to fully reap the potential policy benefits for deployed American forces. Because the United States has jurisdiction under international law, Part VI also explores the reasons why exercising continuum crime jurisdiction could support American policy interests. Finally, Part VII specifies changes to the UCMJ needed to implement the recommendations of this article.

II. Jurisdictional Gaps of the Current Code

The practice of using military forums to punish criminal violations of international law is deeply rooted in American jurisprudence. The United States Constitution specifies that Congress has the power to "define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."[38] As a practical matter, jurisdiction over international crimes is meaningless if United States courts lack a jurisdictional basis for enforcement in domestic law.[39] However, United States forums applying domestic law to enforce international rules does not diminish the status of the violations as international crimes.[40] The UCMJ is the only domestic

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[38] U.S. CONST. art. I, § 8, cl. 10. The origins of the clause are relatively obscure. The only recorded mention of this clause during the Constitutional Convention debates was an expressed concern that the new federal government be able to enforce international law obligations and a dispute over whether the clause's language made a claim to unilaterally define international law. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRASNAT'L L. 73, 148 n.234 (1995).

[39] RESTATEMENT, *supra* note 12, §§ 402-04, 421-23. For an analysis of the process by which states acquire universal jurisdiction over some criminal offenses see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

[40] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995). Hersch Lauterpacht explained that universal jurisdiction simply allows each state to use its domestic law as a tool for enforcing the law of nations. He wrote, "War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action . . . is contrary to international law." Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 64 (1944).

statute in which Congress establishes United States judicial power for military courts to punish violations of the law of war.[41]

The nature of modern military deployments,[42] coupled with the changing scope of humanitarian law,[43] restricts the usefulness of the existing code provisions. Current UCMJ provisions limit jurisdiction of military forums to violations of the "law of war."[44] Existing statutes only address offenses committed by persons not "subject to the Code" if those crimes occur during an international armed conflict or during United States occupation of enemy territory following an international armed conflict.[45]

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[41] *See infra* notes 42-91 and accompanying text for a discussion of applicable Uniform Code of Military Justice (UCMJ) provisions and the limitations of the current statutory language. Congress recently created federal court jurisdiction over grave breaches with the War Crimes Act of 1996. *See* 18 U.S.C. § 2401 (1996), *reprinted in* 35 I.L.M. 1540 (1996).

[42] *See infra* notes 92-143 and accompanying text for a discussion of the evolving nature of United States military deployments and the doctrinal changes necessitated by modern international developments.

[43] *See infra* notes 145-297 and accompanying text for a discussion of the developing international legal prohibitions applicable in previously sovereign internal matters. For a discussion of the norms applicable to internal conflicts *see generally* Meron, *supra* note 40; Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983) [hereinafter *Inadequate Reach of Humanitarian Law*]; Asbjorn Eide et al., *Combating Lawlessness in Eide et al. through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995); James A.R. Nafziger, *The Security of Human Rights, A Third Phase in the Global System*, 20 CAL. W. INT'L L.J. 173 (1990).

[44] 10 U.S.C. §§ 818, 821 (1995). On 5 May 1950, Congress revised the Articles of War by enacting the Uniform Code Of Military Justice, Pub. L. No. 81-506, 1950 U.S.C.C.A.N. (64 Stat.) 2222 (*codified as amended at* 10 U.S.C. §§ 801-946 (1995)). The Second Continental Congress passed the original Code of 1775 on 30 June 1775. The Code of 1775 was based largely on the British Code of 1774. On 20 September 1776, Congress enlarged and modified the existing Code. Congress amended the Code of 1776 in 1786, and the amended Code continued in force after the ratification of the United States Constitution by virtue of amendments "so far as the same are applicable to the Constitution of the United States." *Id.* The revised Code of 1806 contained 101 articles, with an additional article relating to the punishment of spies. Congress revised the Articles of War several times over the years, and subsequently superseded the Articles of War by passing the UCMJ. *See generally Hearings Before the Committee on Military Affairs, House of Representatives*, 62d Congress, 2d Sess., H.R. 23628 Being a Project for the Revision of the Articles of War.

The President implements the UCMJ through a series of executive orders which together compose the *Manual for Courts-Martial*; *See* MANUAL FOR COURTS MARTIAL, UNITED STATES (1995 ed.) [hereinafter MCM] (composed of Exec. Order No. 12,473, 49 Fed. Reg. 17152 (Apr. 13, 1984), *as amended by* Exec. Order No. 12,484, 49 Fed. Reg. 28825 (July 13, 1984) (Change 1); Exec. Order No. 12,550, 51 Fed. Reg. 6497 (Feb. 19, 1986) (Change 2); Exec. Order No. 12,586, 52 Fed. Reg. 7103 (Mar. 3, 1987) (Change 3); Exec. Order No. 12,708, 55 Fed. Reg. 11353 (Mar. 23, 1990) (Change 4); Exec. Order No. 12,767, 56 Fed. Reg. 30284 (June 27, 1991) (Change 5); Exec. Order No. 12,888, 58 Fed. Reg. 69153 (Dec. 23, 1993) (Change 6); Exec. Order No. 12,936, 59 Fed. Reg. 59075 (Nov. 10, 1994) (Change 7); Exec. Order No. 12,960, 60 Fed. Reg. 26647 (May 12, 1995) (Change 8)).

[45] FM 27-10, *supra* note 4, paras. 7-14. General courts-martial may try any person who by the law of war would be within the jurisdiction of a military tribunal. MCM, *supra* note 44, R.C.M. 201(f)(1)(B)(i). The *Manual* defines this class of persons

However, most United States deployments involve operations that do not rise to the level of international armed conflict. In effect, existing statutes extend domestic jurisdiction only to a subset of the offenses under international humanitarian law. A wider range of international crimes is beyond the jurisdictional limits of the current UCMJ, which could seriously impact a deployed commander's mission. Thus, a leading scholar noted that "although the U.S. authority under international law is, in my view, clear, the U.S. statutory authority to prosecute is less so."[46]

A. Jurisdiction of Military Commissions

The practice of using military commissions to punish violations of international law dates back to at least 1688.[47] Because the nations of the world developed the laws of war in response to military requirements, the nearly simultaneous development of tribunals to enforce those laws is completely logical. In United States practice, military commissions originally developed as "common law war courts."[48]

In 1916, Congress adopted Article of War 15 to specifically recognize that commanders could prosecute violations of the law of war

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as those who violate the law of war, or the law of the occupied territory whenever United States forces have superseded the authority of local officials as an exercise of military government. *Id.* The International Committee of the Red Cross "underline[d] the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict" Unpublished Comments, *quoted in* Meron, *supra* note 40, at 559.

The concept of exercising jurisdiction over such a broad class of persons is unique to the UCMJ. The UCMJ applies worldwide (MCM, *supra* note 44, R.C.M. 201(a)(2)) and extends punitive power over any act proscribed by the Code without additional subject matter limitations. Solorio v. United States, 483 U.S. 435 (1987). However, the UCMJ generally applies only to a strictly defined group of United States citizens. 10 U.S.C. § 802 (1995). Some military scholars may feel uncomfortable in modifying the UCMJ to allow jurisdiction over foreign nationals who would not otherwise be subject to its provisions. The key to overcoming those objections is to remember that prosecuting continuum crimes would help the commander accomplish the mission, which is precisely the purpose for having a separate system of military justice. *See* Chappel v. Wallace, 462 U.S. 296 (1983); Parker v. Levy, 417 U.S. 733 (1974); S. Rep. No. 53, 98th Cong., 1st Sess. 2,3 (1983).

[46] Meron, *supra* note 40, at 565 n.64.

[47] *See Articles of James II*, art. LXIV, *reprinted in* COL. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 919-28 (2d. ed. 1920). Subsequent military codes restated the legality of using military commissions to punish violations of the laws and customs of war. *See, e.g.*, British Articles of War of 1765, art. II, § XX, *reprinted in* WINTHROP, *supra*, at 931.

[48] In 1916, Congress held extensive hearings on revising the existing Articles of War. The revised articles added article 2 which defined the class of persons who would be subject to the jurisdiction of military courts-martial. The Judge Advocate General of the Army repeatedly reminded Congress that military commissions had jurisdiction under international law which would not change as a result of amending the American Articles of War. *Hearings on S.3191, Subcommittee on Military Affairs of the Senate*, 64th Cong., 1st Sess., *reprinted in* S. REP. 230, 64th Cong., 1st Sess. (1916).

in either general courts-martial or military commissions.[49] During hearings on the proposed amendments, Major General Enoch Crowder, The Judge Advocate General of the Army, adamantly testified that statutory courts-martial jurisdiction "saves to these war courts [military commissions] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."[50]

Article 21 of the current UCMJ is based on Article of War 15.[51] After restating the concurrent jurisdiction of general courts-martial and military commissions, Article 21 provides that military commissions may convene "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."[52] Given General

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[49] *See infra* notes 85-87 and accompanying text.

[50] *In re* Yamashita, 327 U.S. 1, 66 (1946) (quoting *Hearings on S.3191, Subcommittee on Military Affairs of the Senate,* 64th Cong., 1st Sess., *reprinted in* S. REP. 230, *supra* note 48, at 40, 64th Cong., 1st Sess.). In earlier testimony before Congress, General Crowder explained:

> The next article, No. 15, is entirely new, and the reasons for its insertion are these: In our War with Mexico two war courts were brought into existence by the orders of Gen. Scott, viz. the military commission and the council of war. By the military commission, Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code, the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by the statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

S. REP. No. 229, 63rd Cong. 2d Sess., at 53 (emphasis added) (General Crowder testified in exactly the same language to the House of Representatives Committee on Military Affairs on May 14, 1912, *id.*, at 28-29).

[51] Robinson O. Everett & Scott Silliman, *Forums for Punishing Offenses Against the Law of Nations,* 29 WAKE FOREST L. REV. 509, 515 n.34 (1994).

[52] 10 U.S.C. § 821 (1995). Article of War 15 originally read as follows:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the laws of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

An Act Making Appropriations for the Support of the Army for the Year ending June Thirtieth, Nineteen Hundred and Seventeen, and for other purposes, Pub. L. No. 242, 39 Stat. 653, art. 15 (1916).

Crowder's testimony that the military commission is an institution of greatest importance in time of war,[53] commanders could construe Article 21 broadly.

During operations other than war, commanders could view military commissions as an aspect of their inherent authority to prosecute any offender for any violation of international law that impedes the military mission.[54] However, despite the circular language of the UCMJ, history and judicial precedent show that military commissions have jurisdiction only in the context of what was historically termed war, which in the current vernacular translates to international armed conflicts.

In the American experience, commanders have convened military commissions to prosecute persons not otherwise subject to military discipline. After occupying Mexico in 1847, General Winfield Scott convened "councils of war" to try Mexican citizens who violated the laws of war.[55] The American military tribunals arose "out of usage and necessity" and contributed to the successful occupation of Mexico.[56] Administering occupied territory in Mexico, commanders convened military commissions to punish Mexican citizens for offenses such as theft,[57] receiving stolen property,[58] encouraging

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In the 1920 amendments to the Articles of War, Congress inserted the words "by statute" before the words "by the law of war" and omitted the word "lawfully". *Yamashita*, 327 U.S. at 64.

[53] *Yamashita*, 327 U.S. at 66 n.31.

[54] Interview with Lieutenant Colonel (Ret.) H. Wayne Elliott (Jan. 6, 1996).

[55] WINTHROP, *supra* note 47, at 832-33. The experience in Mexico is the first and only time the term "councils of war" appeared in American history. The war councils tried offenders who committed guerrilla warfare, violated the laws of war as guerrillas, or enticed American soldiers to desert. The War Courts employed procedures "not materially differing" from the military commissions conducted at the same time. *Id.* General Order 20, Army Headquarters at Tampico, Mexico, Feb. 19, 1847, *reprinted in* Military Orders-Mexican War, NARG (entry 134) (as amended by General Orders 190 and 287) provided the following:

> Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault or battery, robbery, theft, the wanton desecration of churches, cemeteries, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against such individuals, or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing" should be brought to trial before "military commissions.

See also A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 833 (1948).

[56] Statement of The Judge Advocate General of the Army, General Enoch H. Crowder, S. REP. NO. 130, 64th Cong., 1st Sess., 40 (1916).

[57] Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 63 n.317 (1990).

[58] *Id.* at 63 n.318.

desertion by United States soldiers,[59] or for fighting as "guerilleros"[60] in violation of the laws of war.

Faced with the task of administering occupied Mexican territory, General Scott relied on his authority as a commander to convene tribunals authorized only by customary international law. Despite the void of codified domestic authority, the law supported General Scott's exercise of command prerogative. In 1848, the United States Attorney General opined that United States courts had no jurisdiction over an Army officer who allegedly murdered a junior officer at Perote, Mexico.[61] General Scott convened a military commission to try the case, but the accused escaped and fled to Georgia. While acknowledging the validity of military commissions "established under the law of nations by the rights of war," the opinion concluded that the jurisdiction of the commission ended "by the restoration of the Mexican authorities."[62] The Supreme Court later reaffirmed the

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[59] *Id.* at 65 n.325.

[60] *Id.* at 65 n.326.

[61] Jurisdiction of the Federal Judiciary, 5 Op. Att'y Gen. 55 (1848). During the war with Mexico, Captain Foster, of the Georgia battalion of infantry allegedly murdered a Lieutenant Goff of the Pennsylvania volunteers. General Scott convened a military commission organized and constituted on the charge of homicide. Captain Foster escaped several days into the trial. The Attorney General concluded that the United States had no common law of crimes. Even today, the United States criminal code has no automatic extraterritorial application unless Congress explicitly regulates conduct overseas.

[62] *Id.* at 56. This is the first legal basis for limiting the authority of military tribunals to occupation after armed conflict. The importance of this early opinion lies in the termination of the authority of the temporary military government at the time the military government ended. The opinion concluded that the rules and articles for the government of the Army no longer conveyed jurisdiction once the Army had been disbanded and been mustered out of the service.

For the purposes of modifying the UCMJ to have more utility during operations other than war, this early opinion is enlightening because the Attorney General recognized that "Congress can easily provide against a recurrence of the difficulties of the present case." *Id.* Congress has never provided a jurisdictional basis in United States military courts for punishing violations of the laws of war committed by ex-service members. *See* Jordan J. Paust, *After My Lai-The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). The attorney general restated the same limitation in subsequent opinions. *See, e.g.*, Jurisdiction of Naval Courts-Martial over Persons Discharged from the Service, 31 Op. Att'y Gen. 521 (1919) (opining that a person discharged from the Naval Service before proceedings are initiated against him cannot thereafter be brought to trial for those violations); Army Officer-Jurisdiction-Civil Courts-Military Courts, 24 Op. Att'y Gen. 570 (1903).

The Supreme Court later held that military jurisdiction ends when a service member is discharged, but noted that Congress could create such jurisdiction. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21 (1955) (holding by a six to three margin that the military cannot constitutionally convene a court-martial against an ex-service member suspected of murder and conspiracy to commit murder committed in Korea during the period of military service).

commander's authority to punish civilians using military commissions in occupied territory.[63]

The Civil War solidified the legal basis for commanders to punish civilians via military commissions and defined the limits of that authority. Statutory authority recognized military commissions in 1863. Their jurisdiction eventually expanded to include guerrillas, inspectors, civil officials working for the quartermaster department, and all persons under martial law.[64] In April 1863, Union Army General Order Number 100 declared that the common law of war allowed military commissions to prosecute "cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial."[65] Military commissions eventually tried and sentenced over 2000 cases during the war and subsequently during the period of military government in the South.[66]

Cases in the aftermath of the Civil War recognized the jurisdiction of military commissions.[67] More importantly for the proposals advocated in this article, the courts limited the jurisdiction to areas occupied by United States forces and governed by martial law[68] or

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[63] Leitensdorfer v. Webb, 61 U.S. (20 How.) 176, 177-78 (1857). *Accord* Mechanics' & Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276, 295-97 (1874); The Grapeshot, 76 U.S. (9 Wall.) 129, 132-33 (1869); Cross v. Harrison, 57 U.S. (16 How.) 164, 189-90.

[64] *See* WINTHROP, *supra* note 47, at 833-34. Congress provided that murder, manslaughter, robbery, larceny, and other specified crimes when committed by military persons *in time of war* or rebellion should be punished by court-martial or military commission. The Act of March 30, 1863, § 30, 12 Stat. 731, 736 (1863) (emphasis added). The Confederate States also recognized the legality of military commissions. *See 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 47, at 1006 (providing that military courts of the Confederate States of America had jurisdiction over "all offences now cognizable by courts-martial . . . and the customs of war").

[65] General Order No. 100, Instructions for the Government of the Armies of the United States in the Field, Apr. 24, 1863, 13, *reprinted in* THE LAWS OF ARMED CONFLICT 3 (Dietrich Schindler & Jiri Toman eds., 1988).

[66] Winthrop, *supra* note 47, at 834.

[67] *See, e.g.*, Coleman v. Tennessee, 97 U.S. 509 (1878). Despite the jurisdictional sufficiency of military commissions, many proceedings were disapproved due to procedural irregularities. *See, e.g.*, Opinion of Judge Advocate General Joseph Holt to President Abraham Lincoln (Sept. 26, 1862), in Letters Sent-JAG, NARG 153 (Entry 1) (sentence disapproved because judge advocate not sworn); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Nov. 4, 1862), *id.* (sentence disapproved because records forwarded to Judge Advocate General were merely copies of original records); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Dec. 16, 1862), *id.* (sentence disapproved because record did not show sufficient procedural protections for the accused); Gen. Order No. 255, Aug. 1, 1863, *id.* (death sentence disapproved because record did not show that the order convening the commission was read to the prisoner, and the prisoner did not have opportunity to challenge members, and members not sworn).

[68] WINTHROP, *supra* note 47, at 834 (describing the Reconstruction Act of March 2, 1867, which established military commissions in the occupied lands of the South); The Reconstruction Acts, 12 Op. Att'y Gen. 141 (1867) (discussing the interpretation of sections of the Reconstruction Act).

limited the jurisdiction to genuine violations of the law of war.[69] In 1866, for example, the Supreme Court granted a writ of habeas corpus filed by a citizen of Indiana who had been convicted by a military commission of, among other charges, inciting insurrection.[70] The Court recognized the authority of military commissions under the "laws and usages of war," but held that a commission had no jurisdiction in Indiana because "the Federal government was always unopposed, and its courts always open to hear criminal accusations and grievances."[71]

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[69] In 1865, a military commission convicted Captain Henry Wirtz, who was the commandant of the prisoner of war camp at Andersonville, Georgia. Captain Wirtz commanded one of the most notorious prisoner of war camps operated by either side during the Civil War. The commission sentenced him to die for murder and conspiring to maltreat federal prisoners of war while he served as the commandant of the prison at Andersonville, Georgia. *See Trial of Henry Wirtz*, 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98 (Leon Friedman ed., 1971); Lewis L. Laska & James M. Smith, *Hell and the Devil: Andersonville and the Trial of Captain Henry M. Wirtz, CSA, 1865*, 68 MIL. L. REV. 77 (1975).

[70] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). On 21 October 1864, Lamdin P. Milligan faced trial by a military commission convened in Indianapolis, Indiana by order of Brevet Major-General Hovey, the commander of the military district of Indiana. The charges were preferred by a major of the Judge Advocate General's Corps, and consisted of numerous specifications grouped under the charges "Conspiracy against the Government of the United States," "Affording aid and comfort to rebels against the authority of the United States," "Inciting insurrection," "Disloyal practices," and "Violation of the Laws of War." The military commission convicted him of all offenses and sentenced him to suffer death by hanging on Friday, 19 May 1865. *Id.*

[71] *Id.* at 121. The authorities were greatly afraid of an organization known as the Sons of Liberty. The Judge Advocate General released a report which described the Sons of Liberty as an organized, powerful group of conspirators who had been hired by Confederate officials to destroy the North. The Judge Advocate General demonized the group by saying that "Judea produced but one Judas Iscariot, but there has arisen together in our land an entire brood of such traitors . . . all struggling with the same reckless malignancy for the dismemberment of our Union." JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 782 (1988). In the case of one of Milligan's co-conspirators, the "Supreme Grand Commander of the Sons of Liberty," the Supreme Court held that neither the Constitution nor federal statutes granted a right to certiorari for review of military commissions. Ex parte Vallandigham, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816), *cert. denied*, 68 U.S. (1 Wall.) 243 (1863). *But see* 12 Op. Att'y Gen. 332 (1867) (opining that a prisoner arrested with a view towards trial by military commission for violating his parole could have sought a writ of habeas corpus from the Supreme Court if the district court had not released him prior to trial). Unlike his compatriot, Milligan sought review of the denial of the writ of habeas corpus by the commission, and the Supreme Court restated the limitations of otherwise valid military commission jurisdiction

> It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection ... Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.

Ex Parte Milligan, 71 U.S. at 127

In apparent contrast, the Attorney General opined that a military commission had jurisdiction to convict the co-conspirators charged with assassinating President Lincoln.[72] However, the opinion revolved around the Attorney General's assessment that the conspirators were "public enemies" who violated the laws of war rather than civilian criminals in a time of peace.[73] Focusing on the wartime context, the opinion disregarded the argument that the Washington, D.C. courts were functioning because "[t]he civil courts [had] no more right to prevent the military, in time of war, from trying an offender against the laws of war than they [had] a right to interfere with and prevent a battle."[74]

Thus, legal developments grounded the jurisdiction of military tribunals firmly in the bedrock of the commander's necessary right to wage war. By extension, military courts have jurisdiction to enforce the law in territory occupied pursuant to the conduct of war. These are not arcane concepts. Warmaking authority provides the linchpin to understanding the consistent case law regarding the jurisdiction of military commissions over both civilians and enemy forces who violate the laws of war.

For example, after the surprise attack on Pearl Harbor, General Order Number 4 established the jurisdiction of a military commission under martial law in Hawaii.[75] Based on the wartime nature of the offense, a military commission convicted Bernard Kuehn on 21 February 1942 for conspiring with Japanese officials to betray the United States fleet four days before the attack of 7

The Justices unanimously recognized the legality of military commissions, but three Justices dissented on the grounds that the lead opinion seemed to imply limits to congressional authority to impose martial law. The Chief Justice wrote, "Where peace exists, the law of peace must prevail. What we do maintain is, that when the nation is involved in war . . . it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals . . . ." *Id.* at 140.

[72] Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *36).

[73] Chomsky, *supra* note 57, at 67. On 14 April 1865, John Wilkes Booth murdered President Abraham Lincoln. In a coordinated assault, another conspirator named Lewis Powell had stabbed and seriously wounded the Secretary of State, William Seward. Another conspirator was too afraid to shoot the Vice President, Andrew Johnson. After mortally wounding the President, Booth leaped to the stage, broke his leg, and escaped into the alley behind Ford's theater. On 26 April 1865, Union cavalry trapped John Wilkes Booth in a Virginia tobacco barn. Another accomplice, David Herrold surrendered, but Booth resisted. The troopers set fire to the barn in an effort to force Booth to surrender. A trooper shot Booth in the back of the head in the barn, and he died whispering, "Tell my mother I died for my country . . . I did what I thought was best." GEOFFREY C. WARD ET AL., THE CIVIL WAR 383-393 (1990).

[74] Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *30).

[75] Green, *supra* note 55, at 833.

December 1941.[76] Even though the offenses occurred prior to the actual onset of hostilities, the conspirators violated the laws of war, and therefore were accountable to the military commission. In 1950, the Supreme Court noted that "the jurisdiction of military authorities, during and following hostilities, to punish those guilty of offenses against the laws of war is long-established."[77] The Supreme Court also held that military commissions in occupied Germany could exercise jurisdiction over United States citizens and foreign civilians.[78]

The Supreme Court has repeatedly recognized the "power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war."[79] In *Ex Parte Quirin,* the Court sustained the jurisdiction of a military commission which convicted German saboteurs who landed in the United States to commit acts of war.[80] The soldiers violated the law of war by burying their German Marine Infantry uniforms immediately upon landing. The soldiers thereby became "unlawful combat-

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[76] *Id.* at 848. *See also* JAMES W. GARNER, II INTERNATIONAL LAW AND THE WORLD WAR 478-82 (1946) (describing the fact that offenses against the law of war may be tried by military commission even though committed before the actual declaration of martial law or the formal declaration of war).

[77] Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) (quoting *Duncan v. Kahanamoku,* 327 U.S. 304 (1945), and denying habeas corpus to Germans convicted in China by an American military commission for war crimes committed after the German surrender and prior to the Japanese surrender). *Accord* Devlin's Case, 12 Op. Att'y Gen. 128 (1867) (opining that a military commission sitting in Washington had no jurisdiction to try a citizen of the United States, not in the military service, for an ordinary crime committed in New York). This holding should not be confused with other cases which limit the jurisdiction of military tribunals over American civilians. As the text points out, applying the proper authority under the law of war is the key to clearly understanding the delineations of military jurisdiction. Accordingly, the holding in *Reid v. Covert,* 354 U.S. 1 (1957), is not surprising. 10 U.S.C. § 802 extends courts-martial jurisdiction to "persons accompanying the force." UCMJ, art. 2(a)(11)(1995). In *Reid v. Covert,* the Court ruled that military jurisdiction could not be constitutionally applied to military dependents in time of peace. 354 U.S. at 35. *See also* Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Guagliardio, 361 U.S. 281 (1960). The Supreme Court has never squarely faced the issue whether a commander would presently have jurisdiction over American civilians who violate the law of war in the vicinity of United States forces. A literal reading of Articles 18 and 21 of the Uniform Code of Military Justice would appear to give the commander the option of punishing those offenses in the forum of his choice, provided that the trial protected the American's constitutional rights as required by *Reid v. Covert* and *Toth v. Quarles.*

[78] Madsen v. Kinsella, 343 U.S. 341 (1952). *See also* United States v. Schultz, 4 C.M.R. 104, 114 (C.M.A. 1952) (holding that the law of war gives an occupying force both the power and duty to enforce law in occupied territory, and consequently affirming the conviction of an American citizen for negligent homicide committed in occupied Japan); Rose v. McNamara, 375 F.2d 924 (D.C. Cir. 1966), *cert. denied* 389 U.S. 856 (1967) (upholding a tax evasion conviction by a military court in occupied Okinawa); 2 L. OPPENHEIM, INTERNATIONAL LAW 336-49 (H. Lauterpacht ed. 8th ed., 1969) (discussing the rights and duties of an occupying force).

[79] Duncan v. Kahanamoku, 327 U.S. 304, 312 (1945).

[80] *In re* Yamashita, 327 U.S. 1 (1946). *See also* FM 27-10, *supra* note 4, para. 74 (stating that soldiers lose their right to treatment as prisoners of war when they remove their uniforms to fight in civilian clothes).

ants . . . subject to trial and punishment by military commission for acts which render their belligerency unlawful."[81] Using the same constitutional analysis, the Supreme Court sustained the jurisdiction of either courts-martial or military commissions to punish General Tomoyuki Yamashita for 123 separate atrocities committed by soldiers under his command in the Philippines.[82]

Therefore, the entire scope of history and American jurisprudence compel the conclusion that Article 21 grants jurisdiction *only* over violations of the international laws of war. The text of Article 21 leads to the same conclusion. A well intentioned contrary view would confuse parties attempting to define their rights and duties under international law. As the Attorney General wrote in 1865, "Congress has power to define, not to make the laws of nations."[83] Accordingly, in military operations where the codified laws of war are not in force, Article 21 does not convey military jurisdiction *in its present form*.

B. Jurisdiction of Courts-Martial

Article 18 of the UCMJ conveys general courts-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal" and it allows "any punishment permitted by the law of war."[84] Congress added explicit courts-martial jurisdiction over persons who violate the law of war in the 1916 revision to the Articles of War.[85] The language of Article 18 mirrors that of Article

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[81] *Yamashita*, 327 U.S. at 48. Seven of the eight soldiers were born in Germany while one was a United States citizen. All eight lived in the United States, and returned to Germany between 1933 and 1941. *Id.* at 20. After the declaration of war between Germany and the United States, the Germans trained them in the use of explosives and other sabotage techniques. Four soldiers landed at Amagansett Beach, New York on 13 June 1942, and the other four landed at Ponte Vedra Beach, Florida four days later. The four in New York buried their uniforms, fuses, incendiary devices, and timing mechanisms, and went to New York City in civilian clothes. The four in Florida did likewise, but went to Jacksonville, Florida. The Federal Bureau of Investigation eventually captured all eight either in New York or Chicago.

[82] *Yamashita*, 327 U.S. at 66.

[83] Military Commissions, 11 Op. Att'y Gen. 297 (1865) (1865 U.S. AG LEXIS *2).

[84] 10 U.S.C. § 818 (1995). Implementing this statutory authority, Rule for Courts-Martial 1003(b)(12) provides that, "[i]n cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war." *See* MCM, *supra* note 44. R.C.M. 1003(b)(12); Civilians Convention, *supra* note 4, art. 68 (providing some limits to the discretion of military tribunals to adjudge punishments under the law of war). Rule for Court Martial 201 recognizes the dual jurisdictional grounds over violations of the law of war as well as offenses in violation of civil statutes when an occupying force declares martial law. *See also* Civilians Convention, *supra* note 4, arts. 4, 64, 66 (outlining the basis for declaring martial law and enforcing civil laws as an occupying power).

[85] Article 2 of the Articles of War defined the class of "persons subject to military law." 39 Stat. 787, art. 2 (1916). In its 1916 form, Article 2 included some persons who, by the law of war, were prior to 1916 triable under the common law of war at military commissions. The 1916 version of Article 2 conveyed court-martial jurisdiction over "all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States." *Id.*

21, and the operational jurisdiction of general courts-martial is similarly restricted.

Although Congress has constitutional authority to punish violations of international law,[86] exercising that prerogative does not change their character as offenses against international law. Congress simply has discretion to specify a domestic forum to try a case originating under and defined by international law. For example, early in United States history, courts-martial tried Captain Nathan Hale[87] and Major Andre[88] for spying. In 1780, Congress passed a resolution calling for a special court-martial against Joshua Hett Smith on the charge of complicity with Benedict Arnold's treason.[89]

Article 21 states that military commissions and general courts-martial enjoy concurrent jurisdiction over persons who violate the laws of war. Accordingly, the commander cannot convene a general court-martial to try a person who has not violated the "law of war."[90]

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[86] *See supra* note 38 and accompanying text.

[87] Green, *supra* note 55, at 832.

[88] *Id.* at 833.

[89] *Id.*

[90] By analogy, Article 2(a)(10) of the UCMJ allows jurisdiction over persons serving with or accompanying the force in the field "in time of war." 10 U.S.C. § 802 (1995). Rule for Court-Martial 103(19) defines "Time of War" as a period declared by Congress or supported by the factual determination by the President that the existence of hostilities warrants a finding that a time of war exists for purposes of the manual. MCM, *supra* note 44, R.C.M. 103(19). "Time of War" affects six punitive articles of the UCMJ. *See* 10 U.S.C. §§ 901, 905, 906 (which define offenses that can occur only in time of war) and 10 U.S.C. §§ 885, 890, 913 (which are capital offenses in time of war). The legislative history of the UCMJ indicates that Congress considered "Time of War" to mean "a formal state of war." *Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services*, 81st Cong., 1st Sess. 1228-1229 (1949). The United States Court of Military Appeals (recently redesignated as the Court of Appeals for the Armed Forces) examined the following circumstances among other to determine whether a time of war exists: the nature of the conflict, i.e., "armed hostilities against an organized enemy," United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957); the movement to and numbers of United States forces in the area; the casualties involved and the sacrifices required; the number of active duty personnel; legislation by Congress recognizing or providing for the hostilities; the amount of expenditures in the war effort. *See* United States v. Bancroft, 11 C.M.R. 5 (C.M.A. 1957); United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968); Carnahan, *The Law of War in the United States Court of Military Appeals*, 22 A.F. L. Rev. 120 (1980-1981).

The Fiscal Year 1996 Department of Defense Authorization Act requires the Secretary of Defense and the Attorney General to appoint an advisory panel to review and make recommendations on jurisdiction over civilians accompanying the force. The panel must review historical experiences and current practices concerning the employment, training, discipline, and functions of civilians accompanying armed forces in the field. The panel must make recommendations regarding court-martial jurisdiction over civilians accompanying armed forces in the field during time of armed conflict not involving a declared war by Congress, to include revisions to existing Article III courts, or the establishment of Article I courts to exercise jurisdiction over such persons. National Defense Authorization Act For Fiscal Year 1996, Pub. L. No. 104-106, § 1151, 110 Stat. 186 (Feb. 10, 1996).

The United States policy requires American soldiers to obey the laws of war during all deployments, but the United States conducts many military operations which are not governed by the codified laws of war. Part III describes the ways in which expanded jurisdiction over violations of humanitarian law by foreign nationals could assist operational commanders.

III. Jurisdiction as a Force Multiplier

The Cold War created a culture of intense but disciplined international tension.[91] Nations recognized that decisions to use force carried grave consequences, and those nations made carefully measured decisions regarding escalation within conflicts.[92] In spite of external political constraints, over forty million people have lost their lives during more than one hundred conflicts since the end of World War II.[93] Despite its authority on paper,[94] 279 Security

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[91] Edward N. Luttwak, *Toward Post-Heroic Warfare*, 74 FOREIGN AFF. 109, 110 (May-June 1995). Now that the Cold War no longer suppresses "hot wars," the entire culture of disciplined restraint in the use of force is in dissolution. Except for Iraq's wars, the consequences have chiefly been manifest within the territories that had been Soviet, as well as Yugoslav. The protracted warfare, catastrophic destruction, and profuse atrocities of eastern Moldavia, the three Caucasus republics, parts of Central Asia, and lately Chechnya, Croatia, and Bosnia have angered many Americans. Aggression and willful escalation remain unpunished. The victors on the battlefield remain in possession of their gains, while the defeated are abandoned to their own devices. It was not so during the Cold War when most antagonists had a superpower patron with its own reasons to control them, victors had their guns whittled down by superpower compacts, and the defeated were often assisted by whichever superpower was not aligned with the victor. *Id.*

[92] *Id.* at 111.

[93] This is the estimated worldwide total number of persons killed in the 125 wars since 1945. Abraham J. Gassama, *World Order in the Post Cold-War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INT'L L. 255, 260 n.16 (1994).

[94] Under the provisions for the peaceful settlement of disputes outlined in Chapter VI, the Security Council can "call upon" parties to pursue peaceful solutions or "recommend" such terms of settlement as it may consider appropriate. U.N. Charter, arts. 33-38. *See generally* GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 594-635 (6th ed. 1992). In contrast, Chapter VII gives the Security Council very broad latitude to respond to "threats to the peace, breaches of the peace, and acts of aggression." U.N. CHARTER, art. 39. The framers of the Charter "conferred upon the Security Council, in the provisions of Chapter VII, a very broad competence to make such determinations and to decide upon the steps necessary to bring about international peace and security." Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 6 (1968).

The Security Council does not have any power to compel states under Chapter VI. The framers rejected a clause which would have allowed the Security Council to impose a solution on parties where a failure to reach a settlement could be interpreted as a threat to the peace. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 257-59 (1969). The framers also rejected a provision which would have explicitly linked Chapter VI actions with Chapter VII enforcement actions. *Id.* at 258.

Council vetoes prevented the United Nations from limiting most of those conflicts.[95] In the wake of the Cold War, the Secretary General promised that the "immense ideological barrier that for decades gave rise to distrust and hostility ha[d] collapsed."[96]

President Bush spoke about a "New World Order" based on the triumph of American democratic values.[97] He pledged to "accept the responsibilities necessary for a vigorous and effective United Nations."[98] The United Nations appeared on the brink of realizing the drafter's intent to maintain a safer, more peaceful world via collective security.[99] The President of Russia declared that "Russia will make use of the effective role of the United Nations and Security Council."[100]

As the Cold War ended, however, latent conflicts around the world exploded. States fragmented into zones of hostility, which resembled the anarchy of the pre-nation state system.[101] Simmering ethnic rivalries boiled into open conflict without restrictions of law or propriety.[102] One scholar noted, "If there is a single power the

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[95] The United Nations Secretary General estimated in an oft-quoted figure that over 100 conflicts left some 20 million dead. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping. Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992.* U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 8, U.N. Doc. A/47/277 S/24111 (1992)[hereinafter Agenda for Peace].

[96] *Id.* ¶ 2.

[97] George W. Bush, *Toward a New World Order,* 1 DEP'T OF STATE DISPATCH 491 (1990) (outlining American expectations of the new international framework before a joint session of Congress); Anthony Clark Arend, *Symposium: The United Nations and the New World Order,* 81 GEO. L.J. 491, 492-93 (1993).

[98] *Summit at the U.N.*, N.Y. TIMES, Feb. 1, 1992, at A5; Frank J. Murray, *Bush Offers U.N. Army Everything But Troops,* WASH. TIMES, Sept. 22, 1992, at A3.

[99] *See* Secretary of State, *Report to the President on the Results of the San Francisco Conference* 87, 79th Cong., 1st Sess.(Comm. Print 1945).

[100] Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable?,* 21 SYRACUSE J. INT'L L. & COM. 283, 288-89 (1995).

[101] *Ethnic Conflict, supra* note 5, at 31. The example of Chechnya, like Bosnia, is only one of many pointing to a regression in the conduct of war to some more bloody ruthless era. Professor Martin van Creveld of the Hebrew University in Jerusalem remarked that this is "a world of small statelets, of warlords with shifting loyalties and wars without major setpiece clashes. The people fighting them are not just soldiers either, but civilians too. That is why there is no distinction between combatants and noncombatants." Marcus Warren, *International Peace and Goodwill: Almost,* THE SUN, TELEGRAPH LTD., Dec. 24, 1995, at 14.

[102] In May 1993, President Clinton began to doubt the policy of using airstrikes to assist the Muslim-led Bosnian government. He read a book called "Balkan Ghosts" by Robert D. Kaplan which suggested that the ethnic hatreds in the Balkans were so deeply rooted that there is little America could do. Michael Dobbs, *Bosnia Crystallizes U.S. Post-Cold War Role; As Two Administrations Wavered, the Need for U.S. Leadership Became Clear;* WASH. POST, Dec. 3, 1995, at A1. Aside from Bosnia-Herzegovina, the following nations suffer from ethnic strife: Spain, Britain, Germany, Romania, Russia, Moldova, Georgia, Azerbaijan, Turkey, Iraq, Israel, Algeria, Egypt, Sudan, Mauritania, Mali, Chad, Somalia, Senegal, Liberia, Togo, Nigeria, Uganda, Rwanda, Burundi, Kenya, Zaire, Angola, South Africa, Tajikistan, Afghanistan, Pakistan, India, Bhutan, Sri Lanka, Bangladesh, Myanmar, The People's Republic of China, Cambodia, Indonesia, Papua New Guinea, Fiji, Guatemala, Colombia, Peru, and Brazil. Lawrence I. Rothstein, Note, *Protecting the New World Order: Is It Time to Create a United Nations Army?,* 14 N.Y. L. SCH. J. INT'L & COMP. L. 107, 112 n.35 (1993).

West underestimates, it is the power of collective hatred."[103] Inequitable distributions of wealth compounded ethnic tensions to create humanitarian disasters that required military responses in Somalia[104] and Rwanda.[105] Criminal organizations also penetrated formal governmental structures to promote lawlessness.[106] The combination of these trends and others[107] transformed international politics and confronted United States policymakers with complex security challenges.

The rapid expansion of the United Nations role in world affairs was the most immediate result of the collapse of Communism. During its first thirty years, the United Nations launched thirteen peacekeeping operations.[108] During the Cold War, United Nations peacekeeping required the consent of the parties, financing by each

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[103] Ralph Peters, *The Culture of Future Conflict*, PARAMETERS 18, 25 (Winter 1995-96).

[104] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 63, U.N. Doc. S/RES/794 (1992) [hereinafter S.C. Res. 794]. *See also* Mort Rosenblum, *Somalia Famine Avoidable, Aid Workers Say*, L.A. TIMES, Oct. 4, 1992, at A16; Elizabeth Kurylo, *Aid Mission to Somalia Marks "New Chapter" U.N. Chief Says*, ATLANTA J. & CONST., Dec. 5, 1992, at A9. In a symptom of the current problems facing policy makers, some commentators suggest that the United States responded only after seeing images of starving Somali children on television sets. *See, e.g., Don't Forsake Somalia*, N.Y. TIMES, Nov. 4, 1992, at A30.

[105] S.C. Res. 846, U.N. SCOR, 48th Sess., 3244th mtg., U.N. Doc. S/RES/846 (1993) (establishing United Nations Observer Mission Uganda-Rwanda (UNOMUR)); S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) (establishing an international tribunal for the prosecution of war crimes committed in Rwanda, and adopting the Statute of the Tribunal which is attached as an Annex to the Security Council Resolution) [hereinafter Rwanda Statute]. *See also* Robert M. Press, *Surviving Tutsis Tell the Story of Massacres by Hutu Militias*, THE CHRIST. SCI. MON., Aug. 1, 1994, at 9. At the time of this writing, the ethnic tensions between the Hutus and Tutsis in Rwanda are still causing tremendous human suffering and tragedy. Donatelli Lorch, *At Edgy Border, Rwanda Army Kills 100 Hutu*, N.Y. TIMES INT'L, Sept. 14, 1995, at A14. The clashes between Tutsis and Hutus are currently threatening the stability of Burundi. *Letter dated 3 January 1996 from the Secretary General Addressed to the President of the Security Council*, U.N. Doc. S/1996/8 (Jan. 5, 1996) (reporting the results of the Presidential Commission in Burundi which reported among other findings that "the ethnic polarization in the country is intensifying").

[106] Peters, *supra* note 103, at 21.

[107] Cyclical trends at work since the end of the Cold War include the violence that accompanies the failure of empires and states, economic scarcity, environmental degradation, epidemics, mass migrations caused by war and famine, and ethnic cleansing. Historically unique trends contributing to the security challenges include global transportation, real-time media images with worldwide coverage, communications technology, proliferation of military technology, pollution, industrialization, and the potential scope of environmental damage caused by population growth. These trends are capable of producing synergistic effects that fast forward systematic collapse in the Third World. Stoft & Guertner, *supra* note 5, at 31.

[108] Thomas G. Weiss, *New Challenges for UN Military Operation: Implementing an Agenda for Peace*, WASH. Q. 53 (Winter 1993). *See Reform of United Nations Peacekeeping Operations*, S. REP. NO. 48, 103d. Cong., 1st Sess., at vii (1993) (also noting the skyrocketing cost of United Nations operations from $364 million in 1988 to nearly $4 billion in 1995).

member state, and minimal use of force.[109] Since 1988, the United Nations has established thirteen new operations while continuing most of the old operations.[110] At the same time, United Nations operations became much more complex due to such factors as the increase in refugees, the paralysis of governing institutions, and the intertwined efforts of humanitarian agencies.[111] As a result, United Nations forces operate in chaotic and lawless environments against militias and armed civilians who have little or no discipline with fluid chains of command.[112]

The changes in the world dramatically affected the United States military. On the one hand, President Clinton declared, "If the United States does not lead, the job will not be done."[113] United Nations operations became an integral part of United States security policy.[114] Despite rising operational requirements, Congress decreased defense spending to reap a promised "peace dividend."[115] By 1994, the United States spent less on defense as a percent of gross domestic product than at any time since 1941.[116] American forces declined in number from nearly 2.2 million personnel in 1990 to 1.5 million by 1995.[117]

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[109] Agenda for Peace, *supra* note 95, ¶ 20. Peacekeeping is a U.N. invention. It was not specifically defined in the charter but evolved as a noncoercive instrument of conflict control at a time when Cold War constraints prevented the Security Council from taking the more forceful steps permitted by the charter. Boutros-Boutros Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89 (Winter 1992-93).

[110] *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 S/1995/1, ¶ 11 (1995) [hereinafter Agenda for Peace II].

[111] *Id.* ¶¶ 12, 13, 18, 20.

[112] *Id.* ¶ 13. United States forces involved in peace operations may not encounter large, professional armies or even organized groups responding to a chain of command. Instead, they will likely have to deal with "loosely organized groups of irregulars, terrorists, or other conflicting segments of a population as predominant forces. These elements will attempt to capitalize on perceptions of disenfranchisement or disaffection within the population. Criminal syndicates may also be involved." FM 100-23, *supra* note 16, at v.

[113] John F. Harris, *Clinton Likely to Stress Faith in U.N.; Some Say Foreign Policy Realities Have Tempered President's Idealism*, WASH. POST, Oct. 22, 1995, at A25.

[114] *See* Madeline K. Albright, Statement Before the Senate Foreign Relations Committee (Oct. 20, 1993), 4 DEP'T OF STATE DISPATCH 789, 792 (Nov. 15, 1993); William J. Perry, *Military Assistance*, 17 DISAM J. 50, 51 (Summer 1995) ("Multilateral peacekeeping is an essential element of U.S. strategy for promoting peace abroad. It allows the United States to share its security responsibilities and burdens with others. The number of situations requiring peacekeeping operations has risen dramatically . . . and can be expected to increase further in the years ahead.").

[115] Dobbs, *supra* note 102, at A1.

[116] H.R. REP. No. 562, 103d Cong., 2d Sess., at 3 (1994) (showing a steady decline in funding beginning in 1986, to the point that 1995 defense appropriations represent only 3.8% of the gross domestic product). By contrast, the spending for the woefully unprepared, ill-equipped force prior to Korea remained at 5% of the gross domestic product in 1949. *Id.*

[117] *Id.*

However, following United States policy interests, United States forces deployed more often on a wider variety of missions. During 1995, the Army had a daily average of 22,200 soldiers deployed to more than seventy countries.[118] The increased tempo of deployments consumed larger chunks of the declining defense budget. The Department of Defense estimates that the operations in Haiti cost nearly $1.5 billion in unbudgeted expenses through the end of 1995.[119] During the same period, the United States share of the world's gross domestic product declined to only twenty percent, about equal to the level in 1870.[120]

United States policy objectives thus rely more on the use of military power even as that power shrinks. The model of an "expeditionary West" drives United States military deployments as policy makers apply limited resources to advance American interests abroad.[121] In summary, American commanders must now accom-

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[118] General Dennis J. Reimer, *Where We've Been . . . Where We're Headed: Maintaining a Solid Framework While Building for the Future*, *in* ASSOCIATION OF THE UNITED STATES ARMY, 1995-96 GREENBOOK 21, 23 (1995) (outlining the Army Chief of Staff's vision for the continued development of an Army "changing to meet the challenges of today . . . tomorrow . . . and the 21st century).

[119] *Implementation and Costs of U.S. Policy in Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Comm. on For. Relations*, 104th Cong., 1st Sess. 25 (Mar. 9, 1995) (statement of Mr. John Deutch, Deputy Secretary of Defense). Mr. Deutch predicted that the funding shortfall would have "devastating results" if not corrected, and that "[o]ur forces will not be able to respond as quickly, endure as long or fight at the level of excellence to which our Nation is accustomed without the timely passing of the supplemental appropriations bill." *Id.* at 73.

In comparison, operations in Somalia cost the Department of Defense nearly $885 million in unplanned expenditures. Peace Operations, Cost of Department of Defense Operations in Somalia, March 1994, GAO/NSIAD-94-88, at 3 (Mar. 1994). Faced with the costs of sustaining operations in Bosnia, the Army decided to eliminate the Armored Gun System after spending more than $260 million over 15 years in development expenses. As a result of canceling the planned system, the 82d Airborne will retain its 30 year old weapons systems until they can no longer function. As a result of operations in Bosnia, the only airborne division in the active United States Army will be forced to deploy on future operations with no deployable armored systems. Sean D. Naylor, *Army Trades Off AGS System for Cash / Kills Plan to Beef Up Quick Reaction Force to Pay Personnel Bills*, ARMY TIMES, Feb. 5, 1996; Pat Trowell, CONGRESSIONAL QUARTERLY INC., Jan. 4, 1996 (reporting plans for Department of Defense rescissions in the Fiscal Year 1996 budget to pay for the Bosnia deployment, totaling around $1.6 billion, and including $150.4 million for the canceled purchase of six F-16 jets, $357.1 million Navy funds, and $275 million Army funds to cancel modernization of 20 helicopters).

The Department of Defense has budgeted more than $1 billion from Fiscal Year 1997 funds for peace operations currently ongoing in Bosnia and Southwest Asia. Secretary of Defense William J. Perry, DOD News Briefing, (Mar. 4, 1996) (available at http://www.dtic.dla.mil/defenselink/news/Mar96/t030496-tper0304.html).

[120] Michael Dobbs, *Who Won the War? For the Allies, the Price of Victory is Still Steep*, WASH. POST, May 7, 1995, at C1.

[121] Peters, *supra* note 103, at 25. After reviewing United States policy regarding peace operations, President Clinton signed Presidential Decision Directive 25 on 3 May 1994. *The Clinton Administration's Policy on Reforming Multilateral Peace*

plish more missions, with fewer funds, in more difficult operational settings, against less defined enemy forces, with shifting objectives, and with fewer personnel.

During international armed conflicts, commanders have discretion to prosecute persons who commit war crimes. Coalition states, for example, could have prosecuted Saddam Hussein for his war crimes.[122] In contrast, commanders conducting peace operations[123] must balance a concern for human rights with a pragmatic concern

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Operations (May 1994), *reprinted in* 33 I.L.M. 795 (1994) [hereinafter PDD-25]. *See also* United States Department of Defense Statement on Peacekeeping, *reprinted in* 33 I.L.M. 814 (1994) (discussing the focus of the new policy and in particular the desire to ensure that conflicts do not spread and to oppose violations of international and human rights law). The PDD-25 outlined the template the President proposed to use prior to committing United States forces to multilateral peace operations. The directive proposed six areas of desirable reform for the United Nations. The "U.S. must be able to fight and win wars, unilaterally whenever necessary." *Id.* The PDD-25 commits United States forces to peace operations "to promote peace and stability" even in conflicts which do not "directly threaten American interests." *Id.* For the first time in American policy, the PDD-25 also defined the scope of peace operations as encompassing "the entire spectrum of activities from traditional peacekeeping to peace enforcement aimed at defusing and resolving international conflicts." *Id.* The six proposals for reform are:

> (1) Making disciplined and coherent choices about which operations to support;
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> (2) Reducing United States costs for United Nations peace operations;
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> (3) Defining clearly our policy regarding the command and control of American military forces in United Nations operations;
>
> (4) Reforming and improving the United Nations' capability to manage peace operations;
>
> (5) Improving the way that the United States government manages and funds peace operations; and
>
> (6) Creating better forms of cooperation between the Executive, the Congress, and the American public on peace operations.

The PDD-25 also describes a three-tiered set of criteria for weighing when the United States will vote to support peace operations, when American forces will participate in United Nations or other peace operations, and when American forces will participate in operations likely to involve combat.

[122] Thomas R. Kleinberger, *The Iraqi Conflict. An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code and Permanent International Tribunal*, 14 N.Y. L. SCH. J. INT'L & COMP. L. 69 (1993); W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393 (1992); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); DEP'T OF DEFENSE, UNITED STATES DEPARTMENT OF DEFENSE REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR-APPENDIX ON THE ROLE OF THE LAW OF WAR, *reprinted in* 31 I.L.M. 612 (1992).

[123] The term "peace operations" is a comprehensive term that covers a wide range of activities. Peace operations create and sustain the conditions necessary for peace to flourish. Peace operations comprise three types of activities: support to diplomacy (peacemaking, peacebuilding, and preventive diplomacy); peacekeeping; and peace enforcement. Peace operations include traditional peacekeeping as well as peace enforcement activities, such as the protection of humanitarian assistance, establishment of order and stability, enforcement of sanctions, guarantee and denial of movement, establishment of protected zones, and forcible separation of belligerents. FM 100-23, *supra* note 16, at iv. *See also* THE JOINT CHIEFS OF STAFF, JOINT PUB 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS (29 Apr. 1994).

for accomplishing the military mission. During peace operations, the military mission complements the nearly simultaneous diplomatic, economic, informational, or humanitarian efforts.[124] In these operations, prosecuting violations of international law in military courts could protect human rights while supporting the military mission in several ways.

First, prosecution may directly serve to accomplish the mission. In response to the murders of Pakistani peacekeepers in Somalia, the United Nations Security Council passed Resolution 837 on 6 June 1993. The Resolution authorized United Nations forces to "take all necessary measures against all those responsible for the armed attacks including to secure the investigation of their actions and their arrest and detention for prosecution."[125]

On 30 August 1993, United States forces began a campaign to capture the Somali Warlord Mohammed Farrah Aidid.[126] A Pentagon spokeswoman explained that "[t]his is not a campaign to go after one man. It's an effort to improve the overall situation in Mogadishu."[127] Violent protests on Aidid's behalf hindered operations. On 9 September 1993, American gunships killed over 100 Somalis by firing into a crowd that was attacking American and Pakistani troops. After several more unsuccessful efforts to capture Aidid, United States Army Rangers captured Osman Ato, the Warlord's chief financial backer.[128]

Ato's arrest was "a significant milestone" because he was a "key individual in Aidid's militia."[129] In New York, the Secretary General responded, "We must have the staying power to see the operation to its end. If the forces of chaos and corruption conclude that the United Nations is short of breath, they will prevail simply by waiting for the world to turn its attention elsewhere."[130] Pursuant to Resolution 837, United Nations forces took custody of Ato.[131]

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124 FM 100-23, *supra* note 16, at 16.

125 S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., ¶ 5, U.N. Doc. S/RES/837 (1993) (expressing grave alarm at the premeditated attacks apparently directed by the United Somali Congress) [hereinafter S.C. Res. 837].

126 Patrick J. Sloyan, *Hunting Down Aidid; Why Clinton Changed His Mind*, NEWSDAY, Dec. 6, 1993, at A1. Unless otherwise noted, all information in this paragraph comes from this source.

127 *Id.*

128 Keith B. Richburg & Julia Preston, *U.S. Rangers Capture Somali Warlord's Aide; 3 U.N. Troops Killed*, WASH. POST, Sept. 22, 1993, at A25.

129 *Id.*

130 *Id.*

131 United Nations officials denied Ato the right to see an attorney by claiming that he had not been charged. United Nations spokesmen argued that Resolution 837 gave them the power to detain anyone for any period of time who was suspected of "militia activities" or of complicity in the 5 June 1993 ambush which killed 24 Pakistani peacekeepers. Keith B. Richburg, *Somalis' Imprisonment Poses Questions About U.N. Role*, WASH. POST, Nov. 7, 1993, at A45.

In truth, the United Nations was unprepared to prosecute persons captured under the authority of Resolution 837.[132] Despite the bloodshed and sacrifice of many brave men,[133] the United Nations released Ato and all other Somalis after four months of confinement. As of this writing, battles between supporters loyal to Ato and Farrah Aidid are costing Somali lives and threatening to keep Somalia mired in political chaos for the foreseeable future.[134] Prosecution in an American military tribunal would have furthered the mission, saved both Somali and American lives, and potentially helped restore long-term order to Somalia.

The arrest of Osman Ato was an unusual situation in which the defined mission included avenging crimes against international peacekeepers. The present situation of forces deployed on Operation Joint Endeavor in Bosnia-Herzegovina offers a haunting parallel. United States commanders have focused on the specific tasks required under the Dayton Accords and declined to aggressively seek out indicted war criminals.[135] North Atlantic Treaty Organization forces will face tremendous pressure to expand their mission to include the arrest of indicted war criminals and the investigation of other offenses.[136] To date, the Tribunal for the Former Yugoslavia has not completed one trial in almost three years of existence.[137] The interests of justice, and the very stability of Bosnia, may compel American military courts to prosecute violations of humanitarian law to make the operational mission succeed.

Finally, the commander always bears an absolute responsibility for protecting his force. An overemphasis on firepower may be

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[132] Interview with Major Charles Pede (Jan. 23, 1996). Major Pede served as the Chief of Justice deployed to Somalia with elements of the 10th Mountain Division.

[133] *See supra* note 3 and accompanying text.

[134] Stephen Buckley, *Somalis Are Not Starving, Nor Are They Coalescing*, WASH. POST, Oct. 21, 1995, at A18.

[135] Joint Endeavor Fact Sheet No. 004-B, (7 Dec. 1995) (detailing various aspects of the IFOR (Implementation Force) mission to "create a stable environment for the civil aspects to proceed." The IFOR mission is to protect the force by ensuring self-defense and freedom of movement, enforce required withdrawal of force to respective territories, establish and man a zone of separation, enforce the cessation of hostilities, and to provide a secure environment which permits conduct of civil peace implementation functions) (available at http://www.dtic.dla.mil/bosnia/fs/bos-004.html).

[136] Rick Atkinson, *U.S. Cautious on Opening Roads to Area of Reported Massacres*, WASH. POST, Jan. 3, 1996, at A17; David Rohde, *U.S. May Be Mired in Bosnia by Aiding War Crime Probes*, CHRIST. SCI. MON., Jan. 17, 1996, at 6; Christine Spolar, *NATO Album of Bosnia's Most-Wanted*, WASH. POST, Feb. 20, 1996, at A7 (describing the poster issued to help NATO's 60,000 troops identify and detain 51 indicted war criminals).

[137] *Note by the Secretary General, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991*, 50th Sess., U.N. Doc. S/1995/728, ¶ 6 (containing the second annual report of the International Tribunal).

counterproductive. Winfield Scott's war courts conserved American manpower by producing an unprecedented degree of stability and order in Mexico.[138] United States forces deployed in a foreign environment must constantly measure their efforts against the milestones that best indicate success.[139] Each operational decision should accordingly mirror that course of action which best achieves the desired endstate for the operation. On the other hand, allowing the criminals to seize the initiative endangers the stated objectives and may increase operational costs in blood and treasure.[140] Prosecutions of foreign nationals could help protect vulnerable forces by improving the political and cultural climate of the host nation.

The consent of the parties to peace operations is another fundamental variable affecting force protection and defining the nature of the operation.[141] In peace operations, the commander must remain aware of the changing dynamics between opposing forces, politicians, and allied forces. Loss of consent may lead to an uncontrolled escalation of violence. Societal violence, in turn, endangers American armed forces and may threaten operational objectives. Prosecuting foreign nationals must be a considered policy decision because trials require the United States to abandon a pretense of absolute neutrality. Trials in military forums could improve the environment, but they also could have adverse short term effects. The commander must consider the likely impacts of prosecution in light of the overall political objective and the cooperation required to achieve that objective. As a corollary, the commander should initiate prosecution of foreign nationals only after coordination with the civilian leadership responsible for the foreign policy of the United States.

In light of these factors, there will be some cases where the only rational military and humanitarian course is to prosecute the criminal. Criminals should not remain unpunished simply because they commit crimes during an operation other than war. As the United Nations learned in Somalia,[142] in Cambodia,[143] and most

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[138] *See supra* notes 55-61 and accompanying text; K. JACK BAUER, THE MEXICAN WAR 1846-1848, at 327 (1974) (describing the birth of a movement for Mexican incorporation into the United States, or at least the assumption of control by Scott within the entire country).

[139] KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 32 (1995).

[140] Chester A. Crocker, *The Lessons of Somalia: Not Everything Went Wrong*, 74 FOREIGN AFF. 2 (May-June 1995).

[141] FM 100-23, *supra* note 16, at 13.

[142] *See infra* notes 125-34 and accompanying text.

[143] After the Cambodian government took little action on murders and numerous acts of political intimidation during October and November 1992, United Nations Transition Authority Cambodia (UNTAC), officials argued for the creation of a Special Prosecutor's Office. The special office was innovative, and the requirement had not been obvious during the planning phase of the mission. The United Nations formed the Special Prosecutor's Office ten months into the operation, and two full months

recently in Bosnia, criminals will remain unpunished unless the mechanism for prosecution is ready. Section IV examines the legal authorities that will allow Congress to amend the UCMJ to empower commanders to prosecute continuum crimes.

IV. The Legal Authorities for Expanded Jurisdiction

A. Multilateral Treaty Rights

1. The Crime of Genocide—Any state violates international law if it "encourages genocide . . . or otherwise condones genocide."[144] Genocide is the paradigm for Hugo Grotius' maxim that a state cannot conduct "atrocities against its subjects which no just man can approve."[145] President Carter stated that organized murder conducted by the Ugandan government "disgusted the entire world."[146] Despite repeated failures to enforce international norms,[147] the

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after an internal UNTAC study verified that the government had taken absolutely no action against human rights offenders. According to one UNTAC official, the decision came too late to significantly improve the situation. United Nations, *U.N. Peacekeeping: Lessons Learned in Managing Recent Missions*, GAO/NSIAD-94-9, at 54 (1993).

[144] RESTATEMENT, *supra* note 12, § 702 cmt. d.

[145] H. GROTIUS, 2 DE JURE BELLI EST PACIS 438 (Whewell trans. 1853). Judge Lauterpacht noted that "there are limits to [a state's] discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of humanity, intervention in the interest of humanity is legally permissible." OPPENHEIM, *supra* note 78, § 137. Thomas Aquinas wrote that the first principle of natural law is do good and avoid evil. According to Aquinas, the very purpose of government is to foster "the unity and peace of the people." PAUL CHRISTOPHER, THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 77 (1994).

[146] During a news conference on 23 February 1977, President Jimmy Carter expressed his "great concern" and stated that the British were considering a request to the United Nations to intervene in Uganda to stop the murders ordered by Idi Amin. 13 WEEKLY COMP. OF PRES. DOC. 244 (Feb. 28, 1977).

[147] The legal literature on humanitarian intervention is far too extensive to completely list here. The recurring pattern of governments slaughtering their citizens has led many scholars to argue for a clear international rule allowing intervention in the otherwise sovereign affairs of other states based on gross, widespread violations of human rights by the government. *See, e.g.*, Douglas Eisner, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L. J. 195 (1993); Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed., 1973); MICHAEL WALZER, JUST AND UNJUST WARS 101-08 (1977); F. Teson, *An Inquiry into the Legitimacy of Humanitarian Intervention*, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185-214 (L. Damrosch & D. Sheffer eds., 1991); Richard B. Lillich, *Forcible Self-Help By States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); B. De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT'L L. REV. 21 (1972); Thomas M. Frank & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973); Thomas Bekuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978); H. Scott Fairley, *State Actors, Humanitarian*

authority to prosecute genocide in domestic courts is one of the clearest examples of the class of offenses I term continuum crimes.

The horrors of the Holocaust inspired the efforts to define[148] and prevent genocide. The Nazis murdered millions of innocent civilians.[149] The Nazis also targeted the Jewish race, as well as Gypsies, Jehovah's Witnesses, homosexuals, political enemies, and occupants of conquered territories.[150] By unanimously adopting Resolution 96(I), the United Nations General Assembly defined genocide as "the denial of the right to exist of entire groups."[151] The resolution established genocide as an international crime and appealed to member states to enact appropriate criminal legislation. Two years later, on 9 December 1948, the General Assembly approved a draft of the Convention on the Prevention and Punishment of the Crime of Genocide.[152] Since its entry into force on 12 January 1951, the Genocide Convention is the clearest definition of the customary *international crime of genocide.*[153]

Intervention And International Law: Reopening Pandora's Box, 10 GA. J. INT'L & COMP. L. 29 (1980); Michael J. Bayzler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987); Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321 (1989); R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. J. INT'L L. 435 (1989); David M. Kresock, Note, *"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L. J. 203 (1994); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force To Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120 (1992/1993).

148 The term genocide derives from the Greek words genos (meaning race) and cide (meaning killing). Dr. Raphael Lemkin introduced the phrase in response to Winston Churchill's comment that Nazi crimes in Poland did not have a name. John Webb, *Genocide Treaty-Ethnic Cleansing-Substantive and Procedural Hurdles in The Application of The Genocide Convention To Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 387 n.49 (1993).

149 Some estimates range as high as 8 million victims. OPPENHEIM, *supra* note 78, § 340p; 8 IMT, *supra* note 2, at 330 (340,000 victims were exterminated at Helmno, 781,000 at Treblinka); 22 IMT, *supra* note 2, at 496 (six million Jews were murdered by the Nazis, four million of which died in concentration camps).

150 Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834 (1990).

151 G.A. Res. 96(I), U.N. Doc. A/231 (1946).

152 *See infra* note 11.

153 President Truman transmitted the Convention to the Senate for its advice and consent on 9 December 1948. The Senate held hearings on the Convention in 1950. On 19 February 1986, the Senate gave its advice and consent to the Convention by a vote of 83 yeas to 11 nays with 6 absences. The Senate's consent is subject to two understandings, five reservations, and one declaration, 32 CONG. REC. 15, S1377-78. For a detailed analysis of each section of the Convention and the effect of the reservations and understanding on each section, *see Crime of Genocide: Hearing before Sen. Comm. on For. Rel. on the Prevention and Punishment of the Crime of Genocide*, 99th Cong., 1st Sess. (1985); *Senate Committee on Foreign Relations, Report of the International Convention for the Prevention and Punishment of the Crime of Genocide*, EXEC. RPT. NO. 2, 99th Cong., 1st Sess. (1985), *reprinted in* 28 I.L.M. 760 (1989). As of this writing, 120 countries have ratified the Genocide Convention. DEP'T OF STATE, TREATIES IN FORCE 358-9 (1995). Of particular note, Yugoslavia was one of the first nations to ratify the instrument on 29 August 1950, *reprinted in* 28 I.L.M. 779 (1989).

The criminal nature of genocide remains constant, regardless of the context. The Genocide Convention imposes a duty on all signatories to prevent "genocide in time of peace or war."[154] Article 6(c) of the London Charter authorized the International Military Tribunal to prosecute "murder, extermination, and other inhumane acts committed against any civilian population, before or during the war."[155] Extending the definition of Crimes Against Humanity, the Genocide Convention defined the crime of genocide to require "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[156] The Genocide Convention applies to a broad class of acts,[157] which are crimes regardless of the identity of the offender.[158]

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[154] Genocide Convention, *supra* note 11, art. 1. Pursuant to the obligation under article V of the Convention, President Reagan signed the Genocide Convention Implementation Act of 1987. Pub. L. No. 100-606, 102 Stat. 3045 (Nov. 4, 1988), *codified* at 18 U.S.C. §§ 1091-93 (1995), *reprinted in* 28 I.L.M. 754 (1989) (restating the definitions and prohibitions of articles III and IV of the Convention). President Reagan commented that nations of the world came together and drafted the Genocide Convention as a howl of anguish and an effort to prevent and punish future acts of genocide. 89 DEP'T OF STATE BULLETIN 38 (Jan. 1, 1989). The statutory implementation limits United States jurisdiction to offenses occurring within the United States or committed by a United States citizen, and specifically states that there is no statute of limitations for the Crime of Genocide.

[155] London Charter, *supra* note 12, art. 6(c). The International Tribunal decided to restrict its examination only to acts listed in Article 6(c) which had taken place after the beginning of the war. Expanding the inquiry to acts prior to the war would have been an unprecedented recognition of fundamental human rights. Prosecuting human rights violations would have been an intervention in the territorial and political sovereignty of states which the Tribunal was unprepared to take. VON GLAHN *supra* note 94, at 885. As this article points out, the evolution on international law in the intervening fifty years has clarified the jurisdiction of international tribunals over criminal violations of human rights law. As used in this article, the term continuum crimes denotes law of war violations during international armed conflicts, as well as violations of international law which occur during internal armed conflicts or other types of peace operations. *See infra* notes 298-347 for the substantive scope of continuum crimes.

[156] Genocide Convention, *supra* note 11, art 1.

[157] Article II of the Convention states: In the Present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group,

(b) Causing serious bodily or mental harm to members of the group,

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

(d) Imposing measures intended to prevent births from within the group,

(e) Forcibly transferring children of the group to another group.

Article III states that the following acts shall be punishable: Genocide, Conspiracy to commit Genocide, Direct and Public Incitement to Commit Genocide, Attempt to commit genocide, Complicity to genocide. Genocide Convention, *supra* note 11, arts. II, III.

[158] Article IV of the Convention states that: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals. *Id.*, art. IV.

Despite the codified Genocide Convention, its textual limitations have not curbed extensive genocidal campaigns throughout the world. Article II requires the specific intent to destroy the protected group with acts taken in furtherance of that intent. A single murder could theoretically constitute genocide if committed with the intent to eradicate the victim's protected group.[159] At the other extreme, states have committed mass killings of religious minorities[160] in areas where they have territorial ambitions[161] while denying any intent to destroy the group. States also have slaughtered innocent civilians as a form of retribution following armed conflicts, thereby slipping through the specific intent loophole.[162] The drafters of the Genocide Convention rejected an amendment which would have applied the Genocide Convention if government action destroyed parts of a designated group without the specific intent to destroy the group.[163]

From the victim's perspective, murder is murder, and the requirement for specific intent regarding the group as a whole is meaningless. However, even if the criminal intended to destroy the group, Article VI prevents enforcement of the criminal provisions of the Genocide Convention. Article VI states that "persons charged . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed."[164] Article VI leaves the foxes in charge of the hen house. No government has exercised its duties under the Genocide Convention to punish offenders of its own

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159 M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, 251 (1979).

160 *See* Paul Starkman, *Genocide and International Law: Is There a Cause of Action?*, 8 ASILS INT'L L.J. 1 (1984) (describing the persecution of the Buddhist population of Tibet by The People's Republic of China in 1959 and 1969); David Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 n.4 (1992) (describing the Iraqi aggression against Kurdish and Shiite minorities which killed thousands and displaced millions of citizens, as well as summarizing a series of genodical campaigns for a variety of reasons by governments all over the world).

161 *See* Jean E. Zeiler, *The Applicability of the Genocide Convention to Government Imposed Famine in Eritrea*, 19 GA. J. INT'L & COMP. L. 5899 (1989) (describing a "deliberate, genocidal attempt" by the government of Ethiopia to starve the Eritrean people into submission, as well as efforts by the government of Paraguay to exterminate the Ache Indian population); *German Parliament Wants Serbs Branded for Genocide*, THE REUTERS LIB. REP. (July 2, 1992) (describing the difficulties implementing the Convention even in extreme cases such as that in Cambodia where the government murdered millions of its citizens).

162 John N. Moore, *The Use of Force in International Relations: Norms Concerning the Initiation of Coercion*, *in* JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 85-192, 162 (1990) (citing estimates that official genocide in Cambodia killed between one and two million citizens in a span of two years).

163 3 U.N. GAOR C.6, 73d mtg., at 12, U.N. Doc. A/C.6/SR 73 (1948).

164 Genocide Convention, *supra* note 11, art. VI. A literal reading of this provision would restrict a domestic court from applying its own law to one of its citizens who committed genocide outside its borders. The United States has an understanding that an American citizen who commits genocide abroad will be prosecuted in federal court under American law, and the United States Code implements that understanding. *See* 18 U.S.C. § 1091(d) (1995).

nationality who killed either individually or on its behalf. The specific intent requirement in conjunction with the domestic jurisdiction clause nullifies any practical application of the Genocide Convention. The Genocide Convention is rightly viewed as a "registration of protest against past misdeeds or collective savagery rather than an effective instrument to prevent and punish genocide."[165]

Nevertheless, the United States retains authority to punish genocide committed by foreign nationals because genocide is a crime under customary international law. The Genocide Convention does not describe a workable enforcement mechanism; rather, it defines and prohibits the crime itself. The United Nations Committee of Experts reporting on the situation in Rwanda noted that the crime of genocide has achieved the status of *jus cogens*[166] and binds all members of the international community.[167] Genocide is therefore a universal jurisdiction crime punishable by any state, regardless of the nationality of the offender or the site of the atrocities.[168]

Punishing genocide in United States military forums would help contribute to the overriding purpose of the Genocide Convention by helping prevent future acts.[169] In any event, Article I of the Genocide Convention arguably imposes a "prevent and punish" duty on the commander concerning genocidal activities in the area of operations.[170] In some situations, protecting the right to life overseas will be an integral component of the mission. Other than simply detaining offenders without convictions, trials in military

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[165] OPPENHEIM, *supra* note 78, § 340p.

[166] *Jus cogens* are the peremptory norms of international law; *e.g.*, "Such [peremptory] norms, often referred to as jus cogens (or 'compelling law'), enjoy the highest status in international law . . . ." Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988).

[167] *Letter dated 9 December 1994 From the Secretary General Addressed to the President of the Security Council*, U.N. Doc. S/1994/1405 (1994) (containing an Annex which prints the Final Report of the Commission of Experts Established Pursuant to Resolution 935 [hereinafter Rwanda Commission], and an Appendix which sets out a Statute for an international tribunal for Rwanda) (available at http://gopher.undp.org:70/00/uncurr/sgrep/94_12/1405). The Commission of Experts documented "overwhelming evidence of genocide," and specified that genocide has attained *jus cogens* status as an international crime. Rwanda Commission, *supra*, ¶ 152.

[168] RESTATEMENT, *supra* note 12, § 404; Starkman, *supra* note 160, at 49.

[169] *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, at 2563 n.105 (1991).

[170] Article I imposes a duty to "prevent" genocide "in time of peace or war." Genocide Convention, *supra* note 11, art. 1. *See also* U.N. Charter arts. 55(c), 56 (obligation to respect and ensure respect for human rights); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3, ¶ 52(A)(1) (Apr. 8, 1993) ("should immediately . . . take all measures within its power to prevent commission of the crime of genocide"); G.A. Res. 3071, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973) ("shall cooperate . . . with a view to halting and preventing . . . crimes against humanity, and take the domestic and international remedies necessary for that purpose").

forums would be the only option within the commander's power. Enforcing the prohibition on genocide would comply with international law and simultaneously advance the objectives of the mission.

2. The Crime of Attacking United Nations Personnel—Danger to United Nations employees and military forces supporting United Nations sanctioned operations is at an all time high. The threats to force security have increased in direct proportion to the rising complexity, pace, and scope of United Nations operations. The Security Council has authorized more operations since 1991 than in the previous forty-six years.[171]

The Security Council also expanded its traditional peacekeeping role to assume new responsibilities such as monitoring elections,[172] human rights investigations, war crimes prosecutions,[173] police training,[174] civil administration, refugee protection, and establishing secure areas for the protection of civilians.[175] To

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171 *Background Notes: United Nations*, 6 DEP'T OF STATE DISPATCH 570, 572 (July 17, 1995) (listing the operations initiated since 1991 in the Middle East (UNIKOM), Africa (UNTAG and MINURSO), Cambodia (UNAMIC and UNTAC), the former Yugoslavia (UNPROFOR and IFOR), Chad (UNASOG), Mozambique (ONUMOZ), Rwanda (UNAMIR/UNOMUR), Somalia (UNOSOM II), El Salvador (ONUSAL), Liberia (UNOMIL), Georgia (UNOMIG), Haiti (UNMIH), Tajikistan (UNMOT), and Angola (UNAVEM)).

172 Civilian police from twenty-five different countries deployed to Namibia in support in UNTAG, and 3600 deployed to Cambodia in support of UNTAC. Based on these experiences, the United Nations deployed civilian police to support both UNPROFOR (Bosnia and Croatia) and UNOSOM (Somalia). *Reform of United States Peacekeeping Operations: A Mandate for Change*, S. REP. No. 45, 103d Cong., 1st Sess., at 22-29 (1993).

173 *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal to try crimes committed in the former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993) (including a proposed statute for the International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia) [hereinafter Report of the Secretary General will refer to the body of the report and Statute of the International Tribunal will refer to the annexed statute]; Rwanda Statute, *supra* note 105.

174 S.C. Res. 997, U.N. SCOR, 50th Sess., 3542d mtg., U.N. Doc. S/RES/997 (1995) (adjusting the UNAMIR mandate). Congress implicitly recognized the need for increased United States efforts in this regard with a specific provision of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for Fiscal Year 1996. Congress amended § 660(b) of the Foreign Assistance Act, to allow United States military forces to assist efforts to "reconstitute civilian police authority and capability in post-conflict restoration of host nation infrastructure for the purpose of supporting a nation emerging from instability." Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 1996, Pub. L. No. 104-107, § 540A(d), 110 Stat. 704 (1996), *to be codified at* 22 U.S.C. § 2420.

175 S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg., U.N. Doc. S/RES/818 (1994), *reprinted in* 5 DEP'T OF STATE DISPATCH 352 (May 30, 1994) (expanding the UNOMIR mission to use all resources available to it to contribute to the security and protection of displaced persons, refugees, and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible of secure humanitarian areas); S.C. Res. 925, U.N. SCOR., 49th Sess., 3388th mtg., U.N. Doc. S/RES/925

implement these goals, Security Council resolutions increasingly authorize member states to use "all necessary means" to restore order and separate warring factions.[176] These difficult missions in dangerous environments have caused a dramatic increase in casualties among United Nations contingents.[177]

In response to the rising wave of violence towards United Nations personnel, the United Nations General Assembly adopted the Convention on the Safety of United Nations and Associated Personnel.[178] The Safety Convention covers all persons engaged or deployed by the Secretary-General as members of the military, the police, or the civilian components of a United Nations operation.[179] The Safety Convention also protects "associated persons" from member states or non-governmental agencies who deploy in support of

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(1994) (authorizing additional forces for UNAMIR and recognizing that those forces may need to use force in pursuit of Security Council objectives); S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993) ("all parties . . . concerned treat Srebinica and its surrounding areas as a safe area which should be free from armed attack or any other hostile act"). *See also* 30 U.N. Chronicle 12, Sept. 1993 (discussing S.C. Res. 824 which expanded "safe area" protections to Sarajevo, Tuzla, Gorazde, Zepa, and Bihac).

