Volume 166 **December 2000**

MILITARY LAW REVIEW

ARTICLES

CASE NOTES

BOOK REVIEWS

Department of Army Pamphlet 27-100-166

MILITARY LAW REVIEW

Volume 166 **December 2000**

CONTENTS

ARTICLES

CASE NOTES

BOOK REVIEWS

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

Pamphlet No. 27-100-166, December 2000

MILITARY LAW REVIEW—VOLUME 166

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia 22903-1781, for use by military attorneys in connection with their official duties for $17 each (domestic) and $21.25 (foreign) per year (see Individual Paid Subscriptions to the *Military Law Review* on pages vi and vii). Periodicals postage 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.

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402; you may call (202) 512-1800. See the subscription form and instructions at the end of this section. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Editor of the *Military Law Review.* Inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies should be addressed

to the Editor of the *Military Law Review.* Judge advocates of other military services should request distribution from their publication channels.

CITATION: This issue of the *Military Law Review* may be cited as 166 MIL. L. REV. (page number) (2000). Each issue is a complete, separately numbered volume.

INDEXING:

* The primary *Military Law Review* indices are volume 81 (summer 1978) and volume 91 (winter 1981).

* Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Military Law Review* indices.

* Volume 91 included 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.

* Volume 161 contains a cumulative index for volumes 152-161.

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 databases—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. The *Military Law Review* is available at http://www.jagcnet.army.mil beginning with Volumes 165 through 154.

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted in Microsoft Word, to the Editor, *Military Law Review* at Todd.Milliard@hqda.army.mil. If electronic mail is not available, please forward the submission 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 on 3 1/2 inch computer diskettes, preferably in Microsoft Word format.

Footnotes should be typed double-spaced, and numbered consecutively from the beginning to the end of a writing, not chapter by chapter. Citations should conform to *The Bluebook, A Uniform System of Citation* (17th ed. 2000), copyrighted by the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 6th ed. 1997). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School; the Director of Legal Research and Communications Department; and the Editor of the *Military Law Review.* Professors at the School assist the Editorial Board in the review process. The Editorial Board submits its recommendations to the Commandant, The Judge Advocate General's School, who has final approval authority for writings published in the *Military Law Review.* The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author

and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

The Editorial Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Editorial Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When a writing is accepted for publication, the Editor of the *Military Law Review* will provide a copy of the edited manuscript to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Editor of the *Military Law Review.*

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Military Law Review.* Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review,* The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781.

Individual Paid Subscriptions to the *Military Law Review*

The Government Printing Office offers a paid subscription service to the *Military Law Review.* To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 3, a renewal notice will be sent.

MILR SMITH212J ISSDUE003 R1
JOHN SMITH
212 MAIN ST
FORESTVILLE MD

The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue unless you renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The individual paid subscription service is handled solely by the Superintendent of Documents, not the Editor of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250 or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government
INFORMATION

Credit card orders are welcome!

Fax your orders (202) 512-2250

Phone your orders (202) 512-1800

Order Processing Code:
* 5722

☐ YES, please send subscriptions to:

_____ **Military Law Review** (MILR) at $17 each ($21.25 foreign) per year.

_____ **Army Lawyer** (ARLAW) at $29 each ($36.25 foreign) per year.

The total cost of my order is $ _____.

Price includes regular shipping & handling and is subject to change.

For privacy protection, check the box below:

☐ Do not make my name available to other mailers

Check method of payment:

☐ Check payable to: Superintendent of Documents

☐ GPO Deposit Account ☐☐☐☐☐☐☐–☐

☐ VISA ☐ MasterCard ☐ Discover

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

(expiration date)

☐☐☐☐

Name or title (Please type or print)

Company name Room, floor, suite

Street address

City State Zip code+4

Daytime phone including area code

Purchase order number (optional)

Authorizing signature 1/97

Mail to: Superintendent of Documents, PO Box 371954, Pittsburgh PA 15250-7954

Important: Please include this completed order form with your remittance. ***Thank you for your order!***

MILITARY LAW REVIEW

Volume 166 **December 2000**

Editor's Note: This article is a direct response to Captain Barry's article: Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress, which appeared in Volume 165, Military Law Review. Captain Barry's reply, which follows this article, directly addresses Captain Maggs's criticisms of his proposal, as well as the peripheral issues Captain Maggs discusses. The Editorial Board of the Military Law Review invites further comment on the Manual for Courts-Martial rule-making process.

CAUTIOUS SKEPTICISM ABOUT THE BENEFIT OF ADDING MORE FORMALITIES TO THE *MANUAL FOR COURTS-MARTIAL* RULE-MAKING PROCESS: A RESPONSE TO CAPTAIN KEVIN J. BARRY

CAPTAIN GREGORY E. MAGGS[1]

I. Introduction

In *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*,[2] Captain Kevin J. Barry, U.S. Coast Guard (Retired), describes the great and steady progress that has occurred in the

1. Judge Advocate General's Corps, United States Army Reserve, and Professor of Law, George Washington University. Captain Maggs has served as an individual mobilization augmentee (IMA) assigned to the Office of The Judge Advocate General (OTJAG), Criminal Law Division (CLD) since 1996. In this capacity, he has provided support to officers assigned to the Joint Service Committee and its Working Group, which has helped develop his interest in the *Manual for Courts-Martial*, including its rule-making process. While performing a recent active duty for training in the CLD, CPT Maggs had the opportunity to begin an article expressing his views and opinions about another author's proposed amendments to the *Manual for Courts-Martial* rule-making process (see footnote 2). While writing this article, CPT Maggs received extremely helpful suggestions and assistance from Colonel Charles E. Trant, Colonel Mark W. Harvey, Lieutenant Colonel Denise Lind, and Lieutenant Colonel Lisa Schenck. For their help and assistance, CPT Maggs is most grateful. CPT Maggs acknowledges that the opinions and conclusions contained in this article are his, and do not necessarily reflect the views of the Army, The Judge Advocate General, or any government agency.

methods for adopting changes to the *Manual for Courts-Martial* (*MCM*).[3] As his article demonstrates,[4] the amendment process has become much more open and responsive to outside views than in decades past. Significant improvements noted by Captain Barry include the following:

- Since 1982, the Department of Defense (DOD) has had a policy of publishing notice of amendments to the *MCM* in the Federal Register and waiting seventy-five days for public comment before submitting them to the President for promulgation by executive order.[5]

- Also since 1982, the notice printed in the Federal Register has included not only a summary of proposed amendments, but also information about where and how to obtain their full text.[6]

- Since 1993, the Federal Register has included the full text of non-binding commentary to be published with new *MCM* provisions in the familiar "Discussion" and "Analysis" sections.[7]

- Also since 1993, the Joint Service Committee on Military Justice (JSC), which has responsibility for preparing *MCM* rule changes for the President's issuance, has held public meetings for the purpose of receiving comments during the seventy-five day waiting period.[8]

- Since 1994, the JSC has published full-text notice of proposed changes to the *MCM* and new commentary prior to the public meeting and prior to their approval as amendments to be submitted to the President.[9]

- Since 1996, a DOD Directive has obliged the JSC to "consider all views presented at the public meeting and written com-

---

2. Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

3. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

4. *See* Barry, *supra* note 2, at 241-64.

5. *See id.* at 249 (citing Department of Defense Policy Notice, 47 Fed. Reg. 3401 (Jan. 25, 1982)).

6. *See, e.g.*, 47 Fed. Reg. 15,823 (Apr. 13, 1982).

7. *See* Barry, *supra* note 2, at 252.

8. *See id.*

9. *See id.* at 252-53.

> ments submitted during the seventy-five day period in determining the final form of any proposed amendments."[10]
>
> • Starting in 2000, the JSC will send annual calls for proposals to the judiciary, trial, and defense organizations, the Judge Advocate General schools, and elsewhere. It also will publish an invitation in the Federal Register for the public to submit proposals.[11]

Although Captain Barry acknowledges the significance of the changes in the JSC process over the years, he believes that much room for progress still remains. He suggests that the recent high profile sexual misconduct cases relating to Lieutenant Kelly Flinn,[12] the drill sergeants at Aberdeen Proving Ground,[13] Sergeant Major of the Army Gene C. McKinney,[14] and Major General David Hale[15] have "raised questions about whether the military trial process is fair."[16] Captain Barry believes that one "crucially important issue"[17] that "bears decidedly on . . . perceptions of fairness" of the military justice system,[18] but which has "received considerably less attention" than other issues,[19] is "the method by which amend-

---

10. *Id.* at 259 (quoting DOD DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (JSC) at encl. 2, E2.4.6 (May 8, 1996) (internal quotation marks omitted) [hereinafter DOD DIRECTIVE 5500.17]).

11. *See id.* at 262.

12. On 28 January 1997, charges of disobedience of a "no contact" order, false statements, fraternization, and adultery were preferred against Lieutenant Flinn. The Assistant Secretary of the Air Force approved her resignation in lieu of trial with a characterization of general under honorable conditions. *See* Tony Capaccio, *Pilot Errors*, AM. JOURNALISM REV., Oct., 1997, at 18 (summarizing the entire Kelly Flinn incident).

13. From November 1996 to April 1998, forty-nine male cadre members and drill sergeants were investigated for sexual misconduct at Aberdeen Proving Ground (APG). Five APG drill sergeants and a training unit company commander were tried by court-martial. One former APG drill sergeant was found not guilty for misconduct while an APG drill sergeant. Captain Derrick Robertson was sentenced to confinement for three years, total forfeiture of all pay and allowances, and dismissal from the service. His pretrial agreement limited confinement to twelve months with eight months suspended. Staff Sergeant Delmar Simpson was sentenced to confinement for twenty-five years, total forfeitures, reduction to Private E-1, and a dishonorable discharge. Staff Sergeant Vernell Robinson Jr. was sentenced to confinement for six months, total forfeitures, and a dishonorable discharge. Staff Sergeant Wayne Gamble was sentenced to confinement for ten months, total forfeitures, reduction to E1, and a dishonorable discharge. Staff Sergeant Herman Gunter was sentenced to reduction from staff sergeant to specialist, and a reprimand. Staff Sergeant Marvin C. Kelley was sentenced to reduction from staff sergeant to private E-1, to be confined for ten months, and to be discharged from the service with a dishonorable discharge. *See* Tom Curley & Steven Komarow, *For Army, the Focus Now Turns to Remaining Cases*, USA TODAY, Apr. 1997 (summarizing charges and verdicts).

ments to the *Manual for Court-Martial* . . . are proposed, considered, and adopted."[20] Accordingly, in Part IV of his article,[21] Captain Barry advances various "Recommendations for the Future"[22] for improving the

14. On 16 March 1999, Command Sergeant Major Gene C. McKinney, the former Sergeant Major of the Army was convicted, contrary to his pleas, by a court composed of officer and enlisted members of one specification of obstruction of justice in violation of UCMJ Article 134. He was sentenced to reduction to Master Sergeant. He was acquitted of four specifications of maltreatment of subordinates, one specification of simple assault, four specifications of wrongful solicitation to commit adultery, one specification of adultery, one specification of obstruction of justice, two specifications of communication of a threat, four specifications of indecent assault, and one specification of assault on a superior commissioned officer. The findings and sentence were approved by the general court-martial convening authority on 28 August 1998. *See* McKinney v. Ivany, 48 M.J. 908 (Army Ct. Crim. App. 1998) (providing these and other details); ABC News, Inc. v. Powell, 47 M.J. 363 (1997) (same).

15. On 17 March 1998, Major General David R.E. Hale was found guilty in accordance with his pleas of seven specifications of conduct unbecoming an officer and one specification of making a false official statement. Major General Hale had improper relationships with the spouses of four subordinates and then lied about it to his superiors. Major General Hale was sentenced by a military judge to receive a reprimand, forfeiture of $1500 pay per month for twelve months and a $10,000 fine. In accordance with the terms of a pretrial agreement, the general court-martial convening authority reduced the forfeitures to $1000 pay per month for twelve months, and approved the remainder of the adjudged sentence. *See* Harry G. Summers, *Defining Deviancy Down in the Army*, WASH. TIMES, Mar. 23, 1999, at A19. He was subsequently retired at the direction of the Secretary of the Army in the grade of Brigadier General. *See Army Secretary Takes Back Star from Retired General; Demoted Officer Convicted of Affairs with Wives of Four Subordinates*, BALT. SUN, Sept. 3, 1999, at 4A.

16. Barry, *supra* note 2, at 239.

17. *Id.* at 240.

18. *Id.*

19. *Id.*

20. *Id.* Captain Barry's assertion that the process for amending the *MCM* has received little public attention appears correct. The Office of The Judge Advocate General (OTJAG), Criminal Law Division (CLD), is responsible for answering most questions from the public about the Army cases in the military justice system that are directed to the President, Congress, Secretary of the Army, Chief of Staff of the Army, and The Judge Advocate General. Colonel Mark Harvey, Deputy Chief, OTJAG-CLD, indicated that approximately 1500 letters were received from the public from 1996-2000. Aside from correspondence from the Standing Committee on Armed Forces Law, the National Institute of Military Justice, and lawyers affiliated with these organizations, no correspondence requesting more public participation in the JSC was received. Out of hundreds of newspaper articles relating to the Aberdeen Proving Ground cases, and the courts-martial of Sergeant Major of the Army Gene C. McKinney and Major General David R.E. Hale, none expressed concern about the JSC process. Interview with Colonel Mark W. Harvey, Deputy Chief, Office of the Staff Judge Advocate, Criminal Law Division, in Arlington, Va. (21 July 2000) [hereinafter Harvey Interview].

21. *See* Barry, *supra* note 2, at 264-76.

method of creating and amending the procedural and evidentiary rules for courts-martial.

Although Captain Barry does not enumerate them, he puts forth a total of seven specific proposals. Three recommendations are based on a resolution of the American Bar Association (ABA) House of Delegates.[23] In 1997, at the recommendation of the ABA's Standing Committee on Armed Forces Law (SCAFL), the ABA House of Delegates approved the following resolution:

> RESOLVED, That the American Bar Association recommends that federal law be amended to model court-martial rule-making procedures on those procedures used in proposing and amending other Federal court rules of practice, procedure, and evidence by establishing:
>
> (1) a broadly constituted advisory committee, including public membership and including representatives of the bar, the judiciary, and legal scholars, to consider and recommend rules of procedure and evidence at courts-martial;
>
> (2) a method of adopting rules of procedure and evidence at courts-martial which is generally consistent with court rule-making procedure in Federal civilian courts;
>
> (3) requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial.[24]

The fourth proposal is derived from a 1973 law review article by Major General Kenneth Hodson.[25] In the article, General Hodson urged that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence."[26] As described more fully below,[27] this proposal relates closely to the ABA's second recommendation because the

---

22. *Id.* at 264.

23. *See id.* at 264-69.

24. American Bar Association, Summary of Action of the House of Delegates, 1997 Midyear Meeting, San Antonio, Texas 2 (1997) [hereinafter ABA Summary].

25. *See* Kenneth J. Hodson, *Military Justice: Abolish or Change*, 22 KAN. L. REV. 31 (1973).

26. *Id.* at 53.

27. *See infra* Part III.D.

Judicial Conference headed by the Supreme Court leads the court rule-making procedure in civilian courts.

The final three recommendations for the future come from Captain Barry himself. First, Captain Barry urges creating an enforceable "mechanism to make available to the public the contents and justifications for . . . proposals . . . generated within the DOD."[28] Second, Captain Barry recommends making available to the public "the minutes of the meetings of JSC (and of its working group) and the decisions on proposals generated within the JSC and the DOD."[29] Third, Captain Barry advocates expanding the membership of the JSC beyond "the five officers chiefly responsible for the administration of military justice in the five services."[30]

When Captain Barry addresses the subject of military justice, his thoughts warrant attention and reflection because of his long and distinguished experience in the field. During his twenty-five years on active duty in the Coast Guard, Captain Barry served in a variety of important positions, including Chief Trial Judge, appellate military judge, and chief of the Coast Guard's Legislative Division.[31] Since retiring from active service, Captain Barry has developed an extensive private practice in military and veterans law. He also has played key roles in leading military law professional organizations, including the National Institute of Military Justice, the Judge Advocates Association, and the ABA's SCAFL.[32] The SCAFL's views are similarly influential because of the vast military and legal experience of its membership, including dozens of retired judge advocates, some of whom are retired general officers. The specific endorsement of most of the proposals by the ABA and by the legendary Major General Hodson, needless to say, makes Captain Barry's ideas even more worthy of study.

This article addresses Captain Barry's proposals. Part II, begins by discussing three preliminary considerations concerning the *MCM* rule-making procedure.[33] First, recent history suggests that the *MCM* probably will undergo only incremental changes for the foreseeable future. Second, the process of amending the MCM is largely irrelevant to most of the major military justice reforms now being urged. Third, changes to the *MCM*

28. Barry, *supra* note 2, at 275.
29. *Id.*
30. *Id.*
31. *See id.* at 237 n.1.
32. *See id.*
33. *See infra* Part II.

rule-making process would affect the present balance of powers between Congress and the President, possibly producing unintended adverse consequences.

Part III then responds to each of Captain Barry's seven recommendations.[34] On the whole, none of the proposals is radical or dangerous. Indeed, each is closely analogous to the federal civilian criminal justice system. In addition, no insurmountable legal obstacles would prevent their adoption. Yet, closer inspection suggests that, in light of all the progress that already has occurred in the methods for amending the MCM, none of the proposals would yield significant new benefits. At the same time, all but one or two of the proposals would impose at least some significant burdens or costs. For these reasons, at least at present, the JSC, the DOD, the President, and Congress should view Captain Barry's recommendations with cautious skepticism.[35]

II. Preliminary Considerations

Before assessing the desirability of adding new procedures and formalities to the *MCM* rule-making process, three preliminary considerations require attention: (1) the nature of future amendments to the *MCM* or, put another way, what the *MCM* rule-making process likely will be used for; (2) the kinds of reforms now being sought for the military justice system; and (3) the effect changes to the *MCM* rule-making process might have on the balance of powers between the President and Congress. The following discussion addresses these three considerations.

A. Changes to the *MCM* that Will Occur in the Future

What kind of changes to the *MCM* will occur in the future? The nature of the changes certainly matters a great deal to the process. If only adjustments to individual rules of evidence and procedure are likely to happen, rather than sweeping systemic changes, then the need for an extensive revision of the *MCM* rule-making process seems less important. The

34. *See infra* Part III.
35. *See infra* Part IV.

final results probably will not vary much no matter how amendments are processed before the President approves them.

The *MCM*, to be sure, has seen dramatic changes in the past fifty years. In 1951, the President promulgated a new version of the *MCM*,[36] designed to conform to the newly enacted UCMJ.[37] The President approved a significantly revised version of the *MCM* in 1969,[38] taking into account the extensive changes in military law wrought by the Military Justice Act of 1968.[39] In 1980, the President codified the Military Rules of Evidence,[40] largely following the codification of the civilian Federal Rules of Evidence in 1975.[41] The last major revision occurred in 1984. In that year, the President adopted the codified Rules for Courts-Martial (R.C.M.),[42] and made substantial changes to address revisions in the UCMJ caused by the Military Justice Act of 1983.[43] These major revisions undoubtedly had a dramatic effect on the substance and practice of military law.

The nature of *MCM* amendments, however, has changed since 1984. The President has amended the *MCM* regularly, but as military jurisprudence has become more similar to civilian criminal procedure (except in

---

36. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951); *see also* COLONEL CHARLES L. DECKER, DEP'T OF ARMY, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES 1951, The Army Library, Washington D.C. (1951) (discussing the history, preparation, and processing of the *1951 MCM*).

37. Congress enacted the UCMJ on 5 May 1950, but delayed its effective date until 31 May 1951. *See* Act of May 5, 1950, 64 Stat. 108 (codified as amended at 10 U.S.C. §§ 801-946); *see also* INDEX AND LEGISLATIVE HISTORY UNIFORM CODE OF MILITARY JUSTICE (1950) (setting forth the extensive legislative history, hearings, reports, and floor debates prior to passage of the Uniform Code of Military Justice).

38. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969); *see also* U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS OF MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION (July 1970) (containing a paragraph by paragraph analysis of the changes made in the *1969 MCM*).

39. *See* Military Justice Act of 1968, 82 Stat. 1334 (1968). This act, which became effective in 1969, among other things established the present role of the military judge in courts-martial. *See* John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 3 (discussing this history).

40. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (3d ed. 1991).

41. *See* STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 4 (7th ed. 1998).

42. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 23, 1984); Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (July 13, 1984).

43. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983); John S. Cooke, *Highlights of the Military Justice Act of 1983*, ARMY LAW., Feb. 1984, at 4. The

the area of sentencing), sweeping revisions appear to have become something of the past. Most of the recent amendments to the *MCM* have strived to serve one of three limited purposes. These amendments either correct errors or oversights in existing rules, conform the rules of procedure and evidence to legislative changes to the UCMJ, or bring military law into alignment with civilian criminal law. They have not attempted bold reforms that effect the overall structure of the *MCM*.

The 1999 amendments to the *MCM* provide good illustrations of the incremental character of recent changes.[44] The first section of the President's executive orders alters six procedural rules. These alterations correct oversights and vestiges from past laws. For example, the first change deletes the words "active duty" from the qualifications for military judges in R.C.M. 507(c).[45] This revision allows Reserve Component judges to conduct trials during inactive duty training and travel.[46] The revisions also

---

43. (continued) Military Justice Act of 1983 directed the Secretary of Defense to establish a commission to study and make recommendations to Congress regarding the following issues:

> 1. Whether the sentencing authority in court-martial cases should be exercised by a military judge in all non-capital cases to which a military judge has been detailed;
> 2. Whether military judges and the Courts of Military Review should have the power to suspend sentences;
> 3. Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year, and what, if any, changes should be made to current appellate jurisdiction;
> 4. Whether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure;
> 5. What should be the elements of a fair and equitable retirement system for the judges of the United States Court of Military Appeals.

The resulting Military Justice Act of 1983 Advisory Commission was composed of six military and three civilian members. Over a one-year period, the Commission heard testimony from twenty-seven witnesses, including civilian experts, and received public comment from sources including retired military leaders, public interest groups, bar associations and experts in military justice and criminal law. The Commission's charter and notice of hearings was published in the Federal Register. *See* THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REPORT (1984) [hereinafter 1983 REPORT].

44. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

45. *Id.*

46. *See* Martin Sitler, *Explanation of the 1999 Amendments to the Manual for Courts-Martial*, ARMY LAW., Nov. 1999, at 27.

bring military law into accordance with recent developments in civilian criminal procedure. For instance, the amendments create special rules for testimony by children in child abuse and domestic violence cases,[47] and recognize a psychotherapist-patient privilege.[48] Additional changes make adjustments to existing rules. For instance, the changes expand the evidence admissible at sentencing, identify a new aggravating factor in capital cases, and define an offense of reckless endangerment under UCMJ Article 134.[49] Other recent proposals have similarly limited scopes.[50]

The near future probably holds more of the same. The military justice system has matured during the fifty years since passage of the UCMJ.[51] The number of courts-martial held annually has declined dramatically.[52] Most importantly, the *MCM* now has a modern, codified structure likely to endure for the long term. Consequently, most new changes to the MCM are likely to correct problems affecting a few cases, or to adapt the rules of evidence and procedure so that they conform to incremental amendments to the UCMJ by Congress or developments occurring outside the armed forces.

In the military, leaders always must look forward and must avoid the mistake–as the quip goes–of preparing to fight the last war, instead of the next. Accordingly, in assessing the procedures for amending the *MCM*, the question should not be whether the current procedures could have handled massive revisions of the kinds seen in 1951, 1969, 1980, or 1984.[53]

---

47. *See id.* at 28.

48. *See id.* at 29.

49. *See id.*

50. Changes proposed by the JSC in 1998 and 2000 will conform the *MCM* to legislative amendments to the UCMJ concerning Article 56a (Sentence to Confinement Without Eligibility for Parole) and Article 19 (Jurisdiction of Special Courts-Martial). *See* 65 Fed. Reg. 39,883 (June 28, 2000); 63 Fed. Reg. 25,835 (May 11, 1998).

51. The military appellate courts and Court of Appeals for the Armed Forces have authored more than 100 volumes over the last fifty years of military justice caselaw, providing a significant body of law filling in the details and providing a judicial explanation for the UCMJ and *MCM*.

52. During the past three years alone, the total number of general and special courts-martial in the Army, Navy, Air Force, and Coast Guard have fallen from 5259 to 4397, for a total decrease of 16%. *Compare* Annual Reports on Military Justice for the Period October 1, 1998 to September 30, 1999 secs. 3-6, *available at* http://www.armfor.uscourts.gov/annual/FY97/FY97Rept.htm (last visited 4 Aug. 2000) (same). The long-term decreasing trend is even more dramatic in the Army. *See* Lawrence J. Morris, *Our Mission, No Future: The Case for Closing the United States Army Disciplinary Barracks*, 6 KAN. J.L. & PUB. POL'Y 77, 88 (1996) (noting that the number of general and special courts-martial in the Army has fallen from 6803 in 1980 to 1178 in 1995).

Rather, the question is whether the current procedures–which are now far more open–will satisfy the needs of the present and future, during which times the *MCM* likely will face annual revisions that add or adjust only a few rules at a time.

B. Limitations of Changes to the Rule-Making Process

Captain Barry and other proponents of reforming the *MCM* rule-making process surely do not view changing the process as an end in itself. On the contrary, they presumably see their reform proposals as the means to an end. They must believe that a better rule-making process will facilitate adoption of better rules, producing an improved military justice system.

Accordingly, in assessing the need for reforming the *MCM* rule-making procedures, two questions arise: (1) What kinds of changes to the military justice system do reformers want to make?; and (2) Will altering the *MCM* rule-making procedures bring about those changes?

For decades, commentators repeatedly have raised a familiar set of concerns about the military justice system. Presumably, many of the advocates who want to reform the *MCM* rule-making process hope that new procedures will overcome long-standing Department of Defense resistance to changing the system to address these concerns. They also may expect a new process to help them deal with other serious problems in the future.

For example, one recurring criticism of the military justice system, articulated mostly by attorneys rather than the general public, concerns the

---

53. This article does not suggest that the *MCM* rule-making procedures were necessarily inadequate in the past. Historically, major changes to the *MCM* generally have occurred in response to amendments to the UCMJ by Congress. In this context, greater public participation in the *MCM* rule-making process would have provided the President only limited benefits. The President had little discretion in conforming the *MCM* to the UCMJ revisions. Congress, moreover, typically has received significant public input before amending the UCMJ. As Captain Barry carefully describes, "[i]n the early years of the UCMJ, there was significant civilian interest in the military justice system, and there was notable input by civilian groups into the *legislative* process affecting statutory changes to military justice. However, there seems to be no evidence of a similar interest or participation in the rule-making process." Barry, *supra* note 2, at 244. It also bears noting that the President and the DOD have never shut out the public; although organizations and individuals with an interest in the military justice process sometimes have not availed themselves of the opportunity, they have always been free to communicate with the President and military officials regarding military justice matters.

independence of the military judiciary. Under the UCMJ and *MCM*, trial and appellate judges have no tenure of office.[54] In theory, if these judges render unpopular decisions, the Judge Advocate General for the service concerned could reassign them to non-judicial duties.[55] Although tenure of office does not necessarily immunize judges from outside pressure (as elected and appointed civilian judges have experienced), some commentators have argued that giving military judges fixed terms would make them more independent.[56] To date, however, neither Congress nor the Supreme Court has required the services to give their judges tenure of office.[57]

---

54. *See* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary–A Proposal to Amend the Uniform Code of Military Justice*, 2 WM. & MARY BILL RTS. J. 629, 629-30 (1994). The civilian judges of the Court of Appeals for the Armed Forces serve for terms of fifteen years. *See* 10 U.S.C. § 142(b) (2000). In 1999, the Secretary of the Army approved limited tenure for Army judges. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, paras. 8-1g and 13-12 (1999) (providing tenure for Army trial and appellate judges for a minimum of three years with limited exceptions).

55. *See* Lederer & Hundley, *supra* note 54, at 629-30.

56. *See* Hodson, *supra* note 25, at 53; Lederer & Hundley, *supra* note 54, at 668-73; Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps*, 28 SW. U. L. REV. 481, 531-33 (1999); Andrew M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 488-92; Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 284-89 (1994).

57. At the request of Congress, the Military Justice Act of 1983 Advisory Commission considered this issue and recommended against providing tenure to military trial and appellate judges. *See* 1983 REPORT, *supra* note 43, at 8-9. In *Weiss v. United States*, 510 U.S. 163, 181 (1994), the Supreme Court held that the accused failed to demonstrate that the factors favoring a fixed term of office "overcome the balance struck by Congress." The court gave the following three reasons for its decision:

> (1) [A]lthough a fixed term of office is a traditional component of the Anglo-American civilian judicial system, a fixed term of office has never been a part of the military justice tradition, given that courts-martial have been conducted in the United States for more than 200 years without the presence of a tenured judge and for more than 150 years without the presence of any judge at all; (2) while this does not mean that any practice in military courts which might have been accepted at some time in history automatically satisfies due process, the historical fact that military judges have never had tenure is a factor which must be weighed; and (3) applicable UCMJ provisions and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality . . . .

Id.

A second recurring criticism deals with the selection of court members. At present, the convening authority selects the members eligible to serve on courts-martial.[58] Although judicial decisions forbid commanders from using the power of selection to pack the court for the purpose of obtaining a specific result,[59] a commander with a lack of integrity potentially could skew choices in favor of the prosecution. Some reformers would like to see panel members selected randomly, much like juror venires in civilian criminal cases, in order to remove any temptation a convening authority might have to pervert the military justice system.[60] Congress and the JSC recently have been studying this issue.[61]

A third, often repeated, criticism deals with the influence commanders have over the military justice system.[62] Under current law, command-

58. *See* 10 U.S.C. § 825(d)(2) (2000) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

59. *See* United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991) (prohibiting stacking of the pool of potential members of the court-martial).

60. *See* James A. Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000); Guy P. Glazier, *He Called for His Pipe, and Called for his Bowl, and He Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998); Hodson, *supra* note 25, at 53.

61. In 1999, Congress directed the Secretary of Defense to submit a report on the method of selection of members of the Armed Forces to serve on courts-martial. *See* National Defense Authoization Act for Fiscal Year 2000 § 552, Pub. L. No. 106-65, 113 Stat. 513 (Oct. 5, 1999). Congress required that the report examine alternatives, including random selection, to the current system of selection of members by courts-martial by the convening authority. Congress specified that any alternative considered be consistent with member selection criteria of 10 U.S.C. § 25(d)(2). The JSC studied the issue and concluded that the current practice best applies the criteria of Article 25(d), UCMJ, consistent with demands of fairness and justice in the military justice system. *See* REPORT OF THE DOD JOINT SERVICE COMMITTEE ON THE METHOD OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL, EXECUTIVE SUMMARY (August 1999) (on file at the Criminal Law Division of the Army Office of The Judge Advocate General).

62. Colonel Mark Harvey, of the OTJAG-CLD, indicated the most frequent criticism by the public of the military justice system relates to the unit commander's discretionary decision to prefer charges and thereafter the general court-martial convening authority's decision to refer the charges to court-martial. Following trial, there is frequent criticism of the findings and sentence, and performance of the defense counsel. Complaints usually originate from the accused, victim or from their family members and friends. Criticism that the convening authority has too many roles or too much power in the military justice system is extremely rare. Colonel Harvey could recall less than ten complaints that the convening authority had too much authority under the UCMJ. Harvey Interview, *supra* note 20. *See also supra* note 20 (describing the role of OTJAG, CLD in responding to questions from the public).

ers determine whether to convene a court-martial[63] and what charges to refer.[64] After trial, they also have the power to approve or disapprove guilty verdicts and the power to remit punishments.[65] In addition, although commanders may not attempt to influence courts-martial,[66] the reality remains that the accused, the court-members, the witnesses, and the trial counsel usually fall within their commands. Many commentators, accordingly, believe that commanders should have less direct and indirect control over military justice.[67]

If reformers want to address these kinds of criticisms, the question arises whether changing the *MCM* rule-making process would help to achieve them. Generalizations are difficult because critics may see different solutions. I am doubtful, however, that reforming the rule-making process would have much effect on efforts to address these kinds of criticisms for three reasons.

First, the UCMJ limits the kinds of changes that the President may make through amendments to the *MCM*. Although the President has the power to promulgate rules of evidence and procedure, these rules may not contradict anything in the UCMJ, such as the panel member selection criteria in Article 25(d).[68] As a result, no matter what the *MCM* rule-making process looks like, the President generally cannot effect radical changes to the military justice system. For example, the President could not amend the *MCM* to take away the commander's discretion to decide which kinds of courts-martial to convene, which charges to refer to courts-martial, or which service members are eligible to serve as members of particular courts-martial.

---

63. *See* 10 U.S.C. §§ 822-824 (power to convene courts-martial).

64. *See id.* § 834 (referral of charges).

65. *See id.* § 860 (actions of the convening authority after trial).

66. *See id.* § 837 (prohibiting unlawful command influence).

67. *See* Spak & Tomes, *supra* note 56, at 512 (discussing the problems of the commander's strong influence); Hodson, *supra* note 25, at 45 (proposing a requirement to limit prosecutorial discretion by requiring a judge advocate to review a commander's charges for legal sufficiency); Donald W. Hansen, *Judicial Functions for the Commander*, 41 MIL. L. REV. 1, 40 (1968) (advocating a similar proposal).

68. *See* 10 U.S.C. § 836 (authorizing the President to promulgate rules of evidence and procedures "which may not be contrary to or inconsistent with" the UCMJ). *See also supra* note 61 (discussing the Report of the DOD Joint Service Committee on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial).

Second, even if the *MCM* rule-making process allowed more external input, the President seems unlikely to use the process to make major reforms of the military justice system. In the past, the President has reformatted the rules of evidence and procedure, but has not changed the overall operation of the system. Instead, the President has left that kind of task to Congress. For example, as noted above, Congress created military judges in the Military Justice Act of 1968;[69] the President did not attempt this dramatic reform of the military justice system through executive order.

Third, proposals for reforming the *MCM* rule-making process generally involve adding more formalities. For instance, as noted above, Captain Barry advocates creating new committees, imposing new publication requirements, delaying the effective date of changes, and so forth.[70] Experience from other fields suggests that adding formalities of these kinds generally impedes rule-making efforts.[71] Indeed, the more significant and the more controversial a desired amendment, the more likely someone will use a formal procedure to block it.

In sum, changes to the process of amending the *MCM*, no matter how reasonable, will not trigger radical change or facilitate any large-scale reforms of the military justice system. Rather, as noted in the previous discussion, they mostly will affect the manner in which the President makes adjustments to the rules of evidence and procedure, either to correct errors and oversights, or to implement incremental legislative changes, or to conform the *MCM* to developments in the civilian courts.

C. Separation of Powers Concerns

The structure of the military justice system reflects a balance of power between Congress and the President. At present, Congress controls the content of the UCMJ, while the President has authority over the *MCM*.[72] Imposing new restrictions or procedures on the rule-making process may

69. *See supra* note 39.

70. *See supra* Part I.

71. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 162-65 (2000) (noting how movements to less formal rule-making increase the number of rules made by administrative agencies).

72. *See* 10 U.S.C. § 836 (granting the President power to promulgate the rules in the *MCM*, so long as they do not conflict with the UCMJ).

dilute the President's power. Accordingly, any change to the *MCM* rule-making process necessarily affects the overall balance of power.

Balances of power may shift from time to time within the boundaries established by the Constitution. Yet, caution dictates careful thought before weakening one political branch. In many instances, tampering with long established balances of powers may have far-reaching effects and unintended consequences. As one example, reducing the President's power over the *MCM* might cause him or his political subordinates to adjust the manner in which they exercise their discretion in dealing with military justice issues. For instance, as noted below, the President may use greater political scrutiny when appointing judges to the Court of Appeals for the Armed Forces.

One response to the observation that the military justice system reflects a balance of power might be that the President derives his power to promulgate *MCM* provisions through UCMJ Article 36.[73] If Congress desired, it could eliminate this delegation. Using its power to "To make Rules for the Government and Regulation of the land and naval forces,"[74] Congress could establish its own rules of evidence and procedure by statute. Accordingly, the argument would be that the balance of power has no great constitutional significance.