[176] FM 100-5, *supra* note 16, at 3-7; S.C. Res. 929, U.N. SCOR, 49th Sess., 3392nd mtg., U.N. Doc. S/RES/929 (1994) (allowing "all necessary means" for UNAMIR to implement the goals of Security Council Resolution 925 in Rwanda); Res. 940, *supra* note 22 (authorizing "all necessary means" for the multinational force operating inside Haiti on Operation Uphold Democracy); S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc., S/RES/770 (1992) ("all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina).

[177] The Secretary-General of the United Nations observed that "[t]he number of fatalities among United Nations military contingents has also dramatically increased during the past two years [1992-1994]. While the grand total for all past and ongoing missions amounts to 1074 fatalities, in 1993 alone 202 personnel were killed." *Note by the Secretary-General*, U.N. Doc. A/AC. 242/1 (1994), *quoted in Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 622 n.3 (1995) [hereinafter *Protecting Peacekeepers*]. The dangers are not limited to military forces. In 1994, 65 United Nations civilians died worldwide, mostly in Rwanda. Peter Hansen, *Humanitarian Aid on an International Scope*, THE CHRIST. SCI. MON., Aug. 15, 1995, at A1. Since 1985, the International Committee of the Red Cross has had 48 employees killed and another 147 simply disappear. *Id.* At the time of this writing, attacks against United Nations agency staff and non-governmental agencies working inside Burundi have virtually halted humanitarian assistance in that country. *Letter dated 16 January 1996 From the Secretary-General to the President of The Security Council*, U.N. Doc. S/1996/36 (Jan. 17, 1996).

[178] Convention on the Protection of United Nations Persons and Associated Personnel, *opened for signature* Dec. 15, 1994, G.A. Res. 49/59, U.N. Doc. A/49/742 (Dec. 9. 1994), *reprinted in* 34 I.L.M. 482 (1995)[hereinafter Safety Convention].

[179] *Protecting Peacekeepers*, *supra* note 177, at 623. This includes military forces supporting Security Council objectives, as well as civilian officials and experts on mission of the United Nations or one of its specialized agencies or the International Atomic Energy Agency (IAEA) who are present in an official capacity in the area of a United Nations operation. As an aside, this Convention may also be a tool for controlling nuclear terrorism by prosecuting persons who interfere with or threaten IAEA employees attempting to perform their monitoring and reporting duties.

United Nations objectives.[180] The United States signed the Safety Convention on 19 December 1994.[181]

The Safety Convention is an important effort to protect personnel who are not lawful targets. Other than the baseline protection of Common Article 3, the Geneva Conventions do not protect persons conducting noncombat operations or working in the midst of internal armed conflicts.[182] The Safety Convention closes an otherwise dangerous gap in international law by defining a wide range of criminal conduct towards United Nations personnel and associated persons.[183] The Safety Convention protects United Nations and associated personnel who are not engaged as combatants in an international armed conflict.

In contrast, some Chapter VII peace enforcement operations entail low levels of consent and questionable impartiality, which can

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[180] This is an important category because it includes United States Armed Forces who are not under the control of the United Nations, but whose deployment authority arises from mandates of the Security Council exercising its Chapter VII enforcement powers. This would include NATO forces supporting UNPROFOR, and the current IFOR deployed on Operation Joint Endeavor in Bosnia, as well as the Multinational Force operating inside Haiti prior to the time that the United Nations assumed control of the situation with UNMIH, and United States assistance in Somalia under the UNITAF.

At the time of this writing, attacks against United Nations agency staff and Nongovernmental agencies working inside Burundi have brought humanitarian assistance to a virtual halt in that country. The Secretary-General has concluded that these attacks violate the Convention and asked for enforcement of its provisions. *Letter dated 16 January 1996 From the Secretary-General to the President of The Security Council*, U.N. Doc. S/1996/36 (Jan. 17, 1996).

[181] *Protecting Peacekeepers*, *supra* note 177, at 622 n.7. At this time, 43 states have signed the Convention, and 4 have become Parties. For a current list of signatories and accession dates *See* http://www.un.org.Depts /Treaty/bible/Part_1_E/XVIII_8.html.

[182] *See supra* note 4. Article 2 Common to the four Geneva Conventions provides the basis for application of the Conventions to international armed conflicts:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them. The Convention shall also apply to all cases of total or partial occupation of the territory of the High Contracting Party, even if the said occupation meets with no armed resistance.

[183] Article 9 prohibits the "intentional commission" of murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel. Article 9 also lists the following violations of the Convention:

> A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; A threat to commit any such attack with the objective of compelling a physical or juridical person to refrain from doing any act; An attempt to commit any such attack; and An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack.

Safety Convention, *supra* note 178, art. 9.

draw United Nations personnel into international armed conflicts. Article 2, therefore, provides that the Safety Convention shall not apply to enforcement actions under Chapter VII in which forces "are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."[184]

The laws of war do apply to United Nations sanctioned operations rising to the level of international armed conflicts. In those situations, the legal and doctrinal watershed is clear. *Field Manual 100-23* accordingly notes that, "from a doctrinal point of view, these two operations [Korea (1950-1953) and the Gulf War (1990-1991)] are clearly wars and must not be confused with PE [peace enforcement]."[185] Thus, the laws of war always define the rights of United States personnel and the corresponding duties of enemy forces during international armed conflicts.

In contrast, United Nations personnel deployed on operations other than war are not combatants and they are therefore not lawful targets. Persons who attack United Nations personnel during operations other than war generally violate the criminal code of the country where the act occurs. However, the climate of lawlessness which required United Nations action often prevents enforcement of criminal laws. By the same token, the civil officials who hinder United Nations operations will likely be the same officials responsible for enforcing the laws.

The Safety Convention captures the essence of continuum crimes. The Safety Convention protections operate alongside the Geneva Conventions to provide a seamless band of protection across the spectrum of risk or conflict.[186] Soldiers and civilians enjoy different rights under the Safety Convention than they would during international armed conflicts because the intent of international law varies. While the laws of war aim to minimize suffering during conflict, the Safety Convention seeks to help United Nations officials prevent international armed conflicts or escalation of internal violence.

Article 10 of the Safety Convention allows universal jurisdiction over persons who commit crimes against United Nations and associated personnel. It requires the United States to implement domestic legislation over some offenses and it allows jurisdiction over a wider category of crimes.[187] Assuming that Congress amends

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[184] *Id.* art. 2, para. 2.

[185] FM 100-23, *supra* note 16, at 2.

[186] United States Mission to The United Nations, Press Release No. 217-94 (Dec. 9, 1994).

[187] Safety Convention, *supra* note 178, art. 10 reads as follows:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:

the UCMJ, United States commanders conducting peace operations would have explicit authority to use military forums to enforce the Safety Convention. Within the context of overall mission requirements, criminal prosecutions could supplement other force protection efforts and thereby enhance all soldiers' inherent right of self defense.[188]

Prosecutions also could help establish American credibility during the operation both in the area of operations and with the American people. For example, in May 1995, Serbian forces captured 33 British peacekeepers and 372 United Nations staff personnel.[189] A local official noted that the "NATO [North Atlantic Treaty Organization] has seriously discredited itself. They promised to chop off the hands [of the Serbian Army]. Instead, they delivered a slap on the wrists."[190] In another instance, Dutch peacekeepers made few efforts to defend the "safe area" of Srebinica in part because the Serbs held Dutch soldiers hostage. As a result, the evidence indicates that the Serbs committed horrible atrocities around Srebinica.[191]

(a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

(a) By a stateless person whose habitual residence is in that State; or

(b) With respect to a national of that State; or

(c) In an attempt to compel that State to do or abstain from doing any act.

3. Any State which has established jurisdiction s mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

[188] FM 100-23, *supra* note 16, at 16-17 ("The inherent right of self defense, from unit to individual level, applies in all peace operations at all times."). Commanders should be constantly ready to prevent, preempt, or counter activity that could bring significant harm to units or jeopardize mission accomplishment. In peace operations, commanders should not be lulled into believing that the nonhostile intent of their mission protects their force. *Id.*

[189] Chris Mclaughlin, et al., *Major Fears Bosnia Tragedy Bloodbath Warning as Tory Pressure for Pullout Grows*, THE SCOTSMAN, May 31, 1995, at 1.

[190] Tom Hundley, *Defiant Serbs Round Up More UN Hostages*, CHI. TRIB, May 29, 1995, at 1.

[191] Michael Dobbs & Christine Spolar, *Anybody Who Moved or Screamed Was Killed; Thousands Massacred on Bosnia Trek in July*, WASH. POST, Oct. 26, 1995, at A1.

Military prosecutions could serve a valuable purpose if opposing forces likewise try to intimidate United States armed forces and manipulate United States policy by attacking. Prosecuting criminals could help control the overall climate of violence. Criminals cannot further agitate already delicate political climates if they are imprisoned for their crimes. Operations could be concluded more quickly if prosecutions enhanced United States credibility. The Convention on the Safety of United Nations and Associated Personnel establishes a jurisdictional basis over foreign nationals who attack American soldiers or hinder peace operations. Implementing the Safety Convention through the UCMJ offers United States commanders a potentially valuable tool for minimizing American casualties and achieving the political objectives of the operation.

3. The Crime of Torture—The Convention Against Torture and Other Cruel, Inhuman, and Degrading Punishments (the Torture Convention) provides another jurisdictional basis for United States military courts.[192] Torture is an abhorrent practice because victims are helpless and are not combatants under any definition. Torture threatens the very essence of human rights and personal dignity. Universal condemnation of torture makes it one of the most widely recognized international crimes.

The 1948 Universal Declaration of Human Rights, for example, stipulated, "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[193] The Geneva Conventions prohibit "any form of torture or cruelty" towards prisoners of war.[194] The Fourth Geneva Convention likewise forbids "physical or mental coercion . . . against protected persons," which includes "any measure of such a character as to cause the physical suffering or extermination of protected persons."[195] Other multilateral[196] and regional human rights conventions[197] establish that tor-

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[192] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 38 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention]. After the Torture Convention came into force for the United States on 20 November 1994, the State Department designated it as Treaty Doc. 100-20. *See also* Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S., *reprinted in* 25 I.L.M. 519 (1986).

[193] Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, U.N. Doc. A/810, art. 5 (1948), *reprinted in* 6 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 237-42 (1965) [hereinafter Universal Declaration].

[194] Convention on Prisoners of War, *supra* note 4, art. 87.

[195] Civilians Convention, *supra* note 4, arts. 31, 32.

[196] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force March 23, 1976.

[197] *See, e.g.*, American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, art. 5, ¶ 2, OEA/Ser. L./V/II.23 doc. rev. 2, *entered into force* July

ture or inhumane treatment violates the rights of all persons in time of peace as well as war.

With unanimous adoption on 10 December 1984, the Torture Convention completed the evolution of international criminal law in the area. The Torture Convention reserves criminal sanctions for egregious cases which are "an extreme form of cruel and inhuman treatment."[198] To commit a crime under the Torture Convention, the offender must have a specific intent to cause severe pain and suffering and the acts must result in severe mental or physical pain.[199] Finally, the Torture Convention limits criminal penalties to acts "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in a public capacity."[200]

The Torture Convention proscribes a relatively narrow band of conduct as a clear violation of international law, but it proscribes that misconduct in any type of conflict or internal process. The Torture Convention does not restrict application of its terms. Article 2 states that criminals cannot cite exceptional circumstances such as war, national emergency, or superior orders as valid defenses to the crime of torture.[201] The United States Senate gave its advice and consent to the Torture Convention on 27 October 1990, thereby gaining jurisdiction for United States courts under the universal jurisdiction provisions of the Torture Convention.[202]

The Torture Convention conveys jurisdiction to United States courts to prosecute torture as a continuum crime. Although international law grants broad jurisdictional rights, the domestic legislation implementing those rights contains a critical omission. Congress determined that existing criminal statutes already penalize the acts constituting torture if the offense takes place in any territory under United States jurisdiction or on board a ship or aircraft registered in

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18, 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 3, entered into force Sept. 3, 1953, *as amended by* Protocol No. 3, *entered into force* Sept. 21, 1970, and Protocol No. 5, *entered into force* Dec. 21, 1971; African [Banjul] Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev 5, arts. 4, 5, June 27, 1981, *reprinted in* 21 I.L.M. 58 (1982).

198 Torture Convention, *supra* note 192, art. 1.

199 *Id.*

200 *Id.*

201 *Id.* art. 2.

202 133 CONG. REC. S17486, No. 150 (daily ed. Oct. 27, 1990). The Senate gave its advice and consent subject to two reservations, five understandings, and two declarations. See *id.* at S17491-92; *The Phenomenon of Torture: Hearings and Markup on H.J. Res. 605 Before the House Comm. on For. Aff. and its Subcomm. on Human Rights and International Organizations*, 98th Cong., 2d Sess. 154-55 (1984).

the United States.[203] Pursuant to Article 5 of the Torture Convention, Congress extended federal court jurisdiction over torture if the offender "is a national of the United States" or the offender "is present in the United States, irrespective of the nationality of the victim or the alleged offender."[204]

The statutes implementing the Torture Convention do not protect soldiers deployed on peace operations because they fail to exercise the full extent of United States authority under international law. If Congress "considers it appropriate," Article 5(1)(c) of the Torture Convention permits Congress to establish jurisdiction over any case of torture or inhuman treatment in which the victim is an American citizen.[205] Citing the death of Colonel William Higgins by torture in Lebanon,[206] Congress recognized that American soldiers serving in peace operations have been captured, tortured, and murdered.[207] Nevertheless, Congress did not enact a statutory basis for jurisdiction over persons who torture American soldiers or citizens abroad. The legislative history is silent on the reason why Congress declined to extend United States jurisdiction to the full extent granted by international law.[208]

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[203] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, EXEC. REP. No. 30, 101st Cong. 2d Sess., at 20 (1990) (containing an excellent description of the United States position regarding every article of the Convention, and reproducing the text of Resolution of Ratification at 29-31). Congress identified a range of offenses already prohibited by federal and state law which would violate the terms of the Convention. DEP'T OF STATE, 1 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, 833-34 (1993).

[204] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, Title V, § 506, 108 Stat. 382 (1994), *codified* at 18 U.S.C.A. § 2340A(b) (West 1984 and Supp.). The implementing legislation contained key definitions of terms for the purposes of federal criminal law (*codified* at 18 U.S.C. § 2340), extended the statute of limitations for torture to 20 years (*codified* at 18 U.S.C. § 3286), enacted statutory punishments (*codified* at 18 U.S.C. § 2340A(a)), and specified that the implementing statutes did not prevent the application of State and local laws to criminal offenses which might also fit the definition of torture (*codified* at 18 U.S.C. § 2340B).

[205] Torture Convention, *supra* note 192, art. 5(1)(c).

[206] Gunmen abducted Lieutenant Colonel William Richard Higgins as he left for work on 16 March 1984. Colonel Higgins served as the head of a 75-member United Nations peacekeeping contingent serving in Lebanon. The Islamic Jihad claimed to have killed Higgins in October 1985 in retaliation for an Israeli air raid. A group calling itself the Organization of the Oppressed on Earth claimed it executed Higgins on 31 July 1989, and released a videotape of his hanging body. His captors dumped the body on the side of a road in December 1991, and an autopsy showed that he died while being tortured. Brooke A. Masters & James Naughton, *2 Slain Hostages Buried as Heroes; Families, Friends Ask That Buckley, Higgins Not Be Forgotten*, WASH. POST, Dec. 31, 1991, at A1. In the context of prosecuting continuum crimes, the plea of Colonel Higgins wife bears repeating, "If we forgive, if we forget, if we thank these savages, then we are merely inviting them, at a time and place they select, to kill again. Shame on us if we do." *Id.*

[207] H.R. CONF. REP. No. 482, 103d Cong., 2d Sess. (1994).

[208] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, 1994 U.S.C.C.A.N. (108 Stat. 382) 302-517.

Unless domestic courts attain personal jurisdiction over the offender, the only remedy for crimes committed against American soldiers is in foreign domestic courts. Because only persons acting under color of official authority are capable of committing the crime of torture, foreign courts can be expected to ignore violations by their officials. Even in the rare case where foreign authorities collect available evidence and desire to prosecute offenders, foreign judicial systems are often incapable of enforcing criminal laws during operations other than war.[209]

Due to the abhorrent nature of torture and the lawless environment common to peace operations, Congress should take every available step to protect American soldiers. Because preventing torture is a major goal of United States foreign policy, Congress has used domestic statutes to advance human rights and help prevent torture by foreign governments.[210] The Torture Convention provides a vehicle for translating abstract commitment into concrete legal remedies.

As another benefit of expanded punitive power, American soldiers would not automatically pay the price for legislative oversight. If Americans suffer torture at the hands of foreign nationals, the commander should have an available tool to punish the offender and to prevent recurrence. Allowing deployed commanders to enforce the Torture Convention by military tribunals could close a dangerous gap in United States enforcement authority while contributing to the accomplishment of the mission.

B. Historic International Tribunals

The Nuremberg and Tokyo trials, along with numerous national prosecutions after World War II,[211] are the most visible examples

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[209] In Somalia, United States armed forces concluded that the task of "facilitating the restoration of a police force (within legal parameters) and a judicial system was a requirement and a challenge." CENTER FOR ARMY LESSONS LEARNED, U.S. ARMY COMBINED ARMS COMMAND, OPERATION RESTORE HOPE LESSONS LEARNED REPORT (3 Dec. 1992-4 May 1993), XIV-39 (1993).

[210] Joint Resolution Regarding the Implementation of the Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, Pub. L. No. 98-447, Oct. 4, 1984, 98 Stat. 1721 (1984) ("the Congress reaffirms that it is the continuing policy of the United States to oppose the practice of torture by foreign governments through public and private diplomacy and, when necessary and appropriate, through the enactment and vigorous implementation of laws intended to reinforce United States policies with respect to torture."). *See also* 22 U.S.C. § 262d (1995) (advancement of human rights by United States assistance policies with international financial institutions); 22 U.S.C. § 2151n (1995) (linking human rights records with development assistance); 22 U.S.C. § 2222 (1995) (granting funds to support the United Nations Voluntary Fund for Victims of Torture).

[211] HOWARD S. LEVIE, TERRORISM IN WAR-THE LAW OF WAR CRIMES 135-39, 179-82 (1992) (citing postwar statistics for the European and Far Eastern theaters respectively); DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOL. II 234-35 (23 Oct. 1962) (citing statistics of national prosecutions) [hereinafter DA PAM 27-161-2]; M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, IND. INT'L & COMP. L. REV. 1, 5 n.17 (Spring 1991) (citing sources of national prosecution statistics).

of enforcing international law through criminal sanctions.[212] The World War II prosecutions of war criminals gave birth to the modern international law of human rights.[213] The legacy of the World War II trials shines through the clutter of world events.

Even after a half century of human suffering, the World War II prosecutions impact international law like sunlight penetrates darkness. As Justice Jackson wrote to President Truman, enforcing international law through criminal forums can only "strengthen the bulwarks of peace and tolerance."[214] United States jurisdiction to prosecute continuum crimes relies in part on legal authority first articulated and refined in the wake of World War II.

1. The Nuremberg Precedent—History has not borne the fruits of Justice Jackson's aspiration that the Nuremberg principles would "become the condemnation of any nation that is faithless to them."[215] Scholars have tried in vain to refine a definitive list of Nuremberg principles.[216] Nevertheless, the Nuremberg trials were a pivotal event in world history because they demonstrated that international law embodies universal moral values which can transcend theory to support criminal judgments.[217] Despite some criticism,[218] several aspects of the Nuremberg experience affect the authority of United States military forums to enforce international law.

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[212] It is incorrect to maintain that the World War II trials are the only historic example of international forums prosecuting violations of international law. In 1647, a tribunal of judges from Alsace, Switzerland, and other members of the Holy Roman Empire heard the case against the Burgundian Governor of Breisach, Peter von Hagenback. The accused tried to justify his troops' crimes against civilians based on a defense of superior orders, which the panel rejected. The international panel ruled that the defense of superior orders was contrary to the law of God and sentenced Hagenback to death. *See* G. SCHWARZENBERGER, 2 INTERNATIONAL LAW, INTERNATIONAL COURTS 462-66 (1968).

[213] Fogelson, *supra* note 150, at 833.

[214] Report to the President By Mr. Justice Jackson, Oct. 7, 1945, *in* DEP'T OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 439 (1945).

[215] *Id. See also* Graham T. Blewitt, *Ad Hoc Tribunals Half a Century after Nuremberg*, 149 Mil. L. Rev. 101-02 ("Nuremberg was a success but the Cold War left it sitting on the shelf for almost 50 years. During that time the world has been dripping with blood. The hope the world would never see the suffering inflicted during World War II has not been realised and the suffering and death has been repeated again and again.").

[216] *See, e.g., Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*, 2 Y.B. INT'L L. COMM. 374-380 (1950); Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, *in* JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 359-402 (1990).

[217] Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 AM. U. L. REV. 1 (1982).

[218] *See generally* DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR 81-118 (1984); Orville C. Snyder, *It's Not Law-War Guilt Trials*, 38 KY. L.J. 81 (1949); A. BRACKMAN, THE OTHER NUREMBERG (1987); R. CONOT, JUSTICE AT NUREMBERG (1983); A. TUSA & J. TUSA, THE NUREMBERG TRIAL (1983).

First, the Nuremberg Trials established beyond question that individual perpetrators can commit international crimes. Perpetrators cannot evade criminal responsibility by arguing that international conventions apply only to sovereign states. For example, the Nuremberg Tribunals prosecuted violations of the Convention Respecting the Law and Customs of War on Land[219] and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.[220] While some modern conventions provide for the jurisdiction of certain courts, individuals can commit international crimes even without specific jurisdictional provisions.[221] Nuremberg established the common sense principle that states comply with international obligations only if public officials understand and obey those duties. Personal obligations cannot be divorced from legal duties of the state. The Tribunals enforced otherwise abstract international law against the individuals who committed real crimes against real victims.

Following the same principle, the Nuremberg trials demonstrated that states can punish persons who violate the laws of war. Because international law can create individual obligations, all nations have jurisdiction to enforce those obligations. All four Geneva Conventions require states to "enact any legislation necessary to provide effective penal sanctions against war criminals."[222]

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219 Oct. 18, 1907, 36 Stat 2277, I Bevans 631 [hereinafter Hague IV].

220 *Opened for signature* July 27, 1929, 47 Stat. 2021 (1932).

221 Meron, *supra* note 40, at 562. Violations of international law need not be defined with absolute letter perfect clarity in all cases. The outer limit to this principle lies in the prohibition on ex post fact laws which is at the very root of the Western notion of judicial fairness. The corresponding principle of international law is known as *nullem crimen sine lege*, which literally means "no penalty without law." Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937) ("[N]o conduct shall be criminal unless it is specifically described in . . . a penal statute.").

No defendant at Nuremberg successfully raised the defense because the facts showed that the German government knew that its conduct violated treaty obligations as well as customary international law. *See generally* DA PAM 27-161-2, *supra* note 211, at 236-38 (describing the raising of the defense at Nuremberg); Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1491, 1533 (1987) (the "ex post facto prohibition occupies a different status in the international field than in the domestic field, for the basic reason that international law has no legislature to pass statutes defining acts as criminal. International law is not a product of statutes, but of treaties, conventions, judicial decision, and customs. It is the gradual expression, case by case, of the moral judgments of the civilized world").

222 Convention on Sick and Wounded, *supra* note 4, art. 49; Convention on Sick and Wounded at Sea, *supra* note 4, art. 50; Convention on Prisoners of War, *supra* note 4, art. 129; Civilians Convention, *supra* note 4, art. 146. The cited article is *reprinted in* FM 27-10, *supra* note 4, para. 506. The term "war crimes" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime. *Id.* para. 499. The provisions of Article 18 and Article 21, UCMJ, meet this treaty obligation on the part of the United States. Other nations have enacted special legislation for the same purpose. *See also* War Crimes Act of 1996, Pub. L. No. 104-192 (1996) *codified at* 18 U.S.C. § 2401, 35 I.L.M. 1540 (1996).

The Geneva Conventions also require each state to search for "persons alleged to have committed, or to have ordered committed, such grave breaches," and to "bring such persons, regardless of their nationality, before its own courts."[223] Codified international law thus recognizes the jurisdiction of all states over war criminals[224] and incorporates concrete measures to facilitate prosecution by states.[225] Based on the principle of universal jurisdiction, national forums have prosecuted the vast majority of war crimes cases.[226]

Finally, because all states have jurisdiction over war criminals, Nuremberg rebutted the right to justify criminal acts based on the defendant's official position. Perpetrators cannot avoid criminal lia-

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[223] The Conventions define "grave breaches" uniformly with only slight variations as: willful killing, torture or inhuman treatment, to include biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The Conventions Protecting Prisoners of War and Civilians also include prohibitions on compelling a prisoners of war (or protected persons respectively) to serve in the forces of the hostile Power, and willfully depriving a prisoner of war (and protected persons respectively) of the rights of fair and regular trial prescribed in the applicable Convention. *See* FM 27-10, *supra* note 4, para. 502.

[224] RESTATEMENT, *supra* note 12, § 404; Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 23 BRIT. Y.B. INT'L L. 382-93 (1951); William Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. R. 177-218 (1945); MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 706-721 (1961).

[225] For example, war crimes do not qualify as political offenses which would prevent extradition to a country seeking jurisdiction. *See* G.A. Res. 3, U.N. Doc. A/50 (1946); G.A. Res. 170, U.N. Doc. A/425 (1947); Genocide Convention, *supra* note 11, art. 7. The General Assembly approved by a vote of 58 to 7 The Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 G.A.O.R., Supp. No. 19, at 40, U.N. Doc. A/7218 (1969), *reprinted in* 8 I.L.M. 69 (1969). *See also* Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR, Supp. No. 30A, at 78, U.N. Doc. A/9030/Add/1 (1973).

[226] The International Military Tribunal at Nuremberg returned verdicts on only 22 defendants. NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 10 (1986). The texts of judgment and the sentences are *reprinted in* 41 AM. J. INT'L L. 172-332 (1947). The international tribunal at Tokyo tried 28 Japanese defendants. TUTOROW, *supra*, at 15. These men "were not just ordinary criminals, they were the leaders of empires, which sought to dominate the world by terror, using genocide and crimes against humanity as major tools to achieve their goals." Blewitt, *supra* note 215, at 102. By virtue of a separate international agreement, the United States alone tried another 185 defendants at Nuremberg. TUTOROW, *supra*, at 11.

In contrast, by late November 1948, a total of 7109 defendants had been arrested for war crimes. By the end of 1958, the Western Allies had sentenced 5025 Germans for war crimes, of whom 806 received death sentences (although only 486 were actually executed). The Soviet Union convicted around 10,000. Von Glahn, *supra* note 155, at 882-83. For a fascinating discussion of the process and legal principles followed in post-War Germany by American military tribunals, as well as long lists of cases, charges, and sentences *See* U.S. Army Judge Advocate General, Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944-July 1948 (1948).

bility by hiding behind the political or military structure of a sovereign state.[227] United States Army doctrine states that "the fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act."[228]

From the opposite perspective, soldiers cannot defend unlawful acts by shifting responsibility up the chain of command. Despite clear regulations to the contrary,[229] defendants at Nuremberg often tried to shift responsibility to superiors who ordered illegal actions. The London Charter mandated that defendants who acted pursuant to military orders remained responsible for their actions.[230] The modern rule of law applies criminal sanctions to public officials who issue orders and subordinates who commit crimes pursuant to those orders.

The legacy of Nuremberg impacts potential prosecution of continuum crimes. Nuremberg removed the legalistic shadows of official purpose as a cover for war criminals and firmly established the foundation from which the United States may exercise universal jurisdiction over war criminals; however, continuum crimes include a broader class of offenses. Nuremberg recognized that the law is not a static relic, but a tool evolving "from the usages established among civilized peoples, from the laws of humanity, and [from] the dictates of the public conscience."[231] The ability of the United States

[227] The Nuremberg Tribunal thus stated:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of the law be enforced. . . . . The authors of these acts cannot shelter themselves behind their official position in order to be freed from the punishment in appropriate proceedings.

1 I.M.T., *supra* note 2, at 222-23.

[228] FM 27-10, *supra* note 4, para. 510.

[229] Article 47 of the German Military Code of 1872 stated that a subordinate is liable to punishment as an accomplice if he knew that the order involved an act the commission of which constituted a civil or military crime or offense. Article 47 is discussed at length in the High Command case, *United States v. Von Leeb*, *reprinted in* II THE LAW OF WAR: A DOCUMENTARY HISTORY 1431-32 (Leon Friedman ed., 1972). For an excellent discussion of the command responsibility issues raised by the High Command Case *See* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 38-58 (1972).

[230] London Charter, *supra* note 12, art. 8. *See also* FM 27-10, *supra* note 4, para. 509 (Defense of Superior Orders).

[231] The quoted language is from the Martens clause which formed the preamble to Hague IV Convention, *supra* note 219. *See also* Protocol I, *supra* note 4, art. 1, para. 2 ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.").

to prosecute continuum crimes relies on defining the boundaries of international criminal law and establishing domestic authority for exercising jurisdiction.

2. The Tokyo Trials—The International Military Tribunal for the Far East reinforced the Nuremberg principles of individual responsibility and universal jurisdiction.[232] The Tokyo Tribunal had a special authority to reinforce binding rules of international law because of its composition.[233] The Tokyo Tribunal's eleven members represented non-western powers as well as some minor powers.[234] The Japanese government also accepted the principle that war criminals would receive "stern justice."[235] The Tokyo Tribunal represented a tangible exercise of international justice which reinforced the rule of international law.

The Tokyo Tribunal also had a unique impact on the possible prosecution of continuum crimes in modern United States military forums and helped define the role of international law in American military tribunals. The United States Supreme Court refused to consider petitions for *habeas corpus* arising from decisions of the Tokyo Tribunal.[236] As the Supreme Allied Commander, General MacArthur

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[232] WILLIAM W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 186 (2nd ed. 1962). Copies of the 1218 page judgment and individual opinions rendered November 4-12, 1948, are available at the United States Army Judge Advocate General's School, Charlottesville, Virginia. Key excerpts are *reprinted in* U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1948-1949, 71-107 (1950). *See also* DEP'T OF STATE, 11 DIGEST OF INTERNATIONAL LAW 960-1017 (Marjorie Whiteman ed., 1962) [hereinafter Whiteman]; Horwitz, *The Tokyo Trial*, INT'L CONC. NO. 465 (1950).

[233] Dr. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances 2*, 149 MIL L. REV. 25, 28.

[234] The members of the Tribunal were, Sir William Webb (Australia), Judge Stuart E. McDougall (Canada), Mei Ju-Au (China), Judge Jenri Bernard (France), Judge R. M. Pal (India), Lord Patrick (England), Judge Bernard Roling (Netherlands), Justice Erima H. Northcraft (New Zealand), Justice Delfin Jaranilla (Philippines), Justice I.M. Zaryanov (Soviet Union), Major General Myron H. Cramer (United States, replacing Justice John D. Higgins in June 1946). Whiteman, *supra* note 232, at 972.

[235] *In re* Yamashita, 327 U.S. 1, 10 (1946). This language echoed Paragraph 10 of the Potsdam Declaration of July 26, 1945 which declared that "stern justice shall be meted out to all war criminals, including those who have visited cruelties on our prisoners." 13 DEP'T OF STATE BULLETIN 137-38 (July 29, 1945).

[236] Hirota v. MacArthur, General of the Army, 338 U.S. 197, 69 S. Ct. 197, 93 L.Ed. 1902 (1948) (a per curiam opinion which also resolved *Dohihara v. MacArthur, General of the Army, et al*, Petition No. 240, and *Kido et. al. v. MacArthur, General of the Army, et al., rehn'g denied* 335 U.S. 906 (1949)). *Accord* Adachi v. MacArthur, Unreported Case, MS Department of State File No. 611.942/2-1350 (*Habeas Corpus* No. 3562) (holding that Japanese officers convicted by a commission composed of one Australian and five American officers "was a military commission of international character with its existence and jurisdiction rooted in the sovereignty of the Far Eastern Commission, acting through its sole executive agency, the Supreme Commander for the Allied Powers"); Nash on behalf of Takeshi Hashimoto et al. v. MacArthur, General of the Army, et al., 184 F.2d 606 (D.C. Cir. 1950); Toneo Shirakura et al. v. Royall, 89 F. Supp. 711, 713 (1948); *motion for recon-*

issued the Proclamation establishing the Tokyo Tribunal, approved its Charter, appointed the eleven judges, and served as the appellate authority in reviewing its findings.[237] The President also issued an executive order appointing the chief counsel.[238] The United States support for the tribunal was so extensive that the Tokyo Tribunal consumed one-fourth of the paper used by the occupation forces and had to be resupplied at one point by American B-29 bombers.[239]

Despite the role of the United States in convening the Tokyo Tribunal, the Supreme Court wrote that General MacArthur acted "as the agent of the Allied Powers."[240] Therefore, the United States federal courts had no power to review, affirm, or annul the Tokyo Tribunal's proceedings. In a thoughtful concurrence, Justice Douglas recognized the international character of the Tokyo Tribunal as a negotiated arrangement among the Allied Powers.[241] Justice Douglas concluded that "the Tokyo Tribunal acted as an instrument of political power of the Executive Branch of Government."[242] The Supreme Court recognized that international law and international obligations can alter the legal nature of American military forums.

Justice Bernard's concurrence to the Tokyo Tribunal's judgment echoed the Supreme Court's sentiment. He concluded that "a Universal authority would be the one competent to create tribunals to judge individuals accused of crimes against universal order."[243] In

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sideration denied 89 F. Supp. 713 (D.D.C. 1949) ("With the sentence of the military tribunal of the conqueror, whether in the Philippine Islands, or Nuremberg, or at Tokyo, a District Court of the United States has neither the power to interfere nor the responsibility. Correction of errors must lie with the political branches of government or with what courts may have the power to act.").

Justice Jackson filed a special memorandum which stated his views as to participation in the decisions despite his prominent role at Nuremberg. 335 U.S. 876 (1948), *reprinted in* II THE LAW OF WAR: A DOCUMENTARY HISTORY 1184-1187 (Leon Friedman ed., 1972). Justice Jackson understood the significance of the cases, and felt that he should break a developing four to four tie because "the issues here are truly great ones. They only involve decision of war crimes issues secondarily, for primarily, the decision will establish or deny that this Court has power to review exercises of military power abroad and the President's conduct of external affairs of our Government." *Id.* at 1186.

[237] For the Proclamation of January 19, 1946, and General Orders No. 1 and 20 containing the Charter, *See* T.I.A.S. 1589, *reprinted in* 14 DEP'T OF STATE BULLETIN 361-64 (Mar. 10, 1946), and U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1946-1947 317-326 (1947).

[238] Exec. Order No. 9660, 10 Fed. Reg. 14591 (Nov. 30, 1945) (appointing Mr. Joseph B. Keenan as the "Chief of Counsel in the preparation and prosecution of charges of war crimes against the major leaders of Japan and their principal agents and accessories").

[239] Pritchard, *supra* note 233, at 26.

[240] *Hirota*, 338 U.S. at 198.

[241] *Id.* at 208.

[242] *Id.* at 215.

[243] Whiteman, *supra* note 232, at 974.

essence, President Truman and the Allies enforced international law because there was no other mechanism with similar authority and resources.

The modern conduct of peace operations presents a striking parallel. Chapter VII of the United Nations Charter allows the United Nations Security Council to decide what measures are necessary to implement its decisions and to call on member states to apply such measures.[244] Chapter VII powers encompass a variety of actions to remedy perceived threats to international peace and security.[245] The Security Council exercised Chapter VII enforcement authority to establish tribunals to enforce international law in Rwanda[246] and the former Yugoslavia.[247]

One step away from establishing tribunals, the Security Council authorized member states to use "all necessary measures" against Somalis responsible for unprovoked attacks against UNOSOM II personnel.[248] The Security Council defined measures against suspected criminals as "including to secure investigation of their actions and their arrest and detention for prosecution, trial, and punishment."[249] Pursuant to this authority, United States forces had authority to use force to capture and detain suspected criminals.[250]

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[244] U.N. CHARTER art. 41. *See also* S.C. Res. 678, UN SCOR, 45th Sess., Res. & Dec. at 27-28, U.N. Doc. S/INF/46 (1990), *reprinted in* 29 I.L.M. 1565 (1990) (authorizing "all necessary means" to drive Iraq from Kuwait and "to restore international peace and security in the area").

[245] The Secretary General described the variety of Security Council functions as including diverse activities such as:

> the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of demining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design of constitutional, judicial, and electoral reforms; the observation, supervision, and even the organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.

Agenda for Peace II, *supra* note 110, at 6. *See also* Frederick L. Kirgis Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 522-39 (1995); M. Jennifer MacKay, *Economic Sanctions: Are They Actually Enforcing International Law in Serbia-Montenegro?*, 3 TUL. J. INT'L & COMP. L. 203 (1995).

[246] Rwanda Statute, *supra* note 105.

[247] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

[248] S.C. Res. 837, *supra* note 125, ¶ 5.

[249] *Id. See also* S.C. Res. 865, U.N. SCOR, 48th Sess., 3280th mtg., U.N. Doc. S/RES/865 (1993) (reaffirming that those who attack UNOSOM II personnel would be held criminally responsible for the attacks).

[250] Telephone Interview with Lieutenant Colonel Frank Fountain, February 5, 1996. Lieutenant Colonel Fountain served with United States forces deployed to Somalia during Operation Restore Hope.

Because the Security Council authorized "all necessary measures," the Secretary General also could have requested United States forces to prosecute detainees. The Security Council's unrestricted delegation of authority would have arguably allowed United States military tribunals to prosecute the persons described by Resolution 837 even without a specific request from the Secretary General. Under the auspices of the Security Council, United States military tribunals would have enforced international law under international authority.

Just as President Truman exercised his executive authority after World War II, the President exercises the authority of the United States in the field of foreign relations.[251] With the President's concurrence, United States commanders could enforce international law and would act as international tribunals.[252] The punitive power of tribunals convened under United Nations Charter Chapter VII authority would therefore arise from international law and not from the UCMJ.

Nevertheless, the Security Council cannot compel United States commanders to prosecute international criminals. The decision to prosecute a particular person remains in the hands of United States authorities subject to the availability of evidence and the overall tactical situation. A military tribunal initiated under the authority of the Security Council would in essence be an international forum capable of punishing any international offense prescribed by the Security Council.[253] Despite this potential basis for subject matter jurisdiction, the existing provisions of the UCMJ prevent a commander from establishing personal jurisdiction over foreign nationals during operations other than war.

C. Crimes Under Customary International Law

Enforcing international law under the auspices of United Nations Charter Chapter VII allows the commander to prosecute crimes beyond classic "war crimes."[254] Pursuant to Chapter VII

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251 United States v. Curtiss-Wright Corp., 299 U.S. 304, 318-21 (1936).

252 Hirota v. MacArthur, General of the Army, 338 U.S. 197, 198 (1948).

253 *Id.* ("We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States."). After a more rigorous analysis than the per curiam opinion, Justice Douglas noted, "Here the President did not utilize the conventional military tribunals provided by the Articles of War. He did not act alone but only in conjunction with the Allied Powers. This tribunal was an international one arranged through negotiation with the Allied Powers." *Id.* at 208

254 *See* M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 130 (1987) (war crimes "consist of conduct which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties are Parties, and the recognized principles of international law of armed conflict").

authority, United States military forums could enforce multilateral treaties and the broader class of criminal international human rights violations. Just as the Nuremberg and Tokyo Tribunals defined and enforced existing international law, the Security Council does not invent international criminal law. Taken together, the potpourri of treaties, state practice, General Assembly resolutions, International Court of Justice opinions, and Security Council actions entitle every human to certain fundamental rights.[255]

International law recognizes a range of human rights violations which occur short of the international armed conflict threshold. Phrased another way, international human rights law criminalizes a range of offenses subject to the universal jurisdiction of all states.[256] During the last half century, the evolution of human rights law has been the dominant trend in international law.[257] The United Nations Charter obligates states to seek "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[258]

In the wake of the United Nations Charter, the General Assembly passed numerous resolutions promoting human rights,[259] and the world's regional organizations enacted treaties designed to

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[255] Vladimir Kartashkin, *Human Rights and Humanitarian Intervention, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 202 (Lori F. Damrosch & David Scheffer eds., 1991).

[256] RESTATEMENT, *supra* note 12, § 702, cmt. n ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void."); *See also Id.* § 404. *Jus cogens* norms are binding on all states. The class of *jus cogens* norms is distinct in international law because they derive from a common heritage of mankind and impose natural law values on all persons, all systems, all states, and apply at all times. Jonathan I. Chaney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993).

[257] Thomas Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3, 4 (1991).

[258] U.N. CHARTER art. 1, para. 3.

[259] *See, e.g.*, G.A. Res. 95, U.N. GAOR, 1st Sess., U.N. Doc. A/RES/95 (1946) (affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal); G.A. Res. 2444, U.N. GAOR, 23d Sess., U.N. Doc. A/RES/2444 (1968) (recognizing the necessity of applying basic humanitarian principles in all armed conflicts and affirming certain principles to be observed in armed conflict); G.A. Res. 2712, U.N. GAOR , 25th Sess., U.N. Doc. A/RES/2712 (1970) (calling on states to try and punish persons who have committed war crimes and crimes against humanity); G.A. Res. 260, U.N. GAOR, 3rd Sess., U.N. Doc. A/RES/260 (1948) (approving and proposing for signature the Convention on the Prevention and Punishment of the Crime of Genocide); G.A. Res. 1904, 18 U.N. GAOR, Supp. No. 15, at 35 (referring to the "duty of states to fully and faithfully observe the provisions of the Universal Declaration [of Human Rights]."); G.A. Res. 2625 (XXV), U.N. Doc. A/RES/8082 (1970) ("Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter . . . The principles of the Charter which are embodied in this Declaration constitute basic principles of international law.").

protect human rights.[260] Modern international law entitles ordinary people to "rights that belong to them as members of the international community."[261] International Court of Justice decisions also establish the consistency of customary human rights law.[262] Chapter VII enforcement authority arises because "human rights have finally been removed from the exclusive jurisdiction of states and lifted up into the realm of international concern."[263] The term continuum crimes encompasses an array of human rights law which operates alongside the codified laws of war.

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[260] *See, e.g.*, American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, OEA/Ser. L./V/II.23 doc. rev. 2, *entered into force* July 18, 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953, *as amended by* Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, *entered into force* Dec. 21, 1971; African [Banjul] Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev 5, June 27, 1981, *reprinted in* 21 I.L.M. 58 (1982).

[261] Buergenthal, *supra* note 257, at 6. The Preamble to the Protocol Additional to the American Convention on Human Rights suggests that human rights instruments simply codify what is already inherent to the nature of humanity. The Protocol recognized that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states. 28 I.L.M. 161 (1989). The logical corollary to the development of human rights has been the shifting views of sovereignty. Because all individuals possess a body of rights simply due to their existence as human inhabitants of the planet, governments cannot disregard those rights with impunity. According to one scholar, sovereignty of a state is now derived from the will of the people, and not from the illegitimate possession of power. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990). Thus, a government that disregards the basic human rights of its citizens "cannot hide behind the protective shield of sovereignty." *Id.* at 872. Some United States courts have recognized that the concept of *jus cogens* might have a domestic legal effect. *See, e.g.*, United States Citizens of Nicarauga v. Reagan, 859 F.2d 929, (D.C. Cir. 1988) ("If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law."). *But c.f.* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (holding that the district court did not have subject matter jurisdiction under the Foreign Sovereign Immunities Act, and overruling the dissent argument that Germany waived its sovereign immunity from 1942 to 1945 by violating jus cogens norms condemning enslavement and genocide).

[262] *See, e.g.*, Nuclear Tests (Australia v. France), 1974 I.C.J. 253, 303 (December 20, 1974) (Opinion of Judge Petren); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16. (June 21, 1971).

[263] Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 214 (1992). For example, violations of human rights by the Republic of South Africa, have been on the agenda of almost every General Assembly. The Security Council declared that South African violations disturbed international peace and security, called for an arms embargo against that country, and took the first action under Chapter VII against that country upon a finding that its policies were "fraught with danger to international peace and security." S.C. Res. 181, 18 U.N. SCOR, U.N. Doc. S/INF/18/Rev. 1, at 7 (1963). *See also* S.C. Res. 421, U.N. SCOR, 32d Sess., 2052d mtg., U.N. Doc. S/RES/421 (1977).

Human rights instruments, multilateral treaties, and the laws of war combine in a complicated interplay of rights and obligations.[264] In general, human rights law applies at all time, treaties apply when the conduct meets the definition in the instrument, and the laws of war apply during an armed conflict within the meaning of Article 2 of the Geneva Conventions.[265] The United Nations Security Council uses the phrase "laws or customs of war" as a shorthand description of the humanitarian obligations which arise during internal or international armed conflicts.[266] Using the Security Council definition, the "laws or customs of war" nearly coincide with my conception of continuum crimes. Using either phrase, human rights law meshes with the law of war to create a modern system in which "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."[267]

1. Common Article 3 Protections—The provisions of Article 3 of the Geneva Conventions provide an ideal vehicle for analyzing the interrelated web of international law. Article 3 of each Convention applies identical language to "armed conflict not of an international character."[268] Common Article 3 specifies a series of protections for "persons taking no part in hostilities," which "each Party shall be bound to apply, as a minimum."[269] Unlike the class of grave breaches of the Geneva Conventions, no treaty identifies violations of Common Article 3 as international crimes. Therefore, some conclude

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[264] *See* Dietrich Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, *in* 2 HUMAN RIGHTS IN INTERNATIONAL LAW 345 (T. Meron ed., 1984) [hereinafter Dinstein]; G. Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326 (1972).

[265] The Geneva Conventions apply during "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if a state of war is not recognized by one of them." Civilians Convention, *supra* note 4, art. 2, para. 1; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *id.*; Convention on Sick and Wounded at Sea, *id.*

[266] Statute of the International Tribunal, *supra* note 173, art. 3.

[267] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT Doc. IT-94-1-AR72, at 54. The quoted language precedes and helps explain the Yugoslavia Tribunal's Appeal Chamber ruling that the phrase "laws or customs or war" proscribed by article 3 of the Statute of the Tribunal applies to war crimes "regardless of whether they are committed in internal or international armed conflicts." *Id.* at 68.

[268] Civilians Convention, *supra* note 4, art. 3; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *Id.*; Convention on Sick and Wounded at Sea, *id.*

[269] *Id.* Common Article 3 prohibits the following acts: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; and (d) the passing of sentences and the carrying out of executions without the previous judgment (sic) pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

that humanitarian law applicable to noninternational armed conflicts "does not provide for international penal responsibility of persons guilty of violations."[270]

Criminal liability for violations of Common Article 3 arises from the substantial body of custom and precedent that prohibit the underlying acts. The Nuremberg legacy dispels any argument that violations of customary international law cannot warrant criminal penalties. By 1949 standards, Common Article 3 was a "radical transformation of the law" because it applied international obligations to internal conflicts.[271] The evolutionary force of current customary law undercuts the absence of express criminal prohibitions in the text of Article 3 like moving water erodes a river bank.

After almost fifty years as a legal norm, Common Article 3 is the "universal contemporary recognition that . . . fundamental human rights exist."[272] The existence of such basic human rights requires a corresponding duty for all states to respect and observe those rights.[273] Therefore, Common Article 3 defines international crimes because all parties must respect an international obligation "that is so essential for the protection of fundamental interests . . . that its breach is recognized as a crime by the international community as a whole."[274]

In this light, Pictet commented in 1958 that Common Article 3 "merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question long before the [Geneva]

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[270] Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990). *See also* Meron, *supra* note 40, at 559 n.25 (comments by the United Nations War Crimes Commission (for Yugoslavia) to the effect that "the only offenses committed in internal armed conflict for which universal jurisdiction exists are crimes against humanity and genocide," these comments preceded the appellate rulings of the International Tribunal for the Former Yugoslavia which concluded otherwise).

[271] Richard R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 168 (1978).

[272] Memorial of the Government of the United States of America, at 71, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Jan. 1980).

[273] *Id.* at 71 n.3, 72 n.2 (citing arts. 1, 55, & 56 of the United Nations Charter, along with arts. 3, 5, 7, 9, 12, & 13 of the Universal Declaration of Human Rights, and arts. 7, 9, 10, & 12 of the Covenant on Civil and Political Rights for the proposition that international law protects fundamental rights such as the right to life, liberty, and the security of person; the prohibition on torture, cruel, inhuman, or degrading treatment; the right to equality before the law; the prohibition on arbitrary arrest and detention; and the right to freedom of movement as justifying criminal sanctions).

[274] International Law Commission, 31 U.N. GAOR, Supp. No. 10, at 226 (1976), *cited in* 2 Y.B. INT'L L. Comm'n 95 (1976).

Convention was signed."[275] The International Court of Justice noted in dicta that the provisions of Article 3 embody "elementary considerations of humanity."[276] In another opinion, the International Court of Justice solidified the status of Article 3 protections as customary law by describing them as a "minimum yardstick, in addition to the more elaborate rules to be applied to international armed conflicts."[277]

Recent developments have reinforced the status of Common Article 3 as customary international law. In the context of an internal armed conflict in Rwanda, the Independent Commission of Experts concluded that Common Article 3 supports the principle of individual criminal liability.[278] As a result, the Statute for the International Tribunal for Rwanda conveyed prosecutorial power over violations and threatened violations of Common Article 3.[279] Arguing for the Statute of the International Tribunal for the Former Yugoslavia, the representatives of the United States, of the United Kingdom, and of France all asserted that violations of Common

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[275] COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Pictet ed., 1958) [hereinafter Pictet].

[276] Corfu Channel (Assessment of the Amount of Compensation Due from the People's Republic of Albania), Merits, 1949 I.C.J. 237 (Nov. 1949).

[277] Military and Paramilitary Activities in and against Nicarauga (Nicar. v. U.S.), Merits, 1986 I.C.J. 4, 114 ¶ 218 (June 27, 1986). *See also* Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Merits, 1970 I.C.J. 4, 32 (Feb. 5, 1970) (distinguishing diplomatic protections available only to nationals of a protecting state from protection of "basic rights of the human person" which "all states can be held to have a legal interest" in protecting, and noting the difference *between the "obligations of a state towards the international community as a whole"* and those obligations arising among individual states).

[278] *Interim Report Dated October 1, 1994 of The Commission of Experts Established Pursuant to Security Council Resolution* 935, U.N. Doc. S/1994/1125, annex, ¶¶ 125-26.

[279] Rwanda Statute, *supra* note 105, art. 4. Article 4 of the Rwanda prohibits "serious violations of Article 3 common to the Geneva Conventions" including, but not limited to the following:

> (a) Violence to life, health and physical or mental well being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment,
>
> (b) Collective punishments,
>
> (c) Taking of Hostages,
>
> (d) *Acts of terrorism*,
>
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,
>
> (f) Pillage,
>
> (g) The passing of sentences and the carrying our of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,
>
> (h) Threats to commit any of the foregoing acts.

Article 3 are punishable as international crimes.[280] The Joint Chiefs of Staff and the American Bar Association also recognize that the customary international law character of Common Article 3 supports international criminal prosecutions.[281]

The description of Article 3 prohibitions as continuum crimes is apt because the acts are criminal during internal armed conflicts and remain so throughout the spectrum of conflict. Various nations have convened national trials for individuals charged with violations similar to common Article 3.[282] Paraphrasing Pictet, what criminal could argue that torture, murder, mutilation, summary executions, or other acts which violate Common Article 3 are valid tools for human relations?[283] Therefore, "Common Article 3 is beyond doubt part of customary international law,"[284] and as such supports criminal prosecutions for violations of its protections.

2. Crimes Against Humanity—The pattern of international agreements, customs, and judicial precedent fits together to proscribe crimes against humanity. The rubric "crimes against humanity" describes a range of offenses closely related yet distinct from Common Article 3. International law defines crimes against humanity as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, or reli-

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[280] Amicus Curiae Brief Presented by the Government of the United States of America, 25 July 1995, IT-94-1-T, at 37, *quoting* Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV.3217, at 15 (1993) [hereinafter Tadic Brief].

[281] Meron, *supra* note 40, at 560-61.

[282] Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1 (1978). On 28 September 1995, for example, a court in Zadar County, Croatia sentenced Miljenko Jasika to ten years confinement for the criminal act of war crime against civilians. From 1992 to 1994, Jasika organized terrorist activities in the Banja Luka area, maltreated Muslims, planted explosive devices, and threw bombs into the homes of Croats and Muslims. *British Broadcasting Corporation, BBC Summary of World Broadcasts*, EE/D2422/A (HINA News Agency, Zagreb, Croatia, Sept. 28, 1995) (on file with the author). In March 1993, a Bosnian military court sentenced two Serb militiamen to death by firing squad for war crimes against Muslims. One defendant, Borislav Herak, confessed to 35 murders and 16 rapes. *Two Charged in War Crimes Trial*, CHI. DAILY L. BULL., Mar. 12, 1993, at 1.

[283] Pictet, *supra* note 275, at 36. *See also* Meron, *supra* note 40, at 566 ("no person who has committed such acts, in Rwanda, or elsewhere, could claim in good faith the he/she did not understand that the acts were prohibited. And the principle *nullem crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed").

[284] Decision on the Defence Motion, Jurisdiction of the Tribunal, 10 August 1995, IT Case No. IT-94-1-T, ¶ 72. The Trial Chamber's decision implicitly strengthens the recognition of Common Article 3 as a continuum crime. In the language of the Trial Chamber, the term "laws or customs of war" applies to international and internal armed conflicts, and the minimum standards of Common Article 3 support criminal prosecutions which do not violate the principle of *nullem crimen sine lege*. *Id.* ¶ 74.

gious grounds, and other inhumane acts.[285] Common Article 3 and Crimes Against Humanity, therefore, encompass the same kind of acts which violate "the elementary considerations of humanity."[286]

Because crimes against humanity violate basic human rights, they govern conduct during all armed conflicts, whether internal or international.[287] The London Charter recognized crimes against humanity as a class of offenses distinct from war crimes.[288] The Statute of the International Tribunal for the Former Yugoslavia establishes jurisdiction over crimes against humanity "committed in armed conflicts, whether international or internal in character."[289] The Rwanda Statute likewise allows jurisdiction over crimes against humanity without restricting the offenses to international armed conflicts.[290] Describing the evolution of the law, one scholar noted that crimes against humanity are autonomous offenses and that "crimes against humanity may be committed in time of war or in time of peace; war crimes can be committed only in time of war."[291]

In this vein, the International Law Commission recognized crimes against humanity as a separate crime defined by general

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[285] Statute of the International Tribunal, *supra* note 173, art. 5; Rwanda Statute, *supra* note 102, art. 3.

[286] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992), U.N. Doc. S/1994/674, ¶¶ 73, 82 (1994). From November 1992 until April 1994, the Commission of Experts gathered information with a view towards providing the Secretary General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of customary international law committed in the territory of the Former Yugoslavia. The 3,000 page report documents large scale and brutal violations of international humanitarian law as well as grave breaches of the Geneva Conventions.

[287] *Id.* ¶ 75.

[288] *Id.* ¶ 74. The London Charter, *supra* note 12, art 6(c), defined crimes against humanity as crimes including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal." The Nuremberg Tribunal recognized the legality of the substantive offenses, but found that the Charter limitation prevented its making a general declaration that the acts prior to 1939 were Crimes against Humanity. 1 I.M.T. *supra* note 2, at 254 ("The Tribunal is of the opinion that revolting and horrible as those crimes were, it has not been satisfactorily proved that they were done in the execution of, or in connection with, any such crime [within the jurisdiction of the Tribunal]."). Allied Control Council Law No. 10 later deleted the requirement for a linkage between crimes against humanity and other crimes. *See* Egon Schwelb, *Crimes Against Humanity*, 23 B.Y.B. INT'L L. 178, 218 (1946) ("it is not necessary for an act to come under the notion of crime against humanity within the meaning of Law No. 10 to prove that it was committed in execution of, or in connection with, a crime against peace or a war crime").

[289] Statute of the International Tribunal, *supra* note 173, art. 5.

[290] Rwanda Statute, *supra* note 105, art. 3.

[291] Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Y.B. OF THE I.L.C. 86, U.N. Doc. A/N/CN.4/SER.A/1989/Add.1, at 87.

international law.[292] Therefore, crimes against humanity is a "self contained category" proscribing conduct during any type of armed conflict "without the need for any formal link with war crimes."[293]

Given that crimes against humanity infringe on fundamental human rights, anyone can be a victim. While the basic protections of Article 3 cover all persons at all times, international custom limits crimes against humanity to large-scale offenses against a civilian population. The Rwanda Statute, for example, authorizes punishment of crimes against humanity when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[294] By definition, then, "The hallmark of such crimes [crimes against humanity] lies in their large-scale and systematic nature. The particular forms of unlawful act . . . are less crucial to the definition tha[n] the factors of scale and deliberate policy, as well as in their being targeted against the civilian population."[295] The distinction between human rights violations and crimes against humanity is one of degree and not of effect.

Crimes against humanity are continuum crimes because the class of offenses are criminal during peacetime, and retain that character throughout both internal and international armed conflicts.[296] Crimes against humanity demonstrate the need to define continuum crimes because of the haphazard intersection of international criminal laws. For example, widespread slaughter of citizens for political purposes is a crime against humanity, but it would not

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[292] James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 410 (1995) (noting that Article 20 of the 1994 Statute confers jurisdiction over four offenses defined by general international law: (a) the crime of genocide, (b) the crime of aggression, (c) serious violations of the laws and customs applicable in armed conflict, and (d) crimes against humanity).

[293] 1 OPPENHEIM'S INTERNATIONAL LAW 996 (Robert Y. Jennings & Arthur Watts eds., 1992).

[294] Rwanda Statute, *supra* note 105, art. 3. *See also* Statute of the International Tribunal, *supra* note 173, art. 5; Report of the Secretary General, *supra* note 173, ¶ 48.

[295] Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, at 76, U.N. Doc. A/49/10 (1994). The International Law Commission explained Article 20 of the Draft Statute for an International Criminal Court using the quoted language. The Report defines the term "directed against any civilian population by repeating the exact same language from Article 3 of the Rwanda Statute, *supra* note 105 and accompanying text.

[296] Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 85 (1995) Many human rights conventions render certain types of behavior between citizens of the same state as international crimes whether committed in peace or war. The "tangled meshing" of crimes against humanity and human rights "militates against requiring a link with war for the former. The better opinion today . . . is that crimes against humanity exist independently of war." *Id.*

violate the Genocide Convention.[297] On the other hand, torturing several armed combatants would violate their rights under Common Article 3, but the acts of torture against those few combatants would not constitute crimes against humanity.

The international law of human rights operates alongside humanitarian laws of war to establish jurisdiction over conduct proscribed as criminal. The transition from peace to war is one landmark to help lawyers apply the right set of law to criminal acts. However, on both sides of the divide, the definitions of various treaties limit the scope of criminal jurisdiction. "Black letter" treaty rights clash with customary international law to create overlapping and often confusing applications.

Despite fragmentation, international law provides the foundation for United States military forums to prosecute foreign nationals whose criminal conduct threatens the achievement of mission objectives. My discussion in Section V harmonizes the various shards of legal authority for prosecuting international crimes. In Section V, I articulate a coherent class of continuum crimes which warrant United States military jurisdiction over foreign nationals.

V. The Substantive Scope of Expanded Jurisdiction

The class of continuum crimes is the logical application of the principle of *omne majus continet in se minus:* "the greater always contains the less."[298] Continuum crimes define the class of fundamental human rights which precede armed conflicts and protect persons throughout the spectrum of conflicts. It is incorrect to maintain that all human rights guarantees "apply always and everywhere."[299]

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[297] Political groups are conspicuously absent from the list of protected groups under the Genocide Convention. Some states feared that including political groups under the Convention would create an unnecessary obstacle to ratification of the instrument. Webb, *supra* note 148, at 391. Thus, the fact that the Convention does not prohibit the widespread killing of political foes does not lead to the conclusion that such killings do not violate international law. Defining genocide as a continuum crime would close the loophole left by the Genocide Convention.

[298] BLACK'S LAW DICTIONARY, 1086 (6th ed. 1990).

[299] *Inadequate Reach of Humanitarian Law*, *supra* note 43, at 594. The court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), implicitly recognized torture as one of the *jus cogens* norms subject to international jurisdiction. The opinion does not use the term *jus cogens*, but states that "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind." *Id.* at 890. *Accord* Filartiga v. Pena-Irala, 577 F. Supp. 860, 865 (D.C. N.Y. 1984) ("it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture"). *See also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1996) (Analyzing the status of torture as a violation of customary international law and upholding a civil suit against the leader of the Bosnian Serbs under the authority of the Torture Victim Protection Act of 1991).

Human rights law describes an array of pedantic protections, the loss of which would be regrettable but not devastating to the victim.[300] Armed conflict modifies most human rights protections and may suspend some rights altogether.[301]

In sharp contrast, continuum crimes embody "certain overriding principles of international law" that cut across the spectrum of armed conflicts.[302] During armed conflicts, the weight of international law bans slavery, murder, prolonged arbitrary detentions, torture, and other systematic crimes against noncombatants. Many multilateral treaty provisions and domestic constitutional provisions echo international condemnation of those practices.

The world also condemns genocide and torture, or other cruel, degrading, and inhuman treatment by criminalizing those offenses domestically by state legislation and internationally by dedicated conventions.[303] These crimes are more than mere legal abstractions because violations of *jus cogens* rights attack the foundational rights of human beings. Real victims suffer when criminals commit murder, torture, unlawful detentions of innocent people, and other heinous crimes.[304]

In other words, continuum crimes represent the class of *jus cogens* norms that are "accepted and recognized by the international community of states as a whole as a norm from which no derogation

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[300] Louis B. Sohn, *The New International Law: Protecting the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 9-12 (1982) (describing the instruments comprising the International Bill of Human Rights, as well as some fifty other instruments, declarations, and conventions on specific human rights and humanitarian issues). One example is the freedom of assembly enshrined in Article 20 of the Universal Declaration, *supra* note 193, and Article 21 of the Civil and Political Covenant, International Covenant on Civil and Political Rights, G.A. Res. 2200A, Dec. 16, 1966, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter Civil and Political Covenant].

[301] Dinstein, *supra* note 264, at 357.

[302] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (3d ed. 1979) According to Brownlie, the major distinguishing feature of *jus cogens* norms such as those I call continuum crimes is their "relative indelibility. They are rules which cannot be set aside by treaty or acquiescence." *Id.*

[303] *See supra* notes 144-70 and accompanying text and notes 191-208 and accompanying text for descriptions of the legal basis for punishing genocide and torture, or other cruel, inhumane, or degrading treatment or punishment respectively.

[304] *Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 79 (1979) (testimony by a representative of Amnesty International); Forti v. Suarez-Mason, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (disappearances and state condoned killings violate rights under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and The American Convention on Human Rights, thereby violating customary international law).

is permitted."[305] Recognizing that continuum crimes embody *jus cogens* norms has several important results.

In the context of armed conflicts, the most striking aspect of *jus cogens* norms is that states cannot consent to any treaty provisions which violate those norms.[306] The codified laws of war build on the foundation of *jus cogens* norms, but codified laws of war do not eliminate nor nullify the effect of *jus cogens*. International treaties may establish specific legal rights applicable in defined circumstances, but states can never contract away their *jus cogens* obligations.

For example, the Geneva Convention Relative to the Treatment of Prisoners of War establishes a special set of rights and duties pertaining to a select class of persons in a limited setting. The law modifies the prisoner's rights to freedom, but it does not extinguish the prisoner's preexisting *jus cogens* right to live. No treaty provision could permit a detaining power to murder prisoners in its care. Without referring to *jus cogens* norms, the International Court of Justice has left no doubt that the international liberty of contract does not allow states to violate basic civilizing and humanitarian "high purposes."[307] *Jus cogens* norms thus dictate that states depart from the absolute sovereign-state model. Similarly, continuum crimes "prevail over and invalidate other rules of international law in conflict with them."[308]

Because continuum crimes protect individual rights of a universal and general nature, they impose obligations on the entire international community.[309] All states must comply with the *jus cogens* provisions of the 1969 Vienna Convention on the Law of Treaties. One scholar described *jus cogens* norms as "rules which, while embodied in a treaty, [are] still valid as customary rules for

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[305] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331, art. 52 (1969), *reprinted in* 63 I.L.M. 875 (1969) [hereinafter Vienna Convention on the Law of Treaties] (articles 64, 66, and 71 all deal with the definition and application of jus cogens norms to the conduct of relations between nations). *See also* RESTATEMENT, *supra* note 12, § 102; *supra* note 166.

[306] Vienna Convention on the Law of Treaties, *supra* note 305, art. 53.

[307] Craig Scott et. al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning The Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo On Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 24 (1994). The cited text refers to the International Court of Justice opinions in the Barcelona Traction case and the Reservations to the Convention on Genocide Case for the proposition that self determination and genocide are *jus cogens* norms. *See also* Erik Suy, *The Concept of Jus Cogens in Public International Law*, *in* GEORGE ABI-SAAB, INTRODUCTION TO THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPER AND PROCEEDINGS 17, 60 (1967) [hereinafter Suy].

[308] RESTATEMENT, *supra* note 12, § 102 cmt. k.

[309] Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 436 (1989).

States not bound by the treaty, and hence for states in general."[310] States must respect *jus cogens* norms regardless of territorial restrictions imposed by broader human rights instruments.[311]

Finally, the status of continuum crimes as *jus cogens* norms permits universal jurisdiction over those offenses. All states can demand and enforce compliance with *jus cogens* norms because of the fundamental character of that law. By definition, *jus cogens* norms exist "in the higher needs of the international community" as opposed to serving the policy goals of individual states.[312]

Universal jurisdiction to enforce *jus cogens* norms arises because widespread violations are "a great danger to the international community as a whole and to the effectiveness of international law in international relations."[313] Cherif Bassiouni described the indirect enforcement of international crimes by domestic forums as "the essence of international criminal law."[314] United States forums have jurisdiction over continuum crimes because they are universal jurisdiction offenses. However, that jurisdiction only has practical value if accompanied by the statutory basis for real prosecution of real criminals.[315]

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[310] Suy, *supra* note 307, at 53.

[311] For example, Article 2, para. 1 of the Civil and Political Covenant, *supra* note 300, obligates states party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Present Convention . . ." Some scholars conclude that this language would allow states to avoid application of the Convention outside their territory. Dietrich Schindler, *Human Rights and Humanitarian Law*, 31 AM. U.L. REV. 935, 939 (1982). Other scholars debate Schindler's position, but all agree that the fundamental obligations of *jus cogens* norms apply to all states even when they seek policy objectives outside their boundaries. *See Inadequate Reach of Humanitarian Law*, *supra* note 43, at 595; *Extraterritoriality of Human Rights Treaties*, *supra* note 7; Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF HUMAN RIGHTS 72, 74-77 (L. Henkin ed., 1981). In the context of a case regarding United States obligations under the Refugee Convention, the Supreme Court wrote that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent." Sales v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2565 (1993). United States law thus appears to recognize the distinction between ordinary human rights obligations and the select class of actions which violate peremptory norms, and which thereby constitute *jus cogens* human rights.

[312] Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

[313] B.S. Murty, *Jus Cogens in International Law*; GEORGE ABI-SAAB, INTRODUCTION TO THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPER AND PROCEEDINGS 79, 111 (1967); Restatement, *supra* note 12, § 404.

[314] *Interstate Cooperation in Criminal Matters*, *supra* note 11, at 298.

[315] International prosecution of international crimes is the exception, and prosecution in national courts is the rule. The most effective, frequent enforcement of international criminal law has been in national courts when national judges apply international criminal law or use national criminal statutes which codify international rules in a domestic context. Bert V.A. Roling, *Aspects of the Criminal Responsibility For Violations of the Laws of War*, *in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 199, 201 (Antonio Cassese ed., 1979).

To clarify, continuum crimes include the following international offenses: genocide, slavery or engaging in the slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination. These crimes violate fundamental human rights guarantees of persons in time of peace or war. Crimes against humanity is another continuum crime which overlaps to some extent the listed offenses.[316]

Finally, the crime of attacking United Nations personnel is a unique continuum crime. Attacks against any noncombatants are universal jurisdiction offenses which violate the fundamental rights of the victim. United Nations personnel deployed on noncombat missions are merely a special group of noncombatants. United Nations personnel may even be entitled to greater protection due to their status as representatives of the international community. As a logical corollary, the continuum crime of attacking United Nations personnel ceases to apply when United Nations personnel participate in international armed conflicts. Because the class of continuum crimes applies across the spectrum of armed conflict, accused cannot escape punishment simply by claiming that a given conflict did not rise to the level of an international armed conflict.

The grouping of continuum crimes does not represent a new statement of international criminal law. For almost twenty years, scholars have sought to define the "irreducible core of humanitarian norms and human rights that must be respected in all situations and at all times."[317] International law proscribes the class of actions I call continuum crimes because each offense outrages the conscience of civilized nations.[318] However, the maze of overlapping

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316 Some courts have expanded the concept of crimes against humanity to include egregious violations of human rights, such as torture, summary executions, and disappearances. *See, e.g.*, Velasquez Rodriguez Case, Inter-Am. Ct. H.R. 35, OAS/ser.L/V/III.19, doc. 13, app. VI PP149-58 (1988).

317 Eide et al., *supra* note 43, at 216 (describing the history and composition of the Declaration of Minimum Humanitarian Standards which is designed to be a "safety net" below which no victim should fall). As early as 1975, the President of the Swiss Red Cross proposed a declaration which would set out "in condensed form the fundamental rules of humanitarian law, and rendering the lofty ideas underlying humanitarian law clearly discernible and easily understandable." *Inadequate Reach of Humanitarian Law*, *supra* note 43, at 604.

318 *See* M. Cherif Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 1949 (1982). There are actually two competing schools of thought on the content *of jus cogens* norms. A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 32-38. The concept of *jus cogens* norms developed prior to the Vienna Convention, and some scholars view the content of *jus cogens* norms as being driven by the object of the norm. JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL 97-98, 103-105 (1974). This approach might be termed the natural law viewpoint. According to the natural law frame of reference, all other sources of law

laws and treaty rights creates confusion which causes lawyers to debate, legislatures to deliberate, and scholars to equivocate. In the meantime, criminals perpetrate deliberate and widespread continuum crimes and remain unpunished.[319]

In the words of the Israeli Supreme Court, international jurisdiction exists over offenses which "shake the international community to its very foundations."[320] Even though the United States has universal jurisdiction over the class of continuum crimes, enforcement depends on clear domestic legislation.[321] The phrase continuum crimes is a figurative toolbox to collect and organize the category of offenses which allow the United States courts, and other state courts, to punish foreign nationals. By analogy, United States prosecutors do not have an organized framework for punishing international criminals.

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recognized by the International Court of Justice must "be subject to the rules of international law concerning *jus cogens*." Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 281-82 (1974-5). On the other hand, the clear language of Article 53 of the Vienna Convention makes the status of *jus cogens* norms dependent on acceptance by states. This might be termed the positive law approach. Applying either methodology, my list of continuum crimes constitutes *jus cogens* norms which generate universal jurisdiction. While the class of continuum crimes protects very basic, core human rights, they are all also defined and proscribed by a number of international instruments.

[319] For a fascinating discussion of the efforts some governments have made to punish perpetrators *See* Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990). *See also* Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL'Y 499 (1994); Louis Gentile, *Terror Seems Uncannily Normal*, N.Y. TIMES, Jan. 14, 1994, at A14 (Canadian diplomat with the High Commissioner for Refugees lamenting the lack of effective protection, adding "[t]he so-called leaders of the Western world have known what is happening here for the last year and a half. They receive play by play reports. They talk of prosecuting war criminals, but do nothing to stop the crimes. May God forgive them. May God forgive us all."); M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 492 (1994) ("present passivity . . . tragic inaction of the world's major powers, who have failed to prevent or stop these events").

[320] Attorney General of Israel v. Eichmann, Israel Sup. Ct. (1962), 36 Int'l L. Rep. 277 (1968), *reprinted in* II THE LAW OF WAR: A DOCUMENTARY HISTORY 1627, 1673 (Leon Friedman ed., 1972). In this famous case, Israel exercised universal jurisdiction over Adolf Eichmann. Israeli agents abducted Eichmann in Argentina and returned him to Jerusalem to stand trial for crimes against humanity. Israel did not even exist at the time the crimes occurred, and this case shows that neutral states can prosecute grave breaches of the Geneva Conventions case.

[321] RICHARD B. LILLICH, INVOKING INTERNATIONAL LAW IN DOMESTIC COURTS (1985). *See also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-16, *cert. denied* 113 S. Ct. 1812 (1993) (acts of torture were violations of *jus cogens* and customary international law, although the provisions of the Foreign Sovereign Immunities Acts still apply). In the *Eichmann* case, *supra* note 320, Israel applied a domestic statute criminalizing crimes against humanity "done during the period of the Nazi regime in an enemy country." Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, *in* JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 359-379 (1990).

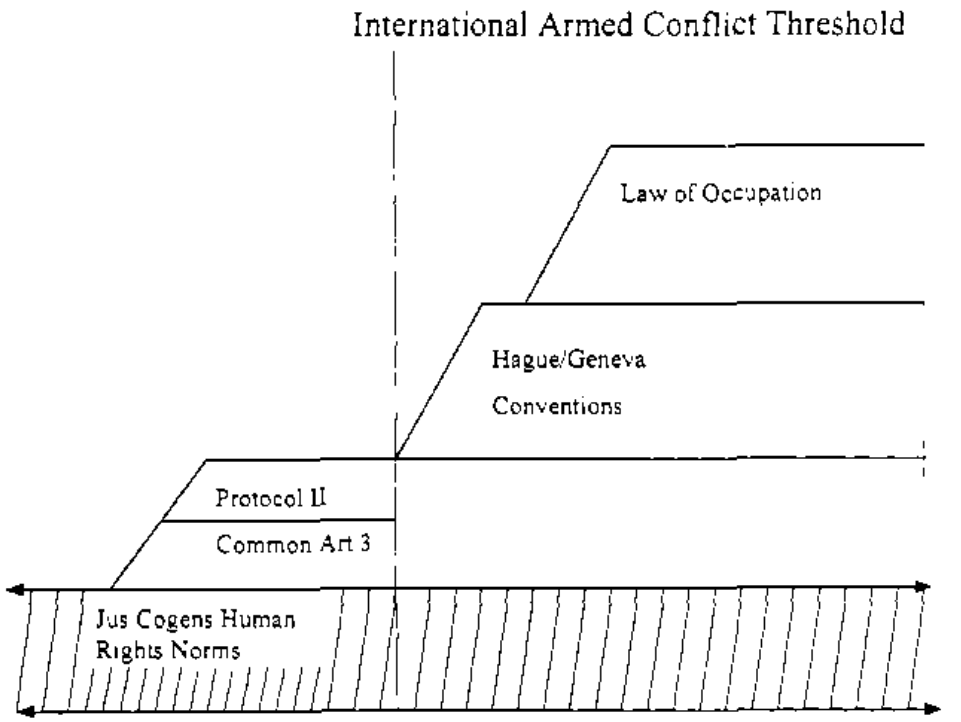

Figure 2

Figure 2 illustrates the relationship between the *jus cogens* offenses I call continuum crimes and the established laws of war. As depicted above, continuum crimes encompass the most basic and powerful human rights. Continuum crimes have greater magnitude than the laws of war in the sense that they define crimes which exist prior to and independent of the state of armed conflict. The *jus cogens* offenses I term continuum crimes operate "as a concept superior to both customary international law and treaty [law]."[322]

As Figure 2 illustrates, the character of continuum crimes remains constant as armed conflict escalates. Due to their *jus cogens* status, no provision of international law replaces the body of continuum crimes. The continuity of continuum crimes is consistent with Telford Taylor's observation that war consists largely of acts that would be criminal if performed in time of peace.[323] Armed conflict

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[322] Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia-Herzegovina v. Yugo., Serbia, and Montenegro), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325 (Sept. 13, 1993) (Separate Opinion of Judge Lauterpacht), ¶ 100. *See generally* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 766-864 (2d ed. 1991) (describing the various human rights instruments as they relate to the established humanitarian laws of war); RESTATEMENT, *supra* note 12, § 102(international agreements which violate *jus cogens* norms are void, thereby showing that *jus cogens norms* sit atop the hierarchy of international law).