This reasoning, although not necessarily incorrect, fails to take into account the special role of the President in our system of government. Article II, section 2 makes the President the Commander in Chief.[75] In *United States v. Swaim*,[76] the Supreme Court held that this status gives the President at least some authority over courts-martial, even in the absence of legislation from Congress.[77] The precise implications of this holding

---

73. *See id*.

74. U.S. CONST. art. I, § 8, cl. 14.

75. *See id*. art. 2, § 2, cl. 1.

76. 165 U.S. 553 (1897).

77. *See id.* at 558 (holding that "it is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial" even without express statutory authorization).

78. *See* William F. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 862-63 (1959) ("Unless restricted by express statute, the President has power, under the Constitution, to issue regulations defining offenses within the armed forces, prescribing punishments for them, constituting tribunals to try such offenses, and fixing the mode of procedure and methods of review of proceedings of such tribunals."). *See also* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 109 (1951) (reaching similar

remain unclear, but some commentators have concluded that the President could have promulgated the rules in the *MCM* even without the grant of authority from Article 36.[78] The Court of Military Appeals, moreover, has upheld an *MCM* provision in at least one instance based solely on the President's constitutional authority and not any statutory grant of power.[79]

Another response to worries about separation of powers might be that the President in reality exercises little power over the *MCM*. In most instances, the JSC prepares the changes and the President simply signs an executive order putting them into effect. As a result, the President and his political subordinates probably would have little objection to changing the rule-making process, even if the changes theoretically weakened executive power.

This response has much truth in it. Still, in a few instances, the President or political members of the DOD may want specific amendments to deal with politically charged topics. The list of aggravating factors such as capital offenses (of which at least one must be found for a sentence of death), may provide one example.[80] A President with strong views on capital punishment may wish to retain plenary power to alter the list. If restrictions on the *MCM* rule-making process inhibit the President, then the President might react by using other powers to influence the military justice system.

III. Assessment of Captain Barry's Seven Proposals

Captain Barry's proposals appear modest and reasonable at first glance. The recommendations generally strive to make more information available, to expand the number of persons who can participate in the *MCM* revision process, and to establish additional stages of review. The

78. (continued) conclusions about the President's inherent power to regulate discipline in the armed forces); EDWARD S. CORWIN, THE PRESIDENT, OFFICE AND POWERS 316 (3d ed. 1948) (same). *But see* Ziegel W. Neff, *Presidential Power to Regulate Military Justice*, 30 JUDGE ADVOCATE J. 6, 6-11 (1960) (arguing that the Constitution does not grant the President plenary power over military justice).

79. *See* United States v. Ezell, 6 M.J. 307, 316-18 (C.M.A. 1979) (upholding a provision in the *1969 MCM* allowing commanding officers to issue search warrants, even though the UCMJ at that time did not authorize the President to create rules governing pretrial activities).

80. *See* MCM, *supra* note 3, R.C.M. 1004(c) (listing aggravating factors, at least of one of which is necessary for a sentence of death).

support for most of the suggestions, from the ABA House of Delegates and from Major General Hodson, gives them weight.

Yet, upon closer inspection, the benefits from adding new procedures and formalities to the *MCM* amendment process turn out to be largely illusory. The proposals at best would offer only marginal improvements to the present procedure, while imposing additional burdens–sometimes substantial burdens–on the system. For these reasons, Congress, the President, and the DOD should hesitate to adopt them without more evidence that the benefits of change will outweigh the costs.

A. The ABA's Advisory Committee Proposal

In 1997, as noted above, the ABA House of Delegates by formal resolution recommended creating "a broadly constituted advisory committee, including public membership and including representatives of the bar, the judiciary, and legal scholars, to consider and recommend rules of procedure and evidence at courts-martial."[81] The report accompanying this recommendation explains that members of the bar would include military trial and defense counsel as well as civilian practitioners.[82]

Captain Barry and the report accompanying the ABA proposal provide little substantive argument for this recommendation. On the contrary, they justify the recommendation solely by pointing out that the Federal Judicial Conference has the benefit of a similar advisory committee to assist it in devising rules of evidence and procedure for the federal courts.[83] They would like to see the same kind of assistance in the military context.

---

81. ABA Summary, *supra* note 24, at 2.

82. STANDING COMMITTEE ON ARMED FORCES LAW ET AL., REPORT TO THE HOUSE OF DELEGATES 5 (1997) ("First, the Committee recommends a statute be enacted by Congress establishing a broadly constituted advisory committee, including public membership, to make recommendations concerning presidential rulemaking affecting courts-martial and appeals, similar to committees prescribed for other Federal courts.").

83. *See id.* at 3, 11. Federal law provides: "The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed . . . under this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges." 28 U.S.C. § 2073(a)(2) (2000).

This proposal is neither radical nor dangerous. Its implementation would not require dramatic effort. The JSC, or a similar body, could compile a list of names of potential advisors who would agree to serve on an advisory committee without pay. This advisory committee from time to time could offer suggestions for changes to rules of evidence and procedure in the *MCM*.

Why then has the DOD declined to establish an advisory committee? One reason may be that little need exists for such a committee. Members of the bench and bar, academics, and others already have the ability to recommend changes directly to the JSC. They do not have to act through an advisory committee, although they certainly could create their own private committees if they desired. Indeed, as Captain Barry indicates, SCAFL has periodically made recommendations to the JSC that were carefully considered by the JSC.

Department of Defense Directive 5500.17 requires the JSC to conduct an annual review of the *MCM*, with an eye to finding needed amendments.[84] The same directive explicitly provides: "It is DOD policy to encourage public participation in the JSC's review of [the *MCM*]."[85] The JSC has implemented these requirements.[86] As a result, any member of the public or Armed Forces may communicate suggestions to the JSC for changing rules of procedure or evidence.

Members of the JSC's working group, indeed, long have urged soldiers and civilians to participate in the amendment process. In 1992, working group member Major Eugene Milhizer published an article explaining the process in *The Army Lawyer.* At the end of the article he proclaimed:

> Amending the Manual should be a cooperative process that incorporates input and ideas from a variety of interested sources. All persons concerned with the quality of the military justice system are encouraged to submit to the JSC their suggestions for amending the Manual.[87]

---

84. DOD DIRECTIVE NO. 5500.17, *supra* note 10, § E2.1.

85. *Id.* § E3.4.2.

86. *See* JOINT SERVICE COMMITTEE OF MILITARY JUSTICE, INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE pt. III (March 2000) [hereinafter JSC OPERATING PROCEDURES].

87. Eugene Milhizer, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 81.

After giving the mailing address for sending comments, Major Milhizer concluded: "Take the time to help improve military justice. It certainly is worth the effort."[88] For the past seven years, the JSC has used similar notices published in the Federal Register to solicit comments and suggestions.[89]

Starting in 2000, moreover, the JSC service representatives have begun sending annual calls for proposals to the judiciary, trial, and defense organizations, and judge advocate general schools.[90] The JSC will acknowledge all proposals received from individuals or organizations outside DOD, discuss the proposal, and notify the sender in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it, or accept it.[91] Although these organizations previously have had the opportunity to make suggestions, these new procedures may provide them greater encouragement.

The process of implementing the new psychotherapist-patient privilege into Military Rule of Evidence 513 provides an excellent example of public participation under the current system of military rule-making and the impact it may have. The initial draft of Military Rule of Evidence 513 developed by the JSC and published in the Federal Register did not include "clinical social worker" within the definition of "psychotherapist." This draft received a large volume of oral and written public comment, including suggestions from the American Psychiatric Association, and the American Psychology Association. At the public hearing, the JSC heard persuasive testimony about the extensive and important role of clinical social workers in psychotherapy. As a result of this informed public comment from experts in the field, the JSC modified the definition of "psychotherapist" to include "clinical social workers."[92]

---

88. *Id.*

89. *See, e.g.*, 58 Fed. Reg. 19,409, 19,410 (1993) (soliciting comments on proposed changes to the *MCM*).

90. Each JSC service representative evaluates proposals received within the service and sponsors proposals, as appropriate to the JSC for consideration in the next annual review cycle. *See* JSC OPERATING PROCEDURES, *supra* note 86, pt. III.

91. *See id.*

92. Exec. Order No. 13,140, 64 Fed. Reg. 196, § 2(a) (Oct. 12, 1999).

Captain Barry himself briefly alludes to another reason that JSC has not sought to create an advisory committee. In particular, the proposed advisory committee almost certainly would come within the coverage of the Federal Advisory Committee Act.[93] This Act imposes nontrivial record keeping and other requirements on advisory committees.[94] It also expressly discourages the creation of unnecessary committees.[95]

Although the JSC undoubtedly could insure compliance with the Act, the effort does not seem worthwhile. As noted previously, interested members of the bench and bar already have ample means to advance proposals for changing the *MCM*. Creating an advisory committee, ironically, probably would not make more input possible. On the contrary, it might reduce the input because federal advisory committee members may fall within the scope of federal conflict of interest laws.[96] As a result, defense attorneys who serve on the committee might not be able to participate in decisions that would benefit their clients This sacrifice seems too great; some of the most likely advisory committee members–like Captain Barry–have active legal practices with many clients.

Finally, Captain Barry notes that changes to the *MCM* are political.[97] Although he is quite correct, creating an advisory committee would not ensure more democratic results than those achieved under the present system. Members of advisory committees are no more politically accountable than the JSC. If the problem is that certain proposals to change the military justice system are likely to raise substantial political controversy, then Congress or the President ought to play the lead role in making them. Unlike advisory committees, they are subject to democratic pressures.

---

93. 5 U.S.C. app. 2 §§ 1-12.

94. *See id.* § 10 (requiring meetings open to the public, detailed minutes, and public inspection of documents).

95. *See id.* § 2(b)(1) ("[N]ew advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary.").

96. *See* Michelle Nuszkiewicz, Note, *Twenty Years of the Federal Advisory Committee Act: Its Time for Some Changes*, 65 S. CAL. L. REV. 957, 961 (1992) (arguing that 18 U.S.C. § 208 bars advisory committees from participating in matters in which they or their firms have a financial interest). The Federal Advisory Committee Act itself mandates that advisory committees not "be inappropriately influenced . . . by any special interest." 5 U.S.C. app. 2 § 5(b)(2).

97. *See* Barry, *supra* note 2, at 246 (quoting 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE ¶ 1-54.00, at 30 n.148 (2d ed. 1999)).

B. The ABA's Rule-making Procedure Proposal

The ABA, as noted above, also wants to see "a method of adopting rules of procedure and evidence at courts-martial which is generally consistent with court rule-making procedure in Federal civilian courts."[98] Evaluating this proposal first requires an understanding of the rule-making procedure in the federal civilian courts. It then calls for an assessment of the benefits and costs that the proposal would produce.

1. Overview of Federal Civilian Rule-Making Procedure

Various authors have described the rule-making procedure in the federal civilian courts.[99] By statute, Congress has given the Supreme Court the power to "prescribe general rules of practice and procedure for the federal courts."[100] These rules include the Federal Rules of Criminal Procedures and Federal Rules of Evidence, which govern federal civilian criminal proceedings and serve the same purpose as the Rules for Courts-Martial and the Military Rules of Evidence.

The Supreme Court does not draft procedural and evidentiary rules itself. Instead, the Court relies on the recommendations of a body called the "Judicial Conference of the United States."[101] The Chief Justice of the United States chairs the Judicial Conference.[102] Its other members include the chief judges of the United States Courts of Appeals, twelve district court judges, and the Chief Judge of the Court of International Trade.[103]

The Judicial Conference relies heavily on an important committee known as the "Standing Committee on Rules of Practice and Procedure."[104] The Judicial Conference also receives assistance from various advisory committees, including an Advisory Committee on Criminal

98. ABA Summary, *supra* note 24, at 2.

99. *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Thomas E. Baker, *An Introduction to Federal Court Rule Making*, 22 TEX. TECH. L. REV. 323, 324 (1991); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

100. 28 U.S.C. § 2072(a) (2000).

101. *See* Baker, *supra* note 99, at 328.

102. *See id.*

103. *See id.*

104. *Id.* at 329.

Rules.[105] The membership of the advisory committees includes state and federal judges, practicing lawyers, and law professors.[106] The Chief Justice appoints the members of all the committees.[107]

Each advisory committee has a continuing obligation to study the rules within its field.[108] It may consider suggestions for revisions from any source, and may generate its own proposals.[109] Proposals approved by the advisory committee undergo review first by the Standing Committee.[110] If the Standing Committee approves them, the Judicial Conference reviews them next.[111] The Judicial Conference then may forward them to the Supreme Court.[112]

The Supreme Court generally approves the recommendations of the Judicial Conference. It then must forward the proposals to Congress during a regular session, but prior to the start of May.[113] To give Congress the opportunity for review, the rules do not become effective until December.[114] During the interim, Congress may pass legislation disapproving them.[115] Congress also can bypass the Federal Civilian Rulemaking procedure in whole or in part.[116]

---

105. *See id.*
106. *See id.*
107. *See id.*
108. *See* 28 U.S.C. § 2073(b) (2000).
109. *See* Baker, *supra* note 99, at 329.
110. *See id.*
111. *See id.*
112. *See id.*
113. *See* 28 U.S.C. § 2074(a).
114. *See id.*
115. *See id.*
116. For example, Congress went against the recommendations of the Advisory Committee when it adopted Federal Rules of Evidence 413, 414, and 415. Congress originally bypassed the normal rule-making process and passed these three evidentiary rules subject to reconsideration upon objection by the Judicial Conference. The Advisory Committee on Evidence Rules met and considered eighty-four written comments, overwhelmingly opposing the new rules. The Judicial Conference objected and proposed, in the alternative, that Federal Rules of Evidence 404 and 405 be amended to correct ambiguities and constitutional infirmities in Federal Rules of Evidence 413, 414, and 415. At the time, the Standing Committees were composed of over forty judges, practicing lawyers, and academics. Everyone, except the Department of Justice, opposed proposed Federal Rules of Evidence 413, 414, and 415. In spite of overwhelming opposition by federal rule makers, Congress declined to reconsider its original passage of Federal Rules of Evidence 413, 414, and 415 and these rules became law in 1995. *See* FED. CRIM. CODE & RULES 256-58 (2000); SALTZBURG, *supra* note 41, at 673-74.

2. Benefits of Adopting the Civilian Rule-Making Process

Neither Captain Barry nor the ABA explain fully how they envision the civilian rule-making procedures working in the military context. One likely possibility would involve a military judicial conference composed of military judges and headed by the JSC. The military judicial conference would make proposals after receiving recommendations from advisory committees. The President would promulgate changes to the *MCM* only after the advisory committees, the military judicial conference, and the JSC all had approved them.

This approach probably would not require new legislation. The President has the power to create advisory committees and could direct military judges to serve as part of a judicial conference. (By contrast, as discussed below, Major General Hodson's proposal to involve members of the Court of Appeals for the Armed Forces would require action by Congress.) The President could further exercise discretion not to issue amendments unless they had obtained full approval.

The more important issue is whether a new rule-making process of this sort would provide any substantial benefit. Captain Barry and the ABA, unfortunately, do not explain in any detail how their proposal would improve the current rule-making process. On the contrary, as mentioned previously, the ABA's report for the most part simply notes that the federal courts use a different system. Presumably, they believe that the formal participation of large numbers of experienced personnel, and the multiple stages of review, would provide better proposals for changes to the *MCM*.

Their view that a judicial conference would enhance the process might prove true, if tested, but I see substantial reason for some skepticism. In particular, Captain Barry and the ABA fail to note that a wide range of commentators recently have criticized the federal civilian court rule-making process. Although no one has called for scrapping the process altogether, their valid objections do raise doubts about the benefits of importing similar formalities into the *MCM* amendment process.

Professor Thomas Baker, who has served on an advisory committee for civil procedure, has advanced perhaps the leading criticism of the civilian court rule-making process. He has observed that most of the participants in the process make their decisions based simply on anecdotal evidence and subjective normative judgments.[117] Although the judges, practitioners, and academics who serve on the various committees have

extensive practical experience, they generally have no empirical or scientific basis for assessing the merits of proposed amendments.[118] Other observers also have advanced this criticism.[119]

The JSC, at present, undeniably has the same problem when it evaluates proposals for changing the *MCM*. It often must make determinations based on informed intuition rather than on any kind of objective data. But involving more experts in the process will not necessarily make this problem go away. Advisory panels and multiple layers of review will add more opinions, but they may not provide any better information than the JSC already can obtain through its study of the military justice system and by receiving public comment.[120]

Another problem with the civilian rule-making process is that it invites the meddling of special interest groups. Professor Linda S. Mullenix, who like Professor Baker also has served on the civil procedure advisory committee, has documented how the process has become increasingly politicized.[121] Because procedural rules often will affect some persons more than others, the most concerned individuals inevitably have a strong desire to seek favorable treatment, regardless of the consequences to others. Various other scholars have made similar observations.[122]

---

117. *See* Baker, *supra* note 99, at 335.

118. *See id.*

119. *See* Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 575-82 (1994).

120. Consider, for analogy, the famous "Emperor of China" fallacy. If you asked everyone in China how tall the emperor is, would their average answer tell you his actual height to the ten thousandth or ten millionth of an inch? Obviously not, unless everyone you asked had some basis for knowing the true height, and was not merely guessing.

121. *See* Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

122. *See, e.g.*, Paul D. Carrington, *Making Rules Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-transubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2075 (1989) (describing lobbying efforts); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 17-18 (1985) (same).

Professor Mullenix laments that advisory committees really have no good option for addressing this form of politicization. She states:

> The Advisory Committee's dilemma, then, is this: On the one hand, it can . . . shunt all potentially controversial rule reforms to Congress. If this happens, the Advisory Committee will become an ineffective third branch institution. On the other hand, the Advisory Committee can embrace the new openness, [and] meet interest group demands . . . .[123]

The second choice, obviously, does not help the system because it produces results that favor the most vocal advocates over all others, regardless of the merits of their positions. This problem is particular troubling when the results concern maintenance of good order and discipline in the military, because this important objective often has no particular spokesperson.[124]

True, under current procedures, special interest groups already might attempt to influence the JSC. Defense counsel, for example, can submit comments and proposals to the JSC advocating positions that specifically would aid their clients.[125] They also can participate at public meetings. They further can write law review articles or newspaper editorials.

This type of input by special interests, however, differs in an important respect from the kind that Professor Mullenix discusses. Under current rules, private parties have no formal role in the amendment procedure. They can make suggestions, but they cannot vote on proposals. The JSC thus does not have to confront the dilemma described by Professor Mullenix.

In addition, to a large extent, the civilian rule-making process serves a different function from the current *MCM* rule-making procedures. When the federal courts amend their rules, they usually are breaking new ground. They are creating novel evidentiary standards or they are implementing procedural innovations. These kinds of changes in theory might benefit

---

123. Mullenix, *supra* note 121, at 836-37.

124. *See* Parker v. Levy, 417 U.S. 733 (1974) (noting the differences between the military community and the civilian community, and between military law and civilian law and concluding that the UCMJ cannot be equated to a civilian criminal code).

125. For example, in March 2000, the Army Defense Appellate Division submitted nine proposals for change to the Army JSC service representative. *See National Institute of Military Justice*, 76 MILITARY JUSTICE GAZETTE 2 (Apr. 2000).

from the prolonged deliberation that the civilian rule-making procedures foster.

The JSC does important work, but realistically it plays a less innovative role than the Judicial Conference. The JSC usually follows changes that already have occurred in civilian rules of evidence and procedure. The 1999 amendments to the *MCM* provide a good example.[126] In those amendments, as discussed above, the President created a psychotherapist-patient evidentiary privilege and also certain special rules for child witnesses in sexual abuse cases.[127] These amendments, while significant, did not require the JSC to engage in original thinking. The federal civilian courts have recognized a psychotherapist-patient evidentiary privilege since 1996,[128] and state courts have had special procedures for child testimony for many years.[129] Thus, the public commentary and other complicated procedures used by the federal courts for rule-making infiltrate through the JSC into the *MCM*.

Finally, the civilian rule-making procedure tends to take a long time.[130] The process, as described above, involves multiple layers of approval and review. In many instances, minor, uncontroversial, but important changes may take several years to go into effect. By contrast, the JSC annual review system results in a systemic review of the MCM within each year. Indeed, its annual review contemplates that it generally will solve all problems that arise.

The civilian rule-making process has produced a workable and not overly controversial set of rules for the federal courts. The *MCM* rule-making procedure, however, has achieved the same result for military courts. In deciding whether the military should adopt the civilian process, the question boils down to whether the benefits outweigh the burdens. In view of the difficulty of stating the benefits of replicating the civilian pro-

126. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

127. *See id.*

128. *See* Jaffee v. Redmond, 518 U.S. 1, 16-18 (1996) (holding that Federal Rule of Evidence 501 requires federal courts to recognize a psychotherapist-patient privilege).

129. *See* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Confrontation, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 214-15 (1999) (discussing this trend and the constitutional implications).

130. *See* Mark Owens Kasanin, *Amending Rule 9(h): An Example of How the Federal Rules of Civil Procedure Get Changed*, 27 J. MAR. L. & COM. 417 (1996) (providing an interesting narrative account of a minor amendment to a rule affecting admiralty cases).

cess, and the apparent problems replicating it would introduce, a convincing case has not been made.

C. The ABA's Congressional Oversight Proposal

In addition to its two other recommendations, the ABA also has asked for "requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial."[131] The federal civilian court rule-making procedure, as noted above, incorporates these features.[132] It requires the Supreme Court to transmit proposed changes to Congress and affords Congress at least seven months to intervene before new rules go into effect.

The pertinent statute governing federal civilian court rule-making says:

> The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such a rule shall take effect no earlier than December 1 of the Year in which such rule is so transmitted unless otherwise provided by law.[133]

Two points about this provision require specific mention. First, the statute does not require Congress to take any action. If Congress does nothing, the new rules become effective. Second, to block proposed changes, Congress must pass an actual law. Both houses must approve a bill and present it to the President for signature or veto.

Imposing a similar waiting period for amendments to the *MCM* rule-making procedures would not work a fundamental change in the JSC's current procedures. At present, as noted above, the JSC waits seventy-five days after announcing changes to the *MCM* before transmitting them to the President.[134] Without great difficulty, the JSC could extend the delay to

131. ABA Summary, *supra* note 24, at 2.
132. *See infra* Part III.B.1.
133. 28 U.S.C. § 2073(a) (2000).
134. *See* DOD DIRECTIVE 5500.17, *supra* note 10, at E2.4.5.

seven months to give Congress the same amount of time that it has to review changes in the civilian rules.

Still, I doubt that Congress actually would take advantage of an extended period of delay to block proposed *MCM* changes. In general, Congress has deferred to the military in determining the procedural and evidentiary needs of military justice system. To my knowledge, it has never attempted to overrule any *MCM* provisions by statute. Indeed, it often has amended the UCMJ to comport with the DOD on policy recommendations. Thus, the proposal would do little more than prolong the *MCM* rule-making process.

In addition, recent experience from federal civilian court rule-making procedure suggests that a required delay before rules become effective may give more power to special interest groups who want to defeat proposed changes. For example, several years ago, the Supreme Court transmitted to Congress a new civil procedure rule requiring litigants to make certain disclosures in discovery.[135] Lobbyists nearly killed the measure in Congress.[136]

D. General Hodson's Military Judicial Conference Proposal

More than twenty-five years ago, Major General Hodson urged that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals [now the Court of Appeals for the Armed Forces], be established and given power to prescribe rules of procedure and evidence."[137] This proposal for altering the *MCM* rule-making procedure resembles the ABA's second recommendation, but with a major difference. It would take authority away from the JSC and President, and vest it in the civilian judges on the Court of Appeals for the Armed Forces.

The previous discussion has highlighted some of the reasons to doubt that the judicial conference model of rule-making greatly would improve the present work of the JSC. Major General Hodson's proposal, though,

---

135. *See* Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49 (1997).

136. *See id.*

137. Hodson, *supra* note 25, at 53.

would have a further potentially harmful effect. In particular, it would tend to upset the balance of power between Congress and the President.

To put Major General Hosdon's proposal into effect, Congress would have to amend UCMJ Article 36.[138] The amendment would have to say that the President could not alter the rules of evidence and procedure except upon the Court of Appeals for the Armed Force's recommendation. Otherwise, the President simply could ignore the Court of Appeals for the Armed Forces in the rule-making process.[139]

This amendment to Article 36 would raise possible constitutional questions. The UCMJ prevents the President from discharging members of Court of Appeals for the Armed Forces for any reason other than neglect of duty, misconduct, or mental or physical disability.[140] In general, Congress may not impose restrictions on the President's ability to discharge individuals who exercise executive functions, if the restrictions would "unduly trammel on executive authority."[141]

The President would have a substantial argument that deciding the kinds of rules that courts-martial should have is an executive function. The President has created rules for courts-martial for half a century under the UCMJ and did the same earlier under the Articles of War. Indeed, the President even has established rules in the absence of legislation under his powers as Commander-in-Chief.[142] Because a duty to act only with the Court of Appeals for the Armed Force's approval would trammel on this important function, the only question is whether the effect is excessive.

In any case, even if the provision would not violate the Constitution, it would alter the current balance of power between Congress and the President. The measure clearly would weaken the President's role in the process. Congress would retain complete control over the content of the

---

138. *See* 10 U.S.C. § 36 (2000) (authorizing the President to promulgate procedural and evidentiary rules).

139. Major General Hodson's proposal also would require legislation mandating that the Court of Appeals for the Armed Forces participate in the rule-making process. *Cf.* 10 U.S.C. § 946 (requiring judges of the Court of Appeals for the Armed Forces to serve on a committee to review the UCMJ).

140. *See id.* § 142(c).

141. *See* Morrison v. Olson, 487 U.S. 654, 691 (1988).

142. *See supra* Part II.C.

UCMJ, while the President would lose the power to change the *MCM* without approval from others.

The President might overlook this shift in power. Just as easily, however, the proposal might have far reaching consequences. For example, the President's selection of judges for the Court of Appeals for the Armed Forces might become more political. Similarly, the President might put greater pressure on the service secretaries to oversee criminal justice issues. Again, the question is whether the potential benefit outweighs the possible cost.

E. Captain Barry's Public Availability Proposal

Captain Barry, as noted above, does not merely advocate adopting the proposals of the ABA and of Major General Hodson. On the contrary, he also advances three significant additional recommendations of his own. He first urges creating an enforceable "mechanism to make available to the public the contents [of] and justifications for . . . proposals . . . generated within DOD."[143] Captain Barry states: "An open process that would allow for access not only to *all* proposals–*but to their justifications and explanations as well*–would clearly be a huge improvement."[144]

This recommendation requires some background information to evaluate. At present, although anyone may suggest *MCM* changes to the JSC, traditionally most proposals do not come from the general public. Instead, they originate from within the DOD. Either service members make them, or they come down from the DOD leadership.

The origin within the DOD of the majority of proposals should not come as a surprise. Judge advocates have the most involvement in the military justice system. They also tend to understand the proper channels through which to make recommendations for amending the *MCM*. Despite the newly instituted annual call to the public for suggestions, judge advocates probably will continue to have a dominant role in the process.

Although Captain Barry does not state this point explicitly, he may be assuming–and, if so, correctly–that the DOD could implement a requirement that any DOD personnel who make recommendations provide writ-

143. Barry, *supra* note 2, at 275.
144. *Id.* (emphasis in original).

ten justifications for them. The DOD then could require the JSC to publish these proposals and their justifications in the Federal Register. The JSC then would have to disclose and explain any action taken on the proposals.

This recommendation, like all of Captain Barry's suggestions, appears reasonable enough. The JSC could follow his suggestion without having to give up any aspect of its current practices. Again, the only question is whether the benefit justifies the burden.

The public might benefit from disclosure of the JSC's reasons for rejecting proposals. Civilian defense counsel, for instance, may wish to criticize what they consider insufficient reasons for rejecting proposals that might benefit their clients. In addition, a public record of what the JSC has and has not considered would assist anyone thinking about submitting future changes.

The burden of the proposal, in some ways, does not seem very great. Most DOD personnel who make proposals already are providing written justifications for their adoption. When the JSC decides to make changes, moreover, it usually writes an analysis or discussion section explaining their purpose and effect. Accordingly, Captain Barry's proposal would impose a significant new burden only in requiring to the JSC to explain its reasons for declining to adopt proposals generated within the DOD.

The JSC, however, has understandable reasons for wishing to avoid the process of justifying its decisions not to adopt proposals. Unless they are superficial and unhelpful (for example, "The proposed changes are unwarranted."), providing explanations may take a great deal of work. If the JSC rejected a large number of proposals, it might have to increase the number of personnel assigned to its working group or ask the current members to neglect their other duties so that they could write reasons for rejecting the proposals. Efficiency of operation is of particular concern as the military services have been downsized.

Experience in other areas also indicates that the task of providing written justifications in formal rule-making procedures can become increasingly burdensome. The Administrative Procedure Act, for example, requires agencies to provide a "concise general statement" of its rationale for rules.[145] Many agencies have found that if they provide only a short statement, they open themselves up to criticism. Accordingly, they try to provide as comprehensive justifications as possible. Professor Todd

145. 5 U.S.C. § 553(c) (2000).

Rakoff has observed: "Statements of Justification that used to be a few paragraphs or pages now run to tens of pages, each three columns wide."[146]

From the JSC's perspective, moreover, providing reasons for each action not taken might cause unnecessary and harmful embarrassment. For example, suppose a judge on the Army Court of Criminal Appeals recommends changes to the *MCM* and the JSC decides not to implement them. The JSC certainly would not relish the task of calling public attention to what it considers the flaws in the judge's ideas. Fear of public criticism, moreover, might dissuade others from recommending changes.

In sum, the issue has two sides, and no clear answer. Here, the stakes do not seem very large. Although the JSC probably should decline to act, it could attempt to follow Captain Barry's suggestion on a trial basis. If the burden proves excessive, then it could rethink the issue.

F. Captain Barry's Minutes Proposal

Captain Barry also has recommended that the JSC make available to the public the minutes of its meetings and the minutes of its working group.[147] I have seen the minutes of a few meetings, and they generally contain only minimal information about its decisions. Because the JSC and its working group diligently keep these records, the proposal would impose little or no burden on them. The JSC, indeed, already publishes the analysis to proposed changes in the Federal Register.

On the other hand, confidentiality often serves important purposes. For example, Congress exempted deliberative process material from disclosure under the Freedom of Information Act for three policy reasons: first, to encourage, open, frank discussions on matters of policy between subordinates and superiors; second to protect against premature disclosure of proposed policies before they are finally adopted; and third, to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for agency action.[148]

---

146. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000).

147. *See* Barry, *supra* note 2, at 275.

148. *See* U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION GUIDE AND PRIVACY ACT OVERVIEW 216 (1998).

Releasing the JSC minutes potentially could harm all of these interests and particularly the third.

G. Captain Barry's JSC Proposal

Captain Barry finally complains that the JSC's membership at present does not extend beyond the "five officers chiefly responsible for the administration of military justice in the five services." Although he does not spell out exactly whom he would like to see included, he does note that the ABA's Standing Committee on Armed Forces Law previously has urged the expansion of the JSC to "include public members."[149]

This proposal raises some of the same considerations as the earlier proposal to create a broadly-constituted advisory board.[150] To the extent that the additional members would serve only to provide advice and make proposals, questions of need again arise. Given that any member of the public already can suggest changes to the *MCM*, adding more members to the JSC solely for that purpose would not accomplish much.

The new members, however, probably would want to do more than just make suggestions. They also would want to vote for or against proposals for changing the *MCM*. Voting power would raise questions about how the JSC could avoid the distorting effects of special interests. The Federal Advisory Committee Act and conflict of interest rules also may pose problems.

At present, some bias may exist within the JSC, but its extent should not be exaggerated. As Captain Barry rightly notes, the five members of the JSC have primary responsibility for administration of military justice in their services. This responsibility does not mean that they represent only the interest of the prosecutors. On the contrary, they represent the needs of the entire system. In fact, JSC members normally have had experience either as defense counsel or trial judges, or both.

Sometimes the JSC takes positions that favor the government. At other times, however, the JSC approves measures favorable to the accused. For example, as noted earlier, last year the JSC approved new *MCM* provisions creating a psychotherapist-patient evidentiary privilege.[151] This

149. Barry, *supra* note 2, at 275.

150. *See supra* Part III.B.

provision aids the accused, who may have made incriminating statements to psychiatrists or social workers. Another example of an amendment that favors the accused is the 1998 amendment to Rule for Court-Martial 916(j) that provides a mistake of fact defense to a prosecution for carnal knowledge when the accused believed that the victim was at least sixteen years old at the time of the sexual intercourse.[152]

By contrast, if members of the public were to serve on the JSC, they might have difficulty subordinating any professional interests that may differ from the general needs of the military justice system. Defense counsel, for instance, naturally and justifiably would seek rules that tend to aid their clients, while voting against amendments favorable to the prosecution. This type of bias could have a distorting effect on the *MCM*.

Perhaps to some extent, the JSC could cancel out potential bias by including members with opposing interests. For example, although logistics might prove difficult, the JSC conceivably could include trial counsel or commanders to weigh against the views of defense counsel. In the end, however, the question remains whether it makes sense to disturb the JSC's formally neutral composition. I am skeptical of the need in view of the JSC's own experience and its willingness to obtain outside views.

V. Conclusion

The JSC has made significant progress in opening up the process of amending the *MCM*. Much of credit for this development must go to SCAFL and other organizations in which Captain Barry has served with distinction. Although Captain Barry modestly declines to identify his personal contribution, he undoubtedly played a key role, and deserves ample credit.

The question now arises whether the JSC or DOD might take further steps to change the *MCM* rule-making process. Captain Barry believes

---

151. *See supra* Parts II.A., III.B.

152. *See* Exec. Order No. 13,086, 63 Fed. Reg. 30,065 (June 2, 1998). The amendment to RCM 916(j) conformed the *MCM* to a 1996 Congressional Amendment to Article 120, which created a mistake of fact as to age defense to a prosecution for carnal knowledge. The JSC proposed this legislation and followed up with *MCM* changes when the legislation was enacted. *See* National Defense Authorization Act for Fiscal Year 1996 § 1113, Pub. L. No. 104-106, 110 Stat. 186, 462.

that they can and should, and his views deserve careful consideration. Nonetheless, the case for the changes that he requests is difficult to make.

The seven proposals discussed in Captain Barry's article would add more formalities to the *MCM* amendment process. The JSC would have to seek input or perhaps even approval from advisory committees. It would have to adhere to new waiting periods and publication requirements. It also might have to explain more publicly its reasons for certain actions or inactions.

The JSC and DOD in short order could implement most of these formalities. The changes, however, probably would not do much good. They would not bring fundamental reforms to the *MCM*. Indeed, they might not change much of anything. At worst, they would risk upsetting the present balance of power that has evolved between Congress and the President.

For these reasons, this response has recommended hesitation in embracing the seven proposals that Captain Barry has recommended. Perhaps the JSC will want to experiment with some of them, such as making more records available to the public or maybe giving reasons for rejecting proposed amendments to the *MCM*. Before doing so, however, it also must consider what else it has on its list of priorities for improving the military justice system.

A REPLY TO CAPTAIN GREGORY E. MAGGS'S "CAUTIOUS SKEPTICISM" REGARDING RECOMMENDATIONS TO MODERNIZE THE *MANUAL FOR COURTS-MARTIAL* RULE-MAKING PROCESS

KEVIN J. BARRY[1]

I. Introduction

Captain Gregory E. Maggs has prepared a thoughtful response[2] expressing his "cautious skepticism" for my proposals[3] to modernize the *Manual for Courts-Martial* (*MCM* or *Manual*)[4] rule-making process. Having carefully reviewed his response, I am happy to say that I am optimistic (and not merely "cautiously" so) that the modernization of the *MCM* rule-making process will continue, and that even after fifty years of development, this "work-in-progress" is far from finished.

My optimism is based on two principal factors.

First, Captain Maggs not only finds none of my proposals "radical or dangerous,"[5] but rather finds that "[i]ndeed, each is closely analogous to the federal civilian criminal justice system. In addition, no insurmountable legal obstacles would prevent their adoption."[6] There is, of course, already a close connection between military and civilian court rules themselves.

---

1. Captain, U.S. Coast Guard (Ret.). While on active duty, the author's assignments included service as chief trial judge and as appellate military judge. He serves as Secretary-Treasurer of the National Institute of Military Justice, publisher of the "Military Justice Gazette" (which is cited several times in this article). He was a member of the American Bar Association (ABA) Standing Committee on Armed Forces Law from 1994 to 1999, and served as chair during 1995-1996. The author acknowledges with gratitude the extremely helpful suggestions and assistance provided in preparing both this Reply and the original article (*infra* note 3) by Michael F. Barry, Philip D. Cave, Eugene R. Fidell, and Dwight H. Sullivan.

2. Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual For Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry* 166 MIL. L. REV. 1 (2000).

3. Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

5. Maggs, *supra* note 2, at 7.

6. *Id.*

Article 36 of the Code[7] provides that military rules "may be prescribed by the President by regulations which shall, 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." It seems a logical next step that the *process* by which those rules are adopted might appropriately also follow the district court model, and thus reap the same benefits that the civilian court rule-making process has provided for many years. The federal civilian court rule-making process has been carefully structured to ensure that the best possible rules are adopted after public consideration by a broadly constituted and diverse committee of experts, in an open and transparent process that enhances public confidence.[8] Thus, I conclude not only that Captain Maggs raises no serious objection to adoption of my proposals, but also that his observations actually argue in favor of their adoption.

Secondly, my optimism is based on the fact that there is much in Captain Maggs's approach with which I can agree. Certainly any proposed changes to an established rule-making system ought to be approached with an appropriate degree of caution, and they should be carefully studied and considered to ensure that the changes would indeed produce the anticipated benefits. Where we depart is on his ultimate conclusion that these changes should be approached with "cautious *skepticism*." I do not believe his option for "skepticism" is well founded.

Captain Maggs states his conclusion as a "cost-benefit" result:

> [I]n light of the progress that already has occurred in the methods for amending the *MCM*, none of the proposals would yield significant new benefits. At the same time, all but one or two of the proposals would impose at least some significant burdens or costs. For these reasons, at least at the present, the JSC [Joint Service Committee on Military Justice], the DOD [Department of Defense], the President, and Congress should view Captain Barry's recommendations with cautious skepticism.[9]

---

7. UCMJ, art. 36(a) (2000). The Uniform Code of Military Justice (UCMJ or Code) is codified at 10 U.S.C. §§ 801-946.

8. *See generally* Barry, *supra* note 3, at 271 nn.132-37 and accompanying text.

9. Maggs, *supra* note 2, at 7.

There are three ostensible underlying bases for Captain Maggs's cost-benefit assessment, and his ultimate conclusion, which he labels "preliminary considerations:"

> First, recent history suggests that the *MCM* probably will undergo only incremental changes for the foreseeable future. Second, the process of amending the *MCM* is largely irrelevant to most of the major military justice reforms now being urged. Third, changes to the *MCM* rule-making process would affect the present balance of powers between Congress and the President, possibly producing unintended adverse consequences.[10]

As will be discussed further below, each of these three assertions is fundamentally flawed—none can withstand critical analysis. Captain Maggs's conclusion based on them is thus similarly untenable. I will briefly address each of these three "preliminary considerations" in Section II below.

In Section III, I will review Captain Maggs's sevenfold division of my proposals, and his various arguments questioning the value of each proposal. I must immediately note, however, that Captain Maggs apparently did not grasp my actual, core proposal for change. I think it critically important that I be clear on this point, so I will restate my proposal as I previously summarized it: "[This article] concludes by calling for continued study with a view to *implementing General Hodson's 1973 recommendation*,[11] thus further advancing this 'work in progress'—the modernization of the military court rule-making process."[12] In my analysis of General Hodson's proposal, I concluded that implementing his recommendation

---

10. *Id.* at 6-7.

11. General Hodson's recommendation was that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence." *See* Barry, *supra* note 3, at 270 n.130 and accompanying text.

12. *Id.* at 241 (emphasis added).

13. My conclusion at the end of the discussion of the Hodson proposal, and immediately prior to the "Conclusion" section, read:

> The SCAFL [ABA Standing Committee on Armed Forces Law] proposal, merged with the almost identical but more complete Hodson proposal, presents an appropriate and needed improvement that will provide significant benefits to the President as military court rule maker, will re-

would *necessarily involve implementing most of ABA (American Bar Association) Recommendation 100*.[13]

Captain Maggs's sevenfold division does make it clear that I also made recommendations that could immediately be implemented to substantially improve the *current* Joint Service Committee (JSC) process. I will address these, as well as my other recommendations, in Section III. Finally, in Section IV, I will reach conclusions on the costs and benefits of improving this rule-making system that are decidedly contrary to—and much more optimistic for this system than—those reached by Captain Maggs.

II. Each of the Three Bases for Captain Maggs's Analysis Is Flawed

In many ways Captain Maggs seems to present a reasoned and reasonable critique of my proposal, and there is truth in much of what he says. His principal objections are not that mine are bad proposals, but that they would, in his view, have too little beneficial effect, while creating additional administrative costs and inconvenience to the government. However, his analysis, and his various conclusions, miss the mark largely because he overlooks or fails to address important facts and arguments, many of which are set forth in my article. In pursuing his analysis, Captain Maggs too often makes assertions without providing a basis for them, while at the same time ignoring contrary conclusions I have reached, that are well supported.

For example, Captain Maggs states that to adopt a rule-making process patterned on that followed by the Judicial Conference of the United States would not provide a benefit, because "the civilian rule-making procedure tends to take a long time . . . [i]n many instances . . . several years . . . [while] [b]y contrast, the JSC annual review system results in a systemic review of the *MCM* within each year."[14] The implication that *MCM* regulations can be (or are) adopted in only one year not only is misleading,

---

13. (continued)

> sult in better rules, and will enhance the stature of the military justice system and the credibility of its rule-making process. No good reason exists not to implement this proposal.

Id. at 274 (footnote omitted).

14. Maggs, *supra* note 2, at 27.

but also is simply incorrect. The military rulemaking process has been a slow and cumbersome one, often taking several years, as is clearly stated (with supporting documentation and examples) in my article.[15]

It is on such unsupported (and erroneous) assertions that Captain Maggs relies to raise doubts regarding the benefits of adopting improvements to this process. Because his premises are flawed, it is *his* conclusions (and not my proposals) that should now be viewed with an appropriate degree of skepticism.

Perhaps most important of the factors overlooked by Captain Maggs in his assessment are the impact of enhanced credibility and public confidence in the system, the reduction of criticism of the system (and of the rule-making process), and the improved quality of the rules adopted, all of which would directly ensue from the adoption of improvements to this process. Having thus overlooked the principal benefits of adopting the proposals, it is not surprising that Captain Maggs urges a skeptical approach to adopting these proposals.

A. Potential Changes to the *MCM* in the Foreseeable Future Are Not Unimportant

Captain Maggs first asserts that all the important changes to the *MCM* were made prior to 1984, and that the "nature of the *MCM* amendments" has changed since then.[16] He says that changes since 1984, and those for the future, are of limited significance, and serve only three purposes: to

---

15. *See* Barry, *supra* note 3, at 272 n.136 and accompanying text. In addition to the discussion and examples in the original article, it is also worthy of note that amendments to the Federal Rules of Evidence (FRE) automatically take effect in the Military Rules of Evidence (MRE) eighteen months after their effective date, unless "action to the contrary is taken by the President." MCM, *supra* note 4, M.R.E. 1102. In 1998 the delay period for the President to act was extended from six months to eighteen months. *Id.* Appendix 22 at A22-61. Clearly six months was manifestly too short a period to propose and implement a contrary rule through the JSC process. Recent events have made it clear, however, that even the eighteen-month period is proving to be totally inadequate. For example, on 11 May 1998, the JSC published a proposed rule to retain former MRE 407, in lieu of a new MRE 407 which automatically became effective following the revision of FRE 407, which had been changed on 1 December 1997. As of late October 2000, more than twenty-nine months after the proposed rule was published, a change to the *MCM* to implement this proposed rule had yet to be signed by the President. Clearly this process is a *very* protracted one.

16. Maggs, *supra* note 2, at 8.

"correct errors or oversights in the existing rules, conform the rules of procedure and evidence to legislative changes to the UCMJ, or bring military law into alignment with civilian criminal law."[17] Because of these perceived limitations, Captain Maggs sees changes to the rule-making process as "less important," and states that "[t]he final results probably will not vary much no matter how amendments are processed before the President approves them."[18] This seems to be a somewhat myopic view of the importance of both the rule-making process and of the potential for important rule changes to be proposed in the future.

As an example supporting his thesis, Captain Maggs cites—as one of these simple procedural rule changes—the adoption of Military Rule of Evidence (MRE) 513, the psychotherapist-patient privilege, in 1999.[19] However, MRE 513 was decidedly not a simple rule change; rather it was an issue of great importance. Its importance (and thus potentially the importance of many yet to be proposed rules) is clearly shown by the fact that the initial promulgation of the proposed rule on this privilege[20] proved to be enormously controversial. The proposed rule was objected to by the American Psychiatric Association because it specifically declined to extend the privilege to active military personnel, and contained "too numerous, expansive and over broadly drawn" exceptions even for those persons who were purportedly protected by the proposed rule.[21] Even those who agreed that the privilege should not extend to persons subject to the UCMJ objected because the proposed rule did not adequately protect even those to whom it did apply, because the exceptions were "overly broad," and would "as a practical matter, eviscerate the protection of the psychotherapist-patient privilege and with it, any hope of mutual trust and security in the therapeutic relationship."[22] In its comments to the Joint Service Committee (JSC) on the proposed rule, the National Institute of Military Justice saw a direct tie between the deficiencies in the initial proposed rule and the process by which it had been prepared:

> Perhaps in none of the proposed rules is the failure to have a system in place which provides for broad perspective and expertise

---

17. *Id.* at 9.

18. *Id.* at 7-8.

19. *Id.* at 10.

20. 62 Fed. Reg. 24,640, 24,643 (May 6, 1997).

21. Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, to William S. Cohen, Secretary of Defense (June 24, 1997).

22. Letter from Russ Newman, Ph.D., J.D., Executive Director for Professional Practice, American Psychological Association, to Lieutenant Colonel Paul P. Holden, Jr., Joint Service Committee (July 10, 1997).

> to be considered and brought to bear more at issue than in this rule. The rule addresses a privilege which was, in the Supreme Court, the subject of a classic confrontation of historical practice and changing societal and judicial norms. NIMJ believes that the development of this rule should allow for substantial meaningful input from a wide range of sources outside the five members of the JSC so that the many societal and public policy issues raised can be explored.[23]

When the revised rule was finally adopted[24] (well more than two years after being proposed), drastic changes had been made, including extending the privilege to active military personnel (albeit with extensive exceptions), incorporating other changes to the application and the definitions, and slightly limiting the exceptions. It simply cannot be said that the process was unimportant. Had the initial process been more broad and inclusive, the rule initially proposed would likely have been substantially different. The process *is* important, even if the resulting rules are "only" rules of evidence or procedure.[25]

---

23. Letter from Kevin J. Barry, Secretary/Treasurer, NIMJ, to Lieutenant Colonel Paul Holden, Jr., Joint Service Committee (July 10, 1997). NIMJ's comments included a detailed analysis of the inadequacies in the current JSC process. The letter is reproduced at MIL. JUST. GAZ. No. 51 (Oct. 1997).

24. Exec. Order 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

25. Only later, in another context, does Captain Maggs acknowledge that the proposed rule for MRE 513 drew significant public comment, which resulted in changes to the rule. He does this when arguing that the current process adequately allows for public participation and comment. Captain Maggs notes that there was written public comment received from the American Psychiatric Association, American Psychological Association, and others, and that "persuasive testimony" was received at the public hearing. He notes that these comments concerned the failure to include "clinical social worker" among those included within the definition of "psychotherapist," and that as a result, the JSC modified the definition of "psychotherapist" to include "clinical social worker." Maggs, *supra* note 2, at 20. As noted above, the objections to the proposed rule went well beyond this one item, and resulted in other significant changes. What Captain Maggs also overlooks is the fact that the JSC has received persuasive testimony on other proposed rules at other public meetings in the last eight years, but has utterly ignored that testimony, and has promulgated final rules without either change to the proposed rule, or any acknowledgment that any comments or objections had been received. It was precisely this kind of insularity and unresponsiveness that impelled the ABA to initially take up the issue of military rule-making, and this unresponsiveness was cited by the SCAFL in its 1995 Report. AMERICAN BAR ASSOCIATION, REPORT ACCOMPANYING RECOMMENDATION 115 (adopted Feb. 1995) at 4. *See also*, Barry, *supra* note 3, at 254 nn.67-69 and accompanying text.

Two other examples, discussed in my article but not addressed by Captain Maggs, also illustrate this point. Rule for Court-Martial 1004, addressing the procedures by which capital punishment is awarded, has been amended four times since 1984,[26] and Military Rule of Evidence (MRE) 707, prohibiting the admission of polygraph evidence, was adopted in 1991.[27] Both involve rules adopted under the JSC procedures, both involve rules which generated major Supreme Court litigation,[28] and both involve issues fundamental to a fair trial.[29] The process by which they were amended or adopted might well have controlled the substantive outcome, especially with regard to MRE 707.[30] The process *is* important.

B. Major Reforms Can Be—and May Well Be—the Subject of Rule-making; The Process Is Far From Irrelevant

Captain Maggs's next caution regarding my proposals begins with the premise that "proponents of reforming the *MCM* rule-making process surely do not view changing the process as an end in itself. On the contrary, they presumably see their reform proposals as the means to an end. They must believe that a better rule-making process will facilitate adoption of better rules, producing an improved military justice system."[31] I absolutely agree with Captain Maggs on this point.

However, Captain Maggs then suggests that the "kinds of changes . . . reformers want to make" are only a small number of "familiar . . . concerns about the military justice system," and that those proposing change likely do so with the "hope that new procedures will overcome long-standing Department of Defense resistance"[32] on these issues. He limits his discussion to only three "recurring criticisms" of the system: independence

---

26. Exec. Order 12,550, 51 Fed. Reg. 6497 (Feb. 25, 1986), Exec. Order 12,767, 56 Fed. Reg. 30,284 (July 1, 1991), Exec. Order 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994), and Exec. Order 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

27. Exec. Order 12,767, 56 Fed. Reg. 30,284 (July 1, 1991).

28. Both these issues were addressed in my original article in some detail. *See* Barry, *supra* note 3, at 242 n.17.

29. Captain Maggs acknowledges the potential importance of aggravating factors, the subject of more than one of these amendments to RCM 1004. *See* Maggs, *supra* note 2, at 17. *See also* MCM, *supra* note 4, Appendix 21 at A21-71 to A21-76.

30. See Barry, *supra* note 3, at 242 n.17, for a discussion of the deference the Court gave to the rule implemented by the President in *United States v. Scheffer*, 118 S. Ct. 1261 (1998), and the potential impact of the rule-making process on such rules.

31. Maggs, *supra* note 2, at 11.

32. *Id.*

of the military judiciary, the current method of selecting court-members, and the multiple roles of the convening authority. He concludes that such "major military justice reforms"[33] are unlikely to ever be the subject of Presidential rule-making.

Captain Maggs sets forth three reasons for his contention that changes in these substantive areas are unlikely to be addressed by regulation: they are beyond the power of the President to make by regulation; they are areas in which the President would be unlikely to act because they involve major reforms; or, because any new rule-making "formalities" would be of the type which "generally impede rule-making efforts," they would of their own nature tend to minimize the potential for any major change.[34] In reaching each of these three conclusions, Captain Maggs again fails to address important relevant factors, and thus his conclusions must be viewed, at the least, with skepticism.

In raising these three important *substantive* issues for discussion, Captain Maggs opens to debate a far larger terrain than simply that of the rule-making *process*, which I intended as the limited focus of my article. Having raised them, however, these are now issues that must be addressed, and I could not dispute that they are relevant to the discussion of whether to improve the rule-making process. Contrary to Captain Maggs's conclusions, a critical review of these three substantive areas makes it clear that the three objections he raises are without factual support. Rather, it is apparent that each of these three "major reform" substantive areas would be a logical and appropriate area for rule-making.[35]

1. Judicial Independence

On the judicial independence issue, Captain Maggs focuses on the lack of tenure (terms of office) for military judges, and notes that the Military Justice Act of 1983 Advisory Commission voted against the need for tenure.[36] Captain Maggs does not mention that all three civilian members

33. *Id.* at 6.

34. *Id.* at 14-15.

35. The point, of course, is not whether changes to the rule-making process will "trigger radical change or facilitate any large-scale reforms of the military justice system." *Id.* at 15. The question is whether any rule-changes that are made, large or small, will be more carefully considered, will potentially be more appropriate rule changes, and will likely inspire public confidence because they have been considered in an open and public process by a diverse, well-qualified panel.

36. *Id.* at 12 n.57.

of the Advisory Commission dissented from the Commission recommendation.[37] He correctly states that the Supreme Court has upheld the constitutionality of the current system for appointment of military judges.[38] In quoting from the opinion of the Supreme Court in *Weiss v. United States*, however, Captain Maggs fails to note that Justice Scalia, in concurring, found that the system we have in the military could not survive constitutional attack were it implemented in *any other justice system in this country*![39]

In addition, it is entirely within the power of the President to impose a system of tenure for military judges. Indeed, Captain Maggs notes that the Secretary of the Army has already (acting on his own authority) imposed such a system for the Army.[40] The other services have either implemented similar protections by regulation, or have assured the ABA Standing Committee on Armed Forces Law (SCAFL) that they are gearing up to do the same thing.[41] In addition, the DOD has appointed an *ad hoc* committee to study the issue of judicial independence, including the issue of tenure.[42] My own view is that a provision establishing mere fixed terms of office, such as has been implemented in the Army, is an inadequate guarantee of independence in this system where the judges are military officers, subject to performance evaluations, to further assignment (both as

---

37. THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REPORT (1984) at 9 [hereinafter 1983 REPORT]. The recommendation was supported only by the six active duty military members. One might wonder what the result might have been had the Advisory Commission been more diverse and balanced.

38. Maggs, *supra* note 2, at 12 n.57, citing Weiss v. United States, 510 U.S. 163 (1994).

39. Justice Scalia, in his concurring opinion in *Weiss*, stated:

> The present judgment makes no sense except as a consequence of historical practice . . . . [N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today. (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")

510 U.S. at 198 (citations omitted) (Scalia, J., concurring).

40. Maggs, *supra* note 2, at 12 n.54.

judges and otherwise), and in many cases are hopeful of receiving further promotion as well.[43] Rather, a more extensive system to promote judicial independence, such as those that have been proposed by Professor Lederer and Lieutenant Hundley,[44] and more recently by Brigadier General John Cooke[45] and Senior Judge Walter Cox,[46] are worthy of serious consideration.

While changes to the UCMJ could and perhaps should be effected to ensure adequate independence for miliary judges, changes well within the President's power could be made that would go a long way to accomplishing the same result. As noted above, such changes are already either partially implemented by the military services, or are under study within DOD. While a total solution may require statutory amendment, the argu-

---

41. Three services, the Army, Air Force, and Coast Guard, have reported to SCAFL that they have implemented regulations addressing judicial terms of office. The Navy and Marine Corps have reported to SCAFL that their change is pending publication. Telephone interview with Major General Keithe E. Nelson, USAF (Ret.), Chair, ABA Standing Committee on Armed Forces Law (Oct. 25, 2000). The SCAFL has in the past expressed its "frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army that established a three year tenure rule." MIL. JUST. GAZ. No. 71 (Nov. 1999).

42. MIL. JUST. GAZ. No. 71 (Nov. 1999).

43. In addition to the concerns set forth by Justice Scalia in *Weiss*, *see supra* note 39, other practical concerns, such as the desirability of the military judiciary from the perspective of future assignment have been raised. "A disturbing prognosis for the future of the military trial judiciary emerges from this Commission's work. The testimony and surveys make it clear that career judge advocates hardly view such duty as career enhancing." 1983 REPORT, *supra* note 37, at 75 (Separate Statement of Professor Kenneth F. Ripple). Some judges may seek to advance their career by being assigned (or reassigned) to positions they see as more career enhancing, such as staff judge advocate. *See, e.g.*, Kevin J. Barry, *Reinventing Military Justice*, 120/7 NAVAL INSTITUTE PROCEEDINGS 56, 58 (1994). Other judges may seek to stay on the bench, and even with the three year term of office established, as in the Army, there still remains the potential for mischief, as Senior Judge Everett recently opined: "Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed." Major Walter M. Hudson (interviewer), *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 78 (2000) [hereinafter *Senior Judge Interviews*]. Each of these concerns needs to be addressed in achieving a balanced solution.

44. Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 2 WM. & MARY BILL RTS. J. 629 (1994).

45. Brigadier General John S. Cooke, *The Twenty-sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 18-19 (1998).

46. *Senior Judge Interviews*, *supra* note 43, at 79-80.

ment that intermediate remedial changes are of too great a magnitude to be effected by regulation is patently insupportable.

2. Selection of Court-Martial Members

The same rationale applies to the issue of selection of court-members. UCMJ changes could be effected to accomplish reform, and to end a system that, even if not inherently unfair, certainly is widely viewed by military professionals as being unfair.[47] Chief Judge Young of the Air Force has proposed statutory changes to the selection process to accomplish this result,[48] and for almost 30 years others have also proposed both statutory and non-statutory changes to this process.[49] A number of these commentators have suggested a method of random selection of military jurors, often completely within the current statutory constraints of Article 25(d)(2), UCMJ, which requires the convening authority to select members deemed "best-qualified." One noted authority in 1991 proposed computerized random selection, consistent with Article 25, UCMJ, as a solution: "I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member's liberty and property interests are at stake."[50] The process of selection of court members "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack."[51] To suggest that improvements in the system of selection

47. "[I]t is impossible to convince even military judges from other countries that our current system of selecting court members is fair." Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 125 (2000).

48. *Id.* at 127-37.

49. Major R. Rex Brookshire, II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1972); Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), reprinted MIL. L. REV. BICENT. ISSUE 577 (1975) (random selection of military juries was Hodson's first of seven suggestions for improvement of the military justice system; removal of the commander from *inter alia* the military jury selection process was the seventh); Captain John D. Van Sant, *Trial by Jury of Military Peers*, JAG. L. REV. 185 (Summer, 1974); Major Gary E. Smallridge, *The Military Jury Reform Movement*, AIR FORCE L. REV 343 (1978); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis* 137 MIL. L. REV. 103 (1992); Guy P. Glazier, *He Called for His Pipe, and Called for his Bowl, and He Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

50. David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*,133 MIL. L. REV. 1, 20 (1991).

51. United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring).

of court-members could not, or should not, or would not be expected to come by regulation, is to ignore what has seemed not only possible and plausible, but also necessary, to numerous commentators. It is clearly not a justification for failing to improve the process, and thus to enhance the quality of any such rule changes ultimately adopted.

3. The Role of the Convening Authority

The final substantive issue raised by Captain Maggs concerns the multiple—and potentially or actually conflicting—roles played by convening authorities. The most troublesome aspect of these multiple roles is the fact that the commander, who exercises command and control of the unit and its personnel, also has the two duties of exercising prosecutorial discretion and hand-selecting, normally from subordinates who may be from her own personal staff, the members of the court-martial panel (the "jury") who will sit in judgment over the accused. As noted by Chief Judge Young, in suggesting a change to our system of selecting members, it is "impossible" to convince military judges from other countries that this system is fair.[52]

This should come as no surprise. The analogy in the civilian system would be requiring the United States Attorney, who decides whether a suspect will be brought to trial and for what specific crimes, to hand-select the jury from government employees who work for the Department of Justice (or even from government employees who work on the U.S. Attorney's own staff). Such a scenario would, of course, be completely intolerable, and would certainly appear illegal and unconstitutional as well. Notwithstanding the fact that the military is a separate society with certain vastly different interests—including good order and discipline—that must be served by its justice system, it is the opinion of these non-U.S. military judges referred to by Chief Judge Young, and of many U.S. legal professionals (both within and without the military), that the current involvement of the convening authority in this military jury selection process simply asks too much of one official, and does not live up to current perceptions of what constitutes the minimal requirements of due process. Even if the selection process is not unfair as a whole, or if it is not actually unfair in any given case, it is difficult if not impossible to get past the potential for—

52. *See* Young, *supra* note 47, at 125.

or the appearance of—unfairness, and thus of the potential for the denial of a fair trial in a given case.

Although statutory changes would be required to fundamentally alter the convening authority's role, adoption of a method of random selection within the current parameters of Article 25, which may be accomplished by presidential regulation, would seemingly be a large step in the right direction toward allaying these concerns.

C. Presidential Power Unaffected

Captain Maggs finally urges that changes to the *MCM* rule-making process would affect the present balance of powers between the President and the Congress.[53] This concern is unfounded.

Under Article 36, the President is the statutorily authorized rulemaker for the military justice system. The President has elected to use the JSC, and its current procedures, to prepare the executive orders to promulgate amendments to the *MCM*. The President could choose to follow the ABA recommendations, and establish an advisory committee to participate in or oversee a revised rule-making process. Similarly the President could resume reporting rule changes to Congress. No new statute would be required. Presidential power would be unaffected.

Alternatively, the Congress could choose to establish a military judicial conference to oversee the rule-making process and the preparation of proposed changes to the *MCM*, without changing in any way the President's ultimate authority as military court rule-maker. General Hodson recommended forming such a conference, headed by the chief judge of the Court of Military Appeals, now the Court of Appeals for the Armed Forces (CAAF).[54]

There is currently no limitation on the authority of the President to promulgate rule changes that have not first been prepared and presented by the JSC, though as a practical matter it is not known that any President has ever acted independently of the JSC or of the usual review process for JSC

53. Maggs, *supra* note 2, at 15-17.

54. *See supra* note 11. I express no view on whether a judicial conference such as recommended by General Hodson could (or if it could, whether it should) be created by the President through regulation.

proposals.[55] Despite Captain Maggs's conclusions to the contrary, there is no suggestion—in either my proposal or the ABA recommendations—that the President's ultimate authority would be one bit lessened under such a model; rather we both suggest the opposite: it would be "effectively enhanced."[56] Certainly the concerns Captain Maggs raises regarding separation of powers are important, and may require taking more care to ensure that the President's authority is not constrained, but is instead more fully supported by the military judicial conference. As discussed below, that would be easy to do, even while maintaining all the benefits that such a system would otherwise provide. Captain Maggs's balance of powers concerns are unfounded.

III. The Proposals are Warranted

Captain Maggs finds in my article seven separate proposals, and he provides his comments on each. Even if I were to accept his enumeration, I find it to be short by at least one recommendation. I strongly suggested that the internal JSC Organization and Operating Procedure document issued in February 2000[57] was an inadequate mechanism for promulgating changes to procedures for a rule-making process involving the public.[58] This is particularly so where such procedures had previously been promulgated in a DOD Directive which was published in the Code of Federal Regulations (CFR). It was my clear recommendation that these procedures be suitably published both in departmental regulation and the CFR, as well as in the *MCM* itself. It is unclear why Captain Maggs does not address this

---

55. *See* Barry, *supra* note 3, at 251 n.53 (providing a summary of this review process).

56. *Id.* at 269; *see also id.* at 269 nn.120-29 and accompanying text. The Chair of SCAFL believed that adoption of the ABA Recommendation 100 was "bound to improve the final product and *enhance* the President's rule-making function." *Id.* at 269 (quoting letter from Francis S. Moran, Jr. to N. Lee Cooper, ABA President, 3 (Jan. 27, 1997) (emphasis added) [hereinafter Moran letter]).

57. INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (initially adopted 3 February 2000, corrected and readopted 2 March 2000) [hereinafter JSC 2000 PROCEDURES]. These JSC procedures are discussed in my article. *See* Barry, *supra* note 3, at 260 nn.90-99 and accompanying text. Because of their importance, they were reproduced in their entirety in the Appendix to my article. *See id.* at 277-80.

58. *See* Barry, *supra* note 3, at 264.

recommendation—it is one of those easy remedies which can and should be immediately adopted.[59]

I am not, however, anxious to accept Captain Maggs's sevenfold division because it tends to distort my actual proposal. My recommendation was to call for "continued study with a view to implementing General Hodson's 1973 recommendation, thus further advancing this 'work in progress'—the modernization of the military court rule-making process,"[60] and as noted above,[61] I incorporated the ABA Recommendations in this proposal. Nevertheless, for the sake of clarity, I will address my proposal which incorporates the ABA recommendations (the first three of Captain Maggs's division) as implemented within General Hodson's proposal (the fourth of Captain Maggs's division). Before doing that, however, I will first address the last three items in Captain Maggs's division, which constitute the three recommendations which concern the *current* JSC process.

A. Improving the Current JSC Process

In my article I made a variety of observations about ways the *current* JCS process could and should be further improved. This current rule-making process was addressed in part as background and as preface to my Hodson recommendation, and also as a necessary portion of my review of the fifty-year history of the *MCM* rule-making process. My suggestions for changes to the current process were—either derived from or restated suggestions long made by the ABA—included the three proposals addressed by Captain Maggs at Sections III. E., III. F., and III. G. Even in the absence of further study or more extensive reform, each of these could be easily and quickly implemented by DOD by slight modifications to the

59. *See id.* at 264. I also noted that the current DOD Regulation 5500.17 issued in 1996 has not yet been published in the CFR, which still contains the outdated and superseded 1985 DOD Regulation. This is a four-year oversight that is long overdue for remedial action. *Id.* However, to now publish the 1996 directive would establish as current federal law a process no longer applicable. What is now required is for DOD to revise its regulation to conform with current practice, or with a new practice modified to conform to these recommendations, and to publish that regulation in the CFR, and in the *MCM*. Due to the public nature of the issue, a notice and comment rule-making process would be appropriate. *See id.* at 258 n.81.

60. *Id.* at 241.

61. *See supra* notes 12-13 and accompanying text.

JSC 2000 Procedures, and would materially enhance the perceived fairness of the *current* system.

The first suggestion addresses the question of public availability of internal DOD proposals, and it is clear that no great effort would be required to accomplish this needed improvement. Detailed proposals, with full justifications, already exist: they have been required by the JSC regulations for years.[62] Currently the JSC refuses to make them available. The fundamental principle I apply in this regard is that rules for a system of justice that tries the most serious crimes and imposes capital punishment should not be made in secret. Making the proposals available to the public would involve only limited administrative cost since, as Captain Maggs notes, justifications are already available both for proposals which are adopted, and for any changes to proposals which are made by the JSC prior to their adoption. Thus, the burden of making them available "does not seem very great."[63]

The same analysis should apply to the JSC's justifications for *rejecting* proposals for rule changes. If a serious proposal is rejected, it should be for a good reason, and there should be no hesitancy to publicly express that reason. Captain Maggs believes that the JSC has "understandable reasons for wishing to avoid the process of justifying its decisions not to adopt proposals . . . [and that] providing explanations may take a great deal of work."[64] He does not clearly state what these "understandable reasons" are, except to suggest that additional personnel might be required, that the JSC members might have to "neglect their other duties so that they could write reasons for rejecting the proposals,"[65] or that it "might cause unnecessary and harmful embarrassment"[66] to the proposer. Even if true, such arguments do not seem very weighty, when balanced with the benefits of making these important rules in a manner that will inspire confidence in the system.

The second suggestion addresses the public availability of the JSC's minutes. Captain Maggs acknowledges that he has seen the minutes of the JSC meetings, but that he believes they contain "minimal information about its decisions."[67] However, he also states that "[b]ecause the JSC and its working group diligently keep these records, the proposal [to make

62. *See* Barry, *supra* note 3, at 245.
63. Maggs, *supra* note 2, at 32.
64. *Id.*
65. *Id.*
66. *Id.* at 33.

them publicly available] would impose little or no burden on them."[68] The failure to make available the full proposals, with their rationales and justifications, and the minutes of meetings, to provide explanations for JSC decisions, casts doubt on the credibility of this rule-making process, and undermines public confidence in the military justice system. Even when recommendations for rule changes are made by such organizations as the SCAFL and the ABA, the JSC does not release the minutes or explain why the recommendations are not adopted.[69] The objections raised by Captain Maggs do not weigh heavily when compared with the values that would be supported by full disclosure. The refusal to make available unredacted minutes can and should be rectified immediately.

The third suggestion concerns whether to expand the membership of the JSC—or even just to give the current CAAF and DOD representative a vote. Both are ideas that SCAFL thought desirable several years ago, but ultimately agreed should be left to the discretion of DOD, accepting DOD's argument that the JSC is an *internal* DOD committee.[70] The idea has been discussed again at several recent SCAFL meetings, and sugges-

---

67. *Id.* The JSC has released redacted minutes of JSC meetings to the author pursuant to the Freedom of Information Act. These contain lengthy blanked-out sections during which issues are apparently being discussed and debated, and also contain sections wherein the votes by the voting members of the JSC are also masked. These redacted minutes are uniformly unhelpful in ascertaining why proposals are being made, what the intended effects are, or what arguments for or against their adoption have been considered. Whether the unredacted minutes contain minimal information or not is an unverifiable conclusion that can be drawn only by one such as Captain Maggs who is allowed access to them.

68. *Id.*

69. In February 1993, the ABA adopted Recommendation 107A proposing that RCMs 1112 and 1201(b) be amended to provide an opportunity for convicted service members to review and submit matters for consideration at all stages of military administrative review, and that RCM 1203(c) be amended to allow convicted members the same opportunity provided to government attorneys to petition the Judge Advocate General to certify an issue to the United States Court of Military Appeals. *See* AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 293 (1999-2000 Ed.); AMERICAN BAR ASSOCIATION, RECOMMENDATION 107A (adopted Feb. 1993). The same recommendations for change had already been presented to the JSC by the Coast Guard appellate defense counsel. *See* MIL. JUST. GAZ., No 3 (Aug. 1992). Two years later, in response to his written request, and contrary to its stated policy, the JSC provided a minimal explanation to the submitter, G. Arthur Robbins (formerly the Coast Guard appellate defense counsel) regarding the reasons the JSC declined to adopt his recommendation. This explanation included the following two arguments: that "the certification process should be non-adversarial" (apparently as justification for not giving the defense a copy of government requests for certification of issues in the case), and that "certification is the Government's vehicle for appeal and not a right of the accused." Letter from Kristen M. Henrichsen, to G. Arthur Robbins (Jan. 12, 1995).

70. *See* Barry, *supra* note 3, at 267-68.

tions have included adding additional members from within the governmental community, such as by adding an appellate military judge, a military trial judge, and one or more representatives of the appellate defense community.[71] It would seem that DOD could, without affecting the "internal" nature of the JSC, vastly improve both the appearance and the actual fairness of the rule-making process by adding representatives from some of the other "communities" affected by the *MCM* and its rules, including defense counsel, prosecutors, academics, and trial and appellate judges.

For a system seeking credibility and respect, implementing each of these three suggestions would bring the same sort of instant favorable response as did promulgating the JSC 2000 Procedures. The DOD can, without any change to statute and without even involving the President, accomplish all these recommended improvements in the current JSC rule-making process, and to do so would, I submit, be welcomed and applauded by all who seek to see this system improved. Such improvements would not only allay concerns and criticisms, but would enhance the quality of the resulting rules, and their inherent credibility, and thus would enhance as well the confidence with which they are accepted.[72]

---

71. *See id.* at 268, n.116. SCAFL had initially pushed for expansion of the JSC, including adding non-governmental members, but abandoned this idea in response to the DOD "internal committee" arguments. *Id.*

72. Recently a potential difficulty with the new JSC 2000 Procedures has become evident, which might now constitute a fourth recommendation for improving the current JSC process. Under the new procedures, proposals submitted to the JSC from outside the military services are submitted to and voted on by the JSC itself, and are to be acknowledged in writing, with the submitter being notified of the decision of the JSC (though apparently not of the reasons for the decision). *See* JSC 2000 PROCEDURES, *supra* note 57, ¶ III.D.3. However, proposals submitted from within the services do not go to the JSC, but rather go to and are screened by that service's JSC representative, who then submits only those proposals that the JSC representative deems "appropriate." *See id.* ¶ III.B.3. There does not appear to be any requirement for a written acknowledgment of proposals from members of the services, or for any notification or explanation why the service JSC representative declined to forward the proposal, or for notification of (or explanation for) action taken by the JSC on those proposals which are forwarded. There seems to be no good policy reason why proposals submitted from an appellate military judge, or a professor of law at one of the Judge Advocate General's schools, or a trial or appellate defense or government counsel, should be subject to screening by the service's JSC representative, while proposals from their counterparts not in uniform are automatically considered by the JSC. This appears to be one of those areas where appearances of fairness weigh heavily in favor of an immediate adjustment to eliminate the gate-keeper role of the service's JSC representative, and to treat all who propose changes to the rules equally.