[323] TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970) [hereinafter Taylor].

lays a blanket of immunity over combatants only if they comply with the laws of war.[324]

The concept of continuum crimes recognizes that the acts prohibited by the laws of war retain the criminal character that it would have had during a state of peace.[325] Because the laws of war create a defined body of different rights and obligations, protected persons enjoy a duality of rights.[326] This duality means that an act may constitute a continuum crime as well as a violation of a specific provision of the laws of war. The laws of war do not replace continuum crimes even though both bodies of law may proscribe the same conduct. United States forums retain independent jurisdiction over continuum crimes in addition to offenses arising from the laws of war.

Building from the baseline of continuum crimes, Common Article 3 protections apply to conflicts "not of an international character."[327] The protections of Common Article 3 resemble those of the continuum crimes because they apply at the lower edge of the zone between war and peace. Importantly, Common Article 3 ensures humane treatment for all persons engaged in internal conflicts regardless of nationality.[328] The core body of *jus cogens* norms remains constant even though Common Article 3 conveys additional legal rights to all persons affected by the armed conflict.[329]

Protocol II establishes a legal regime of more limited application than Common Article 3.[330] Protocol II develops and expands the

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[324] For a discussion of the legal consequences of the state of "war" in modern international law, *see generally* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENSE 140-161 (1988) (concluding that even when the United Nations Security Council deems armed action by a state to be unlawful aggression, individual soldiers on either side who kill enemy soldiers are immunized from criminal prosecution so long as they obey the laws of war).

[325] Taylor, *supra* note 323, at 19-20.

[326] Dinstein, *supra* note 264, at 357.

[327] Civilians Convention, *supra* note 4, art. 3; Convention on Prisoners of War, *id.*; Convention on Sick and Wounded, *id.*; Convention on Sick and Wounded at Sea, *id.*

[328] G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. INT'L L. 191, 202 (1971) [hereinafter Draper].

[329] *See* Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L L. 859, 865-66 (1984); Hernan Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with Its Obligations Under Protocol II and Common Article 3*, 38 AM. U.L. REV. 41, 44 (1983); Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 GA. J. INT'L & COMP. L. 291 (1983).

[330] Although its character as customary international law is open to debate, Protocol II applies to "all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol II, *supra* note 4, art. 1, para. 1.

succinct guarantees of Common Article 3.[331] From the human rights perspective, Protocol II embodies the "hard core" guarantees of the 1966 International Covenant on Civil and Political Rights.[332] Common Article 3 and Protocol II produce overlapping zones of rights which complement, but do not displace, preexisting continuum crimes. Thus, for example, any deliberate killing of a noncombatant in the course of a noninternational armed conflict is punishable as murder under several complimentary legal regimes.[333]

As figure 2 shows, the transition from internal to international armed conflict initiates the binding effect of the full body of the laws of war. The legal divide is sharp,[334] but the reality of modern operations can produce ambiguity about whether the laws of war actually apply.[335] Some scholars argue for broad application of the Geneva and Hague rules because the law governing the conduct of warfare is more than an abstract set of rules to permit the game of "war" between states.[336]

Despite their humanitarian component, the laws of war originated from the tension of military necessity and expedient

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331 Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29, 34 (1983). In the context of considering the relationship between Common Article 3, Protocol II, and the class of continuum crimes, it is important to note that Protocol II itself merely "develops and supplements Article 3 common to the Geneva Conventions of 1949 without modifying its existing conditions of application." Protocol II, *supra* note 4, art. 1.

332 *Id. See also* Antonio Cassesse, *A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict*, THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 461-501 (Antonio Cassese ed., 1979).

333 *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts*, S. TREATY DOC. 2, 100TH CONG., 1st Sess. III, IV (1987), *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 822-824 (2d ed. 1991).

334 *See* III COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (J. Pictet ed., 1960) ("Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of article 2, even if one of the Parties denies the existence of a state of war.").

335 Parkerson, *supra* note 9, at 35-46 (discussing the difficulty of applying humanitarian law standards to operations that possess many of the characteristics of both international and internal armed conflicts). Professor Levy commented that the lack of a method for determining the automatic application of the laws of war to a particular situation is "one of the major inadequacies of the present law of armed conflict." HOWARD S. LEVY, WHEN BATTLE RAGES, HOW CAN LAW PROTECT? 6 (John Carey ed., 1971). *See also* Francoise J. Hampson, *Human Rights Law and International Humanitarian Law: Two Sides of the Same Coin?* 46, 50-51, UNITED NATIONS CENTRE FOR HUMAN RIGHTS, BULLETIN OF HUMAN RIGHTS 91/1 (1992).

336 Richard R. Baxter, *The Role of Law in Modern War*, 1953 AM. SOC'Y INT'L L. PROC. 90, 95-98 ("No more can we allow abstract considerations about the changing nature of hostilities to blind us to the fact that the use of force, whether called war or enforcement action, causes suffering to human beings, and that it is human suffering which the law of war attempts to mitigate."). *See also* Joseph Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313 (1956); Fritz Grob, THE RELATIVITY OF WAR AND PEACE (1949).

restraints on the conduct of hostilities.[337] The laws of war do not apply in time of peace because there is no military necessity.[338] The laws of war also contain express exceptions on the basis of military necessity.[339]

Figure 2 shows that the developed laws of war do not preempt the body of continuum crimes. The perception that the laws of war create a comprehensive, seamless band of protections is false. The laws of war produce a patchwork of protections based on nationality, location, and the exigencies of military operations. As military necessity wanes, the laws of war specify greater rights for protected persons and greater obligations for states. For example, the law of occupation is a subset of the laws of war, which provides very detailed rights and obligations. Even the detailed law of occupation does not preempt the application of *jus cogens* norms of continuum crimes.[340]

The laws of war enshrine a positivist approach towards regulating armed conflict. As a result, all of the Geneva Conventions provide that parties may not conclude special agreements which detract from the rights enjoyed by protected parties.[341] By extension, the

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[337] *Inadequate Reach of Humanitarian Law*, *supra* note 43, at 592. *See also* Draper, *supra* note 328, at 199-201; G. BEST, HUMANITY IN WARFARE 157-215 (1980); PAUL CHRISTOPHER, THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 165-188 (1994).

[338] Speaking to an audience at the Fordham School of Law, the United States Ambassador to the United Nations made this point quite well, albeit indirectly:

> I need not recount the suffering that has been visited upon the people of the regions for which these tribunals were created [Rwanda and the Former Yugoslavia]. The images are seared in our brains. This is not "heat of battle" violence, and the victims were not in the terminology of the soldier collateral damage. The victims were men and women, boys and girls, targeted intentionally not because of what they had done, but for who they were."

Ambassador Madeleine K. Albright, *International Law Approaches The Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT'L L.J. 1595, 1603 (1995).

[339] *See, e.g.*, FM 27-10, *supra* note 4, para. 43(c) (requiring warnings to the civilian population before assaults "when the situation permits"); Protocol I, *supra* note 4, art. 57(2)(c) ("effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."). The Geneva Conventions weigh military necessity against operational requirements before according special status to various groups of "protected persons." For this reason, there cannot be a defense of military necessity for violating the rights of "protected persons".

[340] Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542 (1978).

[341] Civilians Convention, *supra* note 4, art. 7; Convention on Prisoners of War, *id.*, art. 6; Convention on Sick and Wounded, *id.*, art. 6; Convention on Sick and Wounded at Sea, *id.*, art. 6. Professor Dinstein wrote that this provision reflects the common sense proposition that protected persons are entitled to their human rights independently of state rights, and states may not therefore renounce rights which do not belong to them. Dinstein, *supra* note 264, at 357.

laws of war contain clear authority to prosecute violations of the laws of war. The Conventions require states either to hand over offenders on request by other states or to prosecute grave breaches regardless of the location of the crime or the nationality of the offender.[342]

The Conventions also recognize the right of states to prosecute violations that do not constitute grave breaches. The law of war stipulates that states "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the Grave breaches."[343] United States law implements the requirements of international law by providing clear domestic jurisdictional bases for war crimes prosecutions.[344] These provisions coincidentally allow prosecutions of continuum crimes that occur in the context of international armed conflicts.

In contrast, criminals commit continuum crimes during operations other than war without fear of prosecution in a United States court. Current United States law does not provide a statutory basis for punishing extraterritorial continuum crimes. The international legal basis for United States prosecution of continuum crimes is

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[342] Based on the customary international law status of the laws of war, all states share the same obligations with regard to war crimes. The duties of all states under international law stem from the principle *aut dedere aut punire* (extradite or prosecute). *See* Civilians Convention, *supra* note 4, art. 146; Convention on Prisoners of War, *id.*, art. 129; Convention on Sick and Wounded, *id.*, art. 49; Convention on Sick and Wounded at Sea, *id.*, art. 50.

[343] Convention on Prisoners of War, *supra* note 4, art. 129. Judge Roling noted that the distinction between grave and non-grave breaches could revolve around nothing more complicated than the distinction between the right to prosecute crimes and the obligation to prosecute or extradite grave breaches. B.V.A. Roling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUIL DES COURS 325, 342 (1960). *Accord* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205 (1977) ("the system of grave breaches seems to assume that non-grave breaches are to be treated as war crimes for whose suppression States have a duty to take all necessary measures necessary, which measures are left to the state's discretion, and may include punitive prosecutions, disciplinary, or other administrative sanctions"). *See also* Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995).

[344] 10 U.S.C. §§ 818, 821 (1995); 18 U.S.C. § 3231 (1995); *See also* War Crimes Act of 1996, Pub. L. No. 104-192 (1996) (*to be codified at* 18 U.S.C. § 2401). At the conclusion of the Gulf War, President Bush affirmed the proposition that Saddam Hussein and other top Iraqi officials were responsible for numerous violations of international law: "And this I promise you. For all that Saddam has done to his own people, to the Kuwaitis and to the entire world, Saddam Hussein and those around him are accountable." President Bush's Address to the Joint Session of Congress, *reprinted in* WASH. POST, Mar. 7, 1991, at A32. President Bush later admitted regrets for not removing Saddam Hussein from power. Of course, prosecution and imprisonment for his crimes would have removed the Iraqi president. In an interview on the fifth anniversary of the war, President Bush admitted "I miscalculated . . . . You don't cut off part of the snake, you kill the snake . . . . We blew it." Carrie Dowling, *Bush: "I Miscalculated" in Not Forcing out Saddam*, USA TODAY, Jan. 15, 1996, at A1.

sound.[345] The nature of universal jurisdiction is that international law permits United States domestic law to punish continuum crimes even without territorial, national, or other jurisdictional requirements.[346] Continuum crimes committed in the context of operations other than war are matters of international concern which affect American military and political objectives. With slight modifications to the UCMJ, United States military forums can exercise positive jurisdiction over foreign nationals who commit continuum crimes.

Congress should establish a domestic basis for prosecuting continuum crimes during operations other than war. Domestic legislation would bridge the gap between the theoretical bases for prosecuting continuum crimes and the operational realities of such prosecutions. While Congress could grant domestic authority for prosecutions of continuum crimes, deployed commanders must still exercise sound discretion in prosecuting foreign nationals.

In the abstract, there is no moral justification and no persuasive legal rationale for allowing perpetrators of continuum crimes total freedom to commit grievous crimes without fear of punishment.[347] Part VI outlines the policy goals that warrant statutory changes to allow military commanders to prosecute continuum crimes in support of their mission. Exercising jurisdiction over continuum crimes would give deployed commanders another tool to accomplish their military and political objectives.

VI. Expanded Jurisdiction As a Foreign Policy Tool

A. Effective Enforcement of International Law

Military tribunals are the only tools for deployed commanders to provide efficient criminal sanctions against perpetrators who commit continuum crimes. Given that human rights are the "foundation

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[345] The full force of international law proscribes continuum crimes from every potential source. International law springs from four sources: international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031, T.I.A.S. No. 993, 3 Bevans 1153.

[346] Meron, *supra* note 40, at 570. The United Nations War Crimes Commission concluded that "a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court." UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 232 (1948).

[347] Meron, *supra* note 40, at 561.

of freedom [for] justice and peace in the world,"[348] human rights issues are a key concern of United States foreign policy.[349] Promoting the increased observance of internationally recognized human rights is a "principal goal" of United States foreign policy.[350]

Operations other than war intertwine human rights concerns with military operational issues. Of course, unenforceable rights resemble aspirations more than expectations. By contrast, military commanders cannot just "hope" to accomplish the mission. The art of command requires deft use of finite resources to achieve specified objectives. When the needs of the mission require prosecution of continuum crimes, the commander may devote some assets to the apprehension and prosecution of the perpetrators.[351]

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[348] Universal Declaration, *supra* note 193, preamble. In his first speech before the United Nations, President Clinton reminded that body that human rights are not something conditional, founded by culture, but rather something universal granted by God. The United States urged the creation of the United Nations High Commissioner for Human Rights. 6 DEP'T OF STATE DISPATCH 27 (Sept. 27, 1993).

[349] *See generally* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 938-1053 (2d ed. 1991) (describing the role of human rights issues in the last three administrations and commenting on the political factors underlying policy choices with human rights implications).

[350] 22 U.S.C. § 2304 (a)(1) (1995). The National Security Strategy of the United States seeks to enhance United States security through a dual strategy of "engagement and enlargement." THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT (Feb. 1995). "Engagement" refers to selected uses of military and diplomatic power designed to "help resolve problems, reduce tensions and defuse conflicts before they become crises." *Id.* at 7. Figure 1 illustrates the range of operations encompassed by the term engagement. In contrast, the focus of "Enlargement" is to focus efforts towards increasing the number of democracies based on constitutional and free market principles. *Id.* at 22-25 ("Working with new democratic states to help preserve them as democracies committed to free markets and respect for human rights, is a key part of our national security strategy.").

For example, Congress allowed efforts to train foreign police forces in "internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian roles that support democracy." Foreign Operations, Export Financing, And Related Programs Appropriations Act, Fiscal Year 1996, Pub. L. No. 104-107, § 540A(d), 110 Stat. 704 (1996), *to be codified* at 22 U.S.C. § 2420. *See also Id.* § 508 (specifying that none of the funds appropriated by Congress shall be obligated to assist any country whose duly elected Head of Government is deposed by a military coup); *Id.* § 585(a)(2) (outlining criteria for assessing the potential for countries emerging from communism to join NATO and focusing on progress towards accepting democratic principles such as free market economies, civilian control of the military and police, adherence to the rule of law, and commitment to protecting the rights of all citizens and the territorial integrity of their neighbors).

[351] During the 1992 presidential campaign, President Clinton argued for military intervention in Bosnia to "restore some form of humanity." Barton Gellman, *U.S. Military Fears Balkan Intervention: Dual Combat, Relief Role Seen Unworkable*, WASH. POST, Aug. 12, 1992, at A24. Military planners recognized the inconsistencies in attempting to serve as both combatants and relief agents. Prosecution of criminals of either party to the conflict appears to favor one side in the conflict. In a pure peacekeeping role, absolute neutrality is the ideal tactical environment for American forces.

Commanders have several reasons why they may desire prompt prosecution of continuum crimes. First, prosecutions are tangible tools for assuring victims that justice will be done. In addition to the deterrent effect, prosecuting continuum crimes decreases the motivation for victims to pursue personal vengeance against perpetrators. Atrocities which can "inflame mutual passions and engender a cycle of brutality, violence and reprisal," are one of the most serious obstacles to the restoration of peace.[352] Forestalling widespread retributions could, in turn, prevent an upward spiral of violence that would threaten United States forces and undermine the goals of the operation.[353] Timely prosecutions could help contain the conflict.

On a pragmatic note, prompt prosecutions are more likely to succeed. The goal of prosecution is to swiftly and fairly fix responsibility on culpable parties, which depends on the efficient collection and presentation of evidence. Prosecutors at Nuremberg screened some 100,000 captured documents for information, and introduced about 4000 into evidence at trial.[354] By definition, commanders in operations other than war will seldom have access to documentary evidence maintained by a vanquished government. In the absence of documentary evidence, eyewitness accounts, physical evidence, pictures of injuries, and circumstantial corroboration become more critical. Floods of refugees compound the difficulty of collecting evidence.[355] Commanders have some assets to help collect criminal evidence, but available evidence should be collected and used before the opportunity is lost.[356]

Finally, convicting the perpetrators of continuum crimes helps ensure the long-term success of the mission. For example, Serb and Croat leaders moved followers to commit atrocities by arguing that crimes committed before and during World War II had gone unavenged.[357] A Muslim refugee from Bosnia remarked that failures to punish early atrocities allowed so many more crimes to occur that prosecution would "look like a condemnation of a whole nation."[358] The refugee predicted that condemning the entire nation

352 Tadic Brief, *supra* note 280, at 22 (copy on file with the author).

353 John Pomfret, *Atrocities Leave Thirst for Vengeance in Balkans*, WASH. POST, Dec. 18, 1995, at A1 [hereinafter *Thirst for Vengeance*] (the cited article is the second in a three part series entitled Between War and Peace: Seeking Justice for the Balkans).

354 Lieutenant Colonel H. Wayne Elliott (ret.), *Nuremberg: The Final Act of the European War*, ARMY 22, 28 (December 1995).

355 *Thirst for Vengeance, supra* note 353, at A17 (noting experts' estimates that the conflict in Bosnia has driven up to 3 million civilians from their homes).

356 Christopher N. Crowe, Note, *Command Responsibility in the Former Yugoslavia: The Chances For Successful Prosecution*, 29 U. RICH. L. REV. 191 (1994).

357 *Thirst for Vengeance, supra* note 353, at A17.

358 David Wood, *U.N. War Crimes Charges Complicate Peace Talks Among Balkan Factions*, SACRAMENTO BEE, Sept. 29, 1995, at B9.

would "create the conditions for a new war fifty years down the road."[359] Prompt prosecutions can foster both the long and short-term objectives of an operation. In appropriate cases, deployed commanders should be able to prosecute continuum crimes by military commissions.[360]

However, if prompt prosecution of foreign nationals fosters mission accomplishment, the deployed commander has no practical options. Despite the aspirations of prominent scholars, a permanent international criminal court which might try continuum crimes with little notice remains a dream of dim conception.[361] On the other hand, creating an ad hoc international tribunal to prosecute international offenses requires long delays which blunt the operational impact of prosecution. International tribunals require time to employ personnel, obtain funding, draft rules of procedure and evidence, and commence operations.

For example, more than three years have elapsed since the United Nations Security Council resolved to prosecute individuals responsible for the atrocities in the former Yugoslavia.[362] The Tribunal has indicted a number of suspects, but it has not concluded a single trial to date. International tribunals can contribute to the development of the law but their inherent delays and political pressures nullify any operational effect for the deployed commander dur-

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[359] *Id.*

[360] Robinson & Silliman, *supra* note 51; Robinson O. Everett, *Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. J. INT'L L. 269 (1994).

[361] *See* Robert B. Rosenstock, *1994 McLean Lecture on World Law: The Proposal for an International Criminal Court*, 56 U. PITT. L. REV. 271 (1994) (comments by the legal counselor to the United States Mission to the United Nations); Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561 (1975); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994). But *See* Christopher L. Blakesley, *War Crimes: Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77 (Summer/Fall 1994).

[362] Mark A. Bland, Note, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects*, 2 IND. J. GLOBAL STUD. 233 (1994) (recounting the adoption of Security Council Resolution 808 on 22 February 1993, followed by the Statute of the International Tribunal on 25 May 1993, followed by a six month delay before the Tribunal convened its first ceremonial session on 17 November 1993. As of this writing, the first trial is scheduled to begin in the summer of 1996). The leader of the Bosnian Serbs, Radovan Karadzic makes no secret of his contempt for the tribunal, in spite of or perhaps because of the indictment against him for atrocities in the former Yugoslavia. John Pomfret, *Bosnian Serbs' Leader Stages Show of Defiance; Karadzic Tour Ends Months of Seclusion*, WASH. POST, Feb. 10, 1996, at A1 (quoting the leader's assessment of the tribunal, "This is ridiculous. It is shameful what they are doing. They are accusing the political and military leadership without a shred of evidence. It is not a court or a tribunal. It is a form of lynching for the whole nation."). *See also* Terry Atlas, *Atrocity Docket: U.N. Has Done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994, at 1.

ing operations other than war. If nothing else, such lengthy delays create apathy in the minds of criminals which complicates soldiers' tasks. From the commander's perspective, international tribunals have very limited to nonexistent operational impact.

Even though United States courts retain concurrent jurisdiction with international tribunals, military forums are the only workable option for a deployed commander. In theory, United States district courts could exercise jurisdiction over foreign nationals no matter how the United States obtained custody of the offender.[363] Federal law already criminalizes some continuum crimes, but Congress would need to vest additional jurisdiction in the federal courts.[364] Assuming that there was a statutory basis for prosecution, the military could apprehend the offenders and return them to the United States for trial in a federal district court.[365] This option also would require the commander to gather all relevant evidence and witnesses for trial and send them to the United States. This unwieldy process would be too expensive, cumbersome, and time consuming to be of practical benefit.

On the other hand, constitutional Article III courts have no overseas jurisdiction without express statutory authority.[366] In

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[363] United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (restating the doctrine of Kerr v. Illinois, 119 U.S. 436 (1986) that a federal court could try a defendant who had been kidnapped and returned to the United States for trial); United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) (dismissing the former dictator's claim that he was a prisoner of war who could not be tried for violations of United States drug trafficking laws).

[364] U.S. CONST. art. I, § 8, cl. 10(giving Congress authority to "define and Punish Offenses against the Law of Nations."). *See also* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865 (1988).

[365] Congress specified the venue for extraterritorial crimes in 18 U.S.C. § 3238 (1995). This statute is a venue statute, but does not create any jurisdictional limitations on military commissions. With regard to enforcing domestic criminal legislation, the Posse Comitatus Act prohibits use of military assets "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385 (1995). If Congress wants Article III courts sitting in the United States to prosecute continuum crimes, the domestic statute should allow military apprehension of suspects. In general, the Posse Comitatus Act, *codified at* 18 U.S.C. § 1385 (1995), does not have any extraterritorial effect. Opinion of the Office of the Legal Counsel, United States Department of Justice, Extraterritorial Effect of the Posse Comitatus Act, Nov. 3, 1989 (copy on file with the author). On the other hand, some scholars argue that United States apprehensions of foreign nationals would violate American obligations under the Civil and Political Covenant. *Extraterritoriality of Human Rights Treaties, supra* note 7, at 80. Even though the restrictions of Posse Comitatus do not apply overseas, some courts have hinted that the statutory restraints contained in 10 U.S.C. §§ 371-380 (1995) would restrict the law enforcement efforts of deployed forces. See, *e.g.*, United States v. Kahn, 35 F.3d 426, 430 (9th Cir. 1994).

[366] *See generally* Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment-Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971); Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 Wm. & Mary L. Rev. 1 (1986)[hereinafter Hijacking Trials]. *Cf.* Jordan J.

United States v. Noriega,[367] the district court identified a two-part test for claims of extraterritorial jurisdiction. Armed with domestic legislation specifying extraterritorial effect, district courts could prosecute continuum crimes because the United States has the power to proscribe universal jurisdiction offenses.[368] Even if Congress passed such a statute, the foreign government would have to agree to allow a United States Article III court to function on its soil.[369] Even in deployments in areas within the United States special maritime or territorial jurisdiction, experience shows that commanders will not have efficient access to civilian judicial assets.[370] Finally, beyond these drawbacks, federal courts have procedural rules which make prosecutions in the midst of a military operation a practical impossibility.[371]

Military forums, therefore, are the only workable option for timely prosecutions of continuum crimes. Commanders deployed on operations sanctioned under Chapter VII of the United Nations Charter can gain subject matter jurisdiction for military commissions pursuant to that authority. However, Congress should exercise American sovereign rights by giving deployed commanders authority to convene trials on their own authority during operations other than war. Because commanders already may seek punishment for violations of the laws of war during international armed conflict,

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Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). Paust argues that a "federal district court may apply the international law of war under existing rules to trials of civilians." By analogy, Paust might argue that district courts have inherent authority to prosecute violations of international law committed by foreign nationals.

367 746 F. Supp. 1506 (S.D. Fla. 1990).

368 *Id.* at 1512.

369 Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 163 (1995) [hereinafter Gibson, *Extraterritorial Jurisdiction*]; *Hijacking Trials*, *supra* note 366, at 85 (Article III courts operating overseas are limited by the "ultimate legal authority" of the foreign government").

370 Telephone Interview with Lieutenant Colonel Richard Jackson, February 14.1996. Lieutenant Colonel Jackson served in the Office of the Staff Judge Advocate, United States Atlantic Command, throughout the detainee operations at Guantánamo Bay, Cuba. Cuban detainees committed crimes against each other which threatened to destabilize the already restless camps. The commander requested judicial support, but no civilian judge ever deployed to help maintain order. In contrast, military judges were prepared to deploy to Somalia to support operations within forty-eight hours of a request from United States forces. United States Army Legal Services Agency Memorandum, subject: Military Judge Support (22 Dec. 1992) (identifying Colonel Peter Brownback as the judge identified for deployment to Somalia upon the commander's request).

371 Gibson, *supra* note 369, at 162-70. *See also* United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin, 1979) (holding that United States constitutional guarantees apply to a foreign citizen being tried before an American court sitting overseas, but applying analysis which is inconsistent with the later Supreme Court opinion in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).

authority to punish continuum crimes during operations other than war would add symmetry to the UCMJ. Commanders would then have the discretion to prosecute selected cases as the needs of the mission dictate.

B. Deter Misconduct by Regime Elites

The twentieth century has been the "Age of Atrocity" because of the gap between state behavior and respect for the standards of international law.[372] United States policy has long supported "the rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity."[373] At the same time, regime elites have instigated heinous violations of international law despite torrents of international condemnation.

For example, the Khmer Rouge murdered millions of Cambodians.[374] Almost twenty years later, Congress passed the Cambodian Genocide Justice Act to "support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity."[375] More recently, Saddam Hussein relocated large numbers of Kurds and launched massive chemical strikes on Kurdish villages.[376] For the past half century, no foreign policymaker has faced personal criminal liability under international law. Prosecuting continuum crimes in military forums would narrow the gap between idealistic rhetoric and hard reality.

United States forces deploy to unstable environments. During operations other than war, enemy forces or political officials often have committed continuum crimes and other human rights abuses. The political-military objective often seeks to replace anarchy with peace and order. Prosecuting the officials responsible for human rights violations can be a key part of the overall success of the mission.

A Haitian statesman, for example, observed that "the whole purpose is to end the impunity that made these crimes possible . . . otherwise, it [the military operations in Haiti] will mean little."[377]

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372 Louis Rene Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 DICK. J. INT'L L. 425 426 (1992).

373 *Declaration on Human Rights*, Address by President Bush, July 15, 1989, 89 DEP'T OF STATE BULLETIN 1 (Sept. 1, 1989).

374 Meron, *supra* note 40, at 554.

375 Cambodian Genocide Justice Act, Pub. L. No. 103-236, 108 Stat. 486 (Apr. 30, 1994).

376 Beres, *supra* note 372, at 436-38.

377 Douglas Farah, *Haitians Feel Sweet Sorrow at U.S. Departure*, WASH. POST, Feb. 9, 1996, at A25 (commenting on the barely functional court system, decaying courthouses, and poorly trained police forces).

In the same vein, an American official commented that, prior to the Lebanon disaster, the United States substituted rhetoric for substance.[378] As a result, "We carried a big stick and blew hard."[379] To answer shrill cries of protest, Congress should empower American commanders to wield a policy tool with the power of personal punishment for the perpetrators of continuum crimes.

Exercising jurisdiction over foreign policy makers could be a tangible step towards restoring order and respect for the rule of law. The faster the mission is completed, the sooner United States armed forces redeploy home, and the smaller the cost to American taxpayers. Foreign officials who systematically commit continuum crimes need to realize that they face personal accountability for their actions. They will be unable to cloak themselves in the inadequacies of the local judiciary or their exalted station in their regime.

Likewise, the ability of American forces in the field to promptly prosecute violations will help deter further criminal acts. Adolf Hitler, for example, once dismissed arguments against killing Jews with the rhetorical question, "Who after all, remembers the Armenians?"[380] Common sense reveals that the threat of credible, effective sanctions must exist if the force of law is to remain a viable check on human activity. Regime elites who have no fear of personal liability do not regulate their conduct in accordance with abstract expectations of international law. Anarchy and misery result when the force of law cannot constrain evil policymakers.[381] The process of "engaging"

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[378] Thomas L. Friedman, *America's Failure in Lebanon*, N.Y. TIMES, Apr. 8, 1984, at Sec. 6, page 32.

[379] *Id.*

[380] Madeleine K. Albright, *Bosnia in Light of the Holocaust: War Crimes Tribunals*, Address at the U.S. Holocaust Memorial Museum (Apr. 18, 1994), 5 DEP'T OF STATE DISPATCH 209 (Apr. 18, 1994). Hitler referred to the historical fact that, in 1894, Turkish regular troops paired with Kurds to kill 200,000 Armenians, and in 1915, the Armenians lost another 1.5 million people, which was more than 50% of the population at the time. Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF. 110, 113 (Summer 1993). *See also* Richard G. Hovannisian, *Etiology and Sequelae of the Armenian Genocide*, GENOCIDE 111-41 (George J. Andreopoulos ed., 1994).

[381] George C. Marshall deployed to the Philippines as a young officer to participate in the brutal campaign against the rebels. He remarked that, "[o]nce an army is involved in war, there is a beast in every fighting man which begins tugging at its chains, and a good officer must learn early on how to keep the beast under control, both in his men and himself." LEONARD MOSLEY, MARSHALL: HERO FOR OUR TIMES 23 (1982). Many scholars have advocated implementing the provisions of Article 43 of the United Nations Charter in order to give the Secretary General a standing military force to more effectively and quickly implement the desires of the Security Council. Member states would be obligated in advance to provide forces to the Secretary General on an "on call" basis, which proponents maintain would strengthen the rule of law by giving Security Council decisions more speedy and effective implementation. *See* James E. Rossman, Note, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL'Y 227 (1994); Agenda for Peace, *supra* note 95, ¶ 44; Lawrence I. Rothstein, Note, *Protecting the New World Order: It Is Time to Create a United Nations Army*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 69 (1993).

regime elites with the basic principles of the rule of law and democracy is one of America's most powerful foreign policy tools.[382]

I do not mean to imply that prosecutorial power is in itself sufficient to deter criminal elites. Quite the contrary, a lasting and just peace may require the use of armed force to stop atrocities and widespread human rights violations.[383] American paratroopers were prepared to enter Haiti and use military power to coerce the Cedras regime into restoring the rule of law.[384] The use of armed force is more legitimate when authorized by United Nations mandate.

However, during peace operations, many occasions arise when the use of overt force would be improper.[385] At the other extreme, ignoring ongoing continuum crimes would be the functional equivalent of appeasement.[386] The ability to prosecute selected cases would provide a middle ground between using massive force to punish wrongdoers and doing nothing. The political circumstances would combine with tactical considerations to guide the commander in deciding how aggressive American forces should be in apprehending and prosecuting foreign nationals. The international basis for prosecution is clear and Congress should not deny deployed commanders a valuable operational option for punishing continuum crimes that adversely affect the mission of United States forces.

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382 John N. Moore, *Low Intensity Conflict and the International Legal System*, U.S. NAVAL WAR COLLEGE, 67 INTERNATIONAL LAW STUDIES 25, 36 (Alberto R. Coll et al. eds., 1995) [hereinafter *Low Intensity Conflict*]. *See also Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, June 1990, U.S. Commission on Security and Cooperation in Europe, Washington, D.C.

383 Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. U. L.J. 131 (1994). In the words of the Secretary General of the United Nations, "While such action should only be taken when all peaceful means have failed, the option of taking it is essential to the credibility of the United Nations as a guarantor of international security" Agenda for Peace, *supra* note 95, ¶ 43.

384 CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 13 (1995) [hereinafter LAW AND MILITARY OPERATIONS IN HAITI].

385 *See* FM 100-5, *supra* note 16, at 13-4 ("Restraints on weaponry, tactics, and levels of violence characterize the environment [operations other than war]. The use of excessive force could adversely affect efforts to gain legitimacy and impede the attainment of both short and long-term goals.") ("Committed forces must sustain the legitimacy of the operation and of the host government. Legitimacy derives from the perception that constituted authority is both genuine and effective and employs appropriate means for reasonable purposes.").

386 Paust, *supra* note 383, at 131. In the context of ongoing operations inside Bosnia, NATO officials are concerned that continued sniping and shelling will erode civilian confidence in their mission. In early January 1996, Serb snipers shot an Italian soldier, engaged in several small arms attacks against NATO soldiers and equipment, and fired on a Sarajevo streetcar with a 64mm anti-tank weapon. Tom Squitieri, *NATO Talking Tough in Bosnia: Responds to Sarajevo Attack*, USA TODAY, Jan. 11, 1996, at A6. A spokesman stated, "Any further loss of life of such incidents only further hampers the peace process." *Id.*

C. Increasing Respect for the Rule of Law

Professor Dinstein noted the distinction between individual crimes and system crimes.[387] Because regime elites control the political and military institutions, he observed that holding them accountable for the crimes that they condone or order is the most effective way of deterring widespread, systematic crimes. Large-scale criminal violations depend on individual actors who are willing to disregard basic principles of humanity and perpetrate the crimes. In a wider sense, prosecuting continuum crimes would deter individual crimes by increasing respect for the rule of law.

At the state level, promoting the rule of law means strengthening democratic ideals and institutions.[388] By definition, democratic institutions foster respect for human freedom and dignity. However, abstract respect for human rights means little unless individual actions conform to established standards. Even if an individual does not have a detailed knowledge of international law, continuum crimes involve basic human rights.[389] The United States can prosecute universal jurisdiction offenses without proving that the individual had specific knowledge of, or a willful decision to violate, a specific provision of international law.

In a tactical environment, the rule of law constrains individual actors by restricting their freedom of choice. For example, despite rationalization and arguments that expediency, torture, murder, and other continuum crimes are fundamentally evil actions directed toward individuals. The function of law is to increase the likelihood that "soldiers [can] be counted on to do what is right, even when no one is watching."[390] Prosecuting continuum crimes would help convince individual soldiers that the basic rules of human relations are not simple devices of expediency. Effective criminal sanctions for

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387 Dinstein, *supra* note 264, at 348.

388 *Low Intensity Conflict*, *supra* note 382, at 357 n.23.

389 The Geneva Conventions require training in the laws of war, even though soldiers already know that the basic rules regulating human relations preclude the same conduct regulated as grave breaches under the Conventions. *See* FM 27-10, *supra* note 4, para. 14 (signatories undertake "in time of peace as in time of war, to disseminate the text of the Present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military instruction."); H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, ARMY LAW. 1, July 1983.

390 FM 100-5, *supra* note 16, at 14-2. The cornerstone doctrine of the United States Army recognizes the importance of the human dimension of conflict. Thus, despite "the difficult environments in which Army forces operate, soldiers are expected to obey the laws of land warfare, to protect civilians and other noncombatants, to limit collateral damage, to respect private property, and to treat EPWs with dignity. Amid the rigors of combat, the integrity of every soldier—from the highest to the lowest ranks—is of paramount importance." *Id.*

continuum crimes increase the personal incentive for individuals to respect fundamental human rights.

Foreign nationals who covet discretion to commit continuum crimes could argue that United States prosecutions violate their sovereign rights. The criminal school of thought would attempt to portray United States prosecution as legal imperialism. Some foreign governments would likely argue that the United States has no inherent moral or legal right to prosecute continuum crimes.

Despite these potential objections, the United States has authority to proscribe and prosecute the universal jurisdiction offenses I term continuum crimes. The United States would not unilaterally create new law, but would exercise its existing rights under international law. The nature of universal jurisdiction offenses allows any state to establish domestic jurisdiction over perpetrators.[391] Translating abstract legal rights into concrete enforcement is a logical, and indeed necessary, corollary to the very notion of law.

For the same reasons, clear domestic jurisdiction over continuum crimes would discredit arguments that prosecutions are an exercise of "victors justice." A defined jurisdictional basis under domestic law decreases reliance on ad hoc tribunals. The nature of continuum crimes as a component of the established military justice system would acknowledge the force of international law while undermining arguments that criminal accountability resulted from an arbitrary exercise of military power.[392] During future deployments, commanders would have a preexisting tool which no accused or lawyer could claim was created to achieve a particular result against a selected suspect in a particular setting. Amending the UCMJ to authorize continuum crimes prosecutions would therefore increase the legitimacy and moral authority of United States forces deployed on operations other than war.

Finally, enforcing the standards of international law also could increase the discipline and morale of United States forces. The American people demand a high quality force that always honors

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391 *See infra* notes 414 to 417 and accompanying text for a discussion of the basic judicial guarantees recognized by civilized nations throughout the world.

392 This is the same logical and moral foundation which compels some scholars to advocate the creation of a permanent international criminal tribunal. *See, e.g.*, M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 34 (Spring 1991) ("We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.").

the core constitutional values of "strong respect for the rule of law, human dignity, and individual rights."[393] Enemy forces, in contrast, have often openly and repeatedly violated numerous provisions of the laws of war.[394] Although American soldiers face courts-martial for violations of international law,[395] existing UCMJ provisions restrict commanders' ability to punish foreign nationals for similar violations.

At the very least, the disparate standards tend to undermine American soldiers' respect for the law. Rather than an unqualified acceptance of the norms and values embodied in legal standards, soldiers come to view the law as a meaningless set of arbitrary standards. Instead of viewing the law as an inherent and valid component of the mission, some soldiers view international law as an unfair impediment to the accomplishment of the mission.[396] At its worst, disparate enforcement could lead American soldiers to rationalize their own criminal violations. The perception that the enemy

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[393] FM 100-5, *supra* note 16, at 14-2.

[394] *See* LOUIS HENKIN ET AL., MIGHT V. RIGHT (2d ed. 1991). During the Vietnam War, the North Vietnamese Army regularly committed many command directed atrocities. Howard Levie, *Maltreatment of Prisoners of War in Vietnam*, 98 B.U. L. REV. 323 (1969). The North Vietnamese repeatedly executed American prisoners of war as illegal reprisals following valid convictions of Vietcong in South Vietnamese courts. FRITS KALSHOVEN, BELLIGERENT REPRISALS 193-200 (1971). During the Korean conflict, General MacArthur convened a war crimes commission which documented massive war crimes committed by North Korean and Chinese soldiers. The commission prepared cases for trial which documented the torture and murder of prisoners. No enemy soldiers ever faced trial due to fears that trials would interfere with efforts to repatriate prisoners. PAUL CHRISTOPHER, THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 136-37 (1994).

[395] FM 27-10, *supra* note 4, para. 507b ("Violations of the Law of War committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted under that Code. Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished."). For a description of some United States prosecutions *See* VON GLAHN, *supra* note 94, at 882-85.

[396] Colonel John Waghelstein wrote that fighting a counterinsurgency in which the enemy disregards legal standards is difficult for the American military because "this kind of conflict is fundamentally different from the American way of war." *Post-Vietnam Counterinsurgency Doctrine*, MILITARY REVIEW 42 (May 1985). Soldiers who feel no obligation to obey legal standards are also more likely to disregard their rules of engagement. Few senior leaders in Vietnam felt that soldiers understood their rules of engagement before My Lai, and even fewer believed that soldiers carefully followed those rules of engagement. Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 19 (1994). Perceiving that rules of engagement unduly restricted their freedom of action, soldiers engaged in "creative application" or ignored the legal restrictions altogether. ANDREW F. KREPINOVICH, JR., THE ARMY AND VIETNAM 199-206 (1986). *See generally* MICHAEL MCCLINTOCK, INSTRUMENTS OF STATECRAFT: U.S. GUERRILLA WARFARE, COUNTER-INSURGENCY, AND COUNTER-TERRORISM 1940-1990 421-49 (1992) (describing the arguments made by some soldiers and civilian policymakers advocating a legitimate role of terror techniques and human rights abuses as a part of United States military and political policy).

refuses to obey the law can prompt the response, "Why should I care about the rules if the enemy does not?"[397]

Therefore, effective prosecution of foreign nationals could deter further violations by hostile forces, and would complement existing mechanisms for preventing violations on the part of United States forces. In any case, prosecuting continuum crimes would help protect fundamental human rights, enhance the rule of law, and contribute to the successful formation of democratic values.

D. Protecting United States Personnel

Finally, clear authority to prosecute continuum crimes could help deployed commanders fulfill their inherent obligation to protect United States Armed Forces. The Standing Rules of Engagement for United States Armed Forces declare in bold, capital letters:

> THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER US FORCES IN THE VICINITY.[398]

The commander's right to protect the force is a logical extension of every soldier's inherent right of self defense.[399] Commanders can detain foreign nationals in the interests of force protection.

To contain known threats to the force, commanders have detained foreign nationals during most operations other than war. Commanders have operated detention facilities in response to intelligence reports that some individuals pose threats to the force.[400] Commanders detained foreign nationals during Operations Urgent

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[397] *My Lai Lessons*, *supra* note 13, at 175.

[398] SECRET, Chairman of the Joint Chiefs of Staff, Instruction 3121.01, Standing Rules of Engagement for US Forces (1 Oct 1994) (The cited language comes from the unclassified Appendix A which is intended for wide distribution to all forces in the field.).

[399] The 1983 terrorist attack against United States Marines in Beirut caused a fundamental institutional change in subsequently promulgated Rules of Engagement. Each set of ROE reminds every soldier of the inherent right of self defense up front and in capital letters. Martins, *supra* note 396, at 51-52.

[400] LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 384, at 63. Both Military Intelligence and Criminal Investigative Detachment assets may initially investigate some incidents. The primary responsibility of the military intelligence assets is to examine such incidents for intelligence and security-related purposes. DEP'T OF ARMY, REGULATION 381-20, THE ARMY COUNTERINTELLIGENCE PROGRAM, para. 4-5 (15 Nov. 1993). By doctrine, military intelligence will exhaust all intelligence/security dimensions of an incident before turning the case over to the criminal investigators. *Id.* There is no regulatory prohibition against using evidence obtained during the initial intelligence processing of an incident.

Fury,[401] Just Cause,[402] Restore Hope,[403] and Uphold Democracy.[404] Operational necessity forced commanders to detain foreign nationals in response to actual or perceived threats against United States forces.[405] At the same time, commanders often had some evidence that detained individuals had committed continuum crimes.[406]

Prosecuting selected cases would allow commanders to protect their forces as the overall security threat declines. After Operation Just Cause, some human rights groups criticized United States commanders on the basis that "[o]nce the security threat was over, the legal basis for the United States forces to detain, arrest, and search civilians was at best tenuous."[407] Even though the operational climate becomes secure, some individuals remain direct or indirect threats to the force. In those cases, commanders will seldom find a local judiciary willing and able to provide suspects with fair justice. Rather than freeing the suspect to injure United States or allied forces, the commander should be able to prosecute the suspect for known continuum crimes.

Authority to prosecute suspects for continuum crimes raises some tactical and practical concerns. There will be cases which the commander decides not to prosecute because of lack of evidence, as well as potential short term escalation of hostilities, or other operational concerns. In other cases, the commander may grant some form of leniency in exchange for a tactical or political concession by

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401 Colonel Ted Borek, *Legal Services in War*, 120 MIL. L. REV. 19, 47 (1988) (describing the role of judge advocates in detainee issues during operations in Grenada).

402 Parkerson, *supra* note 9, at 68-71. During operations in Panama, early estimates placed the figure of detainees at around 5000. *Id.* at 68 n.191.

403 Lorenz, *supra* note 9, at 34-35 (summarizing the legal problems encountered during operations in Somalia). The Joint Task Force established a detention facility capable of holding 20 Somalis.

404 LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 384, at 63-72. During operations in Haiti, the Joint Detention Facility became "one of the most conspicuous successes of Uphold Democracy" because the standards of humane treatment and due process stood in marked contrast to Haiti's legacy of arbitrary and sometimes brutal detention." *Id.* at 64. One judge advocate remarked that, "ICRC personnel became strong supporters of the JDF when criticism arose from the media and several detainee families." *Id.* The population at the Multinational Force Joint Detention Facility crested at around 200, but decreased to around 24 by January 1995 at the time Haitian officials began to assume control of the facility. *Id.* at 67.

405 At the time of this writing, an American service member lies wounded in Bosnia at the hands of a local civilian looter. Implementing the recommendations of this article would allow prosecution in an American military forum in the event that the NATO forces apprehend the shooter and produce sufficient evidence to sustain a conviction.

406 LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 384, at 63.

407 Parkerson, *supra* note 9, at 69 (describing a report issued by America's Watch that United States forces improperly detained some citizens solely due to their political beliefs).

opposing forces. In still other cases, the commander may decide to turn the suspect over to local justice authorities.[408]

While local officials may accept custody of prisoners following their conviction, the commander's only option may be to incarcerate the suspect in the United States following conviction.[409] During present operations, the commander must choose between releasing individuals who pose known threats or violating their fundamental human rights by holding them indefinitely without trial.[410] In any case, the commander should have the flexibility of selecting the course that most enhances the mission while protecting the force.

VII. Proposed Revisions to the Uniform Code of Military Justice

American military commanders should have a statutory basis for prosecuting foreign nationals who violate provisions of international law. The evolving nature of deployments is prompting a reevaluation of the doctrine guiding the deployment of American forces.[411] Given the doctrinal and structural changes that will govern the use of American military power in the Twenty-First Century,

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[408] The commander should not transfer prisoners to local officials without some evidence that the local standards of incarceration comply with the basic humanitarian standards. *See, e.g.*, Standard Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and The Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended* E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

[409] Confining foreign nationals in United States federal or military prisons is not unknown. Several thousand Cuban citizens came to the United States during the Mariel Boat Lift and some spent years in federal penitentiaries before being returned to Cuba or released. Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans*, 62 S. CALIF. L. REV. 1733 (1989). Bringing foreign nationals to the United States would require coordination with and special status granted by the Immigration and Naturalization Service.

Another option would be to follow the example of the Statute for the current International Tribunals by confining convicted continuum criminals in any state which indicates a willingness to accept prisoners. Report of the Secretary General, *supra* note 173, ¶ 122. In this scenario, prisoners would be eligible for parole, commutation, or other post conviction action in accordance with the laws of the confining state. *Id.*

[410] Universal Declaration, *supra* note 193, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."). The freedom from arbitrary arrest is a fundamental human right as expressed in all major human rights instruments beginning with the Magna Carta (1215) and the French Revolution (1789). In the words of the Magna Carta, "No free man shall be taken or imprisoned or disseised or out lawed or exiled or in any way ruined, nor we go or send against him, except by lawful judgment of his peers, or by the law of the land." Johanna Niemi-Kiesilainen, *Article 9, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 147 (Asbjorn Eide et al. eds., 1991).

[411] Comments on National Public Radio, Mar. 19, 1996, comments by Andrew Krepinovich.

prosecuting continuum crimes could serve an important function in future operations. Congress should amend the UCMJ as an exercise of American sovereignty to assist field commanders.

Amending Article 21 of the UCMJ would give commanders autonomy to prosecute selected cases as the needs of the mission dictate. Although some military lawyers view Article 21 as an outmoded relic,[412] it can provide commanders a powerful tool to assist accomplishment of their mission during operations other than war. Given the potential practical benefits and sweeping force of law supporting domestic prosecution of continuum crimes, the requisite change is strikingly simple. Congress need change only one word of Article 21. A revised Article 21 would allow military commission jurisdiction over offenses defined by statute or the "law of nations."[413]

Incorporating continuum crimes under the jurisdiction of Article 21 would allow military commissions to prosecute offenses that "strike at the very roots of civilized society."[414] Military commissions would provide a fair forum under "the broad principles of justice and fair play which underlie all civilized concepts of law and procedure."[415] Even though international law does not specify a particular code of criminal procedure or evidence, the President could fill that void by issuing uniform procedures for military commis-

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412 Several years ago, the Chief of the Operations and International Law Department at the United States Army Judge Advocate General's School, Charlottesville, Virginia received a telephone inquiry regarding the desirability of retaining Article 21 in the Code. The caller was soliciting opinions as to whether Article 21 had any practical utility in modern operations. Interview with Lieutenant Colonel H. Wayne Elliott (ret.) (Jan. 6, 1996).

413 There is some support for an alternative view that Congress need not modify Article 21 to allow prosecution of continuum crimes. The statute allows prosecution of "offenders or offenses that *by statute or by the law of war* may be tried by military commissions, provost courts, or other military tribunals." MCM, *supra* note 44, art. 21 (emphasis added). If Congress does not amend the statute, the President could make an authoritative determination that the phrase "by the law of war" has a functional meaning. In other words, the President could issue a change to the *Manual for Courts-Martial* specifying that Article 21 incorporate the same offenses which the Security Council described as "violations of the laws or customs of war." I do not believe that the history of military tribunals in United States jurisprudence or the rules of international law warrant such a broad and ambiguous interpretation of the phrase. The better approach, in my opinion, is for Congress to amend Article 21 and make the jurisdictional basis absolutely clear to both potential criminals and their defense attorneys.

414 John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L.Q. 1255 (1964), *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 867-82 (2d ed. 1991) (quoting Professor Schwarzenberger without reference to a specific citation).

415 McDougal & Feliciano, *supra* note 224, at 721.

sions.[416] In any event, United States military commissions would provide what some scholars regard as "internationally recognized standards regarding the rights of the accused at all stages."[417]

The intricate relationship between political and military objectives during operations other than war requires a procedural limit to the power of a local commander. The idea of civilian control over United States military forces is an integral facet of American law.[418] The local commander should not be able to convene a military commission to try a foreign national without first completing a coordina-

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[416] The lack of defined procedures and rules of evidence for military commissions could generate charges of "victor's justice." To prevent this perception, the President should exercise the constitutional authority, U.S. CONST. art. II, § 2, cl. 1, to issue regulations for pretrial, trial, and post-trial procedures, including modes of proof for military commissions which "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . ." 10 U.S.C. § 836 (1995). In the absence of procedural guidance from the Commander-in-Chief, military commissions and provost courts "shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." MCM, *supra* note 44, Part I, para. 2(b)(2).

[417] The Secretary General's Report required by United Nations Security Council Resolution 808 used the quoted phrase with regard to the rights enunciated in Article 14 of the International Covenant on Civil and Political Rights. Report of the Secretary General, *supra* note 173, ¶ 106. The Statute of the International Tribunal for Crimes Committed in the Former Yugoslavia accordingly provides that the accused has the following rights:

> (1) All persons shall be equal before the International Tribunal.
>
> (2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.
>
> (3) The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
>
> (4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
>
> (g) not to be compelled to testify against himself or to confess guilt.

Id. ¶ 107, Statute of the International Tribunal, *supra* note 173, art. 21.

[418] Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

tion procedure specified by the President through the *Manual for Courts-Martial*.

Coordination with civilian and policy officials outside the deployed command also would help ensure the fairness of the proceedings. After a determination by the commander that prosecution would support the mission, civilian policy officials should review the facts to balance the impact of prosecuting continuum crimes against the necessary, albeit limited, invasion of host nation sovereignty.[419] Prosecution should be a deliberate policy choice made by the civilian officials responsible for coordinating overall United States foreign policy.

On a related note, military commission jurisdiction over continuum crimes would not violate other United States obligations under international law. The Geneva Conventions require that prisoners of war can be prosecuted under domestic law "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[420] Some support exists for a technical argument that United States service members are subject to trial by military commission for violations of international law.[421] In any case, persons in the custody of United States forces during operations other than war are not prisoners of war in the legal sense and cannot claim the benefits of the Convention.[422]

Finally, establishing jurisdiction over continuum crimes would not require the United States forces to assume the responsibilities

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[419] *See, e.g.*, RESTATEMENT, *supra* note 12, § 206 ("Under international law, a state has sovereignty over its territory and general authority over its nationals."); *id.* cmt. b. (sovereignty implies a state's lawful control over its territory generally "to the exclusion of other states, authority to govern in that territory, and authority to apply law there.").

[420] Convention of Prisoners of War, *supra* note 4, art. 102. The Convention also states that "Prisoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." *Id.*, art. 85. The Uniform Code of Military Justice implements this provision of international law by providing for court-martial jurisdiction over "Prisoners of war in custody of the armed forces." UCMJ, *supra* note 44, art. 2(a)(9).

[421] *See* DEP'T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 17 (1951) ("Under [article 18 of the Manual for Courts-Martial] there is no question that members of our armed forces may be tried for violations of the law of war, either by military commission or by general courts-martial.").

[422] The United States elected to treat potentially hostile persons detained during Operation Uphold Democracy as if they were prisoners of war based on a policy decision rather than a legal requirement. LAW AND MILITARY OPERATIONS IN HAITI, *supra* note 384, at 54. As a matter of policy, the United States has declared that it will "upon engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict." United States Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994), *quoted in Extraterritoriality of Human Rights Treaties*, *supra* note 7, at 78.

of an occupying power. As an occupying power, international law would require American commanders to "take all measures in [their] power to restore, and ensure, as far as possible, public order and safety."[423] During an occupation, international law would require the commander to prosecute continuum crimes as a function of maintaining civil order.

However, military occupation is a question of fact which "presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority."[424] Legal status as an occupying power would be inconsistent with the core objectives of operations other than war. Therefore, during peace operations, a modified Article 21 should give deployed commanders discretion to prosecute only those continuum crimes that would aid mission accomplishment. Appendix A contains a model Article 21 to establish the necessary statutory basis for commanders to prosecute continuum crimes as the needs of the mission require.

VII. Conclusion

The seeds of future conflicts are rooted in the soil of human nature.[425] The world will remain a dangerous place full of unpredictable threats.[426] In the midst of declining budgets, the United States military must remain effective in peace operations while always retaining its core warfighting skills and focus.[427] Including

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[423] Hague IV, *supra* note 219, art 52, *reprinted in* FM 27-10, *supra* note 4, para. 363.

[424] FM 27-10, *supra* note 4, para. 355.

[425] Bob Marley paraphrased the words of a 1968 speech given by the Ethiopian emperor Haile Selassie to the United Nations:

> Until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned, everywhere is war . . . and until there are no longer first-class and second class citizens of any nation, until the color of a man's skin is of no more significance than the color of his eyes, me see war. And until the basic human rights are equally guaranteed to all without regard to race, there is war. And until that day, the dream of lasting peace, world citizenship rule of international morality, will remain but a fleeting illusion to be pursued, but never attained . . . now everywhere is war.

BOB MARLEY, *War, on Rastaman Vibration* (Caedmon Recordings 1976).

[426] Senator Daniel Patrick Moynihan predicted that "the defining mode of conflict in the era ahead is ethnic conflict. It promises to be savage. Get ready for 50 new countries in the next 50 years. Most of them will be born in bloodshed." *As Ethnic Wars Multiply, U.S. Strives For a Policy*, N.Y. TIMES, Feb. 7, 1993, at A1.

[427] Earl H. Tilford, Jr., *Introduction*, U.S. ARMY WAR COLLEGE, WORLD VIEW: THE 1996 STRATEGIC ASSESSMENT FROM THE STRATEGIC STUDIES INSTITUTE 6 (Earl H. Tilford ed., 1996).

the authority to prosecute continuum crimes under Article 21 will be a decisive step towards helping commanders solve some of the looming problems of future deployments.

Prosecutions of foreign nationals can be an important part of future operations. George Will noted, "The gap between ideals and actualities, between dreams and achievements, the gap that can spur strong men to increased exertions, but can break the spirit of others . . . is the most conspicuous land mark in American history."[428] Unless Congress amends Article 21, Americans deployed in the future operations may pay the price for the existing gap in the commander's judicial power.

This article documents a sound basis for United States prosecution of continuum crimes. Echoing Justice Jackson's admonition at Nuremberg, the UCMJ should not remain static, but by continual adaptation should follow the needs of a changing world.[429] Commanders cannot bridge the gulf between theory and practical, effective enforcement of well established international law without congressional action.

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[428] GEORGE F. WILL, STATECRAFT AS SOULCRAFT 98 (1989).

[429] 1 IMT, *supra* note 2, at 221.

APPENDIX A

Proposed Article 21

Uniform Code of Military Justice

10 U.S.C. § 821. Art. 21 Jurisdiction of Courts-Martial Not Exclusive

(a) 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 nations may be tried by military commission, provost courts, or other military tribunals.

(b) Unless another provision of law specifically vests jurisdiction in another forum, military commissions have jurisdiction to try any person for a violation of the law of nations when that violation has a substantial or probable impact on the accomplishment of the military mission or endangers the safety of United States citizens, provided that trial in a foreign forum is unlikely to remedy the impact of the crime defined under the law of nations.

THE WOLF AT THE DOOR: COMPETING LAND USE VALUES ON MILITARY INSTALLATIONS

MAJOR SHARON E. RILEY*

Why, land is the only thing in the world
worth working for, worth fighting for, worth dying for,
because its the only thing that lasts.[1]

—Gerald O'Hara, Gone with the Wind

I. Introduction

We live in a world where wildlife advocates want to put endangered wolves, already extinct in the wild, onto military bombing ranges. If this sounds like some Orwellian view of the future or the sinister design of someone with a "Nuke the whales" bumper sticker, think again. This project already has been implemented and a second has been proposed and endorsed by a variety of environmental and wildlife conservation organizations.

Red wolves, extinct in the wild and living only in captivity, were released onto the Air Force's Dare County Bombing Range in North Carolina. The United States Fish and Wildlife Service has proposed the reintroduction of the Mexican Wolf, which is extinct in the wild and living only in captivity, onto the White Sands Missile Range in New Mexico. Environmental groups support both programs.

A "boot-camp" to train black-footed ferrets is operating on the contaminated Pueblo Army Depot in Colorado. Red-cockaded woodpeckers will be "harvested" from private land in Louisiana and relocated to Fort Polk to allow development of the private land. Are we turning military installations into zoos? Are we jeopardizing the lives of these endangered animals, already struggling for survival? How did such a world come into being and what are the implications for the military?

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* I want to than Major David N. Diner for his never ending patience, enthusiasm, and assistance; for convincing me to write a thesis; and for making the process so much fun. I also want to thank Major Tom Ayers at the Army Environmental Law Division for sharing his files and ideas.

[1] GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).

The United States was once considered a land of limitless resources. Because we had more land than people, our land use policies encouraged the development and exploitation of resources. Over time, the ratio of land to people decreased, and we began to compete for suddenly limited resources. As resources became more precious, a natural tension developed between land use and land preservation. In some places, the tension is so high that violence results. Federal land managers now wear bullet-proof vests and travel in pairs.

Today, the United States faces intense competition for disparate, and often inconsistent, land-use and resource allocation values. Although the United States owns hundreds of millions of acres of land, this land is controlled by a variety of federal agencies, and there is no overarching federal land-use policy. Instead, federal land is managed in a piecemeal manner, with each agency attempting to support an ever increasing variety of goals. Now, almost desperate federal land use managers are asking the military to share some of its otherwise protected property to ease this tension. As the current federal land use crisis can be expected to worsen rather than abate, these requests can be expected to continue and increase.

As a trustee of federal lands, the military always has been involved in wildlife management. Now, however, military installations are being asked to support wildlife conservation values that exceed mere resource trustee responsibilities at a time when training and weapons testing require more and more land. The proposed reintroduction of the Mexican Wolf onto the White Sands Missile Range exemplifies the struggle of competing land-use values for finite resources.

Why is the military being asked to fill this new role? Is the support of nonmilitary objectives endangering military operations, and, if so, what should be done to protect important national security operations? The Mexican Wolf is a symbol of this history, competition, and tension. The White Sands Missile Range can accommodate the Mexican Wolf, just as the military can contribute to the ongoing effort to meet all of the competing national land-use objectives, but the military must not become a victim of its own good intentions. Instead, the military should seek protective legislation that will enable it to be good a neighbor without endangering its primary mission.

This article demonstrates how we got where we are, evaluates the current crisis in federal land management, and proposes specific legislation to protect military interests and to advance federal land use planning.

First, I propose amending the Endangered Species Act to further protect private parties and military installations that accept

new populations of endangered species onto their property. This amendment would follow the Clinton Administration's current "Safe Harbor" policy, which ensures that requirements for the conservation of endangered species do not become more severe after a management agreement is reached. Such an amendment would protect military installations that cooperate in the reintroduction of species in the event that the reintroduced animals become essential to the overall survival of the species.

Second, I propose the appointment of a Department of Defense (DOD) "Wildlife Czar" to oversee and coordinate all wildlife conservation programs on military property. The Wildlife Czar would have a larger perspective on existing and proposed wildlife conservation initiatives and would replace our current piecemeal approach. This perspective at the DOD level would afford stronger bargaining power and would ensure that military interests are protected on a national level.

Third, I propose the creation of a National Trustee Board (NTB) to develop and to implement a federal land management strategy. The DOD Wildlife Czar would sit on the NTB to ensure that the DOD has a voice in shaping federal land management policy.

II. From Sea to Shining Sea

> *It is impossible to comprehend contemporary public land controversies fully without an understanding of public land law history.*[2]

A. United States Land Acquisition

The newly formed United States comprised thirteen states on the eastern side of the continent.[3] In 1803, the United States purchased 828,000 square miles from France for less than three cents per acre.[4] Known as the "Louisiana Purchase," the "greatest land bargain in United States history" suddenly doubled the size of the country.[5] The Rocky Mountains served as the western border of the

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[2] GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 44 (3d ed. 1993).

[3] *United States of America: History*, BRITANNICA ONLINE, at http://www.eb.com.180 (Encyclopedia Britannica, 1996).

[4] *Id.* (*Louisiana Purchase*).

[5] *Id.* Ownership of the territory bounced back and forth through the late 1700s. French settlements established in the 17th and 18th centuries initially gave France control, but France transferred control of the area west of the Mississippi river to Spain in 1762 and the remainder to Great Britain in 1762. With the rise of Napoleon

purchase, and the area that would become the states of Louisiana, Arkansas, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Oklahoma was added.[6] The purchase also included most of Kansas, Colorado, Wyoming, Montana, and Minnesota.[7] Suddenly, the United States included a predominately undeveloped western expanse which "turned out to contain rich mineral resources, productive soil, valuable grazing land, forests, and wildlife resources of inestimable value."[8]

In 1845, the legacy of the Louisiana Purchase produced two events that solidified a national vision. First, in March 1845, Mexico severed relations with the United States.[9] Then in July 1845, John O'Sullivan, a lawyer and journalist, coined the phrase "manifest destiny."[10] He advocated the "fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions."[11] Politicians quickly adopted the phrase in debating the annexation of Texas and Oregon and the prospect of war with Mexico.[12] Congress issued a formal declaration of war against Mexico in 1846. After two years of fighting, in 1848, the United States annexed the area now known as New Mexico, Utah, Arizona, Nevada, California, Texas, and western Colorado.[13] The United States obtained the Oregon Territory, containing Washington, Oregon, Idaho, and the western portions of Montana and Wyoming through the Oregon Compromise of 1846.[14] These major acquisitions, with several smaller additions, expanded United States domain across the width of the continent.

Bonaparte. Spain returned the land in 1800, giving France control of New Orleans and the mouth of the Mississippi River. Meanwhile, the United States had expanded westward into the Tennessee and Ohio rivers area, and depended on free use of the Mississippi river and the port at New Orleans. President Thomas Jefferson dispatched his minister to discuss the purchase of New Orleans. When negotiations failed, the American minister threatened a British-American alliance against France. In early 1803, Napoleon offered the entire Louisiana Territory to the United States. His motives are unclear, but the decision is attributed to the prospect of war between France and Great Britain and the financial constraints of Napoleon's ongoing wars. James Monroe helped negotiate the purchase, and an agreement was signed on May 2, 1803. However, Jefferson's authority to purchase the property was not clear. Congress was unaware of the planned purchase, and Jefferson feared a constitutional amendment might be necessary. The Senate, however, ratified the treaty, and the purchase proceeded.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id. (Mexican War).*

[10] *Id. (Manifest Destiny).*

[11] *Id.*

[12] *Id.*

[13] *Id. (Mexican War).* The United States purchased this area for $15 million.

[14] *Id. (Oregon Question).*

B. The United States as a Land Owner

The United States gained possession of land through a variety of purchases and annexations. What was the legal status of that land? Article I, Section 8, Clause 17, of the United States Constitution—known as the Enclave Clause—gave Congress exclusive jurisdiction over federal enclaves.[15] Article IV, Section 3, Clause 1, provided for the addition of new states.[16] Finally, Article IV, Section 3, Clause 2, known as the Property Clause, provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[17]

Congress attended the business of deciding what portion of the new territories the United States owned and what was owned by individuals. This process was long and laborious, but the United States government owned most of what it had purchased. In 1823, the United States Supreme Court ruled in *Johnson v. McIntosh* that "the Indian inhabitants are to be considered merely as occupants, [and therefore] deemed incapable of transferring the absolute title to others."[18]

C. Settlement of Public Lands

With all of this land in federal hands, what was to be done with it? The federal land in the West became known as the "public domain" and Congress opened most of it for settlement and development. Indeed, "national public land policy for 150 years was directed primarily at getting the land into the hands of the pioneer."[19] Prior to federal land use laws, it was common practice to stake a claim for land. This practice, also known as "squatting" was unpopular with Congress because the new country was deeply in debt.[20] The Land Act of 1796 provided for public auctions of land at a minimum of two dollars per acre.[21]

The Graduation Act of 1854 decreased the price of unclaimed land over time and resulted in the purchase of millions of acres of

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[15] U.S. CONST. art. I, § 8, cl. 17.

[16] *Id.* art. IV, § 3, cl. 1.

[17] *Id.* art. IV, § 3, cl. 2.

[18] Johnson v. McIntosh, 21 U.S. 543 (1823).

[19] COGGINS ET AL., *supra* note 2, at 79.

[20] *Id.* at 80. A process known as "preemption" became recognized, through a series of laws in the mid-1800s, whereby a squatter could purchase his land for about $1.25 per acre. The General Preemption Act of 1841 authorized future preemption on a maximum of 160 acres, also for $1.25 per acre.

[21] *Id.* at 82.

land in Missouri alone.[22] The Homestead Act of 1862 permitted the settlement of one homestead of no more than 160 acres.[23] If residence was established within six months after application, the land was free.[24] After five years of actual settlement and cultivation, the homesteader would receive a patent on the land.[25] Although the system was subject to widespread abuses, over 100 million acres of land were homesteaded.[26] The Desert Lands Act of 1877 offered up to 640 acres at twenty-five cents per acre to encourage use of land in dry areas not immediately suited to farming.[27] Large corporations obtained most of this land.[28]

The original "public domain" consisted of 1.8 billion acres.[29] American professor and historian, Frederick Jackson Turner, called it "the richest free gift that was ever spread out before civilized man."[30] Of this "vast expanse," two thirds was transferred to individuals, corporations, and states.[31]

In 1893, Professor Turner declared the American Frontier closed because, based on the 1890 census, there was no longer a vast western expanse for the explorer to conquer.[32] His thesis has been called "the most influential idea an American historian ever produced."[33]

There remained, however, large tracts of land to settle, and land disposal legislation continued. The Kinkaid Act of 1904 offered up to 640 acres of land in western Nebraska for $1.25 per acre for cattle production.[34] The Enlarged Homestead Act of 1909 allowed claims of 320 acres of land instead of 160.[35] The 1916 Stock-Raising Homestead Act permitted claim of 640 acres of semi-arid land designated valuable for livestock grazing.[36]

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[22] *Id.* at 83.

[23] 43 U.S.C. § 161 (repealed 1976).

[24] *Id.*

[25] *Id.*

[26] COGGINS ET AL., *supra* note 2, at 84. The Homestead Act was often used as a means to strip timber lands without payment.

[27] 43 U.S.C. §§ 321-39.

[28] COGGINS ET AL., *supra* note 2, at 85.

[29] *History of the BLM*, at http://www.blm.gov/nhp/facts/his.html (Mar. 27, 1996) [hereinafter *History of the BLM*].

[30] *Id.*

[31] *Id.*

[32] Frank J. & Deborah E. Popper, *The Reinvention of the American Frontier*, AMICUS J., Summer 1991, at 4.

[33] *Id.*

[34] 43 U.S.C. § 224 (repealed 1976).

[35] *Id.* § 218.

[36] *Id.* § 292.

III. The Evolution of American Land Use Law

> *The true test of American institutions will come when the free public domain is exhausted and an increased population competes for ownership of the land and its depleted resources.*[37]

A. Regulation of Resources

With the West settled, it became necessary to regulate the allocation and consumption of resources. The primary resources in the West are water, minerals, timber, grazing land, and wildlife.

1. Water—State law and local custom generally control water rights. When the Desert Land Act failed to increase productivity of dry lands, Congress passed the Reclamation Act of 1902 to help irrigate the West through construction of structures for water diversion and storage.[38] The Bureau of Reclamation, an outgrowth of the Act, still manages the distribution of water for irrigation and other uses, and the Act continues to generate litigation today. The Reclamation Act was responsible for large projects such as the Hoover Dam and still provides irrigation for millions of acres of land.[39]

2. Minerals—The Mining Act of 1866 provided that "mineral lands are free and open to exploration and occupation" subject to local custom and usage.[40] The Mining Law of 1872 developed requirements for perfecting a mining claim.[41] While title to the land remains with the United States, the interest in the claim, the surface rights, and possession of the land are transferred to the claimant. The claimant's interest in the land becomes "property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

3. Timber—The Timber Culture Act of 1873 granted larger blocks of land to settlers willing to plant trees on a portion of the land in semi-arid areas. However, this statute was primarily intended to encourage settlement of the land. In 1879, Congress decided not to appropriate funds for the regulation of timber cutting on federal lands.[42] The Timber and Stone Act of 1878 allowed the claim of land valuable for timber or stone harvesting for $2.50 per acre. The

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[37] LORD MACAULEY.

[38] 43 U.S.C. § 371.

[39] COGGINS ET AL., *supra* note 2, at 104.

[40] *Id.* at 95.

[41] 30 U.S.C. §§ 22-39. To maintain a claim, a claimant had to invest $100 worth of annual development. The Mining Act of 1872 is still good law.

[42] COGGINS ET AL., *supra* note 2, at 106.

Timer Cutting Act of 1878 legalized the cutting of timber on unclaimed mining land.

4. Grazing Land—The Homestead Act brought ranchers to the West but only access to additional lands could make cattle ranching profitable. In 1890, the United States Supreme Court recognized "an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids their use."[43] Unfortunately, this policy encouraged ranchers to increase the size of their herds and produced the "inevitable consequence" of "severe overgrazing and degradation of the forage producing capacity of the land."[44]

5. Wildlife Resources—It was generally accepted that states owned the wildlife present on federal land.[45] In *Geer v. Connecticut*, the United States Supreme Court held that a state could outlaw the export of game taken from within its borders without violating the Commerce Clause.[46] There was little in the way of wildlife management at the federal level. Wildlife was generally considered either food or a threat.

B. Disposal to Management

In the late 1800s and early 1900s, land-use policy began the gradual shift from disposal to reservation and management. Land that would later become Yellowstone National Park was set aside in 1872. The General Revision Act of 1891 contained a Forest Reservation provision.[47] This provision allowed the President to "set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth . . . as public reservations." This provision led to the "reservation" from the public domain of millions of acres of land that would later become national parks or national forests.

The Organic Act of 1897 authorized protective management of the retained forest reserves.[48] The Act intended "to improve and protect the forest" but did not "prohibit any person from entering upon such forest reservations . . . provided that such persons comply with the rules and regulations covering such forest reservations."[49] Such

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[43] Buford v. Houtz, 133 U.S. 320 (1890).

[44] COGGINS ET AL., *supra* note 2, at 693.

[45] Geer v. Connecticut, 161 U.S. 519 (1896).

[46] *Id.* at 534.

[47] 16 U.S.C. § 471.

[48] *Id.* §§ 473-81 (repealed in part, 1976).

[49] *Id.*

"rules and regulations," which we take for granted today, were still a new idea at the time. By 1901, fifty million acres of land had been withdrawn.[50] In 1903, President Theodore Roosevelt issued the "Pelican Island Bird Refuge Proclamation," which set aside federal land for wildlife protection,[51] and during his presidency, he withdrew another 150 million acres of forest reservation.[52] Both President Roosevelt and his successor, William Howard Taft, withdrew coal and oil rights from the application of the Mining Act of 1872.[53]

1. Increasing Federal Power—In the landmark decision of *United States v. Grimaud*, the United States Supreme Court addressed the growing tension between land reservation policies and grazing interests.[54] A group of ranchers challenged the constitutionality of the provisions of the 1897 Act that delegated rule-making authority to the Secretary of Agriculture and made rule violations a criminal offense. The lower court dismissed criminal prosecutions against ranchers who grazed sheep in the Sierra Forest Reserve without the license required by regulations.

The Supreme Court first affirmed the lower court's decision by a tie vote of four to four but granted a rehearing a month later.[55] The Court "admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."[56] The Court, however, found that the Secretary's authority to make "such rules and regulations . . . as will insure the objects of such reservations" was "not a delegation of legislative power," and validated the Act.[57] The Court also validated the crucial delegation of rule-making authority by finding "[w]hat might be harmless in one forest might be harmful to another. In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management."[58] This case set the stage for modern federal land-use management practices.

In a companion case, *Light v. United States*, the Supreme Court noted: "'All the public lands of the nation are held in trust for

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[50] COGGINS ET AL., *supra* note 2, at 107.

[51] *Id.* at 782. The United States Supreme Court recognized the implied authority of the President to make withdrawals of public lands from use statutes where Congress has acquiesced.

[52] *Id.* at 107.

[53] JAN G. LAITOS & JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW IN A NUTSHELL 84 (1992).

[54] United States v. Grimaud, 220 U.S. 506 (1911).

[55] COGGINS ET AL., *supra* note 2, at 112.

[56] *Grimaud*, 220 U.S. at 517.

[57] *Id.* at 521.

[58] *Id.* at 516.

the people of the whole country . . . . And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."[59]

With this pronouncement, the Supreme Court validated the right of the United States to retain and manage lands "for the people of the whole country" and set the stage for today's battle to determine just what it is "the people" want.

Congress created the United States Forest Service in 1905.[60] The Forest Service was not created, however, purely for conservation purposes. The Secretary of Agriculture's instructions to the newly appointed Chief Forester stated that "[a]ll the resources of forest reserves are for use."[61] In 1916, Congress created the National Park Service to administer the National Park System.[62]

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[59] Light v. United States, 220 U.S. 523 (1911).

> At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford v. Houtz*, 133 U.S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele v. United States*, 113 U.S. 130; *Wilcox v. Jackson*, 13 Pet. 513.
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> It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes. . . . The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely. . . . "All the public lands of the nation are held in trust for the people of the whole country. . . ." And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.

Id.

[60] 16 U.S.C. § 472.

[61] COGGINS ET AL., *supra* note 2, at 118. Instructions from Secretary of Agriculture, James Wilson, to Chief Forester, Gifford Pinchot. Pinchot was a leading figure in the establishment of the United States Forest Service, and worked closely with President Roosevelt. Pinchot is also considered a leading figure in the move toward resource management, although he favored development over preservation. In describing the role of the Forest Service, Pinchot stated that "scenery is altogether outside its province." It is believed that Pinchot wrote the instructions he received from Wilson. But he did favor management of federal resource for the common good, and so he played a vital role in the transition from exploitation to preservation.

[62] NATIONAL PARK SERVICE ORGANIC ACT, 16 U.S.C. § 1. Stephen Mather, Pinchot's

2. The Conservation Movement—The "conservation" movement also began during this period. In 1892, John Muir, a friend of President Roosevelt's, founded the Sierra Club. Muir and the Sierra Club joined battle with the Forest Service and opened the dialogue over values which continues today.[63] In many ways, this was the pivotal era in land-use transition. It was Muir who, on a camping trip in 1903, convinced Roosevelt to create Yosemite National Park.[64] "Muir inspired a new ethic that has been absorbed into the American consciousness . . . . [His] lasting contribution to public land law is incapable of measurement."[65]

The Migratory Bird Treaty Act of 1918 was the first significant wildlife law to interfere with or supersede state wildlife laws.[66] The Taylor Grazing Act of 1934 withdrew most remaining federal lands from prior settlement acts and created "a new class of otherwise unclassified public lands, under the control of the BLM, that were valuable chiefly for grazing, mineral development, and recreation."[67]

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counterpart in the National Park Service, took a different view. Pinchot originally opposed the creation of the Park Service (stating it was "no more needed than two tails to a cat.") While Pinchot advocated the transfer of the national parks to the Forest Service and the development of resources within the parks, Mather believed in development of parks for aesthetic enjoyment by people. He encouraged construction in the parks to support guests (and is responsible for many of the grand lodges located in the great parks in the west). Under Mather, lodges and roads were built in the parks, and train lines were established up to (but not within) the parks. In many ways, Mather established our expectations for our national parks. With their increased popularity, the National Park Service is struggling with these expectations today.