B. The Hodson and the ABA Recommendations

Captain Maggs addresses my core proposal as four separate entities (at Sections III. A., III. B., III. C., and III. D.). As previously addressed,[73] I actually called for study of General Hodson's military judicial conference recommendation, incorporating the three aspects of ABA Recommendation 100, thus establishing a single cohesive structure that would bring the military rule-making system into parity with the civilian system, with all the benefits (and if there be such, disadvantages) of that system. For clarity, I will address various discrete concerns raised regarding the elements of my proposal, but I submit that they are best understood as elements of a unified military judicial conference structure.

General Hodson did not flesh out his recommendation, and I attempted to do that by incorporating within his military judicial conference the structure recommended by the ABA, which I view as entirely consistent with (and complementary to) his recommendation. One difference, of course, is that the ABA recommendation itself could be entirely implemented by the President, without the need for legislation.[74] He could issue an executive order (EO) establishing a broadly constituted advisory committee that would review all proposals in accordance with "on the record" public procedures clearly established in the EO. The EO could also require that all amendments to the *MCM* be presented to Congress upon their adoption. Presumably, the draft executive order for each proposed change to the *MCM* would be reviewed for approval following a process similar to that used today for all proposed (draft) EOs prepared by the JSC to promulgate rule changes, including review within DOD, the Department of Justice (DOJ), the Office of Management and Budget, and finally by the White House Counsel, prior to submission for signature by the President.[75]

Captain Maggs does not doubt that such a program as recommended by the ABA could be implemented by the President. He asks, however, whether it would be of "any substantial benefit."[76] He asserts that neither I nor the ABA "explain in any detail how their proposal would improve the current rule-making process. On the contrary . . . the ABA's report for the

---

73. *See supra* notes 12-13 and accompanying text.

74. Captain Maggs acknowledged that implementing the core points of the ABA recommendation did not require legislation. *See* Maggs, *supra* note 2, at 18-19 (advisory committee), 24 (public rule-making procedures).

75. The review process is more fully described in my original article. *See* Barry, *supra* note 3, at 251 n.53.

76. *See* Maggs, *supra* note 2, at 24.

most part simply notes that the federal courts use a different system"[77] I cannot agree with Captain Maggs on this point. The report accompanying Recommendation 100, which was prepared by SCAFL, contained fifteen pages, most of which explained in depth the importance of and the reasons for the recommendation. The report was sufficiently detailed and persuasive that the ABA House of Delegates adopted Recommendation 100 almost unanimously.[78] In addition, the objections of DOD to the recommendation[79] were answered in detail in the letter by SCAFL Chair Colonel Frank Moran,[80] and I set forth the rationale for these proposals at length in my article.[81] If Captain Maggs is correct that neither the ABA materials, nor my article, give a rationale for the proposed change, than I doubt that any explanation that anyone could prepare would pass muster.

With regard to both the Hodson and the ABA recommendations, Captain Maggs posits certain assumptions as "fact," and then sets out problems that he sees arising from these "facts," which he believes cast doubt on the efficacy of the recommendations. I will address the most significant of these assumptions, first discussing the concerns regarding the military judicial conference, and then the aspects of the ABA proposals.

---

77. *Id.*

78. The most concise statement of the benefits to be achieved by adopting a rule-making process modeled on the federal civilian rule-making system, was stated in the ABA proposal itself. The ABA first addressed the federal civilian process. "The process enables the adoption of carefully considered rules in a process designed not only to result in the most appropriate rules being adopted, but to enhance the prestige of the courts and the public's confidence both in the courts and in their rule-making process." AMERICAN BAR ASSOCIATION, REPORT ACCOMPANYING RECOMMENDATION 100 (adopted Feb. 1997) at 7. The ABA believed that those benefits would carry over to the military system, as succinctly stated in its conclusion: "Both the quality of the resulting military court rules, and the public's confidence in the military justice system, will be enhanced. The military court rule-making process will then be deserving of the same respect and public confidence presently afforded rules for civilian Federal courts." *Id.* at 12.

79. *See* letter from Judith A. Miller, General Counsel, DOD, to N. Lee Cooper, President, ABA (Jan. 21, 1997). *See also* Barry, *supra* note 3, at 268 nn.118-19 and accompanying text.

80. *See* Moran letter, *supra* note 56. *See also* Barry, *supra* note 3, at 269 nn.120-29 and accompanying text.

81. *See* Barry, *supra* note 3, at 265 nn.100-25 and accompanying text (discussing ABA Recommendation 100), 270 nn.126-45 and accompanying text (discussing Hodson proposal).

1. Military Judicial Conference

Captain Maggs raises important constitutional separation of powers issues regarding a military judicial conference, since in his view the required amendment to Article 36, UCMJ, would "have to say that the President could not alter the rules of evidence and procedure except upon the Court of Appeals for the Armed Force's recommendation."[82] Possibly General Hodson's 1973 recommendation, as written,[83] could be read or implemented in such a way as to bind the President and raise such objections. That, however, is not the necessary result, nor is it my recommendation. Rather, I proposed the following structure.

> The advisory committee would in due course make recommendations directly to the military judicial conference. Once the military judicial conference completed its review, it would make its recommendations to the President as rulemaker. Once approved by the President, the rules would be reported to Congress prior to implementation. The precise mechanism for issuing the final rule could be through promulgation of an executive order, or by other mechanism set forth by statute.[84]

This structure would seem to raise no such constitutional infirmity. This approach follows the Judicial Conference model, in which the advisory committee recommendations are forwarded through the Judicial Conference to the Supreme Court, which, as the civilian court rule-maker, is not bound to accept every recommendation that the Judicial Conference presents.[85] The President would retain his current discretion to reject proposed rules. In addition, the President would continue to be able to effect

---

82. Maggs, *supra* note 2, at 30.

83. "[A] Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence." *See, e.g.*, Barry, *supra* note 3, at 270 n.130 and accompanying text.

84. *Id.* at 274.

85. *See, e.g.*, Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1674 (1995). Indeed, after the creation of the Judicial Conference of the United States in 1958, the "Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference." *Id.* at 1659. There is no reason why a similar approach should not be taken with regard to the President's rule-making authority when a military judicial conference is established.

rules without awaiting a proposal from within the rule-making structure, just as he presently can under the current JSC process.

Nor would this structure raise the suggested political problems between the President and the judges of the CAAF.[86] There is no suggestion in General Hodson's recommendation that any specific number of judges from the CAAF be appointed to the military judicial conference, and presumably none other than the chief judge would be on the conference.[87] All the "political" concerns raised by Captain Maggs are founded on a mistaken understanding of my proposal.

2. Advisory Committee

In addressing the advisory committee proposed by the ABA, Captain Maggs posits that it would be a resource for, and be subservient to, the JSC.[88] However, a careful review of the ABA report accompanying Recommendation 110, and the supporting documentation, makes it clear that the SCAFL had the opposite organizational structure in mind: the JSC would, as DOD's internal committee,[89] have the same freedom to submit proposals to the advisory committee as would other entities or individuals, similar to the relationship DOJ now has with the advisory committees within the Judicial Conference.[90] Thereafter, it would be the advisory committee that would finalize the proposed changes and submit them for consideration within the Administration (as proposed in the ABA Recommendation) or to the Judicial Conference for review and approval prior to submission within the Administration (as in the Hodson/Barry recommendation). Just as with the advisory committees in the Judicial Conference, I accept it as a given that DOJ (or at least DOD) would be rep-

86. *See* Maggs, *supra* note 2, at 29-31.

87. The Judicial Conference of the United States is comprised of the Chief Justice, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district court judge from each judicial circuit. 28 U.S.C. § 331 (2000). A military judicial conference could, as but one possibility, be comprised of the chief judge of the CAAF, the chief judge of each court of criminal appeals, and the chief trial judge from each service and one or more district and circuit court judges from the federal system. Such would seemingly not raise any of the political problems for the President that Captain Maggs suggests.

88. "The JSC . . . could compile a list of names of potential advisors who would agree to serve on an advisory committee without pay. This advisory committee from time to time could offer suggestions for changes to rules of evidence and procedure in the *MCM*." Maggs, *supra* note 2, at 18-19.

89. *See* Barry, *supra* note 3, at 267 nn.114-16 and accompanying text.

resented on the advisory committee, and as noted in the basic article would have a great (if not controlling) influence on the final product.[91] Captain Maggs's assumptions are therefore unsupported.

Captain Maggs's principal objections to an advisory committee seems to be that it is unnecessary, since all interested parties "already have the ability to recommend changes directly to the JSC."[92] He then suggests that creating an advisory committee actually "might reduce the input because federal advisory committee members may fall within the scope of federal conflict of interest laws. As a result, *defense attorneys* who serve on the committee might not be able to participate in decisions that would benefit their clients."[93] This entire concern is unfounded. In fact, for the advisory committees in the Judicial Conference, the number of private practicing attorneys has been *increasing*, and recommendations to further increase those numbers have been made.[94] Private attorneys constituted approximately a third of the members of the Civil Procedure, Criminal Procedure, and Evidence Rules Advisory Committees in 1995, with apparently no hint of any disability created for those private attorneys (or, for that matter, for the judges or government attorneys) serving on these committees.[95]

---

90. My recommendation followed the ABA on this point:

> With such a military judicial conference model, the JSC would presumably continue its present functions, operating as an internal DOD committee, and its proposals for changes to the *MCM* would be forwarded, along with those of other proposers, to the advisory committee, similar to the way the DOJ now makes proposals to the federal rules advisory committees.

Id. at 274.

91. *See id.* at 274 n.145.

92. Maggs, *supra* note 2, at 19. Captain Maggs does not, in this discussion, address the efficacy of that "input," or the fact that the ability to make suggestions actually works to the detriment of the system when the perception is that such suggestions are routinely ignored or rejected, without any explanation from the JSC. *See, e.g.*, *supra* notes 64-69 and accompanying text.

93. *Id.* at 21 (emphasis added) (footnote omitted). Defense counsel are the only group that Captain Maggs lists as being so affected. Interestingly, he does not address why any such conflicts would not affect government (prosecuting) attorneys or other groups serving on the committee.

94. McCabe, *supra* note 85, at 1665 n.69.

95. *Id.* at 1665-66.

3. Rule-Making Process

For the ABA's recommendation to change the process of considering rules changes, Captain Maggs first gives a balanced presentation of the current Judicial Conference process,[96] but then makes unfounded assumptions in assessing the application of this model to the military rule-making process.[97] He states: "One likely possibility would involve a military judicial conference composed of military judges and headed by the JSC."[98] This suggested composition is a straw-man constructed by Captain Maggs out of whole cloth, and it is entirely contrary to both the ABA and my recommendations.[99] General Hodson suggested the chief judge of CAAF as the head of the military judicial conference, but did not further define its composition. Nor did I, in my article, set forth any specific recommended composition for the military judicial conference, but I do indicate one possibility in this article.[100] One thing is entirely clear, however. If the JSC were to head it, as Captain Maggs suggests, it obviously could not be a *judicial* conference, since no member of the JSC is a judge.

Captain Maggs also sees problems with advisory committees (and a civilian rulemaking process) generally, because each would "invite the meddling of special interest groups" and allow for the process to become "politicized."[101] He identifies only one such "special interest" group, and again it is *defense counsel*. Captain Maggs does not address why, for example, the JSC itself should not be considered to represent a particular "special interest."[102] Captain Maggs cites several commentators in support of his concerns, and suggests these concerns weigh heavily against adoption of new procedures.[103] However, these are not valid objections to adopting improved rule-making procedures, as can be seen from the exam-

96. Maggs, *supra* note 2, at 22 (§ III.B.1).

97. *Id.* at 24 (§ III.B.2). Arguably much of the following discussions would more appropriately be included in the discussion of the military judicial conference proposal, or he advisory committee proposal, but since Captain Maggs includes them in his discussion of the rule-making process, I will also.

98. *Id.* at 24.

99. *See, e.g.*, *supra* note 90 and accompanying text (discussing my recommendation, which envisions an advisory committee and a military judicial conference both separate from and superior to the JSC). Both my and the ABA recommendations clearly stated that the current process "needs expanded perspectives and experience by the addition of military and civilian counsel and judges, and academicians, all who may have substantial experience in military law." Barry, *supra* note 3, at 269 (quoting Moran letter, *supra* note 56 at 3).

100. *See supra* note 87. *See also* Barry, *supra* note 3, at 274.

101. Maggs, *supra* note 2, at 25.

ple of the Judicial Conference advisory committee structure, which has functioned so successfully for so many years without any serious conflict of interest issues noted. In any event, any such perceived concerns are wholly outweighed by the fundamental integrity of, and the benefits to the justice system that are inherent in the process itself. As Peter McCabe notes:

> The process by which the federal rules are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules."[104]

McCabe goes on to say that the "essence of the federal rulemaking process has remained constant for the past sixty years," and that the first of its "basic features" is "the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors."[105] Perhaps if the military used such diverse "prestigious advisory committees," our system would not be subject to criticism for its failure to be a "thoroughly open . . . and exacting process." By adopting new procedures modeled on such a time-tested and well-regarded process, the military justice system would enhance its credibility and reap the immeasurable benefits of increased public esteem and confidence, while gaining a vastly improved potential for adopting higher quality, more "substantively neutral" rules.

Captain Maggs finally argues that new procedures are not really needed because "the JSC usually follows changes that already occurred in civilian rules of evidence and procedure."[106] He uses as examples the rules recently adopted for child witnesses, and the rule governing the psycho-

---

102. It has been noted (including by the SCAFL) that the JSC is comprised of "the officers responsible for criminal law in the armed forces." *See, e.g.*, Barry, *supra* note 3, at 266 n.105 and accompanying text. As a result of their status and of events over the years, "the *perception* [of the JSC] . . . is that of a small 'government' committee, operating in secret, which changes the rules (often with the appearance of benefitting only the prosecution) without explaining why." *Id.* at 240. The JSC certainly seems to have been a far more influential and effective "special interest group" in this process than any other group has been (or conceivably could be).

103. Maggs, *supra* note 2, at 24-26.

104. McCabe, *supra* note 85, at 1656 (quoting COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS RECOMMENDATION 30 (1995)).

105. *Id.*

106. Maggs, *supra* note 2, at 27.

therapist-patient evidentiary privilege. He states: "These amendments, while significant, did not require the JSC to engage in original thinking."[107]

I would argue that, had a more diverse body been involved, perhaps someone might have engaged in at least a bit more "original thinking,"[108] and the original proposed rule for the psychotherapist-patient privilege might not have been so unbalanced, with the result that the storm of controversy that erupted might thereby have been much abated. Captain Maggs argues that the controversy, and the resultant changes made by the JSC to the rule, show that the current process works. My answer is that while the process in this case may have "worked" (in that a less objectionable result eventually was achieved), it did not work very well, and in a system concerned with rapid promulgation of rules, this rule does not well stand as a model for the future.[109]

None of the objections or arguments Captain Maggs makes regarding either the ABA Recommendations or the Hodson proposal warrant the conclusions he would draw that the costs of adopting these reforms outweigh the benefits to be derived. His concerns rest on his unsupported assumptions, and such concerns become insignificant when considered in the light of facts and arguments Captain Maggs has overlooked. The Hodson proposal, as I would complete it by incorporating the structure and process set forth by the ABA (following the Judicial Conference model), deserves to be approached and studied openly, without preconception or "skepticism." Whatever "costs" there would be to implement a military judicial conference—and I expect they would actually exceed the minimal[110] administrative inconvenience and costs Captain Maggs has identified—would be marginal when balanced against the substantial benefits a credible open and public rulemaking process would provide. The civilian

---

107. *Id.*

108. I cannot agree that the JSC does not engage in original thinking. It is my impression that considerable effort and thought go into their deliberations. What is missing is original thinking from persons with different (and more diverse) knowledge, experience and perspective, to complement that of the members of the JSC.

109. The Supreme Court decision announcing the new rule came on 13 June 1996. Jaffe v. Redmond, 518 U.S. 1 (1996). The initial publication of a proposed rule, which differed drastically from the federal rule announced in *Jaffe*, came almost a year later on 6 May 1997. 62 Fed. Reg. 24,640 (May 6, 1997). The final rule was not promulgated until almost two and one-half years after its initial notice. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999). Considering Captain Maggs's conclusion that the civilian process "tends to take a long time," Maggs, *supra* note 2, at 27, the current military process hardly seems a preferred option. *See also supra* note 15 and accompanying text.

system has paid those minimal costs, and reaped the benefits. The military system should do the same.

IV. Conclusion

In Captain Maggs's view, as I understand it, there has been very great advancement in the *MCM* rule-making process over the last few years, but such change has (at least for the present) gone far enough, and the *status quo* in the process now should not be disturbed. Rather than a "work in progress," he would have the rule-making process be viewed (at least for some indeterminate period) as a *fait accompli*, and one not to be further modified.

Such a perspective is not in any way modern. Rather it is entirely consistent with the view traditionally taken by those within the military justice system,[111]—including those at the highest levels:[112] a view resistant to any change to the status quo. Such a view, however, does not adequately respect either the concept that the perception of what constitutes fundamental due process is constantly evolving, or even the more basic concept that recognizes that the one constant—in law as in life—is change. Happily, there is evidence that such views are changing, even at the highest levels.[113]

Today, in addition to those such as General Moorman,[114] others within the system also see the need to change—sometimes not only because they view it as right and necessary, but also as a means to control the pace of that change and to guard against changes deemed less desirable, including those coming from outside the system, and from "segments of society unfamiliar with the military justice system."[115] The adoption of

---

110. I recognize that Captain Maggs states that "all but one or two of [my] proposals would impose at least some *significant* burdens and costs," *see supra* text accompanying note 8 (emphasis added), but I do not believe his discussions of the actual administrative costs support this categorization.

111. "Traditional opinion within the service has always held that each successive reform would bring ruin and collapse." VALLE, ROCKS AND SHOALS: ORDER AND DISCIPLINE IN THE OLD NAVY 1800-1861, at 299 (1880).

112. It has been the traditional approach for the Judge Advocates General of the various services to stoutly resist changes to the system. *See, e.g.*, JONATHAN LURIE, ARMING MILITARY JUSTICE - VOLUME I - THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 256-67 (1992): "As retired [Judge Advocate General of the Army] George Prugh stated in 1975, the JAGS 'are not going to be the originators of ideas that are going to change the military justice system, at least not very often.'"

the JSC 2000 Procedures in early 2000 was, in this author's opinion, motivated in substantial part by the perceived threat posed by the pending SCAFL recommendation that there be a broadly constituted commission appointed to review the operation of the entire UCMJ.[116] It is worthy of note that immediately after these new JSC procedures were announced by

---

113. The changes to the military rule-making process adopted in the JSC 2000 Procedures and announced at the February 2000 SCAFL meeting obviously had the support and concurrence of the TJAGs. Further evidence that the old order is changing is provided in a recent article by The Judge Advocate General of the Air Force, Major General William A. Moorman:

> The central question presented today is, "does the [UCMJ] need to be changed?" There can be only one answer. Of course it needs to be changed! For 50 years, the UCMJ and the Manual for Courts-Martial which implements it, have been anything but static documents. The real questions are: "If change is inevitable, what changes should be made? Why should change occur? And, when should changes be made?"
>
> . . .
>
> Our system, like all other legal systems, is subject to the dynamics of change. No legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society. For that reason, we are always looking for and evaluating ways to improve military justice.

Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed*?, 184 A.F. L. REV. 185 (2000).

114. *See id.*

115. Young, *supra* note 47, at 124.

116. As quoted in the SCAFL Agenda Book, the Recommendation under consideration in February 2000 read as follows:

> RESOLVED, That the American Bar Association urges the Congress to use the 50th Anniversary of the enactment of the Uniform Code of Military Justice (UCMJ) in 1950 as an appropriate occasion to establish a diverse and broadly constituted Commission to undertake a thorough and comprehensive review of the military justice system, with a view toward ensuring that the American system of military justice is fully capable of operating effectively and efficiently in peace and war, and is, in both appearance and reality, as fair and just a system as is feasible.

AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA III, Tab C (Feb. 12, 2000). The wording of the recommendation is from the report and recommendation considered at the Fall 1999 meeting. Though the report was revised for the February 2000 meeting, *see id.* Agenda Item II, Tab B, no changes to the wording of the Recommendation were included in the revised report.

Major General Walter Huffman, The Judge Advocate General of the Army, at the February 2000 SCAFL meeting, SCAFL voted "not to forward its revised recommendation for a UCMJ Review Commission to the [ABA] House of Delegates."[117] The same perceived threat of a UCMJ Review Commission, or of other undesirable change imposed from "outside" the system, was addressed by Chief Judge Young as part of the basis for his recent recommendation for change in the court-martial member selection process.[118]

Captain Maggs does not argue absolutely against the changes proposed, but rather suggests that they are unwarranted at this time, in part because the public has not loudly complained about *this* aspect of the system.[119] Truthfully, what better time could there be to make a change seen as desirable by so many professional observers than when there is no "heat" from Congress or the public. In the midst of a *Tailhook*-type scandal, reasoned and balanced change becomes considerably more difficult. These proposed changes have been carefully studied and recommended by leading experts in the field starting more than a quarter century ago with the "legendary Major General Hodson."[120] Now is the time for the JSC, the DOD, the President and the Congress to discard prejudgments and "skepticism" and with due care and deliberation[121] to undertake a careful study of these proposals "with a view to implementing General Hodson's 1973 recommendation, thus further advancing this 'work in progress'—the modernization of the military court rule-making process."[122]

---

117. MIL. JUST. GAZ. No. 75 (Mar. 2000).

118. Young, *supra* note 47, at 124-25.

119. *See, e.g.*, Maggs, *supra* note 2, at 4 n.20.

120. *Id.* at 6.

121. Major General Moorman provides a model for the careful consideration of proposals for change which ought to be required reading for those who have a role in proposing or considering changes to this system. His discussion concludes with the view that the UCMJ "should only be changed if the change enhances the two purposes of the military justice system, the promotion of good order and discipline and the provision of real, fair, and measured justice to all servicemembers." Moorman, *supra* note 113, at 194. I read his comments as applying to regulatory changes as well as statutory changes, and not to be limited to substantive law changes. Application of the steps in his model for consideration of change argue strongly for a more open and fair rule-making process which will lead to better, more broadly considered and balanced rules, as proposed in my article.

122. Barry, *supra* note 3, at 241.

THE EXHAUSTION COMPONENT OF THE *MINDES* JUSTICIABILITY TEST IS NOT LAID TO REST BY *DARBY V. CISNEROS*

CAPTAIN E. ROY HAWKENS, USNR[1]

I. Introduction

It has long been established among a majority of federal courts of appeals that, before a service member may bring a suit against the government challenging an internal military decision, he must first demonstrate that his claim is justiciable pursuant to the multi-faceted test announced by the Fifth Circuit in 1971 in *Mindes v. Seaman*.[2] An integral part of the *Mindes* justiciability test is the requirement that a service member exhaust his intramilitary remedies—a requirement that serves separation of powers concerns, preserves the primacy of the comprehensive system of military justice provided by Congress, avoids judicial confrontation of sensitive military issues that defy the application of judicially manageable standards of review, and protects vital interests that affect military readiness.

The Supreme Court's 1993 decision in *Darby v. Cisneros*[3] may be read as casting doubt on the continuing validity of the exhaustion component of the *Mindes* test in the context of claims brought by service members under the Administrative Procedure Act (APA)[4]—the statutory remedy invoked by service members who seek relief other than money damages on the ground that the military violated their regulatory, statutory,

---

1. Appellate Staff, Civil Division, U.S. Department of Justice. Naval Reservist, United States Naval Academy. He served on active duty as a submariner. B.S., U.S. Naval Academy, 1975; J.D., Marshall-Wythe School of Law, College of William & Mary, 1983. Publications: *The Justiciability of Claims Brought By National Guardsmen Under the Civil Rights Statutes for Injuries Suffered In the Course of Military Service*, 125 MIL. L. REV. 99 (1989); *Griffen v. Griffiss Air Force Base: Qualified Immunity and the Commander's Liability for Open Houses on Military Bases*, 117 MIL. L. REV. 279 (1987); *The Effect of Shaffer v. Heitner on the Jurisdictional Standard in Ex Parte Divorces*, 18 FAM. L.Q. 311 (1984); *Virginia's Domestic Relations Long-Arm Legislation: Does Its Reach Exceed Its Due Process Grasp?*, 24 WM. & MARY L. REV. 229 (1983). Member of the Virginia bar.

2. 453 F.2d 197 (5th Cir. 1971). In this article, the term "justiciability" is interchangeable with the term "reviewability" and connotes limitations—of a constitutional or prudential nature—on a court's power to review the merits of a claim.

3. 509 U.S. 137 (1993).

4. 5 U.S.C. §§ 701-706 (2000).

or constitutional rights. In *Darby*, which arose in the civilian context, the Court held that, unless exhaustion is required by statute or agency rule as a prerequisite to judicial review, the APA divests courts of discretion to require a plaintiff to exhaust administrative remedies prior to seeking judicial review of "final" agency action. In other words, where the agency decisionmaker reaches a definitive position on an issue that inflicts actual, concrete injury on a party, that decision is subject to APA review, and courts are "not free to impose an exhaustion requirement as a rule of judicial administration."[5]

This article examines the *Mindes* decision and its widespread acceptance among federal courts. Next, this article examines the *Darby* decision, and then reviews several cases that have applied *Darby*—with inconsistent results—to service members' APA claims. Finally, this article considers whether *Darby* should be extended to the military context, thereby absolving service members from exhausting their intramilitary remedies prior to seeking APA relief. This inquiry is resolved in the negative.

That *Darby*'s interpretation of the APA does not apply in the military context is consistent with the *Feres* rule of statutory construction, which provides that statutes of general applicability should not, by inference, be construed as applying to the same extent, if at all, to service members' claims challenging service-related decisions, because the routine adjudication of such claims will threaten the effective performance of vital military functions. Moreover, retaining the exhaustion component of *Mindes* test for APA claims brought by service members will prevent premature judicial review of service members' claims, which would marginalize and supplant the comprehensive system of intramilitary remedies enacted by Congress pursuant to its explicit and plenary constitutional authority to regulate the military. In this regard, the exhaustion component of the *Mindes* justiciability test serves the same important interests as does the primary jurisdiction doctrine, from which the exhaustion component in *Mindes* actually evolved.

Exhaustion of intramilitary remedies should, therefore, continue to be the rule for APA claims brought by service members. The *Darby* decision itself seems to have signaled this result when it observed that federal courts remain free in APA suits "to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial

5. *Darby*, 509 U.S. at 144, 153-54.

review."[6] The *Mindes* justiciability test in its integrated entirety—including its exhaustion component—constitutes one such doctrine that should continue to limit the timing and scope of judicial review of service members' APA claims.

II. The Origin and Widespread Acceptance of the *Mindes* Justiciability Test

A. The *Mindes* Test

Nearly three decades ago, the Fifth Circuit in *Mindes v. Seaman*[7] established a multi-factor test for determining the reviewability of claims challenging internal military decisions. The need for a justiciability doctrine limiting the types of claims that service members could bring arose from judicial (1) reluctance to second-guess professional military judgments, (2) apprehension that courts would be inundated with service members' complaints, and, most important, (3) concern that unrestricted review of claims brought by service members would impair the military in the performance of its vital mission.[8]

After canvassing Supreme Court and appellate precedent, the Fifth Circuit distilled the following principles. Federal courts are empowered to review internal military decisions to determine if an official exceeded his scope of authority or rendered a decision in violation of a constitutional, statutory, or regulatory right.[9] Courts are restricted, however, in their ability to review decisions that implicate military discretion and expertise or affect core military functions. The types of challenges that raise these types of concerns include—but obviously are not limited to—service members' claims challenging suitability decisions, promotions, duty assignments, command assignments, transfer decisions, and orders related to specific military functions.[10] Finally, courts routinely require service members to exhaust intramilitary remedies before seeking judicial relief.[11]

---

6. *Id.* at 146.
7. 453 F.2d 197 (5th Cir. 1971).
8. *Id.* at 199.
9. *Id.* at 199-201.
10. *Id.* at 199-202.
11. *Id.* at 200. In support of its inclusion of an exhaustion component in the *Mindes* justiciability test, the court relied on *In re Kelly*, 401 F.2d 211 (5th Cir. 1968), and *Tuggle v. Brown*, 362 F.2d 801 (5th Cir. 1966) — both which held that a service member must

From these principles, the Fifth Circuit formulated an integrated justiciability test, consisting of a threshold two-prong procedural component, followed by a four-factor balancing component. First, a service member's claim challenging a military decision will be deemed non-justiciable unless he has (1) exhausted available intramilitary remedies, and (2) alleged the deprivation of a constitutional, statutory, or regulatory right.[12] If the service member satisfies these threshold requirements, the court will then determine the reviewability of the claim by balancing the following factors: (1) the nature and strength of the member's challenge; (2) the potential injury to the member if review is denied; (3) the type and degree of interference with the military function if review is permitted; and (4) the extent of military expertise or discretion that is involved in the challenged decision.[13]

B. A Majority of Courts of Appeals Have Adopted Either the *Mindes* Test or an Analogous Reviewability Test that Includes an Exhaustion Component

In the nearly thirty years since the Fifth Circuit announced the *Mindes* test, the Supreme Court has not expressed a view on it. Although the Court has adjudicated the merits of service members' claims without applying (or discussing) the *Mindes* test,[14] this should not be viewed as a rejection of *Mindes*. Such a conclusion would ignore the venerable principle that questions that lurk behind the record, not brought to a court's attention or ruled upon, lack precedential value.[15] As the Ninth Circuit stated, the Supreme Court's failure to apply the *Mindes* justiciability test in *Goldman v. Weinberger*,[16] for example, should not be construed as evincing disap-

---

11. (continued) exhaust his administrative remedies before seeking judicial review. Notably, in *Tuggle*, the Fifth Circuit relied on *McCurdy v. Zuckert*, 359 F.2d 491 (5th Cir. 1966), which equated the exhaustion requirement in the military context with the primary jurisdiction doctrine. Thus, in light of its origin, the exhaustion component in *Mindes* may more aptly be characterized as the primary jurisdiction component. *See infra* text accompanying notes 128-38.

12. *Mindes*, 453 F.2d at 201.

13. *Id.*

14. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); Chappell v. Wallace, 462 U.S. 296 (1983); Rostker v. Goldberg, 453 U.S. 57 (1981).

15. Webster v. Fall, 266 U.S. 507, 511 (1925); *cf.* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 119 (1984) (noting that when question of jurisdiction has been passed upon in prior case without discussion, court is not bound when subsequent case raises that issue).

16. 475 U.S. 503 (1986).

proval, because had the Court intended to express a view on *Mindes*, "it would surely have made some reference to [it]."[17]

The following seven circuits have adopted the *Mindes* test in its entirety: the First,[18] the Fourth,[19] the Fifth,[20] the Eighth,[21] the Ninth,[22] the Tenth,[23] and the Eleventh.[24] The Sixth Circuit has cited the *Mindes* decision with approval,[25] and it has recognized the importance of requiring service members to exhaust their intramilitary remedies prior to seeking judicial review.[26] The Second Circuit has not expressed a view on the *Mindes* test, but it has recognized that challenges to discretionary decisions by military officials acting within their authority are generally not justiciable.[27] Moreover, it has held that service members seeking to challenge military decisions must ordinarily exhaust their intramilitary remedies.[28]

In contrast, the D.C. Circuit, Third Circuit, and Seventh Circuit have declined to adopt the balancing component of the *Mindes* test. Instead, the D.C. Circuit[29] and the Third Circuit[30] apply traditional standards of justiciability to service members' claims, while the Seventh Circuit applies a

17. Khalsa v. Weinberger, 787 F.2d 1288, 1289 n.1 (9th Cir. 1986).

18. Nava v. Gonzalez Vales, 752 F.2d 765 (1st Cir. 1985); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984).

19. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).

20. NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980); West v. Brown, 558 F.2d 757 (5th Cir. 1977).

21. Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982).

22. Barber v. Widnall, 78 F.3d 1419 (9th Cir. 1996); Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988); Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir.), *reaff'd*, 787 F.2d 1288 (1986); Helm v. California, 722 F.2d 507 (9th Cir. 1983); Gonzalez v. Dep't of the Army, 718 F.2d 926 (9th Cir. 1983).

23. Clark v. Widnall, 51 F.3d 917 (10th Cir. 1995); Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905 (10th Cir. 1987); Rich v. Sec'y of the Army, 735 F.2d 1220 (10th Cir. 1984); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

24. Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Rucker v. Sec'y of the Army, 702 F.2d 966 (11th Cir. 1983).

25. Dunlap v. Tennessee, 514 F.2d 130, 133 (6th Cir. 1975).

26. Seepe v. Dep't of the Navy, 518 F.2d 760, 762-65 (6th Cir. 1975).

27. Jones v. New York State Div. of Mil. and Nav. Affairs, 166 F.3d 45, 52, 54 (2d Cir. 1999); Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974).

28. Guitard v. Sec'y of the Navy, 967 F.2d 737, 740 (2d Cir. 1992).

29. Kreis v. Sec'y of the Navy, 866 F.2d 1508, 1511-12 (D.C. Cir. 1989); Emory v. Sec'y of the Navy, 819 F.2d 291, 293-94 (D.C. Cir. 1987); Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979).

30. Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981).

unique and deferential justiciability test that inquires "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree."[31] Significantly, each of these courts has recognized the importance of requiring service members to exhaust their intramilitary remedies.[32]

Finally, although the Federal Circuit's grant of jurisdiction does not extend to APA claims,[33] that court has favorably cited *Mindes*.[34] Moreover, the Federal Circuit has held that, at least in cases that do not implicate military pay issues, service members must pursue their intramilitary remedies in the first instance in order to "give the military decision-maker a chance to determine whether a complainant's pursuit in that particular case may be meritorious and, if not, a chance to say why."[35]

---

31. Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 768 (7th Cir. 1993).

32. Bois v. Marsh, 801 F.2d 462, 468 (D.C. Cir. 1986) ("[A] court should not review internal military affairs in the absence of . . . exhaustion of available intraservice corrective measures."); Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 102 n.5 (3d Cir. 1986) (holding that a service member should be required to exhaust unless administrative remedy would be inadequate); Duffy v. United States, 966 F.2d 307, 311 (7th Cir. 1992) (holding that a service member ordinarily "will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies").

33. Service members who invoke the Federal Circuit's jurisdiction, 28 U.S.C. § 1295, allege causes of action pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2), which authorize certain *damage* claims. In contrast, a service member may bring an APA action only where he seeks "relief other than money damages," and only in cases "for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704 (2000).

34. Dodson v. United States, 988 F.2d 1199, 1207 n.7 (Fed. Cir. 1993); Vogue v. United States, 844 F.2d 776, 781 n.7 (Fed. Cir. 1988); Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985).

35. Williams v. Sec'y of the Navy, 787 F.2d 552, 559 (Fed. Cir. 1986). The Federal Circuit has held that exhaustion of intramilitary remedies is not required in military pay cases, because the six-year statute of limitations that governs such claims, 28 U.S.C. § 2501, is jurisdictional and therefore not susceptible to tolling during the pendency of administrative review. *See* Hart v. United States, 910 F.2d 815, 818-19 (Fed. Cir. 1990); Hurick v. Lehman, 782 F.2d 984, 987 (Fed. Cir. 1986); Heisig v. United States, 719 F.2d 1153, 1155 (Fed. Cir. 1983). As discussed *infra* Part IV.B, however, weighty separation of powers concerns underlie the application of the exhaustion doctrine in the military context. When these concerns militate in favor of exhaustion in timely filed cases involving pay claims, the Federal Circuit could require exhaustion consistent with Circuit precedent by staying the action and remanding to the military branch. In this regard, the Tucker Act provides that "[i]n any case within its jurisdiction, the court shall have the power to remand matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491(1)(2).