[63] Muir and the Sierra Club battled Pinchot for years over his plan to flood the Hetch Hetchy Valley in Yosemite National Park to create a reservoir. Pinchot won the battle in 1913 and the dam was built, but the controversy helped sway public opinion to favor the creation of national parks. In formulating his plan, Pinchot ignored other suitable areas for construction of the dam. Such examples of tunnel vision lay the groundwork for passage of the National Environmental Policy Act (NEPA), which requires consideration of alternatives and environmental harms.

[64] COGGINS ET AL., *supra* note 2, at 121.

[65] *Id.* at 120. A citizen poll in 1976 named John Muir the "single greatest Californian" in history.

[66] 16 U.S.C. §§ 703-11. Missouri challenged the Act as a violation of states' rights to manage wildlife within their borders, but, in *Missouri v. Holland*, the United States Supreme Court upheld the Act. Justice Holmes wrote: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." Missouri v. Holland, 252 U.S. 416 (1920).

[67] LAITOS & TOMAIN, *supra* note 53, at 84. The Grazing Act requires a permit and payment of fees for use of range lands for grazing. The permit allows grazing of a fixed number of cattle or sheep on specified lands during specified periods. While the statute limits grazing and ended the custom of free grazing, federal lands are still widely used for this purpose. In the early 1990s, 20,000 ranchers held permits for approximately 160 million acres of Bureau of Land Management (BLM) and Forest Service land. *Id.* at 91. The Wild, Free-Roaming Horses and Burros Act of 1971 further checked the influence of ranchers on federal lands. 16 U.S.C. § 1331.

The transition continued between the 1920s and 1960s.[68]

The 1964 Wilderness Act authorized designation of roadless lands as wilderness areas, exempt from development.[69] The National Wildlife Refuge System Administration Act of 1966 established the National Wildlife Refuge system and allowed withdrawal of land for the creation of refuges.[70]

3. The Modern Era—In 1962, Rachel Carson published *Silent Spring*, and the modern environmental era was born.[71] Congress passed a variety of environmental laws, and courts gave the federal government more power to control federal lands, but a federal land use policy was not established.

a. The National Environmental Policy Act (NEPA)—Land use law entered the modern era with the passage of the NEPA of 1969, "the granddaddy" of environmental statutes. The NEPA requires federal agencies to consider environmental effects of, and alternatives to, "major federal actions significantly affecting the quality of the human environment."[72] The NEPA does not require federal agencies to select the most environmentally friendly alternative. It is a planning rather than an action-forcing statute, which requires agencies to document, through an environmental assessment or environmental impact statement, their decision-making processes. As an environmental planning law, the NEPA became a de facto land use law because it significantly influences land use decisions. "[The] NEPA is an environmental impact full-disclosure

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[68] The Mineral Leasing Act of 1920 reserved to the United States all minerals existing under federal lands and withdrew from patents all energy minerals—such as oil, gas, and coal—and subjected them to leasing. 30 U.S.C. § 181. The United States Supreme Court contributed to the transition. In *Hunt v. United States*, a 1928 case, the Court held that the United States could kill deer in the Kaibab National Forest and Grand Canyon National Game Preserve without conforming to state law. Hunt v. United States, 278 U.S. 96 (1928). Justice Sutherland wrote: "the power of the United States to . . . protect its lands and property does not admit of doubt . . . the game laws or any other statute of the state to the contrary notwithstanding. *Id.* at 100. This case undermined the Geer decision, which recognized a state's inherent right to regulate the wildlife within its borders. Free-roaming horses, the descendants of domesticated animals, compete with cattle for forage in some areas. Prior to the Act, the preferred method of management was roundup or slaughter. With the 1971 Act, Congress ensured a place for these now wild horses on federal lands by prohibiting private parties from removing these animals. The BLM is permitted to thin herds when necessary. 16 U.S.C. § 1333(b). The BLM may kill old or unhealthy individuals or offer healthy ones for "adoption" "under humane conditions and use." Animals may not be adopted by ranchers for resale to dog food manufactures. Animal Protection Institute v. Hodel (1988). The BLM also is required to remove animals found on private lands.

[69] 16 U.S.C. § 1311.

[70] *Id.* § 668(dd)-668(jj).

[71] RACHEL CARSON, SILENT SPRING (1962).

[72] 42 U.S.C. § 4321

law, but this is a far cry from setting a substantive 'national policy.'"[73]

b. The Endangered Species Act (ESA)—Congress passed the ESA, the "pit bull" of environmental statutes, in 1973.[74] The ESA places affirmative obligations on all federal agencies. Section 2(c) declares that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."[75]

All federal agencies must "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species."[76] The Act also provides: "The terms 'conserve,' 'conserving,' and 'conservation' mean to use and the use of all methods and procedures which are necessary" to prevent the extinction of the species.[77] Stated more simply, federal agencies must affirmatively seek to recover the species.

Generally, ESA § 7 requires federal agencies to "insure" that their actions will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical."[78] Agencies make this determination "in consultation with and with the assistance of" the United States Fish and Wildlife Service (FWS).[79] This process is known as Section 7 consultation.

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[73] Gary D. Meyers, *Old-Growth Forests, The Owl, and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act and Other Public Lands and Resources Laws*, 18 B.C. ENVT'L. AFF. L. REV. 623, 645.

[74] 16 U.S.C. §§ 1531-43. For a detailed discussion of the ESA, see David N. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?* 143 MIL. L. REV. 161 (1994).

[75] 16 U.S.C. § 1531(c).

[76] *Id.* § 1536(a)(1).

[77] *Id.* § 1532(3).

> The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulatory taking.

Id.

[78] *Id.* § 1536(a)(2).

[79] *Id.*

Agencies may consult either formally or informally. Formal consultation results in the issuance of "a written statement setting forth the Secretary's opinion."[80] "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives" which would allow the action to go forward without violation of the Act.[81] The opinion, known as a jeopardy opinion, is nonbinding. However, federal employees are subject to criminal prosecution for violating the ESA if the opinion is ignored and are immune if they follow it.[82]

The Secretary of the Interior must "determine whether any species is an endangered species or a threatened species."[83] Species so determined to be endangered or threatened are "listed" as such.[84] The determination is made "solely on the basis of the best scientific and commercial data available."[85] It is "unlawful for any person subject to the jurisdiction of the United States to . . . take any such species" or to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation" of the Act.[86]

Once a species is listed, the Secretary is required to develop "recovery plans" to ensure "the conservation and survival of" the species.[87] Additionally, to the "maximum extent prudent and determinable," the Secretary shall "concurrently with making a determination . . . that a species is an endangered or threatened species,

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[80] *Id.* § 1536(b)(3)(A).

[81] *Id.*

[82] *See* Resources Limited v. Robertson, 35 F.3d 1300 (9th Cir. 1994). An agency is justified in relying on an FWS opinion so long as there is "no 'new' information" which would change that opinion. An agency, however, "cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species" and an agency's decision to rely on a FWS opinion cannot be arbitrary and capricious. *Id.*

[83] 16 U.S.C. § 1533(a)(1).

[84] *Id.* § 1533(c)(1). "The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him . . . to be endangered species and a list of all species determined by him . . . to be threatened species." *Id.*

[85] *Id.* § 1533(b)(1)(A).

[86] *Id.* § 1538(a)(1). More specifically, it is unlawful to

> (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species; or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

Id.

[87] *Id.* § 1533(f)(1).

designate any habitat of such species which is then considered to be critical habitat."[88]

The ESA has proven to be one of the most controversial statutes ever passed. Even the agencies of the federal government take inconsistent views. In the landmark case of *TVA v. Hill*, the Department of Justice supported the Tennessee Valley Authority's attempts to proceed with the building of the Tellico Dam even though it was believed certain to lead to the extinction of the snail darter. However, the Department of the Interior filed an appendix to the government brief which opposed the action.[89]

With passage of the ESA, Congress intended to prevent, or at least to slow, the alarming rate of the extinction of species, not to enact land-use law. That Congress realized that the ESA, coupled with NEPA, would become the driving land use statutes for federal lands is doubtful. However, because there is no comprehensive federal land use policy law, the ESA and NEPA have been shoe-horned into that role. For example, the ESA, which only "secondarily protects habitat," is now being used "as a tool to preserve the remaining old-growth forests."[90]

c. Complete Federal Power over Federal Lands—In 1976, the United States Supreme Court settled long-standing questions of federal power over federal lands within states. In *Kleppe v. New Mexico*, the Court found that the United States is more than a mere proprietor regarding federal lands and that Congress has full legislative authority without implicit limitation.[91] The Court stated that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[92]

In 1981, in *Minnesota v. Block*, Minnesota challenged federal restrictions on the use of state lands.[93] The United States Court of

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[88] *Id.* § 1533(a)(3). Critical habitat is designated "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact" of the designation. *Id.* Habitat may be excluded if the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion "will result in the extinction of the species concerned." *Id.*

[89] COGGINS ET AL., *supra* note 2, at 802.

[90] Meyers, *supra* note 73, at 625.

[91] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[92] *Id.* at 541. *Kleppe* recognized Congress's authority to pass legislation protecting wildlife, and validated the Wild, Free-Roaming Horses and Burros Act.

[93] Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). The Boundary Waters Canoe Area Wilderness Act of 1978 protects the boundary water area between Minnesota and Canada. The Act limited use of 920,000 acres of land bordering the waters, of which the United States owned 792,000 acres and Minnesota 121,000 acres. One provision prohibited motorboat and snowmobile use, except in designated areas. Minnesota challenged the law.

Appeals for the Eighth Circuit held that congressional power must extend to regulation of conduct *on and off* public land that would threaten the designated purpose of federal lands.[94] Thus, the complete federal power extends to actions on nonfederal lands that affect federal lands.

As the history of American land-use law demonstrates, federal power to fully regulate federal land, which many might take for granted today, evolved slowly over time.

IV. Multiple Use and Ecosystem Management

> *Ecology is destined to become . . . a belated attempt to convert our collective knowledge of biotic materials into a collective wisdom of biotic navigation.*[95]

During the last twenty years, preservation management philosophy has shifted from preservation for a single use to multiple use and ecosystem preservation. Put simply, multiple use is the desire to serve all competing land-use goals in a compatible manner. It is the effort to plan and integrate seemingly incompatible activities. Ecosystem management acknowledges that species exist within a complex system that man does not always understand. It is an attempt to preserve all portions of the interdependent support network created by nature. Biodiversity, a concept closely related to ecosystem management, is the recognition that the variety of life should be preserved. Protection of endangered species, and consequently of species diversity, is only a subset of biodiversity.

For example, protection of the spotted owl constitutes protection of an endangered species. A plan to protect the spotted owl will not take the marbled murrelet, another old-growth inhabitant, into account. Protection of the old-growth forest ecosystem is a more broad-based approach, which considers the survival of the entire ecosystem and all of its component parts, including those not currently endangered.[96] Many fear this approach because it is more far reaching and restrictive.

The statutes discussed below dictate current federal land management practices. As I will demonstrate, however, they are piecemeal, rather than comprehensive, and fall far short of providing a national land use policy.

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[94] *Id.* at 1249 (emphasis added).

[95] ALDO LEOPOLD, A SAND COUNTY ALMANAC 189 (1948).

[96] Melanie J. Rowland, *Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENV'T L. 503 (1992).

A. The Multiple-Use, Sustained-Yield Act (MUSY)

The MUSY of 1960 declared that "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[97] With this statement, Congress set the course for the land use management that the country follows today. This policy transformed national forests from timber production facilities into versatile tracts of land, able to serve a variety of masters. Versatility, however, takes energy and effort, and the MUSY philosophy is difficult to implement. The statute does not give federal agencies much guidance.

The MUSY defines multiple use as "[t]he management of all the various renewable surface resources . . . in the combination that will best meet the needs of the American people."[98] Making this determination is a daunting task. "The problem of how to protect sensitive and scarce public land resources does not lend itself to easy solutions."[99] The statute's definition of multiple use further defines the term as follows:

> [M]aking the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest yield.

This stunning example of obtuse legislative drafting goes a long way to explain why we are where we are. One court described the MUSY as "breath[ing] discretion at every pore."[100]

B. The National Forest Management Act (NFMA)

The NFMA of 1976, as amended,[101] acknowledges that "the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time."[102] The NFMA requires the following:

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97 16 U.S.C. § 528.

98 *Id.* § 531(a).

99 Meyers, *supra* note 73, at 625.

100 Strictland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975).

101 16 U.S.C. § 1600.

102 *Id.* § 1600(1).

> a comprehensive assessment of the present and anticipated uses, demand for, and supply of renewable resources . . . through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in [MUSY] . . . and public participation in the development of the program.[103]

Most importantly, the NFMA requires the Forest Service to prepare "land and resource management plans" (LRMP).[104] These plans are to be prepared "for each unit of the National Forest System."[105] Implementing regulations require planning on a regional and national level, but national planning consists of a "Renewable Resources Assessment and Program."[106] The national "objectives" developed are incorporated into regional plans, which are considered in individual LRMPs. But LRMPs remain the primary planning tool, the Forest Service has broad discretion at the local level, and the NFMA has failed to produce a national management policy, even within the Forest Service.[107]

C. The Federal Land Policy and Management Act

In the Federal Land Policy and Management Act (FLPMA), Congress declared "that it is the policy of the United States that . . . the public lands be retained in Federal ownership."[108] This represents a radical departure from historic federal land use policy. The FLPMA also declares a policy that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use."[109]

The FLPMA primarily applies to the BLM.[110] While the Act contains limited provisions for BLM/Forest Service interface, the "land use plans" required by the FLPMA are not coordinated with

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103 *Id.* § 1600(3).

104 *Id.* § 1604.

105 *Id.* § 1604(f)(1).

106 36 C.F.R. § 219.4.

107 Meyers, *supra* note 73, at 654-55.

108 43 U.S.C. § 1701(a). "Congress declares that it is the policy of the United States that—(1) the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest."

109 *Id.*

110 *Id.* § 1702(e), (m).

Forest Service LRMPs. Like the NFMA, the FLPMA requires the BLM to "observe the principles of multiple use and sustained yield."[111]

D. A National Policy?

The statutes discussed above constitute the statutory framework for federal land use policy. The BLM and the Forest Service are not required to integrate their planning efforts. The military is not statutorily involved on any level, and none of the planning efforts are coordinated on a national level. The United States substantially lacks a federal land use policy to govern management of its hundreds of millions of acres of land.

E. Ecosystem Management

In June 1992, members of the United Nations executed the "Convention on Biological Diversity" in Rio de Janeiro at the United Nations Conference on Environment and Development, commonly known as the Earth Summit.[112] The Convention seeks "the conservation of biological diversity, [and] the sustainable use of its components."[113] The United States signed the Convention in 1993.[114] One purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[115] Biodiversity and ecosystem management have become a part of American land-use practice.

In the Interior Columbia River Basin, which spreads across parts of Oregon, Washington, Idaho, Montana, and Wyoming, the current administration is attempting to protect and restore "entire communities of living things while still allowing some resource extraction where appropriate."[116] In 1993, President Clinton announced a thirty-one million dollar ecosystem-management project, aimed at avoiding looming litigation over the salmon, bull trout, water quality issues, and old-growth forest management.[117]

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111 *Id.* § 1712(b)(1).

112 United Nations Conference on Environment and Development: Convention on Biological Diversity, 31 I.L.M. 818 (1992) (*entered into force* Dec. 29, 1993).

113 *Id.* at 823.

114 140 CONG. REC. §§ 14046, 14047. The Bush Administration decided not to sign the convention. The Clinton Administration signed the convention, despite reservations, because it already had the requisite number of ratification s to enter into force. For a discussion of the Convention on Biological Diversity, *see* David Eugene Bell, *The 1992 Convention on Biological Diversity: The Continuing Significance of United States Objections at the Earth Summit*, 26 GEO. WASH. J. INT'L L. & ECON. 480 (1993).

115 16 U.S.C. § 1531(b).

116 Kathie Durbin, *Apathy? Not Around Here*, 34 NAT'L WILDLIFE 36, 38 (1996).

117 *Id.* at 40.

The "Northern Rockies Ecosystem Protection Act of 1995" was introduced "to designate as wilderness, wild and scenic rivers, national park and preserve study areas, wild land recovery areas, and biological connecting corridors certain public lands in the States of Idaho, Montana, Oregon, Washington, and Wyoming, and for other purposes."[118] The bill has forty-seven cosponsors, including forty Democrats, five Republicans (from eastern and midwestern states), and two independents.

Ecosystem management is controversial, and both projects face uncertain futures.[119] While the Columbia initiatives were being developed, a rider added to a congressional spending-reduction bill allowed harvest of diseased and "associated" trees without full compliance with existing environmental laws.[120] The exemption angered environmentalists, who charged that it undermined the efforts underway in the Columbia River Basin and permitted "'logging without laws.'"[121] These emerging multiple use and ecosystem management policies have met with strong opposition from some sectors.

V. Backlash and Controversy

> *The Federal Government doesn't have a right to own any lands, except for post offices and armed forces bases.*[122]

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[118] 104 H.R. 852 (introduced Feb 7, 1995). The last cosponsor was added on 13 March 1996.

[119] *Id.* In July 1995, the House voted to cut funding for the project, but in August the Senate restored sufficient funding to complete the environmental impact statement being prepared to consider future management of the area.

[120] Pub. L. No. 104-19 (July 27, 1995). The law allows "salvage timber sale," which is defined as a timber sale for which an important reason for entry includes the removal of disease or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence. Sales are permitted during the emergency period of the date of passage to 30 September 1997. The law permits expedited sales following completion of a document that combines an environmental assessment under section 102(2) of the National Environmental Policy Act of 1969 and a biological evaluation under section 7(a)(2) of the Endangered Species Act of 1973. The document need only consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species or be consistent with any standards and guidelines from the management plans applicable to the National Forest or Bureau of Land Management District, at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible

[121] Durbin, *supra* note 116, at 44.

[122] Paul Rauber & B.J. Bergman, SIERRA, May 1995 (quoting United States Representative Barbara Cubin (R-WY)).

A. The Sagebrush Rebellion

In seeking to encourage development of the country, federal land-use laws created certain expectations that Congress gradually eroded as the country matured. Because the East developed first, its population tended to be more concentrated. As the desire for reservation and conservation grew, available lands were reserved. These lands predominately were in the West.

The federal government always owned these lands; the land never belonged to the states. Nevertheless, the long-brewing backlash against federal land management policy reached its boiling point when Congress formalized its policy of public land retention by enacting the FLPMA.

The resulting movement to pressure Congress to reverse these policies became known as the Sagebrush Rebellion. In 1977, Utah distributed to other western states a proposal for litigation to force the federal government to cede land to the states. In 1979, Nevada asserted ownership of most federal land in the state by passing a state law to that effect. In 1980, presidential candidate Ronald Reagan and Utah Senator Orin Hatch joined the rebellion.

B. Sagebrush II—Taking Back the Land

Discontent with federal land policy in the west continues today. "Throughout the American West . . . state legislators and governors . . . are engaged in full-scale mutiny against federal and state regulations meant to protect what is left of America's natural resources."[123] More than seventy rural western counties passed or proposed laws to take back public lands. In some cases, the tension is so severe that violence results.

In 1993, a BLM office was bombed, resulting in $100,000 in damage. In April 1995, a bomb shattered windows and a computer in the Forest Service's district office in Carson City, Nevada.[124] Later, pipe bombs destroyed a Forest Service office in Elko County, Nevada. Federal land managers now wear bullet-proof vests and travel in pairs.[125] They also carry cards with phone numbers for the United States Attorney's Office and the Federal Bureau of

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123 *New Guys in White Hats and Black Hats for the Old West*, VANCOUVER SUN, June 20, 1995, at A15 [hereinafter *New Guys in White Hats*].

124 Tom Wharton & Christopher Smith, *West's Rebels Take Fight to the Feds*, SALT LAKE TRIBUNE, Apr. 23, 1995 (available on Lexis/Nexis).

125 *Id.*

Investigation and hold conferences to discuss the "winds of war on the Western range."[126]

Confrontation between state and local officials also is on the rise. In Lemhi County, Idaho, a sheriff refused to allow FWS officers to search a rancher's property while they investigated the killing of a reintroduced wolf.[127] The FWS officers presented a valid federal warrant. In Nye County, Nevada, on 4 July 1994, the vice chairman of the county commission bulldozed open a road on federal land closed by the Forest Service.[128]

Nye County, Nevada, is a leading example of the struggle over the future of public lands. The county claimed ownership of federal lands through local ordinance. The Justice Department filed a lawsuit against the county in December 1994 to counter the county's contention that federal officials lack jurisdiction over lands within the state.[129]

In 1995, the county commissioners told the FWS to stay off the state's lands:

> The United States Fish & Wildlife Service does not have the jurisdiction or authority to come onto lands owned by the State of Nevada or private lands to enforce the ESA. You have not been invited by this Board to come into Nye County.[130]

Michael Spear, FWS regional director in Portland, Oregon, responded to the Board in a June 1995 letter:

> The service can indeed enforce the ESA on state or private lands . . . . To the extent that you are implying that federal public lands actually belong to the state, you are incorrect . . . . No court, anywhere, has ever held the ESA to be constitutionally invalid on its face . . . . The service has the same jurisdiction any federal agency has when enforcing

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126 *Id.* The cards bear this message from Forest Service Chief Jack Ward Thomas: "Because you are a Forest Service employee, we will do everything necessary to ensure your safety and protect your rights. Everything will be done to have you released as quickly as possible." They have been instructed to cooperate if detained by angry citizens, according to the *Salt Lake Tribune*.

127 *Id.*

128 *Id. See also New Guys in White Hats*, *supra* note 123. "A Forest Service special agent dodged the advancing blade while attempting to warn angry citizens that their acts were illegal. The agent's remarks were drowned out by the straining diesel engine and the cheering crowd." *Id.*

129 *New Guys in White Hats*, *supra* note 123.

130 Scott Sonner, *Fish and Wildlife Service Flexing Muscles in Nevada Dispute*, Associated Press, June 15, 1995 (available on Lexis/Nexis).

> federal laws . . . . An invitation does not have to be extended in order for the Fish and Wildlife Service to carry out its congressional mandate with respect to the ESA.[131]

He also stated, "Nevada agreed as a condition of statehood to 'forever disclaim all right and title to the unappropriated public lands lying within the territory.'"[132]

On 14 March 1996, the United States District Court ruled that the United States does own the land in question in Nye County.[133] United States Attorney General Janet Reno reported that the ruling confirms that public lands "are owned by all Americans, to be managed by the United States—that's the rule of law."[134]

The Wall Street Journal reported that "county supremacy movement" members plan to "redouble their efforts to get Congress to enact laws limiting regulators' power and even returning federal land to the states."[135] At the same time, the *Journal* reported that Republican leaders are "toning down their rhetoric on environmental issues, out of concern that the public perceives their position on environmental matters as too extreme."[136] The battle, apparently, will rage on.[137]

C. What Is All the Fuss About?

In 1996, the BLM celebrated its fiftieth anniversary.[138] The BLM manages 270 million acres of land, most of it in the western

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131 *Id.*

132 *Id.* The United States acquired the lands in question from Mexico under the Treaty of Guadalupe Hidalgo in 1848, which ended the Mexican War.

133 Charles McCoy, *Ruling Quashes Nevada County's Claim on U.S. Land*, WALL STREET J., Mar. 18, 1996, at A20.

134 *Id.* (opinion unpublished).

135 *Id.*

136 *Id.* Some freshman senate and congressional representatives came in to office with a clear environmental/land use agenda. *See* Paul Rauber & B.J. Bergman, SIERRA, May 1995: For instance, Representative Barbara Cubin (R-Wyoming) stated, "The federal government doesn't have a right to own any lands, except for post offices and armed forces bases." Representative Helen Chenoweth (R-Idaho) asked how the plight of the chinook salmon can be taken seriously "when you can go and buy a can of salmon off the shelf in Albertsons?" Representative Sonny Bono (R-California) stated, regarding endangered species, "Give them all a designated area and then blow it up." Other representatives simply favor turning federal lands over to the states. Representative James Hansen (R-Utah) stated, "I honestly feel that one of the most prudent things we could do is to pass legislation that turns over the BLM lands to the states."

137 The Wyoming legislature passed a bill to provide $1000 for each wolf killed outside Yellowstone Park. Governor Jim Geringer (R) vetoed the bill. The Colorado legislature passed a bill to allow the legislative body to overrule federal programs for reintroducing endangered animals into the State. Governor Roy Romer (D) vetoed the bill.

138 BLM Celebrates 50th Anniversary, at http://www.blm.gov/nhp/news/press.html (Mar. 28, 1996).

states.[139] This amounts to approximately one-eighth of the land surface of America and comprises forty-one percent of federal land. This land was once referred to as "'the land nobody wanted'" because settlers failed to claim it.[140]

Because BLM land is located primarily in western states, it accounts for a relatively large percentage of the total land area in some states. For instance, BLM land accounts for 28% of Montana, 48.8% of Wyoming, and 82.9% of Nevada, as well as over 50% of Oregon, Utah, and Idaho.[141] The Forest Service manages additional land in these states. This wide-spread federal presence apparently causes resentment among some. What the "return the land" movement fails to acknowledge, however, is the benefit enjoyed by the states. Of the 270 million acres of BLM land, over half (160 million acres) is authorized for grazing.[142] Logging and recreation in National Forests and Parks also generate income for states. Despite this, resentment persists.

Controversy also centers around the manner in which the BLM manages its lands. Today, the BLM is trying to satisfy all interests at one time, in keeping with current management philosophy. According to an agency statement, "[the] BLM is working harder than ever to improve the way it manages the land. One of the ways the agency is doing this is by taking a 'big picture' or ecosystem approach to land management."[143] According to the BLM, this management style "is consistent with the BLM's mandate under the Federal Land Policy and Management Act of 1976, which requires the agency to manage in a way that accommodates may uses of the land—such as fishing, camping, hiking, boating, grazing, timber harvesting and mining."[144] This policy, designed to make everyone happy, seems to make everyone mad. Ranchers want more and cheaper grazing land, logging companies want more timber to harvest, outdoor enthusiasts want more trails and ski slopes, and naturalists want more wilderness. The BLM and other federal land management agencies walk a tight rope trying to strike a delicate balance between all of these competing interests.[145]

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139 *History of the BLM*, *supra* note 29.

140 *The BLM Today*, at http://www.blm.gov/nhp/facts/today.html (Mar. 27, 1996) [hereinafter *The BLM Today*].

141 *BLM Map*, at http://www.blm.gov/nhp/natmap.html (Mar. 27, 1996).

142 Facts About BLM Lands, at http://www.blm.gov/nhp/facts/facts.html (Mar. 27, 1996).

143 *The BLM Today*, *supra* note 140.

144 *Id.*

145 The BLM calls such conflicts "inevitable," but "tries to achieve consensus by soliciting advice from all affected parties or 'stakeholders'—such as ranchers, environmentalists and recreationists." *See id.*

VI. The Military Role in Land Management

> *Now more than ever, continued use of, and access to . . . [military] lands is required by today's powerful and sophisticated weapons systems which need large areas for training and testing.*[146]

A. Traditional Military Wildlife Management

If the military is not part of the federal land use management scheme, what is its role? The military departments are trustees for almost twenty-five million acres of land,[147] much of it teeming with wildlife. The military always has had a wildlife conservation mission as the trustee of these lands. Often, wildlife has flourished alongside seemingly incompatible military functions. The Johnston Atoll and Rocky Mountain Arsenal are both excellent examples of this paradoxical success.

1. Nuclear Tests and Birds—The Johnston Atoll, a twelve-mile long coral atoll, which lies 717 nautical miles southwest of Honolulu, was discovered by an American ship in 1796. In 1923, the Biological Survey of the United States Department of Agriculture conducted an expedition to the island to study the wildlife, and President Calvin Coolidge designated the island a bird refuge.[148] In 1934, President Franklin Roosevelt placed the atoll under Navy control, resulting in the first human habitation of the largest island.[149] Johnston Island served as an airfield in World War II, and was transferred to the Air Force in 1948.[150] Joint Task Force Eight used the atoll for a series of high altitude nuclear tests.[151] The Defense Nuclear Agency maintains the island in reserve status for possible future atmospheric nuclear tests.

In 1971, the United States removed its stockpile of chemical munitions from Okinawa, Japan, at the request of the Japanese government.[152] When Congress passed a law which specifically prohib-

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146 *Hearing Before the Subcommittee on Military Procurement and Subcommittee on Readiness of the House National Security Committee*, 104th Cong., 2d Sess. 1996 (Statement of Sherri W. Goodman, Deputy Under Secretary of Defense (Environmental Security)).

147 *Id.* at 14.

148 Exec. Order No. 4467.

149 Exec. Order No. 6935.

150 UNITED STATES DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE, JOHNSTON ATOLL NATIONAL WILDLIFE REFUGE (Sept. 1991) [hereinafter JOHNSTON ATOLL].

151 P.S. LOBEL, A BRIEF HISTORY OF JOHNSTON ATOLL (1991). After the Korean War, Joint Task Force Seven, the organization charged with conducting atomic tests in the Pacific area, was given command of the atoll.

152 Greenpeace USA v. Stone, 748 F. Supp. 749, 752-53 (D. Haw. 1990).

ited the transportation of the stockpile to the continental United States, the Army moved the weapons to Johnston for storage and destruction.[153] The Johnston Atoll Chemical Agent Destruction System (JACADS) was designed to destroy these chemical munitions. Congress then directed the Army to destroy all unitary chemical weapons and named the JACADS facility the demonstration facility for destruction technology.[154]

Despite this history, wildlife continues to flourish. Today, the FWS conducts a full-time conservation program at the atoll.[155] As the only land within millions of square miles of ocean, the atoll supports tens of thousands of migratory seabirds.[156] The atoll itself is composed of unique coral species not found in Hawaii.[157] The coral supports the green sea turtle and the Hawaiian monk seal, both endangered species, as well as 280 species of fish,[158] including the white tip shark.[159] The wildlife conservation function has been consistent with, and has not interfered with, the varied and important national security functions performed at Johnston Atoll.

2. Chemical Weapons and Wildlife—In 1942, the United States purchased twenty-seven square miles of farmland in central Colorado for construction of the Rocky Mountain Arsenal. During World War II, Rocky Mountain Arsenal produced mustard gas, Lewisite, and chlorine gas.[160] During the Korean War, Rocky Mountain Arsenal manufactured white phosphorous and mustard-filled munitions. One commander boasted that "the arsenal can turn out millions of incendiary bombs a year when operating at full capacity."[161] In the 1950s, a new manufacturing area was added for the production of nerve agent.[162]

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153 *Id. See* Pub. L. No. 91-672.

154 *See* Greenpeace USA v. Stone, 748 F. Supp. 749, 752-53 (D. Haw. 1990); Pub. L. No. 91-672; Lawrence E. Rouse, *The Disposition of the Current Stockpile of Chemical Munitions and Agents*, 121 MIL. L. REV. 17 (1988); Warren G. Foote, *The Chemical Demilitarization Program—Will It Destroy the Nations Stockpile of Chemical Weapons by December 31, 2004?*, 146 MIL. L. REV. 1 (1994).

155 LOBEL, *supra* note 151.

156 JOHNSTON ATOLL, *supra* note 150. These include the Golden Plover, which migrates directly from the atoll to the Arctic, remaining in the air for up to seven days at a time. The most numerous species is the Sooty Tern, with an estimated 50,000 to 100,000 breeding pairs on the smaller islands.

157 *Id.*

158 *Id.*

159 LOBEL, *supra* note 151. These include the yellow and Achilles tang, trumpetfish, longnose and chevron butterflyfish, a variety of goatfishes, yellow and saddleback wrasse, and the flame angelfish.

160 *Program Manager for Rocky Mountain Arsenal, Special Historical Issue*, 4 EAGLE WATCH, Aug. 1992, at 6.

161 *Id.* at 8.

162 *Id.* Built between 1951 and 1953, the "North Plants" produced most of the GB nerve agent (also known as Sarin) between 1953 and 1957. Programs to demilitarize,

Rocky Mountain Arsenal produced large quantities of liquid wastes. The Army first disposed of these wastes in a series of unlined lagoons and later in a 243-million gallon lined pond. Additionally, the Shell Oil Company produced pesticides at Rocky Mountain Arsenal for thirty years.[163] In 1974, the Army discovered groundwater contamination off post. All of Rocky Mountain Arsenal is now listed on the National Priorities List (NPL).

To ensure safety and security, the production and disposal facilities were placed in the center of the land to create a buffer area. As development around Rocky Mountain Arsenal increased, wildlife increasingly sought a safe haven in this buffer area. A winter roosting population of the American Bald Eagle return to cottonwood trees each year, attracted by an abundant prey base of black-tailed prairie dogs, rabbits, and other small mammals. The burrowing owl, a candidate for listing as threatened or endangered, inhabits abandoned prairie dog colonies during the summer months. The Ferruginous hawk, also a candidate species, as well as other raptors such as Swainson's hawks, great horned owls, and ospreys, call Rocky Mountain Arsenal home.

In 1992, Congress declared the DOD's most complex and expensive clean-up site a National Wildlife Refuge. The FWS conducts an extensive management program alongside, and in partnership with, the clean-up program, which is estimated to cost approximately two billion dollars.

B. The Importation of Wildlife to Military Installations

Today's mobile and mechanized tactics require more land than ever before for military training. For instance, a Civil War battalion required 200 acres of land for training maneuvers.[164] In contrast, today's mechanized battalion requires over 80,000 acres for effective combat training.[165] At the same time, the military is being asked to drastically expand its traditional wildlife conservation mission. Increasingly, this involves the importation of individual animals or species onto military property.

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or get rid of, these weapons began in the late 1950s. Full-scale disposal operations began in the 1970s. Between 1971 and 1973, over 3000 tons of mustard agent were destroyed. A destruction facility for GB also operated for several years.

163 *Id.* In fulfillment of Rachel Carson's prophesy regarding DDT, scores of ducks died at RMA from pesticide poisoning. The poisoning was attributed to settlement of pesticides in lake sediments, which were ingested by fish, and in turn by ducks that ate the fish. One of the first environmental clean-up projects at RMA involved dredging the lake bottoms to remove poisonous sediments.

164 *Id.*

165 *Id.*

1. Ferret Boot Camp—In 1991, the FWS asked Rocky Mountain Arsenal for permission to establish a training ground for black-footed ferrets. The black-footed ferret is severely endangered over most of its range, and is currently bred in captivity in the hopes that its numbers will increase sufficiently to allow it to be returned to the wild.[166] Because the ferrets are bred in captivity, they lack the skills necessary to survive in the wild.[167] The FWS decided to establish a boot camp to train the ferrets.[168] They asked to put it on the Rocky Mountain Arsenal. The Army declined because of the ongoing clean-up program, but the FWS was undaunted. They established the facility at the Pueblo Army Depot two hours south of Denver.[169]

The training facility simulates wild conditions. Ferrets live in outdoor pens with access to active prairie dog burrows.[170] Ferrets learn to hunt the prairie dogs, their natural food source, in a protected environment. Studies show that trained ferrets are three times as likely to survive in the wild as those released directly from captive breeding facilities.[171] Unfortunately, ferrets are susceptible to plague, and eighteen ferrets died at the Pueblo facility in November 1995.[172] In January 1996, the FWS established another training facility at Warren Air Force Base in Wyoming and transferred two male Pueblo ferrets for mating with females from another group.[173]

This ferret program is an example of cooperative land management between the military and FWS. Because the training programs are small, confined, and temporary, there are few risks to the military. The FWS runs the program and is responsible for its success. While it would be difficult for the military to evict the ferrets, few

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166 Patrick O'Driscoll, *Experts to Map Ways to Restore Ferrets*, DENVER POST, June 1, 1995, at B-4 [hereinafter *Ways to Restore Ferrets*]. The black-footed ferret was thought to be extinct until a single colony was found on a ranch in Wyoming in 1981. After an outbreak of an unknown disease killed most of the colony members in 1987, the survivors were captured and placed in a captive breeding program. Since that time, several hundred ferrets have been bred in captivity, and 200 have been reintroduced in Wyoming, Montana, and South Dakota since 1991. Most of the reintroduced animals have died, as they become easy prey for hungry predators such as coyotes, badgers, hawks, and owls. *See* Patrick O'Driscoll, *Plague Latest Hurdle to Restoring Ferrets*, DENVER POST, Sept. 10, 1995, at B-1 [hereinafter *Plague*].

167 *Ways to Restore Ferrets, supra* note 166, at B-4.

168 *Id.*

169 *Id.* The Pueblo Army Depot also is on the NPL.

170 *Plague, supra* note 166.

171 *Id.* Unfortunately, an outbreak of plague among prairie dogs in reintroduction areas jeopardizes the release program. Ferrets, thought to be immune to plaque, recently have been proven susceptible to the disease.

172 Patrick O'Driscoll, *Plague Decimates Federal Ferret Program*, DENVER POST, Nov. 26, 1995, at B-4. The ferrets died from eating plague-infected prairie dogs.

173 *See* ROCKY MOUNTAIN NEWS, Jan. 25 1996, at 6A.

land use issues are triggered because the amount of land involved is so small. The program, now at two military facilities, demonstrates the cooperative role that the DOD is playing in wildlife conservation.

2. Red-Cockaded Woodpeckers (RCWs) Come Home to Roost at Fort Polk—In 1995, the Red Oak Timber Company asked the EPA for an "incidental take permit" so that it could cut down trees which are habitat for the RCW.[174] With the permit request, the company filed a Habitat Conservation Plan (HCP). Habitat Conservation Plans spell out what applicants will do to mitigate their projects' impact to the species. When approved, HCPs become enforceable agreements between the FWS and the applicant.[175] Red Oak proposed to "translocate" RCWs "from the project site to the Fort Polk military installation."

Transporting more RCWs to an Army installation with an important training mission just to allow a timber company to cut down trees does not appear to be in the Army's best interest. Red-cockaded woodpeckers need a lot of space. A single clan of two to six birds requires about 125 acres of habitat.[176] However, according to Will McDearman, staff biologist for the FWS, the move makes sense. An investment of eight to ten thousand dollars to implement the HCP will yield $250,000 in timber for Red Oak.[177] The RCWs on Red Oak's land are isolated groups which are too small to contribute to the overall recovery of the species. Red Oak will set aside ten sites, and the FWS will add artificial cavities to the trees. In the spring, the FWS will harvest the offspring and transport them to Fort Polk to augment that installation's existing RCW population. The Army, McDearman claims, agreed.

The ESA coordinator for the Army Environmental Law Division was unaware of the agreement but said that it made sense from the Army's perspective.[178] Because the Army has an obligation

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[174] Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for a Timber Harvest Operation by Red Oak Timber Company in Vernon Parish, Louisiana, 60 Fed. Reg. 26,049 (1995.) Section 10(a)(1)(B) of the ESA provides for the issuance of permits where "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Incidental take permits allow the holder to kill or otherwise take up to a specified number of endangered animals.

[175] *Id.* Section 10(a)(2)(A) of the ESA requires submission of a conservation plan, known as a Habitat Conservation Plan, which requires a statement of "the impact which will likely result," and "what steps the applicant will take to minimize and mitigate such impacts."

[176] 56 Fed. Reg. 40,598 (1991).

[177] Telephone Interview with Will McDearman, USFWS staff biologist, Jackson, Mississippi Field Office (Jan. 24, 1996).

[178] Interview with Major Tom Ayers, United States Army Environmental Law Division, Washington, D.C. (Jan. 29, 1996).

to recover its RCW populations, it has to set aside land for RCW expansion which would otherwise be available for training. Recovery requires more land than maintenance of a population, so the land set aside for recovery is more than a recovered population would need. If the population increases, the amount of land set aside can actually decrease, and more land will be available for training.

In this scenario, the Army allowed private parties to use its land, while setting aside installation land. The land on Fort Polk was more valuable to conservation efforts than private land because large tracts have been left undisturbed. Undeveloped military land has become essential habitat for endangered species because surrounding land has been developed. The paradox is that Fort Polk's seemingly undeveloped land was actually "developed" long before the surrounding off-post land. The Army actively uses the land for training, and, in a sense, this land is developed because it is being used for its intended purpose, training.

C. Buffalo Roam at Fort Wingate

In keeping with the maxim "no good deed goes unpunished,"[179] the military is often the victim of its own good intentions. One effort at cooperation and generosity landed the Army in federal district court.

In 1966, the New Mexico Department of Game and Fish established a bison herd on Fort Wingate Army Depot.[180] New Mexico originally intended to use the herd as breeding stock to produce offspring for formation of additional herds, but the herd was, at the time, the only publicly owned herd in the state.[181] The state managed the herd after its introduction.[182] As the herd flourished, population control measures became necessary.[183] Throughout the 1970s, New Mexico held auctions to remove some surplus animals and transferred others to local Native American tribal herds.[184]

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[179] While this phrase is often repeated in the Army, I first heard it from Colonel (Retired) McGowan, previously the Chief of the United States Army Environmental Law Division.

[180] The Fund for Animals v. United States, Civ. No. 96-0040 MV/DJS, at 2 (D. N.M. Jan. 26, 1996).

[181] NEW MEXICO DEPARTMENT OF FISH AND GAME, NEW MEXICO WILDLIFE NEWS, Oct. 19, 1995, at 2.

[182] *Fund for Animals*, Civ. No. 96-0040 MV/DJS, at 2.

[183] NEW MEXICO DEPARTMENT OF FISH AND GAME, NEW MEXICO WILDLIFE NEWS, Oct. 19, 1995, at 23. Fort Wingate is estimated to be capable of supporting approximately 75 bison. The herd reached 150 at one time.

[184] *Id.* In 1972, 115 bison were sold. In 1979, 43 bison were sold. In 1990, 95 bison were sold. In 1993, 25 bison were moved to BLM property, but were returned to Fort Wingate when the BLM determined the herd to be "unmanageable and a nuisance."

A 1980 cooperative agreement between New Mexico and the Army permitted state-authorized hunting of game on Fort Wingate "subject only to the requirements of military security and safety."[185] New Mexico authorized periodic antelope hunts pursuant to that agreement.[186]

Fort Wingate closed in 1993. The four remaining federal employees had no responsibility for the herd.[187] In August 1995, New Mexico requested permission to conduct a bison hunt, and Fort Wingate agreed, subject only to safety concerns.[188] In October 1995, after holding public hearings, New Mexico adopted regulations authorizing the hunt and issued nine permits for the taking of nine bulls.[189]

On 10 January 1996, The Fund For Animals filed a "Complaint for Declaratory Relief" to prevent the hunt. The Fund claimed that the hunt was a "major federal action"[190] with the potential to significantly affect the human environment under the NEPA. The complaint sought an injunction to stop the hunt until the Army complied with the NEPA by preparing either an environmental assessment or environmental impact statement.[191]

In its opposition brief, the United States countered that because the United States lacked a substantive role in the decision-making process, the action did not rise to the level of a major federal action. The United States argued that the Army "had no discretion to deny permission to access the lands for hunting purposes for any reason other than military security or safety."[192] The "bison have always belonged to the State of New Mexico and the agreement gives it the power to manage and dispose of them. The Army has no control or interest in the bison."[193]

On 26 January 1996, the United States District Court for the District of New Mexico found the Army's role "sufficiently major in scope to trigger NEPA analysis procedures."[194] The district court

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185 The Fund For Animals, Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order, Civ. No. 96-0040 MV/DJS (filed Jan. 12, 1996).

186 *Id.* Exhibit B.

187 *Id.* at 3.

188 *Id.* at 2-3.

189 *Id.* at 3.

190 The Fund For Animals, Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order, Civ. No. 96-0040 MV/DJS, at 6 (filed Jan. 12, 1996).

191 The Fund for Animals v. United States, Complaint for Declaratory Relief and Mandamus, Civ. No. 96-0040 MV/DJS (filed Jan. 10, 1996).

192 *Id.* at 8.

193 *Id.* at 9.

194 The Fund for Animals v. United States, Civ. No. 96-0040 MV/DJS, at 6 (D. N.M. Jan. 26, 1996).

concluded that the "[d]efendants had obvious discretion over the outcome."[195] As a result, the Army was required to perform costly, time-consuming NEPA analysis regarding the disposition of a bison herd it never requested, managed, or owned.

D. Where Are We and Why?

Federal officials currently want to put the Mexican wolf onto White Sands Missile Range. The story of the wolf is one of the most ironic environmental tales. After *intentionally* eradicating it, federal land managers now want to restore the wolf, and they want the military to help. Why would federal land managers want to send these highly endangered animals to a missile range, and what are the risks to the military?

VII. The Tale of the Wolf

> *Wolves . . . stir the most visceral human fears—and the deepest human reverence.*[196]

A. The Legend of the Wolf

The wolf is one of the most universally hated species ever to walk the planet. Although the wolf was revered by some cultures—such as Native Americans, Eskimos, and other hunt-based societies—which considered the wolf a brother and admired its abilities, most modern societies intentionally and systematically exterminated the wolf.[197]

In Europe, the view of the wolf evolved over the ages.[198] During the Roman Empire, the legend of Romulus and Remus, who were raised by a she-wolf, depicted the wolf in a positive light.[199] During the Middle Ages, the human population increased dramatically due to improved agricultural techniques.[200] As forests were cleared and

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195 *Id.* at 7.

196 Karen Brandon, *Why Wolves Arouse the U.S. West*, TORONTO STAR, Mar. 25, 1995, at C6.

197 BARRY HOLSTUN LOPEZ, OF WOLVES AND MEN 77-97 (Charles Scribner's Sons 1978); United States Fish and Wildlife Service, *Gray Wolf (Canis Lupus)*, at http://www.fws.gov/bio-gwol.html [hereinafter *Gray Wolf*]; RUSSELL J. RUTTER & DOUGLAS H. PIMLOTT, THE WORLD OF THE WOLF 29 (J.B. Lippincott Co. 1968); ERIK ZIMER, THE WOLF: A SPECIES IN DANGER 293 (Eric Mosbacher trans., 1981).

198 ZIMER, *supra* note 197, at 295-96.

199 *Id.* at 296. However, scientists have declared the legend of Romulus and Remus impossible, because the wolf's lactation period would not be long enough to rear a human child.

200 *Id.*

hunting for food and sport increased, wolves were driven into areas inhabited by humans in search of food.

Charlemagne employed professional wolf hunters, and the first reports of wolves attacking humans appeared.[201] "Whether they really attacked human beings cannot be established. It is hard to distinguish among reality, invention, and magic in the literature of the period."[202] *Little Red Riding Hood*, published in France in 1697, is a story that depicts such an attack.[203] In the story, a wolf devours an unfortunate grandmother, then lies in wait for the granddaughter to return.

While wolf attacks occurred, the role of myth is evident. For instance, many European depictions of wolves from the Middle Ages portray angry black wolves, but there were no black wolves in Europe.[204] Some biologists now attribute isolated wolf attacks on man to rabies, which was widespread in Europe but uncommon in North America.[205] Man's negative opinion of the wolf is widely attributed to his transition from a hunter gatherer to a herder.[206] This loathing of the wolf was widespread throughout Europe and the British Isles and American colonists brought it with them to the new world.

B. The Wolf in America

The "colonist was not much troubled by wolves until he began raising stock."[207] The first livestock was imported at Jamestown, Virginia, in 1609, and stock animals were common by 1625.[208] In 1630, Massachusetts passed the first wolf bounty statute. Other eastern colonies followed suit throughout the 1600s, and the war on the wolf began.[209] Although wolves attacked stock animals, the extent of these attacks was probably exaggerated. A limited number of individual wolves committed most of the attacks, but reprisal was

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201 *Id.*

202 *Id.*

203 Jim Dutcher (producer and film maker) WOLF: RETURN OF A LEGEND (ABC/Kane Prod. Int'l, Inc. 1993).

204 ZIMER, *supra* note 197, at 298.

205 RUTTER, *supra* note 197, at 24-26.

206 ZIMER, *supra* note 197, at 295. The "positive attitude to the wolf . . . changed only with the extensive keeping of domestic animals, when the wolf became an enemy." RUTTER, *supra* note 197, at 29. "The formal declaration of war was undoubtedly made by man the herder who greatly prized his domestic animals and was very jealous of them."

207 LOPEZ, *supra* note 197, at 171.

208 *Id.*

209 *Id.* at 171-72.

indiscriminate.[210] As eastern forests were cut and settlements expanded, the eastern wolf was driven west and south. Despite bounties and wolf hunts, the loss of habitat through the clearing of forests was the primary cause of near extinction for the eastern wolves.[211]

In the West, wolves were larger and hunted the same animals as man. In one of his journals, Meriwether Lewis referred to the wolf as the "shepherd of the buffalo."[212] As settlers "emerged from the dark forests" of the East and entered the plains,[213] they met *Canis lupus nubilis,* the prairie wolf. Wolves were regarded with "amusement" and as being "the very incarnation of destruction"[214] by early settlers. In the early days of open-range cattle ranching, wolf kills of cattle (called depredation) were largely tolerated as an inherent risk, and ranchers feared Native Americans more than wolves.[215]

Trappers were the first in the west to kill wolves[216] and they first killed wolves incidentally to beaver hunting. Then, in the mid-1800s, when beaver populations had been exhausted, they began to hunt wolves for pelts. In 1853, the Missouri outfit of the American Fur Trading Company shipped 3000 wolf pelts.[217] Buffalo, however, had become the primary target, with seventy-five million killed between 1850 and 1880.[218] Generally, only hides were taken, leaving carcasses for wolves to scavenge. This constant food supply encouraged wolves to follow hunters, and hunters began to shoot wolves for sport or skins.[219]

Cattle ranching increased during this period, and as the buffalo were eradicated, hungry wolves turned to cattle for food. In the 1870s, ranching interests began to form livestock associations.[220]

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[210] *Id.* at 173. For instance, if a sheep died of natural causes and was scavenged by wild dogs or wolves, the death would be attributed to wolves. Most attacks by wild dogs also would be attributed to wolves, because their foot prints are similar and few could tell the difference. Responsible wolves were not hunted, rather, wolves were hunted and killed indiscriminately.

[211] RUTTER, *supra* note 197, at 37.

[212] LOPEZ, *supra* note 197, at 174.

[213] *Id.*

[214] *Id.* at 175. German explorer Maximilian of Wied wrote that he was "long amused" by the antics of wolves and found their howl pleasing. A buffalo hunter described the wolf as "the very incarnation of destruction, with his powerful jaws of shark teeth." Others have described the wolf as "cowardly."

[215] RUTTER, *supra* note 197, at 38.

[216] LOPEZ, *supra* note 197, at 177.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 177-78.

[220] RUTTER, *supra* note 197, at 38.

Ranching was hard and was subject to the vagaries of drought and disease. Depredation may not have been a great threat, but it was controllable. The poison strychnine was introduced in the 1860s and became a tool for controlling wolves.[221] It became "an unwritten law that no rangeman would pass an animal carcass without poisoning it . . . in the hope of eventually killing one or more wolf."[222] Wolves in mountainous areas fared better, subsisting on deer, elk, and other still plentiful game. However, "the slaughter of wolves on the prairie reached its peak between 1875 and 1895 when bounties were offered by state and local governments and by livestock associations.[223] The widespread practice of poisoning had unintended effects. Raptors and other animals often fed on wolf carcasses and died.[224] Generally, strychnine use was abandoned by 1900 as too dangerous. Steel traps became the weapon of choice.[225]

"As the land filled up with other ranchers, as water rights became an issue, and as the Indians were removed to reservations, however, the wolf became . . . 'an object of pathological hatred.'"[226] Perhaps people "in a speculative business like cattle ranching singled out one scapegoat for their financial losses . . . . There was a feeling that as long as someone was out killing wolves, things were bound to get better."[227]

In Montana, a one-dollar wolf bounty was offered in 1884, and 5450 wolves were presented the first year.[228] The state wolf bounty was raised to five dollars in 1899. "People went out and killed wolves far and wide, wolves up in the Bitterroot Mountains that had never even seen sheep and cattle."[229] Even as hatred toward wolves began to lessen among ranchers in the early 1900s, the Montana legislature passed a law requiring veterinarians to inject wolves with mange and release them to spread the disease among wolf packs.[230]

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221 *Wolves* (National Audubon Society, Inc. & TBS Productions, Inc. 1989).

222 RUTTER, *supra* note 197, at 38.

223 LOPEZ, *supra* note 197, at 179.

224 *Id. See also* RUTTER, *supra* note 197, at 38.

225 LOPEZ, *supra* note 197, at 190.

226 *Id.* at 181.

227 *Id.* at 184.

228 *Id.* at 181. The cattle market was profitable that year due to high prices, but a harsh winter in 1886 devastated stock herds. At the same time, grazing policies were changing, and business became more difficult for the rancher. Similarly, the sheep industry, which "had lost more animals to bears and mountain lions than to wolves, began to blame its every downward economic trend on the wolf." *Id.* at 182.

229 *Id.*

230 *Id.* at 183.

Wolves suffered a similar fate in other western states.[231] The wolf did not benefit from the new American conservation movement. In 1915, the United States Congress appropriated $125,000 to provide wolf hunters on public grazing land. By 1942, government hunters had killed over 24,000 wolves in Colorado, Wyoming, Montana, and western North and South Dakota.[232] "A final devastating blow fell when officials in Yellowstone decided to exterminate the park wolves—they succeeded."[233]

VIII. The Return of the Wolf

> *[T]o keep every cog and wheel is the first precaution of intelligent tinkering . . . .*[234]

A. Recovery and Reintroduction

The ESA mandate for species recovery required the FWS to reintroduce some species into the wild. Like the black-footed ferret, several species survived only in captivity in breeding programs. Who would allow the FWS to place an endangered species on their property? Landowners dread the discovery of an endangered species on their property because of the restrictions that the ESA places on their activities. Even most states and federal agencies did not want to host endangered species. If the ferret comes to a state park, other activities, such as grazing, trapping, and recreation have to be curtailed to protect the ferret.

In response to this problem, the ESA Amendments of 1982 gave the Secretary of the Interior increased flexibility in implementing the Act. Congress recognized the ESA's inherent "tendency to discourage voluntary introduction of species in areas of their historic range."[235] Through the amendment, they hoped to reduce "political opposition to reintroducing species" and "encourage private parties

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231 In 1912, Colorado's Piceance Creek Stock Growers' Association offered $150 per wolf. *Id.* at 187. In all, 80,000 United States bounties were collected between 1883 and 1918. Audubon, *supra* note 221.

232 LOPEZ, *supra* note 197, at 187. Government hunters killed over 850 wolves in Arizona and New Mexico between 1916 and 1960. United States Fish and Wildlife Service, United States Department of the Interior, Draft Environmental Impact Statement 1-6 (June 1995) [hereinafter Draft EIS].

233 Wolves, *supra* note 221. Between 1914 and 1926, park officials killed at least 136 wolves, including 80 pups.

234 LEOPOLD, *supra* 95, at 190.

235 H.R. REP. No. 567, 97th Cong., 2d Sess. (1982) (available at 1982 WL 25083 (Legis. Hist.)) [hereinafter H.R. Rep. 97-567].

to host experimental populations on their lands."[236]

Section 10(j) of the ESA[237] permits the Secretary to "authorize the release (and the related transportation) of any population . . . of an endangered species or a threatened species outside the current range of such species if . . . such release will further the conservation of such species."[238] Prior to release, the Secretary "shall by regulation identify the population and determine . . . whether or not such population is essential to the current existence of an endangered species or a threatened species."[239] If it is not, it is designated a nonessential experimental population. A population released under the provisions above is considered an "experimental population" so long as it is "wholly separate geographically from nonexperimental populations of the same species."[240] The Secretary is not permitted to designated critical habitat for nonessential experimental populations.[241]

An experimental population may be treated as a threatened species instead of an endangered species.[242] Threatened species receive less protection under the ESA than endangered species. Protection for threatened species is limited to regulations adopted by the Secretary of the Interior.[243] Because protection of threatened species is limited to regulations, the FWS can tailor the regulations to address the special needs of the experimental population and its

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236 *Id.* The legislative history recognizes that the introduction of listed species outside their current range "if carefully planned and controlled, may be beneficial in securing the restoration of listed species."

237 Pub. L. No. 97-304, § 6 (amended ESA § 10 by adding § 10(j)).

238 16 U.S.C. § 1539(j)(2)(A).

239 *Id.* § 1539(j)(2)(B). The legislative history indicates that a population will be considered essential if "the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild." The statute does not prohibit the release of a population determined to be essential, and does not impose any affirmative requirement if such a determination is made.

240 *Id.* § 1539(j)(1). The 1982 amendments do not specify whether a population determined to be essential may be released under § 10(j) or whether it may be considered an experimental population. The conference report is inconsistent in that regard. In one passage, the history indicates that "[t]o qualify for the special treatment afforded experimental populations, it is necessary to determine whether the population is essential to the continued existence" of the species. A later passage states that "in most cases, experimental populations will not be essential." In light of the conference report, the most reasonable reading of the vague language of the statute is that essential experimental populations may be designated and released, but only nonessential populations will receive the special treatment discussed below. The implementing regulations, however, allow an essential experimental population to be treated as a threatened species.

241 *Id.* § 1539.

242 *Id.* § 1539(j)(2)(C). The statute does not indicate whether essential experimental populations may be treated as threatened. The House Report is more clear and more detailed than either the conference report or the statute. It indicates that "[e]ach experimental population is to be treated as a threatened species under the act."

243 *Id.* § 1533(d) provides:

reintroduction area. These regulations provide flexibility and can lessen the sting of suddenly having to contend with a new endangered species.

Additionally, an experimental population that is determined to be nonessential will be treated "as a species proposed to be listed" for Section 7 purposes, except when it is on a National Wildlife

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> the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit . . . any act prohibited . . . with respect to endangered species; except that with respect to the taking of resident species . . . such regulations shall apply in any State which has entered into a cooperative agreement . . . only to the extent that such regulations have also been adopted by such State.

Section 6 provides for cooperative agreements with states. "[T]he Secretary is authorized to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered and threatened species." In other words, threatened species are protected to the extent that the Secretary deems necessary through regulations. The extent of protection, however, is tempered in the case of "taking" provisions. These provisions will apply in states that have not entered into cooperative agreements and in states with cooperative agreements if such states adopt them. Thus, states have a role to play in, and can limit, the protection of threatened species. The Secretary's power to regulate the protection of threatened species is not absolute. For example, *see Fund for Animals v. Andrus and Sierra Club v. Clark*.

Threatened status does not give the FWS unfettered discretion regarding the species. In *Sierra Club v. Clark*, the Sierra Club challenged changes to regulations concerning the Minnesota Timber Wolf. The USFWS published regulations allowing public sport trapping of the timber wolf, a species listed as threatened. The district court declared the regulation illegal. On appeal, the Secretary argued that the decision was permissible under ESA § 4(d) which authorizes the Secretary to issue regulations governing threatened species. Invalidating the regulation, the United States argued, "destroyed the distinction made in the Act between endangered and threatened species." The United States Court of Appeals for the Eighth Circuit concluded, however, that the discretion permitted by § 4(d) "is limited by the requirement that the regulation he is to issue must provide for the conservation of" the species.

The United States argued that language contained in both the Senate and House reports on the 1973 Act demonstrated Congress's intent that the Secretary have discretion to permit "harvest" of threatened species. The Court, however, gave precedence to the Conference Committee report, which removed language dealing with harvesting and substituted language indicating that controlled taking of threatened species should be limited to "extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where the pressure can be relieved in no other feasible way."

The United States then argued that the Senate Committee Report on the 1982 amendments contradicted the Court's interpretation. Before reviewing that language, the Court quoted the United States Supreme Court, stating "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Next, the Court examined the language regarding the 1982 amendments. The Senate Committee Report discussed the taking of members of an experimental population. Where appropriate, the regulations may allow for the direct taking of experimental populations. For example, "regulations pertaining to the release of experimental populations of predators . . . will probably allow for the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition." The Court concluded that it did "not follow that the report authorizes or approves of sport taking of threatened species."

Refuge or a National Park.[244] Therefore, for purposes of Section 7 consultation, the military and other agencies are permitted to treat nonessential experimental populations merely as members of a candidate species. A candidate, or proposed, species is one that is "presently under consideration for listing" as threatened or endangered.[245]

Candidate species "have no legal status, and are accorded no protection" under the ESA.[246] Federal agencies are still required to enter into informal consultation with the FWS if their actions are "likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat."[247] During the consultation, the FWS "will make advisory recommendations . . . on ways to minimize or avoid adverse effects."[248] The FWS is required to document the conclusions and recommendations offered during the conference.[249]

What does this mean for the federal landowner hosting the species? Consultation is still required, but it always will be informal unless the agency requests formal consultation. The agency will not be required to prepare a biological assessment.[250] This will save the agency considerable work. However, because the species is treated as threatened for purposes other than the consultation, the agency is still bound by the Section 7 requirements to carry out "programs for the conservation of endangered species and threatened species."[251] Federal agencies are still subject to the general take prohibition of Section 9, except as authorized by the specific regulations adopted for the population. So while federal agencies are relieved from some of the procedural requirements of Section 7, they are still at risk if they violate the suggestions offered by FWS and should still seek the protection of a biological opinion as a shield for their actions.

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244 16 U.S.C. § 1539(j)(2)(C)(i).

245 7 C.F.R. pt. 1940 (Exhibit D to subpt. G). Candidate species are divided into two categories. Category I species are those "for which FWS currently has substantial data on hand to support the biological appropriateness of proposing to list the species." Category II species are those "for which information now in the possession of the FWS indicates that proposing to list the species . . . is possibly appropriate but for which conclusive data on biological vulnerability and threat(s) are not currently available to presently support proposed rules."

246 50 C.F.R. § 402.12(d).

247 *Id.* § 402.10(c).

248 *Id.*

249 *Id.* § 402.10(d).

250 *Id.* § 402.12(d)(1).

251 *See* 16 U.S.C. §§ 1536(a)(1), 1539(j)(2)(C)(i). Section 1539(j)(2)(C)(i) allows experimental populations to be treated as candidate species for purposes of section 7, except for subsection (a)(1) of section 7, which still applies.

Regulations promulgated to protect the experimental population "shall provide . . . [m]anagement restrictions, protective measures, or other special management concerns of that population."[252] Regulations also must provide "[a] process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species"[253] To accomplish the release and management of the species, the Secretary is authorized to issue incidental take permits pursuant to ESA § 10(a)(1)(A).[254]

The FWS is required to consult with affected state and local governments, federal agencies, and private landowners.[255] Promulgated regulations must "to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies, and persons holding any interest in land which may be affected."[256] This section requires coordination between the FWS, state agencies, county and municipal governments, or their equivalents, and owners and users of land such as those holding grazing or timber permits on federal land.

The FWS issued implementing regulations interpreting the statute.[257] The regulations clarify the requirements for treatment of an experimental population as a candidate species for Section 7 con-

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252 50 C.F.R. § 1781(c).

253 *Id.* § 1781(c)(4).

254 *Id.* Section 10(a)(1)(A) of the ESA provides for the issuance of incidental take permits "for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental population."

255 50 C.F.R. § 1781(d).

256 *Id.*

257 50 C.F.R. §§ 17.80-17.83. The regulations mirror the House Report more closely than does the statute. The regulation defines an "experimental population" as "an introduced and/or designated population . . . that has been so designated . . . but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species." "Any population determined by the Secretary to be an experimental population shall be treated as if they were listed as a threatened species. . . ." The regulations clarify the statute, and indicate that all experimental populations will be treated as threatened. The following language supports this conclusion: "The term 'essential experimental population' means an population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental populations are to be classified as 'nonessential.'" Because the regulation allows for both essential and nonessential populations, and does not distinguish in providing for the treatment of experimental populations as threatened, it must be assumed that even essential experimental populations will be treated as threatened.

The regulations provide for overlap between the range of the experimental populations with natural populations. If the range overlaps at times, the released population will lose its experimental designation during the overlap, and with that loss, will again be subject to the full protection of the ESA. The language regarding overlap is taken almost directly from the House Report. *See* H.R. Rep 97-567, *supra* note 235.

sultation purposes. With the nonessential, experimental populations designation, federal agencies may treat the species as if it were merely a candidate for listing for Section 7 consultation purposes. If the population is determined to be an essential experimental population, it will be treated as threatened for Section 7 consultations.[258] As discussed above, this would require the preparation of a biological assessment and necessitate a formal consultation, but the significance of the consultation remains the same under either scenario.

B. Wolf Reintroduction

All wolves belong to the *Genus Canis*. The domestic dog, *Canis familiaris*, and the coyote, *Canis latrans*, are its closest relatives.[259] There are two species of wolf in the world: the red wolf and the gray wolf.[260] Both are listed as endangered species under the ESA. Like the black-footed ferret, some wolves were placed in emergency captive breeding programs and were considered extinct in the wild. Using the 1982 amendments, the FWS sought the reintroduction of the wolf in several locations. Two of the three most important projects require the use of military land.

1. The Red Wolf—The red wolf, *Canis rufus*, once lived throughout the eastern and southeastern United States, as far north as Pennsylvania and as far west as central Texas.[261] The red wolf weighs forty-five to eighty pounds, is smaller than the gray wolf but larger than the coyote, and ranges in color from light tan to red to black.[262] Its head generally has a reddish appearance, and it has long ears and legs.[263] Some biologists recently have suggested that the red wolf evolved as a hybrid between the gray wolf and the coyote, but its origin remains unconfirmed.[264]

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258 *Id.* § 17.83(b). Additionally, biological opinions concerning both experimental and nonexperimental populations shall analyze both as a single listed species.

259 LOPEZ, *supra* note 197, at 62-68. Predecessors to the *genus Canis* evolved around 60 million years ago, during the Paleocene period. By the Miocene period, 20 million years ago, dog and cat-type carnivores became distinct, and the first true member of the genus, the wolf's immediate ancestor, developed one million years ago during the Pleistocene period. The dog was intentionally bred into a separate species by man. *Canis lupus* is thought to be its immediate ancestor. Wolves are related to bears, but hyenas are more closely related to cats than dogs or wolves. Some animals bearing the common name "wolf" are not wolves. For example, the manned wolf and the Andean wolf are wild dogs, not wolves. The Tasmanian wolf is actually a marsupial related to kangaroos. The Cape hunting dog, or African wild dog, however, a member of the genus *Lycaon*, may actually be related to the wolf and belong in the same genus.

260 *Wolf FAQ*, at http://tigerden.com/Wolf-park/Walffaq.html (Jan. 17, 1996).

261 United States Department of the Interior, Fish and Wildlife Service, *Red wolf (Canis rufus)*, at http://www.fws.gov/bio-rwol.html (Jan. 17, 1996).

262 *Id.*

263 *Id.*

264 *Id.*

"The demise of the red wolf was directly related to man's activities, especially land changes, such as the drainage of vast wetland areas for agricultural purposes; the construction of dam projects that inundated prime habitat; and predator control efforts at the private, State, and Federal level."[265] Finally, the red wolf was finally found only in southeastern Texas and southwestern Louisiana.

In the mid-1970s, the FWS trapped forty wild adult wolves and placed them in a "captive breeding program" at the Metropolitan Park in Tacoma, Washington, in a desperate effort to preserve the species.[266] The first litter of pups was born in 1977.[267] The breeding program later expanded to six other facilities.[268] By 1986, there were eighty captive red wolves.

a. Red Wolf Recovery Plan—The ESA requires the FWS to prepare recovery plans for endangered species.[269] To be considered recovered, a species must live in the wild. The Red Wolf Recovery Plan envisioned the establishment of three self-sustaining populations prior to downlisting the species from its current "endangered" status.[270]

b. Experimental Releases—In 1976 and 1978, prior to the "experimental population" amendment to the ESA, the FWS conducted experimental releases of red wolves onto the 4000-acre Bulls Island, part of the Cape Romain National Wildlife Refuge near Charleston, South Carolina.[271] Although the island was not large enough to support a self-sustaining population, the experiment demonstrated the feasibility of reintroduction. The release also

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[265] Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 26,564 (July 24, 1986) [hereinafter 51 Fed Reg. 26,564].

[266] *Id.*

[267] *Id.*

[268] It is critical to expand captive breeding programs to a variety of facilities when the number of remaining individuals is low to avoid extinction due to catastrophe (such as disease outbreak, fire, or other disaster).

[269] 16 U.S.C. § 1533(f)(1)(B)(i)-(iii). These plans must include the following:

> (i) a description of such site-specific management actions as may be necessary to achieve the plan s goal for the conservation and survival of the species;
>
> (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
>
> (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan s goal and to achieve intermediate steps toward that goal.

Id.

[270] 51 Fed. Reg. 26,564, *supra* note 265.

[271] *Id.*

demonstrated the utility of creating a half-way house environment, where previously captive wolves could be released in a protective environment to breed. The wild-born pups would learn the ways of the wild from birth and would be better candidates than their parents for release into less controlled environments. Although the wolves released on Bull Island were recaptured at the end of the experiment and returned to captivity, the FWS continues to use island sanctuaries as transition environments.

c. Environmental Assessment and Designation of Experimental Population—The FWS published an environmental assessment to consider alternatives for the red wolf reintroduction program. The preferred alternative was the reintroduction of red wolves onto the Alligator River National Wildlife Refuge and the Air Force's Dare County Bombing Range. In July 1994, the FWS issued the "Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina."[272] The FWS proposed to introduce mated pairs of red wolves into the Alligator River National Wildlife Refuge in the North Carolina counties of Dare and Tyrell to determine the population to be nonessential experimental.

Under the proposal, eight to twelve animals would be released from the captive breeding program during the first twelve months. Pairs would be fitted with radio collars and placed in an on-site acclimation pen for six months prior to release. In early spring of 1987, three pair would be released, a pair at a time, at two-week intervals. The animals would be closely tracked by radio telemetry until they established a home range, after which tracking would become less frequent.

Based on the Bull Island experiment, the FWS selected the Alligator River National Wildlife Refuge based on its "[a]pparently ideal habitat," consisting of swamp forests, pocosins, and freshwater salt marshes.[273] The site also contained "the small mammal prey base and the denning and escape cover required by the species."[274]

The Proposed Determination referred to Dare County Bombing Range only briefly. "Adjacent to the refuge is a 47,000-acre United States Air Force bombing range with similar habitats. The very limited live ordnance expended by the Air Force and Navy on this range is restricted to two extremely small, well defined, and cleared target areas (approximately 10 acres each)."[275] The language is an obvious

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272 *Id.*

273 *Id.*

274 *Id.*

275 *Id.*

attempt to soft pedal the activities conducted at the range. It is unlikely that Dare County Bombing Range would survive the current base realignment and closure (BRAC) battles if it only conducted "very limited live ordnance" testing.

The proposal included Dare County Bombing Range as an integral part of the reintroduction program. The proposal "anticipated that the Refuge and adjacent United States Air Force lands could eventually sustain a red wolf population of about 25 to 35 animals."[276] The Proposed Determination also "anticipated that, because of the size and habitat characteristics of the reintroduction area, animals will remain within the boundaries of the refuge and adjacent military lands." Wolves are known to wander, and these wolves did just that. The FWS had to expand the protected area twice after the original designation.[277]

The proposed rules, the heart of any reintroduction program, provided for the take of red wolves by any person:

> (i) Incidental to lawful recreational activities, or
>
> (ii) In defense of that person's own life or the lives of others, provided that such taking shall be immediately reported to the Refuge Manager.[278]

Additionally, the proposal permitted designated FWS and state conservation agency employees to take any wolf "which constitutes a demonstrable but nonimmediate threat to human safety, or which is responsible for depredations."[279] The Proposed Determination noted, however, that "[k]illing of animals would be a last resort" and that public take would be "discouraged by an extensive informal and education program."

The provision allowing the taking of wolves incidental to lawful recreational activities was a crucial gesture to the political reality

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[276] *Id.*

[277] In 1991, the FWS added Beaufort County, North Carolina. 56 Fed. Reg. 37,513. In 1993, the FWS added Martin and Bertie Counties, North Carolina. 58 Fed. Reg. 62,056.

[278] *Id.* at proposed amendment to 50 C.F.R. 17.84(c)(4)(i),(ii).

[279] *Id.* at (c)(5)(iii). The proposal allowed take by an employee of any wolf:

> which constitutes a demonstrable but nonimmediate threat to human safety, or which is responsible for depredations to lawfully present domestic animals or other personal property, it has not been possible to otherwise eliminate such depredation or loss of personal property, provided that such takings must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge.

Id.

surrounding the proposal. The North Carolina Wildlife Resources Commission supported the proposal only so long as the refuge continued to allow hunting and trapping.[280] Trappers were not at all sure they wanted the wolf invading their domain. The wolf would bring competition for small mammals and restrictions on their activities.[281] Only the dedicated efforts of FWS personnel, who worked closely with the trappers, made the reintroduction possible.

The proposed regulations demonstrate the flexibility of the 1982 amendments. The incidental take provisions account for preexisting uses of the refuge. The provision allowing employees to take animals guilty of depredation addresses the concern of farmers, ranchers, and local residents. Only the flexibility to kill a member of an endangered species made the proposal palatable to local residents. Conversely, the very idea that the ESA permits the killing of an endangered animal is unconscionable to some. It is only this flexibility which makes reintroductions politically possible.

The proposal addressed state authority to regulate wildlife, concluding that "[t]he State of North Carolina has regulatory authority to protect and conserve listed species and we are satisfied that the State's regulatory system for recreational activities is sufficient to provide for conservation of the red wolf. No additional federal regulations are needed." The proposal did not explain this statement further.

Because experimental populations are treated as threatened species, the state is responsible for protection outside the area covered by the regulations. The statement above is conciliatory, but also recognizes that while the FWS has authority to enforce the ESA take prohibitions, it has little authority to institute conservation programs for these animals outside the designated reintroduction area. If a state is hostile to the reintroduction, as the western states are, protecting the reintroduced population becomes more difficult.

The Proposed Determination addressed the relaxed Section 7 consultation requirements for nonessential experimental populations as follows:

> [O]nly two provisions of section 7 would apply on . . . non-Service lands: section 7(a)(1), which requires Federal agencies to confer informally with the Service on actions that are likely to jeopardize the continued existence of the species. *The results of a conference are only advisory in*

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[280] Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, Final Rule, 51 Fed. Reg. 41,790 (Nov. 19, 1986) [hereinafter 51 Fed. Reg. 41,790].

[281] *Wolves*, *supra* note 221.

> *nature; agencies are not required to refrain from commitment of resources to projects as a result of a conference.*[252]

While this conclusion is factually correct, it overlooks that if the agency ignores the conference results, it may be held liable for any take that occurs. As discussed above, Dare County Bombing Range is free of many of the procedural requirements but still is required to ensure that its actions do not jeopardize the species. In cases where a species is otherwise extinct in the wild, this requirement remains a formidable responsibility. The Proposed Determination also concluded the following:

> There are in reality no conflicts envisioned with any current or anticipated management actions of the Air Force or other Federal agencies in the area. The presence of the bombing range is in fact a benefit, since it forms a secure buffer zone between the refuge and private lands; the target areas . . . would be easily avoided by the wolves. Thus there would be no threats to the success of the reintroduction or the overall continued existence of the red wolf from . . . [the] less restrictive section 7 requirements.

The wolves avoid the open areas used as target zones, except for hunting. As the Dare County Bombing Range coordinator for the project observed, the odds of a practice round hitting a wolf are extremely remote.[253] This conclusion does not take future actions into account. If the Air Force decides to test a new weapon or decides to realign the installation to serve other training goals, there could be a conflict, at least with regard to the Dare County Bombing Range portion of the habitat. In this case, unlike at White Sands Missile Range, a large wildlife refuge surrounds the Dare County Bombing Range.

The Proposed Determination found that the reintroduction would be made into the historic range of the species but outside its current range and would "further the conservation of this species." It also "reviewed all ongoing and proposed uses of the refuge, including traditional trapping and hunting with or without dogs, and found that none of these would jeopardize the continued existence of the red wolf, nor would they adversely affect the success of the reintroduction effort." This was no doubt a gamble on the part of the FWS. Such activities certainly could jeopardize the reintroduced wolves. On the other hand, discontinuing these programs would

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[252] 51 Fed. Reg. 26,564, *supra* note 265 (emphasis added).

[253] Telephone Interview with Ron Smith, Wildlife Biologist, United States Air Force, Dare County Bombing Range (Feb. 9, 1996) [hereinafter Smith Interview].

make the reintroduction unacceptable to local interests, and there was no where else to put the wolves. Because the wolves must be returned to the wild to recover, the FWS had to find that the programs would not jeopardize the wolves. Continuation of the programs made wolf recovery politically possible.

The Proposed Determination found the "nonessential" status appropriate because "[a]lthough extirpated from the wild, the red wolf nevertheless is secured in seven widely separate captive breeding programs and zoos in the United States. The existing captive population totals 63 animals."[284] It seems intellectually dishonest to claim that twelve of only sixty-three animals are not essential to the species survival, but reintroduction offers the best hope for the species. The FWS was not sued over this determination, despite the small number of surviving individuals. Suit was filed, however, challenging the nonessential experimental determination for gray wolves in Yellowstone.

d. Final Determination of Experimental Population—The final rule, with an effective date of 19 December 1986, determined the red wolf population to be a "nonessential experimental population."[285] The final rule contained clarifications and changes based on twelve letters received in comment on the Proposed Determination.[286] While the final rule was very similar to the Proposed Determination, it specifically addressed the comments received and included additional language.

Although the state insisted that ongoing activities be allowed to continue on the refuge, The Wildlife Information Center and Defenders of Wildlife objected to the determination that such activities would not jeopardize the wolves. The final rule noted, however, that the 1982 amendments were enacted "to eliminate the requirement for absolute protection . . . in order to foster the chances of reintroduction." The rule concluded that "[i]f traditional uses of the

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[284] *Id.*

> Given the health checks and careful monitoring that these animals receive, it is highly unlikely that disease or other natural phenomenon would threaten the survival of the species. Furthermore, the species breeds readily in captivity. . . . Therefore the taking of 8 to 12 animals from this captive assemblage would pose no threat to the survival of the species even if all of these animals, once placed in the wild, were to succumb to natural or man-caused factors.

51 Fed. Reg. 26,564, *supra* note 265.

[285] 51 Fed. Reg. 41,790, *supra* note 280.

[286] *Id.* The Edison Electric Institute, Tennessee Valley Authority, and North Carolina Department of Natural Resources and Community Development supported the proposal. The Defenders of Wildlife, National Audubon Society, the Humane Society of the United States, and the National Wildlife Federation supported the release, but objected to the incidental take provision.

refuge have to be significantly modified . . . it is going to be very difficult, if not impossible, to approach other public land management agencies to permit wolf reintroduction on their lands."

Regarding provision permitting "incidental to lawful recreational activities," the final rule recognized the future events.

> [C]ircumstances could arise whereby a person engaged in an otherwise lawful activity such as hunting or trapping, might accidentally take a red wolf despite the exercise of reasonable due care. Where such a taking was unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care, the Service believes that no legitimate conservation purpose would be served by bringing an enforcement action under the ESA. Therefore . . . the Service would not prosecute anyone under such circumstances.[287]

The approval process for this proposed reintroduction went very smoothly when compared to the proposed reintroduction at Yellowstone and White Sands Missile Range. Still, the process demonstrates the controversy inherent in this type of program even among outdoor enthusiasts. Trappers, hunters, and hikers want the land for their own purposes and are not always eager to share with a predator species. Wildlife organizations, on the other hand, want increased protections, but such protections would make the reintroduction politically impossible.

e. Reintroduction of Red Wolves into the Wild—In September 1987, eight radio-collared adult red wolves were released[288] onto the 120,000 acre Alligator River National Wildlife Refuge and the adjacent 47,000 acre Dare County Bombing Range.[289] The animals move between the properties without restriction, and the first wolf pups were born on the Air Force Bombing Range.[290] "The experiment represented the first project in conservation history designed to restore a species that had been declared extinct in the wild."[291] Between 1987 and 1995, sixty-five captive-born wolves were released.[292]

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287 *Id.*

288 *Id.*

289 Proposed Determination of Experimental Population Statutes for an Introduced Population of Red Wolves in North Carolina and Tennessee, 56 Fed. Reg. 37,513 (Aug. 7, 1991).

290 Smith Interview, *supra* note 283.

291 Michael K. Phillips, *Red Wolf Reintroduction—The Experiment Succeeds*, INT'L WOLF, Fall 1993, at 5-8. Michael Phillips worked on the red wolf project from 1986 until 1994, when he became the project leader for the gray wolf recovery program in Yellowstone National Park.

292 UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE,

f. Results—Mike Phillips, former red wolf coordinator, declared that the "experiment was a success—red wolves had been restored to the wild."[293] Since 1987, eighty-five pups were born in the wild.[294] The FWS estimates the free-ranging population contains between thirty-nine and sixty wolves.[295] Of thirty-two complaints filed, only seventeen actually involved wolves. Of the seventeen, eleven were merely complaints that wolves were present where not wanted. Only one depredation was confirmed.[296] Only thirty percent of the population surveyed in the surrounding counties are opposed to the reintroduction.[297]

However, the wolves "were so productive that in less than five years the population grew too large for the study area, and wild-born pups routinely dispersed out of the 400-square mile reintroduction area."[298] Accordingly, the FWS had to expand the protected area more than once.

Some members of the public adamantly opposed the program. One state legislature representative called the red wolf "a deep and present danger."[299] Another said "[i]t's just another damn dog, as far as I'm concerned."[300] The legislature passed a bill to allow residents of two counties to trap or kill red wolves on their property.[301] Although these types of bills provoke further controversy, these efforts cannot trump federal law and will not protect individuals who violate the ESA. In 1995, debate continued in the United States Senate over funding for the red wolf program. Senator Helms introduced an amendment to the 1996 Department of the Interior Appropriations bill to prohibit the FWS from spending federal funds on the project.[302] Senator Chafee from Rhode Island opposed the amendment in Senate debate.[303] As a result, the Senate tabled the Helms amendment.

SUMMARY OF THE RED WOLF REINTRODUCTION PROJECT IN NORTHEASTERN NORTH CAROLINA—SEPTEMBER 1987 THROUGH 31 JULY 1995 (1995) [hereinafter SUMMARY].

293 Phillips, *supra* note 291, at 8.

294 SUMMARY, *supra* note 292.

295 *Id.*

296 *Id.*

297 *See* RED WOLF NEWSLETTER 1 (1995) (51.7% supported the reintroduction, 18.1% had no opinion).

298 Phillips, *supra* note 291, at 8.

299 *Bill Would Allow Open Season on Red Wolves*, GOLDSBORO NEWS-ARGUS, June 24, 1994, at 6A.

300 *Id.*

301 *Red Wolf Taking Bill Passed by Legislators*, COASTLAND TIMES, July 3, 1994, at 5A.

302 141 CONG. REC. S12002-01, S12018 (amendment 2309).

303 *Id.* "I think it is to the advantage of all of us as a nation, as members of this society, as Americans, to have these populations come back." *Id.*

The military experience with red wolves has been positive, according to Ron Smith, Air Force wildlife biologist. When asked how the wolves have affected Dare County Bombing Range, he responded "not at all."[304] There has been "no modification to the mission" of the installation.[305] He calls the reintroduction program "very successful."[306] Trucks, rather than bombs, seem to be the greatest threat to the wolves at Dare County Bombing Range. A number of wolves have been struck and killed accidentally by automobiles and, when this occurs, the Air Force notifies the FWS. So far, the program seems to be a success. But the Air Force has not attempted to modify its use of the land in any significant way. Future land use could be restricted.

Because the population has been designated nonessential, the FWS cannot designate critical habitat. The statute does not prohibit the FWS from changing the designation. If the designation is changed to essential, critical habitat could be designated and, because wolves actively use the installation, it is likely that the Dare County Bombing Range would be included. A critical habitat designation significantly restricts a landowner's activities, particularly when animals with a large home range such as the wolf are involved.

2. The Gray Wolf—Canis lupus is larger than the red wolf, and ranges in color from pure black to mixed grays to pure white.[307] Numerous subspecies of gray wolf exist throughout the world.[308] In North America, wolves once ranged from Mexico to Alaska and Greenland.[309] The gray wolf is endangered over most of its range, except in Minnesota, where it is listed as threatened, and in Alaska, where it is not listed. The gray wolf was reintroduced into Yellowstone National Park in 1995.

Canis lupus baileyi (C.l. baileyi), a distinct subspecies of the gray wolf, is commonly known as the Mexican wolf or "el lobo." The Mexican wolf once ranged from near Mexico City, Mexico, into Texas, New Mexico, and Arizona. The Mexican wolf is the smallest[310] and

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304 *Id.*

305 Smith Interview, *supra* note 283.

306 *Id.*

307 LOPEZ, *supra* note 197, at 12.

308 *Id.* at 13-15. The wolves, *C.l. hattai and C.l. hodophilax,* lived in Japan, but are presumed extinct. The small Iranian wolf, *C.l. pallipes* is not believed to howl and travels alone instead of in packs. The Chinese wolf, *C.l. laniger*, also hunts alone. The European wolf, *Canis lupus,* has adapted to living in close contact to humans. The taxonomic classification of wolves has changed over time as our understanding of them has grown.

309 Wolf Education and Research Center, Wolf Information Sheet (1993) (on file with the author) [hereinafter Wolf Education]. *See also* LOPEZ, *supra* note 197, at 13.

310 *The Phoenix Zoo, Mexican Gray Wolf,* at http://aztec.asu.edu/phxzoo/wolfmexn.html. (Jan. 17, 1996).

the most endangered of the gray wolves.[311] It is considered one of the rarest land mammals in the world and is the most genetically distinct of the North American gray wolves.[312] Because "[e]volution occurs at the fringes of a species' range,'" and the Mexican Wolf was the southernmost gray wolf, it was "on the frontlines of evolution."[313] A UCLA geneticist has determined that the Mexican wolf contains unique genetic material not found in other gray wolves.[314]

The last known Mexican wolf in the United States was documented in 1970, and *C.l.baileyi* was listed as endangered under the ESA in 1976.[315] The last known member of the subspecies was captured in Mexico in 1980.[316] Between 1977 and 1980, two males and one pregnant female were captured from the wild in Mexico for captive breeding.[317] These were the last confirmed Mexican Wolves in the wild. By 1994, there were eighty-eight Mexican wolves in captivity at twenty-four facilities in the United States and Mexico.[318]

The FWS proposes to reintroduce the Mexican Wolf onto White Sands Missile Range. This proposal faces stronger opposition than the Red Wolf reintroduction proposal faced. The reintroduction of the Gray Wolf to Yellowstone Park is a preview of things to come for White Sands Missile Range and holds many valuable lessons.

a. The Gray Wolf Returns to Yellowstone—In May 1994, the DOI approved a record of decision (ROD) for the reintroduction of experimental populations of gray wolves into Yellowstone National Park and central Idaho.[319] Ralph Morgenweck, FWS Regional Director, issued the final EIS (FEIS) on 14 April 1994.[320] The FWS

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311 *Wolf FAQ*, at http://tigerden.com/Wolf-park/Walffaq.html (Jan. 17, 1996).

312 Harlin Savage, *Waiting for El Lobo*, DEFENDERS, Fall 1995, at 8-15.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.* at 8.

317 Draft EIS, *supra* note 232, at 1-7.

318 *Id.* at 1-7. In 1994, there were 75 Mexican Wolves in the United States in 19 facilities and 13 Mexican Wolves in 5 facilities in Mexico.

319 United States Department of the Interior, Fish and Wildlife Service, Final Environmental Impact Statement (April 14, 1994) [hereinafter FEIS] (Abstract available at http://web2.starwave.com/outside/online/news/specialreport/wolf/eisabstract.html (Feb. 13, 1996) [hereinafter FEIS Abstract]).

320 *Id.* The FEIS considered the following alternatives:

> Alternative 1. Reintroduction of Experimental Populations Alternative (The Proposal). Alternative 2. Natural Recovery Alternative (No Action). Encourage wolf populations to naturally expand into Idaho and Yellowstone. Alternative 3. No Wolf Alternative. Change laws to prevent wolf recovery. Alternative 4. Wolf Management Committee Alternative. Establish legislation so the states could implement wolf recovery and liberal management without federal oversight. Alternative 5. Reintroduction of Nonexperimental Wolves Alternative. Reintroduction

made dozens of public presentations and received over 160,000 comments on the draft EIS.[321] The administrative process to bring wolves to Yellowstone has been called "the most exhaustive environmental review in the history of the Endangered Species Act."[322]

(i) The Final Environmental Impact Statement—The FEIS considered five alternatives and selected the alternative that would allow for the reintroduction of experimental populations.[323] The FEIS estimated that this approach would result in wolf population recovery (approximately 100 wolves per area for three successive years) by the year 2002.[324] The FWS patterned the proposed regulations for protection of the wolves after the red wolf regulations.[325]

The FEIS examined public attitude toward wolves.[326] In a 1985 survey, Yellowstone National Park visitors favored reintroduction three to one.[327] However, based on a 1987 study, fifty-one percent of the public in Wyoming counties surrounding the park (presumably local residents) opposed reintroduction. A nation-wide survey in 1992 determined that Yellowstone area residents were almost evenly divided regarding wolf reintroduction, but that Americans generally favor wolf reintroduction two to one.[328]

Local opposition centers around the economic impact of wolf reintroduction. Ranchers oppose the reintroduction of wolves under any scenario but adamantly oppose the introduction of wolves with ESA status. The National Cattlemen's Association (NCA) comment-

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and high level of protection for wolves without establishing an experimental population rule to address local concerns.

Id.

321 Brandon, *supra* note 196.

322 Tom Kenworthy, *Wolves Reintroduced to Yellowstone Making Themselves at Home*, WASH. POST, Jan. 13, 1996.

323 FEIS Abstract, *supra* note 319.

324 *Id.*

325 Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252 (Nov. 22, 1994).

326 FEIS, *supra* note 317, app. 3 (Public Attitudes About Wolves). This section summarized surveys regarding attitudes of Americans toward wolves. The surveys were conducted between 1977 and 1992.

327 *Id.* (citing a 1985 study by McNaught).

328 *Id.* (citing a 1992 study by Duffield). The survey also found that while over 89% of Wyoming Defenders of Wildlife members favored reintroduction, over 91% of Wyoming Stock Growers members opposed it. A 1987 study of Montana residents found that 65% believed wolves belonged in Montana. However, support was considerably higher in more densely populated areas than in rural areas. In the most densely populated counties, 78% agreed that wolves belong in Montana: in rural areas, only 54% agreed. Most people (52%) supported reintroduction in Montana, Idaho, and Yellowstone Park.

ed on the draft EIS.[329] The NCA indicated that it would support efforts to "delist the wolf and return the management of the species to the states" but remained "strongly opposed to any expansion of existing parks or designations of 'ecosystems' that give priority to wolf recovery efforts over economic values."

This attitude is not surprising when examined in light of the wolf's history in the West. It is ironic that Yellowstone officials exterminated the park wolves and now are fighting to bring them back. It is not surprising that ranchers, many of them second or third generation cattlemen who were steeped in the folklore of the wolf, still oppose their return. Cattle associations went to great lengths to eliminate the wolves; they do not want them back with ESA protections. Biologists believe that livestock losses can be controlled by improved management techniques.[330]

In 1987, Defenders of Wildlife created a fund with $100,000 raised through T-shirt sales to reimburse ranchers for wolf depredation.[331] The fund paid $17,000 to twenty ranchers in northwestern Montana for depredation by wolves recolonizing the area from Canada.[332] Defenders of Wildlife agreed to use the fund to reimburse ranchers suffering depredation from the Yellowstone wolves.

Sport hunters also see the wolf as a threat. "Hunters don't want to compete with the wolves for deer."[333] The FEIS exhaustively addressed the impact of the introduction on recreation, hunting, and ranching and found that the reintroduction would have negligible effects on all of those activities.[334] Still, opposition remains strong.

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329 Letter from The National Cattlemen's Association to Ed Bangs, Wolf Recovery Coordinator (Oct. 14, 1994) (available at http://web2.starwave.com/outside/online/news/specialreport/wolf/cattle.html (Feb. 16, 1996)). The letter indicates that the NCA represents "230,000 professional cattlemen, including members of 74 affiliated state cattle and national breeding organizations."

330 Wolves, *supra* note 221 (quoting Dave Olson, conservation warden for the Minnesota Natural Resources Division). Olson indicates the "mosaic" of farms and woods in Minnesota create a worst case scenario of "max contact" between wolves and farms. "If livestock losses can be controlled in this situation, biologists think they can be controlled anywhere." In Minnesota, biologists work with ranchers to improve management techniques, including electric fences and guard dogs, to avoid conflict. Some Minnesota farmers say that it is working.

331 Tamar Stieber, *Ranchers in N.M. Snarl at Lobo Plan*, DENVER POST, July 2, 1995, at C-1.

332 *Id.*

333 Wolves, *supra* note 221 (quoting Dave Olson, conservation warden for the Minnesota Natural Resources Division. He attributes wolf kills by hunters to "greed.").

334 The Yellowstone reintroduction area encompasses 25,000 acres of land, of which 76% is federally owned. Harvest of male prey by hunters would not decrease; harvest from some herds of female deer, elk, and moose might be reduced. The hunter harvest of bighorn sheep, mountain goats and antelope would not be affected. This area contains over 95,000 ungulates, of which over 14,000 are taken annually by

Perhaps ranchers and hunters see the wolf as just one more form of government interference.

(ii) Wolves Released—On 26 January 1995, Montana Senator Conrad Burns told the Senate Energy and Resources Committee that the reintroduction plan "is a bad idea for Montana ranchers and taxpayers."[335] He recommended using the money to improve the infrastructure of the national parks instead of reintroducing wolves.[336] Despite his protestations, wolves were transferred to Yellowstone and Idaho on January 1995. The wolves were captured in Canada by trappers, purchased by the United States for $2000 each, and transported to one-acre pens within the parks.[337] Wolves were freed in Idaho later that month. In Yellowstone, biologists opened the pens on Tuesday, 21 March and Wednesday, 22 March 1995.[338] Although the wolves initially "refused to budge," they left the pens on Friday, 24 March.[339] They began "cavorting, playing, and checking things out" according to a Park biologist, exhibiting behavior which "suggests recent liberation."[340] A male from the second pen began howling the same afternoon, breaking the wolves' fifty-year silence in Yellowstone National Park.[341] The wolf was "the only species missing from [Yellowstone] that was [there] when the park was established in 1872."[342] With the reintroduction of the

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hunters. The EIS predicted that a recovered wolf population would take 1200 ungulates per year.

Approximately 412,000 livestock graze in the Yellowstone area. The FEIS predicted that wolves would take 19 cattle and 66 sheep per year. The estimate of 19 cattle is based on an estimated range of 1 to 32 cattle per year. The estimate of 66 sheep is based on an estimated range of 17 to 110 sheep per year.

The FEIS predicted that recreational visits to the area would increase by five percent due to the presence of wolves. The area currently receives 14,500,000 recreational visits per year. The associated increase in visitor expenditures is expected to exceed the combined loss to the economy from decreased hunter expenditures, decreased hunter benefits, livestock losses.

335 Senate Energy and Natural Resources Committee (Jan. 26, 1995) (Statement of Senator Conrad Burns, R-Montana) (available at http://web2.starwave.com outside/online/news/specialreport/wolf/burns.html) (Feb. 13, 1996).

336 *Id.* "Yellowstone Park's infrastructure is falling down around our ears . . . where are our priorities?" *Id.*

337 *Wolves Leave Pens at Yellowstone and Appear to Celebrate*, NEW YORK TIMES, Mar. 27, 1995 [hereinafter *Wolves Leave Pens*].

338 Paul Leavitt, *3 More Gray Wolves Freed in Yellowstone*, U.S.A. TODAY, Mar 23, 1995. The wolves did not leave the pens immediately, but biologists predicted that they would leave as soon as they got hungry. When the wolves were released, one prowolf organization disbanded, its mission apparently complete. "The Wolf Fund," founded by Renee Askins, a wolf biologist, in 1986 to encourage restoration of the wolf to Yellowstone, officially dissolved when the first gate was opened. Rocky Barker, *Howls of Success Greet the Efforts of Wolf Advocate*, IDAHO FALLS POST REGISTER.

339 *Wolves Leave Pens*, *supra* note 337.

340 *Id.*

341 *Id. See also* Barker, *supra* note 338.

342 *Wolves*, *supra* note 221.

gray wolf, Yellowstone become one of only a few complete ecosystems left in the United States[343]

(iii) Yellowstone Litigation—Although the reintroduction brought Yellowstone Park full circle, the surrounding controversy produced a flood of litigation, some of which is still pending.

Defenders of Wildlife v. Lujan. Prior to the FEIS, Defenders of Wildlife sought to compel the release of wolves into Yellowstone in accordance with the Gray Wolf Recovery Plan (Recovery Plan).[344] The Recovery Plan determined that gray wolves should be conserved in three areas. The Recovery Plan found that natural repopulation might occur in Montana and central Idaho, as wolves migrate south from Canada, but that reintroduction would be necessary in Yellowstone.

The Court held that the "Recovery Plan itself has never been an action forcing document."[345] No action could occur until the completion of NEPA documentation, and an EIS could not begin until an action plan was developed.[346] Because the 1992 Appropriations Act prohibited the expenditure of funds for the requested reintroduction, the lawsuit was moot. In addition, the plaintiffs asked for declaratory judgment that an EIS under the NEPA could not be a prerequisite to implementation of the Recovery Plan. The Court, appropriately, disagreed.

In 1988, the Senate-House Interior Appropriations Committee directed additional study regarding potential management problems. The 1992 Appropriations Act included a rider which provided that "none of the funds of this Act may be expended to reintroduce wolves in Yellowstone National Park and Central Idaho."[347] The Appropriations Report, however, directed that an EIS be completed by mid-1993.[348]

Defense of Endangered Species (DES) v. Ridenour. In this case, the DES sought to preclude the consideration of alternatives in an EIS which did not include the release of wolves into Yellowstone.[349] Defense of Endangered Species also sought to compel the National Park Service to state at public meetings that wolves must be released into Yellowstone.

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343 Dutcher, *supra* note 203.

344 Defenders of Wildlife v. Lujan, 792 F. Supp. 834 (D. D.C. 1992).

345 *Id.* at 835.

346 *Id.*

347 1992 Appropriations Act, Pub. L. No. 102-154, 105 Stat. 970, 993-94 (1991).

348 H.R. REP. No. 256, 102d Cong., 1st Sess., at 16-17, 23-24 (1991).

349 In Defense of Endangered Species v. Ridenour, 19 F.3d 27 (9th Cir. 1994).

The Court found that the issue of alternatives was not ripe until a final decision stating, "If defendants ultimately decide not to translocate wolves into Yellowstone, DES may seek judicial review" at that time. The Court also found the issue of statements at public hearings moot because the hearing had been concluded but noted that "DES's frustration with the history of administrative delay relevant to this case is understandable."[350]

American Farm Bureau v. United States. In this case, the American Farm Bureau (AFB) also challenged the release. The AFB and the Mountain States Legal Foundation argued that they would suffer severe economic losses due to wolf depredation of livestock and sought to block implementation of the reintroduction plan.[351] On 3 January 1995, the federal district court in Wyoming denied the AFB request for an injunction to halt the release.[352] The court found that the AFB failed to establish irreparable harm and concluded that their evidence was speculative and anecdotal.[353]

Sierra Club v. United States. On 7 September 1994, the Sierra Club, the National Audubon Society, and others sent a sixty-day notice letter to the Secretary of the Interior and the Director of the FWS.[354] The letter provided the Secretary "notice . . . that you are in violation of the Endangered Species Act . . . by approving the reintroduction of gray wolves to central Idaho on an experimental, nonessential basis."[355] The letter charged that the designation as a nonessential, experimental population was improper because "of overlapping introduced and natural wolf populations."[356]

The letter cited increased sightings of wolves in northwestern Montana in the early 1980s and the discovery of a wolf den in 1986 in Glacier National Park, Montana, as evidence of natural (nonintroduced) populations. The letter also cited frequent wolf sightings in Idaho. The letter concluded that these sightings indicate "a likelihood that wolves are migrating to central Idaho and that such

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350 *Id.*

351 United States Department of Justice, Press Release, *Federal Court Rejects Request to Halt Wolf Reintroduction Program*, (Jan. 3, 1995) (available at http://www.usdoj.gov:70/ORO-2614-/press_releases/previous/Pre_96/January95/2.txt (Feb. 16, 1996).

352 *Id.*

353 *Id.*

354 Letter from Sierra Club Legal Defense Fund to Bruce Babbitt, Secretary of the Interior, and Mollie Beattie, Director, USFWS, (Sept. 7, 1994) (available at http://web2.starwave.com/outside/online/news/special report/wolf/sierra.html (Feb. 13, 1996)). The letter was written on behalf of the Sierra Club, the National Audubon Society, the Wilderness Society, the Idaho Conservation League, the Predator Project, Sinapu, Michael Medberry, and Louisa Willcox.

355 *Id.*

356 *Id.* The letter stated:

migration will increase with time."[357] The letter also cited FWS estimates that breeding activity "is likely within the next 1-5 years" in Idaho.

The notice letter concluded that because there already were wolves in the central Idaho reintroduction area, the reintroduced population may not be designated as experimental because they would not be geographically separate or outside the species' current range. The letter also charged that the designation of all wolves in the area as nonessential and experimental was a de facto delisting of wolves migrating from Canada, wolves now afforded full protection under the ESA.[358] This suit is pending.

National Cattlemen's Association v. United States. Another pending suit involves the National Cattlemen's Association. This organization charged that rules allowing the taking of wolves were inadequate, particularly on federal grazing land. The comments also expressed doubt that the reintroduced population would be geographically separate and questioned the viability of the "experimental" designation.[359]

Court Hearing. On 8 February 1996, the federal district court in Casper, Wyoming, held oral argument on three consolidated cases challenging the reintroduction program.[360] The suits, by the AFB, the Sierra Club, and two residents of Wyoming, all attacked the program for different reasons. The AFB wanted the wolves removed, the Sierra Club wanted them to receive a higher level of protection,

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(1) the plan invokes section 10(j) whose use is proscribed when, as in the central Idaho Experimental Nonessential Population Area ("Idaho Experimental Area"), non-introduced (or "natural") members of the species are present; and (2) the plan withdraws or denies full ESA protections from animals legally entitled to those protections, including members of overlapping introduced and natural wolf populations, naturally recolonizing wolves already present within the Idaho Experimental Area, wolves that will migrate into the Idaho Experimental Area in the future, and the offspring of reintroduced and naturally recolonizing wolves within the Idaho Experimental Area.

[357] *Id.* The letter contends that nine wolf packs currently range within 250 kilometers of central Idaho.

[358] *Id.* Section 10(j)(1) provides that reintroduced populations may be declared experimental "only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." Section 10(j)(2)(A) provides that the reintroduction area must be "outside the current range" of the species. The letter indicates that the USFWS defines a "population" as two breeding pairs, and thus does not consider wolves inhabiting central Idaho a population.

[359] *Id.* The letter also questions the legality of treating migrating wolves as part of the experimental population.

[360] Gary Gerhardt, *Fate of 71 Wolves in Judge s Hands*, ROCKY MOUNTAIN NEWS, Feb. 8, 1996.

and the private citizens wanted to prevent breeding between two different subspecies.[361] If any of the challenges are successful, the FWS may be forced to remove the wolves.

(iv) Wolf Kills—Protesters have not relied solely on litigation to express their opposition. Two wolves were killed by local residents in violation of the regulations.

As part of the Yellowstone program, wolves also were released in Idaho in January 1995. That same month, a wolf was shot near a dead calf.[362] Federal agents obtained a warrant to search the property of Eugene Hussey, an Idaho rancher.[363] Hussey denied killing the wolf, refused to acknowledge the warrant, and called the local sheriff, who also refused to admit the federal agents.[364] The incident created a controversy in Congress and came to symbolize the tension between some westerners and "the feds" regarding conservation values in the West.[365]

Idaho Senator Dirk Kempthorne charged the agents with contributing to an atmosphere "of fear, anger and frustration" and insisted that they should have been more sensitive.[366] The FWS later released a tape which contradicted the rancher's claims of foul play. A federal autopsy concluded that the calf died at or shortly after birth rather than from a wolf attack, and the Defenders of Wildlife denied the rancher's claim for the calf.[367]

Hussey and the Mountain States Legal Foundation filed suit in United States District Court in Boise, Idaho, in September 1995.[368] The plaintiffs sought $500 for the calf, $10,000 for the "physical taking" of his ranch, and $10,000 for the "regulatory taking" of the ranch through restrictions imposed by the reintroduction.[369] According to the plaintiffs, "[t]he government has imported wolves

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361 *See infra* note 378. James and Cat Urbigkit allege that the imported wolves belong to a different subspecies than the wolves already present, and oppose potential mixing of the two gene pools.

362 Kit Miniclier, *Group Sues U.S. Over Dead Calf in Idaho Wolf Area*, DENVER POST, Sept. 6, 1995.

363 *Rancher Tangles with Federal Agents*, at http://web2.starwave.com/outside/online/news/specialreport/wolf/audio/library.html (Feb. 7, 1996).

364 *Id.* Agents feared that the sheriff, who threatened to go to "plan B" might call in a local militia.

365 *Id.*

366 U.P.I., *Idaho Senator Blasts Feds for Search*, Mar. 30, 1995 (available on LEXIS/NEXIS, file name "Current News" (Mar. 31, 1995)).

367 Miniclier, *supra* note 362

368 *Id.*

369 Greenwire, *Rancher Doesn't Like Wolves, Sues Federal Government*, at http://web2.starwave.com:80/outside/online/news/specialreport/wolf/rancher.html (Feb. 15, 1996).

and implemented regulations to protect the wolves, which prohibit him from protecting his own property."[370]

Bureau of Land Management ecologist Helen Ulmschneider praised Hussey's treatment of the federal land he used to graze livestock and said whoever pulled the trigger "probably just thought it was a coyote."[371] She indicated, however, that local ranchers bait their property with dead calves to attract coyotes then shoot them on sight to thin the population.[372] Such management techniques are inconsistent with wolf reintroduction and directly threaten the success of the program. Attempting to change these deeply ingrained attitudes will be a significant challenge for the reintroduction team.

In April 1995, a male wolf was found dead outside Yellowstone. In October 1995, Chad McKittrick, of Red Lodge, Montana, was convicted by a jury in federal court of killing, possessing, and transporting a federally listed and protected species under the ESA. McKittrick admitted shooting the animal but testified that he thought it was a wild dog. However, government witnesses testified that he had told them that he knew it was a wolf.[373] Police found the wolf's hide and skull at his house after receiving a tip.[374]

(v) The Fate of the Wolves—Despite the uproar, the Yellowstone reintroduction effort has been "an almost unqualified success."[375] The *Washington Post* reported that no livestock had been killed by reintroduced wolves in Yellowstone or Idaho in the first year.[376] The program coordinator for the FWS reportedly remarked, "None of the predictions of doom and gloom have come true."[377]

A later Associated Press story reported the loss of four sheep, which fell well below predicted losses.[378] Federal agents shot and

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370 *Id.* (quoting Maurice Ellsworth).

371 Jason Lathrop, *Stereotypes Abound in the New West*, OUTSIDE ONLINE, at http://web2.starwave.com/outside/online/news/specialreport/wolf/jwolf2.html (Feb. 16, 1996).

372 *Id.*

373 *Wolf Shooter Convicted, Faces Prison*, OUTSIDE ONLINE, at http://web2.starwave.com:80/outside/online/news/specialreport/wolf/shooter.html (Feb. 15, 1996).

374 *Id.*

375 KENWORTHY, *supra* note 322 (citing Mike Phillips who indicates that the reintroduction has begun to restore the predator/prey balance of local elk herds, and relates the story of two wolves selecting a deformed elk from a herd of 200. According to Phillips, this story is "[a] vivid illustration of the culling effect" that wolves have. Wolves strengthen herds by removing weak individuals.).

376 *Id.* Wolves did kill a hunting dog outside Yellowstone Park. The incident created an outcry from local politicians and residents. Park officials were unable to track the wolves that day due to weather conditions.

377 *Id.*

378 *Another Group of Canadian Wolves Introduced to Yellowstone*, A.P., Jan. 23, 1996 (available on LEXIS/NEXIS).

killed the male wolf responsible for the sheep depredation, and the Defenders of Wildlife reimbursed the rancher for the value of the lost sheep.[379] A single depredation incident at the start of the second year heralds a very successful program.

Park visitors now rank the wolf first on their hope-to-see wish lists, displacing the grizzly bear for the first time.[380] At least eight pups were born during the first year.[381]

Despite the success, political opposition remains strong. Senator Conrad Burns remains a staunch opponent. He championed a $200,000 cut in the program budget and believes that the wolves eventually will develop a taste for sheep and cows.[382] "As long as we put them there, we are going to have confrontations. It is only a matter of time."[383] A Yellowstone biologist disagrees. "They have no trouble getting groceries," he said, thanks to the large elk and bison herds in the park.[384] The Yellowstone program holds many lessons for the proposed White Sands Missile Range introduction.

b. Proposed Reintroduction of the Mexican Wolf—The White Sands Missile Range is located in south-central New Mexico. It is managed by the Army to develop and test missile and weapons systems for United States Armed Forces and the National Aeronautics and Space Administration (NASA). The property spreads over five New Mexico counties and supports a variety of activities in addition to its primary mission. White Sands National Monument was established on White Sands Missile Range in 1933 to preserve the unique sand dunes. The San Andres National Wildlife Refuge was established in 1941 on ninety-square miles in the San Andres Mountains to protect a population of desert bighorn sheep. The Jordana Experimental Range overlaps the southwest corner of White Sands Missile Range and is operated by the Department of Agriculture for agricultural research.

The White Sands Missile Range supports a variety of military operations. Holloman Air Force Base and a test center for the NASA

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379 *Federal Agents Kill Yellowstone Wolf with an Appetite for Sheep*, OUTSIDE ONLINE, at http://www.web2.starwave.com:80/outside/online/news/specialreport/wolf/wolfshot.html (Feb. 6, 1996).

380 KENWORTHY, *supra* note 322.

381 *Id.* The pups were fathered by the male that was shot. Eight pups were born to the female shortly after his death. The female has taken a new mate. Six of the wolves released in Idaho have selected mates, and may reproduce next year.

382 *Id.*

383 *Id.* (quoting Senator Conrad Burns (R-Mont.)).

384 *Id.* (quoting senior Yellowstone scientist John Varley). Varley reports the wolves have enjoyed an exclusive diet of elk, supplemented by one moose and one mountain goat.

Manned Spacecraft Center are located within White Sands Missile Range. The missile range is divided into four range centers, with over 1000 instrument sites.

(i) Recovery Plan—In 1986, the state of New Mexico nominated White Sands Missile Range as a potential Mexican Wolf reintroduction site.[385] In March and September 1987, Michael Spear, Regional Director for the FWS in Albuquerque, New Mexico, wrote to the White Sands Missile Range Commanding General regarding the potential reintroduction and requested access to the site so that it might be evaluated.[386] On 15 April 1987, the Army granted access to White Sands for that purpose. However, while the evaluation was being conducted, the Army withdrew White Sands from further consideration.[387] Because this was the only nominated site, the reintroduction project stopped.

(ii) Biological Evaluation—Despite this development, the FWS completed "An Evaluation of the Ecological Potential of White Sands Missile Range to Support a Reintroduced Population of Mexican Wolves" in June 1989.[388] The evaluation criteria were whether suitable topography, suitable cover, sufficient water, an adequate prey base, and a low enough level of human or other disturbances were present at the site.[389] The report also considered potential conflicts between the White Sands Missile Range mission and the wolf reintroduction program and the extent of potential depredation of livestock.[390]

The evaluation found 996 square miles of suitable wolf habitat, predominately in the San Andres Mountains.[391] The estimated prey base was "within . . . the range of the biomass of prey that is available to populations of wolves currently reproducing and surviving in the wild"[392] However, the estimated available biomass was "less than that recommended as 'desirable' by the Mexican wolf recovery team," particularly for deer.[393] The report's attempts to justify

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385 *See* Letter from Paul W. Johnson, Deputy Assistant Secretary of the Army for Installations and Housing, to Michael J. Spear, Regional Director, United States Fish and Wildlife Service (Apr. 20, 1990) (on file with the author) [hereinafter Johnson Letter].

386 *Id.*

387 *Id.*

388 JAMES C. BEDNARZ, FISH AND WILDLIFE SERVICE, AN EVALUATION OF THE ECOLOGICAL POTENTIAL OF WHITE SANDS MISSILE RANGE TO SUPPORT A REINTRODUCED POPULATION OF MEXICAN WOLVES.

389 *Id.*

390 *Id.*

391 *Id.* at 27.

392 *Id.* at 52.

393 *Id.*

approval of an insufficient prey base demonstrates the FWS's desperation to find the wolves a home.

Despite overflights for Air Force training missions and occasional discard of targets in the area, the evaluator found "the San Andres Mountain range, in fact . . . much cleaner and more free of trash than are all other mountain ranges under public ownership that I have visited."[394] Because most testing occurred in the non-mountainous basin areas—which are not prime wolf habitat—impacts were expected to be minimal.[395] The report noted that no adverse effects have been noticed at Dare County Bombing Range from air-to-ground target operations and concluded that "it is extremely unlikely that high-altitude (> 4500m) training exercises involving military aircraft would have adverse impacts on the activity of wolves."[396] The evaluation also found "no reason to predict that endangered Mexican wolves would be in any measurable jeopardy from the current activities that take place within White Sands."[397]

Ability to support a viable population also was a concern. The report predicted the available habitat that could support five to eight social groups consisting of twenty-five to forty-eight wolves.[398] "[T]his population probably is too small for long-term self maintenance . . . [but] this limitation should not be an impedance to the proposal to restore wolves at White Sands."[399] The author reached this conclusion because minimum viable population estimates have not been verified and population management models do not take protective management into account.[400] This conclusion also must have been driven by the lack of an alternative reintroduction site.

The reintroduction area would be adjacent to BLM lands used for cattle production on the western side of the San Andres Mountains. In Canada and Minnesota, annual loss of one cow per twenty-five to ninety-three wolves and one sheep per twenty-five wolves is expected. The evaluation estimated the potential depredation rate for this location at three or fewer livestock animals per year with proper management.[401]

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394 *Id.* at 61.

395 *Id.* at 65.

396 *Id.* at 61.

397 *Id.* at 65.

398 *Id.* at 68.

399 *Id.*

400 *Id.*

401 *Id.* at 74. Proper management would include prompt removal of individual wolves responsible for livestock deaths, protection of wolves not involved in livestock depredation, and maintenance of the prey base, including "prudent harvesting by humans."

Overall, the evaluation did not assign a single "unsatisfactory" to any criteria and concluded that "several aspects of White Sands make this location highly attractive for implementing a reintroduction of the Mexican wolf."[402] Based on the most important criteria, the report determined that "White Sands may provide one of the best refuges possible for an isolated population of wolves in the United States." This conclusion is convenient because White Sands Missile Range is the only site under serious consideration.

(iii) Wolf Action Group, et al. v. United States—On 14 February 1990, more than seven years after publication of the recovery plan, an attorney representing the Wolf Action Group, Mexican Wolf Coalition, Environmental Defense Fund, National Audubon Society, Sierra Club, and the Wilderness Society informed the Secretaries of Interior and Defense that the United States had violated the ESA by effectively abandoning the recovery plan and reintroduction effort.[403] This letter, known as a sixty-day letter, is required by ESA § 11(g)(2) as a prerequisite to filing a citizen suit.[404]

On 20 April 1990, the Deputy Assistant Secretary of the Army for Installations and Housing wrote to Mr. Spear and agreed to participate in the reintroduction planning effort.[405] He quoted Army guidance which provides that "[t]he conservation of endangered species, including introduction and reintroduction, will be supported unless such actions are likely to result in long term significant impacts to the accomplishment of the military mission." The Deputy Assistant Secretary also noted that "decisions will be made in coordination with the installation and the Department of the Army only after a thorough assessment" and concluded "[n]othing in this letter should be construed as authorizing reintroduction of any Mexican wolf population at White Sands Missile Range."[406]

On 23 April 1990, the parties listed in the notice letter filed *Wolf Action Group, et al. v. United States*.[407] The complaint sought "to compel the Secretary of the Interior . . . to implement the

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[402] *Id.* at 77. These include the large area available, the presence of water springs, lack of livestock in the primary area, restrictions on public access, and the isolated location of the suitable habitat.

[403] Letter from Grove T. Burnett, Attorney at Law, to Manuel Lujan, Secretary of Interior, and Richard Cheney, Secretary of Defense (Feb. 14, 1990).

[404] 16 U.S.C. § 1540(g)(2).

[405] Johnson Letter, *supra* note 385 (citing DEP'T OF ARMY, REG. 420-74, NATURAL RESOURCES—LAND, FOREST, AND WILDLIFE MANAGEMENT (25 Feb. 1986), as supplemented by CEHSC-FN Technical Note 420-74-2, Endangered Species Management Requirements on Army Installations (17 Nov. 1989)).

[406] *Id.*

[407] Wolf Action Group, et al., v. United States, No. CIV90-0390HB (United States District Court, District of New Mexico, April 30, 1990).

Mexican Wolf Recovery Plan."[408] The complaint cited Michael Spear's statement that "[i]f wolves cannot be reintroduced they cannot be recovered."[409]

Regarding the Army, the complaint alleged that the withdrawal of White Sands Missile Range violated the ESA requirement that federal agencies "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species."[410] Additionally, the complaint challenged the Army's failure to consult with the FWS before withdrawing White Sands Missile Range as a violation of Section 7 consultation requirements.[411]

In its "Motion to Dismiss," the United States stated that "immediate release of Mexican wolves into the wild would probably do more harm than good to the few remaining animals" and noted that, "to ensure successful release . . . and to safeguard the animals themselves, the FWS must carefully plan the release process."[412]

In its reply memorandum, plaintiffs stated that "the defendants" violations of the ESA are likely to recur, and are likely to evade review."[413] Plaintiffs noted that the defendants had exchanged letters by telefax the day before the sixty-day notice period expired and claimed that "the current voluntary change in policy is inadequate assurance of long-term compliance" with the ESA.[414]

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[408] *Id.* at 1. In addition, the plaintiffs sought "a mandatory injunction obligating the Secretary of the Interior . . . to implement those provisions of the Mexican Wolf Recovery Plan which call for the Mexican Wolf to be reintroduced into the wild . . . [and] compelling the Secretary of Defense to cooperate . . . in the implementation of the Mexican Wolf Recovery Plan." *Id.* at 1-2.

[409] *Id.* It also criticized Mr. Spear's decision to allow "[a]ffected States and land managers . . . the right to refuse authorization of the reintroduction effort within their jurisdiction."

[410] *Id.* at 12 (citing 16 U.S.C. § 1536(a)(1)).

[411] *Id.* at 12-13 (citing 16 U.S.C. § 1536(a)(2)).

[412] Defendants' Memorandum of Law in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment, United States Department of Justice (June 29, 1990). The United States argued that the elements of the complaint against the Secretary of Defense should be dismissed because the Army's actions since the notice letter had rendered them moot, and therefore the court lacked an actual "case or controversy." The United States also argued that the FWS had "resumed the evaluation of WSMR as a potential reintroduction site for the wolves. Thus, the plaintiffs' claims are moot. *Id.* at 15-16.

[413] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants Motion to Dismiss, or, in the Alternative, for Summary Judgment, 2 (May 22, 1991).

[414] *Id.* at 2, 5.

On 1 August 1990, the Army granted the FWS staff access to the White Sands Missile Range.[415] On 4 August 1990, the Arizona Game and Fish Commission authorized evaluation of candidate reintroduction sites in that state.[416]

On 19 February 1991, the FWS issued a "Proposal and General Plan for an Experimental Release of the Mexican Wolf."[417] The Proposal "to continue implementation of the *Mexican Wolf Recovery Plan* by initiating the re-establishment of wild Mexican wolf populations into suitable habitat" announced initiation of the NEPA process and future "scoping" sessions prior to release of an environmental assessment.[418] The FWS held public meetings in Las Cruces, New Mexico, and Tucson, Arizona, later in February.[419]

Michael Spear wrote to Susan Livingston, the Assistant Secretary of the Army for Installations, Logistics, and Environment on 24 March 1992, requesting the Army's assistance in the preparation of an EIS for the reintroduction.[420] A year later, the FWS requested that White Sands Missile Range appoint two representatives to the interdisciplinary EIS preparation team.[421]

Wolf Action Group et al. v. United States terminated with a stipulation of dismissal (without prejudice) filed by the parties on 21 May 1993.[422] Contrary to the result in *Defenders of Wildlife v. Lujan*

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[415] Letter from Major General J.P. Jones, Commanding General, WSMR, to Michael Spear, Regional Director, Region II, USFWS (Aug. 1, 1990) (on file with the author).

[416] David R. Parsons, Proposal and General Plan for an Experimental Release of the Mexican Wolf *(Canis lupus baileyi)* (Feb. 19, 1991).

[417] *Id.*

[418] *Id.* at 2.

[419] Department of the Interior, Fish and Wildlife Service, News Release (Feb. 6, 1991); *Public Meeting Agenda,* February 25, 1991; *Public Meeting Agenda,* February 27, 1991.

[420] Letter from Michael Spear, Regional Director, USFWS, to Susan Livingston, Assistant Secretary of the Army for Installations, Logistics and Environment (Mar. 24, 1992). The Deputy Assistant Secretary for Environment, Safety, and Occupational Health responded that the Army "will consider this request as the process develops. We recognize that our role will be limited in the event the selected site does not include Army lands." The letter also stated the necessity that an EIS include a full consideration of alternatives. Letter from Lewis D. Walker, Deputy Assistant Secretary of the Army for Environment, Safety, and Occupational Health, to David Parsons, USFWS (Apr. 14, 1992). Michael Spear replied to the Army's letter with the assurance that the EIS would include a consideration of alternatives, and again requested the Army s cooperation in the process. Letter from Michael Spear, Regional Director, USFWS, to Lewis D. Walker, Deputy Assistant Secretary of the Army (May 21, 1992).

[421] Letter from John G. Togern, Regional Director, USFWS, to Brigadier General Richard W. Wharton, Commanding General, White Sands Missile Range (Mar. 5, 1993).

[422] Stipulation of Dismissal signed 3 May 1993 for the Department of Justice and 21 May 1993 for the Plaintiffs—filed 21 May 1993, with Stipulated Settlement Agreement attached [hereinafter Stipulated Settlement Agreement]. *See generally* Wolf Action Group, et al., v. United States, No. CIV90-0390HB (United States District Court, District of New Mexico, April 30, 1990).

at Yellowstone—which held that recovery plans are not action forcing documents—the United States agreed to "implement the Mexican Wolf Recovery Plan, and all amendments thereto, which Recovery Plan expressly recognizes that recovery of the species is dependent upon its establishment in suitable habitat in the wild."[423]

Although the United States agreed to reintroduce the Mexican wolf, the problem of selecting a feasible site remained. The FWS published notice of availability of the draft EIS on June 27, 1995.[424] The FWS selected release into the San Andres Mountains on the White Sands Missile Range and into the Apache and Gila National Forests.[425]

(v) Local Opposition—Catron County, New Mexico, invoked Presidential Executive Order 12,630 in May 1992, and requested that the FWS complete a "takings implication analysis" for the proposed reintroduction, signaling that the county might not be in favor of the proposal.[426]

Ranchers graze livestock on one side of the San Andres mountains and they generally do not want wolves reintroduced into their grazing areas. Al Schneberger, a leader in the New Mexico Cattle Growers Association, labeled the reintroduction plan "just another action by the federal government to evict rural people, destroy their culture and override their property rights."[427] Defenders of Wildlife agreed to extend its wolf depredation fund to the Mexican wolf, so that ranchers' proven losses would be covered.[428]

After the draft EIS was issued, the FWS received "10,000 comments, many of them negative."[429] The FWS project director was surprised. "We were caught a bit off guard, and we're disappointed by the opposition."[430] The governors of both New Mexico and

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[423] Stipulated Settlement Agreement, *supra* note 422, at 1. Additionally, the United States agreed to "accomplish the reintroduction of the Mexican Wolf into the wild" in accordance with the Proposal cited above. The dismissal did "not constitute an admission or adjudication on the merits . . . including the issue of whether States, in their sovereign capacities . . . have the authority to refuse authorization of the reintroduction of the Mexican Wolf within their jurisdictions."

[424] 60 Fed Reg. 33,224.

[425] Draft EIS, *supra* note 232, at 2-10.

[426] Letter from Catron County Commission to USFWS Field Supervisor (May 13, 1992). The letter indicated that the reintroduction might effect private property and investment backed expectations.

[427] Keith Easthouse, *Wolf Recovery Plan Faces Uphill Battle*, SANTA FE NEW MEXICAN, June 28, 1995, at A1.

[428] *Mexican Wolf Draft EIS Released: Defenders Expands the Wolf Compensation Fund to the Southwest*, U.S. NEWSWIRE, June 27, 1995 (available on Lexis/Nexis).

[429] *Wolves: Reintroduction in AZ, NM "Doubtful" Officials Say*, GREENWIRE, Jan. 11, 1996 (available on LEXIS/NEXIS).

[430] Jodi Bizar, *Opposition Stalls Program to Return Wolves*, TIMES-PICAYUNE, Dec. 30, 1995, at A10.

Arizona issued statements supporting the reintroduction, but in each other's states. Both opposed reintroduction in their own states.[431]

The New Mexico Game and Fish Department opposed the plan because it "sees no potential Mexican wolf release site that provides both the biological and societal elements necessary."[432] This position made some citizens angry. They charged that the Department was representing hunters and ranchers rather than all citizens of the state, especially because polls showed that a majority of New Mexico citizens favor the reintroduction.[433] One poll showed that even residents of the surrounding counties favored the reintroduction.[434] The Arizona Game and Fish Commission voted in favor of the reintroduction—but in New Mexico, not Arizona.[435]

The FWS found itself in this predicament because there is no federal land use policy. There are conflicting land use requirements but there is no national authority to sort them out and make the crucial decisions. The Forest Service, FWS, and BLM are stuck in the middle, trying to do the right thing, trying to make everyone happy, while the military is caught in the cross fire.

(vi) Risks to the Military—The proposed reintroduction of Mexican wolves onto White Sands Missile Range raises five major issues.

The San Andres Wildlife Refuge. The habitat selected for the Mexican wolf on the White Sands Missile Range is the San Andres Mountains, already a National Wildlife Refuge. Under the Experimental Population provisions of the ESA, nonessential experimental populations receive full ESA protections on National Wildlife Refuges. That means that some of the advantages to the experimental population designation are lost so long as wolves are within the bounds of the refuge. In terms of Section 7 consultation, the Army actually will be accepting a threatened, rather than a candidate, species onto its property. Accordingly, the Army will have to prepare a biological assessment if it proposes to change its activities in the San Andres Mountains, and enter into formal consultation with the FWS.

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[431] New Mexico Governor Gary Johnson expressed concern that the wolf would "devastate local economies." *See* Keith Easthouse, *Johnson: Wolf Could "Devastate" Local Economies*, SANTA FE NEW MEXICAN, Nov. 15, 1995, at A-1.

[432] Gary Gerhardt, *Love of Lamb Chops Proves Deadly for Wolf No. 3*, ROCKY MOUNTAIN NEWS, Feb. 6, 1996, at 28A.

[433] Kathleene Parker, *Critics Angry over Wolf Decision by Game Commission*, SANTA FE NEW MEXICAN, Jan. 2, 1996, at B-1.

[434] Keith Easthouse, *Survey: Support for Return of Wolves Is Strong*, SANTA FE NEW MEXICAN, Dec. 1, 1995, at A1.

[435] Barry Burkhart, *The State That Cried Wolf: Politics May Decide Issue*, ARIZONA REPUBLIC, Nov. 5, 1995, at C9.

Congress neither anticipated nor intended this situation. The rule is appropriate on traditional wildlife refuges administered by the National Park Service or the FWS. There, both the land and the host agency have as their primary mission the conservation of species. However, the military should receive the advantages that every state and private land owner enjoy if they agree to host an experimental population. The provision regarding wildlife refuges should be changed to extend the exemption to experimental populations in wildlife refuges on military installations.

Future Missions. The FWS found no conflict between current activities in or around the San Andres Mountains and the conservation of the Mexican wolf. However, the wolf will retain threatened species status. The Army will not be permitted to take the wolf except under limited circumstances, as provided by the proposed rules. New weapons and new training missions are always being added; at any time the DOD could decide to test a new weapon or vehicle. The San Andres Mountains may be the ideal, or only available, place to conduct these tests. If the FWS determines that the weapon or vehicle will take the wolf, the DOD will not be allowed to test the weapon at that location.

Although some additional activities may be permissible in the reintroduction area, others may be precluded by the presence of the wolf. The single greatest risk of accepting an experimental population is unanticipated changes in current land use. Military property was reserved primarily for training and national security purposes. As more land is donated for nonmilitary functions, the chance of conflict increases. The Army may regret the loss of land if an unforeseen need for the mountains arises. Parcels of land are being given up at a variety of facilities, but no one knows all of the nontraditional conservation projects within the DOD. No one is bringing a national perspective to the various conservation projects within the DOD. No one is available to negotiate the conditions of these programs with DOD-level bargaining power.

Nonessential to Essential. The second greatest threat to the military is the loss of the nonessential designation. The statute does not prohibit a change to the designation. Because the status is regulatory, it can be amended or set aside by a judge. An essential experimental population is still treated as a threatened species.[436] However, an essential species is not treated as a candidate species for Section 7 consultation purposes. As a result, at White Sands Missile Range, the Army would have to prepare a biological assessment for actions which could affect the wolf. Formal consultation

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[436] *See supra* note 243.

procedures could be triggered, and the Army would be subject to potentially lengthy negotiations with the FWS. If the FWS found that the proposed action would jeopardize the species, the Army would, for all practical purposes, be precluded from taking the action.

Relying on the nonessential designation for a species with so few remaining members is risky. An outbreak of disease among captive breeding programs could render the experimental population essential to the survival of the species. Thus, the protections afforded the population could be made more stringent.

The Clinton Administration is addressing a similar concern within the Habitat Conservation Plan (HCP) process. Landowners undertake HCPs, which serve as agreements with the FWS. Under the "Safe Harbor" policy, the conservation requirements for the property covered by the agreement cannot be increased over time.[437] If landowners improve habitat, they are guaranteed that no additional requirements will be imposed. Under the "no surprises" policy, landowners who enter into HCPs are not subject to additional requirements for species listed or found after the date of the agreement. The ESA should extend this policy to land owners who host experimental populations, and should ensure that requirements will not be increased if a nonessential experimental population is later declared essential.

Lawsuits. The ESA in general, and species reintroduction programs in particular, generate lawsuits. The Yellowstone reintroduction demonstrates the variety of litigation that can be expected. Parties on all sides sued—some to get rid of the wolves, others to grant them more protection. The Mexican Wolf already has generated litigation and the DOD should be prepared for more.

At Yellowstone, the FWS may have to remove the wolves if the court finds fault with its program. Being recaptured and moved again would stress the animals. While gray wolves are numerous, Mexican wolves are not, and added stress decreases their chance of survival. Future lawsuits remain a concern. If the number of Mexican wolves in captivity decreases, citizen suits could challenge the nonessential designation.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as "Superfund," contains a provision which prevents citizen suits prior to completion of

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[437] *Hearing before the House Resources Committee Regarding H.R. 2275, The Endangered Species Conservation and Management Act of 1995* (Testimony of George T. Frampton, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior (Sept. 20, 1995)) (available on LEXIS/NEXIS).

an environmental cleanup.[438] A similar provision could prevent citizen suits from interfering with a reintroduction once the animals have been released. Such a provision would protect the land owner and the animals. Citizens still would retain the right to challenge the decision through NEPA citizen suits (regarding the decision) and Administrative Procedure Act suits (regarding the regulations before the release occurs).

Piecemeal Decisions. Any decision reached regarding the Mexican wolf at White Sands Missile Range merely sidesteps the larger issue of federal land use policy. The conservation agencies are scrambling to comply with all the mandates confronting them. They will take help anywhere they can get it, and military installations are a rich target. Because the ESA requires that all federal agencies conserve threatened and listed species, the military has to cooperate. Conservation agencies get to "steal" land using the ESA as leverage. They use the ESA as a land management statute—a role Congress never intended it to fill.

A true federal land use policy, and someone to implement it, is an absolute necessity. A wise, well-reasoned policy will not be reached by Congress or by a political appointee because of the detail involved. The federal government must find a way to manage its land outside the political process. One way to do this would be through the appointment of a nonpolitical board or committee, like the Council on Environmental Quality (CEQ) established under the NEPA.

IX. Proposal

Military testing and training programs require more land than ever. New weapons and new national security missions develop daily. Just as training is requiring more and more land, Congress is closing bases and other agencies are asking the military to help them complete their missions. "[Department of Defense] installations want to be good neighbors," but the military's primary mission must be protected. The following proposals are designed to allow the continued sharing of resources among agencies, while protecting the military's training and national security missions.

Additionally, federal land managers at all levels are struggling to implement the "multiple-use" policy without a nation-wide land use plan. The complicated issues that these managers face should be

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[438] 42 U.S.C. § 9613(h).

addressed at a national level to ensure consistency and vision in the allocation of limited federal lands. The final proposal is designed to provide integration of the regional planning efforts currently underway, a role for the DOD in the national planning effort, and a multidisciplined approach to the question of land allocation.

A. Amendments to the ESA

I propose three amendments to the ESA to improve the experimental population provisions under ESA § 10(j). Draft Conference Report language is attached at Appendix A.

1. Loss of Nonessential Designation—One of the protections given to land owners who host experimental populations is the "nonessential" designation. If the species declines after the reintroduction, that designation could be changed to essential, which would place more stringent demands on the land owner.

I propose to amend the ESA to address just such a contingency. The amendment would provide a "safe harbor" to land owners by retaining the special treatment given nonessential populations to those later redesignated as essential. Draft legislation is attached at Appendix B.

2. Wildlife Refuge Exemption—Nonessential experimental populations are treated as candidate species for purposes of Section 7 consultations, except when the species is on a National Wildlife Refuge. Congress intended to give greater protection to experimental populations on wildlife refuges, because wildlife refuges are designated for conservation purposes. Congress did not address wildlife refuges on military installations. This gap in the legislation places an unintended burden on the military. I propose to amend the ESA to exempt wildlife refuges on military property from the heightened protection. Draft legislation is attached at Appendix B.

3. Timing of Review—Citizens may challenge experimental population designations and governing regulations under the Administrative Procedure Act. Citizens also may challenge the accompanying NEPA documentation. Citizens should not, however, be permitted to challenge reintroductions after the animals are released. I propose to amend the ESA to rescind federal court jurisdiction to review reintroductions after the action is taken. Draft legislation is attached at Appendix B.

B. Creation of a DOD Wildlife Czar

It is unlikely that any central point of contact is aware of all introductions of endangered species and individuals onto military

property. Even the military departments have difficulty keeping track. If the "right hand does not know what the left hand is doing," the DOD is in danger of losing more land to wildlife than it intends.

When each request is handled at the local level, the request may seem minor, and there will be a natural tendency for the local commander to want to be "a good neighbor." But when taken together, these piecemeal requests may begin to erode the DOD's ability to control its own land.

I propose the creation of a DOD Wildlife Coordinator, or Wildlife Czar, to coordinate all DOD wildlife and endangered species conservation efforts. I propose new legislation which would create this position within the DOD. The Wildlife Czar would be appointed by the President with the advice and consent of the Senate for a term of six years.

The Czar would bring a national perspective to local wildlife issues, and ensure that local decisions are consistent with DOD plans and policy. Draft legislation is attached at Appendix C.

C. Creation of a Federal Land Management Council

The United States needs a federal land management policy and a way to implement it. Currently, land management agencies plan for land use at the regional level, but there is little coordination of the regional efforts at the national level, and there is even less coordination between the agencies. As the Supreme Court acknowledged in *United States v. Grimaud,* it is "impracticable for Congress to provide general regulations for these various and varying details of management."[439] Political appointees are also ill suited to the task, because policy and direction could change every four years.

The ESA is increasingly used as a land management tool. The Endangered Species Committee, commonly known as the "God Squad," used the ESA to institute a land management plan for the old growth forests in the northwest under the guise of spotted owl protection. This approach is practical, but should be entrusted to a committee designed to make this type of decision, with input from all federal land management agencies. The same committee could do much more to implement a national vision for federal land management. The DOD should be included in these efforts.

I propose to abolish the Endangered Species Committee and establish the National Trustee Board (NTB) to develop and coordinate national land use policy. The NTB is patterned after the NEPA CEQ and the BRAC Commission. I propose a five-member NTB

[439] United States v. Grimaud, 220 U.S. 506, 517 (1911).

appointed by the President, with the advice and consent of the Senate, for a term of eight years each. Five additional, nonvoting members, would be appointed to assist the NTB. These members would include the DOD Wildlife Czar, and similar appointees from the BLM, FWS, the Forest Service, and the National Park Service. Each member would be "a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues."

The NTB would formulate, coordinate, and implement national policies regarding management of federal land; integrate agency planning efforts; and settle disputes between federal agencies regarding land use conflicts. The NTB would publish, within three years, an integrated nation-wide land management plan with biannual amendments thereafter. This plan would implement the MUSY, FLPMA, and the ESA.

The NTB also would replace the Endangered Species Committee. Appeals previously addressed to the Endangered Species Committee would now be heard by the NTB. The NTB would be better situated to hear ESA appeals by virtue of its role as the senior federal land management organization. The NTB also would hear disputes between agencies regarding land management.

The tasks facing the NTB would be daunting. However, the BRAC Commission, appointed to cut through a similarly volatile, seemingly inscrutable, political process, has succeeded. The NTB, as a nonpolitical body, could craft a national policy and fill the obvious void that currently frustrates all of our land use management planning attempts. Draft legislation is attached at Appendix C.

X. Conclusion

The United States is still a land of vast resources, but it is no longer a land of unlimited resources. Environmental and land-use laws evolved to meet the changing needs of the country. In the West, these new laws are met with resentment and contempt by some. Our current policy of "multiple use" requires federal land managers to administer our public trust lands "for the people of the whole country,"[440] but does instruct these managers what the people want or how to do it.

As federal land managers scramble to meet conflicting demands with finite resources, they increasingly call on the military

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[440] Light v. United States, 220 U.S. 523 (1911).

to help. Bolstered by the ESA—which assigns a broad conservation mission to all federal agencies—these land managers are successfully taking military land for nonmilitary functions.

This rush to take military land is symptomatic of a larger problem—a lack of a federal land use policy and the means to implement it. This lack is "the wolf at the door," which threatens both the availability of our military lands for training and the wise use of our public trust lands.

Making the ESA more flexible by giving the military a voice in federal land use management protects national security. An NTB settling disputes between agencies, which would replace the Endangered Species Committee, could protect public lands by developing and implementing national land-use policy.

Land "is the only thing that lasts,"[441] but no one can make more of it. We must begin to plan the use of our land at the national level. Only a national land use policy will ensure that our lands truly are administered "for the people of the whole country."[442]

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[441] GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939)

[442] *Light*, 220 U.S. at 523.

APPENDIX A

Conference Report. The following language is proposed for the Conference Report accompanying the Endangered Species Act amendments:

The Congress recognizes that the Experimental Population provision of the Endangered Species Act, added to the Act as an amendment in 1982, has been successful in returning populations of endangered animals to the wild. That amendment provided a more flexible management approach to encourage the acceptance of reintroduced populations.

This amendment is designed to provide a "Safe Harbor" to land owners agreeing to host experimental populations. These land owners include private parties and federal agencies, particularly the Department of Defense and the Forest Service, which make possible the reintroduction of experimental populations on land outside the National Park and National Wildlife Refuge Systems.

Under this amendment, these land owners are protected from unforeseen, more stringent restrictions on the use of their land, should the "nonessential" designation be changed, either by regulation or judicial decision, to "essential." At the same time, the Fish and Wildlife Service will receive an automatic permit to allow the capture and removal of the animals to a more suitable, more protected, location. In this way, both the land owner, the Service, and the species are protected, and the release of experimental populations is further facilitated.

Further, experimental populations introduced to wildlife refuges on military installations will be treated as experimental populations found outside wildlife refuges and national parks. This amendment places military installations on a equal footing with other land owners, and ensures that military departments are not penalized, or unduly burdened, by the wildlife refuge designation on portions of the property that they administer in support of national defense. The original provision for enhanced protection on wildlife refuges and national parks did not take military installations into account.

Finally, the amendment protects experimental populations and land owners hosting experimental populations by preventing lawsuits after a population is released. Citizen suits still are permitted under the National Environmental Policy Act and the Administrative Procedures Act up until the time the population is released.

APPENDIX B

Proposed Amendment to the Endangered Species Act. The Endangered Species Act of 1973 (As Amended) is amended by adding after 16 U.S.C. § 1539(j)(3) the following:

> (4) If a population determined by regulation to be a nonessential, experimental population is later redesignated an essential population—
>
> (A) The Fish and Wildlife Service shall prepare, within thirty days of the redesignation, an amended recovery plan, detailing the manner in which the Service will respond to the redesignation; and
>
> (B) The population will continue to be treated as a threatened or candidate species, as provided under this Section, so long as it remains on land outside the National Wildlife Refuge System and the National Park System.
>
> (i) On land outside the National Wildlife Refuge and National Park Systems, the population will continue to be protected by the regulations adopted when the population was designated "nonessential."
>
> (ii) Upon redesignation as an essential population, the Fish and Wildlife Service will automatically receive an incidental take permit under this section for the capture, removal, and transportation of the animals to an alternate location. Such capture, removal, and transportation shall be left to the discretion of the Service, and is not required.
>
> (iii) Owners of land hosting such population (whether federal or private) will not be subject to more stringent requirements for the protection of the population than adopted when the population was designated "nonessential." Owners will cooperate with the Service in the event the Service elects to remove the animals.
>
> (5) Experimental Populations released onto Department of Defense property will be treated as a threatened or candidate species, in accordance with subparagraph (2) of this section, even if portions of the Department of Defense property have been designated as part of the National Wildlife Refuge System.

(6) No federal court shall have jurisdiction to review any challenges to introduction, maintenance, management, or removal of an experimental population, or to review any regulation promulgated under this section, after the introduction of one or more individuals belonging to the experimental population.

APPENDIX C

Title 43, United States Code, is amended by adding after section 2246 the following new Chapter:

Title 43—Public Land

NATIONAL TRUSTEE BOARD

NATIONAL TRUSTEE BOARD ACT OF 1996

(43 U.S.C. §§ 2247 to 2254)

Chapter XX—National Trustee Board

§ 2247. Congressional Declaration of Policy

(a) The Congress declares that it is the policy of the United States that—

(1) effective management of the public lands requires management on a national level;

(2) the various land management agencies should cooperatively manage the lands for which they serve as trustees;

(3) effective and consistent implementation of federal land management policy, such as: the Multiple-Use, Sustained Yield Act of 1960 (16 U.S.C. § 528), the National Forest Management Act of 1976 (16 U.S.C. § 1600), the Federal Land Policy and Management Act (43 U.S.C. § 1701), the National Environmental Policy Act of 1969 (42 U.S.C. § 4321), and the Endangered Species Act (16 U.S.C. § 1536), requires coordinated planning efforts among the various trustees.

§ 2248. Establishment of the National Trustee Board

(a) There is established a National Trustee Board for the management of federal lands.

(b) The National Trustee Board shall be composed of five voting members and five nonvoting members.

(1) Voting members.

(A) The voting members shall be appointed by the President with the advice and consent of the Senate.

(B) The President shall designate one voting member to serve as chairman.

(C) Each voting member shall be a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues.

(2) Nonvoting members.

(A) There is created within each of the following agencies a federal land use coordinator, who will serve as a nonvoting member of the National Trustee Board:

(1) The United States Forest Service

(2) The Bureau of Land Management

(3) The United States Fish and Wildlife Service

(4) The National Park Service.

(B) There is created within the Department of Defense a Wildlife Coordinator. The Department of Defense Wildlife Coordinator shall:

(1) Coordinate Endangered Species Act compliance within the Department of Defense;

(2) Coordinate wildlife conservation programs within the Department of Defense;

(3) Serve as a nonvoting member of the National Trustee Board.

(C) Each nonvoting member shall be a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues.

(c) Each voting and nonvoting member shall be appointed for a term of eight (8) years.

§ 2249. Duties and Responsibilities of the National Trustee Board.

The National Trustee Board shall:

(a) Assume the role and responsibilities of the Endangered Species Act Committee as detailed at 16 U.S.C. § 1536(e). 16 U.S.C. § 1536(e) is incorporated by reference, with the exception of § 1536(e)(3), which is repealed.

(b) Prepare, within three years of appointment of all voting and non-voting members, a "National Land Management Plan," which shall:

(1) contain the following:

(A) a national plan for the allocation of resources under the control of the United States Forest Service;

(B) a national plan for the allocation of resources under the control of the Bureau of Land Management;

(C) a national plan for the allocation of resource under the control of the National Park Service;

(D) a national plan for the allocation of resources under the control of the Fish and Wildlife Service;

(E) a national plan for the allocation of resources on public lands not previously classified, withdrawn, set aside, or otherwise designated for one or more uses;

(F) an inventory of the resources contained on the lands under the control of the Department of Defense, including training areas, administrative areas, wildlife conservation areas, and areas not otherwise classified.

(2) be based on the following:

(A) the principles of multiple use and sustained yield set forth in this and other applicable law;

(B) a systematic interdisciplinary approach considering physical, biological, economic, and other sciences;

(C) a consideration of present and potential uses of the public lands;

(D) a consideration of long-term and short-term benefits to the public.

(c) Prepare, on a biannual basis, revisions to the National Land Management Plan. The first revision shall be published not later than twenty-four (24) months after publication of the National Land Management Plan. Later revisions shall be published not later than twenty-four (24) months after publication of the previous revision.

(d) Hear disputes between or among federal agencies upon the written request of one or more Secretaries.

§ 2250. Employment of personnel, experts, and consultants.

(a) The National Trustee Board may employ such officers and employees as may be necessary to carry out its functions under this Chapter. In addition, the Board may employ and fix the compensation of such experts and consultants as may be necessary for carrying out the functions under this Chapter.

(b) The Board may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Board.

§ 2251. Public Involvement.

(a) Not later than two (2) years after the appointment of all voting and nonvoting members, the National Trustee Board shall publish in the *Federal Register* a notice of availability of the "Draft National Land Management Plan."

(b) The notice shall provide a forty-five (45) day period during which public comments may be submitted to the Chairman.

(c) No public hearing will be required.

(d) The National Trustee Board shall consider all comments submitted on the Draft National Land Management Plan in developing the Final Plan.

(e) The Administrative Procedure Act shall not apply to any action taken under this section.

§ 2252. Publication of the National Land Management Plan and Revisions.

(a) Publication of "Notice of Availability" in the *Federal Register* shall constitute publication of the National Land Management Plan and Revisions.

(b) Upon publication of the "Notice of Availability" in the *Federal Register*, the National Land Management Plan and Revisions shall be available at the Library of Congress, and at each regional office of Departments of Agriculture and the Interior.

§ 2253. Reports to Congress.

The President shall transmit the National Land Management Plan and all Revisions to the Congress at least ten (10) days prior to publication.

§ 2254. Applicability of the National Land Management Plan and Revision.

(a) The United States Forest Service, the National Park Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall incorporate the policy and directives contained in the National Land Management Plan and Revisions thereto. The National Land Management Plan and Revision shall not govern the use of property under the control of the Department of Defense.

(b) With respect to the Department of Defense, the policy and directives contained in the National Land Management Plan and Revisions thereto shall be advisory in nature.

MAJOR GENERAL WILTON BURTON PERSONS, JR. UNITED STATES ARMY (RETIRED) THE JUDGE ADVOCATE GENERAL OF THE ARMY (1975-1979)

MAJOR MICHAEL E. SMITH*

I. Introduction

Major General Wilton B. Persons was one of the most influential The Judge Advocate Generals (TJAG) because no TJAG before or after him held such critical jobs at such watershed times and had such a positive impact on the Judge Advocate General's (JAG) Corps and the Army. From his involvement in the Civil Disturbance Commission at the Pentagon during the Vietnam War to the creation of the Trial Defense Service, Major General Persons shaped Army policy and elevated the role of judge advocates. This article is primarily based on two oral histories taken of Major General Persons in 1985; one by two graduate course students, Major Dan Wright and Captain James Rupper, the other by two students at the Army War College, Colonels Herbert J. Green and Thomas M.

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Crean.[1] This article distills Major General Persons' invaluable, but voluminous, oral histories and captures his distinguished service record for future judge advocates. By studying the programs Major General Persons initiated and his views on leadership, on commanders, and on the Army in general, young judge advocates will benefit from his example of service, devotion to duty, and tenacious pursuit of controversial programs he knew would benefit his client.

II. Family

To understand Major General Persons' accomplishments and character, one must examine his rich heritage. His grandfather, Frank Stanford Persons, was the youngest of ten children from a poor family in Montgomery, Alabama.[2] What Frank lacked in physical stature, he made up for in determination. He was not satisfied with his position in life and went to work at a drug store. Frank worked hard, saved his money, and eventually bought the drug store. Frank married Kate Porter, the granddaughter of the famous Judge Benjamin Faneuil Porter, cofounder of the first female college in Alabama.[3] Kate and Frank had five sons and a daughter: Seth Gordon, John Williams, Frank Stanford, Jo Robert, Wilton Burton, and Katie. The Honorable Seth Gordon Persons, considered the smartest of the boys, became the Governor of Alabama. At seventeen, John Williams "Willie" Persons, Frank's second son, lied about his age and joined the Royal Canadian Air Force during World War I. After the war, Willie returned to Montgomery and bought a new Harley-Davidson motorcycle. For a time, he dated the beautiful and daring Zelda Sayre, but a young lieutenant from the North with a passion for prose, F. Scott Fitzgerald, stole her away.

Pursuing his love of flying, Willie joined the United States Air Force and eventually flew every type of United States plane in service at the time. He served as director of gunnery training for the Air Force in World War II. After the war, he commanded Randolph Air Field in San Antonio, Texas. Willie remembered his father as a stern disciplinarian who never made hollow commitments, "Papa

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[1] Hereinafter, citations to the Graduate Course Oral History will be either "Grad Course vol. I" or "Grad Course vol. II" and citations to the War College Oral History will be "War College." Each oral history is on file with the Library of The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[2] Roger Butterfield, *Four Persons of Distinction*, LIFE, Sept. 13, 1954, at 186. Unless otherwise indicated, this entire portion of Major General Persons' family background was gleaned from Mr. Butterfield's article.

[3] Frank also had a southern celebrity cousin named Truman Streckfus Persons who later changed his name to Capote.

taught me to make my promises slow and keep 'em fast."[4] With such discipline, Willie rose to the rank of major general in the United States Air Force.

The Reverend Frank Stanford Persons junior attended the Virginia Theological Seminary and was ordained as an Episcopal priest. His first preaching assignment was to live among the mountaineer moonshiners near Charlottesville, Virginia. In the early 1950s, Frank had a church in Opelika, Alabama, where he encouraged interracial attendance. On several occasions, Frank unsuccessfully lobbied his brother, Governor Persons, to commute the death sentences of convicted murderers.

Jo Robert Persons was a successful businessman in New Orleans and died in 1946. Katie, the only girl, died when she was eight years old after drinking some typhoid infected well water.

Wilton Burton "Burt"[5] Persons was his mother's pet. All the boys attended Starke University School in Montgomery, but Burt worked harder than the others. He went on to Alabama Polytechnic Institute (now known as Auburn) where he was captain of the drill team. Burt placed great importance on being born on Robert E. Lee's birthday, January 19.

When the United States entered World War I, Burt left for Boston to apply for the officer training corps. When he got to the recruiting office, he discovered he was three and one-half pounds below the minimum weight. He went next door to a drug store and drank water and ate bananas until he gained the weight. After completing his officer training, Burt commanded a battery of howitzers in France.

After World War I, the Army sent Burt to teach military tactics at the University of Minnesota, and later Harvard, where he studied business administration. As a captain, Burt ended up in the office of the Assistant Secretary of War, where one of his duties was to furnish information about Army appropriations to the House Military Affairs Committee. Burt became close friends with a young major down the hall named Eisenhower who worked in the office of General Douglas MacArthur, the Chief of Staff.

In 1941, defense spending became a critical issue. Because of his expertise, Burt Persons rose through the ranks quickly, eventually becoming the Army's Chief Legislative Liaison on Capital Hill. Burt tried very hard to participate in the war overseas and was set to go to Africa when General Marshall interceded: "There are few

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[4] Butterfield, *supra* note 2, at 186.

[5] Burt Persons was also known as "Jerry."

men in the Army I consider irreplaceable, and Persons is one of them."[6]

In 1949, Burt retired and became superintendent of Staunton Military Academy in Virginia. In 1951, his old friend "Ike" Eisenhower called and brought him back on active duty to become liaison officer at Supreme Allied Headquarters in Rocquencourt, France.[7] During this time, Burt encouraged his friend Ike to run for President.

President Eisenhower appointed Burt Persons as one of his White House aides. Burt Persons was Special Assistant to the President from January 1953 to September 1953. He served as Deputy Assistant to the President from September 1953 to September 1958. In September 1958, President Eisenhower promoted Burt to White House Chief of Staff where he served until January 1961.[8] He retired to Florida where he died in 1977.

III. Childhood

Wilton Burton Persons, Jr. was born on 2 December 1923 in Tacoma, Washington. His father, Wilton Burton "Burt" Persons, Sr. was stationed at Fort Lewis, and his mother, Charlotte Caldwell, was a Tacoma native.[9] His parents divorced when he was four years old, and his mother remarried and moved to Kansas City, Missouri.[10] Wilton spent the school year with his mother, stepfather, three half-sisters and half-brother in Kansas City, and the summers with his father wherever he was stationed.[11]

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[6] Butterfield, *supra* note 2, at 190.