In sum, federal courts of appeals are unanimous in recognizing that military-related claims brought by service members raise unique justiciability concerns of practical and constitutional significance, and such claims generally should not be reviewed if the service member (1) has not exhausted intramilitary remedies, or (2) challenges a military decision that is not suitable for judicial review. Although, as discussed above, the courts differ to some degree in their approach to the latter inquiry,[36] they are in substantial agreement that the reviewability inquiry should include the exhaustion component.[37]

III. The Supreme Court's Decision in *Darby* and How Courts Have Applied it to APA Claims Brought By Service Members

A. The *Darby* Decision

In *Darby v. Cisneros*,[38] the Department of Housing and Urban Development (HUD) administratively sanctioned petitioners after concluding that they had improperly circumvented federal rules in order to receive federal mortgage insurance for their multi-family development projects.[39] Petitioners appealed to an administrative law judge, who reduced the administrative sanctions in light of certain mitigating factors, and this decision became final agency action when neither party elected to seek further administrative review.[40]

Petitioners filed an APA action in federal district court, arguing that the sanctions imposed by HUD were not in accordance with law and thus

---

36. *Compare, e.g.*, *Mindes* balancing test (cases cited *supra* notes 18-24) *with* standard justiciability test (cases cited *supra* notes 29 & 30) *and* modified justiciability test (case cited *supra* note 31).

37. Of course, in those instances where a service member is able to demonstrate that his interest in immediate judicial review outweighs the countervailing institutional interests favoring exhaustion, a court has discretion to excuse a service member from exhausting. *See* McCarthy v. Madigan, 503 U.S. 140 (1992); McKart v. United States, 395 U.S. 185 (1969).

38. 509 U.S. 137 (1993).

39. *Id.* at 140-41.

40. The HUD's regulation provided that the decision of the Administrative Law Judge is final unless "the Secretary or his designee, within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. . . . Any party may request such a review writing within 15 days of receipt of the hearing officer's determination." *Id.* at 141 (quoting 24 C.F.R. § 24.314(c)).

violated the APA.[41] The HUD moved to dismiss, claiming that petitioners—by forgoing the opportunity to seek review by the secretary pursuant to 24 C.F.R. § 24.314(c)[42]—failed to exhaust administrative remedies. The district court rejected HUD's exhaustion argument and entered summary judgment for petitioners.[43] The court of appeals reversed, holding that petitioners' action should have been dismissed for failure to exhaust.[44]

The Supreme Court granted certiorari to consider "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the [APA], where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review."[45] The critical inquiry was whether Congress had spoken to the issue of exhaustion, because courts lack discretion to impose an exhaustion requirement on plaintiffs where Congress has directed otherwise. The *Darby* court concluded that Congress had spoken directly to the exhaustion requirement in 5 U.S.C. § 704, which provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[46]

Applying the plain language in section 704, the *Darby* court held that courts may require exhaustion in the context of APA claims "only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a

---

41. *Id.* at 142 (citing 5 U.S.C. § 706(2)(A)).
42. *See supra* note 40.
43. *Darby*, 509 U.S. at 142.
44. *Id.*
45. *Id.* at 138.
46. *Id.* (quoting 5 U.S.C. § 704).

rule of judicial administration where the agency action has already become 'final' under [section 704]."[47]

B. The Lower Courts Have Been Inconsistent in Applying *Darby* to APA Claims Brought by Service Members

In the seven years since *Darby* was decided, the lower courts have rendered inconsistent or inconclusive decisions as to whether *Darby* extends to APA claims brought by service members. The D.C. Circuit in two unpublished decisions applied *Darby* to excuse service members from exhausting their intramilitary remedies prior to seeking APA review.[48] On the other hand, in another unpublished decision, the D.C. Circuit—without mentioning *Darby*—summarily held that a former service member, who appeared to be advancing an APA claim, may not "seek injunctive relief prior to exhausting available administrative remedies."[49] Because these decisions are not published, they may not be cited as precedent pursuant to D.C. Circuit Rule 28(c).

In at least two cases in the Ninth Circuit, the issue of whether *Darby* applies to service members' APA claims has been briefed,[50] but the Ninth Circuit has declined to address the issue—although its disposition in both cases suggests that the exhaustion component of the *Mindes* test remains unaffected by *Darby.* In one case, where a service member was challenging the lawfulness of his separation proceedings and the constitutionality of the regulations that required his discharge, the court acknowledged that "strict application of exhaustion requirement in military discharge cases helps maintain the balance between military authority and federal court intervention,"[51] but it refused to require exhaustion on grounds of futility.[52] In another discharge case, where a service member contended that the military erred in failing to diagnose his service-related disability, the court held in an unpublished decision that the exhaustion rule should

47. *Id.* at 154.

48. Ostrow v. Sec'y of the Air Force, 48 F.3d 562, 1995 WL 66752 (D.C. Cir. 1995) (table); Dowds v. Clinton, 18 F.3d 953, 1994 WL 85040 (D.C. Cir. 1994) (table).

49. Jones v. Sullivan, 1995 WL 551256 (D.C. Cir. 1995).

50. *See* Brief for the Appellees, Kennedy v. Sec'y of the Army, No. 99-15214, at 22-24 (served Mar. 31, 1999); Brief for the Appellants, Meinhold v. United States Dep't of Defense, No. 93-55242, at 17-18 (served July 29, 1993).

51. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1473-74 (9th Cir. 1994).

52. *Id.* at 1474.

be strictly applied in military discharge cases, and that plaintiff had not shown that an exception to this rule was warranted in his case.[53]

Two district courts in the Seventh Circuit have held that *Darby* absolves service members from exhausting their intramilitary remedies. In *St. Clair v. Secretary of the Navy,*[54] a former service member brought an APA claim arguing that the characterization of his discharge should be upgraded from "general" to "honorable." The government argued that the member's claim should be dismissed because he had not yet exhausted his intramilitary remedies—that is, had not sought relief from the Board for Correction of Naval Records—as required by Seventh Circuit case law.[55] The district court for the Central District of Illinois noted that the Seventh Circuit case law cited by the government preceded the decision in *Darby,* and that *Darby* no longer required exhaustion for plaintiffs seeking APA remedies unless exhaustion is "expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."[56] Because "neither the applicable statute, 10 U.S.C. § 1552, nor regulations, 32 C.F.R. Part 723-24, expressly require appeal to the [Board for Correction of Naval Records] before judicial review," the court held that exhaustion was not required.[57]

Similarly, in *Perez v. United States*,[58] the district court for the Northern District of Illinois held that, after *Darby,* a service member need not exhaust intramilitary remedies prior to pursuing an APA remedy. In *Perez,* a service member who had been administratively discharged from the Navy for the commission of a serious offense sought a judicial declaration that his discharge was void and an order compelling the Navy to reinstate him.[59] The government moved to dismiss, arguing that *Darby* should not be extended to the unique military context.[60] The district court rejected this argument, holding that if APA claims brought by service members are

---

53. Kennedy v. Sec'y of the Army, 191 F.3d 460, 1999 WL 710317 (9th Cir. 1999) (table).

54. 970 F. Supp. 645 (C.D. Ill. 1997).

55. *Id.* at 647.

56. *Id.* (quoting Darby v. Cisneros, 509 U.S. 137, 154 (1993)).

57. *St. Clair*, 970 F. Supp. at 648. The court opined that if the "Navy wishes to require an appeal to the BCNR before judicial review under these circumstances, it should include an express requirement in its regulations or ask Congress to include such an express requirement in the statute." *Id.*

58. 850 F. Supp. 1354 (N.D. Ill. 1994).

59. *Id.* at 1357.

60. *Id.* at 1360.

to be exempted from the *Darby* rule, such an exemption should come from the Supreme Court or Congress.[61]

District courts in the Ninth Circuit have reached inconsistent results regarding whether *Darby* applies to service members' APA claims. In *Watson v. Perry*,[62] a Naval officer challenged the constitutionality of a statute and its implementing regulations that mandated his discharge. Applying *Darby*, the district court for the Western District of Washington held that exhaustion is only a prerequisite to judicial review of final agency action when expressly required by statute, or when agency rule requires exhaustion and the administrative action is made inoperative pending administrative review.[63] Because resort to the Board for Correction of Naval Records was not mandated by statute or regulation, the court held that exhaustion of intramilitary remedies was not required.[64]

In contrast, the district court for the Southern District of California held that *Darby* does not relieve a service member from exhausting his intramilitary remedies prior to seeking APA relief. In *Saad v. Dalton*,[65] a discharged Naval officer challenged the constitutionality of her separation and sought reinstatement. The district court granted the government's motion to dismiss for failure to exhaust. The court observed that the Constitution vests the political branches with the responsibility for regulating and governing the military, and that the orderly functioning of government and the preservation of military readiness requires the judiciary scrupulously to avoid interfering in legitimate military matters.[66] In light of these concerns, service members must exhaust intramilitary remedies before pursuing judicial review, and *Darby*—which occurred in the civilian context—does not alter this conclusion, because "[r]eview of military personnel actions . . . is a unique context with specialized rules limiting judicial review."[67]

Finally, one district court in the Tenth Circuit refused to apply any portion of the *Mindes* justiciability test in light of *Darby*, but the Tenth Circuit reversed in an unpublished decision.[68] The Tenth Circuit held that the

---

61. *Id.* at 1361.

62. 918 F. Supp. 1403 (W.D. Wash. 1996), *aff'd*, 124 F.3d 1126 (9th Cir. 1997). On appeal, the exhaustion issue was neither raised nor addressed.

63. *Id.* at 1411.

64. *Id.*

65. 846 F. Supp. 889 (S.D. Cal. 1994).

66. *Id.* at 891.

67. *Id.*

Mindes test still applies to APA claims brought by service members,[69] but it noted that it need not reach the question of the "viability of the exhaustion component of the first step of the *Mindes* test in light of *Darby* because there is no issue of failure to exhaust in this case."[70]

IV. *Darby* Does Not Require Deleting the Exhaustion Component of the *Mindes* Test for Service Members' APA Claims

A. Retaining the Exhaustion Component of the *Mindes* Test is Consistent with Congressional Intent

As shown above, no court of appeals has squarely resolved in a published opinion whether *Darby* extends to APA claims brought by service members. The unpublished decisions of the D.C. Circuit appear to be inconsistent in their application of the exhaustion doctrine to service members' APA claims. The Ninth Circuit has declined to address *Darby*, but appears to be continuing to apply the exhaustion component of the *Mindes* test to service members' APA claims. District courts that have considered the issue have reached differing conclusions.

Due regard for service members' rights, congressional intent, and military readiness demand that *Darby* be applied in a consistent, and therefore foreseeable, fashion. As this article now discusses, courts should con-

---

68. Robertson v. United States, 145 F.3d 1346, 1998 WL 223159 (10th Cir. 1998) (table).

69. 1998 WL 223159, at *3.

70. *Id.* at *4 n.2.

71. *Darby* recognized that it remains open to Congress and agencies to take affirmative steps, in the form of legislation or regulation, to "mandate exhaustion as a prerequisite to [APA] judicial review." Darby v. Cisneros, 509 U.S. 137, 138 (1993). Such a legislative or regulatory response in the military context is feasible and has been explored in other articles. *See, e.g.*, Michael E. Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix For Darby v. Cisneros*, ARMY LAW., Feb. 1997, at 3; William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, ARMY LAW., Sept. 1994, at 3. This article concludes, however, that—given the special rule of statutory construction that applies in the military context, as well as unique separation of powers concerns that are implicated when a service member uses the judicial forum to challenge an internal military decision—a legislative response is not necessary because *Darby*

clude that *Darby*'s holding is no bar to applying the exhaustion component of the *Mindes* test to service members' APA claims.[71]

In *Darby*, the Supreme Court's paramount concern was applying the APA "in a manner consistent with congressional intent."[72] Because the APA provides for judicial review of "final agency action,"[73] *Darby* held that courts may not, consistent with congressional intent, "impose an exhaustion requirement as a rule of judicial administration where the agency order has already become 'final' under § 10(c) [of the APA, 5 U.S.C. § 704]."[74]

However, applying the exhaustion component of the *Mindes* test to service members who use the APA to challenge internal military decisions is not a rule of judicial administration that serves to supplant the APA's finality requirement. Rather, it is a critical factor in an integrated, reviewability matrix that—like the political question doctrine[75] and the primary jurisdiction doctrine[76]—serves separation of powers concerns. Application of the doctrine results in channeling claims that are unsuitable for judicial review to the appropriate congressionally created review board, which will compile an administrative record, render findings of fact, and apply

---

71. (continued) should not be read as extending to the military context.

72. *Darby*, 509 U.S. at 153.

73. 5 U.S.C. § 704 (2000).

74. *Darby*, 509 U.S. at 154.

75. The Ninth Circuit has analogized the *Mindes* reviewability test to the political question doctrine, observing that both doctrines serve to filter out claims that "may prove unsuitable for review by a court acting in its traditional judicial role." Khalsa v. Weinberger, 779 F.2d 1392, 1395-96 (9th Cir.), *reaff'd*, 787 F.2d 1288 (9th Cir. 1986). When a service member is permitted to seek judicial review without exhausting, courts encounter difficulty "finding judicially manageable standards to justify intervention into internal decisions grounded in military expertise . . . [o]wing to the distinctive role of the military and the exceptional nature of its organization and activities." 779 F.2d at 1395 n.1. *See* Stephen R. Brodsky, *Chappell v. Wallace: A Bivens Answer to a Political Question*, 35 NAVAL L. REV. 1, 25-40 (1986).

76. The D.C., Third, and Fifth Circuits have concluded that the exhaustion doctrine in the military context is analogous to the primary jurisdiction doctrine—a power-allocation doctrine that determines whether certain claims should be resolved in an administrative or judicial forum. *See infra* text accompanying notes 130-49. Indeed, the exhaustion component in the *Mindes* test is derived from Fifth Circuit precedent that held that a service member's failure to exhaust renders an action premature pursuant to the primary jurisdiction doctrine. *See supra* note 11; *infra* text accompanying notes 131-38. In addition to being related to the primary jurisdiction doctrine, the exhaustion doctrine is related to the doctrines of abstention and ripeness, which also "govern the timing of federal court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

particularized expertise in interpreting and applying relevant military regulations and policies.[77]

Equally important, retaining the exhaustion component of the *Mindes* test conforms with congressional intent. It is well established that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."[78] This is true because (1) the Constitution vests Congress, not the judiciary, with explicit and plenary authority over the military,[79] (2) Congress has exercised its authority and provided service members with a "special and exclusive system of military justice,"[80] and (3) civilian courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[81] A civilian court must therefore "hesitate long before entertaining a suit which asks the court to tamper with the established relationship [between service members, which] is at the heart of the necessarily unique structure of the Military Establishment."[82]

These compelling concerns, which are unique to the special military context, have animated the creation of a rule of statutory construction that, when applied to the APA, demonstrates that Congress did not intend courts to relieve service members from exhausting their intramilitary remedies prior to seeking APA relief. Specifically, to avoid "congressionally uninvited intrusion"[83] by the judiciary into internal military affairs, the Supreme Court has long adhered to a rule of statutory construction—the *Feres* principle—whereby courts will not, absent an express and unequivocal declaration of congressional intent, construe a statute as authorizing judicial interference in military matters.

---

77. For a discussion of the comprehensive and highly reticulated intramilitary remedies that Congress has provided for service members, see *infra* text accompanying notes 109-24.

78. United States v. Stanley, 483 U.S. 669, 683 (1987).

79. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

80. *Id.* at 300.

81. *Stanley*, 483 U.S. at 683; *accord* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

82. *Chappell*, 462 U.S. at 300. In light of Congress' plenary constitutional authority to regulate the military, and the civilian judiciary's lack of competence in this field, "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Id.* at 301 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

83. *Stanley*, 483 U.S. at 683.

The *Feres* principle derives from *Feres v. United States*[84] and its progeny.[85] *In Feres*, service members or their survivors attempted to bring claims for service-related injuries under the Federal Tort Claims Act (FTCA). Had the Supreme Court applied conventional rules of statutory construction that apply in the civilian context, it unquestionably would have construed the FTCA as providing a remedy for service members, because the Court was "confronted with an explicit grant of congressional authority [in the FTCA] for judicial involvement that was, on its face, unqualified."[86] However, cognizant that adjudication of military-related claims may implicate serious separation of powers concerns and impair the military in the performance of its vital mission, the Court held that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole."[87] Not wishing, in the absence of an "express congressional command,"[88] to disturb the "comprehensive system"[89] of intramilitary remedies created by Congress, and seeking to avoid unauthorized judicial interference in military matters that might impair military readiness, the Court declined to impute to Congress an intent to extend FTCA remedies to service members for injuries incident to military service.

The *Feres* principle has evolved into a "judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary."[90] This rule of statutory construction preserves "the proper relation between the courts, Congress and the military,"[91] and courts frequently have applied this rule to foreclose service members from

---

84. 340 U.S. 135 (1950).

85. United States v. Stanley, 483 U.S. 669 (1987); United States v. Johnson, 481 U.S. 681 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983).

86. *Stanley*, 483 U.S. at 681; *see Feres*, 340 U.S. at 138-39.

87. *Feres*, 340 U.S. at 139.

88. *Id.* at 146.

89. *Id.* at 140.

90. Stauber v. Cline, 837 F.2d 395, 399 (9th Cir. 1988). As the Supreme Court has stated, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs." Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).

91. *Stauber*, 837 F.2d at 399.

using remedial statutes of general applicability to seek relief for service-related injuries.[92]

As the D.C. Circuit explained in *Bois v. Marsh*,[93] when it applied the *Feres* principle to reject a service member's attempt to use 42 U.S.C. § 1985(3) to seek redress for service-related injuries:

> *Feres* itself represents a refusal to read statutes with their ordinary sweep. The unique setting of the military led the *Feres* Court to resist bringing the armed services within the coverage of a remedial statute in the absence of an express congressional command. Moreover, *Feres* principles were invoked by the Court in *Chappell* to foreclose assertion of constitutional rights. Taken together, *Feres* and *Chappell* powerfully suggest that the obvious effects on military discipline, which animated the Court in both of those cases, counsel against an expansive interpretation of another remedial statute so as to encompass military personnel.[94]

---

92. *See, e.g.*, Coffman v. Michigan, 120 F.3d 57 (6th Cir. 1997) (applying *Feres* principle to hold that Americans with Disabilities Act, 42 U.S.C. § 1201, does not extend to service members); Wright v. Park, 5 F.3d 586 (1st Cir. 1993) (applying *Feres* principle to hold that 42 U.S.C. § 1983 and federal whistleblower statute, 5 U.S.C. §§ 2301-2302, do not extend to service-related injuries); Farmer v. Mabus, 940 F.2d 921 (5th Cir. 1991) (applying *Feres* principle to hold that 42 U.S.C. § 1983 does not extend to service-related injuries); Lovell v. Heng, 890 F.2d 63 (8th Cir. 1989) (same); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) (same); Roper v. Dep't of the Army, 832 F.2d 247 (8th Cir. 1987) (applying *Feres* principle to hold that Title VII, 42 U.S.C. § 2000e, does not extend to service members); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (applying *Feres* principle to hold that 42 U.S.C. § 1985(3) does not extend to service-related injuries); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986) (applying *Feres* principle to hold that 42 U.S.C. §§ 1983 and 1985(2) do not extend to service-related injuries); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) (applying *Feres* principle to hold that 42 U.S.C. § 1983 does not extend to service-related injuries); Brown v. United States, 739 F.2d 362 (8th Cir. 1984) (applying *Feres* principle to hold that 42 U.S.C. §§ 1981 and 1983 do not extend to service-related injuries); Gonzalez v. Dep't of the Army, 718 F.2d 926 (9th Cir. 1983) (applying *Feres* principle to hold that Title VII, 42 U.S.C. § 2000e, does not extend to service members); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (applying *Feres* principle to hold that 42 U.S.C. §§ 1985(1) does not extend to service-related injuries). *See* E. Roy Hawkens, *The Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered Incident to Military Service*, 125 MIL. L. REV. 99, 105-10, 122-27 (1989) (discussing *Feres* principle and its application to suits by service members who seek to invoke remedial statutes of general applicability for service-related injuries).

93. 801 F.2d 462 (D.C. Cir. 1986).

94. *Id.* at 469-70 n.13.

The *Feres* principle thus eschews judicial intrusion into internal military matters in the absence of an express congressional command. Notably, the APA does not mandate that claims by service members and civilians be treated identically for purposes of determining justiciability, and Congress could rationally conclude that they should be treated differently. The military's special constitutional function to wage and win wars should the occasion arise renders it a "specialized society separate from civilian society [that has] by necessity developed laws and traditions of its own during its long history."[95] These special military laws have no counterpart in civilian society, and their application in the unique military context is beyond the common experience of civilian jurists. Because "it is difficult to conceive of an area of governmental activity in which the courts have less competence,"[96] Congress could reasonably expect the judiciary to "hesitate long"[97] before accepting a service member's invitation to entertain a suit that challenges an internal military decision that has not been reviewed in the first instance by the intramilitary remedial system established by Congress.

Because there can be no doubt that the APA does not divest courts of their unquestionable authority to avoid premature, unnecessary, or inappropriate judicial incursion into legitimate military matters, and because the APA does not command courts to facilitate the ability of service members to circumvent the comprehensive system of military justice that Congress has provided, courts may, pursuant to the *Feres* principle, continue to apply the exhaustion component of the *Mindes* justiciability test to service members' APA claims and be confident that they are applying the APA "in a manner consistent with congressional intent"[98] and, thus, consistent with *Darby.*[99]

---

95. Parker v. Levy, 417 U.S. 733, 743 (1974).

96. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

97. Chappell v. Wallace, 462 U.S. 296, 300 (1983). *See* James M. Hirschhorn, *The Separate Community: Military Uniquenes and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 186-204 (1984).

98. Darby v. Cisneros, 509 U.S. 137, 153 (1993).

99. Congress has enacted a comprehensive system of intramilitary justice, *see infra* text accompanying notes 109-24, that maintains the delicate balance between the rights of service members and the needs of the military. *See* Weiss v. United States, 510 U.S. 163, 177 (1994); The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 563-65 (1994). It is rational to conclude that Congress did not, by implication, intend the APA to serve as an alternative to its carefully crafted system of intramilitary relief.

It might be argued that, under the *Feres* principle, service members ought never be permitted to invoke the remedial provisions of the APA even if they satisfy the *Mindes* justiciability test, because the APA contains no explicit congressional command authorizing its use by service members for service-related claims. However, the Supreme Court stated in *Chappell* that decisions regarding the correction of military records are subject to judicial review under the APA "and can be set aside if they are arbitrary, capricious, or not based on substantial evidence."[100] This statement "casts serious doubt" on an argument that service members' APA claims are never reviewable.[101] Moreover, courts have relied upon the Supreme Court's statement in *Chappell* as authority for reviewing service members' APA claims.[102] A principled adherence to precedent should therefore compel courts to reject the Draconian argument that would lock the court house doors to all APA claims brought by service members.[103] It is, after all, the "function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander."[104]

Judicial review of exhausted and otherwise justiciable APA claims brought by service members will not, in any event, encroach on military prerogatives or result in second-guessing of military judgments. Rather, as discussed below, exhaustion permits congressionally constituted remedial boards to review sensitive military issues in the first instance, exercise their expertise, compile an administrative record, issue findings of fact, interpret and apply military regulations, and provide a rationale for any decision that may ultimately be the object of judicial review. Exhaustion thus preserves the primacy of Congress' intramilitary remedies and minimizes the risk of undue judicial interference in military matters, because a court is simply called upon—aided by an administrative record and guided by an administrative rationale—to perform its traditional judicial function

---

100. *Chappell*, 462 U.S. at 303. The solicitor general consistently has taken the position in the Supreme Court that BCMR decisions are subject to APA review. *See, e.g.*, Brief for the Federal Respondent in Opposition to Certiorari, Mier v. Van Dyke, No. 95-816 at 11-12 (Feb. 1996).

101. Kries v. Sec'y of the Air Force, 866 F.2d 1508, 1513 (D.C. Cir. 1989).

102. *Id.* at 1512.

103. The policy of adhering to precedent, or *stare decisis*, "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

104. Winters v. United States, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968). *Accord* Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962).

of applying the deferential standards of APA review to an administrative decision.[105]

B. Separation of Powers Concerns Strongly Support Retaining the Exhaustion Component of the *Mindes* Test, Which Is Also Aptly Viewed As the Primary Jurisdiction Component

The Framers of the Constitution vested Congress with exclusive authority "To raise and support Armies"; "To provide and maintain a Navy"; and "to make Rules for the Government and Regulation of the Land and naval Forces."[106] Congress, thus, has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[107] Congress has

> exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of [service members'] complaints.[108]

Examples of intramilitary remedies provided by Congress include a statutory right for any service member who believes himself wronged by his commanding officer, and who is refused redress by the commanding officer, to bring the complaint to the attention of any superior commissioned officer. The superior officer shall forward the complaint to the officer exercising general court-martial jurisdiction over the putative offender, and that officer shall investigate the matter, take appropriate corrective action, and inform the secretary of the entire matter.[109] Service members also have the statutory right to communicate grievances to members of Congress or an inspector general without incurring retaliatory action.[110]

Additionally, pursuant to legislative requirement, each military branch has established a board to review the discharge or dismissal (other

105. *See Chappell*, 462 U.S. at 303; *Kries*, 866 F.2d at 1511-15.
106. U.S. CONST. art. I, § 8, cls. 12-14. *See also Chappell*, 462 U.S. at 301.
107. Weiss v. United States, 510 U.S. 163, 177 (1994).
108. *Chappell*, 462 U.S. at 302.
109. 10 U.S.C. § 938 (2000).
110. *Id.* § 1034.

than by sentence of a general court-martial) of any former service member upon either the board's motion or the former member's request.[111] The board may, subject to secretarial review, change a discharge or dismissal, or issue a new discharge to reflect its findings.[112] The board's decision shall be based on military records and any relevant evidence, and the board is authorized to conduct hearings and obtain testimony from witnesses in person or through affidavits.[113]

Congress also has required the service secretaries to establish boards to review claims by service members who contend that they have been improperly retired or released from active duty without pay for physical disability.[114] These boards have the "same powers as the board whose findings and decisions are being reviewed."[115] Thus, the petitioning service member may appear before the board in person, by counsel, or by an accredited representative, and the board shall compile a record that includes extant military records, as well as any other evidence that the board deems relevant, including witness testimony in person or by affidavit.[116] The board then sends its findings to the secretary, who submits them to the President for approval.[117]

Finally, a clearly significant intramilitary remedy for purposes of the exhaustion component of the *Mindes* test is the Board for Correction of Military Records (BCMR). Congress has required each service secretary, acting through a BCMR, to correct any "error" or "injustice" identified by an aggrieved service member.[118] The BCMR's review authority is expansive, extending to any "document or record" that pertains to a service member, as well as "any other military matter affecting a member or former member."[119] Pursuant to procedures established by the relevant service secretary and approved by the Secretary of Defense, service members are entitled, with the assistance of legal counsel, to submit all relevant records, evidence, and arguments to the BCMR, which in turn may grant hearings and consider any regulatory, legislative, or constitutional griev-

111. *Id.* § 1553(a).
112. *Id.* § 1553(b).
113. *Id.* § 1553(c).
114. *Id.* § 1554.
115. *Id.* § 1554(b). The boards whose findings and decisions are subject to challenge under this statute include retiring boards, boards of medical survey, and disposition boards. *Id.* § 1554(a).
116. *Id.* § 1554(c).
117. *Id.* § 1554(b).
118. *Id.* § 1552(a)(1).
119. *Id.* § 1552(g).

ance advanced by the service member.[120] The BCMR compiles an administrative record,[121] and then exercises its broad remedial authority to grant appropriate relief, which may consist of correcting a military record, reinstating a member in the military, or awarding back pay or other pecuniary benefits.[122] Congress has also enacted statutes establishing timeliness standards for disposition of claims considered by the BCMR[123] and protecting the procedural rights of service members who seek relief from the review boards.[124]

It defies logic, as well as the *Feres* principle,[125] to conclude that Congress, by enacting the APA, implicitly intended service members to circumvent the comprehensive system of military justice that it so carefully crafted to fit the special needs of the military. Indeed, if *Darby* is extended to service members' APA claims, the BCMR's function and utility would be vitiated in derogation of congressional intent. Little incentive would exist for service members to seek administrative relief from an agency that they perceive has already harmed them when they could, instead, seek immediate judicial review of their claim.[126]

---

120. *See* 32 C.F.R. pt. 865 (2000) (Air Force Board for Correction of Military Records); 32 C.F.R. pt. 581 (Army Board for Correction of Military Records); 32 C.F.R. pt. 723 (Naval Board for Correction of Naval Records).

121. For example, the Air Force BCMR is required to compile an administrative record that includes: (1) the name and vote of each board member; (2) the service member's petition for relief; (3) briefs and written arguments; (4) documentary evidence; (5) a hearing transcript if a hearing is held; (6) advisory opinions obtained from any Air Force organization or official; (7) the service member's response to advisory opinions; (8) the findings, conclusions, and recommendations of the board; (9) minority reports, if any; and (10) any other information necessary to show a true and complete history of the proceedings. 32 C.F.R. § 865.4(m).

122. 10 U.S.C. § 1552(a)-(d) (2000).

123. *Id.* § 1557.

124. *Id.* § 1556.

125. *See supra* Part IV.A.

126. The Federal Circuit, in holding that a service member must seek relief from the BCMR before seeking judicial review, stated:

> Congress having provided the extensive and elaborate system designed to achieve justice within the military, no warrant appears for judicial end-running of that system. . . . If the rush to the federal courthouse and bypassing the congressionally created system attempted by [plaintiff] were permissible, Congress would be well advised to dismantle the military justice system as no longer required.

Williams v. Sec'y of the Navy, 787 F.2d 552, 560 (Fed. Cir. 1986).

Requiring service members to exhaust their internal administrative remedies before pursuing APA claims will, on the other hand, preserve the primacy of Congress' system of military justice, thus ensuring that (1) service members continue to utilize the intramilitary channels provided by Congress through which their grievances can be considered and fairly settled,[127] and (2) judicial remedies do not marginalize and supplant intramilitary remedies, thus arrogating authority vested in the executive branch by the legislative branch.

In this regard, exhaustion serves the important interests protected by the primary jurisdiction doctrine. Like the exhaustion doctrine, the primary jurisdiction doctrine:

> is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[128]

Where an action, properly cognizable in court, contains an issue within the special competence of an administrative agency, the primary jurisdiction doctrine requires the court to refer the issue to the agency "to give the parties reasonable opportunity to seek an administrative ruling. . . . Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the

---

127. Chappell v. Wallace, 462 U.S. 296, 301 (1983). As the Supreme Court stated: "It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Id.*

128. United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956). *See also* 2 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 14.1-14.6 (3d ed. 1994); Bernard Schwartz, *Timing of Judicial Review—A Survey of Recent Cases*, 8 ADMIN. L.J. AM. U. 261, 262-84 (1994); Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037-38 (1964).

parties would not be unfairly disadvantaged, to dismiss the case without prejudice."[129]

The Ninth Circuit has indicated that the primary jurisdiction doctrine is applicable when the following four factors are present: (1) the need to resolve an issue, (2) that has been placed by Congress within the jurisdiction of an administrative body having regulatory authority, (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme, (4) that requires expertise or uniformity in administration.[130] Each of these factors is usually, if not invariably, present when a service member seeks judicial review of an internal military decision without first seeking relief from the BCMR. Thus, as discussed below, the D.C., Third, and Fifth Circuits have recognized that application of the exhaustion requirement to service members' claims can comfortably be characterized as an application of the primary jurisdiction doctrine.

Indeed, the exhaustion component of the *Mindes* justiciability test itself derived from Fifth Circuit precedent that characterized the exhaustion requirement in the military context as the application of the primary jurisdiction doctrine.[131] The exhaustion component of *Mindes* may thus correctly be viewed as amounting to the application of the primary jurisdiction doctrine. So viewed, the exhaustion component of *Mindes* is—and should be treated as—unaffected by *Darby*, which states that federal courts remain free in APA suits to "apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review."[132]

In *McCurdy v. Zuckert*,[133] a Fifth Circuit progenitor of the exhaustion component in *Mindes*, a service member sought to challenge a finding of unfitness by an administrative discharge board and enjoin his imminent discharge. The district court, inter alia, denied the service member's request for a temporary injunction and directed the member to seek relief from the Air Force BCMR.[134] The service member appealed, arguing that he was entitled to temporary injunctive relief pending proceedings before the BCMR to avoid irreparable harm. The court of appeals disagreed, holding that the service member would not suffer irreparable harm pending

129. Reiter v. Cooper, 507 U.S. 258, 268-69 (1993).
130. United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987).
131. *See supra* note 11; *infra* text accompanying notes 133-38.
132. Darby v. Cisneros, 509 U.S. 137, 146 (1993).
133. 359 F.2d 491 (5th Cir. 1966).
134. 359 F.2d at 493.

exhaustion of his intramilitary remedy and that the primary jurisdiction doctrine rendered his suit premature. The court stated that the "remedies available to the [service member], should he . . . ultimately prevail on the merits [before the BCMR], amount to complete retroactive restoration; he could hardly ask for more. This being true, the district court lacked primary jurisdiction [and] the action is premature."[135]

Thereafter, in *Tuggle v. Brown*[136]—a case that the court in *Mindes* cited in support of the exhaustion requirement[137]—the Fifth Circuit relied on the primary jurisdiction doctrine rationale from *McCurdy* to affirm the district court's dismissal of a service member's suit. In *Tuggle*, a service member appealed the district court's denial of his request that the military be temporarily enjoined from separating him with an undesirable discharge. The Fifth Circuit held that because the service member "has yet to exhaust available post-discharge administrative remedies, following our recent decision in *McCurdy v. Zuckert* [which equated the exhaustion requirement in the military context with the primary jurisdiction doctrine], we hold that resort to the district court was premature."[138]

The D.C. Circuit in *Sohm v. Fowler*[139] likewise has concluded that the exhaustion doctrine and the primary jurisdiction doctrine are supported by similar rationales and serve the identical function when applied in the military context. In *Sohm*, a Coast Guard officer who had a petition pending before the BCMR brought suit seeking to enjoin his retirement and compel his promotion on grounds of due process.[140] The district court held that the officer need not exhaust his pending administrative petition, and it entered judgment on the merits for the government.[141]

The D.C. Circuit reversed with directions that the district court stay the case pending exhaustion before the BCMR.[142] The D.C. Circuit held that exhaustion was particularly advisable here, because the BCMR proceedings may relieve the court from having to adjudicate the officer's difficult constitutional claims.[143] Moreover, the court held that the factual

135. *Id.* at 494-95.
136. 362 F.2d 801 (5th Cir. 1966) (per curiam).
137. Mindes v. Seaman, 453 F.2d 197, 200 (1971). *See supra* note 11.
138. *Tuggle*, 362 F.2d at 801 (citation omitted).
139. 365 F.2d 915 (D.C. Cir. 1966).
140. *Id.* at 916.
141. *Id.* at 916-17.
142. *Id.* at 919.
143. *Id.* at 918.

questions raised by the officer should be decided by the BCMR in the first instance, because resolution of these issues depended on an understanding of Coast Guard "regulations and practice. Not only is the Board better equipped to decide these questions, but also considerations of uniformity in interpretation suggest that we first allow the Coast Guard an opportunity to construe their own regulations."[144] Notably, the court stated that "[t]hese rationales of expertise, uniformity and ripeness also underlie the doctrine of primary jurisdiction. Thus if the case were analyzed under this rubric rather than that of exhaustion, the proper disposition would still be for the court to stay its hand pending resort to the administrative process."[145]

Finally, the Third Circuit in *Sedivy v. Richardson*[146] similarly concluded that a service member who failed to exhaust his intramilitary remedies was foreclosed from seeking judicial relief, noting that "in the context of district court-military court relations [the exhaustion requirement] is more closely analogous to the doctrine of primary jurisdiction."[147] Although *Sedivy* involved a service member who failed to exhaust military *judicial* remedies, the rationale applies equally to situations where service members fail to seek *administrative* relief from the BCMR. Application of the primary jurisdiction doctrine in *both* circumstances reflects a proper judicial appreciation for the "special deference [that] is due the military decision-making process . . . because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with the [military justice system] which ha[s] no analogs in civilian jurisprudence."[148] Moreover, challenges to internal military decisions will often be fact-intensive and turn on matters of judgment or regulatory interpretation—subjects as to which the expertise of the BCMR is singularly relevant, and as to which its judgment is indispensably informative for any eventual review by a civilian court.[149]

As the Supreme Court has counseled, civilian courts ought not intervene into military life without the guidance of the military tribunal to

144. *Id.* at 918-19.