[7] Major General Persons was present when his father received this call and remembers him bounding into the room and asking what he thought of the idea. Grad Course vol. I, *supra* note 1, at 155-56.

[8] While universally acclaimed as President Eisenhower's liaison with Congress and, later, as chief of staff, he also has been criticized for his conservatism. He consistently opposed any move by the President to publicly denounce Senator Joseph R. McCarthy, even when the White House and the Army came under attack. Furthermore, Jerry Persons has been criticized for his opposition to civil rights reforms. Even though he was deeply troubled by segregation issues, he felt that a cautious approach was appropriate. POLITICAL PROFILES: THE EISENHOWER YEARS (Facts on File, Inc., 1977) (on file with the Dwight D. Eisenhower Library, Abilene, Kansas). Another author has blamed Eisenhower's staff system for the 1956 U-2 embarrassment where the government initially denied the spy missions. Vermont Royster, *Presidential Styles and the Churchill Model*, WALL ST. J., Jan. 7, 1987, editorial page.

[9] War College, *supra* note 1, at 1.

[10] *Id.*

[11] *Id.* at 2.

Burt thought that his fourteen year-old son lacked direction and he took Wilton to Montgomery, Alabama to attend the same preparatory school Burt had attended more than thirty years before.[12] Starke University School was still run by "Old Man Starke."[13] Students had to recite every day in every subject and if someone made a mistake, they would have to come back in the afternoon.[14] If a student failed to satisfactorily complete the lesson by Friday, Professor Starke would declare, "I have been here every Saturday for the last forty-five years. I'm going to be here this Saturday, and if you want to join me just keep on goofing off."[15]

Professor Starke did not tolerate misbehavior. Students who committed serious transgressions were summoned before the entire school and administered a whipping on the hand with a switch cut by the student.[16] Professor Starke was accommodating, though, because he gave the offender the choice of having all twenty-five lashes on one hand or twelve on one hand and thirteen on the other.[17] While times were difficult at Starke, years later Major General Persons reminisced that his high school education taught him how to work, and it made the rest of his academic life seem easy.[18]

At seventeen, Wilton had enough credits to get into college.[19] Continuing to follow in his father's footsteps,[20] Wilton enrolled at Alabama Polytechnic Institute. In 1943, after two years at Alabama Polytechnic Institute, he applied for an aviation cadet training program.[21] Bad eyesight prevented him from flying, and Wilton finished as a meteorology cadet at the University of Chicago.[22]

Wilton tried for some time to get into West Point, but he failed to win an appointment.[23] Burt had a unique way of motivating his son, and Wilton once remarked that "he [his father, Burt] thought I was nuts when I wanted to go to West Point. He didn't think I was

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[12] Major General Persons conceded, "I was an incipient juvenile delinquent at fourteen. I wasn't working in high school, I was goofing off, I was a discipline problem, I was nearly failing." War College, *supra* note 1, at 7.

[13] *Id.* at 3; *see also* Butterfield, *supra* note 2, at 188.

[14] War College, *supra* note 1, at 3.

[15] *Id.*

[16] *Id.* at 5

[17] *Id.* "Old Man Starke" must have gone soft over the years. Major General Willie Persons remembered the number of strikes being forty-nine. It used to be fifty until a boy fainted at fifty. Butterfield, *supra* note 2, at 188.

[18] War College, *supra* note 1, at 7.

[19] *Id.*

[20] Major General Persons also indicated that cost may have been a factor. *Id.* at 9.

[21] *Id.*

[22] *Id.*

[23] Grad Course vol. I, *supra* note 1, at 157.

strong enough or smart enough. That was his technique."[24] Perseverance paid off, and on 1 July 1943, Wilton entered West Point.[25]

IV. West Point

> *I had learned enough not to throw up my hands and give up, instead, shrug your shoulders, pull your helmet a little lower over your ears and carry on.*[26]

During World War II, the Academy operated on an accelerated schedule—graduation was in two and one-half years for some, three years for others, to include Cadet Persons.[27] The war had a tremendous impact on life at West Point. During the plebe year, in addition to memorizing a plethora of trivial information, the cadets had to be prepared to recite what was going on in every theater of the war every day.[28] Some faculty members did not hide their desire to deploy, rather than "baby-sit a bunch of cadets."[29] Upperclassmen "were straining at the leash . . . to get out."[30]

Cadet Persons did very well at West Point, finishing 83d out of a class of 873.[31] However, the war ended before he graduated, which posed a special problem for Cadet Persons and his classmates.[32] The

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[24] *Id.* at 156. At the end of his plebe year, he met his father in New York City "and he admitt[ed], somewhat begrudgingly, that he was wrong—that I had at least made it through the first year." War College, *supra* note 1, at 11. Major General Persons stated that his father rarely gave him advice about the Army, but one thing he did stress was never turn down a school or a chance at a challenging job. "The idea being that rather than just punching that ticket, you were positioning yourself for more responsible jobs." *Id.* at 13.

[25] All new cadets start their education at West Point on equal footing, regardless of the number of years of college they have already completed. Many new cadets at West Point have already completed some college courses at another university prior to entering the Academy.

[26] Grad Course vol. I, *supra* note 1, at 159.

[27] His class was the next to the last to graduate in three years. Thereafter, cadets graduated in four years. War College, *supra* note 1, at 14.

[28] *Id.* at 14.

[29] *Id.*

[30] *Id.*

[31] OFFICIAL REGISTER OF THE OFFICERS AND CADETS, UNITED STATES MILITARY ACADEMY, WEST POINT. Major General Persons just missed being a Distinguished Cadet; the top fifty-three cadets in his class were Distinguished Cadets. *Id.* at 38. Major General Persons finished number one in his class in Final Tactics and fourteenth in Law. *Id.* at 60. Interestingly, his worst showing was in Final Aptitude for Service, where he placed 443d in his class. *Id.*

[32] Grad Course vol. I, *supra* note 1, at 169.

message was clear—not only was there a tremendous number of officers ahead of them in grade, but they had all served in combat.[33]

V. Armored Cavalry Officer

Even though all of his education and training was in engineering, Lieutenant Persons decided he did not want to become an engineer.[34] Instead, he chose Armor as his branch.[35] After attending the Armor School at Fort Knox, Kentucky, Lieutenant Persons was assigned to the 24th Constabulary Squadron in Austria as a cavalry officer.[36] The Constabulary Squadron's primary mission was law enforcement. By the time Lieutenant Persons arrived in May 1947, many of the law enforcement duties had already been returned to the Austrian government.[37] During his eighteen months in Austria, Lieutenant Persons worked to transition the unit from a police force to a tactical unit.[38] He also had the opportunity to prosecute and defend numerous special courts-martial.[39]

Lieutenant Persons' next assignment was to the newly formed 6th Armored Cavalry Regiment in Landshut, Bavaria.[40] The regiment received new M-24 and M-26 tanks and trained at Grafenwoer, Vilseck, and Munsingen.[41] Apparently someone at Headquarters, European Command, recognized Lieutenant Persons' abilities and brought him in as an Assistant Secretary of General Staff.[42] After nine months in this position, Lieutenant Persons was accepted for a funded legal education.[43] When he listed his choices for law schools, he knew nothing about them and only put the ones he had heard of: Harvard, Yale, and Columbia.[44] In July 1950, Lieutenant Persons returned to the United States to attend law school.

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[33] *Id.* at 17. However, four years later the Korean War began and promotions came at a normal pace. *Id.* Major General Persons noted that his father never had much sympathy with the rate of promotions (he had been a captain for seventeen years). *Id.*

[34] *Id.* at 161.

[35] *Id.* Out of his graduating class of 873, only forty-four went into Armor.

[36] *Id.* at 162.

[37] *Id.* Germany was slower to transition to civilian control.

[38] *Id.*

[39] *Id.* at 163.

[40] *Id.* at 162. When the Constabulary Headquarters was deactivated, 7th Army was activated at Patch Barracks. *Id.* at 165.

[41] *Id.* at 163.

[42] *Id.*

[43] *Id.*

[44] War College, *supra* note 1, at 64. He later changed his third choice to Virginia at the prompting of the European Command Deputy Judge Advocate Colonel Stanley Jones (who later became The Assistant Judge Advocate General), a Virginia alumnus. *Id.* at 63.

VI. Law School

From 1950 to 1953, Captain Persons attended Harvard Law School and it was a humbling experience.[45] Prior to Harvard, Captain Persons knew that if he buckled down and studied hard he could usually get top marks.[46] Harvard was full of students who could do that. Studies were arduous, but he finished in the top ten percent of his class the first year.[47]

During his second and third years, Captain Persons worked in the Legal Aid Bureau.[48] He spent his summers working at an old Boston State Street law firm[49] and became vice-president of the Legal Aid Bureau in his third year.[50] His hard work again paid off and he graduated *cum laude*.[51] Some of his classmates also did well and built upon their law school success, like Senator Thomas Eagleton from Missouri, Senator William Hathaway from Maine, and David McGiffert, Under Secretary of the Army during the civil unrest of the 1960s.[52]

VII. Major General Persons' Judge Advocate Career

A. Military Affairs Division, The Judge Advocate General's Office

While Wilton was assigned to the Pentagon as a new judge advocate captain in The Judge Advocate General's Office (JAGO), his father was working for President Eisenhower in the White House.[53] He remembered telling his father everything that was wrong with the Pentagon, and he also recalled having his father "explain to me in no uncertain terms that I didn't know what the hell I was talking about:"[54]

> Son, what you have to remember is that DCSPER's of the Army come and go, chiefs of staff come and go, even the secretaries of defense come and go, the Army goes on forever.[55]

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[45] Lieutenant Persons was promoted to Captain on 4 January 1951. *Id.*

[46] *Id.* at 65.

[47] *Id.* He noted that he finished 44th out of 440.

[48] Grad Course vol. I, *supra* note 1, at 167.

[49] *Id.* at 166.

[50] *Id.* at 167.

[51] War College, *supra* note 1, at 66.

[52] Grad Course vol. I, *supra* note 1, at 170.

[53] *Id.* at 165.

[54] *Id.*

[55] War College, *supra* note 1, at 127.

Captain Persons' father was advising him to "take the long view."[56]

B. General Law Branch, Administrative Law Division

For a young judge advocate, Captain Persons was given tremendous responsibility. After the Korean War, the active duty Army rapidly downsized.[57] The Army sought to improve the Reserve and National Guard and make them combat ready.[58] Captain Persons was the judge advocate representative in the planning process which ultimately led to passage of The Reserve Forces Act of 1955.[59] Initial active duty for training was not required prior to the Act.[60] The National Guard brought all its political pressure to bear on defeating the legislation. Major General Persons described the concern as follows: "They thought that if they had to require this kind of training for all new enlistees then nobody would enlist in the Guard, and their strength would decline, and therefore their promotions would stop and all this great hierarchy of civilians would be out."[61]

Late one afternoon, Captain Persons was told that the Secretary of the Army was going to testify about the Act before the House Armed Services Committee at 0900 the next morning. The Secretary needed someone to brief him on the National Guard and the militia clause of the Constitution at 0730.[62] The Secretary wanted a five minute briefing. Everyone went home, but Captain Persons stayed at the office all night preparing the briefing. After sleeping at his desk, he got up, shaved, had some breakfast, and gave the briefing.[63] The Secretary was pleased and told him that he was coming to the Hill with him to answer any questions that might come up.[64] Captain Persons sat right behind the Secretary and the Chief of Staff, General Maxwell Taylor, during the Secretary's testimony.[65]

Captain Persons got another opportunity to shine during his first year at the Pentagon. Someone in the JAGO[66] thought it would be a good idea to have a young captain in the Pentagon to try a case under the new 1951 *Manual for Courts-Martial*.[67]

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[56] *Id.*

[57] *Id.* at 79-80.

[58] *Id.* at 79.

[59] *Id.* at 80.

[60] *Id.* at 79.

[61] *Id.* at 80-81.

[62] *Id.* at 81.

[63] *Id.* at 82.

[64] *Id.*

[65] *Id.*

[66] The JAGO stands for Judge Advocate General's Office, or what is now referred to as OTJAG, Office of The Judge Advocate General.

[67] War College, *supra* note 1, at 114.

Captain Persons was assigned as assistant defense counsel on the court-martial of Corporal Edward Dickenson, an accused traitor during the Korean War.[68]

C. Chief, Research Branch, Administrative Law Division

After a year as an action attorney, Captain Persons became branch chief of the Research Branch.[69] This dubious honor prompted Captain Persons to extract a promise that after a year he could return to one of the branches as an action officer. Captain Persons was faced with the unenviable task of reorganizing drawers and drawers of file cards of digests and references to Opinions of The Judge Advocate General dating back to before World War I. After a year of wrestling with the antiquated system, he went to his boss to remind him of their agreement. Honoring the commitment, Colonel Robert H. McCaw sent Captain Persons to the Legislation Branch and replaced him in the Research Branch with Lieutenant William Fulton.[70]

Major General Persons stated that his three years in Administrative Law taught him how to "write in an economical way."[71]

> The system is designed to produce a very high quality of opinion on a very short notice. It requires you to submerge your ego, and your pride of authorship. You're glad when someone improves it. Of course it's always a nice feeling when it sails through relatively untouched. This was hard for some people to swallow.[72]

Major General Persons recounted a time when he took an opinion into his brilliant and exacting branch chief, Colonel Lawrence J. Fuller, to review.[73] After reading the opinion, Colonel Fuller remarked, "Pretty good papers."[74] Major General Persons recalled that he "went into the next room, out of [Colonel Fuller's] sight, and threw my hands in the air and danced around the room."[75]

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[68] *Id.* at 115. *See* United States v. Dickenson, 20 C.M.R. 154, 6 U.S.C.M.A. 438 (1955). Dickenson was sentenced to a dishonorable discharge, total forfeiture of pay and benefits, and ten years confinement at hard labor.

[69] War College, *supra* note 1, at 84.

[70] Grad Course vol. II, *supra* note 1, at 191.

[71] *Id.* at 197.

[72] *Id.* at 198.

[73] *Id.*

[74] *Id.*

[75] *Id.*

D. Command and General Staff College

From August 1957 to June 1958, Major Persons attended Command and General Staff College, Fort Leavenworth, Kansas.[76] A strong believer in judge advocates attending service schools, Major General Persons observed:

> I happen to think that the more you know about your client's business, the better lawyer you are, plus the associations and, the protective coloration you get from having attended those places, you know, are just invaluable. It makes you part of the Army team and not just a technical specialist.[77]

E. 8th Infantry Division

> *Young officers asked me what they should do in the JAG Corps and what kind of assignment should they try and get, what should they ask for. I would tell them any assignment you get is going to be important and interesting and all that. But if you have any druthers and you can do it, ask for a division. The division is where the Army is. That's the real Army, and the farther you get away from the division, the farther you get away from the real Army.*[78]

Major Persons' first and only division assignment was the 8th Infantry Division.[79] He started out as a defense counsel,[80] later became a claims attorney, and also served as an administrative law attorney. Major Persons was the deputy staff judge advocate during his last eighteen months in the 8th Division.[81]

Major Persons had a good mentor in his second staff judge advocate (SJA), Colonel Bruce C. Babbitt. Not many judge advocates can claim to have worked for an SJA with as distinguished a background as Colonel Babbitt. He was the SJA of the 2d Infantry Division in Korea when the Chinese crossed the Yalu river. As the 2d Infantry Division was overwhelmed, his outfit in the division supply trains was surrounded and defeat seemed imminent. As the senior

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[76] Captain Persons was promoted to Major on 14 May 1958. *Id.*

[77] Grad Course vol. I, *supra* note 1, at 171.

[78] Grad Course vol. II, *supra* note 1, at 217.

[79] *Id.*

[80] For judge advocates who have only served in the Army since the creation of the Trial Defense Service, it is interesting to note that as a new defense counsel, Major General Persons often sought the advice of his deputy SJA, Major Frank C. Stetson: "When I had a case, I knew that he would help. He wouldn't tell the trial counsel what I was planning to do. I could talk to him off the record." *Id.* at 219.

[81] *Id.*

officer, he took command of the support troops, a provisional combat battalion, and they fought their way out of the encirclement. Colonel Babbitt was well prepared for the challenge because during World War II he was an infantry officer and fought all the way through the Aleutian Islands and then in the Pacific with the 7th Infantry Division.[82] Such experiences gave Colonel Babbitt a keen sense of discipline and a firm commitment to fairness for soldiers.

As deputy SJA, Major Persons got first-hand experience in dealing with Commanders who did not like the new *Manual for Courts-Martial*.[83] During the remodeling of the 8th Infantry Division's courtroom, he and Colonel Babbitt devised a unique way to drive home the idea that the Law Officer, not the President, now ran a court-martial. They built the Law Officer's bench about a foot higher than the panel's bench.[84] One day, in the middle of a court-martial, a panel president came storming into the office: "Who is responsible for that JAG officers' bench being higher than the rest of the court. I am still the president of the court, and the law says that I fix the time, the uniform, and . . . all that sort of thing."[85]

Major Persons explained to the angry colonel that he was the foreman of the jury, a very important job: "I tried to calm him down and explain to him why it has to be that way if the thing is going to pass muster in all the reviews it is going to get up the line; and if it is not, then we are all wasting our time down here."[86] This approach usually persuaded angry line officers who were accustomed to the old system.

Major General George W. Hickman, Jr., then The Judge Advocate General, came to 8th Infantry Division for a visit and spoke to each officer individually. He asked Major Persons where he wanted to go next. After the Pentagon and three years in Germany, Major Persons told him that he wanted to go to an Army post in the states, "the womb of the Army as [his] wife puts it."[87] Major General Hickman told him that he should think about procurement law and that there were a couple of posts in the Southwest that would be just right: Sandia Base, Fort Huachuca, and Fort Bliss, Texas.[88] That night, Major Persons and his wife, Christine, got out the Atlas and started reading up on the desert.

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[82] *Id.* at 221.

[83] This served him well in Vietnam when he implemented the 1969 *Manual*.

[84] War College, *supra* note 1, at 118-19.

[85] *Id.* at 119.

[86] *Id.* at 121.

[87] *Id.* at 33.

[88] *Id.* at 34.

A couple of months later, Major General Hickman retired and Major General Decker became The Judge Advocate General. Major General Decker sent Major Persons a letter: "Dear Major Persons, I understand you are interested in a procurement law assignment, and we have just the job for you and that is to take over as the chief of the Procurement Law Division at the JAG School."[89] Major Persons was devastated; it was the last place in the world he wanted to go.

> I contemplated jumping out the window—it was not economically feasible for me to resign at that point, and I could not very well, at least it never occurred to me, to write back to General Decker and tell him that he got it all wrong from General Hickman. So we gritted our teeth and went off to Charlottesville.[90]

F. The Judge Advocate General's School

1. Secretary to the Commandant—When Major Persons walked in to meet the Commandant and to begin his new job as Chief of Procurement Law, Colonel John F.T. Murray said, "Am I ever glad to see you. You are going to be the new school secretary."[91] Major Persons was the school secretary for one year. He learned a lot about management and how to juggle several things at once, which was quite an accomplishment considering that he was working under Colonel Murray. Major General Persons remembered Colonel Murray as having "a million ideas . . . that's the kind of supervisor, manager, and leader that he was. I can remember I would go in about once a week, and he would reel off about fifteen new projects, and I would write them down dutifully, then he would say, 'What are we doing about?'—unfortunately, he had a memory like an elephant, he would remember what he had told me to do the week before . . . ."[92]

After a year as secretary, Major Persons started looking for a teaching position. He was in a good position to find his replacement and pick the teaching position he wanted. Colonel Bob McGuire, the Chief of the Military Justice Division and popularly known as "Mr. Evidence," was leaving and Major Persons thought that would be a great subject to teach.[93]

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[89] *Id.*

[90] *Id.* at 35. As it turned out, the new Commandant was Colonel John F.T. Murray. He had been two years ahead of Major General Persons at Harvard Law School and five years ahead of him at West Point.

[91] *Id.*

[92] *Id.* at 36-37. Major General Persons also mentions the challenge of "dealing on the one hand with what I considered to be the prima donnas in the academic department, and at the same time trying to keep under control this ant-hill of activity." *Id.*

[93] *Id.* at 38.

2. Instructor, Military Justice Division—Major Persons became the assistant division chief in Military Justice and taught evidence. Colonel McGuire graciously turned over his teaching notes. However, Major Persons found himself relying too heavily on the notes and trying to teach too much detail.[94] It took him several classes before he found his own voice. He discovered it was better to only teach one or two ideas an hour.[95] His first year of teaching was both exciting and terrifying:

> I don't remember working any harder in my life than I did when I was teaching here. In those days, we had these room air conditioners in each instructor's office. I would sit there in front of that room air conditioner with it on full blast and soak my uniform from sweating. I didn't relax until at least the second year. I felt that I had to be completely prepared to answer any question that might possibly arise from anyone who might even walk in the classroom . . . . I found it the most exhilarating, invigorating thing, particularly with the basic classes . . . the amount of energy and the amount of enthusiasm that you could engender in this class—get them stirred up.[96]

After a year of teaching, the division chief left and Lieutenant Colonel[97] Persons became the Chief of the Military Justice Division for his last year.

3. Chief, Military Justice Division—Lieutenant Colonel Persons had a hands-off approach to management. He disliked faculty meetings—thinking that they were a waste of time.[98] He also thought that faculty evaluations from the advanced class were only valuable as to administrative matters and that evaluations from basic course students served no purpose:

> [T]o take seriously what they thought should be in the curriculum and who should teach it seemed to me to be pretty silly. That's what we were being paid to do. So my feeling was, okay, let them fill out papers—I remember going to see Colonel Murray one time, and he said, 'We've got these papers here from the basic course. What do you think we ought to do with them?' I said, 'Throw them in the waste basket. Don't even read them.'[99]

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[94] Grad Course vol. II, *supra* note 1, at 215.

[95] *Id.*

[96] *Id.* at 215-16.

[97] Major Persons was promoted to Lieutenant Colonel on 15 January 1963. *Id.*

[98] War College, *supra* note 1, at 41.

[99] *Id.* at 41.

Lieutenant Colonel Persons felt that the role of The Judge Advocate General's School, United States Army (TJAGSA), was to turn out people who could immediately function in the Army: "We are the only law school in the country that has any responsibility for its product."[100] Lieutenant Colonel Persons believed TJAGSA was a service school first and a graduate school second.[101] General Decker was trying hard to get a master's degree bill through Congress, but Lieutenant Colonel Persons never felt strongly about it.[102]

This was also around the time (1963) that serious discussions were being conducted about building a new school.[103] Classes were taught in the University of Virginia Law School classrooms and Major General Persons noted that it was Major General George S. Prugh who deserved all the credit for getting the school built: "Just exactly two weeks before he retired and I got sworn in as The Judge Advocate General, they opened it. I had been back from Europe one day and went down for the dedication; it was a real kick."[104]

While his three years at TJAGSA were a strain financially,[105] professionally it was extremely rewarding. "I got not only a feeling for what that school does, and how well it does it, but also I got to know an awful lot of Reserve officers and have a lot of respect for these guys who give up their vacations to come there in the summer."[106] Just about the time he was becoming bored with teaching, Lieutenant Colonel Persons was selected for the Army War College.[107]

G. Military Affairs Division, JAGO

After the War College, Lieutenant Colonel Persons returned to Washington, D.C. It was 1965, and the Army was building up in Vietnam. Lieutenant Colonel Persons kept a map on his wall, plotting the location of divisions.[108] It would be three years before he went to Vietnam, but he had battles to fight at home.

Lieutenant Colonel Persons' initial assignment in the JAGO was Chief, General Law Branch, Military Affairs Division. A year later, he became the Assistant Chief, Military Affairs Division. He

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100 *Id.* at 42.

101 *Id.* at 48.

102 *Id.* at 48.

103 *Id.* at 49-50.

104 *Id.* at 50-51.

105 Major General Persons stated, "We cashed all the children's war bonds and borrowed on my life insurance..." *Id.* at 39.

106 *Id.*

107 Grad Course vol. II, *supra* note 1, at 217.

108 *Id.* at 130.

spent his last two years as the Chief of Military Affairs Division.[109] Shortly after he arrived, the riots in Watts broke out. As Major General Persons recalled, "All of a sudden the Army was in the civil disturbance business in a big way, and they were very much dependent upon their lawyers to tell them what to do."[110] Nothing like this had happened since the 1950s when race riots occurred in Little Rock, Arkansas, in Oxford, Mississippi, and in Birmingham, Alabama.

Civil disturbance missions started with Little Rock. Major General Creighton Abrams was sent to Little Rock as the Department of Army liaison. His mission was to be the eyes and ears of the Chief of Staff and the Secretary.[111] When told he had two hours to get ready and assign whoever he wanted to staff the mission, General Abrams said, "'Give me a provost marshal, a PAO [public affairs officer], a communicator, and a JAG,'" and that was it. That set the tone for the next twenty years.[112] These early experiences were the only precedent available to the Army and formed the foundation for what would soon be called the Civil Disturbance Teams.[113]

To handle the new wave of disturbances in the 1960s, the Department of the Army (DA) established the Civil Disturbance Liaison Committee. The head of the team was Brigadier General John J. Hennessy who was also Director of the Operations Center for the Deputy Chief of Staff for Operations.[114] The Committee included representatives from intelligence, provost marshal, logistics, public affairs, and the JAGO.[115] Lieutenant Colonel Persons was the judge advocate representative.

The Committee set about drafting model proclamations, operations plans, and rules of engagement.[116] The Committee was responsible for preparing the DA team chiefs for deployment once the President determined that soldiers should be deployed. The team chief, a commander, was the DA liaison with local police departments, the director of public safety, and the other civil authorities. His team included a signal officer, a military police officer, a public affairs officer, and a judge advocate.[117] The team chief's job was to

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109 *Id.* app. 1.

110 *Id.* at 130.

111 *Id.* at 131.

112 *Id.* at 140-41.

113 *Id.* at 130.

114 *Id.* at 131.

115 *Id.*

116 *Id.* at 132.

117 Grad Course vol. II, *supra* note 1, at 172.

establish communications, advise the local authorities, and recommend various actions.[118] The JAGO set up rosters with judge advocates assigned to each of the twenty-five DA civil disturbance teams. The assigned judge advocate was the legal advisor to the DA team chief and was usually the only lawyer deployed.[119] They had to be prepared to fly at a moment's notice and were directed to have a credit card and some cash at the ready.[120]

Each judge advocate on a team had a kit which contained the Constitution, relevant statutes, the Presidential Proclamation, an Operations Order, and selected opinions from The Judge Advocate General.[121] Major General Persons recalled that the judge advocate on these teams practiced the "law of necessity" or common sense.[122] For example, one of the judge advocates called him with the following question: "The jails are all full and we are now using city buses in the city bus yard, a guard at each end, to detain prisoners, is that okay?"[123] During the riots which erupted after the assassination of Dr. Martin Luther King, Jr., all twenty-five teams were called into action at cities all over the country.[124]

Before President Johnson dispatched a team, he insisted that the governor of the requesting state give him a written statement that the situation was beyond his control and that law and order had broken down.[125] In one case, Governor Romney of Michigan could not bring himself to admit that law and order had broken down in Detroit. The stand-off between the Governor and President Johnson lasted almost twenty-four hours.[126] Around two in the morning, the Governor finally sent the message, and the team was dispatched.[127]

Major General Persons once told a story which illustrates the tremendous discipline required of soldiers in handling civil disturbances. During his tour in the Military Affairs Division, a large crowd of demonstrators marched on the Pentagon, and soldiers were

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118 *Id.*

119 War College, *supra* note 1, at 132.

120 *Id.* at 132, 134.

121 *Id.* at 139. *See also* DEP'T OF ARMY, MIL. AFFAIRS DIV., OFF. JAG, ARMY, JAGA/3490, CIVIL DISTURBANCE CHECK LIST (5 Feb. 1968).

122 War College, *supra* note 1, at 139-40.

123 *Id.* at 140. Major General Persons stated that, "if they had the right to put them in jail, they surely had the right to keep them in a bus. Once the law of necessity becomes the guiding light then it's common sense, and Army commanders have a lot of that, most of them do." *Id.*

124 *Id.* at 132, 134.

125 *Id.* at 135. *See* DEP'T OF ARMY, REG. 500-50, EMERGENCY EMPLOYMENT OF ARMY AND OTHER RESOURCES: CIVIL DISTURBANCES, para. 2-3 (1 June 1972).

126 War College, *supra* note 1, at 135.

127 *Id.* at 135.

deployed in a ring around the Pentagon. Some demonstrators urinated on soldiers, others got in the soldiers' faces and screamed obscenities.[128] Sergeants walked the line looking for soldiers who were reaching the breaking point, pulling them from the line.

It is hard to imagine the volatility of these years. Major General Persons related a story about the assassination of Dr. King. He was called into the Pentagon Operations Center about 2200 hours. After reviewing the operational plans, he went home about 0100. At 0630 he got another call and rushed into the Pentagon. As he drove onto the George Washington Parkway, he noticed that no one else was driving into the city and that the road heading out of the city was choked with cars. As he approached Key Bridge, he raised his eyes higher and saw ten huge columns of smoke rising out of Washington, D.C.[129] Lieutenant Colonel Persons spent the next two and a half days in the Pentagon Operations Center. The Armored Cavalry Regiment stationed at Fort Meade deployed to the Nation's capital and blanketed a square mile of the District with tear gas.[130]

> You forget that that sort of thing could happen, but it happened and it could happen again, I suppose. I would hope that, if it does, the Army can respond as well as it did then. We tend to forget that when all else fails, we're all that stands between the populace and the worst you can imagine.[131]

General Abrams understood the necessity of having a lawyer with him when he headed to Little Rock. If Lieutenant Colonel Persons and his contemporaries had done anything less than a stellar job in the 1960s, the Army staff could have been soured on judge advocates in nontraditional operations for years to come. As it turned out, judge advocates have made themselves indispensable in operations other than war.

> [I]t was really a remarkable example of how the Army can, when it has to, adapt to and perform a new mission, one they did not want, an unpleasant and worst kind of mission, policing your own kind of people, but they did and they did it superbly. They did it with a lot of legal help.[132]

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128 *Id.* at 178.

129 Grad Course vol. II, *supra* note 1, at 182.

130 *Id.* at 183.

131 *Id.*

132 *Id.* at 180.

H. Staff Judge Advocate, United States Army, Vietnam[133]

Colonel Persons arrived in Vietnam in July 1969,[134] just months after passage of the Military Justice Act of 1968.[135] He viewed implementation of the new Act in Vietnam as his number one priority.[136]

1. Implementing the Military Justice Act of 1968—The creation of military judges and the requirement that military judges sit on all special courts-martial engendered the greatest animosity among commanders and posed the greatest challenge for Colonel Persons.[137] When the first two full-time special court-martial judges arrived in Vietnam, Colonel Persons made a "big production" out of their arrival:[138]

> [We] had a ceremony in which they were sworn in by Chief Judge Colonel Wondolowski. We had it in General Mildren's[139] office. We had the entire staff there. I remember General Mildren turning to me and saying, 'These look like kids.' Well, they did look like kids. Both of them had baby faces, and their hair was cut short. He wondered if they could handle this. I assured him there was no problem.[140]

Colonel Persons knew it was crucial to gain the support of commanders in implementing the new Act. To win their support, the Judge Advocate General's Corps had to present a unified front, throwing its complete support behind the new judges.

Major General Persons related a glaring example of the problems faced by the new special court judges. Captain John F. Naughton, one of the new judges, was sent to try a case for I Field

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133 The first course Major General Persons attended at TJAGSA was the SJA course prior to going to Vietnam. He never attended the basic course or the graduate course. *Id.* at 197.

134 Lieutenant Colonel Persons was promoted to colonel on 29 November 1967. *Id.*

135 Pub. L. No. 90-632 (Oct. 1968).

136 War College, *supra* note 2, at 231. Colonel John Jay Douglas, USARV, SJA, in 1968-1969, laid the ground work for implementation and sent Colonel Persons much material on the legal situation in Vietnam. *Id.* at 153.

137 Major General Persons notes that there was an exception to the requirement of lawyer counsel under "exigencies of the service." However, Major General Persons stopped this by a United States Army Vietnam directive and required lawyer counsel no matter what the circumstances. *Id.* at 234.

138 *Id.* at 236.

139 General Mildren's official title was Deputy Commanding General, United States Army Vietnam (USARV). General Abrams wore two hats. He was the Joint Commander of Military Assistance Command Vietnam and the commander of USARV. But the day-to-day activities, including UCMJ matters, were handled by General Mildren—Major General Persons' boss. *Id.* at 163.

140 *Id.* at 236.

Force.[141] The SJA for I Field Force was Colonel Charles C. Grimm. The trial took place in a remote area which could only be reached by helicopter. Judge Naughton found the accused not guilty, and the battalion commander "went into orbit."[142] He refused to provide Judge Naughton a helicopter and said, "That judge can sit there until hell freezes over . . . ."[143] The trial counsel heard the commander's tirade, called the SJA, who then called the next level commander. Before the end of the day, the battalion commander publicly apologized to Judge Naughton, and the convening authority had administered an Article 15 reprimand to the battalion commander.[144] Major General Persons stated, "As far as I was concerned, that's exactly the way to handle it."[145] He knew ultimately that no amount of massaging by him or anyone else would convince commanders: "It was people like her [Nancy A. Hunter, the first female special court judge], Dennis [Hunt], and John that sold the program simply by their performance."[146]

Not all SJAs supported the new changes; some sympathized with the commanders who vehemently resisted them. Major General Persons described the situation: "I remember, particularly with the judges, and I used to try to make it very plain to SJAs in Vietnam and in Europe too, we had the same problem in Europe—probably more in Europe—that I considered someone who badmouthed the military judge as being disloyal to the system. Larry Williams used to put it a little more bluntly, he used to say, 'It's like spitting in the soup and we don't do that sort of thing, fellows.' Some of them made that mistake and that just set the course of progress back and made it hard on all concerned."[147]

Major General Persons did not mean that an SJA can never discuss a judge's sentence with a commander. In the privacy of the commander's office, they are free to complain about a particular sentence. The SJA should listen, let the commander air his irritation, but make sure the commander understands that "there is nothing you can do about it."[148] Major General Persons condemned "actively joining in and badmouthing the judges, that is a . . . I can't think of a strong enough word to put on it."[149]

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141 *Id.* at 237.
142 *Id.* at 238.
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 239.
147 Grad Course vol. I, *supra* note 1, at 97.
148 *Id.* at 98.
149 *Id.*

Another big change under the new *Manual* was that lawyers were now required at all levels of courts-martial, including special courts.[150] Commanders felt that lawyers were taking over the system, that they were losing control.[151] The job of the JAG leadership was to educate commanders, to stress to the commanders that they still made the key decisions. Major General Persons recalled how then Secretary of the Army, Mr. Martin R. Hoffmann, put it, "[H]e said it was important that the commander be the one who decides what cases go to trial, and it's important that the soldier understands that it's the commander who makes those decisions."[152] As Major General Persons explained, "I mean it is part and parcel of the whole reason you have got an Army and the reason you have to have [command enforced] discipline in the Army . . . ."[153] Commanders needed to know that lawyers were not taking this fundamental power from them.

2. The Green Beret Case—While Colonel Persons' primary objective in Vietnam was to implement the new manual, the Green Beret Case was the first order of business when he arrived in Vietnam on 1 July 1969. It would occupy most of his time for the first three months.[154] Suffering from jet lag, and operating on one hour of sleep, he was summoned by the Deputy Chief of Staff for Personnel, Brigadier General Verne Bowers, and briefed on the case.[155]

The Green Beret Case is a fascinating story that reads like a Hollywood script.[156] The case is relevant for two reasons. As the SJA, Colonel Persons' experiences with defense counsel had a direct impact on his subsequent fight for a separate Trial Defense Service. The case also shows how interference from Washington, brought on by massive press coverage, can influence the execution of military justice in the field.

Sometime in June 1969, intelligence officers in the 5th Special Forces Group suspected that a Vietnamese agent who had been working for them was a double agent.[157] Their suspicions were

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150 *Id.* at 15-16.

151 *Id.* at 16.

152 *Id.*

153 *Id.*

154 War College, *supra* note 1, at 155-56.

155 *Id.*

156 The complete story is beyond the scope of this article. If the reader is interested in more detailed accounts, two books have been written on the case. John Stevens Berry, the author of *Those Gallant Men: On Trial in Vietnam* (Presidio Press 1984), was one of the military defense counsel on the case. The other book is *A Murder in Wartime: The Untold Spy Story That Changed the Course of the Vietnam War*, by Jeff Stein (St. Martins Press 1992). The author credits Major General Persons for his cooperation in writing the book. STEIN, *supra*, at x.

157 War College, *supra* note 1, at 164.

based primarily on a photograph of a man who looked like the Vietnamese agent with known North Vietnamese soldiers and intelligence officers.[158] A group of Special Forces officers and noncommissioned officers went to Saigon, got the suspected spy, and brought him back to their headquarters in Nha Trang where they detained him for several days.[159]

The Special Forces soldiers proceeded to interrogate the individual, administered a polygraph examination and later had one of their medics give him sodium pentathol.[160] He never confessed to anything. The Special Forces group kept meticulous records of every aspect of this incident, which would subsequently provide irrefutable evidence of their guilt.[161] After a few days of keeping the suspect incommunicado, his wife, who lived in Saigon, began to make inquiries as to his whereabouts. A couple of the intelligence officers approached the Central Intelligence Agency (CIA) and cryptically asked if they knew of a place they could send this alleged spy where he would not be heard from again.[162] The CIA knew exactly what they were asking and reported the incident to Military Assistance Command-Vietnam (MACV).[163]

On approximately 10 June 1969, General Abrams, the MACV Commander, called Colonel Rheault,[164] the 5th Special Forces Group Commander into his office and asked him point blank,[165] "What is this business about a double agent who some of your people have been asking the CIA how to get rid of?"[166] Colonel Rheault told General Abrams that the man was fine and that he was on a mission in Laos. In fact, Colonel Rheault's soldiers had already killed him.[167] About ten days later, a Staff Sergeant in the Group who was directly involved with the murder reported to the Criminal Investigation Division (CID) and confessed to the whole incident because he feared for his life.[168]

The sergeant, after CID gave him a polygraph examination which verified his story, implicated a warrant officer, two captains, a

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158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 165.

162 *Id.*

163 *Id.* at 166.

164 An interesting twist to the case is that Colonel Rheault was a West Point classmate of Major General Persons and a close friend. Grad Course vol. I, *supra* note 1, at 54.

165 War College, *supra* note 1, at 166.

166 *Id.*

167 *Id.*

168 *Id.*

couple of majors, a lieutenant colonel, and the commander.[169] The CID thought that the warrant officer would be the weak link, so they brought him in for questioning, and he also confessed to the whole conspiracy.[170] Everyone up to the majors confessed. Major General Persons summed up the evidence:

> They were very thorough in their planning, but in the process they managed to leave footprints and circumstantial evidence that was overwhelming—from the guy that got the boat, the guy that got the gun, the guy that washed the boat, the guy that got . . . a wheel and a chain to put around his neck, the sack that they put him in and dropped him in the ocean; the guy that . . . took the boat back and cleaned it afterwards to get the blood out of it. They had a very elaborate cover scheme in which they had one of their Special Forces men, who was of Chinese descent, dress in the kind of jungle fatigues that this guy would have worn and they dummied a mission in which they put him on an airplane. They had witnesses see him on this airplane that flew a long-range mission into Laos. They even dummied a radio log, which purported to be the messages, reports from him for about ten days. It was a very thorough operation.[171]

Seven officers, including Colonel Rheault, were charged with the premeditated murder and conspiracy to murder Thai Khac Chuyen.[172] The Article 32 investigation started on 31 July and concluded on 21 August.[173] The charges were referred to trial but the officers were never tried.

The Green Beret defense team posed a dilemma for Colonel Persons. Members of the defense team were trying the case in the media by holding daily press conferences. Colonel Persons felt these press conferences were at least unprofessional and perhaps unethical if designed, as they appeared, as attempts to influence the disposition of the case.[174] However, if he attempted to counsel the defense counsels, it could be perceived as an attempt to improperly pressure them. An incident involving the judge advocate assigned to the 5th Special Forces Group illustrates just how sensitive Colonel Persons

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169 Grad Course vol. I, *supra* note 1, at 52.

170 *Id.* at 53.

171 *Id.* The evidence revealed that they had prepared a five-paragraph operations order. *Id.* at 58.

172 JOHN STEVENS BERRY, THOSE GALLANT MEN: ON TRIAL IN VIETNAM 92 (Presidio Press 1984).

173 *Id.* at 138.

174 Grad Course vol. I, *supra* note 1, at 61.

had to be in handling military attorneys involved in the case. Colonel Persons felt that the Special Forces Group Judge Advocate had to be reassigned because he was acting as both a legal advisor to the command and as a defense counsel to the accused individuals.[175] Colonel Persons also suspected that at some point during the conspiracy the Special Forces Group Judge Advocate may have become involved with advising the suspects.[176] The Special Forces Judge Advocate wrote his Congressman complaining of his treatment, and claiming that his phone was tapped and that his mail was opened. Colonel Persons was investigated by the Chief Judge in Vietnam, Colonel Peter S. Wondolowski, and cleared of all charges.[177] Even though Colonel Persons was initially furious at the allegations, he later agreed that the investigation was necessary.[178]

Another incident involving defense counsel in the case made Persons increasingly aware of the need for a separate Trial Defense Service. Colonel Persons thought that the relatively young defense counsel could use an experienced, senior officer to act as a mentor and as a go between for administrative matters.[179] As Major General Persons explained, his well-intentioned plan did not go over well with the other defense counsel:

> I thought they ought to have a super experienced guy to go to, but they immediately assumed he was a spy. I told General [Kenneth J.] Hodson later that I had really underestimated the degree of paranoia that had developed in the group and that they thought he was a spy, wouldn't talk to him, so I relieved him and he didn't stay there very long . . .[It] didn't work and that was probably a blunder on my part; that gave them something else to worry about.[180]

As the case dragged on, political pressure back home continued to build. Congressman Rodino, a representative for Captain Morasco, one of the accused, "insisted on a private hookup to the cell

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175 *Id.* at 62-63.

176 *Id.* at 64.

177 *Id.* at 65.

178 *Id.* at 65-66

179 *Id.* at 70.

180 *Id.* at 70-71. This paranoia is confirmed by the former Captain Berry in his book on the trial "Colonel Persons had informed the defense counsel that a certain Major Kane under his command was to be made available to all defense counsel as the 'super defense counsel' . . . . I first thought that the prosecution had (ironically) planted a 'double agent' among us." BERRY, *supra* note 172, at 124. However, later in his book, Mr. Berry recounts his testimony at a hearing investigating allegations of prosecutorial misconduct, he stated, "Would I personally make allegations or charges against Colonel Persons or Colonel Rector? The answer is No. We have a very honorable Corps, made up of excellent attorneys; but, like all lawyers, we like to fight." *Id.* at 162.

in which Captain Morasco was confined and not once, but several times, asked for special consideration for Captain Morasco."[181] John Stevens Berry, one of the military defense counsel assigned to the case, in his book *Those Gallant Men*, quotes from some of the letters received by President Nixon regarding the case: "'Mr. President, I urge you to intervene in the murder charges against our eight great fighting men and give them what they really deserve: A MEDAL FOR GALLANTRY IN ACTION AGAINST AN ENEMY BY KILLING AN AGENT OF THE SAME AND SAVING COUNTLESS NUMBERS OF AMERICAN LIVES . . . .'"[182] Furthermore, Mr. Berry states:

> Finally, the political pressure became too much. Congressman George Bush and many other distinguished members of both Houses were demanding answers. On September 29 [1969], a statement was issued ordering the case dismissed because 'the Central Intelligence Agency, though not directly involved in the alleged incident, has determined that in the interest of national security it will not make available any of its personnel as witnesses.'[183]

On 29 September 1969, the Secretary of the Army directed dismissal of the charges in the interest of National Security even though the "intelligence people had concluded there was no possibility of any national security being jeopardized by trying the case."[184] Major General Persons believed that public opinion back home generated too much pressure for the Pentagon leadership, and that "They couldn't stand the heat."[185]

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181 Grad Course vol. I, *supra* note 1, at 74.

182 BERRY, *supra* note 172, at 155 (emphasis in original). Mr. Stein in his book, *A Murder in Wartime*, quotes Nixon's speech writer, Patrick Buchanan to Nixon, "The case is hurting us." STEIN, *supra* note 156, at 240 (photos in center of book).

183 BERRY, *supra* note 172, at 156-57.

184 Grad Course vol. I, *supra* note 1, at 50. Major General Williams on 12 April 1996 told me that Major General Hickman told him the real reason the charges were dismissed. The father of Major Middleton, one of the accused, was friends with the Congressman from Charleston, Mendel Rivers, who was the Chairman of the House Armed Services Committee. Congressman Rivers told President Nixon that if he wanted his continued support on the war in Vietnam, he better dismiss the charges.

185 *Id.* at 78. The impact of public opinion and political pressure on the Military Justice system is not limited to the Vietnam era.

Two cases from the Persian Gulf War were affected by national media coverage and public attention. Doctor Yolanda Huet-Vaughn was a captain in the Army Reserves called to active duty from her practice in Kansas City (*See generally* Colman McCarthy, *Anti-War Doctor Under Fire*, WASH. POST, Nov. 30, 1993, at Health Tab; Alan Bavley, *Metropolitan*, KANSAS CITY STAR, June 4, 1994. She refused to deploy, citing moral objections, was court-martialed and convicted. After serving eight months of a thirty month sentence at the United States Disciplinary Barracks, and before her case became final, the Deputy Assistant Secretary of the Army commuted the remainder of her sentence.

Major General Persons relied on his experience in the Green Beret Case to argue for the creation of the Trial Defense Service:

> [W]hen SJAs and commanders would come up with arguments against Trial Defense Service . . . one of the arguments I used was that you're taking a function away from the SJA, which is very difficult for him to perform without getting accused of being heavy-handed and doing improper things to defense counsel, namely of rating them. You know, it is possible to do it, but very, very damn difficult. What would you do if you had an SJA in this dilemma and you had a defense counsel who was incompetent? Now I am not talking about one who is brash and too 'vigorous.' I am talking about one who is simply incompetent, who does not do his homework, does not know the law, does a disservice to his clients when he appears in court; . . . Now what could you do about him as an SJA?[156]

Huet-Vaughn was convicted on 9 August 1991 and sentenced to thirty months confinement. United States v. Huet-Vaughn, 39 M.J. 545, 547 (A.C.M.R. 1994). On 3 December 1991, the convening authority reduced the sentence to confinement to fifteen months. *Id.* On 25 February 1992, the Army Clemency and Parole Board denied parole, stating that while "there was community support for the appellant's release . . . many other doctors who were called to serve [their] country during the war reported for duty. This was [the appellant's] duty also and [she] failed to live up to [her] agreement." *Id.* Huet-Vaughn appealed to "the Deputy Assistant Secretary of the Army for Department of the Army Review Boards and Equal Employment Opportunity Compliance and Complaints Review who ordered the appellant's release on 6 April 1992, after 240 days of confinement. He also remitted the remaining seven months of her approved sentence to confinement." *Id.* On 25 January 1994, the Army Court of Military Review set aside the findings and sentence—the government appealed. On 18 September 1995, the United States Court of Appeals for the Armed Forces reversed the Army Court of Military Review (ACMR) and remanded it for further review. United States v. Huet-Vaughn, 43 M.J. 105 (1995).

The other case which received substantial press coverage involved Sergeant Robert C. Pete, a member of the Louisiana National Guard. While his unit was training at Fort Hood in preparation for deployment, Sergeant Pete and several other members of his unit, decided to go on strike. In April, 1991, Sergeant Pete was convicted and sentenced to six years confinement (United States v. Pete, 39 M.J. 521, 522 (A.C.M.R. 1994)). In mid-March, 1993, the CBS Evening News aired a story about Sergeant Pete and the disparate punishment received by black soldiers in the brigade (*Freed Guardsman Calls Mutiny Charges "pre-emptive strike,"* BATON ROUGE ADVOC., Apr. 3, 1993, 1993 WL 7075188. "[B]lack members of the brigade were court-martialed afterward even though they never left the base, but the Army didn't punish nearly 100 white guardsmen who returned home without permission in a separate incident." *Id.* Approximately two weeks later, on 31 March 1993, the Deputy Assistant Secretary of the Army remitted the unexecuted portion of appellant's sentence to confinement. *Id.* at 522 n.1. On 11 January 1994, the ACMR, in a unanimous opinion, set aside Sergeant Pete's conviction and dismissed the charges. *Id.* at 527.

Both of these cases illustrate that the Army's civilian leadership will not hesitate to usurp the military justice system under the klieg lights of the media and public opinion. In Huet-Vaughn's case, justice was denied. In Sergeant Pete's case, perhaps justice was served a bit sooner. However, had the military justice system been allowed to run its course, both cases would have ended with the appropriate outcome—Huet-Vaughn's conviction was reinstated and Sergeant Pete's was set aside.

[156] Grad Course vol I, *supra* note 1, at 66-67.

Major General Persons would remember his involvement in this case and his experiences in Germany when he became TJAG. He knew the Army and the Judge Advocate General's Corps needed a separate Trial Defense Service and he would eventually do everything in his power to get one.

3. War Crimes—The Green Beret case was over, but Colonel Persons still faced other highly sensitive issues, including war crime allegations. Major General Persons noted that Vietnam was the first war in which "war crimes investigations meant investigations of alleged war crimes by our soldiers against the enemy or against civilians."[187] During the year he was stationed in Vietnam, Major General Persons estimated that there were between 100 and 150 reported cases that would qualify as "war crimes."[188] Even though American soldiers were tried under the Uniform Code of Military Justice, these crimes also had to be reported as war crimes.[189] Major General Persons recalled an example of how well the reporting system worked.

A soldier in the 101st Airborne Division returned from a patrol and showed his squad leader a couple of ears he had cut off of a Viet Cong body.[190] The squad leader immediately reported it up the chain of command. Major General Persons recalled, "Within an hour and a half I had the report on my desk . . . ."[191] The 101st "felt very badly about this, felt that it adversely reflected on their reputation as a disciplined outfit . . . ."[192] The commander called the company together, explained what the soldier had done and explained how he had disgraced the company.[193] The soldier received a field grade Article 15.[194]

Command admonitions were insufficient by themselves to prevent war crimes; they had to be accompanied by organized training. Judge advocates used the Socratic method to teach law of war to all new incoming soldiers.[195] Colonel Persons observed training sessions on many occasions and felt it was very effective:

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187 *Id.* at 35. "We had War Crimes Detachments in War World (sic) II and Korea, who were engaged solely and exclusively in documenting violations by the enemy against our soldiers or against civilians." *Id.* at 35 (emphasis in original).

188 *Id.* at 37. "They were all crimes under the Uniform Code from murder to rape to assault to disfiguring a corpse, that sort of thing." *Id.*

189 *Id.* at 35. Major General Persons states, "We had a very well wired reporting system for war crimes." *Id.* at 34.

190 *Id.* at 35-36.

191 *Id.* at 36.

192 *Id.*

193 War College, *supra* note 1, at 258.

194 Grad Course vol. I, *supra* note 1, at 36.

195 *Id.*

> You gotta persuade the soldier all the moral reasons and all the practical reasons and then, finally, you tell him because its murder and we'll put your ass in jail. So this was an ongoing thing and commanders, all the commanders I knew, were very conscientious about it and worked very hard at making sure their soldiers understood what the rules were and staying on top of it.[196]

Major General Persons makes the prescient observation that judge advocates could play a greater role in the planning stage of operations by addressing law of war issues.[197] However, he notes that "it is rare in the planning stage that commanders deliberately decide to do something that's gonna look like it's excessive force or, you know, violate any of the—laws of war."[198]

While some issues received critical press coverage, the day to day business of operating the Army's disciplinary system in Vietnam proceeded with little fanfare. However, Major General Persons saw the strengths and weaknesses of the Judge Advocate General's Corps in action. The War College interviewers asked Major General Persons the following question, "Looking back over your tour in Vietnam, what were the things that gave you the most satisfaction?"[199] He responded:

> I guess the biggest thing was being able to urge people to see the Uniform Code, particularly one that had just been drastically revised, work in that environment. In other words to be able to man, try, support—whatever you want to call it—this whole huge criminal justice system that was going on, and to do it in a way that as a lawyer I thought would withstand the scrutiny of history—not to mention the appellate courts back in the United States . . . There were twelve or thirteen SJA jobs and they probably all turned over once; so, I saw twenty-five to thirty lieutenant colonels and colonels perform as SJAs. I happen to think this is the real test of a JAG officer—some of them in really tough situations, units in a lot of contact, a lot of problems going on—when the fragging started, for example. That was a real tough era to live through . . . to see for the second time in this century, well really since Korea—the Uniform Code of Military Justice was enacted in 1950. It came into effect right smack in the middle of the Korean War and it worked. The next big overhaul, the Justice Act of 1968, to have that go in right in the middle

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196 *Id.* at 36-37.

197 *Id.* at 38-39.

198 *Id.* at 39.

199 War College, *supra* note 1, at 259.

> of the Vietnam War and have it work. Those are the most satisfying things to me.[200]

It is telling to note that Major General Persons listed the accomplishments of his SJAs and the Corps in general as the source of his greatest satisfaction and not his own accomplishments.

I. Staff Judge Advocate, United States Army, Pacific

Colonel Persons left Vietnam in July 1970, and reported for duty in August as the Staff Judge Advocate, United States Army, Pacific, Fort Shafter, Hawaii. Colonel Persons spent only ten months in Hawaii. He seriously considered retiring there and was talking to some people about forming a law firm:[201]

> I was really undergoing a, you know, crisis at that point whether I really wanted to stay in the Army, and this seemed like a pretty good time to get out if I was going to get out. I had twenty-five years service, still young enough for a second career.[202]

However, fortunately for the Army and the JAG Corps, Colonel Persons was selected for promotion to brigadier general. The day the selection list was published, General Hodson called Colonel Persons to congratulate him: "He asked if I had any druthers about where I went? I couldn't believe my ears. I said, 'Yes, sir? I want to go to USAREUR [United States Army Europe].'"[203]

J. Judge Advocate, U.S. Army, Europe and Seventh Army

General Davison, the European Command commander, asked Colonel Persons if he thought it would help him in his dealings with the Germans to be a brigadier general.[204] Colonel Persons had many pending legal issues with the Germans and felt that the higher rank would definitely help.[205] General Westmoreland, the Chief of Staff at the time, felt that frocking was appropriate for certain high level commands and other sensitive positions involving contacts with foreign governments.[206] General Davison sent a message to Washington and received approval. Colonel Persons was the first judge advocate ever frocked.[207] The Navy had a long tradition of

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200 *Id.* at 260-61.

201 Grad Course vol. I, *supra* note 1, at 103.

202 *Id.* at 103.

203 War College, *supra* note 1, at 277.

204 Grad Course vol. I, *supra* note 1, at 133.

205 *Id.*

206 *Id.*

207 *Id.* The "frocking" took place on 17 September 1971. On 1 February 1972 Colonel Persons was promoted to Brigadier General.

frocking an officer to match his position, but the Army seldom frocked officers.[208] Colonel Persons had a one day notice to get a general officer's uniform and insignia.[209]

VIII. Post-War Europe

The Army in post-Vietnam USAREUR was a disaster. During the Vietnam war, USAREUR had been "robbed, drained, and neglected."[210] Officer and noncommissioned officer manning was down. Facilities were not receiving essential maintenance. Soldiers were living and working in dilapidated buildings. To meet the North Atlantic Treaty Organization manning levels, the Army assigned draftee soldiers to USAREUR directly from Vietnam—soldiers who only had a few months left to serve. All of these factors made for an extremely difficult situation. Major General Persons, quoting his friend Major General Williams, put the problem into historical perspective:

> [A]fter every war, at least in this century, you will see a reduction in courts-martial and adverse personnel actions, and then after a period of time, when the commanders start trying to restore discipline and, as someone puts it, try to walk the cat backwards, which is always the most difficult thing once you've let it get out of hand, then the rates skyrocket again.[211]

This was the USAREUR awaiting Colonel Persons.

A. The Drug War

General Davison had been the II Field Force Commander in Vietnam and one of the first to aggressively address the drug problem in Vietnam.[212] When he arrived in USAREUR, controlling the drug problem remained his top priority. His amnesty program in Vietnam for heroin users was the precursor to the drug program he and Brigadier General Persons implemented in Germany.[213]

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208 *Id.*

209 *Id.*

210 *Id.* at 110.

211 *Id.* at 111.

212 *Id.* at 113. Major General Persons first met General Davison on a command visit to Vietnam from his position in Hawaii. During the General's briefing, he outlined his anti-drug initiatives, stating that the drug problem in Vietnam was "a national disgrace." War College, *supra* note 1, at 398.

213 Grad Course vol. I, *supra* note 1, at 113. General Davison was most concerned with hard drug use like heroin. He was not concerned so much with marijuana. Under his amnesty program, addicts were identified, brought in, dried out, and counseled. Major General Persons visited some of these facilities while he was in Vietnam.

First, General Davison initiated a fundamental shift in attitude. He started with a vision and communicated that vision to subordinate commands—he made it clear he would not tolerate drugs in the barracks.[214] Major General Persons explained General Davison's leadership this way:

> You do not have to tolerate drugs in the barracks. You can apprehend soldiers and find the drugs and get them out of the barracks. It is hard work-—it means you have to have officers and noncommissioned officers around at night and on the weekends. You have to do your homework so that you have got probable cause to search. Once you catch them, you got to be sure that you administer punishment quickly and fairly.[215]

Cracking down on drugs also required a reexamination of priorities and fairness. General Davison recognized the anomaly created by a policy that focused on treatment rather than punishment. A confirmed heroin addict, detected against his own wishes by a urinalysis, was not punished and yet a soldier caught experimenting with marijuana would be court-martialed.[216] General Davison asked Brigadier General Persons to prepare a new policy letter to address this anomaly.

The innovative position outlined in the letter was an "earth shaker" when it was published in October 1971. Major General Persons summarized the letter to commanders in USAREUR as follows:

> [W]e have got to accept the fact that a lot of young soldiers do not consider the use of that [marijuana] in the same ball park as heroin. By trying to treat them at the same level, even though the law permits it, that it is really undermining respect for the whole system. Also, he said there are not enough jails in the world to hold them and, in effect, we cannot try them all . . . . So he says I urge all subordinate commanders to exercise the utmost restraint in imposing trials by court-martial on young first offenders for personal use of small quantities of marihuana or hashish.[217]

The change in statistics was significant. The number of Article 15s for use and possession of marijuana and hashish went up, and these

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214 *Id.* at 136.

215 *Id.*

216 *Id.* at 137.

217 *Id.* at app. 3.

drugs began to disappear from the barracks.[218] The military police were able to focus on heroin because marijuana use was addressed with Article 15 punishment.[219]

The battle had another objective. General Davison wanted to attack the source of the drugs, the German suppliers.[220] Brigadier General Persons met with the German police, but the German police did not feel it was a German problem. In Frankfurt, the police had only two or three officers assigned to drug trafficking.[221] The Army provided CID agents to assist the Germans in making drug arrests.[222] They discovered that certain drugs which were classified as narcotics in the United States were available over the counter in Germany. Brigadier General Persons successfully lobbied Bonn to put these narcotics on the controlled drug list.[223]

General Davison and Brigadier General Persons fought the drug war on several fronts, but their most effective tactic was to convey continuously the crystal clear message that the command simply would not tolerate drug use. However, their war on drugs was not without its setbacks.

B. Drug Inspection Challenge

In April 1973, a group of soldiers in USAREUR filed a class action complaint in Washington, D.C., challenging General Davison's drug abuse prevention plan, alleging the following:

> [T]he plan offended due process, that military necessity did not warrant the unconstitutional intrusions into the privacy of the soldier, that plan provision permitting dissemination of drug information to nonmilitary government agencies and to civilian applicants was invalid and that the provision of the regulation which authorizes commanders to prohibit the display on barracks walls of posters and other items which, in their estimation, constitute 'a clear danger to military loyalty, discipline, or morale' was void for vagueness.[224]

District Court Judge Gerhard A. Gesell certified the class as "representing all soldiers in the European Command with ranks of E-1 through E-5 who are subject to the drug provisions of *Circular 600-*

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218 *Id.* at 138.

219 *Id.*

220 War College, *supra* note 1, at 400.

221 *Id.* at 401.

222 *Id.* at 402.

223 *Id.*

224 Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D. D.C. 1974).

85."[225] The Army argued "that the USAREUR drug abuse program [was] required to prevent serious impairment of morale and discipline" and "that because of military necessity they need not comply with constitutional safeguards otherwise applicable."[226] The Court rejected this argument and held that "the existing USAREUR drug plan [was] so interlaced with constitutional difficulties that *Circular 600-85* must be withdrawn and canceled, along with all earlier related orders and instructions."[227]

The headline in the *Stars and Stripes* newspaper declared, "District Judge Enjoins CINC. Stops Drug War in Its Tracks."[228] General Davison was out of town when the opinion was issued. He called Brigadier General Persons about nine o'clock at night and, as Major General Persons recalled, he "stood at attention with a telephone in [his] hand while [Davison] chewed [him] out for about five minutes . . . . [Davison] said, 'How did you ever get me crosswise with a federal judge?'"[229] The Department of Justice agreed to appeal the ruling, and Judge Gesell stayed the order pending the outcome of the appeal.[230] However, "[h]e required that we keep very detailed records on everyone who went through the program while the appeal was taken; so that if his opinion prevailed, we could find all these people and then undo or change the character of their discharge or undo whatever administrative action was taken against them in the program."[231] Over the next few months this record keeping requirement, along with other litigation support efforts, required an enormous effort and many overtime hours by Brigadier General Persons and his staff.[232]

One particular passage in the court's opinion especially irritated Brigadier General Persons: "It is certainly clear that drug use in the Command has not reached anything comparable to the epidemic proportions detected in Vietnam and is not particularly different from drug use encountered among civilians in major United States cities."[233] Brigadier General Persons correctly felt the comparison was ludicrous, given "that these soldiers are armed with rifles and

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225 *Id.* at 937.

226 *Id.* at 940.

227 *Id.* at 941.

228 War College, *supra* note 1, at 421.

229 *Id.* at 421-22.

230 Grad Course vol. I, *supra* note 1, at 143.

231 *Id.*

232 War College, *supra* note 1, at 420.

233 Committee for G.I. Rights v. Callaway, 370 F. Supp. 934, 940 (D. D.C. 1974). Major General Persons remembered the passage this way, "The trial judge said that he saw no difference in the drug problem among young soldiers in the Army in Europe and the drug problem among young teenagers in the District of Columbia . . . ." Grad Course vol. I, *supra* note 1, at 143.

machine guns, that they were driving tanks, that they were flying helicopters, that they were manning artillery units [and] shells, you know, day and night, a good many of them. That there were nuclear capable artillery units, that they were deployed on the very border with our adversaries. Not only that, but they were charged with the defense of Western Europe."[234]

On 2 September 1975, twenty-eight months after the plaintiffs filed the complaint, the Court of Appeals for the D.C. Circuit, in a unanimous decision, completely vindicated the Army, reversed Judge Gesell, and held:

> Maintaining the proper balance between the legitimate needs of the military and the rights of the individual soldier presents a complex problem which lends itself to no easy solution. With the advent of the all volunteer Army in recent years, the Armed Forces have improved conditions of military life by providing greater benefits and a broader scope of individual freedom to the enlisted man. Nevertheless, the fact remains that discipline and fitness are prerequisites of an effective military force. We have set out in some detail the regulations of the *USAREUR Circular* to show the precautions taken by the Army to safeguard the constitutional rights of the GI in the drug program. Recognizing the inherent differences between military life and civilian life and the vital interest of the nation in maintaining the readiness and fitness of its Armed Forces, we conclude that all of the challenged regulations are reasonable and constitutionally valid.[235]

With *Committee For G.I. Rights v. Callaway* out of the way, the war on drugs in Europe was back on track.[236]

C. Race Relations

Brigadier General Persons and General Davison inherited not only a drug problem but also a highly charged racial situation in USAREUR. Black soldiers were taking over barracks and announcing that only blacks could live there.[237] Before his arrival, VII Corps tried the Hohenfels Grenade case in which a soldier threw a grenade into a room full of people, killing several, and wounding others.[238]

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[234] War College, *supra* note 1, at 419.

[235] *Committee For G.I. Rights v. Callaway*, 518 F.2d 466, 480 (D.C. Cir. 1975).

[236] Major General Persons credited, among others, the hard work and able representation of a sharp judge advocate in the Army's litigation division—Royce Lamberth. Royce Lamberth is now a federal district court judge in Washington, D.C.

[237] Grad Course vol. I, *supra* note 1, at 111.

[238] War College, *supra* note 1, at 349.

Black soldiers felt that the command overreacted by initially placing a number of blacks in pretrial confinement. White soldiers felt that the black soldiers were being "mollycoddled" by the command. Things were so bad that the Department of Defense sent a task force to Germany to investigate discrimination in military justice.[239] The summer Colonel Persons arrived in Germany, he faced his own racial incident—The Darmstadt 44.

A group of black soldiers had a favorite spot in the battalion mess hall where they would greet each other with an "exaggerated 'dap'."[240] One day, a group of white soldiers decided to sit with the blacks and began doing their own "dap." A fight broke out. The command placed one black soldier in confinement.[241] A group of black soldiers demonstrated outside the confinement facility and refused to leave until the command released their friend. They were ordered to disperse and all but 44 soldiers complied—thus the Darmstadt 44.[242] The commander surrounded them with military police and barbed wire and held them there for several hours. The next day he offered them field grade Article 15s. About half accepted the Article 15, and the other half demanded a court-martial.[243]

The cases dragged on for months. General Davison ordered an inspector general investigation which revealed the whole incident was initiated by white soldiers and that the only serious injury was inflicted by a white soldier with a steel bar.[244] General Davison felt things had dragged on long enough and dismissed the charges. It just so happened that the same day he dismissed the charges, two attorneys from the American Civil Liberties Union (ACLU), who were going to defend the soldiers, arrived in Frankfurt and held a news conference. One of the reporters told them that the charges had been dismissed, and the ACLU attorneys claimed it was because of their arrival.[245] Some members of Congress read about this turn of events and ordered an investigation into this commander who was "kowtowing to the ACLU."[246]

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239 Grad Course vol. I, *supra* note 1, at 119. On 1 May 1972, General Davison directed Major General Persons to "make a comprehensive examination of the nature and extent of racial discrimination in military justice in USAREUR in preparation for the forthcoming visit of the Department of Defense Task Force . . ." *Id.* app. 4 (results of this examination, along with recommendations, are attached at Appendix 4 and the text of Major General Persons' briefing to the Department of Defense Task Force is attached as Appendix 5).

240 *Id.* at 127. A "dap" is like a handshake.

241 *Id.* at 128.

242 *Id.*

243 *Id.*

244 *Id.* at 129.

245 *Id.*

246 *Id.*

Major General Persons observed that very soon after his and General Davison's arrival in Germany, it became clear that the command was not communicating with young black soldiers.[247] They envisioned a two pronged solution to the race relation problem.[248] First, they had to convince the black soldier that the system was fair. The command had to restore their confidence in the Army while at the same time telling them that they were part of a team and were expected to behave in an acceptable way.[249] The second prong involved educating and sensitizing white noncommissioned officers and officers. General Davison wanted white noncommissioned officers "to understand what the perceptions of the blacks were, and to examine in their own hearts whether they really were behaving in a way that appeared to be biased or bigoted . . . the emphasis was always on changing of behavior . . . .' I don't care how you feel about this, but bigoted behavior will not be tolerated.'"[250] To this end, General Davison established equal opportunity staff officers in each unit, well before the Department of Defense implemented a similar program.[251]

D. Magistrate Program

In 1970, General Prugh, Brigadier General Persons' predecessor in USAREUR, established a policy which required that every person entering pretrial confinement have a defense counsel appointed within seven days.[252] The *Manual for Courts-Martial* did not set a time limit for the appointment of counsel in this situation.[253] General Prugh also started a stockade visitation program, which required defense counsel to visit the stockade every day to interview new prisoners and advise them of their rights.[254] Brigadier General Persons took the next logical step. One of the first things he got General Davison to approve was a true Military Magistrate Program.[255] The magistrate had the responsibility and authority to review every case of pretrial confinement to ensure compliance with USAREUR confinement policy.[256]

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[247] War College, *supra* note 1, at 349.

[248] *Id.* at 350

[249] *Id.* at 351.

[250] *Id.* at 350

[251] *Id.* at 352.

[252] Grad Course vol. I, *supra* note 1, at 122.

[253] *Id.* at 122.

[254] *Id.* at 123.

[255] *Id.* Major General Prugh had run a test program and the test had expired when Major General Persons arrived. War College, *supra* note 1, at 322.

[256] Grad Course vol. I, *supra* note 1, at 123.

Brigadier General Persons used another lesson learned from Vietnam and restricted pretrial confinement authority to the general courts-martial convening authority, who usually delegated his authority to the SJA.[257] To make the system work, Brigadier General Persons developed a pretrial confinement checklist.[258] As with any program that affected command control over military justice, there was tremendous opposition to the Military Magistrate Program. Commanders felt the program interfered with their authority to decide who should go into pretrial and who should stay in their units.[259]

Brigadier General Persons moved incrementally to soften the resistance. Initially, the magistrate had to see the new prisoners within two weeks. This was later changed to forty-eight hours.[260] Next, he pushed for giving the magistrate authority to release someone improperly confined—this was the toughest sell.[261] Building on General Prugh's initiative, Brigadier General Persons implemented a requirement that the prisoner have a defense counsel *before* being placed in pretrial confinement. If the prisoner arrived without having appointed defense counsel, he was released.[262] Brigadier General Persons' strong feelings in this area were based on visits to the stockade and interviews with soldiers:

> [I]t was clear to me that there were prisoners in there who were confused as to why they were there and what their legal rights were and what was going to happen to them. They were uncertain. That was the worst thing, they were uncertain. I thought it would help if they had a counsel assigned to them at the earliest possible stage, not only someone who could counsel them, but then they would know who was working on their case. That was really the biggest thing it seemed to me we could do for a soldier that was being locked up, properly, lawfully, and necessarily locked up before trial.[263]

After he became TJAG, Major General Persons implemented the Military Magistrate Program Army-wide, turning the program over to the Trial Judiciary.[264]

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257 *Id.* at 124.

258 *Id.*

259 War College, *supra* note 1, at 324.

260 *Id.*

261 *Id.* at 325.

262 *Id.* at 331.

263 *Id.* at 333-34.

264 *Id.* at 521.

E. Area Jurisdiction

> *It was interesting how in area after area things that had a germ in Vietnam we were able to expand on them in Europe and later extend them to the whole Army.*[265]

When Colonel Persons arrived in Europe, all administrative and disciplinary matters were handled strictly along command lines.[266] For example, the Theater Area Support Command and the 32d Army Air Defense Command (AADCOM) had small troop units spread across Germany.[267] Major General Persons explained the problem this way:

> That meant when some legal action had to take place, the soldier if he wanted legal assistance, had to get in the jeep to go a hundred miles, or if he had to see his lawyer or if his lawyer had to see him in a disciplinary case. There was just an enormous amount of time, gasoline, and money being wasted on people because everything was being run along strictly command lines.[268]

Command line jurisdiction could be unfair, therefore undermining the soldiers' faith in the system.[269] If three soldiers from three different units committed a crime together they would be shipped off to their respective units. The three different commanders could have different disciplinary philosophies, and the three soldiers acting with the same degree of culpability in commission of the crime could end up with widely disparate sentences. General Davison gave Brigadier General Persons three weeks to come up with some recommendations to improve the situation.[270]

During these three weeks, the initial brainstorming sessions produced several programs that remain in effect today and changed the way the JAG Corps does business.[271] A few suggestions were immediately approved:

> [A] supplement to an Army regulation that exempted lawyers and court reporters from the performance of non-legal duties, a use of a written authorization for searches,

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265 *Id.* at 23.

266 *Id.* at 284.

267 *Id.*

268 *Id.* at 264. Major General Persons did not mention the safety concern. The author speculates that the odds for having an accident in a government vehicle greatly increases the more often and the longer distances the soldiers were having to drive for legal work.

269 *Id.* at 307.

270 *Id.* at 284.

271 *See* Disposition Form, Judge Advocate, USAREUR, AEAJA-CLD, to Chief of Staff, subject: Improvement of Military Justice in USAREUR (31 Aug. 1971).

> the famous forty-five day rule,[272] and streamlining the procedures for curtailing the overseas tours of people not in confinement who were pending Department of the Army approval of adjudged bad conduct discharges.[273]

However, the most significant program was area jurisdiction. Brigadier General Persons requested a feasibility study of the "realignment of courts-martial jurisdictions and consolidation of legal resources on an area basis."[274] The idea proved to be more complicated than he ever imagined.[275]

As luck would have it, around the same time Brigadier General Persons was studying the concept of area jurisdiction, the USAREUR was conducting a major realignment of military communities.[276] The goal was to remove the mundane duties of running the community from tactical commanders and transfer these duties to a community commander.[277] The problem for both initiatives was where to draw the boundary lines?

Brigadier General Persons tried to make the plan as palatable as possible for commanders by drawing boundary lines which maintained unit integrity whenever practicable.[278] If a commander was going to lose a large portion of his command to another commander, he was going to fight the proposal more vigorously. In the case of the 32d AADCOM, most of the command was located away from the headquarters.[279] However, the 32d AADCOM commander would actually pick up many soldiers who were not in his command.

Finally, they had all the boundaries drawn. Amazingly, the area jurisdiction boundaries were almost identical to the new military community boundaries.[280] This would make the selling job a little easier. Brigadier General Persons took the plan to General Davison and recommended approval. General Davison wanted to run it by the commanders informally first; everyone opposed it.[281] General Davison suggested a test with one division.

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272 The forty-five day rule required special courts-martial to be processed within forty-five days. The sole purpose of the rule was to speed up special court processing times. War College, *supra* note 1, at 286-7, 290.

273 *Id.* at 285.

274 *Id.* at 4.

275 *Id.* at 300.

276 *Id.*

277 *Id.*

278 *Id.*

279 The 32d Air Defense Commander fought area jurisdiction harder than any other commander. *Id.* at 301-02.

280 *Id.* at 301.

281 *Id.* at 302.

Brigadier General Persons recommended the two month test be conducted in the 8th Infantry Division.[282] He knew the SJA, Lieutenant Colonel Barney L. Brannen, and he knew the commander, General Snapper Rattan.[283] The test resulted in the loss of a brigade at Mannheim, and the addition of some units around Baumholder and Mainz.[284] The test required the recording of statistics on miles traveled by attorneys and clients, processing times, and so forth.[285] At the end of the test, the results were presented to General Davison.[286] None of the problems envisioned by the commanders occurred and processing times went down.[287] On 5 May 1972, General Davison approved area jurisdiction in USAREUR with an effective date of 1 July 1972.[288]

The battle for area jurisdiction between Brigadier General Persons and the commanders was so bitter that some commanders threatened his future promotions.[289] He was not worried:

> I had a hard head and thick skin. I knew who I was working for [General Davison]. I always felt that I had his support. I didn't stick my neck out or his neck out. I made sure that I wasn't overstepping, but when he sent me out to see if I could persuade people that this was a good idea, I tried. If they wanted to scream about it, why that was all right. I'd go back and tell him there was still some resistance. He said, 'Did you persuade old so and so?' And I would say, 'No, sir, not this time.' He said, 'We'll try again.' It wasn't that bad.[290]

Some SJAs also opposed area jurisdiction. The ones who picked up more soldiers generally liked the idea while the ones who lost soldiers did not.[291]

The idea of area jurisdiction originally grew out of concern for courts-martial processing times. However, area jurisdiction affected

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[282] *Id.* at 303. *See* Disposition Form, Judge Advocate, USAREUR, AEAJA-CLD, to Chief of Staff, subject: Establishment of Pilot Program in USAREUR (17 Dec. 1971).

[283] War College, *supra* note 1, at 303; Grad Course vol. I, *supra* note 1, at 116.

[284] War College, *supra* note 1, at 303.

[285] *Id.*

[286] *See* Disposition Form, Judge Advocate, USAREUR, AEAJA-CLD, to Chief of Staff, subject: Area Jurisdiction (27 Apr. 1972).

[287] War College, *supra* note 1, at 304.

[288] *See* Memorandum, Acting Chief of Staff, USAREUR, AEAGS, to Judge Advocate, subject: Area Jurisdiction (5 May 1972); Message, Headquarters, CINCUSAREUR, AEACC, subject: Area Courts-Martial Jurisdiction (050639Z May 72).

[289] War College, *supra* note 1, at 305.