145. *Id.* at 919 n.10 (citations omitted).

146. 485 F.2d 1115 (3rd Cir. 1973).

147. *Id.* at 1121 n.8.

148. *Id. See* Seepe v. Dep't of the Navy, 518 F.2d 760, 764 (6th Cir. 1975) (relying on Schlesinger v. Councilman, 420 U.S. 738 (1975), for conclusion that policy requiring exhaustion of military *judicial* remedies where court-martial proceedings were pending also required exhaustion of military *administrative* remedies where service member failed to seek BCMR relief).

which Congress has confided primary responsibility for the review of military claims.[150]

V. Conclusion

Pursuant to the *Feres* principle of statutory construction, the APA should not be construed as absolving service members from exhausting their intramilitary remedies prior to pursuing APA claims. Whether the exhaustion component of the *Mindes* test is characterized as an essential component of an integrated justiciability test or as the application of the primary jurisdiction doctrine, neither congressional intent nor the language or rationale of *Darby* bars courts from continuing to use this well-established doctrine to limit the timing and scope of judicial review of APA claims brought by service members.

---

149. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975) (holding that federal civilian court should not exercise equitable jurisdiction to intervene in pending court martial proceeding); Gusik v. Schilder, 340 U.S. 128 (1950) (holding that habeas corpus petition from military prisoner should not be entertained in federal civilian court until all available remedies within military court system have been invoked in vain).

150. Noyd v. Bond, 395 U.S. 683, 695 (1969).

THE THIRTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

PROFESSOR YORAM DINSTEIN[2]

It is a distinct privilege for me to deliver the Thirteenth Solf Lecture, inasmuch as I had the pleasure of knowing and, to some extent, collaborating with Colonel Waldemar Solf for almost an entire decade—from the mid-70s to the mid-80s. He was the Department of Defense (DOD) representative to the international conference, which culminated in the two Additional Protocols to the Geneva Conventions of 1949.[3] Personally, I was most unhappy with the main outcome of the conference, *i.e.* Protocol I relating to international armed conflicts. To this very day, when consulted, my advice is to not ratify Protocol I, owing to its intrinsic flaws. All the same, one cannot deny that many of the clauses of the Protocol are incontrovertible and/or reflect customary international law. I met Colonel Solf on numerous occasions in connection with the Protocol. He was always good-natured, usually smiling, and had a tendency to always look at the glass as half full where others (like myself) would see it as half empty. We were having lengthy discussions as to what ought to be done about the Protocol. One of the ideas that emerged from those deliberations is only now materializing. There is a current effort in Geneva to identify those provisions of the Protocol which are either declaratory of customary international law or are otherwise acceptable to countries (like the United States) opposed to the Protocol as a whole. When I participate in the Geneva sessions, striving to produce a consensus along these lines, I often

1. This article is an edited transcript of a lecture delivered on 1 March 2000 by Professor Yoram Dinstein to members of the staff and faculty, distinguished guests, and officers attending the 48th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Waldemar A. Solf, who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

think of Colonel Solf, who regrettably is not there to contribute to the intellectual exercise. He is sorely missed by all those who knew him.

For this presentation, I have chosen a topic which might have been appreciated by Colonel Solf: the present challenges to the international law of war (the *jus in bello*). Of course, I cannot cover every aspect of the law of war. I shall therefore focus on only three challenges (with an emphasis on the first): (a) the issue of "humanitarian intervention" in the specific context of Kosovo; (b) the law with respect to non-international

---

2. Presently, Dr. Yoram Dinstein is a Humboldt Fellow at the Max Planck Institute, Heidelberg, Germany. Dr. Dinstein served as the Stockton Professor of International Law at the Naval War College (1999-2000); President of Tel Aviv University (1991-1999), Rector of the University (1980 - 1985), and Dean of its Faculty of Law (1978-1980). He is also Professor of International Law and Yanowicz Professor of Human Rights at Tel Aviv University.

Professor Dinstein was born in Tel-Aviv in 1936 and obtained his legal education at the Hebrew University in Jerusalem and New York University. He started his career in Israel's Foreign Service and served as Consul of Israel in New York and a member of Israel's Permanent Mission to the United Nations (1966/1970). Even subsequent to becoming a full-time academic, Professor Dinstein has represented his country in various international fora, ranging from the United Nations Human Rights Commission through International Red Cross Conferences to Interpol. He served as Counsel in the Taba Arbitration with Egypt (1986/1988).

Professor Dinstein is a member of the prestigious Institute of International Law. He has been a visiting Professor of Law at the University of Toronto (1976/1977) as well as Meltzer Visiting Professor of Law at New York University (1985/1987). He has given guest lectures in dozens of leading universities across the world. The University of Buenos Aires, the University of Chile, and the Hebrew Union College conferred on him honorary doctorates. The National University of Mexico (UNAM) awarded him the title of Distinguished Professor.

Professor Dinstein has written extensively on subjects relating to international law, human rights and laws of armed conflict. He is the founder and Editor of the *Israel Yearbook on Human Rights* (twenty-eight volumes of which have been issued–in English–since 1971). His other publications include a six-volume treatise (in Hebrew) on international law. His principal book in English is *War, Aggression and Self-Defense* (2nd ed. 1994). Professor Dinstein's numerous writings are widely cited, and several have been translated into Spanish and French. His works are frequently referred to by the Supreme Court of Israel.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, 1977 U.N. Jur. Y.B. 95 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977. *Id.* at 135.

armed conflicts; and (c) the theme of air and missile warfare, especially in the context of targeting.

I shall start with "humanitarian intervention." Under present-day international law, the use of inter-State force is prohibited by Article 2(4) of the Charter of the United Nations.[4] As proclaimed by the International Court of Justice, in the *Nicaragua* case of 1986, Article 2(4) of the Charter must be viewed as a reflection of contemporary customary international law.[5] Indeed, the prohibition of the use of force in international relations may be considered the cornerstone of modern international law.

It must be stressed that the proscription of the use of inter-State force is all-embracing and subject only to two exceptions explicitly set out in the Charter: (i) self-defense (under Article 51[6]) in response to an armed attack, and (ii) enforcement action ordained or authorized by the Security Council (pursuant to Chapter VII of the Charter[7]) in any setting of aggression, breach of the peace, or threat to the peace. Many people refuse to reconcile themselves to the narrow scope of these two exceptions. They argue that if genocide is perpetrated, if human rights are systematically violated by a despotic regime, if minorities are harshly oppressed, there is (or there should be) a right for a foreign state–preferably a group of States–to intervene unilaterally (that is to say, even without a go-ahead signal from the Security Council), using force where necessary to prevent or stop genocide and to terminate other types of widespread violations of human rights. This contention may be impelled by the best of intentions. However, forcible intervention on humanitarian grounds is still forcible intervention. Consistent with the law of the Charter, only the Security Council can unleash the use of force against a sovereign State under any circumstances exceeding the bounds of self-defense in response to an armed attack. The Security Council, and only the Security Council, is the policeman of the world.

Evidently, the Security Council too can act only in compliance with the Charter. Under the Charter, each of the five permanent members of the Council (viz. the United States, Russia, China, Britain, and France) benefits from a veto power, so no resolution can be adopted against its wishes.[8]

---

4. U.N. CHARTER art. 2, para. 4, 9 INTERNATIONAL LEGISLATION 327, 332 (M.O. Hudson ed., 1950).

5. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), 1986 I.C.J. 14, 99-100.

6. *See* International Legislation, *supra* note 4, at 346.

7. *Id.* at 343 nn.

The system of the Charter was formulated in San Francisco in 1945. Both the venue and the date are of consequence. Much of the text of the Charter is based on American proposals. It was the United States that was primarily interested in the creation of the United Nations. Other big powers at the time were either lukewarm or skeptical. It was definitely the United States which was responsible for the crucial role assigned to the Security Council and to the Permanent Members. The time-frame was equally significant: April-June of 1945, when World War II was drawing to a close yet was not quite over. The five Permanent Members were the leaders of the Grand Alliance winning the War. Conversely, Germany and Japan were still enemy States, naturally excluded altogether from the United Nations at that formative stage. Today it is easy to maintain that Germany and Japan (and perhaps one or two other countries like India) should also become permanent members, but this requires a cumbersome–and difficult-to-achieve–amendment of the Charter.

In any event, if one compares the Security Council to other organs of the United Nations–preeminently, the General Assembly (where every Member State is represented and all States have an equal standing in voting[9])–the Security Council shines by example. The General Assembly is essentially a debating club, lacking the power to adopt binding resolutions in matters pertaining to international peace and security. The glass UN Building in Manhattan serves as a prism deflecting the rays of light of reality. The General Assembly has become a forum often led by minuscule countries that have managed to coalesce into a political bloc whose might is noticed only within the confines of the UN Building. Frequently, the General Assembly is staging a theatre of the absurd, where leading powers like the United States wield as little or less clout than tiny nations with little or no power in the world in which we live. By contrast, the Security Council by and large mirrors the power politics of our planet, warts and all. Certainly, when the Council can act by unanimous support of the permanent members, its decisions have a cachet that no other international organ can emulate. Legally speaking, these decisions (especially when the Council is acting under Chapter VII of the Charter) can be binding on all member States, in accordance with Article 25.[10]

What is the advantage inherent in the Security Council system? The advantage lies in the veto power, ensuring as it does that at least here–

8. *Id.* at 340 (art. 27).
9. *Id.* at 334, 337 (arts. 9(1), 18(1)).
10. *Id.* at 339.

where it really counts–the United States (or any other permanent member) has as much say in world affairs as it does outside the United Nations. What is the disadvantage in the system? The disadvantage equally lies in the veto power. It all depends on who is casting the veto. Many Americans are appalled when one or more of the four other permanent members blocks by a veto a resolution advocated by the United States. But it must be observed that the United States itself does not hesitate to exercise the veto power when the need arises. Immoderate use of the veto (mostly by the former USSR) was characteristic of the "Cold War" era. It has been calculated that, over half a century, the veto was cast 242 times as regards 202 proposals (meaning that sometimes more than one Permanent Member voted against a particular proposal); 195 of the 202 proposals defeated by the veto were put to the vote before the collapse of the USSR.[11] The number cited, if anything, is understated. In a host of additional cases, the mere threat of a veto had a chilling effect, precluding a formal vote. Thus, the Security Council has been often paralyzed by the use or abuse of the veto. While the number of vetoes has gone down dramatically since the end of the "Cold War," they still constitute an ever-present obstacle frustrating the adoption of Security Council resolutions. It must be further appreciated that, under the Charter, a permanent member is entitled to cast a veto in a matter affecting itself. In other words, it can serve as a judge in its own case. This is why nobody is going to the Security Council to challenge the Russian conduct in Chechnya: everybody knows that such an effort is doomed to failure because Russia is bound to exercise its veto power against any resolution likely to condemn or even deplore its *modus operandi*.

That brings us to the issue of Kosovo. Undeniably, atrocities were committed in that part of Yugoslavia. Action should have been taken by the Security Council, but it was not–owing to Russian (and Chinese) opposition. What other options were there? The obvious option was diplomacy. The record shows that international intervention can sometimes be carried out by obtaining-through various means of suasion-the prior consent of the State most immediately affected. This is what happened, after considerable international pressure had been brought to bear on Indonesia, in the case of East Timor in 1999.[12] In the case of Kosovo, too, negotiations were held in Rambouillet (France). Regrettably, the negotiations

11. *See* S.D. BAILEY & S. DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 230-37 (3rd ed. 1998).

12. S. C. Res. 1264, U.N. SCOR, 4045th mtg. U.N. Doc. S/RES/1264 (1964), 38 I.L.M. 232, 233 (2000).

failed. Yet, why did they fail? The principal item on the agenda was reinstating the autonomy of the province of Kosovo (abolished by the Yugoslav despot, Milosevic, in 1989) within the sovereign boundaries of Yugoslavia. Curiously enough, on that all-important question, agreement was ostensibly reached. The deal breaker was an ancillary matter, namely, the stationing of troops of the North Atlantic Treaty Organization (NATO) in Kosovo.[13] At that point in Rambouillet, I believe that the Western diplomats made a fundamental error. In Diplomacy 101 the Western negotiators would have been taught to respond to the crisis in a different manner, by exploiting the limited consent gained. In my opinion, the Western negotiators should have said to Milosevic at that point: "Okay, we all agree on the basic principle that autonomy must be reinstated in Kosovo. Let us sign an agreement to that effect and adjourn for three months. If by then we all witness autonomy actually implemented in Kosovo, all is well. But should Yugoslavia renege on its pledge, sanctions would be imposed." I sincerely believe that, had Yugoslavia signed on the dotted line and then reneged on its word, Russia would have been morally compelled to uphold Security Council enforcement action. As it is, after all the bombings, NATO troops are not alone in Kosovo: there are Russian troops in the province as well. Arguably, recourse to force did not really generate better results as compared to what might have been accomplished through diplomacy. But in any event, to my mind, the diplomatic option was not played out.

Another legal option available at the time was awaiting the opportunity to strike in invocation of the right of collective self-defense, in response to an armed attack under Article 51 of the Charter. As long as the Yugoslav army was operating within Kosovo (an integral part of Yugoslavia), clearly no armed attack was committed against any foreign country and there was no room for the exercise of individual or collective self-defense. However, the policy of ethnic cleansing undertaken by the Milosevic regime in Kosovo was bound to reverberate beyond the boundaries of the province into neighboring Albania, which is a sovereign country. The majority of the Kosovars are ethnically Albanians, and most of the refugees from Kosovo were seeking sanctuary in independent Albania. Under the circumstances, there was every reason to believe that in all likelihood, sooner or later, a clash of arms would occur between Yugoslav and Albanian military units at the international frontier. Once that happened, once there was an armed attack by Yugoslavia against Albania, every other country in the world was entitled to come to the aid of Albania in the name

13. *See* FACTS ON FILE 181 (1999).

of collective self-defense. For collective self-defense to be exercised, no previous military alliance is required. Unilateral or coordinated (coalition) action can be taken on the spur of the moment, even by geographically remote States, as long as they are supporting the victim of an armed attack. The NATO could strike in support of Albania (assuming that an armed attack had occurred) without being obliged to get a prior green light from the Security Council. It is true that, under Article 51, the Council is vested with the right to a subsequent review of the action taken and to an evaluation whether or not it constituted genuine self-defense against an armed attack. But had the Security Council been convened, with a view to determining the legitimacy of hypothetical NATO action invoking collective self-defense in response to a Yugoslav armed attack against Albania, it is more than doubtful that the majority of the Council would have wished to override NATO's judgment. In any event, no resolution could possibly be adopted against three permanent members armed with the veto power.

Like it or not, these two options were not availed of. Instead, NATO resorted to an air campaign, relying merely on the argument that the Security Council had twice determined (in Resolutions 1199 and 1203 of 1998) that the situation in Kosovo constituted "a threat to peace and security in the region."[14] This argument sounds attractive but is untenable. The Charter allows States–acting individually or in a coalition–to exercise their own judgment as regards the use of force only in conditions of self-defense, in response to an armed attack. Absent an armed attack, that freedom of unilateral action disappears. When a threat to the peace looms on the international horizon, it is the exclusive prerogative of the Security Council not only to determine (as it did in the case of Kosovo) the existence of the threat, but also to activate enforcement measures. Article 53(1) of the Charter specifically refers to the possibility that the Security Council, where appropriate, would use regional organizations for enforcement action under its authority; still, the provision expressly adds: "But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[15]

---

14. S. C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998), 38 I.L.M. 249, 250 (1999); S. C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203 (1998).

15. *See* International Legislation, *supra* note 4, at 347.

What was conspicuously lacking in the Kosovo operation was the authorization of the Security Council.

To fully comprehend what went wrong in Kosovo, it is useful to compare the scenario with what had happened in another part of the former Yugoslavia, *i.e.* Bosnia-Herzegovina. In Resolution 816 (1993), the Security Council (having determined earlier the existence of a threat to the peace in the area) decided that member States, "acting nationally or through regional organizations or arrangements" could, "under the authority of the Security Council" take "all necessary means" (a common euphemism meaning the use of force) in the air space of Bosnia-Herzegovina.[16] In Resolution 836 (1993), the same call was made with a view to supporting the United Nations force operating in Bosnia (UNPROFOR) in the performance of its mandate, including the protection of safe areas for civilians.[17] Accordingly, in 1994-1995, NATO aircraft repeatedly conducted air strikes in Bosnia, in coordination with the UN. The Bosnia situation is a prime example of NATO forces acting on the basis of a specific and explicit Security Council authorization to do so. The NATO should have conducted itself in Kosovo in the same way that it did in Bosnia. Having failed to do so, NATO acted in breach of the Charter.

One of the salient arguments of the advocates of "humanitarian intervention" is that, no matter what happens in other contexts, one cannot sit idly by in the face of genocide. They conveniently ignore the text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[18] Article I of the Convention prescribes that genocide, whether committed in peacetime or in wartime, is a crime under international law which the Contracting Parties undertake to prevent and to punish.[19] But it is not sufficient to read Article I in isolation. How do you prevent or terminate genocide perpetrated on foreign soil? Article VIII lays down that any Contracting Party may call upon "the competent organs of the United Nations" to take such action under the Charter as they consider appropriate.[20] In other words, when genocide appears to be imminent or has already started, the legitimate remedy is not to use unilateral force but to go to the compe-

16. S. C. Res. 816, U.N. SCOR, 3191st mtg., U.N. Doc. S/RES/816 (1993), 48 Resolutions and Decisions of the Security Council 4. *Id.*

17. S. C. Res. 836, U.N. SCOR, 3228th mtg., U.N. Doc. S/RES/836 (1993), 48 Resolution and Decisions of the Security Council 13, 14 (1993).

18. Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277.

19. *Id.* at 280.

20. *Id.* at 282.

tent authorities of the United Nations (an indirect reference to the Security Council). What happens if the Council is paralyzed by the veto power or is otherwise unable to stop the conflagration? The answer is provided by Article IX, establishing the compulsory jurisdiction of the International Court of Justice in case of disputes relating to the application or interpretation of the Convention (including the issue of State responsibility for genocide).[21] Thus, there are two choices. You can go either to the Security Council or to the International Court of Justice. Nowhere does the Convention imply that there exists a third choice of a unilateral air campaign.

I regard what happened in Kosovo not only as bad law but also as a dangerous precedent. I have no doubt in my mind that, in Kosovo, the "children of light" were confronting the "children of darkness." Differently put, NATO was acting in Kosovo with the best of motivations and intentions, albeit in breach of the Charter. But what is sauce for the goose is sauce for the gander. Who can guarantee that in future it would not be the "children of darkness" who would fight the "children of light" in the name of the self-same principle? And can it always be appraised clearly who the "children of light" and the "children of darkness" are? Suppose that China would send troops to Indonesia, claiming that it is acting in the face of massive violations of human rights in Aceh (Sumatra). Will the United States concede China's right to act unilaterally, even though the area is relatively adjacent to China and many people of Chinese extraction live there (whereas the Balkans are far away from the United States and scarcely any Americans reside in Kosovo)? The pivotal point is that when a State–or even a group of States (like NATO)–intervenes unilaterally with force in the affairs of another country, its action is automatically suspect. Only the seal of approval of the Security Council can remove doubts concerning the sincerity of the intervenors. Precisely because of that organ's complex composition and the omnipresence of the veto power, when a consensus emerges in the Security Council it commands respect and credibility. There is certainly no better procedure to ensure that a forcible intervention from the outside lacks a hidden agenda.

The second challenge to the international law of war emanates from the current proliferation of non-international armed conflicts. I have already pointed out that Article 2(4) of the Charter deals with the use of inter-State force. There is no prohibition in the Charter on the use of intra-State force: force being used by one faction against another within a single country. Unfortunately, when one studies history one finds that the most

21. *Id.*

sanguinary and traumatic armed conflicts are usually internal in character. Every American knows that the worst war in the history of the United States was the Civil War. In terms of casualties, more blood was shed in the four years of the War between the States (1861-1865) than in all America's foreign wars combined (including two World Wars) until almost the last phase of the War in Vietnam. The American experience is by no means unique. Other countries–like Spain–have gone through similarly disastrous civil wars overshadowing their international conflicts in recent memory. Still, civil wars are not forbidden by international law.

There is some international humanitarian law governing non-international armed conflicts. Protocol II Additional to the Geneva Conventions is a case in point.[22] More significantly, there is common Article 3 of the four Geneva Conventions of 1949.[23] This is a minimum standard, which has been held by International Court of Justice to reflect general international law.[24] Violations of common Article 3 are incorporated as crimes (for which perpetrators are individually accountable) in Article 4 of the Statute of the International Tribunal for Rwanda, established by the Security Council in Resolution 955 (1994).[25] Moreover, Article 8(2)(c) of the 1998 Rome Statute of the permanent International Criminal Court expands the concept of war crimes to include serious violations of common Article 3 of the Geneva Conventions.[26] The occurrence of "war crimes" in internal armed conflicts does not detract from the cardinal fact that the conflict itself does not amount to an inter-State war.

The trouble is that in many instances it is not clear whether a particular conflict represents a civil war or an inter-State war. Yugoslavia is a good illustration for the proposition that the same conflict can change its nature more than once. Thus, Bosnia used to constitute a part of the former Yugoslavia. The conflict there started as a civil war between Serbs, Croats

---

22. Protocol II, *supra* note 3, at 135.

23. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 U.N.T.S. 31, 32-34; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949. *Id.* at 85, 86-88; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949. *Id.* at 135, 136-38; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949. *Id.* at 287, 288-90.

24. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), 1986 I.C.J. 14, at 114.

25. S. C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600, 1604 (1994).

26. Rome Statute of the International Criminal Court, 1998, 37 I.L.M. 1002, 1008 (1998).

and Muslims. Once Bosnia-Herzegovina became an independent country, the conflict transmuted into an inter-State war by dint of the cross-border involvement of Serbian (former Yugoslav) armed forces in military operations conducted by Bosnian Serbs rebelling against the Bosnian Government (in an effort to wrest control over large tracts of Bosnian land and merge them into a Greater Serbia). Then a withdrawal of the Yugoslav troops was announced in May 1992. Did the conflict revert to being non-international in nature? That was the conclusion of the majority of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its 1997 decision in the *Tadic* case.[27] Yet, an Appeals Chamber of the ICTY reversed that decision in 1999.[28] From the perspective of the individual soldier on the ground, perhaps not much has altered. By contrast, legally speaking, each time there was a sea change giving rise to a completely different set of rules governing the conflict.

We are now living in a period in which there is a striking upsurge in the number of borderline cases between internal and international armed conflicts. It is becoming increasingly difficult to tell what the nature of the conflict is and therefore what rules apply. If that is not enough, there is the phenomenon of "failed States." In a "failed State," like Sierra Leone or Somalia in Africa, there is no longer any central government. Usually, in a civil war, there are two factions fighting each other. On the one hand, there is the central (constitutionally legitimate) government. On the other hand, there is a group of rebels trying to overthrow that government. In a "failed State," the central government has vanished. All that remains is a multiplicity of groups of irregular combatants fighting each other. The consequences for civilians have been shocking in their barbarity. Thus, one of the horrid aspects of the civil war in Sierra Leone has been the phenomenon of child fighters trained to maim civilians belonging to other tribal groups by chopping off their arms. What is the point in developing elaborate rules of international humanitarian law in internal armed conflicts if they are allowed to be utterly ignored? Who is bearing the equivalent of State responsibility when total chaos reins or when the country is ruled by irresponsible "warlords"? Who is going to impose law and order in such circumstances? The international community usually relies on domestic courts and agencies to enforce the law. The breakdown of the State system means anarchy, and anarchy is the antonym of law. One of

27. Prosecutor v. Tadic, No. IT-94-1-T (1997) (Trial Chamber) , 36 I.L.M. 908, 933 (1997).

28. Prosecutor v. Tadic, No. IT-94-1-A, (1999) (Appeals Chamber), 38 I.L.M. 1518, 1549 (1999).

the challenges to contemporary international law is to develop special rules governing the situation in a "failed State".

The third challenge to the present-day international law of war concerns air and missile warfare. It is astounding to note that the last time that a systematic attempt was made to codify the rules of air warfare was in 1923.[29] Needless to say, in 1923 air warfare was in its infancy and missile warfare was not even conceived as a serious possibility. Technologically and operationally, we live in an entirely dissimilar age. Yet, no attempt has been made to conduct a systematic review of the law since 1923.

Air warfare has many dimensions, but the most significant issue is targeting. The United States has consistently adhered to the position that the best thing to do is to not have a binding list of legitimate targets for aerial attack. The argument is that, should a binding list be drawn up, it would in time become obsolete and then–should American aviators wish to take out a target not envisaged in the past-they would be faulted for deviating from the straight and narrow. To paraphrase, circumstances change. We do not know now what military objectives would warrant being hit ten or twenty years down the road. Therefore, we are better off without a fixed list of potential targets. On the face of it, this is a persuasive position. Yet, when one undertakes an empirical study of the evolution of air warfare, the argument proves entirely counterproductive: a real boomerang. The historical record demonstrates that, after every major war, the United States-instead of gaining new objectives for air strikes-has actually lost a few previously legitimate targets. Let me cite a few examples.

During World War II, the idea of strategic bombing was linked to the notion that a belligerent party could legitimately attack any and all enemy military targets, regardless of the extent of collateral damage to civilians. Hence, Dresden, which was a major German railroad center, could be subjected to a massive bombing. The fact that tens of thousands of people lived in close proximity to the railroad station and to the railroad lines was not factored in. That was the law of the time. The outcome was the devastating bombing of Dresden by both United States and United Kingdom air forces, resulting in higher numbers of civilian casualties than in either Hiroshima or Nagasaki. After the War, there came a backlash. Article 51(5)(b) of Protocol I forbids an attack where the incidental injury to civil-

29. *Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Rules of Aerial Warfare (The Hague, 1923)*, 32. AM. J. INT'L L. (Supp. 1, 12, 34 (1938)).

ians "would be excessive in relation to the concrete and direct military advantage anticipated."[30] As enunciated by Judge Higgins, in her Dissent in the International Court of Justice's Advisory Opinion of the 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, there is in customary international law a "principle of proportionality," whereby "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."[31] Indeed, the United States no longer contests this principle.[32] Consequently, today the bombing of Dresden would have been in breach of international humanitarian law.

Furthermore, throughout World War II and thereafter, American aviators resorted to the use of incendiary bombs. However, in 1980 a Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) was formulated, prohibiting attacks by air-delivered incendiary bombs against military objectives located within a concentration of civilians.[33] The United States has not ratified Protocol III. However, it does not seriously object to the core of the instrument: the President has actually recommended advice and consent by the Senate, subject merely to a reservation relating to the case when the use of an incendiary device is judged to cause less collateral damage than alternative weapons.[34] That means that the bombing of Dresden would have been prohibited twice today: once because of disproportionate civilian losses, and the other owing to the use of firebombs in that air raid. Indeed, an air raid similar to Dresden would be illicit at the present time. The same applies to the bombing of Tokyo and other prime targets of World War II.

If that is not enough, one of the basic tenets in World War II was the freedom to attack "target areas," such as the Ruhr valley in Germany. The Ruhr basin is the heartland of German steel and coal heavy industry. The idea was that Bomber Command could send a thousand planes to drop bombs on the Ruhr from a high altitude. The region was very effectively

---

30. Protocol I, *supra* note 3, at 114.

31. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 936 (1996).

32. COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 73 INT'L L. STUD. 404 (Naval War College, A.R. Thomas & J.C. Duncan eds., 1999) (Supp.).

33. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, 19 I.L.M. 1524, 1534, 1535 (1980) (Article 2(2)).

34. COMMANDER'S HANDBOOK, *supra* note 32, at 452 n.44.

defended and was also often covered by clouds, so that pinpointing a specific target was both difficult and dangerous. Absent adequate precision-bombing devices, the aviators were not required to risk their lives unnecessarily. All that they were required to do was release the bomb loads once the aircraft were over the Ruhr. The entire valley was regarded as one huge legitimate target. If the bombs did not hit Dortmund, perhaps they would hit Essen; if they did not strike at the Krupps works, they might strike at Thyssen. Yet, Article 51(5)(a) of Protocol I no longer permits treating "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects."[35] Obviously, what was done at the Ruhr cannot be replicated nowadays.

During the Vietnam War, there was a great deal of public outcry against the United States bombing dams and dikes. I belong to a generation that grew up on a famous British film, entitled "The Dam Busters," portraying how the RAF successfully undertook to bomb the Ruhr Dam in the course of World War II. The result was a huge flood with lots of civilian casualties, but more significantly grave damage to German industry supporting the war effort. Today, such an attack would we illegal under Article 56(1) of Protocol I, which disallows attacks against dams, dykes and similar installations.[36] The United States does not accept this provision of the Protocol. Nevertheless, I do not know that since Vietnam the United States has dared to attack a single dam or dike. If you ask me, the United States has lost another legal battle.

In Vietnam, the main problem along the Ho Chi Minh Trail was to identify the targets underneath the jungle's foliage. The United States used herbicides as defoliants. Again, there was much criticism of recourse to these chemicals. Afterwards, the United States took the lead in initiating the 1993 Chemical Weapons Convention (CWC).[37] The United States opposed the inclusion in the text of an outright ban of herbicides, but the opposition ended in a dubious victory. There is no operative clause in the CWC dealing with the topic. All the same, the Preamble recognizes "the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare."[38] If that is not enough, the United States issued a unilateral declaration, which

35. Protocol I, *supra* note 3, at 114.

36. *Id.* at 115.

37. Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, 32 I.L.M. 800 (1993).

38. *Id.* at 804.

is fully binding, whereby it has formally renounced first use of herbicides in time of armed conflict.[39] Thus, another item has been dropped from the air warfare arsenal.

I do not want to belabor the point. Altogether, the United States–as the foremost air power in the world-has already lost a large number of legitimate targets for air attack, only because of the non-existence of a fixed list which would have legitimized their use (and such a list was fairly easy to work out in the past). Paradoxically, the United States has lost these concrete targets today only because of the curious belief that the availability of a binding list might restrict its freedom of action tomorrow, should it wish to strike at unspecified theoretical targets that are over the horizon of time. Thus, while dreaming of expansion of the range of potential military objectives open to air attack, what we witness is contraction of the actual targets open to attack by American aviators. I find it ominous that during the air campaign in Kosovo voices have been heard criticizing the United States for the destruction of bridges. In my considered opinion, bridges are among the clearest of military targets. But as long as there is no binding list, nothing prevents those wishing to curtail the freedom of action of American aviators from striving to develop a tide of legal opinion that may ultimately bar aerial attacks against bridges. Before you know it, the leading air power may find itself bereft of legitimate targets against which it can direct its huge aerial armada.

What I submit is that the best thing for the United States is to proceed to producing a binding list. Let everybody know what is permissible and what is impermissible in air and missile warfare. As for the need to have elasticity in terms of unforeseen future targets, the legal technique is fairly simple. I do not propose the adoption of an exhaustive list. All that is required is an open-ended enumeration of military targets that can be revised and updated in the years ahead. That way there will also be some leeway for a possible trade-off should irresistible pressure mount to delete an item from the list.

The three challenges to the contemporary international law of war are of particular relevance to the United States. The reason is manifest: we live in a unipolar world when much of the burden of peace enforcement is carried by the only remaining superpower. It is true that the European Allies are often urging the United States to joint action, but when the chips are down it turns out that most of the combat action is left to American

39. COMMANDER'S HANDBOOK, *supra* note 33, at 477.

armed forces. There is a famous anecdote about the elephant and the mouse running on an unpaved path in Africa. The mouse turns to the elephant, marveling: "Did you notice how much dust we are making when we run together?" There is perhaps more to this allegorical anecdote than meets the eye. Militarily, when it comes to operations, the mouse's contribution is at best limited. Yet, in terms of politics, public opinion and law, the elephant is not alone. Willy-nilly, it must take into account the views of others. Many Americans still believe that they can afford the luxury of isolationism and ignore the rest of the world. This is a major error. In the era of the intercontinental ballistic missile, the nuclear submarine and an international network of terrorism, the United States cannot maintain the fiction of "Fortress America." There is no alternative to military alliances, and they imply coalition warfare. Unfortunately, the European Allies hold different opinions on a plethora of international legal issues. The United States purports to be aloof to constraint from the outside, but in reality it is susceptible to the sway of world public pressure. A telling example is Protocol I. The United States refuses to ratify it, and yet in all legal publications issued by the armed services there are constant references to the instrument. My point is that there is often erosion in American positions vis-à-vis the laws of war. To my mind, it is time for the United States to take the initiative in the codification of the *jus in bello*. By being more proactive, it can impact on international legal thinking and on the formulation of legally binding rules that might prove more amenable to American needs.

It is only fitting and proper to say all this in a Solf Lecture. In the 1970s, the DOD frequently had to rely on outsourcing when international legal questions were raised. Colonel Solf was one among a very small group of in-house experts. At the turn of the Millennium, the state of affairs has radically changed. Currently, a large number of highly trained international lawyers are working in the DOD and in the armed services. The human assets are in place to meet the challenges of the international law of war. My advice to you is: use them!

THE CONCEPT OF BELLIGERENCY IN INTERNATIONAL LAW

LIEUTENANT COLONEL YAIR M. LOOTSTEEN[1]

I. Introduction

The concept of belligerency in International Law deals with occurrences of civil war. Certain conditions of fact, arising during such armed conflicts, classically gave rise to recognition of belligerency. These facts include: the existence of civil war within a state, beyond the scope of mere local unrest; occupation by insurgents of a substantial part of the territory of the state; a measure of orderly administration by that group in the area it controls; and observance of the laws of war by the rebel forces, acting under responsible authority.[2] Traditionally, upon recognition of the status of belligerency, third party States assumed the obligations of neutrality regarding the internal conflict[3] and treated the two parties to the conflict as equals—each sovereign in its respective areas of control.[4] Furthermore,

---

1. Israel Defense Forces (IDF). This article was submitted in partial completion of the Master of Laws requirements of the 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. LL.B., 1984 Hebrew University of Jerusalem, Jerusalem, Israel; 1992, partial completion of LL.M., Hebrew University of Jerusalem, Jerusalem, Israel. Formerly assigned as the Military Advocate, General Staff Command, IDF, Tel Aviv-Yafo, Israel, 1994-1999; Legal Advisor to the IDF in the Gaza Strip, Gaza City and Erez Crossing, 1992-1994; LL.M. studies, 1991-1992; Deputy Legal Advisor to the IDF in Judea and Samaria, Beth El, Israel, 1984-1989. The opinions and conclusions in this article do not necessarily represent the views of the IDF or the government of Israel. The author expressly wishes to thank Commander Brian Bill, International and Operational Law Department, The Judge Advocate General's School, U.S. Army, for his advice in the preparation of this article.

2. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 249 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM]; MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 18-19 (1959); DIGEST OF INTERNATIONAL LAW 501-03 (Marjorie M. Whiteman ed., 1963); GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 703 (6th ed. 1992); Rosalyn Higgins, *Internal War and International Law, in* 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 81, 89 (Cyril E. Black & Richard A. Falk ed., 1971); JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 34 (1974); Dietrich Schindler, *State of War, Belligerency, Armed Conflict, in* 3 THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3 (Antonio Cassese ed., 1979).

3. PHILIP C JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 53 (1968); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 291 (1952).

4. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 39 (1978); Bond, *supra* note 2, at 51.

upon recognition of their belligerency, insurgents were afforded important benefits but also responsibilities. Captured members of the rebel armed forces, as well as soldiers of the incumbent government, were entitled to prisoner of war status.[5] Insurgent ships were admitted into the ports of recognizing States. These ships had the right to visit and search at sea.[6] Contraband could be confiscated and the ports of both parties to the conflict could be blockaded.[7] In fact, the conflict was viewed in terms of an international armed conflict rather than one that was internal[8] and the humanitarian laws of warfare became applicable to the hostilities.[9] The recognition of a belligerency was therefore of significance as it allowed the combatants and civilians affected by combat much wider protections than those granted to combatants and civilians during other internal armed conflicts.

Notwithstanding its implicit utilitarian advantages, the doctrine of belligerency has fallen into disuse. The American Civil War was the last conflict in which insurgents were positively recognized as belligerents. More than half a century later, during the Spanish Civil War of 1936-1939, a debate arose as to whether to grant the insurgents similar recognition; since that conflict the doctrine has not been applied to any of the internal armed conflicts in which it might have been relevant. It was not addressed directly in the post World War II Geneva Conventions[10] or in their supplementary 1977 Protocols.[11] Chapter II of this article will provide a short synopsis of the historical background of the doctrine to illustrate the milieu

---

5. VON GLAHN, *supra* note 2, at 703; KELSEN, *supra* note 3, at 291.

6. CHARLES G. FENWICK, INTERNATIONAL LAW 146 (3rd ed. 1948).

7. *Id.*

8. GEORGE GRAFTON WILSON, HANDBOOK OF INTERNATIONAL LAW 46 (3rd ed. 1939); KELSEN, *supra* note 3, at 291-92.

9. Richard A. Falk, *Janus Tormented: The International Law of Internal War*, *in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 205 (James N. Rosenau ed., 1964); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1321 (YVES SANDOZ et al. eds., 1987) [hereinafter PROTOCOLS COMMENTARY].

10. The Geneva Convention for the Amelioration of the Wounded and Sick in the Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114; the 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; the 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; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516. Unless otherwise stated, in this article these conventions will be collectively referred to as the Geneva Conventions.

11. Protocol I Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts, *opened for signature* at Berne, 12

in which it was employed in the past and how, perhaps, it might still be employed in the future. This will be followed in Chapter III by a theoretical as well as practical examination of the preconditions for application of the doctrine. The relevant questions are whether insurgents can attain the status of belligerency merely by achieving the four preconditions stated above or whether some form of external recognition must accompany the realization of these criteria. Moreover, if some form of recognition is required, a further analysis will endeavor to suggest from whom such recognition should come.

An assumption will be made that the doctrine is still germane, particularly because it might serve to expand the legal protections bestowed on the victims of certain types of internal armed conflicts. If this is true, before it can be applied to any conflict, additional study will be necessary as to the viability of its use as a valid instrument of international law, bestowing the full spectrum of humanitarian law rights and privileges on the parties to relevant internal armed conflicts. Chapters IV and V will therefore focus on the post World-War II legal regimes created to deal with internal armed conflicts, specifically Article 3 common to the four Geneva Conventions (Common Article 3) and Protocol II. As will be shown, these important treaties might be interpreted as having effectively annulled the doctrine of belligerency. An attempt will be made to re-view these interpretations from both a theoretical and historical point of view to examine whether other interpretations, more conducive to the continued existence of the notion of belligerency are plausible.

Some sixty years have passed since the Spanish Civil War. Scholars assert that there is no practical need for discussion of the doctrine of belligerency because it is outdated,[12] particularly since modern civil wars tend to be less centralized, less territorial, and guerrilla in nature[13]and the four established criteria for its recognition seem not to cover contemporary situations. Therefore, some contend that recognition of the status has lost all practical significance[14] and that belligerency has become a dead letter in

---

11. (continued) Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; and Protocol II Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 26 I.L.M. 561 (1987) [hereinafter Protocol II].

12. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 165 (1992).

13. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 268 (1979).

14. ROSALYN HIGGINS, INTERNATIONAL LAW AND CIVIL CONFLICT, *in* THE INTERNATIONAL

international law.[15] One author even titled a chapter in his work "The Decline of Belligerent Recognition: Desuetude in International Law."[16] Noting these remarks and others, one might question the need for any deliberation regarding this dormant notion of belligerency, particularly as the conditions that give rise to it are very uncommon in the reality of the current period. In Chapter VI an attempt will be made to examine whether this doctrine, or what is left of it after the post World War II conventions, might be applicable in the contemporary international environment. This will be done through an analysis of its potential application in different places around the globe in an effort to examine whether it can be legitimately utilized as a *sui generis* method of dealing with certain internal armed conflicts while using the legal tools applicable during international armed conflicts. As will be shown, a rather tentative argument can be made for the continued existence of belligerency as a salient international legal doctrine, even if only in the rare occurrences where it could be pertinent. As such it might still be used to expand the protections allowed belligerents in certain internal armed conflicts, protections that the accepted rules of intrastate warfare would not bestow upon them.

Traditionally the focus of most legal assessments of the doctrine has centered on the effect of third party recognition of belligerents on the neutrality of these third parties.[17] More recently these influences have received significant attention chiefly in the wake of the United Nations Charter, as questions arose about the effect of the Charter regime on interventionist policies.[18] These questions were important, especially during the Cold War era.[19] This article does not deal with these issues. Rather it

---

14. (continued) REGULATION OF CIVIL WARS 169, 171 (Evan Luard ed., 1972).

15. Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 48 (1988).

16. ROSCOE R. OGLESBY, INTERNAL WAR AND THE SEARCH FOR NORMATIVE ORDER 100 (1971).

17. *See, e.g.*, LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 222-26 (1956) (recognizing third party implications of belligerency); OPPENHEIM, *supra* note 2, at 250-54; Falk, *supra* note 9, at 203-06; WILSON, *supra* note 8, at 47-49; OGLESBY, *supra* note 16, at 48-71, 100-14; VON GLAHN, *supra* note 2, at 703. Most of the debates regarding third party recognition or non-recognition of belligerencies focus on the issues arising from such recognition or non-recognition, including the substantive implications of neutrality. Some of the discussions centered on the timing of recognition. Premature recognition of the status of belligerency was considered an unlawful intervention in the internal affairs of the *de jure* government. Others focused on the inherently political nature of such recognition.

18. The drafters of the Charter were principally concerned with issues regarding international armed conflicts rather than intrastate violence. However, almost from the out-

endeavors to examine the current relevance of the belligerency doctrine with regard to the rights and obligations of the parties to internal armed conflicts. However, there will be a limited discussion of third party recognition of belligerency and its implications, if any, for the scope of legal protections to be granted the parties to a conflict.

II. Historical Background

Traditional international law provides three relevant statuses of internal strife: rebellion, insurgency and belligerency. Domestic violence is labeled rebellion "so long as there is sufficient evidence that the police forces of the parent State will reduce the seditious party to respect the municipal legal order."[20] International law does not purport to grant protections to participants in rebellions.[21] An insurgency occurs when there

18. (continued) set the United Nations has been involved in internal armed conflicts. Such involvement is seemingly precluded by the first part of Article 2(7) of the Charter, which prohibits United Nations intervention in matters "essentially within the domestic jurisdiction of any state." In Article 2(4) the Charter also expresses the objective of territorial integrity of member states. It prohibits the use or threat of external force against the territorial integrity of any state unless within the exception enunciated in Article 51 regarding the "inherent right of individual or collective self-defense" in the event of an "armed attack." As such it would *a priori* appear that the United Nations has no legal basis for intervention in matters arising from domestic insurgencies. However, the second part of Article 2(7) together with Article 39, in Chapter VII of the Charter, empower the Security Council to "determine the existence of any threat to the peace, breach of the peace or act of aggression." Once such a determination is made, Security Council enforcement measures become explicitly applicable even in circumstances of internal armed conflicts. These articles have served as the legal basis for the U.N.'s exercise of some form of control over intrastate conflicts when such conflicts have been perceived as threatening world peace and security. This authority addresses the feasibility of third party intervention in times of internal armed conflicts. *See, e.g.*, LINDA B. MILLER, WORLD ORDER AND LOCAL DISORDER: THE UNITED NATIONS AND INTERNAL CONFLICTS 22 (1967) (discussing the legality of the United Nation's role in intrastate conflicts, in view of several such examples); Oscar Schachter, *The United Nations and Internal Conflict*, *in* LAW AND CIVIL WAR IN THE MODERN WAR 401 (John Norton Moore ed., 1974); HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS, 19, 933-35 (1951); KOTZSCH, *supra* note 17, at 279-81; William Chip, *A United Nations Role in Ending Civil Wars*, 19 COLUM. J. TRANSNAT'L L. 15 (1981).

19. For example, during the Vietnam War some academic discussions arose as to whether the Viet Cong should be afforded belligerent status. *See* Lawrence C. Petrowski, *Law and the Conduct of the Vietnam War*, *in* 2 THE VIETNAM WAR AND INTERNATIONAL WAR 439, 476-77 (Richard A. Falk ed., 1969).

20. KOTZSCH, *supra* note 17, at 230.

21. *Id.* at 230-31; Falk, *supra* note 9, at 198.

is more sustained and substantial intrastate violence than is encountered during a rebellion. In such cases there is in effect "an international acknowledgment of the existence of an internal war", [22] but third parties "are left substantially free to determine the consequences"[23] of this acknowledgment. If they acknowledge the rebels as insurgents they are in fact "regarding them as contestants-in-law, and not as mere law-breakers."[24] However, in recognizing a state of insurgency third parties do not assume any obligation under international law[25] and they are still free "to help the legitimate government, but should desist from helping the rebels."[26] Furthermore, recognition of an insurgency does not provide the rebels with any international law protections.[27]

Belligerency can be achieved when an insurgency meets the four objective criteria described above.[28] As Kotzsch describes succinctly, when these preconditions are met, "recognition of belligerency gives rise to definite rights and obligations under international law."[29] While not conferring statehood, proper recognition of belligerency grants the rebels substantive protections under the laws of war.

It was therefore much to the chagrin of United States President Abraham Lincoln when, in 1861, near the outset of the American Civil War, the British government recognized the belligerency of the Confederate States that had unilaterally seceded from the Union.[30] This recognition caused the British to be neutral in the domestic American conflict and to aid neither the rebels nor the government.[31] Though he neither recognized the Southern States' claim to independence nor their claim to sovereignty over the territory of these States, during the war Lincoln ordered that the Confederates be treated as belligerents in all war-related matters. For instance, in April 1861 he proclaimed a blockade of the Southern ports, thus conferring on them and on Southern lands in general, the status of enemy territory. He also declared the subjects of the rebellious States alien enemies.[32]

---

22. Falk, *supra* note 9, at 199.
23. HIGGINS, *supra* note 14, at 170.
24. *Id.*
25. KOTZSCH, *supra* note 17, at 232.
26. HIGGINS, *supra* note 14, at 170.
27. KOTZSCH, *supra* note 17, at 233.
28. *Supra* note 2 and accompanying text.
29. KOTZSCH, *supra* note 17, at 233.

It was the recognition of the Confederate *de facto* belligerency, among other factors, that also brought Lincoln to acknowledge that captured Confederate soldiers should be afforded prisoner of war status, even though the Civil War was not of an international character. Captured Union soldiers were granted similar protections and in general the two sides adhered to the laws of war as then understood.[33] That the United States had been prepared to treat its own civil war for many purposes[34] as if it were an international armed conflict, based mainly on recognition of the Confederate belligerency, undoubtedly had a powerful influence on the development of the law in this area.[35]

The most recent significant internal armed conflict during which the notion of belligerency was discussed as relevant was the Spanish Civil War. From 1936 to 1939 civil war raged in Spain as Franco and his fascist Nationalists attempted to unseat the incumbent government. An international debate arose about this war and the possibility that it might lead to a conflagration across all of Europe.[36] As Franco and the Nationalist forces advanced through the Spanish countryside, furthering their aims of ousting the existing regime, so too did an international diplomatic and legal debate

---

30. Evan Luard, *Civil Conflicts in Modern International Relations*, *in* THE INTERNATIONAL REGULATION OF CIVIL WARS 7, 20 (Evan Luard ed., 1972).

It should be noted that the American Civil War was not the first civil war during which issues regarding the status of the belligerents were addressed. *See* Kotzsch, *supra* note 17, at 221 (discussing earlier conflicts). *See also* G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253 (1983). Draper provides a germane 18th century quote from M. de Vattel, who wrote: "[W]hen a Nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect as a public war between two different nations." *Id.* at 258 (quoting M. DE VATTEL, THE LAW OF NATIONS 427 (Chitty-Ingraham transl. 1883)). *See also* FENWICK, *supra* note 6, at 145-48; Petrowski, *supra* note 19, at 476-78. Both authors note that in the first quarter of the nineteenth century there were debates as to whether the revolting colonies in North America were belligerencies, and the implications of this status.

31. *See* OGLESBY, *supra* note 16, at 34-35 (stating the chronology leading to the British government's act granting the Confederacy full belligerent rights). *See also* Quincy Wright, *International Law and the American Civil War*, 61 AM. SOC'Y INT'L L. PROC. 50, 52 (1967).

32. 2 A. BERRIEDALE KEITH, WHEATON'S INTERNATIONAL LAW 102 (7th ed. 1944) [hereinafter BERRIEDALE].

33. Howard J. Taubenfeld, *The Applicability of the Laws of War in Civil War*, *in* Moore *supra* note 18, 499, at 505-06. Taubenfeld notes that besides treating each other's soldiers as prisoners of war, persons and property in "occupied" territory were generally spared, and adherents of the Confederate government were not treated as traitors. *Id.*

34. Other purposes included judicial decisions handed down during and after the American Civil War in which the courts recognized that the hostilities between the Union

rage as to the pros and cons of recognizing the Nationalists as a belligerency.[37] This debate centered mostly on the third party States implications of such recognition, especially given the European geopolitical situation during that turbulent period.[38] It focused less on the ramifications of such recognition for the warring sides.[39] As noted, this was the

---

34. (continued) and Confederacy amounted to a war between two sovereigns. During the war the Supreme Court upheld President Lincoln's proclamation of a blockade of the Southern States. The Court held that he was justified in so doing, on the ground that the existence of a state of war was purely a question of fact. *See* Prize Cases, 67 U.S. (2 Black) 635, 652.

The Court went on to state the conditions for recognition of such a war. Note the similarities to the belligerency criteria.

> A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

Id. After the Civil War the Supreme Court also handed down several decisions in which it discussed the post war status of the Confederate government's actions. In *Thorington v. Smith*, 75 U.S. (8 Wallace) 1, the Court dealt with claims that Confederate dollars and contracts in that currency were void. It held that after the war "the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States." *Id* at 14. In *United States, Lyon et al v. Huckabee*, 83 U.S. (16 Wallace) 414, the Court recognized that upon the capitulation of the Confederacy, the title to any property it had owned became vested completely in the U.S. government.

35. Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, *in* Moore, *supra* note 17, 518-19.

36. *See* Hugh Thomas, *The Spanish Civil War*, *in* Luard, *supra* note 14, at 26, 26-36 (providing a thorough examination of the Spanish Civil War, from an historical and interventionist perspective).

37. *See, e.g.*, James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938), C.G. Fenwick, *Can Civil Wars Be Brought Under the Control of International Law?*, 32 AM. J. INT'L L. 538 (1938). Both authors discuss the political background for Britain's decision not to recognize the Nationalists as belligerents notwithstanding the fact that they were perceived at the time to have achieved the four objective belligerency criteria.

38. During that war both the Germans and Italians supported the Nationalists, headed by Franco. Because of this German-Italian support, the Americans, British, French and many other European nations, while recognizing the fact that an all-out war existed between the parties, did not formally recognize an insurgency and therefore only partially

last civil war in which issues relating to the doctrine of belligerency were in fact engaged.[40]

III. The Nature of Recognition

It has been noted that the present endeavor will not deal with the relationship between the doctrine of belligerency and third party treatment of belligerents. However, a discussion of the viability of the doctrine would not be complete without analyzing whether a belligerency exists only when recognized, or whether its existence is a matter of fact alone. The relevance of this issue is clear. If some form of recognition is required, be it by third party states or the *de jure* government, then insurgents need not only meet the belligerency criteria but must also create enough international or internal pressure so as to achieve such recognition. Conversely, if it is only a matter of fact, then the insurgents need only realize the criteria to enjoy their legal fruits.[41] Some notable scholars argue that belligerency does not exist without recognition[42] and that without such recognition "belligerency might be open to abuse for the purpose of gratuitous manifestation of sympathy with the cause of the insurgents."[43] It is further asserted that unless that recognition comes from the *de jure* administration, even third party recognition does not immunize insurgents from future

38. (continued) between the parties, did not formally recognize an insurgency and therefore only partially conceded belligerent rights with regard to the conflict. *See* H.A. Smith, *Some Problems of the Spanish Civil War*, 1937 BRIT. Y.B. INT'L L. 17, at 26-31 (discussing the problematic position of these third-party states).

39. Notwithstanding this debate, and the statements made at the time by the leaders of both sides that the rules of the law of war would be applied, in retrospect it is clear that neither side in this war particularly adhered to the laws of war. Neither side treated prisoners decently. They were often executed summarily. Furthermore, civilian populations faced attack and bombardment. Taubenfeld, *supra* note 33, at 506-09. It is notable in this respect that given their lack of respect for the laws of war, it is today questionable whether the Nationalist insurgents were in fact belligerents, as they did not meet this belligerency criteria.

40. *See also* OGLESBY, *supra* note 16, at 104-06 (discussing the issues relating to the principle of belligerency as enunciated during the Spanish Civil War).

41. This was the crux of the debate that arose in Britain in the late 1930's regarding that country position on the Spanish Civil War. Both legal scholars and politicians debated Britain's withholding of recognition of Franco's forces as a belligerency. The British government refrained from recognition because it did not want to become neutral in a conflict in which its European rivals, the Germans and Italians, had chosen to support the Nationalists.

42. OPPENHEIM, *supra* note 2, at 249-51; GREENSPAN, *supra* note 2, at 19.

43. OPPENHEIM, *supra* note 2, at 250.

prosecution as traitors under domestic law.[44] According to this view, while the existence of the different belligerency criteria is a prerequisite, the doctrine's full legal manifestation only rises if a belligerency is recognized, preferably by the insurgents' own enemies.

Others assert that recognition of belligerency is not required and that its existence is a question of fact based solely on the objective existence of the belligerency criteria.[45] Thus, recognition of belligerency "is nothing more than recognition of the fact of the existence of war"[46] and so long as the insurgents maintain "a certain degree of territorial and administrative effectiveness"[47] they enjoy certain rights. Furthermore, it is argued, once the conditions of belligerency are met it could be considered undue influence to refuse to recognize this status.[48]

The conclusion of this debate is not all-together moot. While it is clear that certain preconditions must prevail to justify the existence of belligerency, it is equally clear that such a factual situation does not exist within a vacuum, and that some form of recognition of this status is required. The scholars question whether this recognition should come from third-party states or from the incumbent administration. It could also come from the insurgents themselves, proclaiming their own belligerency. Such a declaration could certainly be viewed as self-serving—an invitation to the world to be recognized. If aimed, however, at the *de jure* government it could hypothetically be effective in ensuring that both parties abide by the rules of the laws of war. Be that as it may, it is evident that some form of recognition is necessary. Without such recognition the existence of the belligerency criteria will not suffice to grant the insurgents any rights whatsoever.

The need for some form of recognition leads to further questions. First, what is the required nature of such recognition? Must it be explicit or can it be tacit? The prevailing view appears to be that recognition might

---

44. *Id*. at 251.

45. BERRIEDALE, *supra* note 32, at 101. That author quotes United States President Ulysses S. Grant, who in June 1870 declared: "The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either parties. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of international law." *Id.*

46. Garner, *supra* note 37, at 111.

47. CRAWFORD, *supra* note 13, at 254.

48. FALK, *supra* note 9, at 206.

be implicit and "can be deduced from government measures or attitudes towards an internal situation of conflict (for example, a blockade)."[49]

Second, for the belligerency standard to be relevant, its factual preconditions must be present. But who will decide if they exist? The insurgents, the existing government, third parties? The lack of an acceptable arbiter who might settle these matters has resulted in further criticism of the doctrine of belligerency.[50] Furthermore, even if such a judge could be found, in most conceivable occurrences of civil war it is questionable whether the *de jure* government would accept his or her judgment and afford the insurgents the protections of the full body of the laws of war. As several scholars have noted, without that government's acquiescence, any third party or external acknowledgment would be of little affect in providing such protections.[51]

One interesting proposal that might serve to overcome these and perhaps other obstacles is that recognition of a belligerency would be an act of the United Nations, just as new states are recognized by that organization.[52] However, as Jessup notes, this might lead to procedural problems. The natural organ of the United Nations to vote on such a matter, as it does when new states are recognized, would be the General Assembly. However, the exigencies of the conflict might not allow the necessary time to convene that body. It would therefore seem necessary for the Security Council to act. But that too may not be plausible given the veto politics common in that organ of the United Nations.[53] Even if these political hurdles could be overcome, with the legal mechanisms in place today under the United Nations Charter, a belligerency determination, if tabled in the General Assembly or Security Council, would likely be replaced by a res-

---

49. PROTOCOLS COMMENTARY, *supra* note 9, at 1320-21.

50. *Id*. *See also* Petrowski, *supra* note 19, at 478. Petrowski notes the seemingly open-ended definitions within the four belligerency criteria, such as occupation, degree of orderly and effective administration, observance of the rules of war and responsible and ascertainable authority. Given that the government against whom the insurgents are fighting will naturally not view these definitions broadly, that author does not see such governments bestowing protection of the laws of war upon the rebels.

51. KOTZSCH, *supra* note 17, at 224; OPPENHEIM, *supra* note 2 at 251; GREENSPAN, *supra* note 2, at 20; DOCUMENTS ON THE LAW OF WAR 12 (Adam Roberts & Richard Guelff ed. 1982) [hereinafter DOCUMENTS].

52. JESSUP, *supra* note 3, at 54.

53. *Id.*

olution that a given conflict is a threat to or a breach of international peace and security.[54]

This calls for several tentative conclusions. For belligerency to occur a set of objective circumstances must come about. However, the mere existence of these conditions is not sufficient. They must be recognized by third party states, by the belligerents or by international organizations. If the *de jure* government does not recognize the insurgency as a belligerency, either tacitly or explicitly, all other forms of recognition would not in fact serve to bestow upon the insurgents any protections to which they would be entitled under the laws applicable during international conflicts. The cases in which an incumbent administration would agree to bestow such safeguards on persons they naturally view as traitorous citizens will be very rare. However, in reality only that government's recognition of its enemy's belligerency will serve to provide the rebels with the protections of the full body of the laws of war.

These conclusions alone need not lead to discarding of the doctrine of belligerency as obsolete. As will also be discussed in later chapters, in an all-out civil war reaching the objective belligerency criteria, the *de jure* administration might well perceive that providing their own warriors with the full protections of the laws of war necessitates a formal recognition of its enemy as a belligerent. It may also act in a manner that would tacitly provide the rebels with recognition of their belligerency.

IV. The Relevance of Common Article 3

Assuming, therefore, that the significant obstacle of some form of *de jure* government recognition of the belligerency is surmountable, the next task requires an examination of the influence of the post-World War II international legal regimes on the doctrine. The analysis will commence with the first instrument of international law to attempt to provide some protections for the victims of internecine strife.

Almost immediately after the conclusion of the Spanish Civil War, the world was engulfed in World War II. The terrible price that humanity paid during this war, on and off the actual battlefield, led to the signing of the 1949 Geneva Conventions. The primary focus of the drafters of these

54. To paraphrase Article 39 of the United Nations Charter. *See supra* note 18 (discussing United Nations-related issues regarding the doctrine of belligerency).

Conventions was to create rules and regulations for the conduct of nations engaged in international armed conflicts and to ensure safeguards for the protection of different classes of victims of these conflicts.[55] Although not the primary focus of the Conventions, Common Article 3 was incorporated within each of the four treaties. This was a "Convention in miniature"[56] meant to deal with internal strife. It was considered highly significant and innovative because it was the first attempt to provide limited international law protections for the victims of internal armed struggles.[57] Because of its nature, questions arose about the relationship between it and the doc-

---

55. These different groups included, *inter alia,* wounded and sick soldiers in the field, shipwrecked soldiers, prisoners of war, civilians and medical personnel aiding wounded and sick civilians and soldiers. The protections bestowed on all of these groups were addressed in the four Geneva Conventions. *Supra* note 10.

56. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 34 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV].

57. Common Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages on personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

trine of belligerency. If this is a "Convention" enunciating the nature of protections granted the victims of internecine disorder, did it in fact annul the protections inherently provided during similar conflicts by the doctrine of belligerency, even though the latter offered the protections of the full scope of the laws of war? Some scholars believe that Common Article 3 established a basic written regime for the laws of internal armed conflict or *jus in bello interno*,[58] according to which, in times of armed conflicts not of an international character, each party is bound to apply, as a minimum, certain fundamental humanitarian provisions. According to these scholars, this new regime is now the *only* applicable law relating to internal armed conflicts. It is not dependent on recognition of belligerency, and did away with the need to discuss the existence of the four belligerency criteria. Others claim, however, that a thorough examination of the historical background of Common Article 3 leads to the conclusion that its drafters recognized the doctrine of belligerency and intended the Common Article to apply to internal armed conflicts not reaching the scope of the belligerency criteria.[59] They note that in the preparatory sessions before Common Article 3 was accepted, deliberations arose as to the triggering mechanism for its application. Those desirous of a narrow scope of application supported a notion that the Article should only be triggered in internal armed conflicts rising to the level of the four belligerency criteria. Elder suggests that the drafters recognized the need to establish a threshold that was not so low as to allow mere rioting or common criminality to enjoy the limited protections of the article.[60] However, they also recognized that demanding that the preconditions for belligerency be set as a threshold would serve to empty the Common Article of any substantive content. While a consensus arose that the Article would apply in cases of armed conflict not of an international nature that surpassed mere rioting or terrorism, in cases of belligerency, when an internal conflict is more analogous to an international armed conflict, "there remained persuasive sentiment amongst the draftsmen"[61] that the rules of international armed conflicts continuing to govern in their entirety.

---

58. DOCUMENTS, *supra* note 51, at 12-13.

59. David A. Elder, *The Historical Background of Common Article 3 of The Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37, 53 (1979). *See also* Eugene D. Fryer, *Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors*, 11 INT'L LAW. 567 (1977). Fryer notes in this respect that "[t]he advent of recognized belligerency unquestionably triggers the application to the conflict of the full Geneva Conventions of 1949." *Id.* at 568 n.2.

60. Elder, *supra* note 59.

61. *Id.*

The latter argument seems much more persuasive, certainly from a strictly utilitarian point of view. However, an analysis of the official commentary to the four Geneva Conventions regarding Common Article 3, and the very definite language of the Article itself, do not support this conclusion.[62] It notes that Common Article 3 "applies to non-international conflicts only, and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention." [63] It goes on to state:

> Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.[64]

It appears from a reading of these and other sources[65] that the drafters of Common Article 3 were cognizant of the doctrine of belligerency and included its occurrence within the article. Belligerencies are internal armed conflicts "which are in many respects similar to an international war, but take place within the confines of a single country." Their existence not having been overlooked, it is difficult to assert that they continued to enjoy a unique status under the post Geneva Conventions international legal regime.

Difficult but not inconceivable. If a utilitarian goal of providing the most legal protection to the most people possible is desired, continued acknowledgment of the existence of the doctrine of belligerency is important as a unique means of treating the rare occurrences of civil wars that more closely parallel international armed conflicts. That these occurrences are atypical should not be a pretext for justifying the doctrine's abandonment. On the contrary, because the criteria that create a belligerency are so stringent, in the infrequent cases when these circumstances exist the bel-

---

62. Bond, *supra* note 2, reaches a similar conclusion. After reading through the conventions' conference committee reports he concludes that one senses "that the delegates intended Article 3 to apply perhaps to insurgencies . . . , to belligerencies or civil wars . . ., but never to bandits or even to riots." *Id*. at 57-58.

63. COMMENTARY IV, *supra note* 56, at 34.

ligerents should be provided with the utmost safeguards that international law allows.

---

64. *Id*. at 36. Furthermore, the Commentary lists several criteria for the application of Common Article 3, drawn from the various draft proposals:

> 1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> 3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
> 4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory.
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Id. at 35-36. The similarity between these criteria, particularly those listed in section 4 of the excerpt quoted above, and the accepted belligerency criteria cannot be mistaken.

65. *See supra* note 64 and accompanying text (showing a more complete text of the Commentary regarding the legislative history of Common Article 3). Furthermore, when the Commentary discusses the obligations placed on the parties of a conflict by Common Article 3 it notes with regard to the insurgents:

> Doubts have been expressed on this subject. How could insurgents be legally bound by a Convention which they had not themselves signed? But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.

COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III]. This language again reminds the reader of a possible belligerency scenario. Given that it is brought within a discussion of the obligations of the parties under Common Article 3, it lends further credence to an argument that this Article intended to include within its scope occurrences of belligerencies.

With that in mind, two arguments can be made for the continued adherence to the doctrine of belligerency, based on a practical interpretation of Common Article 3. First, the preamble to the substantive provisions of the Article states that it will apply to "armed conflict not of an international character." A conflict in which insurgents meet the four belligerency criteria is *ex definitio* an armed conflict of an international character. Therefore, the full body of the laws of war applies to it, and it is not within the material scope of Common Article 3.[66]

Second, the preamble also provides that the parties to a conflict shall apply these provisions "as a minimum." This language certainly allows the sides to apply a higher standard of protections to the conflict between them, but does not require them to do so. If that is so, when a belligerency in fact occurs, the practicalities of warfare might well require the sides to provide more than the minimum Common Article 3 protections. As the two historical examples of this doctrine provided above surely illustrate, when a civil war reaches the intensity of belligerency, the warring sides might have reasons enough to desire the application of the full spectrum of the laws of war to their conflict. Several good reasons can be given for this conclusion. As one scholar notes "[t]his is the result of considerations of general convenience and the fear of reprisals."[67] For instance, as such hostilities proceed, the parties to the conflict will start to amass prisoners of war. The *de jure* government and its forces will initially consider treating the insurgent prisoners as treasonous common criminals, but as another scholar notes "[t]he government may feel compelled to apply the laws applicable to international armed conflict because of the impracticability of prosecuting and executing all the insurgents."[68] Furthermore, once large numbers of government soldiers are also taken prisoners, as is to be expected in a conflict of this nature, it will be in the common interests of both parties to abide by the laws of war as they relate to prisoners of war. This might also serve to facilitate the eventual restoration of peace and to help heal the wounds of the nation.[69] Similar hypotheticals regarding the mutual concerns of the enemies will encourage them to expand the substantive protections provided to those affected by the fighting. This will

66. *See* KOTZSCH, *supra* note 17, at 238 n.73. Kotzsch notes that it can easily be seen from the preparatory works of the Geneva Conventions that this was the proper interpretation of Common Article 3. *Id.*

67. Draper, *supra* note 30.

68. 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. 279, 292-93 (1983).

69. *Id*. at 293.

be done by applying to the conflict more of the humanitarian provisions of the laws of war, including those relating to the wounded and sick and civilians on the one hand, and behavior on the battlefield on the other. Thus, while the language of Common Article 3 appears to limit the protections provided during occurrences of all types of internal armed conflicts, a practical argument can be made that in the rare cases of belligerencies, the caveat attached to the Common Article might not preclude expanded law of war protections. On the contrary, just as the inherent nature of a civil war attaining the scope, severity and duration required to meet the belligerency criteria may cause the incumbent government to recognize the insurgents as belligerents, so too might these circumstances encourage the parties to the conflict to raise the minimum standard set in Common Article 3 and to expand it to the full range of protections provided during international armed conflicts.

It is interesting to note that the commentary to Common Article 3 also appears to support this argument and takes it even farther; perhaps farther then it should be taken. In discussing the background for the words "as a minimum" in this Article it is noted:

> Care has been taken to state, in Article 3, that the applicable provisions represent a compulsory minimum. The words "as a minimum" must be understood in that sense. At the same time they are an invitation to exceed that minimum. The time may come when, in accordance with the law of nations, the adversary may be bound by humanitarian obligations that go farther than the minimum requirement stated in Article 3. For instance, if one Party to a conflict is recognized by third parties as being a belligerent, that Party would then have to respect the Hague rules.[70]

The implications of this statement must be understood within the context of the previous chapter's discussion. As noted there, in the realm of victims' protections, third party recognition of a belligerency can be of little or no significance so long as the *de jure* incumbent does not follow suit. Since the incumbent is not obliged to recognize the insurgents as belligerents, Pictet's conclusion that third party recognition will suffice to trigger the application of the entire body of the laws of war appears to be an overstatement. However, such third party recognition may undeniably serve to

70. Commentary III, *supra* note 65, at 38.

encourage or pressure the established authority to also bestow such recognition.

The language and legislative history of Common Article 3 do not support an assertion that the doctrine of belligerency continues to be viable. In almost all cases of belligerencies this Article will supplant the wider protections of the full body of the laws of war with the more limited protections afforded in Common Article 3. However, interpretation of this Article also provides that when a *de jure* government recognizes insurgents as belligerents, a convincing argument can be made for the continued utility of the legal notion of belligerency, and through it for the application of the wider standard of safeguards to the victims of the civil war.

V. Belligerency and Protocol II

The analysis to this point has endeavored to illustrate that the need for some form of recognition of a belligerency, preferably by the existing authority, as well as the limiting language of Common Article 3, create complex restrictions on the continued viability of the doctrine of belligerency. If that is the case, it might also be argued that Protocol II,[71] relating to the protection of victims of non-international armed conflicts, which was meant to supplement the rather general terms of Common Article 3, seems to have gone a long way in "driving another nail in the coffin" of the belligerency doctrine.

In setting its material scope of application, Article 1(1) of Protocol II states that it will apply in all conflicts not of an international nature:

> 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

71. *Supra* note 11.

72. The full text of Article 1(1) of Protocol II states:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

> to carry out sustained and concerted military operations and to implement this Protocol.[72]

The conditions stated for application of the rules regarding internal armed conflicts seem to mirror those classically associated with belligerency as described above. Therefore, there appears to be a clear declaration by the parties to Protocol II that in the limited cases that would previously have required application of the rules of international warfare to a conflict that was internal in nature, even under the provisions of General Article 3, such conflict should now be regulated by the much more restrictive rules relating to internal armed conflicts.[73]

Several arguments should be considered, however, before "burying" the doctrine of belligerency only because of the apparent scope determination of Protocol II. First, and perhaps most importantly, it is questionable whether Article 1(1) of Protocol II has evolved into customary international law.[74] The current legal status of this Article, and Article 1(4) of

---

72. (continued)

> International Armed Conflicts (Protocol I) and which take part 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.

73. It is interesting to note in this respect that considerable discussions regarding the implications of the scope of applicability of Protocol II took place after its signing. Many scholars have remarked that it substantially revised the rules existing in this area under Common Article 3. The argument is that while Common Article 3 did not establish a definite threshold in demanding only "armed conflict" as a triggering mechanism, this threshold is considerably lower than all-out civil war. Article 1(1) of Protocol II set a much higher standard for its application, one that does resemble all-out civil war. As will be endeavored to illustrate, the latter threshold is not so high that it views occurrences of belligerency as falling within its scope. *See* BART DE SCHUTTER & CHRISTINE VAN DE WYNGAET, *Coping With Non-International Armed Conflicts: The Borderline Between National and International War*, 13 GA. J. INT'L & COMP. L. 279, 285 (1983) (discussing the differences in the scope of application of Common Article 3 and article 1(1) of Protocol II); SOLF, *supra* note 68, at 294-95; Asbiørn Eide, *The New Humanitarian Law in Non-International Armed Conflict, in* Cassese, *supra* note 2, 276, 307; DAVID P. FORSYTHE, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272, 285-86 (1979); Draper, *supra* note 30, at 273-76.