[290] *Id.*

[291] *Id.* 309.

all legal functions. From that point forward, legal assistance, claims, and administrative eliminations, were all delivered more efficiently. As commanders who had opposed the idea rotated out of Europe, the new ones came into the new system assuming it had always been this way. As Major General Persons noted, "It was just like military judges; after a while you got used to those and even thought they were a good idea . . . . When I was TJAG, I'd travel around the country and commanders would [say to him] 'This military judge system is the best thing you folks ever thought of.'"[292]

This would not be the last time Major General Persons would face tough resistance to new ideas.

F. Training

1. Commanders—In sharp contrast to area jurisdiction, Brigadier General Persons' innovations in training faced little opposition from Commanders. Major General Persons credited Lieutenant General Willard Pearson, the V Corps commander, with starting a program of leadership training in post-Vietnam Germany.[293]

During the war, Europe was critically short of officers. After the war, the officers who were arriving from Vietnam lacked experience commanding in garrison—especially in Europe.[294] General Pearson thought that the Army school system was not addressing this problem and set up courses for commanders and noncommissioned officers at all levels. The courses covered basic military skills, and judge advocates, including military judges, were asked to teach.[295] General Davison thought this was a great idea and implemented the training throughout USAREUR.[296] Company commanders trained at the 7th Army Training Center in Vilseck, while battalion and brigade commanders trained in Heidelberg.[297] Brigadier General Persons taught a block of instruction to the senior commanders.

All new commanders were required to attend the courses. Judge advocate hours of instruction steadily increased.[298] The legal training covered military justice innovations, command authority in Germany, and how to handle dissent in the Army.[299] With so many changes in the criminal justice system, it was a great opportunity to

292 *Id.* at 313.

293 Grad Course vol. II, *supra* note 1, at 1.

294 *Id.* at 1.

295 *Id.* at 1-2.

296 *Id.* at 2.

297 *Id.*

298 *Id.* at 4.

299 *Id.*

start new commanders off on the right foot. As far as they knew, this was the way things had always been; they were free of the preconceptions of older commanders. By July 1974, all new commanders in USAREUR received a copy of the commander's legal guide.

2. Judge Advocates—During this same period, Brigadier General Persons convinced General Davison to greatly increase the amount of continuing legal education for judge advocates.[300] Initially called "Captains Conferences," the training focused on young judge advocates' concerns, the rules of practice in Germany, and the reasons for these rules.[301] Later, the training expanded to focus on specific areas of operation, and by 1974, there were at least twelve to fifteen conferences a year tailored to the needs of prosecutors, defense counsel, legal assistance attorneys, claims attorneys and international law attorneys.[302] The conferences were held in Garmisch or Berchtesgaden and included family members.[303] Brigadier General Persons, through the SJAs, garnered the support of commanders by convincing them of the benefit to the unit.

3. Legal Clerks and Court Reporters—Before Major General Persons' arrival in Germany, there was no legal clerks school, and court reporters were trained at the Navy School in the states.[304] Brigadier General Persons assigned a judge advocate and several instructors to the Intelligence School in Oberammergau to train legal clerks and court reporters in USAREUR.[305]

4. Relationship with Washington—Neither the civilian nor the military leadership in Washington fully understood the problems of post-Vietnam Germany. There had been no race or drug problems when they had been in USAREUR in the early sixties.[306] This lack of understanding lead to numerous instances where the Department of Defense and the Department of the Army second guessed the way USAREUR handled a given situation. If a story appeared in the Washington Post or the soldier involved wrote his or her congressional representative, issues would get blown out of proportion.[307]

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300 *Id.*

301 *Id.*

302 *Id.* at 5.

303 *Id.*

304 *Id.* at 8.

305 *Id.* After Major General Persons became TJAG, he established the Army's Court Reporting School. *See* Remarks of Colonel Wayne E. Alley, Chief, Criminal Law Division, OTJAG, at the graduation of the first court reporters' class. *Making History As a Court Reporter*, ARMY LAW., Sep. 1976, at 1.

306 Grad Course vol. II, *supra* note 1, at 20.

307 *Id.*

Major General Persons provided a wonderful illustration of a simple case which turned into a public relations nightmare and how he handled the interference from Washington. The case involved a 3d Armored Division engineer lieutenant, assigned as an equal opportunity officer, who decided that he was not going to shave or cut his hair.[308] The lieutenant held press conferences and even appeared on television. The case made the papers back in the states. Certain members of Congress felt that haircut regulations "were an infringement of human rights" and supported the lieutenant.[309]

Brigadier General Persons believed the lieutenant's commander did the right thing; he counseled him and gave him a direct order to cut his hair and shave. The lieutenant refused.[310] A short time later, the commander offered him a field grade Article 15, and the lieutenant demanded a court-martial.[311]

The case dragged on, newspaper coverage continued to expand, and people in Washington became more and more unhappy.[312] As the court-martial drew near, Brigadier General Persons received numerous messages from Washington: "Isn't there some way you can handle this matter—short of trying this obviously misguided soldier and officer?"[313] Brigadier General Persons reached his breaking point and sent a message back to Washington with this suggestion, "Yes, we'll transfer him to the Military District of Washington."[314] Brigadier General Persons felt that it was the commander's call, and no one should intervene with his decision.

The lieutenant was tried and convicted, and then he shaved and cut his hair. He was immediately processed for administrative elimination.[315]

Another area in which Brigadier General Persons faced stiff resistance from Washington while breaking new ground was the regulation of motor vehicles in Germany. Under the treaty with Germany, the Army was given authority to regulate the registration and operation of motor vehicles.[316] Brigadier General Persons implemented a mandatory policy regarding drunk driving offenses which required that the soldier lose his or her license for various periods of time, depending on whether the incident was a first or

308 *Id.* at 21.
309 *Id.*
310 *Id.* at 22.
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.*
315 *Id.* at 23.
316 *Id.* at 3.

second offense.[317] Brigadier General Persons also was concerned about the number of serious motorcycle injuries involving young soldiers. Germany did not have a helmet law. When Brigadier General Persons proposed a helmet requirement under our treaty authority, the Department of Defense stated, "Can't do that. That's unconstitutional."[318] But Brigadier General Persons persisted and finally convinced the Department of Defense that the command had authority to require our soldiers to wear helmets.[319]

Persons arrived in Europe at a watershed time in United States history. The contentious, divisive and tumultuous ten year war in Vietnam was coming to a close. After the Vietnam War, Americans distrusted the military justice system, just as they did after World War II. As the USAREUR Judge Advocate, Brigadier General Persons helped ensure that the United States had a strong and disciplined peacetime Army.

Major General Persons described his tour as the USAREUR Judge Advocate as "the most exciting, professionally rewarding four years I spent in the Army."[320] His description is understandable considering what he accomplished. He helped reshape the post-Vietnam War Army, restore discipline, and prepare the Army for its new peacetime role. He possessed every quality the JAG Corps looks for in its officers: hard work, innovation, vision, devotion to duty, knowledge and understanding of the soldier client, and technical competence. These qualities served Brigadier General Persons well in USAREUR.

Brigadier General Persons' orchestration of General Davison's war on drugs was innovative and courageous. In the face of vociferous challenges, both from within the Army and the civilian community, Brigadier General Persons pressed on. Technical competence and hard work resulted in complete vindication in federal court.

Brigadier General Persons' understanding of his client, and the corresponding respect the client had for him, allowed Brigadier General Persons to implement virtually every program he proposed. His sincere concern for soldiers led him to push for the creation of a magistrate program, the assignment of defense counsel at the time of pretrial confinement, and the implementation of race relations training. These legal and social innovations helped restore the American public's confidence in the Army's military justice system.

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317 *Id.*

318 *Id.*

319 *Id.* at 3-4.

320 *Id.* at 38.

Brigadier General Persons designed and implemented area jurisdiction and the forty-five day rule to help commanders restore and maintain discipline in the post-Vietnam Army. Brigadier General Persons' fundamental understanding of General Davison's authority as USAREUR Commander enabled him to convince the Army Staff that General Davison could regulate soldiers' operation of motor vehicles in Germany, could require them to wear a helmet when riding a motorcycle, and could revoke their drivers license if they drove drunk.

For most senior judge advocates, to retire at this point would have been tremendously satisfying, knowing that you were leaving a legacy of invaluable contributions to the Corps and the Army. However, Brigadier General Persons was far from finished. He was yet to make his greatest contributions to the JAG Corps as its new TJAG.

IX. The Judge Advocate General

Sometime in late 1974 or early 1975, the Secretary of the Army appointed a board[321] and told it to select two candidates from which he would pick the next TJAG.[322] In the Spring of 1975, Brigadier General Persons received a message in Germany stating that he had two days to report to Washington for an interview with the Secretary of the Army.[323] He suspected it concerned selection of the next TJAG.

As he usually did when he returned to the Washington area, Brigadier General Persons stayed with his good friend, Brigadier General Lawrence Williams. The night he arrived, he and Brigadier General Williams "sat down and looked at each other, and Persons said 'I've got an interview with the Secretary of the Army at eight-thirty in the morning,' and Williams said, 'I've got an interview with the Secretary of the Army at nine o'clock in the morning.'"[324] Williams told Persons that the Secretary selected only two candidates. The two old friends discussed putting on clown suits for the interview, but wisely decided to "let the chips fall where they may"

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321 Major General Persons noted that at this level there was no standard operating procedure like there was for colonels or even for brigadier generals. The board was purely a creature of the Secretary to select his TJAG. As it turned out, the other person selected by the Board, Major General Williams, would be The Assistant Judge Advocate General.

322 Grad Course vol. II, *supra* note 1, at 39.

323 *Id.*

324 *Id.*

and promised "that whoever got selected the other one would loyally and happily serve under him."[325] On 1 July 1975, Brigadier General Persons became the twenty-ninth TJAG of the Army.[326]

A. General Williams

As Major General Persons put it, "I got the flip of the coin" and was selected as the new TJAG over Major General Williams. The senior-subordinate roles were now reversed,[327] and the two old friends settled into a fruitful partnership. Major General Persons referred to Major General Williams as his "alter ego."[328] They lived a mile apart from each other and rode to and from work together every day. Major General Persons had complete confidence in Major General Williams' judgment, and if he needed to leave the office on a temporary duty, he could return and never second guess a decision made in his absence.[329]

While the two of them worked well together, that does not mean they always agreed:

> He [Major General Williams] can be irascible and tactless; he can also be as sweet as pie and he usually knows the difference and when to do those. He and I would disagree on matters sometimes and have them out in the privacy of the office. He was scrupulous to never raise any points of disagreement when there was anyone else around; he never did that.[330]

Sometimes when they disagreed, and Major General Persons went ahead and did it his way and things turned out badly, Major General Williams would come back and say, "I told you so." Major General Persons would agree, "You were absolutely right. I wished I'd followed your advice."[331]

Major General Persons viewed Major General Williams as an invaluable asset to his tour as TJAG. He not only respected his enormous energy and "steel trap" mind, but also valued his counsel and friendship. As true professionals do, they set aside their egos, pooled

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325 *Id.* at 40.

326 See Announcement, *New TJAG: Wilton B. Persons, Jr.*, ARMY LAW., July 1975, at 1.

327 When Major General Persons was a branch chief in OTJAG Administrative Law, Major General Williams was the Assistant Division Chief. Grad Course vol. II, *supra* note 2, at 40.

328 *Id.* at 42.

329 *Id.*

330 *Id.* at 43.

331 *Id.*

their substantial assets[332] and together implemented programs which changed the role of the Army JAG Corps forever.

B. General Order 8

The Secretary of the Army issued General Order 8 right before Major General Persons became TJAG.[333] The order made the General Counsel the legal advisor for the Army. Major General Persons never felt that it diminished his authority or his role.[334] While he lost direct access to the Secretary, the order had no effect on his relationship with the Army staff.[335] He noted that both of the General Counsels he worked with as TJAG quickly realized that their small office of attorneys could not compare with his huge law firm which had offices all over the world.[336] Through hard work and technical competence, Major General Persons convinced the General Counsel that the JAG Corps was handling the Army's legal problems well.[337] He came to view the General Counsel as the "political advisor" to the Secretary rather than legal advisor.[338]

Major General Persons' relationship with the General Counsel was not always cooperative though. There was a long established tradition in Office of the General Counsel to recruit and select JAG candidates who had passed a bar and had passed the initial screen. The General Counsel would then give the TJAG his list, the TJAG would appoint the officers, and they would serve in the General Counsel's office in civilian clothes.[339] Some of these young "officers" let their position go to their head and began throwing their weight around.[340] This irritated senior officers, especially when they discovered that they were actually just JAG lieutenants and captains. Further, these attorneys had no practical experience in the Army.

Major General Persons decided he would no longer let the General Counsel select officers for him to appoint.[341] He felt it was

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332 As Major General Persons put it, "There were some things that he was better at than I was and some things that I was better at than he was, so I think we just made a great team." *Id.* at 44.

333 *Id.* at 162.

334 Major General Persons noted that "there was nothing to be gained by pointing out that the U.S. Code didn't say anything about that; the U.S. Code says the JAG is the Legal Advisor to the Secretary of the Army and the Chief of Staff and the Army Staff." *Id.* at 163.

335 *Id.*

336 *Id.* at 162-63.

337 *Id.* at 163.

338 *Id.*

339 *Id.* at 165.

340 *Id.*

341 *Id.*

"an unlawful diminution of [his] authority and responsibility to appoint and assign judge advocates."[342] As far as Major General Persons was concerned, these were wasted slots; the officers were never going to make a career of the military.[343] Before he confronted the General Counsel, he spoke with General Walter T. Kerwin, Jr., the Vice Chief of Staff, who agreed that it was a bad practice. When Major General Persons addressed the General Counsel, the response was, "All right, then we will stop appointing JAG officers. We'll start getting lawyers and have them appointed in other branches."[344]

The General Counsel's rationale was that they must have only law review, ivy league type lawyers. Major General Persons responded that we have those types in uniform, and they have practical knowledge of the Army and military law.[345] Major General Persons was proud to note that at the time of the oral history:

> I see we have JAG officers—twice as many JAG officers in the Defense Department, Office of Assistant Secretaries, than when I was on active duty. I think that's all to the good because your opportunity to influence the course of events, is enormous. They get used to seeing JAG officers around, they think they're pretty smart.[346]

This battle with the General Counsel's office raged as Major General Persons retired.

C. Abundance of Captains and Shortage of Majors

In the early to mid 1970s, the Army personnel system experienced tremendous turbulence. This turbulence extended to the Army JAG Corps. In response, Major General Persons implemented several new personnel policies.[347]

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342 *Id.*

343 *Id.* at 167.

344 *Id.*

345 *Id.* at 167-68.

346 *Id.* at 168. A review of the JAG Corps Personnel and Activity Directory, reveals twenty-three judge advocates in Department of Defense offices, and six judge advocates in the Department of Army General Counsel's office. DEP'T OF ARMY, JAG PUB 1-1, at 34-37, 42 (1995-1996).

347 *See* TJAG Memorandum to All Staff Judge Advocates, subject: Personnel Policy Changes, ARMY LAW., May 1976, at 1. Major General Persons responded to complaints from SJAs regarding the limited number of spaces in the "career course." The problem was an over strength in year groups 1968-1973. Major General Persons felt that the only fair way to handle the problem was through a selection board. Even with the expansion of the size of the course from thirty-five to fifty, only a quarter of those considered by the newly created board were selected. Major General Persons said, "I cannot 'sugar-coat' a difficult situation, nor can I guarantee anyone in the Corps, including the company grade officers, that their future is assured. We are part of the Army and the Army is undergoing very severe turbulence in the area of personnel and personnel policies." *Id.*

One of these policies was the use of a selection board to choose officers to attend the "career course," *i.e.*, the graduate course. Ironically, many SJAs complained that the selection process discriminated against judge advocates serving in line units. Today, many would argue that just the opposite is true, *i.e.*, that judge advocates serving at a division or corps have a better chance for retention[348] than those serving in some of the specialties. The difference of course being the presence of line officers on most of our selection boards.

Another change Major General Persons implemented was a radical shift in the focus of the JAG Corps' recruiting efforts. The Corps was having a difficult time retaining young judge advocates.[349] The recruiting literature contained "pictures of Hawaii and beaches and officers clubs and it talked about all these marvelous places you could be assigned."[350] Major General Persons told recruiting, "Let's just talk about the hard work they're gonna do and how tough it's gonna be and how we can't promise them anything in the way of assignments or promotions or anything else."[351] The new approach worked and the Corps had "several times as many people wanting to stay on after their initial tour as we could accommodate."[352]

D. West Point Cheating Scandal

> *I guess what I'm saying is I do not think that the honor system is an unrealistic system, although I realize that during every one of the scandals that there was a substantial body of opinion that said, 'This is totally unrealistic to take these young men and expect them to live up to these impossibly high standards.' I say that's pure hogwash.*[353]

In April 1976, approximately one year into his tour as TJAG, Major General Persons faced another high profile issue—the West Point Cheating Scandal. The cheating was actually detected in mid

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348 Major General Persons was very concerned about retaining bright young lawyers. On 2 February 1978, he created the Army Young Lawyer's Advisory Council (AYLAC) and was its first guest speaker. Captain Lee D. Schinasi, *The Judge Advocate General Conducts Sidebar With Army Young Lawyer's Advisory Council*, ARMY LAW., May 1978, at 6. While indicating that military justice was still the JAG Corps' primary concern, Major General Persons noted that declining courts-martial numbers would allow "greater professional service to commanders." *Id.* at 6. Major General Persons specifically mentioned the rapid growth of the litigation division and the tremendous opportunities for young judge advocates to work in this exciting area. *Id.*

349 Grad Course vol. II, *supra* note 1, at 30.

350 *Id.* at 29-30.

351 *Id.* at 30.

352 *Id.*

353 War College, *supra* note 1, at 21.

March when Major Bill Frazier, course director for Electrical Engineering 304, discovered widespread collusion on a take-home exam:[354]

> In some cases, the papers from cadets within the same companies had identical misspellings, similar arithmetic mistakes, or word-for-word wrong answers; one cadet had even painstakingly copied the margin doodle from another paper in the apparent belief that it was part of the answer. Not only had they cheated, Frazier concluded, but many of them had cheated stupidly.[355] On April 4, the academic department reported 117 suspected cheats, 50 of which were subsequently discharged.[356]

A discussion of Major General Persons' role in the scandal is important for two reasons. First, it is important to study the way in which Major General Persons defended the Cadet Honor Code and helped to reform the Academy's adjudication process, while tempering the involvement of the civilian and military leadership in the scandal so that the Academy could properly process the cases. Second, as a result of the scandal, Major General Persons reinstated a separate Office of the Staff Judge Advocate at the Military Academy.[357]

When the scandal broke, the Chief of Staff of the Army was about to retire.[358] He was not a West Point graduate and hesitant to get involved.[359] The lack of leadership left a vacuum which was quickly filled by the Secretary of the Army, Martin R. Hoffmann.[360] Mr. Hoffmann was an activist and jumped into the scandal as a "super action officer."[361] General Bernard W. Rogers, a West Point

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354 RICK ATKINSON, THE LONG GRAY LINE 397 (1989). Mr. Atkinson stated, "When cadets turned in their exams on March 17 and 18, one conscience-stricken cow had scrawled on the bottom: 'I have received assistance on this paper.'" *Id.*

355 *Id.* at 397-98.

356 *Id.* at 398.

357 Major General Persons noted that a formal system of investigating and reporting judge advocate ethical violations grew out of an earlier West Point case. During the investigation of this cadet case, a JAG captain falsely indicated that he had a tape recorded statement from another cadet implicating the cadet being interviewed. A possible investigation by the Department of the Army Inspector General prompted Major General Persons to preempt this action by starting a formal JAG system. He felt that he, as TJAG, was statutorily responsible for his judge advocates. War College, *supra* note 1, at 591-94. He believed the system was important because everyone in the Corps would know it existed and that allegations would be investigated fairly. *Id.* Further, citing the Code of Professional Responsibility, Major General Persons noted that every attorney is responsible for reporting the transgressions of other attorneys. Grad Course vol. II, *supra* note 1, at 112-15.

358 War College, *supra* note 1, at 566.

359 *Id.*

360 *Id.*

361 *Id.*

graduate and former commandant of the Academy, took over as the new Chief of Staff in October 1976 and tried to remove Mr. Hoffmann from the process.[362] Major General Persons was right in the middle of the fray.

1. The Chief of Staff of the Army—General Rogers did not like the idea of lawyer involvement in the Academy's Honor Code system and was not happy when Major General Persons told him that some of his proposed actions would jeopardize the Army's legal position in federal court.[363] General Rogers ignored Major General Persons' advice on several occasions and Mr. Hoffmann subsequently disapproved the proposed action, citing the same reasons Major General Persons had presented to General Rogers.[364] Major General Persons suspected that General Rogers thought he was speaking to Mr. Hoffmann behind General Rogers' back, when in fact he was not.[365] This created a tense relationship between Rogers and Persons.

General Rogers mistook Major General Persons' advice as an attempt to undermine his authority.[366] He disliked Major General Persons challenging his decisions and telling him that he should not take a particular action. Major General Persons understood that the credibility of the Army's military leadership was at stake. "I did not think that it was good for the Chief of Staff of the Army or the Army as a whole to be consistently overruled by the Secretary . . . that was really my motivation."[367] Things got so bad between General Rogers and Major General Persons that:

> Sometimes I would come in the room; he would get red before I even said anything, and he would tell me in no uncertain terms that he had already made up his mind about whatever it was I was going to see him about and that I was wasting my breath. That is not the way one wants his client to approach a problem.[368]

Major General Persons did not give up, he simply concluded, "You had to acquire a very thick skin and hard head and that's what I did."[369]

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362 *Id.* at 566, 575. "When he [General Rogers] came on board as Chief of Staff he was horrified to find that the Secretary was already up to his eyeballs in it. The Secretary was doing such things as flying up to West Point and meeting with the Cadet Honor Committee in camera." *Id.* at 575.

363 *Id.* at 87.

364 Grad Course vol. II, *supra* note 1, at 87-88.

365 *Id.* at 87.

366 *Id.* at 88.

367 *Id.*

368 *Id.*

369 *Id.* at 89.

2. Overhauling the Cadet Elimination Process—Major General Persons did not let his difficult relationship with General Rogers inhibit his desire to make much needed reforms at West Point.[370] Major General Persons saw two problems which needed to be addressed: (1) change the system of legal support at the Academy and (2) overhaul the cadet elimination system.[371] Major General Persons noted that "it was harder and more expensive and took longer to finish one of these cases than it did to finish a BCD special court-martial."[372] Major General Persons strongly believed in the Honor Code, but he thought that the Academy had given cadets too much due process in the administrative process.[373] He viewed the Honor Code as a common sense fundamental principle at the Academy. There was no need for a lot of legal interpretation or layer upon layer of due process required. It was wrong, everyone knew it was wrong, and everyone was told you would be eliminated if you cheated.

> *The reason why you didn't lie, cheat, or steal was not just because it was immoral in an abstract way, but because you were taking advantage of your classmates, you were getting an unfair advantage. . .More important than that, it was drummed into your head that people's lives would depend on your being absolutely truthful, and it just had to be that way, and that you were going to be entrusted with men's lives, and with security of the country.*[374]

The General Counsel of the Army at the time, Jill Wine-Vollner, agreed that the system was out-of-hand and issued the directive to "simplify it."[375] Major General Persons sent a couple of attorneys from Administrative Law to the Academy to carry out the General Counsel's directive. Major General Persons examined the right to counsel and considered at what point should counsel be made available.[376] He wanted to get rid of verbatim records and limit the number of appeals.[377] Major General Persons believes that the reforms to the honor code system which were implemented in the aftermath of the scandal, provided sufficient due process, while making the system "sensible again," and thus made the Academy stronger.[378]

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370 The Army appointed Colonel Frank Borman to investigate the scandal and make recommendations. *Id.* at 94. Colonel Borman's son was one of the cadets accused of cheating. *Id.*

371 *Id.* at 97.

372 *Id.*

373 War College, *supra* note 1, at 567.

374 *Id.* at 20.

375 Grad Course vol. II, *supra* note 1, at 100.

376 *Id.* at 101.

377 *Id.*

378 *Id.*

3. Separate SJA Office—Before the scandal, there had been a Post Judge Advocate Office, but for some unknown reason it had been abolished and its functions subsumed under the Professor of Law.[379] The Professor appointed one of the two lieutenant colonel assistant professors to serve as post staff judge advocate. When the scandal broke, the Professor, who also sat on the academic board, felt it would be improper for him to become involved in the adjudication of the cases because he was part of the last level of appeal for the accused cadets.[380] This meant that a junior lieutenant colonel was saddled with resolving the scandal.

As a lieutenant colonel assistant professor, he had little access to the commandant, General Sid Berry.[381] General Berry was a War College classmate of Major General Persons and used him as his legal advisor throughout the scandal.[382] Major General Persons tried to convince General Berry that he needed a senior staff judge advocate who could advise him on matters like the cheating scandal: "Now, Sid, what if during the time you were the CG [commanding general] of the 101st your SJA had been a junior officer in the Office of the SJA at Forces Command in Atlanta?"[383] General Berry got the point and six months after Colonel Borman issued his report, the Academy had a separate SJA office.[384]

A separate SJA office was necessary for another reason. The judge advocates assigned to the Academic Department prosecuted and defended cases as an additional duty to their teaching chores. There was a fundamental conflict between the role of a professor and a defense counsel or prosecutor.[385] The judge advocates assigned to the academic department must have academic independence and a rapport with the cadets. Major General Persons recognized that it was too much to ask cadets to understand the different roles. "Lots of folks have difficulty understanding how we can step in and out of being a prosecutor or defense counsel or a teacher, counselor or whatever."[386]

E. Unionization of the Military

> *There was no issue that was more fundamental, in my opinion, to the preservation of discipline and good order in*

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379 *Id.* at 97.

380 *Id.* at 98.

381 *Id.*

382 War College, *supra* note 1, at 569.

383 Grad Course vol. II, *supra* note 1, at 99.

384 *Id.*

385 *Id.* at 108.

386 *Id.*

> *the Army and the maintenance of an effective fighting force than the unionization question . . . it's just a given that we cannot have an effective fighting force if we permit the placing between the commander and the soldier some other organization or some other person who purports to speak for the soldier.*[387]

For most people in the service today, it is hard to imagine that the idea of unions in the military was ever seriously considered. In the aftermath of Vietnam, given the public opinion of the military, anything was possible.

Major General Persons stated that the genesis of the movement began because the memberships of two federal employee unions were dwindling, and they were looking for recruits.[388] The movement started first among full-time civilian technicians in the National Guard.[389] Articles began to appear in various newspapers, and the subject received serious debate.[390] The argument in favor of the unions was that soldiers "needed the safeguard that the union could give them against oppressive and unlawful actions by their commanders."[391] Finally, the unions came out and announced that they were going to unionize the Army.[392]

The Army wanted to put out a directive to do two things: prohibit commanders from dealing with unions, even allow commanders to bar them from post, and prohibit soldiers from joining a union.[393] When the proposal reached the Department of the Army General Counsel's office, the General Counsel thought that it raised serious constitutional concerns—that it was an improper infringement of First Amendment rights.[394] The issue made it up to the Chief of Staff, General Rogers. Major General Persons advised General Rogers that the proposed directive was proper and necessary.

The Chief agreed with Major General Persons and convinced the Joint Chiefs that the directive was necessary.[395] The Commandant of the Marine Corps also agreed, but the Chief of Staff of the Air Force and the Chief of Naval Operations of the Navy, "based on some kind of wishy-washy legal advice they were getting

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387 *Id.* at 129-30.
388 *Id.* at 130.
389 *Id.*
390 *Id.* at 131.
391 *Id.*
392 *Id.*
393 *Id.*
394 *Id.* at 131-32.
395 *Id.* at 132.

at the time," would not support the directive.[396] The Joint Chiefs recommended to Secretary of Defense Schlesinger to issue the directive. The Secretary never responded.[397] In fact, he never responded to Senator Stennis, Chairman of the Senate Armed Service Committee, who also supported the measure.[398]

In the meantime, the issue ended up on the agenda of the American Bar Association meeting in Chicago, and Major General Persons was sent to represent the Department of Defense.[399] Major General Persons was strictly limited in what he could say; the Department of Defense was politically very concerned about the issue. Major General Persons believed that the Department of Defense was concerned because, off the record, the American Federation of Labor and Congress of Industrial Organizations had told the Department of Defense that they did not like the idea of unions in the military and had no intention of supporting such a proposal.[400] However, publicly, they had to stand behind those who were trying to unionize the Army.

Senator Stennis got tired of waiting for a response from Secretary Schlesinger and introduced a bill to prohibit by law, as the Army was trying to do by directive, unions in the Armed Forces.[401] Senator Strom Thurmond also got involved. Senator Thurmond's administrative assistant and chief legal counsel was a former judge advocate, Retired Brigadier General Emory M. Sneeden.[402] He came to Major General Persons and asked the Army to "draft the bill that the Army would like to see passed if the bill was going to be passed."[403] The Department of Defense eventually opposed the bill.

To support his position, Major General Persons told a story about a joint luncheon between the Department of Defense and Army General Counsels Offices in midst of the union controversy. The guest speaker was Solicitor General Robert H. Bork.[404] One of the young attorneys in the Department of the Army General Counsel's office asked Mr. Bork a question about unions in the military and "expressed grave reservations about the constitutionality of any effort to prohibit this."[405] "Mr. Bork laughed and he said that he

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396 *Id.*
397 *Id.*
398 *Id.* at 134.
399 *Id.* at 132.
400 *Id.* at 133.
401 *Id.* at 134.
402 *Id.*
403 *Id.*
404 *Id.* at 135.
405 *Id.*

couldn't think of any case he'd rather argue before the Supreme Court. He said it would be 9-0."

Despite the Department of Defense's reluctance to take a stand on the issue and confront organized labor, the statute was implemented without challenge. Major General Persons noted that Congress saved the day by stepping in and taking the lead when the Department of Defense would not.[406]

F. Civilianization of Military Justice

Major General Persons is quick to note that his predecessor, General Hodson, laid the ground work for protecting military justice from civilian control during the development of the Military Justice Act of 1968.[407] Major General Persons' role during his term as TJAG was to prevent further intrusions into the military justice system. He did this by attending numerous American Bar Association (ABA) committee meetings, defending the system, and responding to criticisms.

Many of the attorneys in these ABA committees who were pushing for reform had served in the military in World War II, and their views were tainted by memories of the abuses which occurred during their service.[408] Major General Persons spent his time "leading them by the hand through how far we had come"[409] and focusing on fine tuning, rather than major overhauls. Major General Persons even took one of the committees to Fort Hood for three days to show them what the real Army does. He ensured that they rode in tanks and helicopters and saw where soldiers lived and worked. He wanted them to see the average, hard working soldier, and not be preoccupied "with the pathological five percent that screwed up."[410] He realized that a trip like this was infinitely more effective than briefings and memoranda.

G. The Court of Military Appeals

While civilianization of military justice was a serious concern, Major General Persons thought that Chief Judge Fletcher at the Court of Military Appeals (COMA) posed a bigger threat to military justice.[411] Major General Persons and Judge Fletcher both arrived

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406 *Id.* at 136-37.

407 *Id.* at 137.

408 *Id.* at 138-39. As Major General Williams commented during my interview with him, some of the liberal civilian community thought we should "staple a lawyer to every new troop" as they entered the Army.

409 *Id.* at 139

410 *Id.* at 140.

411 *Id.* at 140-41.

in Washington, D.C. in July 1975.[412] Judge Fletcher had been a state court judge in Kansas.[413] Major General Persons, through conversations with Judge Fletcher, realized that Judge Fletcher did not understand the military justice system. For example, he was not aware that most disciplinary matters are handled by nonjudicial punishment—he did not know how an Article 15 worked.[414] As Major General Persons put it, "He was a doozie."[415]

The opinions issued by the COMA under Judge Fletcher were so upsetting that the Office of The Judge Advocate General started to change the entire focus of its legislative proposals just to repair the damage created by the court.[416] The most damaging ruling called into question the legitimacy of the *Manual for Courts-Martial,* except as it relates to trial procedure. Judge Fletcher believed that the language contained in the Uniform Code of Military Justice Article 36, which grants the President the power to prescribe rules for courts-martial, only applies to rules for trial procedure.[417] This unique reading of the Code cast doubt on the validity of roughly two-thirds of the *Manual.*[418]

Another ruling by the COMA which caused tremendous turmoil dealt with constructive enlistments.[419] Under the COMA's interpretation of the rules concerning constructive enlistments, a soldier accused of a crime two years into his enlistment could claim that his recruiter misled him and avoid prosecution because his enlistment was void and the Army lacked jurisdiction.[420] Major General Persons stated, "We were spending thousands of dollars to try to track these cases down. It was impossible in many cases to go back and even find the recruiting sergeant . . . ."[421] Major General Persons believed that Judge Fletcher simply did not trust the government and "saw his role as sort of defender of the downtrodden soldier."[422]

Major General Persons took it upon himself to try to educate Judge Fletcher. He took him on a trip to the United States

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412 *Id.* at 142.

413 *Id.*

414 *Id.* at 141.

415 *Id.* at 143.

416 *Id.*

417 *Id.* at 143-44. *See* United States v. Ware, 1 M.J. 282, 285 n.10 (C.M.A. 1976); United States v. Newcomb, 5 M.J. 4, 13 (C.M.A. 1978).

418 Grad Course vol. II, *supra* note 1, at 144.

419 *Id. See* United States v. Russo, 1 M.J. 134, 137 (C.M.A. 1975); United States v. Harrison, 5 M.J. 476, 479 (C.M.A. 1978).

420 Grad Course vol. II, *supra* note 1, at 144.

421 *Id.*

422 *Id.* at 145.

Disciplinary Barracks, "the best run prison in the United States."[423] Major General Persons hoped that the high ratio of social workers, psychiatrists, and counselors, would convince Judge Fletcher that military inmates were treated well, that they were not "hung . . . up by their thumbs and that it was worse than the Bastille in the 17th Century."[424]

Major General Persons took Judge Fletcher to the XVIII Airborne Corps for its Law Day Celebration.[425] Judge Fletcher was the guest of honor and dedicated a new law center. The commanding general was General Hank Emerson, a War College classmate of Major General Persons, and the SJA was Colonel Lloyd Rector.[426] They pulled out all the stops and gave Judge Fletcher a first class reception. He got to see many soldiers and was even scheduled to go on a jump with the 82d Airborne Division. Bad weather prevented the jump, but Judge Fletcher did get to climb a tower and watch some soldiers rappel.[427]

General Emerson spent about an hour telling Judge Fletcher his philosophy of leadership and discipline. Major General Persons stated that he did not speak to General Emerson about this ahead of time, but felt that he could not have done a better job:

> He talked—from the heart, off the cuff to the Judge, with the Judge asking questions all along. He talked about how young these soldiers were. How—what they really needed was someone to identify with. Someone to inspire them. Someone to give them an example . . . . A lot of these men had come from backgrounds where they didn't have that opportunity, and that was one of the things that they were trying to do by the noncommissioned officers and with the officers in the units. He came across as a very understanding, compassionate, and at the same time, a strong leader who was really interested in the welfare of his troops. Not interested in driving them into the ground like a tent peg when they screwed up the first time.[428]

Major General Persons spoke to General Rogers, the Chief of Staff of the Army, about Judge Fletcher, and the Chief suggested they meet for lunch.[429] The Chief was also from Kansas. Major General Persons later observed, "It didn't help a bit. I just don't

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[423] *Id.*
[424] *Id.*
[425] *Id.*
[426] *Id.*
[427] *Id.* at 146-47.
[428] *Id.* at 147-48.
[429] *Id.* at 149.

believe he understood or wanted to understand that we really did have a fair system and that we were men of good will." Major General Persons speculated that Judge Fletcher enjoyed his activist role. "He really liked being written up, and he was referred to by a number of newspapers as 'The New Chief Justice Warren of the Military Court,' the revolution in Military Law because of this one man who came out of Kansas and straightened everything out. I thought he was a loose cannon on the deck."[430]

The Secretary of the Army, Mr. Hoffmann, was aware of the problems and also asked Judge Fletcher to lunch. Major General Persons, the Secretary and Judge Fletcher were the only ones present. Most of the lunch was merely social, however, at one point Mr. Hoffman looked to Judge Fletcher and asked, "What's this I hear about you becoming a flaming liberal?"[431] Judge Fletcher laughed it off and then the Secretary stated, "You know, it's perfectly legitimate and an appropriate matter for me to mention this, but you were appointed by a Republican President."[432] Major General Persons recalled, "I just about dropped my teeth." The Secretary went on to lecture Judge Fletcher on the balance of political power, that he was confirmed as a conservative, and that he seemed to have gotten off track.[433] Judge Fletcher again laughed it off saying, "You got the wrong information Mr. Secretary."[434]

Despite Major General Persons' efforts to convince Judge Fletcher that military justice was not an oxymoron, Judge Fletcher continued, at various public forums, to "inveigh against the evils of the system and he'd knock the insensitivity, and the unwillingness of those who were in charge of it to change."[435] It was not until President Carter named Judge Robinson O. Everett the new Chief Judge that Judge Fletcher's damaging influence ended.[436]

Major General Persons' travails with Judge Fletcher provide a wonderful model of leadership. Even though his efforts appeared to be futile, he continued to make every effort to convey the Army's view of military justice to a Judge who, in Major General Persons

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430 *Id.* at 150.

431 *Id.*

432 *Id.*

433 *Id.*

434 *Id.*

435 *Id.* at 148. Major General Persons also speculated that Judge Fletcher's commissioner at the court, Ward Mundy, a former active duty judge advocate who came to the court from Defense Appellate Division, had a tremendous influence on Judge Fletcher's views of the military justice system. Major General Persons recalled someone who had worked in Government Appellate Division when Mr. Mundy was in Defense Appellate Division telling him that "Mundy never won a case before the court and now he's making up for it." *Id.* at 151.

436 *Id.* at 153.

opinion, did not appreciate the necessity of a disciplined fighting force. Major General Persons could have given up after a couple of attempts, but he continued to fight for his client.

G. The Birth of the Trial Defense Service

Lieutenant Colonel John R. Howell wrote an excellent article in 1983 on the establishment of the Trial Defense Service (TDS) and I highly recommend it to anyone interested in an extensive examination of this watershed development in the Army JAG Corps.[437] I will not attempt to revisit Lieutenant Colonel Howell's able treatment, but will instead focus on the personalities involved and Major General Persons' inside knowledge of the behind the scenes battles fought to create a separate defense service.

While Major General Persons was the Judge Advocate in USAREUR, he encouraged SJAs to separate the defense counsel as much as possible; assign judge advocates as defense counsel and leave them there for a year.[438] During his first year as TJAG, Major General Persons realized that "encouragement" was insufficient motivation to SJAs. Some SJAs continued to assign "their greenest, most inexperienced counsel to the defense function."[439] In December 1976, Major General Persons issued a directive: Do not assign an officer as defense counsel until they had at least four months in service, and they had to serve as assistant defense counsel first.[440]

Some SJAs thought Major General Persons was interfering with their internal operations. Others understood what he was trying to do and were already complying with his directive.[441] During his command visits, Major General Persons also encouraged SJAs to provide separate buildings to defense counsel if possible, or, at a minimum, separate entrances.[442] He also encouraged SJAs to assign a solid middle grade officer to head the defense office.[443] In the end, he realized this was too much to ask of SJAs. It was not fair to expect them to put their best person in the defense office.[444] The

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[437] John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983).

[438] Grad Course vol. II, *supra* note 1, at 118.

[439] *Id.*

[440] *Id.* at 118-19. According to Howell, the program was called "split certification." Howell, *supra* note 437, at 29.

[441] Grad Course vol. II, *supra* note 1, at 119.

[442] *Id.*

[443] *Id.* Major General Persons took other steps to separate the defense function and provide technical support, in September 1976, he created the Field Defense Service, a Trial Counsel Assistance Program for defense lawyers. Letter to All SJAs from: TJAG, *Field Defense Services*, ARMY LAW., Oct. 1976, at 1.

[444] Grad Course vol. II, *supra* note 1, at 120.

only way to avoid even the appearance of "improper hanky-panky" was to create a separate defense chain.[445]

Major General Persons' other motivation for creating a separate defense chain was to provide "professional discipline and to increase the level of competence of defense lawyers."[446] If anyone other than another defense counsel is charged with the supervision and training of young defense counsel, "you are always running the risk of your efforts being misinterpreted," either in the rating of the officer, or the assignment of the officer's duties.[447]

When asked about his strategy for developing the TDS, Major General Persons stated, "I sort of turned Colonel [Robert B.] Clark loose, and I gave him some good people to help research and write, and I gave him pretty much carte blanche."[448] However, Major General Persons' biggest hurdle was the Army Chief of Staff, General Rogers, who did not like the idea. He thought that defense counsel were already out of control and that under a separate system they would become even more out of control.[449]

Colonel Clark interviewed many commanders in preparation of the proposal. The majority of the commanders supported the idea.[450] After the proposal was completed, Colonel Clark sent a copy to each of the major subordinate commanders for their comment.[451] The Commanders-in-Chief in USAREUR, Korea, Forces Command, and Training and Doctrine Command all supported it. General Don Starry, the commander of Training and Doctrine Command, stated "if Larry Williams and Will Persons think this is a good idea, I have enough confidence in their judgment that I think it is a good idea."[452] General Rogers remained unconvinced.[453]

Major General Persons told General Rogers that if the Army did not do this on its own, then Congress or the courts would do it. General Rogers was aware of Judge Fletcher's activism, and Major General Persons was aware of the civilian bar's grumbling about military justice through his attendance at numerous ABA

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445 *Id.*

446 *Id.*

447 *Id.*

448 *Id.* at 118. Howell states that, in March 1977, Major General Persons directed Colonel Wayne Alley "to assign and take the actions necessary to establish a separate defense organization." Howell, *supra* note 437, at 30.

449 Grad Course vol. II, *supra* note 1, at 122.

450 *Id.*

451 *Id.* at 123.

452 *Id.*

453 *Id.*

functions.[454] Major General Persons thought that this argument, more than any others, probably persuaded General Rogers to approve the test program.[455]

Two weeks before his retirement, Major General Persons had the final decision paper for the creation of the TDS sitting on his desk.[456] General Rogers and others on his staff gave every indication that if the Office of The Judge Advocate General presented the Chief with a yes or no decision on a full-fledged TDS, the answer would be no.[457] Major General Persons is not sure who came up with the idea, himself, Major General Williams, Brigadier General Harvey, or Colonel Clark, but they decided to ask for a test program first.[458]

General Rogers approved the test program and it was a success.[459] General Edward C. "Shy" Meyer[460] replaced General Rogers at the time of Major General Persons' retirement.[461] General Meyer was the deputy chief of staff for operations under General Rogers and Major General Persons had briefed him extensively on the TDS. He fully supported the proposal and in November 1980, after a two-year Army wide test, "TDS was given permanent organizational status."[462] However, Major General Persons was disappointed, "I'm not going to accomplish something that I set out to do four years ago."[463]

I have outlined some of the major initiatives and programs Major General Persons implemented while TJAG. However, the reader should not conclude that Major General Persons and Major General Williams were activists who set out to reshape the Army JAG Corps. To the contrary, Major General Williams explained to me in our interview that Major General Persons' predecessor had submitted numerous proposals to the Army leadership during his

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454 *Id.* at 124.

455 *Id.* at 126.

456 *Id.*

457 *Id.*

458 *Id.* at 126-27. Howell states that, on 3 February 1978, Major General Persons submitted the proposal to General Rogers recommending immediate implementation without a test and that on 18 March 1978 General Rogers rejected the recommendation but authorized a one-year test. Howell, *supra* note 437, at 32.

459 Grad Course vol. II, *supra* note 1, at 127.

460 As a Lieutenant Colonel in 1965, General Meyer was the Deputy Commander of 1st Cavalry's 3d Brigade during the Pleiku Campaign in the Ia Drang Valley. J.D. COLEMAN, PLEIKU: THE DAWN OF HELICOPTER WARFARE IN VIETNAM 175 (1988). General Meyer also had been the 3d Infantry Division Commanding General in Wurzburg when Brigadier General Persons was the USAREUR Judge Advocate.

461 Grad Course vol. II, *supra* note 1, at 127.

462 Howell, *supra* note 437, at 6.

463 Grad Course vol. II, *supra* note 1, at 127.

tenure, many of which had nothing to do with legal work.[464] Major General Persons felt that the Office of The Judge Advocate General's legal mission had suffered because of this activism. He and Major General Williams made a conscious effort at the beginning of their tour to step back, take a lower profile, and focus on providing the Army with timely, quality legal service.

X. General Observations Regarding Various Topics

A. One Year Tours

Major General Persons expressed some concerns with the effect of one-year tours in Vietnam. These concerns are relevant to recent military operations. Major General Persons noted two schools of thought regarding one year tours. On the one hand, morale benefited: "[P]eople knew that they only had one-year and, if they didn't get zapped in one-year, . . . they weren't going to get zapped."[465] On the other hand, one year tours contributed to soldier stalemate, an unwillingness to take chances.[466] The "DEROS syndrome" takes over, and soldiers with a month or less left in country would become very cautious. "In other words, if you had to stay there 'until the war was won,' as it was in World War II, they might have gotten on with it . . . . I suspect that's an oversimplification, because I think the decisions were made not to win the war in the overall sense in Washington early on."[467]

B. Professional Pay for Judge Advocates

In 1969, Congress considered and rejected professional pay (propay) for judge advocates.[468] Major General Persons did not support the proposal. He noted that the draft was still in effect, and the JAG Corps had plenty of lawyers. Major General Persons felt there were practical problems in implementing propay. The purpose of propay was to retain good young attorneys, and it was not needed for lieutenant colonels and colonels because they did not pose a retention problem. Therefore, when would the propay stop, when the judge advocate made major?[469] Major General Persons also had philosophical objections to propay:

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[464] A member of the Army staff once told Major General Williams that under Major General Prugh, the OTJAG generated more paperwork to the Army staff than any of the other staff elements.

[465] Grad Course vol. I, *supra* note 1, at 26.

[466] *Id.*

[467] *Id.*

[468] Grad Course vol. II, *supra* note 1, at 73.

[469] *Id.* at 73-74.

> [T]o me it was a divisive thing. It made us different from the rest of the Army and it's hard to justify in any kind of intellectual way that you should pay a lawyer—Captain, Major, Lieutenant Colonel—more than an Infantryman or a helicopter pilot or a tank battalion commander.[470]

C. Qualities of a Good SJA

Major General Persons looked for certain characteristics in an officer to determine if he or she would make a good SJA. They must be "forthright and vigorous and not bashful."[471] They must be flexible. Commanders are in the field during the day, and the only time SJAs can take care of legal business is late at night. Most importantly, they must really want to be an SJA:

> There are so many opportunities to fail at the Division SJA level and that's really the truth of the matter . . . . It's the closest thing to command in the JAG Corps in the sense of you're directly responsible for people, but you're also responsible for a whole lot of action that's gotta be taken in sequence, on time or else the whole enterprise may go down the tube . . . .[472]

D. The Leadership Role of an SJA

One of the toughest jobs for an SJA involves reining in a commander who insists on doing something which may not be illegal but is simply unwise. Major General Persons explained the difference between the two situations:

> It's not a question of a judgment call, as a great many of them [issues] are not black and white; there is some legal support for the position he feels very strongly he's going to take and he'll take the risk. That's what he gets paid for. But, where you have a case where he's gonna do something that is clearly illegal, and it's not going to be good for him or the Army or the command, now what do you do?[473]

Major General Persons recommended that if you have tried unsuccessfully to change the commander's mind, and he or she is going to do something illegal, use your technical chain. Major General Persons quoted Major General Decker, as saying, "If that ever happens, that's why we've got a technical chain. You pick up the telephone and call me, twenty-four hours a day, anywhere. If I'm not in

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[470] *Id.* at 74.

[471] *Id.* at 90.

[472] *Id.* at 91.

[473] *Id.* at 33-34.

Washington, you can get a hold of me anywhere in the world and I'll call that commander and talk with him."[474] Noting that an overwhelming number of commanders want to do the right thing, Major General Persons stated that he never had to play the ultimate "ace in the hole," which is, "Sir, if you like your job, you'd better do it this way."[475]

E. Choosing SJAs

As TJAG, Major General Persons reserved final approval of all SJA assignments.[476] He relied heavily on his two Chiefs of Personnel, Plans and Training Office; the first was Ronald M. Holdaway and the second was William K. Suter.[477] Major General Persons frowned on active lobbying. He put out the word that it was a waste of time to try and influence or change a decision once it was made.[478] He firmly believed that "if you ever let someone in your door, who can bleed and cry and throw up on your desk and whatever, and you are moved to change it, within no time at all the grapevine, knows it; that all you've got to do is raise enough hell, and you won't go to Korea or you can get a school assignment changed or whatever."[479]

Major General Persons did everything he could to bring credibility to the system. He felt "very strongly that you had to do what you say you were gonna do too; you had to really follow through on this stuff."[480] One of the ways he improved credibility was by publishing all JAG personnel policies in the personnel directory.[481] He also initiated a policy of using boards for all selection decisions: accession boards, retention boards, extension boards, graduate course boards, Leavenworth boards.[482] This "business like" approach was fairer, and it removed the appearance of favoritism and "good old boy" networking. Major General Persons regularly got calls from Congressmen, and others, trying to get a cousin or a nephew into the JAG Corps or into a school. By implementing a selection board system, he could "look them right in the eye and say 'A board considered it.'"[483]

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474 *Id.* at 34.

475 *Id.* at 34.

476 However, he gave his USAREUR Judge Advocate veto power over SJA assignments in Germany. *Id.* at 59.

477 *Id.* at 54.

478 *Id.* at 55.

479 *Id.* at 55-56.

480 *Id.* at 57.

481 *Id.*

482 *Id.*

483 *Id.*

F. Major General Persons' Mentors

Major General Persons stated that Generals Decker and Hodson were his role models.[484] General Decker was a brigadier general when Major General Persons was a brand new captain in the Pentagon.[485] Major General Persons admired that Major General Decker "never stinted an ounce of his energy or abilities on behalf of the Army and Corps."[486] He also respected him as a soldier:

> [H]e always looked like he stepped right out of a band box. I mean his shoes gleamed. His uniform fit. He stood up straight. He looked like a soldier. And when he came to visit you in the field you were delighted to take him in and meet your commanding general. There were other general officers who didn't quite fit that bill.[487]

XI. Conclusion

At the conclusion of the War College oral history, Colonel Crean told Major General Persons that both he and Colonel Green "felt that your history and your contribution and what you went through as a JAG should be recorded for the Army's history."[488] After acknowledging their effort, Major General Persons stated, "[I] thought you'd never ask."[489] The entire JAG Corps should be thankful that someone took the time to record Major General Persons' illustrious career.[490]

There is a phrase Army officers use when they want to foster creativity and innovation in a subordinate, "Think outside the box."

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[484] *Id.* at 228.

[485] *Id.* at 227.

[486] *Id.* at 228.

[487] *Id.* at 228. General Hodson was TJAG while Colonel Persons was Chief, Administrative Law, OTJAG, and SJA, U.S. Army Vietnam. He was so universally admired and respected that, to quote General Williams, "He could have been elected TJAG by acclamation."

[488] War College, *supra* note 1, at 605.

[489] *Id.*

[490] Brigadier General Altenburg compared the importance of Major General Persons' contributions to those of Elihu Root, Secretary of War under President McKinley (1899-1904). Mr. Root established the Army War college (1900) and transformed the old infantry and cavalry school at Fort Leavenworth into the General Service and Staff College. PHILIP C. JESSUP, I ELIHU ROOT 254, 258-59 (1954). According to Newton D. Baker, Secretary of War during World War I, Mr. Root's creation of the General Staff "was not only his outstanding contribution to the national defense of the country, but the outstanding contribution made by any Secretary of War from the beginning of history. Without that contribution from him, the participation of the United States in the World War would necessarily have been a confused, ineffective and discreditable episode." *Id.* at 240.

Major General Persons spent the bulk of his career thinking outside the box. As one would expect, life outside the comfortable routine can be turbulent. Major General Persons weathered the turbulence and became a true innovator, a fearless advocate for the JAG Corps. His ideas and programs can be seen in every aspect of today's Corps. He is a role model for every judge advocate, regardless of age or rank.

Major General Persons knew when to confront a commander, and he knew when to retreat and fight the battle another day. His sense of duty and service was unflinching. He believed strongly in putting good people into positions of responsibility and letting them do their job with minimal interference and maximum support.

Time and space prevented me from including all of Major General Persons' fascinating stories of historic times in the Army JAG Corps. I encourage all judge advocates to read the two oral histories.[491] One will gain a practical historical perspective on many programs which still exist in the Army. The most important reason to read the oral histories is that one can see that Major General Persons experienced the same day-to-day problems that all judge advocates encounter. He got assignments he did not want, only to realize later that things worked out for the best. He got jobs that he did not want but eventually enjoyed. He worked for good and bad bosses. He even thought about getting out of the Army. But through it all, we learn from Major General Persons "not to throw up [your] hands and give up, instead, shrug your shoulders pull your helmet a little lower over your ears and carry on."[492]

At the conclusion of the Graduate Course oral history, the audio tape runs out as Major General Persons refers to the just completed interview sessions, "I don't know if it [his oral history] is of any value, but, ah . . . ."[493] You be the judge.

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[491] The oral histories are archived in the Library of The Judge Advocate General's School, Charlottesville, Virginia.

[492] Grad Course vol. I, *supra* note 1, at 159.

[493] Grad Course vol. II, *supra* note 1, at 229.

THE PRINCIPLE OF LEGALITY AND THE ISRAELI MILITARY GOVERNMENT IN THE TERRITORIES

BRIGADIER GENERAL URI SHOHAM*

I. Introduction

Since 1967, barely nineteen years from the date of its foundation, Israel has been in control of two areas of land commonly referred to today as the West Bank and the Gaza Strip. While this control has been given various legal names, depending on one's personal point of view—"military administration," "belligerent occupation," or "liberation"—the facts of the matter remain the same: Israel, with a current population of around five and a half million, has for over two decades been in control of an Arab population currently estimated at around two and a half million people,[1] a large percentage of whom tend to view Israel's presence with something less than enthusiasm.

For the sake of allegorical comparison, imagine the United States being in control of an area of land a quarter its own size,

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1. Estimate published in *El Quds* newspaper, 4 September 1996.

located just scant miles away from major United States cities, and populated by no less than 120 million Iraqis. With a few minor adjustments, these are the circumstances Israel has had to face since 1967.

The Israeli control of what is collectively referred to as "the Territories" has been the subject of deep-rooted controversy within Israeli society itself. The extreme parties of Israeli politics have advocated either annexation (on the extreme right) or immediate establishment of an independent Palestinian state (on the extreme left). In between, the majority of the Israeli population probably view the Israeli control of the Territories as a necessary, albeit uncomfortable, situation imposed on Israel by the military-political condition of the Middle-East.

Regardless of their political viewpoints, all Israeli governments from 1967 to the present have laid down a strict requirement that all activities of the Israeli military in the control of the Territories must adhere to the principle of "the rule of law," for as the philosopher John Locke said in 1690, "Wherever law ends, tyranny begins."[2]

It is the purpose of this article to give a relatively brief overview of the problems Israel has had to face in the implementation of the principle of "the rule of law," and the solutions Israel has found, or sometimes invented, for these problems.

The difficult challenges faced by Israel in this context are brought into sharp focus when contrasted with the approaches adopted by all other "occupants" in the post World War II era. Whether based on a purported request for intervention by the local government (e.g., Afghanistan, Grenada), claims of sovereignty by the occupier (e.g., Kuwait, Western Sahara, East Timor), or implementation of the principle of self-determination (e.g., Bangladesh, Cyprus), it has been the policy of all modern "occupants" to deny the relevance of the Hague Regulations or the Fourth Geneva Convention to the circumstances in question. Viewed from this perspective, Israel's acknowledgment that its actions in the Territories are subject to or guided by previously untested international legal standards, at least in the modern context, is worthy of note as a landmark in the formal applicability of such rules, as well as in terms of the practical and inevitable difficulties of traveling hitherto uncharted ground.[3]

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[2] TWO TREATISES ON GOVERNMENT (1690)

[3] *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (Princeton University Press, Princeton, New Jersey, 1993).

II. 1967-1993

A. The Historical Background

To fully understand the situation in which Israel has found itself for over twenty-five years, one must first have some basic understanding of the historical events which brought about the current state of affairs. May and June 1967 were destined to be two of the most important months in the history of the (then) nineteen-year old State of Israel. At that time, Israel was completely surrounded by hostile Arab nations, intent on eliminating the upstart Jewish State and thereby rectifying what in their eyes was nothing more than a temporary historical footnote.

For the sake of brevity, the events leading up to the 1967 "six day war" can be summarized chronologically as follows:

a. May 15: Egypt mobilizes its armed forces;

b. May 16: Egypt moves forces into and across the Sinai Peninsula, towards the Israeli border, demanding the withdrawal of all United Nations forces from the region;

c. May 19: The United Nations peacekeeping force stationed in the Sinai, comprised of over 3000 soldiers from six nationalities, accedes to the Egyptian demand and flees the region, thereby exposing Israel's southern border to Egyptian attack;

d. May 22: Egypt publicly declares the Straits of Tiran, Israel's only southern sea access to the Indian Ocean and a vital trade route, closed to all Israeli shipping;

e. May 25: Encouraged by Egypt—Syria, Iraq, Jordan and Saudi Arabia commence moving troops to the Israeli borders;

f. June 4: Arab soldiers, tanks, aircraft and artillery amassed on Israel's frontiers outnumber Israeli forces by a ratio of three to one.[4]

Arab intentions were clear. On May 27, President Nasser of Egypt made a public statement proclaiming:

> Our basic objective will be the destruction of Israel. The Arab people want to fight . . . . The mining of Sharm el Sheikh is a confrontation with Israel. Adopting this mea-

[4] For further reading *see* JOHN MOORE, THE ARAB-ISRAELI CONFLICT, vol. II, at 5-21 (1974); ISRAEL'S FOREIGN RELATIONS—SELECTED DOCUMENTS 1947-1974, vol. II, at 703-801 (1976).

> sure obligates us to be ready to embark on a general war with Israel.[5]

President Aref of Iraq, predecessor to the current Iraqi president, Saddam Hussein, proclaimed a similar intention:

> The existence of Israel is an error which must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear—to wipe Israel off the map.[6]

And finally, the Chairman of the Palestine Liberation Organization, Ahmed Shukairy, predecessor of the current Chairman, Yasser Arafat, stated on June 1 as follows:

> This is a fight for the homeland—it is either us or the Israelis. There is no middle road. The Jews of Palestine will have to leave. We will facilitate their departure to their former homes. Any of the old Palestine Jewish population who survive may stay, but it is my impression that none of them will survive.[7]

Recognizing its plight, Israel decided to launch a preemptive air strike against the Egyptian air force, destroying most of its planes on the ground. As the ensuing conflict proved, the quickest way of ending a war is to lose it.[8] The war lasted only six days, at the end of which Israel had succeeded in protecting all of its boundaries and had taken possession of the following areas:

a. From Egyptian control, the Sinai Peninsula (the launch base for the Egyptian offensive against Israel) and the Gaza Strip (from which terrorist attacks were launched against Israel throughout the 1950s and 1960s);

b. From Jordanian control, the West Bank (from which Jordanian forces and artillery had threatened to cut Israel's narrow eight mile waist in half) and East Jerusalem; and

c. From Syrian control, the Golan Heights (the launching area of the Syrian offensive and of numerous attacks prior to the 1967 war).

Thus, at the end of the Six Day War, Israel found itself controlling territory three times larger than its previous borders, and with the responsibility for an additional one million Arab residents of the

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[5] MARTIN GILBERT, THE ARAB-ISRAELI CONFLICT, *supra* note 4, at 66.

[6] *Id.* at 67.

[7] *Id.*

[8] GEORGE ORWELL, SECOND THOUGHTS ON JAMES BURNHAM: SHOOTING AN ELEPHANT (1950).

West Bank and the Gaza Strip. Israel's offer, immediately after the war, for the return of all the newly acquired territories (except for the united Jerusalem) in return for a full peace with its neighbors was totally rejected by all the Arab countries, who chose to proclaim instead the "triple negation doctrine," no peace with Israel; no recognition of Israel; and no negotiation with Israel.[9] As a result, the state of affairs on the ground in the West Bank and the Gaza Strip would remain relatively unchanged for twenty-seven years, until the Israel Defense Forces (IDF) withdrawal from the Gaza Strip in 1994 as part of the implementation of the Israel-PLO agreements which shall be addressed later.

B. Israel's Legal Status in the Territories

One of the first questions Israel had to face and answer immediately following the end of the Six Day War was, "What is Israel's legal position in relation to its presence in the Territories?" It should be stressed that this question was anything but theoretical, for the legal position adopted by Israel in this regard would have far-reaching practical consequences for the inhabitants of the Territories. Three different legal approaches were advanced:

a. Israel is the occupant of the Territories and therefore should hold and govern them in accordance with the principles of public international law applicable to belligerent occupation;

b. Israel is the "missing owner" (sometimes referred to as "the missing reversioner") of the Territories. This proposition was based on three separate facts: (1) the 1947 United Nations Partition Resolution which proposed dividing Palestine into two separate states; (2) the illegality of the Jordanian annexation of the West Bank in 1950 (recognized only by two countries—Great Britain and Pakistan); and (3) the Territories had been acquired as a result of a legitimate use of self defense;[10]

c. Israel is the "trustee" of the Territories for the local population until they will be able to form their own self government. According to the proponents of this view, following the end of the British mandate over western Palestine, the true sovereignty over the West Bank, although latent, had been transferred to the Palestinian residents.

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[9] *See* also the statement to the Israeli Knesset by Prime Minister Eshkol on 12 June 1967 in ISRAEL'S FOREIGN RELATIONS, *supra* note 4, at 794-801; statement to the United Nations General Assembly by Foreign Minister Eban on 19 June 1967 in *id.* at 802-817; and the statement to the United Nations General Assembly by Foreign Minister Eban on 8 October 1968 in *id.* at 849-857 (especially at 853).

[10] Y.Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. R. 97, 97-105 (1968).

After serious political and legal deliberations, Israel chose to adopt a mixed practical approach. Israel would not acknowledge *de jure* that the Territories are occupied territory, thereby effectively setting aside the political aspect of the question, but it would govern the Territories *de facto* under the provisions of customary international law applicable to belligerent occupation.[11]

In light of this decision, the Israeli military government of the Territories was specifically instructed to abide by the relevant provisions of customary international law, especially those principles embodied in section III of the 1907 Hague Regulations relating to "Military Authority over the Territory of the Hostile State" (hereinafter referred to as the "Hague Regulations").

Regarding the other various international conventions which apply in occupied territory (*e.g.*, the Fourth Geneva Convention of 1949 and the 1954 Hague Convention for the Protection of Cultural Property), Israel, again without acknowledging that the Territories are in fact occupied territory, and further unsure whether these conventions had acquired the status of customary (as opposed to conventional) international law, instructed all of its soldiers to abide by their provisions, incorporating them into the IDF internal regulations.[12]

Parenthetically, it is interesting to note in this context that the Israeli Supreme Court, presiding as the Israeli High Court of Justice (HCJ), has repeatedly refused to accept claims that the Fourth Geneva Convention has attained, as a whole, the status of customary international law.[13] This result, although relatively unpopular in the international legal community, is not as surprising as it may seem if one takes into consideration that, as far as Israel is aware, it is the only country in the world which has actually applied the provisions of the convention on a continuing basis. This, of course, has not stopped the Israeli authorities from applying the humanitarian provisions of the convention on a case-by-case basis.

C. The Legal Structure of the Israeli Military Government in the Territories

In accordance with accepted international practice, upon taking control of the Territories, Israel appointed a high ranking mili-

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[11] For further discussion of this question and additional references *see also* ISRAEL: DEFENSE FORCES MILITARY ADVOCATE GENERAL'S UNIT. ISRAEL, THE INTIFADA AND THE RULE OF LAW, at 21 (1993).

[12] ISRAEL: DEFENSE FORCES GEN. HQ REG. 33.0133 (1963, revised 1982).

[13] *See, e.g.*, H.C.J. 785/87; 845/87; 27/88. El-Affo *et. al.* v. The Commander of IDF Forces in the West Bank, 42(2) P.D. 4, 23-24, 76; H.C.J. 606/78, 610/80. Ayub et. al. v. The Minister of Defense *et. al.* 33(2) P.D. 113, 120, 127, H.C.J. 698/80, Kawasme *et. al.* v. The Minister of Defense, 35(1) P.D. 617.

tary officer in each area to the position of "Military Commander of the Area." Each Military Commander was given the overall responsibility for all aspects of the administration of the area in question, both the security and the civil affairs of the local population.

To manage this newly-acquired population (equal then as now to approximately 40% of the entire population of Israel) each Military Commander established a subordinate Military Government, employing a cadre of Israeli staff comprised of both soldiers and civilians. The handling of the day-to-day affairs of the Palestinian population was left mostly in the hands of the Palestinians formerly employed in the Jordanian and Egyptian administrations, albeit now under Israeli supervision.

This organizational structure remained in place until 1981. During that year, following several years of Israeli-Egyptian negotiations concerning the establishment of a Palestinian autonomy in the Territories, Israel decided formally to separate the civilian and security aspects of the military government, thus establishing the Civil Administration.[14]

Formally still under the authority of the Military Commander, in practice the Civil Administration was placed under the direction of the Coordinator of Government Activities in the Territories, a high-ranking post in the Ministry of Defense. Despite this functional separation, Israel planned to facilitate the transfer of civil authority to the Palestinian autonomy, if and when it were to occur. Although the Israel-Egypt Palestinian autonomy talks eventually fell through, the separation of the Civil Administration from the rest of the Military Government would prove very useful twelve years later when Israel and the Palestinian Liberation Organization commenced direct negotiations for a peaceful settlement of their decade-long conflict.

Under customary international law, the Military Commander of the occupying forces holds not only the highest executive power in the area but also the power to legislate.[15] However, the Military Commander's powers in this field are not unlimited for regulation 43 of the Hague Regulations provides that the Military Commander must respect the existing laws in force in the territory "unless, absolutely prevented."

Upon the entry of IDF forces into the Territories in June 1967, the term "laws in force" was not easy to decipher in relation to the

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[14] Order Concerning the Establishment of the Civil Administration (Judea and Samaria) (No. 947) 1981. A similar Order was issued in the Gaza Strip.

[15] *See* BRITISH MANUAL OF THE LAW OF WAR ON LAND, art. 528, at 145 (1958);

Territories. Prior to the Israeli appearance in 1967, the West Bank had been under Jordanian rule after being formally annexed to Jordan in 1950. As a result, all Jordanian laws were in force in the West Bank. Furthermore, some British Mandatory legislation, remnants of the 1922-1947 British rule in Palestine, still remained in force. Finally, in some obscure cases, Ottoman law, surviving from prior to World War I, still applied in the West Bank.

In the Gaza Strip, the situation was no less obscure. Prior to the Israeli victory in 1967, the Gaza Strip had been under Egyptian military rule but had not been annexed by Egypt. As a result, the Egyptians had enacted several volumes of security-related laws and regulations specifically for the Gaza Strip. In most other fields, the prevailing legislation remained the British Mandatory Ordinances and Orders, together with some Ottoman remnants.

In other words, the Israeli Military Governments found themselves faced with two totally new and singular legal systems under which they had to administer a population of one million people. Fortunately, the IDF Military Advocate General's Unit, responsible for all legal affairs in the Military Governments, was prepared. Prior to the outbreak of the May-June 1967 crisis, the IDF Military Advocate General, erstwhile President of the Israeli Supreme Court Meir Shamgar, had planned for this very contingency by preparing detailed files for each legal advisor, which contained the required international conventions (the Fourth Geneva Convention 1949, the IV Hague Convention 1907, and the 1954 Hague Convention for the protection of Cultural Property in the Event of Armed Conflict) and the pre-printed initial versions of security legislation for publication in the Territory.

Thus, soon after the IDF took control of the Territories, the IDF Military Commanders published Proclamation No. 1, "The Proclamation Concerning the Assumption of Power by the Israel Defense Forces," stating in article 1 the following:

> The Israel Defense Forces have today entered the area and have assumed responsibility for government and for the security and public order of the area.

Proclamation No. 2, issued immediately thereafter,[16] added provisions relating to the issue of legislation by stating the following:

> The law that was in force in the area on 7 June 1967 shall remain in force, insofar as it does not contradict this

[16] Proclamation concerning the Regulation of Law and Order (No. 2) (The West Bank) 1967.

> Proclamation or any Proclamation or Order issued by me, and with the amendments deriving from the assumption of power by the Israel Defense Forces in the Area.

In effect, this article was the embodiment of regulation 43 of the Hague regulations in the Military Commander's security legislation.

Since that time, the Military Commanders in the West Bank and the Gaza Strip, and their authorized subordinates, have issued over one thousand acts of primary legislation in each area (referred to in the Territories as "Orders") and thousands of acts of secondary legislation (termed "regulations," "provisions," or "notices"). Due to the differences in the law in force between the West Bank and the Gaza Strip, the security legislation has required adaptation, resulting in two nonidentical codifications, one in each area, referred to collectively as "the security legislation."

From its name, one would assume that the security legislation deals solely with security related issues. Such would also seem to be the intention of the drafters of regulation 43 of the Hague Regulations, which specifically refers to "public order and safety."

However, soon after taking control of the Territories, the Israeli Military Commanders found, to their dismay, that the administration of a million Palestinian residents requires legislative intervention in numerous civilian-related affairs. Some examples of these include new fiscal legislation required to amend outdated fiscal legislation unsuited for modern economies, improved transportation legislation required as a result of the marked increase in the number of privately owned automobiles in the Territories, new telecommunications laws required as a result of the introduction of telephone networks, and many other spheres too numerous to mention here.

In effect, the longer the Israeli administration of the Territories continued, the more the Israeli authorities were required to delve into additional civil spheres as the existing legislation, in force for at least several decades, was found lacking. This process, recognized by the Israeli HCJ as a *sui generis* situation, was commonly referred to as the "prolonged occupation doctrine," and was interpreted as meeting the "unless absolutely prevented" requirement of regulation 43.[17]

Today, following almost three decades of Israeli administration in the Territories, the Israeli security legislation and the previous

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[17] For a detailed analysis of the implementation of Regulation 43, *see* H.C.J. 69/81, 493/81, Abu Ita et. al. v. The Military Commander of the West Bank *et. al.*, 37(2) P.D. 1.

local legislation are almost totally intertwined, forming a proverbial Gordian knot which I seriously doubt it would be wise, or even possible, to unravel.

D. Legal Scrutiny and Judicial Review

Under the general decision taken by Israel, as previously stated, to ensure that the Israeli Military Government functioned in all aspects in accordance with the principle of "the rule of law," the Israeli administration established numerous legal checks and balances.

First and foremost in this respect are the legal advisors of the area. Each area is appointed a senior legal advisor (usually bearing the rank of colonel or lieutenant colonel) whom, together with his staff, are responsible for providing legal advice to all IDF authorities active in the area, from the Military Commander and the head of the Civil Administration through all the chains of command and down to the simple soldier on patrol or manning a checkpoint.

In effect, the legal advisors serve dual roles. On the one hand, they dispense legal advice in all fields (both security and civil affairs) and as such are not much different than their counterparts in civilian life. In this capacity they also represent the military authorities before the various courts and tribunals, which adjudicate cases related to Israel's activities in the Territories. On the other hand, the legal advisors also serve as legal watchdogs, directing the military authorities on the "do's" and "don'ts" of military government, not hesitating to open disciplinary or even more forceful proceedings against infractions and violations of IDF laws and regulations.

This dual role of both lawyer and supervisor prompted the Israeli authorities to refrain from placing the legal advisors under the command of their military "clients." Instead, all the legal advisers are under the direct supervision and command of the Military Advocate General and his staff, thereby freeing the legal advisors, at least in theory, from any potential conflicts of "dual loyalty," and providing an additional supervisory "umbrella" for their actions.

In addition to the quasi-supervisory role of the IDF legal advisors, the Territories contain quite a significant number of judicial and quasi-judicial *fori,* intended to deal with the civilian and security aspects of the lives of the local population. These organizations include the following.

a. The local Palestinian criminal and civilian court system established prior to the Israeli administration and allowed by Israel to continue functioning. This system deals with all non-security related offenses and suits.

b. The religious tribunals, which decide on questions of a religious nature. Separate tribunals exist for each religious persuasion.

c. The military courts, established by Israel in 1967 in accordance with customary international law.[18] These courts deal almost exclusively with security related offenses, although they have jurisdiction over all criminal offenses in cases in which the security of the area or the preservation of public order so require.

The military courts are presided over by military judges, senior IDF lawyers who enjoy total independence in the execution of their judicial duties and are subject only to the law. It should be stressed that the rules of evidence and procedure in the military courts are based on their counterparts in the Israeli criminal court system and the IDF court-martials, thereby ensuring the protection of the rights of the accused.

d. In 1989, following a petition to the HCJ,[19] the Israeli authorities established an appellate military court, authorized to hear appeals for both defense and prosecution, against the decisions of the military courts.

It should further be noted that the Military Commanders, while they do not have judicial powers, are empowered under the security legislation to mitigate punishments established by the military courts and to grant pardons. In the same context, one of the more difficult questions faced by any occupant is whether to allow the local population to file claims and suits against it. Taking into consideration that the source of the occupant's power is rooted in its military supremacy, it is an accepted principle of international law that an occupant is neither bound by the laws nor subject to the jurisdiction of the courts of the occupied state.[20] Accordingly, the ability of members of the local population to bring legal proceedings against the occupant is a policy matter at the discretion of the occupant.

Israel, recognizing the necessity to strike a balance between the relative "immunity" of the military government and the desirability, from a humanitarian perspective, of allowing the local population some recourse in cases in which they feel themselves wronged by the Israeli authorities, has opened three separate avenues for this purpose.

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[18] *See* Article 66 of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

[19] H.C.J. 87/85, Arjub v. The Military Commander of the West Bank, 42(1) P.D. 353.

[20] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 108, (University of Minnesota Press, 1957); JAGS, No. 11, at 227; BRITISH MANUAL OF MILITARY LAW, art. 520 (1958).

First, under an Order issued by the Military Commanders in 1968,[21] Israel established the post of a claims staff officer. Any local inhabitant who believes he has been wrongly damaged as a result of the activities of the Israeli authorities (including the IDF and other security agencies) may file a claim for compensation before the claims staff officer who is generally a fully qualified Israeli lawyer.

To ensure, as far as possible, the impartial nature of the decisions of the claims staff officer, all his decisions may automatically be appealed before a claims appeal committee. At this point, it should be stressed that the claims staff officers over the years have dealt with an extremely large number of claims of all kinds (standard torts and security related acts), proving the efficacy of the position, and reaffirming the reasoning underlying its establishment.

It should further be noted that the only type of claim specifically excluded from the jurisdiction of the claims staff officer is a claim concerning damage caused as a result of military activity carried out due to military necessity which the military commander has certified, in writing. This option, based on accepted principles of customary international law (Article 23(g) of the Fourth Hague Convention and Article 53 of the Fourth Geneva Convention), is only utilized in exceptional cases, under the supervising eye of the legal advisor of the area.

The second forum established by the Israeli military government is the Appeals Committee, established in 1967 by Order of the Military Commanders.[22] As opposed to the claims staff officer, who deals solely with claims for damages, the Appeals Committee hears appeals lodged by local inhabitants against decisions of the Israeli Military Government under local and security legislation. For example, if a Palestinian resident of the West Bank feels that the decision of the Israeli customs concerning an appraisal of imported goods is unfair, he may appeal to the Appeals Committee against the appraisal. Throughout the years, the Appeals Committees have dealt with myriad subjects, with the main focus on fiscal and property-related matters.

The Appeals Committee is headed by a chancellor, a fully qualified Israeli lawyer, usually a member of the Military Advocate General's Unit. It should also be noted that the decisions of the committee are in the form of recommendations to be brought before the Military Commander or the Head of the Civil Administration for their decision.

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[21] Order Concerning Claims (Judea and Samaria) (No. 271) 1968.

[22] Order Concerning Appeal Committees (Judea and Samaria) (No. 172) 1967.

The third, and perhaps most interesting, avenue open to the Palestinian residents of the Territories is the Israeli national court system, and especially the HCJ. Due to the unique nature of Israeli policy in this regard, some elaboration would seem warranted on this point. The Israeli HCJ was established during the British Mandatory rule over Palestine. Its mandate under the British legislation was to deal with all matters requiring resolution "for the administration of justice" and this mandate remained unchanged upon the establishment of the State of Israel in 1948.[23]

One of the questions Israel had to face following the 1967 War was whether to allow the Palestinian residents of the Territories to petition the HCJ concerning the activities of the Israeli Military Government. The question was far from a simple one.

On the one hand, not only does customary international law not require such a course of action, but a careful study of past international practice showed that other countries had been loath to open their national courts before the inhabitants of territories administered as occupied territories. No precedent was found of a state allowing such a right of appeal in similar circumstances. For example, the British Act of State doctrine, which acts as an obstacle to the review of executive acts concerning other states or their residents, also applies to the review of measures adopted within the framework of an occupation. In the same vein, the French Conseil D'Etat rejected a contention that activities of the French Commander-in-Chief in occupied Germany after World War II were subject to the jurisdiction of the French courts.[24] Moreover, United States federal courts have consistently barred recovery of damages caused by military operations conducted abroad.[25]

On the other hand, several considerations favored the opposite approach (in addition to Israelis' well known fondness for legal proceedings, second only to that of the United States).

a. It was believed that allowing the Palestinians access to the Israeli court system would prove the benign intentions of the Israeli government, equivalent to publicly stating, "We have nothing to hide."

b. It was hoped that enabling such access would be influential in convincing Palestinians of the advantages of a democratic system based on the rule of law.

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[23] BASIC LAW: THE JUDICIARY, art. 15(c) (1984).

[24] In re Societe Bonduelle et Cie, [1951] AD Case no. 177 (June 29, 1951).

[25] Committee of United States Citizens Living in Nicaragua et al. v. Ronald Reagan, 886 F.2d 438 (D.C. Cir. 1989); Industria Panaficadora, S.A., et al. v. United States, 763 F. Supp. 1154 (D.D.C. 1991).

c. Last, but perhaps not least, such a decision would serve to strengthen the political ties between Israel and the Territories, with each petition by Palestinians to the Israeli court system serving as an implied recognition of the legitimacy of the Israeli control over the Territories.

In light of the above, the Israeli Ministry of Justice and the IDF Military Advocate General's Unit ultimately agreed not to challenge the jurisdiction of the Israeli courts to deal with such cases, effectively agreeing by implication to their jurisdiction, while leaving the courts the option of declining to address such issues.

The HCJ, faced with the first petitions filed by inhabitants of the Territories in the late 1960s, chose not to raise the question of jurisdiction of its own accord, reaching an unspoken agreement with the Israel government lawyers to the effect of "if you will not raise it, neither shall I." Since that time, the capacity of the Israeli courts to hear such cases has not been challenged, becoming, by virtue of precedent and judicial interpretation, an incontrovertible axiom of the Israeli legal system.[26]

The Palestinians, at first hesitant, quickly discovered that the petition to the HCJ was the most effective method of attacking the actions of the Israeli Military Government. Thus, the first trickle of petitions in the late 1960s and early 1970s soon evolved into a veritable flood. The filing of petitions reached epic proportions in the late 1980s (the beginning of the *Intifada*), during which the Palestinian inhabitants of the territories filed several hundred petitions on average per year, comprising approximately one quarter of all the petitions filed in Israel.

The supervision of the HCJ over the activities of the Israeli Military Government did not evolve only quantitatively. If, at first, petitions were mainly concerned with major events, mostly of a security-nature (large-scale appropriation of lands and deportations), as time wore on, the Palestinians discovered that any action of the Israeli authorities could be brought with ease before the HCJ.

As a result, it became common practice for petitions to be filed concerning any and all Israeli actions, no matter how small. For example, if Israel were to decline a request for a visitor's permit to the Territories for security reasons, such as the involvement of the said person in terrorist related activities, it was reasonable to

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[26] In 1982, the HCJ finally ruled that its jurisdiction over the activities of the Israeli Military Government is based on the specific provisions of the *Basic Law: The Judiciary* and does not emanate from an *ex lege* agreement of the Government. *See* H.C.J. 393/82, Jama'aiat Iskan v. The Military Commander of the West Bank, 37(4) P.D. 785.

assume that the person would petition the HCJ seeking the overturning of the decision.[27] It should be noted that the HCJ has been willing to hear such petitions even in cases in which the petitioner is a citizen of a country which does not have any relations with Israel, including enemy countries! It should further be noted that the supervision of the HCJ in this regard is not limited to administrative actions of the Military Commanders, but applies to their legislative actions as well.

As the Israeli courts became more and more accustomed to hearing petitions of the inhabitants of the Territories, another noticeable change could be discerned in the willingness of the HCJ to intervene in security-related decisions of the Military Government. If, during the initial years, the Court was willing to give a veritable *carte blanche* for actions undertaken due to "reasons of security," as the years passed, the Court became more and more willing to examine the reasonableness of the Governments' action, imposing an ever-increasing burden of proof on the Government in order to justify them.

A prime example of the evolution of the HCJ supervision over the actions of the Israel Military Government can be seen in the HCJ decisions concerning security-related house demolitions. Regulation 119 of the *Defence (Emergency) Regulations,* enacted by the British Mandatory Government in 1945, empowers the Military Commander with the following authority:

> direct the forfeiture . . . of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants . . . of which he is satisfied have committed, or attempted to commit . . . any offence against these Regulations involving violence, intimidation or any military court offence . . . the Military Commander may destroy the house or structure or anything in or on the house, the structure or the land . . . .

The logic behind the British thinking was clear. Confiscating and demolishing a house would seem to be an extremely effective deterrent against terrorist attacks. Instead of wasting time on identifying the exact house from which the attack had emanated, Regulation 119 empowers the Military Commander to order the for-

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[27] For a recent example, *see* (unpublished opinion, H.C.J. 1934/96) Ouda v. The Civil Administration.

feiture (and demolition, if he so wishes) of any house situated in the same region, regardless of the residents' innocence! There exist documented cases of British officers utilizing Regulation 119 in exactly such a fashion against the houses of Jewish inhabitants in Palestine. British courts, addressing the use of Regulation 119 in similar cases, limited their supervision to ensuring that the measure had been exercised strictly in good faith, in accordance with the letter of the law.[28]

The Israeli Military Government, desirous of utilizing Regulation 119 as a tool in combating terrorist attacks, but at the same time recognizing its intrinsic unfairness if applied to a house chosen at random, opted for a middle-ground approach. Regulation 119 would be used as a response against serious terrorist attacks but only against the house in which the terrorist actually resided. Utilization of Regulation 119 based upon this "limited" interpretation has been the subject of numerous petitions to the HCJ over the years.

At first, the HCJ was hesitant to intervene in such cases, reiterating that Regulation 119 was part of the law in force in the Territories and that the Military Government was justified in utilizing it as a response against terrorist actions.[29] All attempts by lawyers representing Palestinian petitioners to claim that Regulation 119 contradicts principles of customary international law were repeatedly rejected by the Court.[30]

The first change in the Court's attitude towards Regulation 119 appeared in 1988 in the important ruling in a petition filed by the Association for Civil Rights in Israel (ACRI) against the decision of the Military Commander to utilize Regulation 119 against several houses in the West Bank.[31] The Court, approving the actual use of the measure, nevertheless ruled that the military authorities must give the residents of houses prior notification of the intention to confiscate and demolish the house. This ruling effectively prohibited the utilization of the full force of Regulation 119 as an immediate response to terrorist attacks, requiring the authorities instead to delay utilizing Regulation 119 until all legal proceedings had ended, which often proved a lengthy interval.

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[28] Carltona Ltd. v. Commissioner of Works, 2 All E. R., 560, 564 (1943).

[29] H.C.J. 434/79, Sachwil v. The Military Commander of the West Bank, 34(1) P.D. 464; H.C.J. 572/82, Mutzlah v. The Minister of Defense, 36(4) P.D. 610; H.C.J. 22/81, Hamed v. The Military Commander of the West Bank, 35(3) P.D. 223.

[30] *Sachwil*, 34(1) P.D. at 464; *Mutzlah*, 36(4) P.D. at 610; *Hamed*, 35(3) P.D. at 223.

[31] H.C.J. 358/88, The Association for Civil Rights in Israel v. The O.C. Central Command, 43(2) P.D. 529.

An even more significant change took place in 1992 when the HCJ, led by a newcomer to the bench of the Supreme Court, the Honorable Justice Heshin, ruled that Regulation 119 may only be utilized against that part of the house in which the terrorist resided with his immediate family.[32] In most cases, this ruling has meant limiting the implementation of the measure to a single room in the house, significantly diminishing the deterrent factor.

In light of the above, it is unsurprising that there has been a significant decline in the number of instances in which Regulation 119 has been implemented by the military authorities since 1992, although one cannot discount the major contributing factor of the Israeli-Palestinian Peace process to this result.

This process notwithstanding, it should not be misunderstood from the above examples that the Israeli HCJ has totally abandoned its original pro-security rulings. As a specific example, following the chain of suicide bombings instigated by Palestinian terrorists in March 1996, the Israeli military authorities again resorted to utilizing Regulation 119 against terrorists' houses. The family members of the suicide-bombers responsible for the death and injury of dozens of civilians petitioned the HCJ against this action. The HCJ denied all the petitions.[33] Especially interesting in this context is the opinion given by the Honorable Justice Heshin, who, as stated above, was one of the leading proponents of the limitation of the implementation of Regulation 119:

> our supervision over demolition orders is accompanied by a strong feeling of alienation. And this is not because that it is not in our power and authority to intervene in the decisions of the Military Commander. We have intervened in the decisions of the military commander more than once, overturned decisions he has made, and ordered him to act in one manner and not another. The feeling of alienation emanates from the fact that the act of demolition of houses under the Defense Regulations is by very nature and character an act of war. And acts of war are not acts which the courts are required to address in daily life.
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[32] H.C.J. 5510/92, Turqeman v. The Minister of Defense, 48(1) P.D. 271. Justice Heshin had voiced the same opinion in two previous cases, but his opinion was not accepted by the other judges in those cases. *See* H.C.J. 2722/92, El-Amarin v. The Military Commander of the Gaza Strip, 46(3) P.D. 693; H.C.J. 4772/91, Hizran v. The Military Commander of the West Bank, 46(2) P.D. 150.

[33] *See* (unpublished opinion H.C.J. 1730/96) Sabiah v. The Military Commander of the West Bank.

> The developments which have occurred since 1967 have justified this policy of applying the jurisdiction of the High Court of Justice over the Territories, for this policy has embedded the principles of the rule of law in the activities of the Military Government. And with all the good this policy has brought in its trail—and the good has been plentiful—we cannot turn a blind eye to the fact that, by applying principles of law to acts of war carried out by the military authorities—including house demolitions—the courts have found themselves dealing with a topic which is foreign to them, a topic the principles of which lie far from them, a topic for which the principles of law were not intended, created or established. We have not said, and shall not say, that we must entirely shy away from such acts of war. Nevertheless, at the same time, we cannot refuse to see what we are dealing with, and how exceptional this is.
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> Indeed, we shall not weaken in our efforts to enforce the rule of law. We have undertaken by oath to judge fairly, to be the servants of the law, and shall be faithful to our oath and to ourselves. Even when the trumpets of war are blaring, the rule of law will sound its voice, but we must be truthful: In such districts its voice is as that of the piccolo, pure and sweet but lost in the commotion.

Evident from the above example, the Israeli HCJ, while much more critical today of the actions of the Israeli military authorities in the Territories, is at the same time obviously very much aware of the sensitive and fragile security situation in the region, which often necessitates harsh measures. The finely-balanced supervision imposed by the HCJ in such difficult cases is one of the more unique aspects of the Israeli Military Government in the Territories.

E. The Intifada

It would be impossible to conclude a discussion of the legal aspects of the Israeli Military Government in the Territories between 1967 and 1993 without dedicating some words to the period between December 1987 and September 1993, commonly referred to as the period of the Palestinian uprising—the *Intifada.*[34]

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[34] For a detailed discussion of the origins and reasons for the outbreak of the *Intifada, see* ISRAELI DEFENSE FORCES MILITARY ADVOCATE GENERAL'S UNIT, ISRAEL, THE "INTIFADA" AND THE RULE OF LAW, at 27-40 (1993).

During these six years, the Israeli Military Government faced constantly changing and increasingly dangerous security threats, commencing from mass demonstrations and stone throwing, progressing to the mass use of Molotov cocktails against Israeli targets, and finally reaching the stage of organized, well-armed terror attacks including suicide attacks aimed at Israeli soldiers and civilians.

To counter these threats, the Israeli authorities often found themselves required to use harsh measures, more reminiscent of the earlier days of the Israeli control of the Territories. These measures included demolition of terrorist's houses, administrative detention and deportation of security activists, prolonged curfews, limitations of movement and other security-related steps.

While the period of the *Intifada* did require the Israeli authorities to initiate some legislative changes in the Territories, no changes were implemented in the legal and judicial supervision procedures during this time. On the contrary, due to the extensive utilization of security measures during this period, legal safeguards, both legislative and administrative, were expanded and enhanced. Indeed, despite the hostile and violent character of the *Intifada,* the Military Commander continued to impose more burdens on the Military Government than absolutely necessary under international law, thereby allowing the Palestinian population greater freedoms in various spheres. An example of this approach can be found in an examination of policy concerning the ability of the Palestinian population to demonstrate and assemble for political purposes.

Under international law, it is clear that the military authorities in the Territories have the power to amend laws which are prejudicial to the welfare and safety of their forces. The rights to assemble and demonstrate have traditionally fallen into this category. As Von Glahn notes, "Public meetings of all kinds are subject to the control of the occupant. Normally, all political meetings as well as political activities, regardless of purpose, will be forbidden, although occasional exceptions have been recorded."[35]

This principle finds further expression in the American manual of military law, which provides that "[t]he occupant may alter, repeal or suspend laws of the following types: . . . . Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly."[36]

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[35] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 140 (University of Minnesota Press, 1957); *see also* GREENSPAN, THE MODERN LAW OF LAND WARFARE 223 (1959).

[36] DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 143, para. 371 (1956); *see also* GREAT BRITAIN LAW OF LAND WARFARE, art. 145, at 519 (1958).

In accordance with the above stated principles, the Military Commander issued the Order Concerning Prohibition of Incitement and Hostile Propaganda, Judea and Samaria (No. 101), on 27 August 1967, which forbids the conduct of protest marches or meetings (a grouping of ten or more people where the subject concerns or is related to politics) without permission from the Military Commander. No limitations are placed on the Commander's authority to permit or prohibit such gatherings, so that in theory, all political meetings falling within the ambit of the order could be subject to a complete ban.

It is important to stress that weighty considerations would tend to militate in favor of a complete prohibition of such demonstrations and assemblies in the Territories, given the often volatile situation on the ground. Not only do such meetings, by their very nature, often pose a potentially serious threat to security and public order, but the allocation of security resources necessary to police large public gatherings affects the conduct of other essential day-to-day security assignments. Such, in fact, was the policy of the Israeli Military Government in the West Bank and the Gaza Strip throughout the first two decades of existence.

However, in recognition of the special circumstances of a long military administration, which require greater consideration to be given to the needs of the local population over an extended period, since the second half of the 1980s the Military Commanders have refrained from exercising their powers in this area in an absolute manner, and instead have attempted to strike a balance between the interests of the local population and the security needs of the Military Government. Influenced by the equivalent test in Israeli national law, in determining whether a proposed assembly or demonstration should be permitted, the Military Commanders considered whether there was a "reasonable suspicion" or a "real possibility" that the security of the area or public safety and order would be endangered. In applying this test, the Military Commanders considered whether changes in the format of the proposed gathering would be sufficient to alleviate the potential security risks involved and so enable the assembly to take place, such as changing the proposed route of the demonstration or location of the assembly.

This is one example of the existence of strong administrative safeguards which remained in place despite extended periods of time when the Territories became a veritable combat-ground between Palestinians and Israeli forces. Moreover, throughout the *Intifada*, the Palestinians still were enabled full access to all the legal avenues previously discussed, despite public proposals in some quarters to bar access to the HCJ and adopt harsher administrative mea-

sures for as long as the *Intifada* continued. In summary, the Israeli adherence to the principle of the rule of law, although encountering stormy weather, managed to hold its course.

F. The Effects of Israeli law on the Law in the Territories

In accordance with international law, the Israeli Military Government administered the Territories as a totally separate legal entity from Israel. Notwithstanding their separate nature, one cannot ignore the fact that the Israeli Military Government is an organ of the State of Israel, a democratic country situated just a few miles away, and that all of the Israeli officers and employees of this government are citizens of that country. In a nutshell, the dilemma faced by Israel in this regard was whether to disassociate all the activities of the Israeli Military Government from the State of Israel itself or to apply some or all of the legal standards applicable to the holders of public office in Israel to their counterparts in the Territories.

This question was first addressed by the HCJ in its decision in the *Abu Ita* case of 1981.[37] The Court, recognizing the *sui generis* nature of the situation, laid down the rule that the actions of the Israeli Military Government must meet a three-layered test.

(1) They must conform to the principles of customary international law from which the authority vested in the Military Commander originates;[38]

(2) In accordance with the previously discussed principles of international law, they must conform to the provisions of the local law in force in the area; and

(3) They must conform to the principles of Israeli administrative law, which include the requirements of proportionality and good faith, the prohibitions on discrimination and undue influence, due process of law, and reasonableness.

It is this third, and extremely important, requirement which lends the Israeli Military Government its unique character and forms the primary basis for the supervision of the HCJ.[39] As erstwhile president of the Supreme Court, Meir Shamgar (who has previously been mentioned in his capacity as the Military Advocate

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[37] Abu Ita *et. al.* v. The Military Commander of the West Bank *et. al.*, 37(2) P.D. 1 (1981).

[38] *See* H.C.J. 390/79, Duweikat v. The Government of Israel, 34(1) P.D. 1, 12.

[39] The HCJ has not hesitated to exercise its supervision and to overturn decisions of the Military authorities in cases in which it deemed that the principles of administrative law had not been met. *See* H.C.J. 802/80, Samara v. The Commander of the Judea and Samaria Area, 34(4) P.D. 1, 3; *Duweikat*, 34(1) P.D. at 1.

General at the time of the 1967 War) stated in the Abu-Ita case that "[t]he rules of Israeli law were indeed not applied to the Area, but an Israeli office-holder in the Territory carries with him to his office the obligation to act in accordance with the additional standards resultant from his being an Israeli organ, be the location of his action as it may."

No reference to the effect of the Israeli legal system on the Military Government of the Territories would be complete without some reference to the constitutional revolution Israel has been undergoing over the last decade. Israel and Britain are unique in that they are, to the best of my knowledge, the only two Western countries who do not have a written constitution. The reasons for the absence of an Israeli constitution are numerous and complex, and are outside the scope of this presentation. However, since the establishment of the State of Israel in 1948, several Basic Laws have been enacted, with the prospect of uniting them into a comprehensive constitution if and when deemed feasible. Until such a time, these Basic Laws generally enjoyed no greater status than other, "normal" legislation, despite addressing important national issues.[40]

This state of affairs changed dramatically in 1992 when two new Basic Laws were added to the Israeli book of laws: (1) the Basic Law: Human Dignity and Liberty, and (2) the Basic Law: Freedom of Occupation (not to be confused with military occupation). From this time forward, the Basic Laws were no longer regarded as "just another kind of law" but were recognized as forming the foundation of the emerging Israeli constitution.

Article 1 to the Basic Law: Human Dignity and Liberty states as follows:

> Fundamental human rights in Israel are founded upon recognition of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.
>
> The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

Additionally, this Basic Law also encompasses the principles of preservation of life, body and dignity, and the protection of property,

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[40] Examples of Basic Laws, among others, include the *Basic Law. The Israel Defense Forces; Basic Law: The Government; and Basic Law: The Knesset.*

personal liberty and privacy. The freedom of occupation (*i.e.*, the right to practice any trade or profession) is guaranteed under the second Basic Law.

Both Basic Laws provide that the protected rights may not be contravened except by a law meeting three strict criteria:

(1) It must befit the values of the State of Israel,

(2) It must be enacted for a proper purpose, and

(3) It must not infringe the protected right to a greater extent than is required.

The most revolutionary provision of both Basic Laws is that of empowering the HCJ to declare void any new Israeli legislation which contravenes their provisions. Up to that time, the Israeli courts were not authorized to address the question of the validity of legislation, let alone declare it void (or even voidable). The new Basic Laws opened the way for a series of ground-breaking rulings in a variety of fields, including, in one case, the declaration of a Parliamentary law as void by a District Court (although this decision was later reversed by the Supreme Court).[41]

The question posed by this new situation, in relation to the Military Government in the Territories, is a difficult one. On the one hand, because the new Basic Laws are envisaged as representing the basic tenets of Israeli constitutional law, it would seem reasonable to assume that they should be applied to the Israeli Military Government in a similar fashion to the above mentioned application of Israeli administrative law.

On the other hand, the principles underlying the new Basic Laws, and the rights and freedoms protected therein, stem directly from the democratic nature of Israeli society. The Territories, however, are far removed from being a democratic society. On the contrary, customary international law applicable to the Territories specifically envisions the suspension of most basic freedoms in such cases. The relevant distinction in this case is therefore between the applicability of international humanitarian law, which is definitely relevant to the Territories, and the laws of civil rights, which probably are not relevant.[42]

An additional consideration against the application of the Basic Laws to the Territories would be the political ramifications of grant-

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[41] *See* (unpublished opinion C.A. 6821/93) United Mizrahi Bank Ltd *et. al.* v. Migdal Cooperative Village et. al.

[42] A similar distinction would seem to have been made in Article 15(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms which provides as follows:

ing Palestinian inhabitants of the Territories rights and privileges under Israeli constitutional legislation, which would at least require implied recognition of the legitimacy of the Israeli rule inherent in such a course of action. The question of the applicability of the Basic Laws to the Israeli Military Government has yet to receive a definitive answer in the rulings of the HCJ, although some reference has been made to the Basic Laws in several recent decisions relating to the Territories.[43]

The President of the Israeli Supreme Court, Chief Justice Barak, addressing this question in an academic publication, maintains that, "[a]s a matter of principle, Israeli legislation is territorial. The presumption is that the national norms are locally applicable. However, this presumption may be refutable . . . . The provisions of the Basic Laws apply to every person in Israel, and if they have extra-territorial applicability with regard to Israeli citizens then they apply to non-Israeli citizens also."[44]

Justice Barak's position notwithstanding, it should be noted that, in the only instance to date in which the Israeli Supreme Court has directly tackled the question of the applicability of the new

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> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

[43] In one case, the HCJ, referring to Article 5 of the Basic Law: Human Dignity and Liberty, ruled that the right of a detainee to meet with his lawyer is derived from the right to personal freedom. *See* H.C.J. 3412/91, Abdalla v. The Commander of the Gaza Strip, 47(2) P.D. 843. In the *El-Amarin case*, Justice Heshin, based his opinion on Articles 3 and 8 of the same *Basic Law*. *See* H.C.J. 2722/92, El-Amarin v. The Military Commander of the Gaza Strip, 46(3) P.D. 693. In *Gerar v. The Commander of the Judea and Samaria Area*, the HCJ applied the principle of freedom of occupation, protected by the new *Basic Law: Freedom of Occupation*, to the Military Government when addressing the right of a Palestinian resident of the West Bank to practice law in spite of his having being convicted of committing security offenses. 47(3) P.D. 298 (H.C.J. 3940/92).

[44] *See* 3 AARON BARAK, INTERPRETATION IN THE LAW 460 (1994). For comparison, it is interesting to note that the United States Supreme Court has ruled that the provisions of the Constitution relating to human rights apply outside the United States only to American citizens. Reid v. Covert, 354 U.S. 1 (1957). Additionally, the United States Supreme Court held that the restrictions on search imposed by the Constitution's 4th Amendment do not apply to a search performed by an American Authority outside the United States in a non-American's house. Verdugo Orouidez v. United States, 494 U.S 259 (1990). In the *Orouidez*, the Supreme Court stated that the 4th Amendment, as well as the 1st, the 2d, the 9th, and the 10th, apply to, "A class of persons who are a part of national community or who have otherwise developed sufficient connection with this Country to be considered part of that community." *Supra*, 494 U.S. at 265. Therefore, aliens outside the United States do not enjoy the protection of the United States Constitution.

Basic Laws to the Territories, the court ruled against their application.[45]

In summary, in light of the above, it would appear that this question still remains open today, awaiting future resolution by the HCJ.[46]

III. 1993-1996

A. The Israeli-Palestinian Peace Process

The year 1993 would prove a momentous year in the history of the Arab-Israeli conflict. After two years of relatively fruitless negotiations between Israel and its Arab neighbors following the 1991 Madrid Peace Conference, Israel and the Palestinian Liberation Organization surprised the world with the signing, on 13 September 1993, of the Declaration of Principles on Interim Self-Government Arrangements, commonly referred to as the DOP.

The DOP, a document of which it would be appropriate to quote the Hebrew saying *"the little which holds the many,"* establishes a three staged plan for the Israeli-Palestinian negotiations:[47]

a. The first stage will include an agreement on the withdrawal of Israeli forces from the Gaza Strip and the Jericho area.

b. The second stage will, generally speaking, include two agreements to be implemented for an Interim period of five years: (1) an agreement on the conduct of democratic elections for a Palestinian Council and (2) an agreement on the redeployment of Israeli forces in the West Bank and the resultant transfer of agreed powers and authorities to the Palestinian Council.

c. The third, and final, stage envisaged by the DOP is the Permanent Status Agreement, which should be finalized by the end of the Interim period (*i.e.*, May 1999).

In spite of some minor delays and disagreements, only to be expected in negotiations of such complexity and sensitivity, the first two stages were implemented surprisingly smoothly.

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[45] Cr. A. 4211/91, El-Mazri v. The State of Israel, 47(5) P.D. 624. Although it should be noted that in this case the court was sitting as the Criminal Court of Appeals and not as the HCJ.

[46] Chief Justice Barak, in his book *Interpretation in the Law*, would seem to concur with this conclusion.

[47] The DOP includes provisions relating to additional agreements and undertakings such as specific agreements concerning preparatory transfer of civil authority and the establishment of a multi-party committee with Egypt and Jordan and other countries.

Thus, on 4 May 1994, Israel and the Palestinian Liberation Organization signed the Agreement on the Gaza Strip and the Jericho Area (the "Gaza Agreement"). The Gaza Agreement contained detailed provisions concerning the security, civil, legal, and economic aspects of the Israeli withdrawal from the Gaza Strip and the Jericho Area, and was implemented within several weeks of its signing.

In effect, following the implementation of the Gaza Agreement, Israel remains in control of only minute portions of the Gaza Strip, mainly comprised of the Gush Katif Settlement Area, several additional Israeli Settlements, and a 100 meter wide security strip along the Egyptian border. The remainder of the territory was transferred to the jurisdiction of the Palestinian Authority established under the Gaza Agreement.

On 28 September 1995, Israel and the Palestinian Liberation Organization signed the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the "Interim Agreement"). The Interim Agreement, a document over 300 pages in length, superseded the Gaza Agreement and contains the provisions necessary for the implementation of the second stage envisaged in the DOP (the Palestinian elections, the Israeli redeployment in the West Bank, and other self-governing entitlements).

Under the Interim Agreement, the West Bank was divided into three separate areas, forming an extremely complex pattern, more reminiscent of an abstract painting than of an operational map:

a. Area A, which encompasses all the major Palestinian cities;

b. Area B, comprised of several hundred smaller towns and villages and their adjoining areas; and

c. Area C, comprised of the remainder of the West Bank, including all Israeli Settlements and military locations (and containing only some 80,000 Palestinian residents).

Under the provisions of the Interim Agreement, Israel has redeployed its forces from areas A and B, with the sole exception of Hebron (concerning which special arrangements have been agreed). As a result of this redeployment, approximately 95% of the Palestinian residents of the West Bank are now under the jurisdiction of the Palestinian Council.[48] Israel has further undertaken to execute three additional redeployments, the end result of which shall be to leave only the Israeli Settlements, military locations and

[48] Although it should be noted that Area C, still under Israeli control, comprises over 70% of the territory of the West Bank.

issues to be negotiated in the permanent status negotations, such as borders under Israeli control. The status of the Israeli Settlements and the military locations, together with the other outstanding issues,[49] will be decided only in the permanent status negotiations.

In summary, as we near the end of 1996, Israel finds itself, for the first time in almost three decades, no longer directly responsible for the overwhelming majority of the Palestinian population of the Territories (except for approximately 5% of the residents of the West Bank).

B. The Rule of Law and the Israeli-Palestinian Agreements

The Interim Agreement provides for the establishment of independent Palestinian legislative and judicial bodies, in addition to the establishment of a 30,000 strong Palestinian police force. Recognizing the importance of ensuring that these new Palestinian entities function by democratic principles, the Interim Agreement contains several provisions in this regard. The most important is Article XIX, which states that "Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law." The Interim Agreement further addresses the issue of judicial review. In this context, Article VIII of the Interim Agreement guarantees the right of petition to the Palestinian Court of Justice in relation to any activity or action of the Palestinian authorities.

In light of the geographical, economic, and substantive ties between Israel and the Territories, and to further enable its smooth implementation, Annex IV of the Interim Agreement[50] contains detailed provisions relating to mutual assistance in civil and criminal legal matters between the two sides. Unfortunately, these provisions have yet to be satisfactorily implemented.

Two specific legal points are worthy of mention at this point. First, the agreements between Israel and the Palestinians have raised a very interesting question concerning the current status of Israel in the Territories. On the one hand, as Israel is no longer in direct control of the majority of the Palestinian population, can Israel still be deemed to be the occupant of the Territories? On the other hand, the Interim Agreement itself specifically states that all powers and responsibilities remaining in Israeli hands shall continue to be exercised by the "Israeli Military Government." Such lan-

[49] Outstanding issues include, among others, Jerusalem, foreign relations, borders, refugees, security arrangements, water rights and others.

[50] The Protocol Concerning Legal Affairs (1995).

guage begs the conclusion that the legal status of the Territories has remained unchanged. The answer to this question, it should be stressed, is likely to have important practical ramifications.

At this point, it would seem that the provisions and the language of the various agreements, coupled with the facts on the ground, tend to lead to the conclusion that the general status of the Territories has remained unchanged in spite of granting partial autonomy to the Palestinians. As far as Israel is aware, other countries and organizations (such as the International Committee of the Red Cross) have reached similar conclusions.

Second, Israel obviously continues to apply the same principles of the Rule of Law and administrative and judicial supervision to all the powers and responsibilities still held after the implementation of the agreements. Thus, Palestinians continue to petition the HCJ concerning Israeli actions in the West Bank, although such petitions are naturally fewer in number and are limited to those areas that have remained under Israeli jurisdiction.

One final point worthy of mention in this context is the attitude adopted by the HCJ about petitions concerning the implementation of the Israel-Palestinian agreements. As opposed to the extremely critical approach adopted by the HCJ to the activities of the Military Government, the HCJ has recently repeatedly refused to intervene in cases involving questions relating to the agreements, ruling that the implementation of international agreements and obligations such as these are not subject to judicial review. The HCJ has consistently maintained that these questions are appropriate for political negotiation only. International agreements, the HCJ held, do not incur rights and duties upon the individual, and their provisions could only be enforced in the international arena in the manner provided for by the agreements themselves.[51]

IV. Summary

Sir Winston Churchill is oft quoted as having once remarked, "The problems of victory are more agreeable than those of defeat, but they are no less difficult."[52] Such has been the Israeli experience with the administration of the Territories which came under Israeli

[51] *See* (unpublished H.C.J. 5551/93) The Association of the Victims of Arab Terrorism v. The State of Israel; (unpublished opinion H.C.J. 2718/95) The Association for the Preservation of the Jews' Rights in Israel v. The Prime Minister; (unpublished opinion H.C.J. 6023/95) Carmela Hanoch v. The Minister of Justice; *cf.* (unpublished opinion H.C.J. 6230/95) Dr. Ahmed Tibi v. The State of Israel; (unpublished opinion H.C.J. 4528/94) Sofran v. The Prison Service.

[52] Speech to the House of Commons, 11 November 1942.

control in the aftermath of the 1967 War. By their very nature, democratic countries, based upon the principles of human rights and freedoms, are relatively unsuited for the long term administration of territory under the law of belligerent occupation with its inherent restrictions on these same freedoms and rights.

Be that as it may, Israel, often referred to as a democracy under siege, has had to adapt to the complex and often uncomfortable political situation in the Middle-East, and has administered the Territories for almost three decades to the best of its abilities. One basic principle underlying the entire history of the Israeli Military Government in the Territories has been the strict adherence to the principle of the Rule of Law. In applying this principle, Israel has gone to further lengths than any other nation in similar circumstances by providing the local population with numerous options for legal recourse, over and above its obligations under customary international law.

Today, as the Israeli-Palestinian Peace process enters its fourth year since the signing of the historic Declaration of Principles, it is only to be hoped that the future will bear witness to a Middle-East in which friendly relations between peoples and the application of the principle of the Rule of Law are the norm and not the exception. For it has already been recognized, "The god of Victory is said to be one-handed, but Peace gives victory to both sides."[53]

[53] RALPH WALDO EMERSON, JOURNALS (1867).

BEAUTIFUL LOOT*

REVIEWED BY H. WAYNE ELLIOTT,
LIEUTENANT COLONEL, UNITED STATES ARMY (RETIRED)**

He removed statues and ornaments from the city of the enemy which had been taken by force and valor, in accordance with the law of war and the right of a commander.

—Marcus Tullius Cicero (106-43 B.C.)[1]

All seizure or destruction of, or wilful damage to, . . . works of art and science, is forbidden, and should be made the subject of legal proceedings.

—Hague Conventions (18 October 1907)[2]

In the spring of 1945, the Soviet juggernaut moved rapidly into a collapsing Nazi Germany. German opposition was fierce, particularly around Berlin. However, many German officials had secretly prepared for defeat and allied occupation, and part of that preparation included the safeguarding of the cultural treasures of the German people. Unfortunately for much of Europe, among the treasures of the Reich were many art objects that had been acquired, sometimes by purchase, but more often by theft, from nations occupied by the German Army. Many of these artifacts fell into the hands of the Soviet Army.

The conquerors moved the artworks[3] to the Soviet Union, then hid much of it from public view, and even denied having taken the treasures. Thus, began the saga of the "beautiful loot," the subject of this book. Konstantin Akinsha, a Ukrainian art historian who was on the staff of a Kiev museum, and Grigorii Kozlov, who served on the staff of the Pushkin Museum in Moscow, are now research fellows in Bremen, Germany. Eminently qualified to write *Beautiful*

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* KONSTANTIN AKINSHA & GRIGORII KOZLOV, BEAUTIFUL LOOT (New York: Random House, 1995); 304 pages, $26 (hardcover).

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[1] Quoted in HUGO GROTIUS, II THE LAW OF WAR AND PEACE 550 (Francis W. Kelsey, trans., 1925).

[2] Art. 56, Annex, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631.

[3] "Artwork" included not only canvasses and drawings, but books, statues, incunabula, manuscripts, and archival documents.

Loot, the co-authors expand on articles they published in *Art News* magazine several years ago.[4]

During its occupation of part of the Union of Soviet Socialist Republic (USSR), the German Army removed artwork from Soviet museums, including the famous and priceless "Amber Room" from Catherine's Palace in Tsarskoe Selo.[5] At the end of the war, the Soviet leadership sought to make Germany pay for the cost of the war. To this end, in 1943, Stalin ordered the creation of "trophy brigades." Their mission would be to strip Germany of all kinds of property as compensation for the cost of the war. Igor Grabar, a well respected Soviet artist and art historian, introduced the idea that works of art should be taken from Germany as part of the compensation owed the Soviet Union. Special trophy brigades, composed mainly of art historians and archivists, were created to find objects of cultural value and send them back to the Soviet Union.[6] These trophy brigades excelled in their work, ultimately moving some two and one-half million works of art to the Soviet Union.

If compensation for damage to the Soviet Union was the legal basis for taking German goods to the Soviet Union, then the value of a particular piece of art became crucial. They started by determining exactly which art objects had been looted by the Germans from the Soviet Union and by establishing these objects' value. However, the process of placing a value on art includes determining more than just its monetary price; its cultural significance also plays a part in the valuation. Because communist ideologues denied that much of the art of Czarist Russia had *any* cultural value, it was a difficult task from both a monetary and a political viewpoint to estimate the value of the works of art. Finally, the problem was resolved by deciding that rather than establish a monetary value for missing Soviet art, the trophy brigades would simply look throughout Germany for specific pieces of European art with an "equivalent" value,[7] especial-

[4] Konstantin Akinsha & Grigorii Kozlov, *Spoils of War*, 90 ART NEWS 130 (April 1991). Konstantin Akinsha, *A Soviet-German Exchange of War Treasures*, 90 ART NEWS 154 (May 1991).

[5] The room was built for Frederick I of Prussia and took twelve years to complete. In 1716, Frederick's son, King Frederick William I, presented the room to Peter the Great of Russia. In World War II, German soldiers removed the room to Konigsberg. The last mention of the room in German military reports was in January 1945. It disappeared after that and has never been found.

[6] The United States Army also had a special unit to deal with art objects in Europe. The "Monuments, Fine Arts and Archives" group's mission was to safeguard and protect such objects. It was not intended to confiscate and ship works of art to the United States. *See* MICHAEL J. KURTZ, NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945-1955 (1985). *Contra* KENNETH D. ALFORD, THE SPOILS OF WAR: THE AMERICAN MILITARY'S ROLE IN THE STEALING OF EUROPE'S TREASURES (1994).

[7] The equivalent for the Amber Room was apparently Heinrich Schliemann's Trojan Gold collection. It had been removed from the Berlin Museum to a building

ly when a particular item of Czarist Russian art was believed missing or destroyed. Of course, in such a system of ideology driven "equivalents," which devalued elitist bourgeois aesthetics in favor of collective proletariat industry and utilitarianism, a painting by Rembrandt or Rubens might be determined to have no greater value than a communist inspired political portrait with little more artistic merit than that which might be produced by a paint-by-numbers kit.

The Soviet art historians compiled a list of artwork that might be located in Germany and, if found, seized and shipped to the Soviet Union, either as part of a monetary compensation scheme or as an identified equivalent. The list was valued by the Soviet art historians at $70,587,200. At the Yalta Conference in February 1945, the Soviets claimed $10 billion as compensation from Germany for their losses. After some debate, the Allies finally agreed to the Soviet figure. Stalin quickly set his plans in motion. Finding and shipping the items back to the USSR was the mission of the "Special Commission on Germany." Subordinate "commissions" would actually scour eastern Europe for the best items.

The special trophy brigades arrived in the Soviet sector of occupied Germany, and using museum guides and tour books of pre-war Germany, the brigades set out to find the missing and sometimes hidden art of the Reich. Unfortunately, even if the members of the trophy brigades had some appreciation of art, the average Soviet soldier did not. Much was destroyed or stolen by individual Soviet soldiers before it could be shipped to the USSR. The standard Soviet tactic for entering a building was to first throw a grenade in it; this tactic also destroyed many artifacts. Nonetheless, trainloads of artwork were shipped back to the Soviet Union. Much of it was properly inventoried, but a large amount was taken by individuals who often had no idea what they had and who had no intention of turning it over to command authorities.

Much of the inventoried art treasures ended up in the Pushkin Museum in Moscow. The original intent was to build a massive "Museum of World Art" in Moscow and display the art there.[8] Until the new museum could be built, at least part of the art was publicly displayed in the Pushkin.

Stalin, "the leader and teacher of the world proletariat," celebrated his seventieth birthday in December 1949. To make room for all the gifts sent to him by "admirers," the Pushkin moved some of

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near the Berlin Zoo in 1941. The Soviets found the collection in 1945 and took it to the Soviet Union. Its fate was unknown in the West for over four decades. The collection is still in the basement of the Pushkin Museum in Moscow.

[5] Much of the art "collected" by the Nazis from around Europe had been intended for a similar museum to be built in Linz, Austria, Hitler's hometown.

the art taken from Germany to other locations. When Stalin died in 1953, the birthday exhibit (after a four year run) was closed. By then, the looted artifacts were in the museum's "special inventory" in the basement. They were not returned to public display.

In 1955, the post-Stalin leadership decided that some of the German artifacts—those which could be traced to museums in East Germany—should be returned to communist East Germany. To make the return more politically palatable, it was made contingent upon the East German authorities returning to the Soviet Union art objects which had been taken during the Nazi occupation. Two years later, the East German authorities finally reported to the Soviets that "[a]fter a careful search . . . it was learned that there are no cultural valuables from the USSR in the German Democratic Republic."[9] The return of East German artifacts was postponed. Nikita Kruschev finally directed the return to East Germany of most of the objects that had been taken from that part of Germany in 1945. Yet, much more still remained hidden in the vaults of Soviet museums, and its very existence was considered to be a "state secret."

In October 1991, the Soviets finally admitted that secret depositories in various museums throughout the country were still filled with the works of art that had been looted. Plans for the "World Museum" had long since been scrapped, and the Soviets were now willing to return the art but only if they were given works of equal artistic quality. Finding those works and agreeing on their artistic or monetary equivalency might take years. Many in the USSR were in no hurry to return the loot. To do so, they reasoned, would be an admission that World War II was finally over and somehow Germany had been forgiven.

With the collapse of the Soviet Union, many Europeans believed that the art treasures would be returned. In 1992, a treaty was signed between Germany and Russia to reaffirm a 1990 "Good-Neighborliness Treaty" between the two countries. This treaty contained a provision concerning the return of "lost or unlawfully transferred art treasures."[10] However, any optimism soon faded because the issue became whether a particular piece of art had been "lost or *unlawfully* transferred." Russian nationalists were as determined as their Soviet predecessors to keep the artwork and saw it as part of the fruits of victory in World War II. Additionally, refusing to return

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[9] AKINSHA, *supra* note *, at 209.

[10] Treaty on Good Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R., art. 16, para. 2, 30 I.L.M. 504 (1991) ("They agree that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors.").

the artwork would be a clear statement that Russia—successor to the Soviet Union and a readmitted player to the world stage—could not be intimidated by the West. The problem is still being discussed.

Under the Soviet regime, *Beautiful Loot* could not have been written and, at one time, even discussing the presence of these treasures would have certainly sent one to the gulag. With the fragmentation of the Soviet Union, the Russians have finally confessed to taking and secretly holding these masterpieces. In February 1995, some of the artwork was displayed in the Hermitage Museum. Paintings by Gauguin, Degas, and van Gogh were seen for the first time since World War II. A few weeks later, the Pushkin Museum opened its own exhibit and displayed works by Degas, Goya, and Manet. Many of these works were believed to have been destroyed during the war. The Russians again discussed their possible return. But, to whom do they belong? Some Russian officials, essentially relying on Cicero's rule quoted above, now claim that the works of art are "trophies of war" and can be kept as part of Russia's compensation for the war. Others, relying on the modern Hague rule quoted above, claim that the treasures must be returned and cannot be used as part of a general wartime compensation package. To aggravate the legal issues, many of the artifacts were taken by Nazis from museums and private collections throughout Europe. To whom should these be returned? To Germany, where the Soviets "found" them, or to the country where the Nazis "found" them?[11] As a practical matter, if the works are ever to be returned, the return will be pursuant to a negotiated international agreement. The process of negotiating such an agreement will assuredly be a lengthy one.

Art and war are not often thought of as being related. A nation's artistic heritage often reflects its cultural ideology. And, particularly in the war between Germany and the Soviet Union, a clash of cultural and political ideologies—Nazism and Communism—was at the core of the reasons for the war. As a result of that cultural basis for the war, the capture of important works of art belonging to the enemy essentially became a political goal in the war.

Akinsha and Kozlov have written a very readable account of the wartime seizure and the peacetime concealment of priceless works of art and cultural treasures. With the hallmarks of a fiction

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[11] The Nazis sometimes paid for art works. Hitler, who considered himself an artist, bought paintings from auction catalogues. Also, art works owned by Jews were often seized. Volumes of photographs of these art works were introduced as evidence at the Nuremberg trials. ALBERT SPEER, INSIDE THE THIRD REICH 177-79 (1970). Of course, there is no proof that a true market price was paid for a painting desired by the Führer. Yet, that any consideration was exchanged for these works adds another element to the issue of ownership.

bestseller, *Beautiful Loot* incorporates elements of mystery, espionage, sabotage, and war. However, photographs of some of the treasures and the members of the trophy brigades in action document the reality of the events. Art historians will find the book an important reference for research into the saga of art in World War II. For the military lawyer, *Beautiful Loot* provides even more. It recounts not only the seizing of many of the art treasures of Europe by a victorious Soviet Army, but it explores the behind the scenes attention given to devising an acceptable explanation—in fact, a legal defense—for reparation policies against defeated Germany. The law can be a weapon, and it is the only one in the commander's arsenal which is essentially controlled by the lawyer. In *Beautiful Loot,* the judge advocate can see how ineffectual that weapon was used by the Soviet Union during and after World War II.

Whatever legal justifications might have been made—and some were made—to justify the taking of the property in the first place, the Soviets denuded their utility by hiding the treasures from world view. The Soviets might have strengthened their legal case by making either of two arguments. First, they might have stuck to the idea that the Germans owed the Soviets reparations as compensation for the cost of the war and that it was lawful to take the art as part of the compensation package, in spite of the language of the Hague Convention. Or, they might have argued that the art, much of which was destined for the proposed Führer Museum, was in itself a military objective and, in any event, constituted a permissible "trophy of war" under customary international law. The major mistake made by the Soviets was the decision to conceal the loot. Concealment gives credence to the idea that what happened in Germany in 1945 was nothing more than governmental mugging and theft on a grand scale.

When one reads of the deliberate concealment of works by Gauguin, van Gogh, Manet, Rembrandt, and a host of other luminaries, one can surely infer that something sinister was involved. *Beautiful Loot* transforms the inference into a conclusion. Whether or not a crime, in the legal sense, was committed when the treasures were initially taken, it was certainly a crime, in the moral sense, to keep them hidden from public view. Let us hope that until an agreement for their return can be negotiated, this beautiful loot will be displayed for all to see. These art treasures, some hundreds of years old and which somehow survived the devastation of World War II, certainly merit public display. *Beautiful Loot* provides an excellent historical background, not only for that display, but for an examination of the relationship between war, art, and law.

THE COMFORT WOMEN*

REVIEWED BY DONNA K. HARVEY**

I first saw the term "comfort women" in 1995 in a local newspaper article. It referred to Asian women who had been forced into prostitution by the Japanese Army during World War II. The article related that survivors were suing the Japanese government, seeking restitution for their ordeal. I was outraged that such a thing had happened to these women. Then, a number of questions came to mind. Who were these women? Why were those responsible for this atrocity not prosecuted after the war? Why has it taken so long for the women to receive restitution? George Hicks answers these questions in his book *The Comfort Women.*

George Hicks also first became aware of the comfort women through a newspaper article. Mr. Hicks is an economist and writer who lives in Australia and Singapore. He has had a lifelong interest in Asian history. After reading a 1991 article, Mr. Hicks began contacting friends and colleagues knowledgeable in Asian history and politics for any information on the subject. It was like pulling on a thread. The more he inquired, the more the story unraveled before him.

The story of the comfort women actually was an open secret in some areas of Asia. As early as 1962, an Asian journalist, Senda Kako, came across Japanese wartime photographs of women identified as comfort women while doing research on the war. Intrigued, he searched for more information on these women. He and other Asian writers published their findings in Asian language newspapers and books. While they and Asian activists knew the story of the comfort women, it was not until the early 1990s that the general public in the West began reading about the comfort women. It was not until 1992 that the Japanese even admitted the comfort women existed.

Who were these women? Survivors tell their own stories throughout the book. The stories are shockingly blunt. They are told in unadorned, straight forward language. They are stories of young women and girls abducted or deceived into sexual slavery for the

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* GEORGE HICKS, THE COMFORT WOMEN (New York: W. W. Norton & Company, Inc. 1995; 303 pages, $25.00 (hard cover).

** Attorney Advisor, Department of the Army. Written while assigned as a Student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General School, United States Army, Charlottesville, Virginia.

Japanese Army. Most survivors, and their stories, came from Korea. Others came from China, Indonesia, the Philippines, or wherever the Japanese set foot during World War II. Approximately 200,000 women were enslaved. They were referred to as comfort women in Japanese military documents, but Japanese soldiers referred to them as public toilets. They were forced to have sex with 20 to 100 men a day. They were listed as part of supplies and ammunition in military documents. They went where the Japanese Army went, even to the front lines. Many were killed. Those who survived bore both physical and psychological scars the rest of their lives.

Why were those responsible for this atrocity not prosecuted after the war? Legal scholars have debated this question for a number of years, arguing whether international law encompassed the concept of mass rape as a war crime at the time this atrocity was committed.[1] Mr. Hicks takes a different approach to answering the question. First, he dismisses the argument that no one knew of the atrocity, referring to, among other things, United States Army wartime studies of the comfort women encountered in the war zones. He then looks at the context in which the comfort system arose. It arose during a time when the world's military organizations viewed prostitution as a natural by-product of military movements. He points out that military sponsored prostitution was not conceived by the Japanese. The Roman Empire utilized a similar system for its armies. The Spanish brought 1200 prostitutes with them when they invaded the Netherlands in the Sixteenth Century. The British military set up a register for prostitutes in India, providing compulsory medical exams and toiletries. During World War II, the German Army set up military brothels in occupied territories.

Against this backdrop, Mr. Hicks addresses how sexism and racism also may have affected the Allies' decision not to prosecute those responsible for the atrocity. His observations and conclusions are reasoned. Historical references are telling. For example, when the Allies returned to Dutch Indonesia, the Dutch discovered that approximately 50 Dutch interned women and 100 local national women had been forced into prostitution by the Japanese occupying Batavia, now known as Jakarta. The Dutch tried Japanese officers and agents responsible for the Batavia brothels for the war crime of enforced prostitution of the Dutch women but not of the local national women. No other Allied force listed enforced prostitution as a war crime. The Dutch trials, which took place in 1948, were not common knowledge until 1992 when the Hague released records to the public. The names of the Dutch victims have been sealed until 2025.

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[1] *See generally* David Boling, *Mass Rape, Enforced Prostitution, and The Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT'L L. 533 (1995).

Why has it taken so long for the women to receive restitution? Mr. Hicks focuses on the personal and political reasons for the delay. On a personal level, the women were afraid to come forward because of well-founded fears of rejection. In Asian societies, chastity has always been revered. Loss of virginity, even by rape, means a life of ostracism with little chance of marriage. This attitude in turn leads to poverty because in most Asian countries a woman's major or sole source of support comes from her husband. Some women did reveal what happened to them. They recall the consequences of those revelations in the book. One woman, Jan Ruff, had begun the process of becoming a nun before the war. During the war she was interned on Batavia and was one of the Dutch women forced into prostitution. She did not testify at the war crimes trial. She did, however, tell the Catholic church of her ordeal. As a result, the Catholic church found her unacceptable as a nun. It is not surprising to the reader, therefore, that most of the victims concealed the crimes committed against them.

The second half of the book addresses the political reasons for the delay in restitution. Mr. Hicks focuses on three general areas: the political situation in Asia immediately after the war, the treaties entered into between Japan and her Asian neighbors settling war claims, and Japan's official denial that the comfort women system existed.

While Japan was recovering economically after the war, her neighbors were involved in wars of independence from colonial rule or facing insurgencies. War broke out between southern Korea and northern Korea and China. The South Korean government refused to compromise on the amount of wartime claims or establish official diplomatic contact with Japan until 1960. Korea and Japan did not sign a treaty settling Korea's claims until 1965. Documentation of claims was almost impossible because of the devastation in the Pacific during World War II and the Korean conflict. As a result, Korea and other Asian countries agreed to accept economic block grants in settlement of all claims. Each country was responsible for distributing the money within its own borders. The Japanese consistently have used these treaties as shields against any subsequent individual claims.

The story, however, does not end here. Mr. Hicks reminds the reader that during the 1970s and 1980s, Asia experienced an economic boom. It also experienced the birth of women's rights groups. These developments were most profound in Korea. Unfortunately, as Mr. Hicks points out, Asia also saw the development of sex tourism, tours designed to provide different sexual experiences for clients. The majority of the clients were Japanese. This opened old wounds

in Korea, which had been most affected by the comfort women system. Korean women's rights groups linked the two issues together when protesting against the sex tourism industry. They compared the Japanese tourist to the Japanese soldier. While this probably did little to stop sex tourism, it did increase public awareness of the comfort women.

The plight of the comfort women has become a hot issue in the 1990s. Mr. Hicks guides the reader through the different events surrounding the comfort women's lawsuit against the Japanese government filed in Tokyo in December 1991. Korea's prime minister discussed the issue with Japan's emperor during a visit to Japan in 1990. Korean women groups, acting on behalf of comfort women, presented the Japanese prime minister with six demands concerning compensation and government admission of responsibility in 1990. The Japanese rejected those demands in 1991. The Japanese and Korean governments issued reports on the comfort women in 1992. The Japanese prime minister discussed the issue with the Korean president in 1992. The Japanese Diet debated the comfort women issue in 1990 and 1992. The Japanese government continued to deny that its Army had forced women into prostitution.

In an ironic twist, the continued Japanese denial of wrongdoing led some comfort women to come forward with their stories. They were angered by the Japanese denials. They were emboldened by their own advanced age and their culture's new awareness of women's issues. They wanted to make sure the truth did not die with them. They wanted justice.

Their voices have been heard. Shortly after the suit was filed, Japanese scholars, moved by the women's stories, uncovered documentary evidence in Japan's Self Defense Agency Library that linked the Japanese military to the creation and administration of the comfort women system. The Japanese government admitted to the Army's responsibility for the forced prostitution within hours after the documents were made public. Additionally, Japan established the Asian Woman's Fund with private donations to provide financial assistance to the comfort women. The comfort women rejected this money as a settlement of their claims against the government and have continued with their lawsuit.

After I read that newspaper article in 1995, I did not expect to find answers to my questions about the comfort women. After Mr. Hicks read a similar article, he was determined to find the answers to his questions. We, as readers, can be grateful for his determination. *The Comfort Women* not only answers our questions, it provides valuable insight into Asian culture and politics. It is well-written

and understandable. It is an excellent source of information for the reader interested in doing additional legal or political research on the topic.

The book also is timely. Forced prostitution did not end with World War II. During the recent Bosnian conflict, allegations abounded that the Serbian military engaged in mass rape and forced prostitution of Bosnian Muslim women. *The Comfort Women* stands as a testament to the need to bring these atrocities to the light, to immediately and forcefully punish those responsible for committing such atrocities, and to aid and comfort those forced to provide "comfort" to others.

SOMALIA OPERATIONS: LESSONS LEARNED*

REVIEWED BY MAJOR JOHN P. PATRICK**

Americans may best remember Somalia for the ill-fated operation on 3 October 1993 in which eighteen United States soldiers died during the unsuccessful attempt by Task Force Ranger to capture clan leader Mohammed Farrah Aideed. This tragic event caused a fundamental reexamination of United States policy and ultimately resulted in the complete withdrawal of all United States troops from Somalia in the spring of 1994. In spite of this disastrous turn of events, the United States military's involvement in Somalia provided valuable lessons in the conduct of peace operations.[1]

Somalia Operations: Lessons Learned is a good starting point for a study of such operations. Its author, Colonel Kenneth Allard, examines operational issues that arose during the course of the United States deployment to Somalia from the early stages of humanitarian relief through the final phase of peace enforcement. Colonel Allard's book reinforces lessons learned from the recent peace operation in Haiti and provides useful insights into issues specific to humanitarian relief missions. Although Colonel Allard did not personally participate in the Somali deployment, his observations are based on a variety of first-hand sources, including official military after action reports. Colonel Allard is a senior military fellow at the Institute for National Strategic Studies, and his examination of Somali operations was part of a National Defense University program to study peace operations. This study was prompted by the increasingly important role that peace operations have come to play in the post-Cold War era.

Colonel Allard's book is divided into three sections: an overview of the operational context of the American mission in Somalia, lessons learned from the mission, and conclusions. In the first sec-

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* COLONEL KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED (National Defense University Press 1995).

** Judge Advocate General's Corps, Unites States Army. Written while assigned as a Student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

1 Peace operations is an umbrella term which encompasses three types of activities: support to diplomacy (peacemaking, peace building, and preventive diplomacy), peacekeeping, and peace enforcement. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, at iv (30 Dec. 1994).

tion, Colonel Allard outlines the challenges imposed on the relief effort by a country in chaos, where prolonged drought conditions and a devastating civil war resulted in over a half million Somali deaths by early 1992. With food and water supplies essentially nonexistent in some areas of the country, peacekeepers had to transport all of these basic supplies, a task complicated by the extremely poor infrastructure of the country.

United States involvement in the Somali relief effort progressed through three stages: Operation Provide Relief, a humanitarian assistance mission; Operation Restore Hope, which combined humanitarian assistance with some military action; and United Nations Somalia II (UNOSOM II), a peace enforcement mission consisting of combat operations and nation-building. As these operations progressed, the nature of United States participation changed from providing mainly logistical support to conducting military operations to maintain a secure environment and restore order. This mission expansion threatened the power base of Mohammed Aideed. His continued interference and violent defiance of United Nations forces ultimately led to the failed manhunt conducted by Task Force Ranger.

Colonel Allard addresses the consequences of the changing United Nations and United States' missions in the book's second section. This is the heart of the book, where he presents numerous lessons learned. Each lesson identified is followed by concrete examples and a discussion of relevant experiences from the Somali operation. Many of Colonel Allard's observations, such as those dealing with logistics and the media, are not new, but his insights are valuable nonetheless because they show how these familiar issues were complicated by the peacekeeping environment in which the United States operated as part of an international coalition. Colonel Allard's discussion of the issues unique to peacekeeping operations, several of which are highlighted below, is what makes this book ultimately worth reading.

Colonel Allard identifies command authority over the United Nations contingent as one of the major challenges facing Somali operations. Although the multinational relief effort consisted of soldiers from more than twenty countries, the operation proceeded smoothly during the initial stages thanks in part to the extensive use of liaison officers. Cooperation began to break down, however, as the mission changed from pure humanitarian relief to peace enforcement when the threat to Mohammed Aideed's power base increased the potential for combat. Not all contingent members supported the decision to apprehend Mohammed Aideed, and the commander of the Italian forces actually opened separate negotiations with the

fugitive warlord. Other United Nations contingent members regularly sought approval from their respective capitals prior to carrying out even routine tactical orders. Turkish Lieutenant General Cevik Bir, the UNOSOM II commander, cited the lack of command authority over contingent members as the most significant limitation of the Somali operation or of any operation organized under Chapter VII of the United Nations Charter.[2]

While pointing out deficiencies in the United Nations command structure, Colonel Allard also highlights United States command and control problems, which were caused by several different chains of command operating simultaneously. The logistical elements were under operational control of the United Nations, the Quick Reaction Force, used to provide security, was under the control of the United States Central Command, and Task Force Ranger had its own separate Army chain of command. Colonel Allard notes that these obstacles to unity of command were imposed by the United States on itself, and this convoluted command arrangement created a condition that allowed no clear priorities in designing and executing a comprehensive force package. Although Colonel Allard credits the close working relations among the various United States commanders as the key factor in overcoming command structure obstacles, this assessment glosses over the deadly consequences that the lack of unity of command had on the ability of United States forces to react quickly to rescue Task Force Ranger during the attack on 3 October 1993.[3]

Colonel Allard's observations about the critical role of rules of engagement (ROE) in peace operations are more on target. As was discovered during the United States deployment to Haiti, some of the hardest yet most important questions in peace operations involve who can shoot at what, with which weapons, and where.[4] Colonel Allard correctly notes that the use of force in this setting is often inappropriate because the objective is to minimize violence. Commanders must, therefore, provide extensive training to avoid overreaction and to counter the natural tendency to view civilians as likely enemies rather than as potential allies. Also important is the use of repeated warnings prior to the use of force and the limiting of this use of force at all times to the minimum level required. A diffi-

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[2] Chapter VII of the United Nations Charter provides the mechanism for enforcing mandates of the Security Council. If the Security Council determines there is a threat to peace, a breach of peace, or act of aggression, it may authorize military intervention to maintain or restore international peace and security.

[3] Sean D. Naylor, *Are Soldiers Learning the Lessons of Somalia?*, ARMY TIMES, Oct. 7, 1996, at 12. This article points to the failure of the United States forces to ensure unity of command as significantly hindering the rescue effort.

[4] CENTER FOR L. AND MIL. OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 34 (1995).

cult but essential task is balancing the competing needs of restraint and force protection. In Somalia, soldiers learned to use water bottles, smiles, and patience as basic negotiation skills to defuse potentially violent situations. A soldier's ability to understand and correctly apply the proper use of force may prevent both military and civilian casualties. The critical importance of ROE has been shown during operations in Haiti, in Somalia, and in Bosnia.

Another important point made by Colonel Allard is the need for soldiers to recognize that the "real" peacekeepers are the humanitarian relief organizations (HROs) at the scene prior to the arrival of military forces and who remain well after those forces depart. Colonel Allard observes that military and humanitarian efforts are part of a common whole (in Somalia, forty-nine different international agencies participated in the relief effort), and he cites the establishment of a Civil-Military Operation Center (CMOC) as one of the most important initiatives of the Somali operation. The CMOC acted as a single focal point for all relief agencies in Somalia, and the extensive coordination and communication helped reduce the natural suspicion HROs had of the military force and its objectives. Colonel Allard helpfully provides an appendix summarizing the Somali CMOC's table of organization and principal functions.

The book's final section provides several general conclusions about peacekeeping operations. One is that government civilian agencies rather than the military should have the primary responsibility for nation-building. Secondly, if disarmament of the local populace becomes a military objective, leaders should recognize that the operation has essentially become a combat mission. A third observation is that the integration of military, diplomatic, and humanitarian actions works best to achieve mission success while reducing the potential for casualties. These are just a few of the conclusions Colonel Allard makes which not only highlight issues specific to humanitarian relief missions but also reinforce lessons learned from other recent United States operations.

Colonel Allard's book is a good starting point for a study of peace operations, but a reader who expects answers to every issue that arose in Somalia will be disappointed. As Colonel Allard states in his introduction, this book is not a comprehensive history of United States involvement in Somalia, nor is it an in-depth analysis of the functional areas that it does examine. This book was not intended to be a "how to" soldier's manual for peace operations; rather, its scope is limited to providing an overview of the issues that will undoubtedly arise during these increasingly common operations. Given the myriad and diverse technical issues involved

in a deployment of this nature, practitioners may wish to consult other sources.[5]

In spite of these limitations, Colonel Allard's book is a welcome addition to the literature on peace operations because it causes the reader to think about the many issues involved in such missions as well as to understand that such missions are in some ways more difficult than conventional operations. While future peace operations will undoubtedly present their own unique challenges, they are likely to contain enough parallels that many of the lessons learned in Somalia will apply. To cite just one example, it is no surprise that the United States forces in Bosnia are not eager to search for war criminals after the disastrous experience with the effort to hunt down Mohammed Aideed.

[5] The Center for Army Lessons Learned in Fort Leavenworth, Kansas, has prepared two after action reviews which address specific issues involved in Somali operations. Military lawyers will also want to contact the Center for Law and Military Operations at The Judge Advocate General's School, United States Army, in Charlottesville, Virginia, for detailed information regarding legal issues associated with the Somali deployment.

ASSAULT AT WEST POINT THE COURT-MARTIAL OF JOHNSON WHITTAKER*

REVIEWED BY CAPTAIN STEPHANIE L. STEPHENS**

The American Civil War ended in 1865. Fifteen years later, Johnson Chestnut Whittaker was the only black cadet at West Point. On the morning of 6 April 1880, however, he gained distinction for another reason. Cadet Whittaker was absent from the 0600 cadet reveille formation. The Cadet Officer of the Day, George R. Burnett, went to look for Whittaker, assuming he had overslept. Burnett found "Whittaker lying on the floor, looking as though he had fallen out of bed. Coming closer, Burnett saw that Whittaker's legs were tied to the bed and that he was covered with blood. The room showed signs of mayhem."[1] Whittaker's hands were bound in front of his body. In addition to the blood on his face, neck, ears, feet, and underclothes, blood was on the mattress, the wall above the bed, the floor, the doorjamb, and Whittaker's pillow, blanket, and comforter. Other evidence, including a blood-stained Indian club, a broken mirror, a wet sock, charred papers, bunches of Whittaker's hair, a pocket knife, and a blood-soaked handkerchief, was scattered about the room.

Johnson Whittaker was alive, but unconscious. Two years of turmoil would follow him. The Academy Superintendent, General John M. Schofield, ordered the Commandant of Cadets, Lieutenant Colonel (LTC) Henry M. Lazelle, to investigate the incident. Despite Whittaker's claim that he had been attacked in the night by three masked men dressed in civilian clothes, and his production of a warning note left in his room while he was at dinner the evening before he attack, LTC Lazelle's cursory investigation placed the blame on Whittaker. A day and a half after the attack, LTC Lazelle opined to General Schofield that Whittaker had written the warning note, mutilated himself, and faked unconsciousness. General Schofield informed Whittaker of the findings, and

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* JOHN F. MARSZALEK, ASSAULT AT WEST POINT, THE COURT-MARTIAL OF JOHNSON WHITTAKER (New York, Macmillan Publishing Company, 1994), 289 pages, $12.00 (soft cover) (originally published COURT MARTIAL: A BLACK MAN IN AMERICA (New York, Scribner, 1972)).

** Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] MARSZALEK, *supra* note *, at 2.

offered him the choice of resignation, a Court of Inquiry, or a Court-Martial. Whittaker immediately demanded a court of inquiry. The inquiry convened on 9 April 1880 and issued its decision on 29 May 1880. After almost seven weeks of testimony and argument, the panel of four officers issued an opinion that affirmed the conclusions of LTC Lazelle's investigation. Whittaker's motivation in committing these acts upon himself, according to the court of inquiry, was to gain sympathy from his instructors in light of the upcoming final examinations.

The story of the alleged assault of a black cadet at West Point gained national attention. However, as the transcript of the Court of Inquiry slowly made its way through the War Department, the Judge Advocate General, and finally, to the President of the United States, media attention subsided. While Cadet Whittaker awaited his fate, President Rutherford B. Hayes placed the case on the back burner. Finally, on 20 December 1880, almost seven months after the inquiry delivered its conclusions, President Hayes, in one of his last actions as President, ordered a court-martial to try Johnson Whittaker. The court-martial convened on 20 January 1881, with Cadet Whittaker accused of conduct unbecoming an officer by writing the warning note, and mutilating himself to avoid his examinations and bring discredit upon the Academy. A second charge accused Whittaker of conduct prejudicial to good order and discipline by lying at the Court of Inquiry. The trial lasted almost five months, until 10 June 1881. Nevertheless, the convening authority, President Chester A. Arthur[2] did not take action on the case until 22 March 1882. The entire time Whittaker remained in limbo: a cadet though not able to continue his cadet life, but also not authorized to act as a private citizen.

In his book, *Assault at West Point: The Court-Martial of Johnson Whittaker,* Mississippi State University professor and historical biographer[3] John F. Marszalek endeavors to strip away some of the mystery of the United States Military Academy and an often misunderstood military institution: the court-martial. The author puts a human face on the military legal process as he provides insight to West Point history and tradition. Nevertheless, the book's title is misleading. This book is not about West Point or the military

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[2] President Hayes, who preferred the charges, was succeeded by President James A. Garfield who was assassinated before he took action on the Whittaker case. His successor was President Arthur.

[3] Professor Marszalek's other books include *A Black Businessman in White Mississippi* (1977), *The Diary of Miss Emma Holmes 1861-1866* (1979), *Sherman's Other War: The General and the Civil War Press* (1981), *Black Physician: Bringing Hope in Mississippi* (1985), *Grover Cleveland, A Bibliography* (1988), *Encyclopedia of African-American Civil Rights, From Emancipation to Present* (1992), and *Sherman: A Soldier's Passion for Order* (1993).

legal process. It is more than the tale of a single cadet's ordeal. Marszalek's book is an excellent study of race relations in post-Civil War America.

At first glance, Whittaker's plight seems a fictional tale. Today, it is almost inconceivable that Whittaker, or anyone else, could be accused of committing such an assault upon himself. However, Marszalek puts the incident into perspective using great detail to remind the reader that Whittaker was not an average West Point cadet at a settled time in history. Whittaker was a black cadet in post-Civil War America. Marszalek demonstrates this distinction in a short discussion of the history of the twenty-three black cadets and cadet candidates that attended West Point between 1870 and 1889. He focuses on the experiences of a few of the most visible black cadets to show exactly how different a black cadet's experience was from that of a "normal" cadet at that time in history. Although the first two black cadet candidates, Michael Howard and James Smith, arrived at the Academy in 1870, Henry O. Flipper was the first black to graduate, which occurred in 1877. Two other black cadets, John Alexander and Charles Young, graduated in 1887 and 1889, respectively. Only three of the twenty-three black cadets successfully completed West Point in that nineteen year span. Marszalek points to ostracism, not academics or military training, as a black cadet's biggest obstacle to success at the Academy.

Social ostracism was a routine part of West Point life, often imposed upon those who were out of favor with the other cadets. Usually, the ostracism lasted a few months. Blacks, however, were ostracized for their entire time at West Point simply because of the color of their skin. They were only spoken to for official business, they ate alone, and they lived alone except on the rare occasions when there was more than one black cadet at the academy. White cadets who might have broken the cycle did not do so because they feared becoming the victims of the same type of treatment. Academy officials, though they claimed not to condone the ostracism of the black cadets, did nothing to stop it. The prevailing opinion was that

> the treatment of black cadets . . . was related to [the] general pattern of excellence [at West Point]. West Point was doing its duty toward blacks despite the inferior quality of the black candidates it was receiving. Considering the close relationship between cadets, the poor quality of the blacks, and the anti-black feelings brought in from home by the white cadets, the resulting ostracism was not unexpected.[4]

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[4] MARSZALEK, *supra* note *, at 20.

In addition to the ostracism that framed Whittaker's life at West Point, and the legacy of those black cadets that came before him, Whittaker's pre-West Point personal life, both as a slave and after emancipation, was central to his life at the Academy. Johnson Chestnut Whittaker began his life on 23 August 1858 at "Mulberry," the Camden, South Carolina, plantation of James Chestnut. Whittaker's father, James, was a free mulatto who abandoned the family shortly after the birth of Johnson and his twin brother, Alex. His mother, Maria Whittaker, was a light-skinned house servant of Mary Chestnut, the plantation owner's daughter-in-law. At Mulberry, there was "plenty to eat, little to do, a warm house to sleep in, a good church and a good preacher all here right at hand."[5] Because of their parents' status, Johnson, Alex, and their older brother were given light tasks around the plantation house. They did not work in the fields, and they were allowed to play with the white children. After emancipation, Maria worked as a paid domestic for a prosperous Camden family. Her sons worked for the family at various times, but they also attended a freedmen's school in Camden. Later, Johnson received tutoring in math, geography, grammar, history, and Latin from the local black Methodist Episcopal minister. Finally, he attended the University of South Carolina at Columbia for two years before being accepted to West Point. Marszalek illustrates that, because of his upbringing, Whittaker was academically and socially prepared to enter West Point.

Whittaker was rarely hazed or harassed at West Point as some of the more out-spoken black cadets before him had been, though at times he was subjected to minor pranks. Essentially, however, Whittaker was left completely on his own. He got through the years by studying, writing letters, and reading his bible. Whittaker's upbringing around whites had taught him that they did not want to associate too closely with blacks. As a house slave and later as a student at the integrated University of South Carolina, Whittaker learned that whites would accept his presence among them as long as he "kept his place". Whittaker was, therefore, not too forward. He accepted his ostracism with the patience and dignity that he had learned while working in the homes of affluent whites. Marszalek implies that perhaps that attitude, as well as Whittaker's extremely light skin, served to make him seem to white cadets less a threat than other darker-skinned black cadets.

Marszalek repeatedly returns to Whittaker's upbringing as a focal point from which he tells the story of the court-martial proceedings. The ordeal is not related as an isolated incident, but it is illuminated against the backdrop of post-Civil War America and the

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[5] *Id.* at 31.

prevailing, and often conflicting, attitudes and opinions in the country at that time. Marszalek recounts the assault, and the subsequent inquiry and trial, in the true historical light of the racial turmoil present in post-Civil War America and against the accompanying shadow of the political confusion that resulted from that turmoil.

Marszalek evidences this turmoil and confusion in his exploration of the many individuals involved in determining Johnson Whittaker's fate after the assault. As Marszalek walks the reader through the investigation, the inquiry, and the trial of Johnson Whittaker, he relates each phase of the ordeal in contrast with the military, political, and social events taking place in America at the time. He painstakingly probes the competing interests of the key players, such as the Commandant of Cadets, the Academy Superintendent, the cadets, the witnesses, the experts, the politicians, and even the various United States Presidents involved. Marszalek shows the reality of the turmoil between official duties, personal feelings, and public pressures.

As Marszalek explores these conflicts, he makes Johnson Whittaker's guilt or innocence secondary. Marszalek's work points out that "the facts themselves are not as significant as their handling during the trials."[6] He concludes that the Academy, and the nation, treated Whittaker and his case with the same paternalism and racism common to the treatment of blacks at that time. In Marszalek's words:

> The Whittaker trials, then, were important for more reasons than simply to determine the guilt or innocence of a single cadet. They showed in sharp focus the life of the black American. The case of Johnson C. Whittaker is a tale of Gilded Age America's attitude toward and treatment of its newly enfranchised black citizens.
>
> Whittaker's entire life indicates clearly that this plight was not limited to the courtroom nor to one age. He lived during several historical periods when to be black was to have hope and little else.[7]

As Marszalek tells the story of Whittaker's assault, inquiry, and court-martial, he immerses the reader in a time warp. He often abruptly interrupts the story to take us back in time to Whittaker's childhood. At other times, he simply takes the reader to a different location in America at the time of the court-martial: from the courtroom to the President's office or from West Point to the floor of Congress. This is an admirable attempt to keep the story in its prop-

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[6] *Id.* at 276.

[7] *Id.* at 278.

er context. It compels the reader to view the story in light of American history. Though admirable, this approach is, nevertheless, confusing for two reasons. First, it assumes an almost complete lack of knowledge of American history. For example, Marszalek goes to great pains to explain that there was massive racial turmoil in America in the 1860s, 1870s, and 1880s, and that that turmoil affected every aspect of American life. Marszalek's constant rehashing of the most minute concepts is annoying, and it detracts from the flow of the book. Second, the "history lesson" is presented in a vacuum. Marszalek does not really tell us his goal up front. He makes slight mention in the preface that this book is an attempt to study "the factual role of the Afro-American in the life of the United States,"[8] and to "reveal the innermost soul of an age and a people."[9] Nevertheless, his theme does not really become clear until his discussion, in the last few chapters of the book, of the court-martial decision and the events that followed.

The theme would have been more clear had Marszalek published the book this second time under its original title, *Court Martial: A Black Man in America*. That title gives the reader a hint of the book's racial focus. Marszalek supports his race relations theme by giving extensive treatment to Whittaker's life after the court-martial. He discusses Whittaker's successes and failures, his lifestyle and his groundbreaking efforts in many different areas. He repeatedly mentions Whittaker's lack of malice over his treatment at West Point. This, coupled with the earlier glimpses into Whittaker's life before West Point, gives the reader true insight to the man and to the struggle for recognition faced by all black Americans of that time.

The Johnson Whittaker story is amazing in itself, but the credibility of Marszalek's sources make this work particularly interesting. While searching historical records about General Sherman at the Ohio Historical Society and the Library of Congress, Marszalek happened upon references to Whittaker. His instincts led him to the National Archives where he found nine manuscript boxes of inquiry records and over 9000 pages of testimony from the court-martial. All of the court-martial exhibits were preserved, including Whittaker's medical records and his Bible. These official transcripts were brought to life by records contained at South Carolina State College where Whittaker taught in his latter years, and by reports from friends and family, including Whittaker's granddaughter, Cecil Whittaker McFadden. The book contains many photographs, charts, and drawings that Marszalek gathered from these sources. Not only

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[8] *Id.* at xi.

[9] *Id.* at xii.

are they interesting and informative, but the drawings of the crime scene reveal the absurdity of the accusations against Whittaker.

Although at times distracting in its detail, this book is a must read for any person looking for a unique, yet fact based and scholarly, perspective on American race relations. The book is the story of one man, but, in doing so, it also tells the story of a nation's struggle for the equality that is guaranteed under our Constitution. Marszalek probably reviewed the book most accurately himself in the afterword he wrote in 1993 shortly before its second publication:

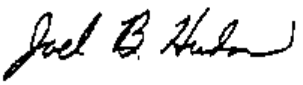
> I see his life story as a microcosm of American race relations. Johnson Whittaker experienced the unrelenting prejudice of American society, the hardcore discrimination that persists to the present day. Yet he somehow overcame it, achieving a successful life for himself and his family despite its persistence. There is both tragedy and triumphant hopefulness in his story: the tragedy of racism and the hope that it can be overcome. Whether the future will see more tragedy or the triumph of hope is the crucial question still facing the American people. There is just so much injustice that a society can tolerate without flying apart. After all, there are only so many Johnson Whittakers among us.[10]

[10] *Id.* at 289.

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:



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U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001

PIN: 074940-000