74. Protocol II has been ratified by 149 states, thirteen of which have recorded reservations regarding its different provisions. States that have not ratified it include

Protocol I, which will be discussed later in this chapter,[75] is not within the scope of the present article. However, it will suffice to state that if either of these provisions is not yet law, particularly Article 1(1) of Protocol II, the discussion of the contemporary status of the belligerency doctrine must revert to the previous discussion of the implications of Common Article 3.

Even assuming that Article 1(1) of Protocol II is customary international law, a textual argument can be made for the continued existence of the notion of belligerency. Although there are great similarities between the terms of Article 1(1) and the belligerency criteria, careful evaluation of

---

74. (continued) India, Israel, Japan, Mexico, Morocco, Pakistan, Turkey, the United States and Viet Nam. *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications. Accessions and Successions*, http://www.icrc.org/icrceng.nsf/ (last visited Mar. 30, 2000) [hereinafter ICRC Website]. Furthermore, if United States practice is important in the creation of customary international law, it is noteworthy that in referring Protocol II for the advice and consent of the Senate, President Reagan requested that the Senate act promptly on the matter "subject to the understandings and reservations that are described more fully in the attached report." The attached Letter of Submittal, signed by Secretary of State Shultz, noted:

> The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by article 3 common to the 1949 Conventions (and only such conflicts). Which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTIONS OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal]. Based on this position and the assumption that United States acceptance is currently salient for the creation of customary rules of the laws of war, a persuasive argument can be made that Article 1(1) of Protocol II has not evolved into customary law.

75. *See infra* notes 79-84 and accompanying text.

the two leads to the conclusion that they do not mirror one another. The Protocol sets its applicability to "armed forces and dissident armed forces or other organized armed groups which . . . 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." Conversely, two of the belligerency criteria require occupation by insurgents of a substantial part of the state and a measure of orderly administration by that group in the area it controls. The belligerency requirements are more stringent than those in the Protocol in that they lend themselves to a group of rebels who have more than mere military control over part of the state. The belligerency conditions mandate its recognition when insurgents control a substantial part of the state. Furthermore, they also require that rebels establish some semblance of government or administration in the area under their control. The substantive distinction lies in the fact that upon attaining the objective criteria of belligerency, the insurgents achieve many of the characteristics of an independent state—they become in effect a *de facto* state.[76] This in turn justifies applying to them and to the conflict in which they are involved the body of rules meant to regulate international armed conflicts. On the other hand, the criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than state-to-state warfare. It more closely resembles the status of insurgency[77] previously described.[78] This amounts to a noteworthy dis-

---

76. BOND, *supra* note 2, at 51. *Cf.* David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 442-44 (1996) (noting that during civil war, the presumption that the government speaks for the state "can only be overcome when the level of civil strife demonstrates objectively that the presumed congruity between the government and the people of the state either no longer exists, or exists only in relation to a portion of the state and its population").

77. This conclusion is supported by the PROTOCOLS COMMENTARY. In describing the definition of the material scope of Protocol II's application, the Commentary notes:

> By excluding situations covered by Protocol I, this definition creates the distinction between international and non-international armed conflicts. The entities confronting each other differ, depending on which category the conflict falls under; in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power acting in the exercise of the public authority vested in it. This distinction sets the upper threshold for the applicability of the Protocol.

PROTOCOLS COMMENTARY, *supra* note 9, at 1351. *But see* George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 60 (2000). Aldrich notes that the scope of application of Article 1(1) of Protocol II "is reminiscent of the standard in customary law for the

tinction between the material scope requirements of Protocol II and those of belligerency.

A further argument begins with the statement that Article 1(1) of Protocol II cannot be read apart from Article 1(4) of Protocol I.[79] In many respects Article 1(4) of Protocol I was as "revolutionary" in 1977 as Common Article 3 was in 1949. In 1949, Common Article 3 was innovative when it established international legal rules pertaining to internal armed conflicts. In 1977, Article 1(4) of Protocol I declared that henceforth "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"[80] will be viewed as international armed conflicts. One might ask how this innovation impacts the legal status of belligerencies, if at all, especially as it is highly questionable whether this provision

77. (continued) recognition of belligerency and the consequent application of all customary laws of war. It is perhaps cynical, but doubtless true, to comment that this narrow applicability of [P]rotocol II explains why there are now 147 states party to it." *Id.* The *real politic* of this conclusion might be enticing. However, as noted above, a proper comparison between the Protocol II scope of applicability criteria and the accepted belligerency criteria leads to the conclusion that the latter create a higher threshold of applicability, which justifies the application of all customary laws of war.

78. *See supra* notes 22-27 and accompanying text.

79. *Supra* note 11.

80. The full text of Article 1 of Protocol I states:

> 1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
> 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.
> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in situations referred to in Article 2 common to those Conventions.
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

81. As noted, for the purpose of the present analysis of the contemporary status of the doctrine of belligerency, it has been assumed that both Article 1(1) of Protocol II and Article 1(4) of Protocol I are considered part of customary international law. If some uncer-

has become customary international law.[81] Nonetheless, assuming it has, an exercise in logic will attempt to illustrate the answer. It can be assumed that not all armed conflicts against colonial domination, alien occupation and racist regimes will be conflicts in which the insurgents might also be considered belligerents, according to the four objective belligerency criteria. If so, it can also be assumed that Article 1(4) of Protocol I now allows the victims of conflicts that are less all-inclusive then belligerencies the full protections of the laws of war. Conversely, as has been argued above, Article 1(1) of Protocol II provides limited protections to victims of internal armed conflicts not attaining the intensity of belligerency. Therefore,

---

81. (continued) tainty might arise as to the status of Article 1(1) of Protocol II, this is certainly not the case with regard to Article 1(4) of Protocol I. This Protocol has been signed by 156 States, thirty-four of which have made reservations about its different provisions. Several important States have yet to ratify it, including France, India, Israel, Japan, Pakistan, Turkey, and the United States. ICRC Website, *supra* note 74. While Protocol I is generally viewed as a document reiterating customary humanitarian international law, several of its provisions, including Article 1(4), are considered very controversial. This article was one of the provisions regarding which the United States made a specific objection. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987). Protocol I was signed by United States during the Carter Administration. President Reagan, in his Letter of Transmittal of Protocol II for the advice and consent of the Senate, remarked that Protocol I was "fundamentally and irrevocably flawed," noting, among other things, the problematic language of Article 1(4). Letter of Transmittal, *supra* note 74. While not directly describing Article 1(4) of Protocol I as not in keeping with customary international law Levie notes:

> Obviously, this provision refers to civil conflicts, i.e., internal conflicts, which have always heretofore been considered to be governed by national law, not international law, except insofar as Common Article 3 of the 1949 Geneva Conventions may be said to govern civil conflicts—something that rebels have heretofore steadfastly denied, or disregarded.

Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS L.J. 469, 473 (1993).

Furthermore, state practice, traditionally identified as a precursor to the establishment of customary international law, has not evolved in this area. On the contrary, as Meron remarks, in the period of time since Protocol I came into force, "time has passed Article 1(4) by" and this Article has not been invoked as binding customary international law in the occurrences when it might have been relevant. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 683. *See also* Aldrich, *supra* note 77, at 45 (noting that the use of the terms "colonial domination," "alien occupation," and "racist regimes" in Article 1(4) of Protocol I "made the provision a dead letter from the moment it was adopted, as they ensured that no state would ever agree that it was such a regime, which meant that the provision would never be applied").

occurrences of belligerencies not fought against colonial domination, alien occupation or racist regimes fall between the two articles. If so, what law applies to such rare eventualities? The answer to this query is clear: the prevailing international legal doctrine of belligerency. Thus, if the factual preconditions of belligerency transpire, and if the *dejure* government recognizes it as such, the co-belligerents would enjoy the protections of the rules applying to international armed conflicts.[82]

This is also the response to those who claim that Article 1(4) of Protocol, and its recognition of wars of national liberation as international armed conflicts, is a new form of recognition of belligerency.[83] As has been demonstrated, Article 1(4) of Protocol I sets a low bar for the application of the full body of the laws of war—any armed conflict waged to achieve national self-determination. None of the belligerency criteria need exist in such a conflict for the rules of international armed conflict to apply. Nor is any sort of recognition required. Even today, in the post-colonial era, wars of national liberation are not uncommon and Article 1(1) of Protocol I could serve to protect the victims of these conflicts.[84] However, other wars are also possible, not necessarily nationalist in their nature—true civil wars that might throw brethren at each other's throats. Protocol I would not provide the victims of such conflicts any of the protections of the laws of war. The doctrine of belligerency might. If the insurgents meet the notion's pre-conditions it might serve to protect them, even though they would not be fighting a war for national self-determination.

The discussion above illustrates that even assuming they have evolved into customary international law, neither the restrictive language of Protocol II nor the expansive nature of Protocol I have invalidated the doctrine of belligerency. It survives between the two on a continuously narrowing wedge.

VI. Belligerency: Possible Future Practice

Potential contemporary application of the doctrine of belligerency is very limited. It is an historical fact that it has not been applied in any civil war for almost 140 years. It is thus an understatement to declare that it has in fact fallen into disuse. However, it has been shown that strictly speaking it still exists in international law. Neither Common Article 3 nor the Protocols to the Geneva Conventions of 1949 completely invalidated the doc-

trine. As the above analysis has exposed, for it to be applicable the following factual premises must be present:

1. The four belligerency criteria: a) civil war within a state, beyond the scope of mere local unrest. b) occupation by insur-

---

82. Based on Common Article 3, Article 1(4) of Protocol I, and Article 1(1) of Protocol II, Solf describes four separate legal regimes which can be classified by the stage of the applicable conflict:

> 1. In situations in which tensions and disturbances within the state fall short of actual armed conflict, domestic law and international human rights principles are applicable.
> 2. In situations severe enough to constitute an armed conflict, but falling short of being a civil war, article 3 common to the 1949 Geneva Conventions, domestic law, and international human rights principles are all applicable. However, since common article 3 does not define "armed conflict", the determination of the threshold for the application of common article 3 is left to the government of the affected state.
> 3. A third stage of conflict is high intensity civil war in which the rebels have organized armed groups under a responsible command, and they have exercised control over a part of the national territory sufficient to enable them to carry out sustained and concerted military operations, and therefore sufficient to implement Protocol II. In such situations, 1977 Protocol II is applicable in addition to the norms applicable in situation 2 above. Despite the high threshold, which approaches the threshold for the application of the nineteenth century doctrine of recognized belligerency, there is no requirement for granting prisoner of war status.
> 4. In select struggles of self-determination, articles 1(4) and 96(3) of Protocol I operate to make most of the rules governing international armed conflict applicable. The parties to the conflict may also agree, expressly or impliedly, to make the rules of international armed conflict applicable.

SOLF, *supra* note 68, at 294-95. In describing the third of the four regimes he proposes, Solf notes the high threshold of the doctrine of belligerency but seems to derogate the notion in its entirety to the nineteenth century. In keeping with both historical and legal analyses proffered in Chapter II and in this chapter of this article, a fifth regime might be suggested to fit between Solf's third and fourth. In line with the Solf"s choice of language the new stage 4 would state:

> 4. A fourth stage of conflict is high intensity civil war in which the rebels, who observe the laws of war, have organized armed groups under a responsible command, and have exercised control over a substantial part of the territory of the state sufficient to enable them to carry out sustained and concerted military operations as well as an orderly administration of the territory under their control. The doctrine of belligerency would make the rules governing international armed conflict applicable.

> gents of a substantial part of the territory of the state. c) a measure of orderly administration by that group in the area it controls. d) observance of the rules of the laws of war by the rebel forces, acting under responsible authority.
> 2. Tacit or explicit recognition by the *de jure* government of the insurgents' belligerency.
> 3. The armed conflict is not one in which a people are fighting against colonial domination, alien occupation or a racist regime, in the exercise of their right to self determination.

The seemingly most obvious contemporary conflict in which the doctrine of belligerency might be viewed as potentially relevant is that which exists between China[85] and Taiwan.[86] Taiwan certainly meets the four objective belligerency criteria and under the "one China" positions offi-

---

83. Schindler, *supra* note 2, at 6. He writes:

> The recognition of wars of national liberation as international armed conflicts has been considered as a new form of recognition of belligerency. It must be emphasized, however, that this form differs from the traditional recognition of belligerency in several respects. First, the law of war is to apply automatically in wars of national liberation; no recognition of belligerency by the incumbent government or by third States is necessary. Second, the traditional conditions of recognition of belligerency (particularly the occupation of certain part of national territory), are no longer important; the claim to be recognized as a belligerent is exclusively based on the right of self-determination. Third, foreign States are no longer obliged to observe the laws of neutrality; on the contrary, according to General Assembly Resolutions and Declarations, their duty is to promote the realization of self-determination. Fourth, no formal state of war comes into existence in wars of national liberation.

As is demonstrated, Protocol I cannot replace the doctrine of belligerency in every factual situation, particularly in civil wars that are not national liberation in nature. It should also be re-emphasized in this regard that the expanded scope application of Article 1(4) of Protocol I has yet to attain the status of customary international law and therefore it is pretentious to claim that it has annulled the beligerency doctrine. *See supra* note 81 (discussing Article 1(4)'s customary law status).

84. "Could" and not "would" since in most actual occurrences of such conflicts states are loathe to provide their own rebellious citizens with anything but the hard hand of domestic law. This is true since the application of any international legal protections might imply that those citizens also enjoy some political rights.

85. Reference is to the Peoples' Republic of China, also commonly known as mainland China.

86. Known officially as the Republic of China. Taiwan is also known as Formosa.

cially espoused by both sides,[87] the conflict might still be viewed as internal. Therefore, if the conflict evolves into an armed conflagration might the doctrine provide the parties the protection of the full body of humanitarian international law? Probably not and for several reasons. There is a growing trend which views Taiwan as a *de facto* independent state no longer interested in unifying with the rest of China.[88] Thus, if war broke out, the Taiwanese could hypothetically argue that the laws of war apply directly to the conflict as in war between two states, with no need to rely on the belligerency doctrine. They could also assert that the conflict is being waged in the exercise of their right to self-determination[89] and that therefore, in light of Article 1(4) of Protocol I, the clash is to be viewed as an international armed conflict. This position would also exclude reliance on the doctrine of belligerency. It is very doubtful that China would accede to either of these arguments. If the rules governing international armed conflicts could not be applied directly to the conflict, it is also very unlikely that China would recognize Taiwan's belligerency. As has been suggested above, without such recognition, the doctrine of belligerency could not be applied and the conflict would be viewed as purely internal.

Is there any other contemporary global "hot-spot" to which these conditions might be applicable? The answer to this question seems to be negative. The most prominent internal disputes taking place today are in Chechyna, Kosovo and East Timor, as well as continuing struggle of the

---

87. The "one China" policy is also the stated policy of most other states with regard to the Taiwan-China conflict, including the United States. *See, e.g.*, Lung-chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 682-83; Hong-jun Zhou, *The Legal Order on Both Sides of the Taiwan Strait and the Current Sino-Vietnam Relation*, 87 Am. Soc'y Int'l L. Proc. 61, 61-63; Mark S. Zaid, *Taiwan: It Looks Like It, But Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations*, 32 NEW ENG. L. REV. 805, 809.

88. According to this view, the recent democratization of Taiwan has produced a growing demand for an independent Taiwan based on a "one China, one Taiwan" policy. Eighty-five percent of the island's population is native Taiwanese, while fifteen percent are refugees from mainland China, who arrived in 1949. Ralph N. Clough, *The Status of Taiwan in the New International Legal Order in the Western Pacific*, 87 AM. SOC'Y INT'L L. PROC. 73, 75. *See* Chen, *supra* note 87, at 675-80; Zaid, s*upra* note 87, at 809-10.

89. The argument is that Taiwan meets the basic requirements for statehood: a permanent population, control over a defined territory, and a government capable of governing effectively internally and acting responsibly in external relations. Chen, *supra* note 87, at 677-79. *But see* Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENG. L. REV. 685, 692-93 (noting the need for a new international norm of self-determination to fit the Taiwan-China situation and that the longer separation between the two entities continues, the stronger Taiwan's claim to self-determination will become).

90. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to*

Kurds in Turkey and Syria. While the Chechans, Kosovars, East Timorese[90] and Kurds intuitively appear to be engaged in conflicts against colonial domination, alien domination or racist regimes in the exercise of their right to self determination, convincing legal arguments can and are made against such suppositions.[91] Therefore, for the sake of the present discussion it will be assumed that none of these conflicts is a struggle for self-determination. If that is the case, might it still be possible to apply the belligerency doctrine to them based on the suggested factual premises? Arguably not. Questions arise as to each of these examples meeting the four belligerency criteria. However, even assuming that each of these internal conflicts meets the four pre-conditions this would not be sufficient to advance these cases of possible belligerency. The most daunting of the belligerency premises proffered does not exist in any of these cases. None of the metropolitan governments in these conflicts, the Russian, Yugoslav, Indonesian, Turkish or Syrian, have recognized the legitimacy of the rebels' causes and certainly have not recognized their belligerency.[92] This is perhaps based on the enduring presumption that recognition of their enemies' status as belligerents will advance their arguments as international, and not internal, players.

This conclusion inevitably leads to the next beckoning question. If the doctrine in its diminished form is not relevant to these conflicts, are there any other internecine conflicts for which it might still be germane as a tool for expansion of victim protections under international law rules of conflict management? If the answer to this query is also negative, serious reservations would, and should, arise as to the continued utility of the doctrine of belligerency and as to the justification for not relegating it to a rightful place in the dust heap of international law history.

While there is no conclusive answer to this question, particularly as there do not appear to be any current conflicts that might fit the mold of the

---

90. (continued) *International Law*, 94 AM. J. INT'L L. 102, 105-08 (2000) (describing the East Timorese conflict and the United Nations and United States reaction to it).

91. *See, e.g.*, Duncan B. Hollis, *Accountability in Chechnya—Addressing Internal Matters With Legal and Political International Norms*, 36 B. C. L. REV. 793 (1995). Hollis analyzes whether the Chechnyan-Russian conflict is an internal armed conflict or an international armed conflict. After examining the impact of both the Geneva Conventions and Protocol I, he arrives at the conclusion that this war is an internal armed conflict. With regard to Article 1(4) of Protocol I he found that the Chechnyan war is not in fact a struggle for self-determination as this is defined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among Nations. *Id*. at 818-19.

92. *Id.* at 814 n.135 (regarding the Russian view of the Chechnyan belligerency).

suggested belligerency criteria, upon further consideration it appears that the doctrine's assignment to the annals of international law history is still premature. It is from the two historical examples described in Chapter II that a lesson can be learned about the potential use of the notion. In both the American and Spanish civil wars the conflicts did not focus on one or the other belligerent's right to self-determination but rather on enormous ideological schisms which had developed within mostly homogeneous societies. In the American example, these schisms led the belligerents to secede from the federal entity of which they had been a part. In the Spanish example it led the belligerents to attempt, and succeed, to wrest power from the existing government and to replace it. In both of these cases widespread civil wars broke out, fought by armies under responsible command. The rebels in both conflicts quickly gained control of large areas of the state and were able to administer them. Furthermore, in both wars, and especially the American, the sides fought by the rules of the laws of war as applicable at the time, or at least had pretensions of doing so. However, there were also significant differences between the two wars and it is perhaps because of these dissimilarities that the outcomes of both conflicts with regard to belligerency were also different. In the American war the North begrudgingly recognized the South's belligerency. In the Spanish, foreign powers got embroiled in the fighting, violating the codes of neutrality and effectively destroyed any hope that the insurgents would be recognized as belligerents. The result was that the American North recognized the South's belligerency while in Spain no such recognition emerged.

Are there any similar wars or conflicts ready to be fought today between brethren within the same state? Apparently not. Does the potential exist? Possibly. Might one conjecture that a state or province or a group of states or provinces may opt to leave say the American,[93] Australian, Canadian[94] or German federations? While it seems unlikely, it is certainly not impossible, particularly during an era of burgeoning economic regionalism. If such a movement were to develop and lead to any form of military conflicts in which the four belligerency criteria would occur, it is suggested that the doctrine of belligerency might still find some utility. The assumption being that the parties to these conflicts might have a common desire to bestow the protections of the rules of international armed warfare upon the victims of these conflicts. Is it with Western superciliousness that such a premise is proffered? The idea that only Western nations might respect their brethren enough to provide each other with expanded protections is far from certain, and the German experience of World War II does not bode well for this premise. But it is suggested that

if some form of recognition of an enemy's belligerency is not possible within a possible Western internal conflict, then the notion of belligerency should in fact be discarded.

VII. Conclusion

As generally accepted today, the full spectrum of the rules of the laws of war, primarily articulated in the Geneva Conventions and their Protocols, apply during international armed conflicts. The doctrine of belligerency served to expand the application of humanitarian international law to internal armed conflicts in which four factual preconditions existed. Historically speaking, the doctrine was last applied to a conflict in the American Civil War. Its application to any internal armed conflict was last debated more than sixty years ago, during the Spanish Civil War. Since

---

93. Even today there are several self-styled independence movements in different regions and states in the United States, from New England in the east to Hawaii in the west, and from the southern states to Alaska. *See, e.g.*, *The New England Confederation—Principles and Vision*, http://www.metro2000.net/~ stabbott/NEconfederation.htm (last visited Nov. 3, 2000); *Hawai`i—Independent & Sovereign*, http://hawaii-nation.org/nation/ (last visited Nov. 3, 2000); *League of the South: Declaration of Cultural Independence*, http://www.dixienet.org/ (last visited Nov. 3, 2000); *The Second Republic of Texas*, http://www17.geocities.com/CapitolHill/1842/ (last modified July 27, 1998); *Home of the Alaskan Independence Party*, http://www.akip.org/ (last modified Nov. 1, 2000). It is interesting to note that none of these proponents of some form of political independence from the United States base their demands on economic reasoning. They all appear to be desirous of maintaining what they believe to be the unique history and culture of their region or state. The only "movement" noted that advocates independence based mainly on its economic strength and not on an historical "right" is that advocating independence for the State of California. *See Free the Bear! The First California Secession Movement Online! Independence for California*, http://www.geocities.com/CapitolHill/Senate/1029/ (last visited Nov. 3, 2000).

94. Within the context of the hypothetical Canadian scenario, it is not the struggle of Quebec to separate from the Canadian confederation that would be relevant to the present discussion. While there is still peace between Canada and Quebec, were there to be a conflagration of this dispute it might well be more in line with the self-determination analysis described above. The notion might be relevant if one of the other provinces were to choose to secede for economic reasons. It is interesting to note in this respect the existence of self-proclaimed movements for the political independence of the provinces of Ontario, Alberta, and of Western Canada in general. *See, e.g.*, *Ontario Independence League Homepage*, http://ourworld. compuserve.com/homepages/Ontario_Independence (last visited Nov. 3, 2000); *The Alberta Independence Party*, http://www.albertaindependence.com/ (last visited Nov. 3, 2000); *What is the Western Canada Concept?*, http://www.westcan.org/what.htm (last visited Nov. 3, 2000). All three "independence" movements describe, amongst other things, the economic benefits their province or region would attain from secession from Canada.

then it was not directly addressed by the framers of the major post World War II conventions of relevance. It is with this historical background that this article endeavored to examine whether there is any reason not to consign the doctrine to the pages of legal history.

Before analyzing the current legal viability of the notion, a utilitarian presumption was made—that combatants in internal conflicts and the civilian populations affected by them should be provided with the widest possible legal protections. These are granted today by the laws of war as they pertain to international armed conflict. Since the notion of belligerency purports to provide these same protections to victims of certain internal armed conflicts, an examination of its continued utility was deemed worthy.

Because the focus of the analysis was an attempt to expand the legal protections given the combatants and civilians involved in internal wars, the examination of the doctrine of belligerency was directed at the relations between the parties to the conflict. Much less attention was given to the third party implications of the notion, which have traditionally been the central focus of most discussions of the issue.

Prior to a thorough examination of the doctrine in light of existing conventions of international law, another assessment was necessary. When is a conflict assigned the status of belligerency? If it is conditioned on the existence of certain factual criteria, who is to decide if these criteria actually exist? It was discovered that unless the parties to the conflict come to some form of understanding, whether tacit or open, this issue is not likely to be resolved. Furthermore, only it's resolution through the *de jure* government's recognition of rebels as belligerents will lead to the application of the full body of the laws of war to the conflict.

Having reached this conclusion and through it the understanding that a belligerency determination will only be accorded in very rare circumstances, a further examination was required. Even in a situation justifying its application, based on these very narrow factual premises, might not suffice under the innovative international legal regimes created by Common Article 3 and expanded by Protocol II. These provisions purport to govern internal armed conflicts. It was, therefore, also necessary to determine whether belligerency falls within the material scope of these documents. If it does, the doctrine could no longer exist independently to provide the full spectrum of law of war protections during relevant internal armed con-

flicts. An analysis of both Common Article 3 and the Protocols led to a conclusion that belligerency had survived the two, but just barely.

Based on all of the previous suppositions, a three part test was suggested to resolve whether a belligerency exists—the factual occurrence of the four belligerency criteria, recognition of the belligerency by the incumbent government, and the existence of a conflict not being fought in the exercise of a nation's right to self-determination.

Reaching this theoretical conclusion was not enough, and the proposals were put to the test. As was shown, there do not appear to be any contemporary internal struggles that meet the very narrow pre-conditions suggested, particularly because most on-going conflicts involve nations struggling to achieve some form of self-determination. Whether they are of this genre or not, or whether they have in fact achieved the four required criteria was found to be moot since the probability that one of the incumbent governments involved in those conflicts will recognize the insurgents as belligerents is extremely unlikely.

Upon reaching this practical conclusion, it became further necessary to explain why the doctrine of belligerency should not be consigned to legal history. Before doing so, it was tentatively proffered that the notion might still be of some utility in some future civil war in which a geographic part of a nation might opt to secede from the federal entity of which it was a part for ideological or economic reasons and not because of nationalist aspirations. This was based in no small measure on the historical background provided, particularly of the American Civil War. This proposal might certainly be challenged because it has limited practical and theoretical foundations.

Given the foregoing conclusions a final query arises. Was the entire foregoing exercise indispensable? Arguably not, especially with the very limited potential fruits of the endeavor. If it has any redeeming function it was in the analysis of the current status of the doctrine of belligerency and the understanding that while it is not all together obsolete, in the future it could only be applied in very narrowly defined circumstances. Since even in such conditions it would serve to expand the protections afforded combatants and civilians during some occurrences of civil war, this exercise has not been completely superfluous.

REVIEW OF RECENT DECISIONS OF THE *AD HOC* INTERNATIONAL WAR CRIMES TRIBUNALS

Since the creation of the International Criminal Tribunal for the Former Yugoslavia in 1993,[1] cases involving significant law of war issues have been the subject of international judicial resolution. These cases represent perhaps the most significant judicial analysis of the law of war to occur since the close of the post-World War II war crimes trials. Although decisions of these tribunals do not have any binding legal effect on the international community, they do have an undeniable and important impact on the development of the customary international law of war. Many of these cases have involved offenses alleged to have been committed during the course of a non-international armed conflict.[2] As a result, the impact of these cases on customary international law is perhaps most profound when assessing the contours of the law of war applicable to such conflicts—an area with minimal conventional legal regulation but a growing body of customary legal regulation.

While the extent of the significance of these decisions is subject to debate, the fact that they have an impact is not. Judicial decisions of international tribunals are an accepted source of evidence of customary international law.[3] Because the analysis contained within these decisions may have an immediate or future impact on what is considered a binding international obligation under the law of war, it is obvious that those involved in the practice of operational law should become familiar with them. The

1. The ICTY was created pursuant to United Nations Security Council Resolution 827 for the purpose of "prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (recommending an international tribunal for 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 an International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) (establishing the International Criminal Tribunal for the Prosecution of War Crimes in the Former Yugoslavia (ICTY) and adopting the statute recommended in the Secretary-General's report) [hereinafter International Criminal Tribunal for Yugoslavia Statute].

case comments in the following pages are intended to facilitate this pro-

2. "[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4339 (Yves Sandoz, Christopher Swinarski, & Bruno Zimmerman eds., 1987) [hereinafter OFFICIAL COMMENTARY, PROTOCOL II].

> The expression 'armed conflicts' give an important indication . . . since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within a territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new state.

Id. at ¶ 4341.

Although Serbia was involved in the fighting, alongside the Federal Republic of Yugoslavia, their involvement did not change the character of the conflict from non-international to international. Serbia's involvement was at the behest and with the consent of the Yugoslav Government, the legitimate Government, and was directed at the Kosovo Albanians, not Yugoslavia. Thus, there was no state on state conflict, which would cause the conflict to be characterized as an international armed conflict. The same rationale was used to justify Operation Just Cause, the United State's invasion of Panama, as a non-international as opposed to international armed conflict. The United States "invasion" of Panama on 20 December 1989 was at the request and invitation of the legitimate elected President, President Guillermo Endara. "The United States government never recognized Noriega as Panama's legitimate, constitutional ruler." United States v. Noriega, 117 F.3d 1206, 1211 (1997); *see also* Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 POL. SCI. Q. 539 n.4 (1995). Thus, the conflict between the United States and Manuel Noriega, the Panama Defense Forces, and the forces loyal to Noriega was not State on State; rather, it was a non-international armed conflict between the legitimate Government of Panama and forces assisting the Panamanian Government against insurgents commanded by Manuel Noriega. *But cf*. United States v. Noriega, 808 F. Supp 791 (1992) (holding Manuel Noriega is entitled to Prisoner of War status based on the court's analysis of the invasion of Panama as an Article 2 conflict, an international armed conflict, despite evidence to the contrary from the Department of State and Department of Defense). "The Court finds that General Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty, regardless of the type of facility in which the Bureau of Prisons chooses to incarcerate him." *Id*. at 796.

cess.

The following case comments are intended to provide a brief summary of several significant decisions from these tribunals. Each was written by a student enrolled in the Advanced Law of War Graduate Course elective during the 48th Graduate Course at The Judge Advocate General's School. Each comment focuses on a specific opinion from one of the tribunals, and how that opinion resolved a specific issue related to the law of war. They are not intended to offer in-depth analysis of the decisions, but merely as a review of opinions from the tribunals. They represent what is hoped will be a continuing effort to provide such reviews in the *Military Law Review* of future decisions from these tribunals.

---

3. Customary status may be achieved in various ways ranging from diplomatic relations between states, state practice, practice of international organs, state laws, decisions of state and international courts, and state military and administrative practices. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 142 (2d ed. 1995).

THE FINE LINE BETWEEN POLICY AND CUSTOM: *PROSECUTOR v. TADIC* AND THE CUSTOMARY INTERNATIONAL LAW OF INTERNAL ARMED CONFLICT

MAJOR IAN G. COREY[1]

I. Introduction

On 2 October 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia[2] (the Tribunal) rendered a decision in the case of Dusko Tadic[3] that potentially has serious implications for United States participation in internal armed conflicts.[4] In *Tadic*, the Appeals Chamber concluded that certain rules and principles governing the conduct of international armed conflicts now apply to internal armed conflicts as a matter of customary international law.[5]

The United States has long maintained a policy of compliance with the law of war[6] during all armed conflicts, however such conflicts are characterized.[7] Yet the U.S. policy is characterized as nothing more than a pronouncement of policy, rather than the pronouncement of state practice premised on a legal obligation.[8] Regardless of how the United States characterizes this pronouncement, however, the *Tadic* decision may indeed raise it to the level of customary law.

---

1. Judge Advocate General's Corps, United States Army. Presently assigned as Administrative Law Attorney, Military and Civil Law Division, Office of the Judge Advocate, United States Army, Europe, and Seventh Army, Heidelberg, Germany. B.S.F.S., 1988, Georgetown University; J.D., 1996, George Mason University School of Law; LL.M., 2000, The Judge Advocate General's School, United Staes Army, Charlottesville, Virginia. Previous assignments include Student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia, 1999-2000; Senior Trial Counsel and Administrative Law Attorney, Office of the Staff Judge Advocate, 3d Infantry Division (Mechanized) and Fort Stewart, Fort Stewart, Georgia, 1996-1999; Funded Legal Education Program, 1993-1996; Executive Officer, Company E, 25th Aviation Regiment (AVIM), 10th Mountain Division (Light Infantry), 1992-1993; Assistant S3 and Company Executive Officer, 210th Support Battalion (Forward), 10th Mountain Division (Light Infantry), 1990-1992; Company Executive Officer and Platoon Leader, 10th Supply & Transportation Battalion, 10th Mountain Division (Light Infantry), Fort Drum, New York, 1989-1990.

II. Facts

In February 1994, German officials arrested Dusko Tadic in Munich after Bosnian exiles recognized him as one of the Bosnian Serbs who had participated in a number of atrocities committed against Bosnian Mus-

---

2. The International Criminal Tribunal for the Former Yugoslavia was established on 25 May 1993, by United Nations Security Council Resolution 827. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993) [hereinafter S.C. Res. 827], *reprinted in* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA SINCE 1991, BASIC DOCUMENTS 147 (1995) [hereinafter BASIC DOCUMENTS]. *See also* S.C. Res. 808, U.N. SCOR, 48th Sess. 3175th mtg., U.N. Doc. S/RES/808 (1993) [hereinafter S.C. Res. 808], *reprinted in* BASIC DOCUMENTS at 141 (deciding that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" and requesting the United Nations Secretary-General to submit proposals for implementation of the decision). S.C. Res. 827 expressed the Security Council's "grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia . . . including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing' . . . ." S.C. Res. 827. Accordingly, the Security Council established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined . . . ." *Id.* In so doing, the Security Council acted pursuant to its authority under Chapter VII of the United Nations Charter. *See* U.N. CHARTER arts. 39-51.

3. Prosecutor v. Tadic (a/k/a Dule), No. IT-94-1-AR72 (Oct. 2, 1995) (Appeal on Jurisdiction) [hereinafter Tadic Appeal], *reprinted in* INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDICIAL DECISIONS, 1994-1995, at 353 (1999) [hereinafter JUDICIAL DECISIONS]. Dusko Tadic is also known as Dusan Tadic.

4. An internal—or non-international—armed conflict "is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." Sylvie-S. Junod, *Commentary on the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* [hereinafter Commentary on Protocol II], *in* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1305, 1319 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

5. International law "consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) [hereinafter RESTATEMENT]. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Id*. at §102(2).

lims.[9] Germany charged Tadic with crimes against humanity, including aggravated assault and murder, as well as genocide.[10]

Pursuant to Article 9 of the Tribunal's statute,[11] the Trial Chamber formally requested that Germany defer to the Tribunal's jurisdiction.[12] Germany acceded.[13] Subsequently, the Tribunal's prosecutor prepared an indictment charging Tadic with grave breaches of the Geneva Conventions of 1949,[14] violations of the laws and customs of war, and crimes against humanity, pursuant to Articles 2, 3, and 5 of the International Criminal Tri-

---

6. The Department of Defense defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law." U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 3.1 (9 Dec. 1998) [hereinafter DOD DIR. 5100.77]. Today, the "law of war" is often referred to as "international humanitarian law." *See, e.g.*, Jean-Jacques Surbeck, *Dissemination of International Humanitarian Law*, 33 AM. U.L. REV. 125, 126 n.5 (1983) ("The view of the [International Committee of the Red Cross] is that 'international humanitarian law' is synonymous with 'law of war.'"). *But see* Alfred-Maurice de Zayas, *Book Review: Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 82 AM. J. INT'L L. 416, 418 (April 1988) ("[H]umanitarian law goes beyond 'the law of the Hague,' or law of war proper, which determines the rights and duties of belligerents in the conduct of operations and limits the means of doing harm, and 'the law of Geneva,' which is intended to safeguard military personnel placed *hors de combat* and persons not taking part in hostilities."). *See also* Tadic Appeal, *supra* note 3, para. 87 (discussing the evolution of terms related to and encompassing the "law of war").

7. *See infra* notes 61-62 and accompanying text.

8. *See id.*

9. *See, e.g.*, William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept. 1995, at 5, 64.

10. *See id.* at 64.

11. *See* U.N. Doc. S/25704, annex, art. 9 (1993) [hereinafter ICTY Statute], *reprinted in* BASIC DOCUMENTS, *supra* note 2, at 5. Article 9 provides that the Tribunal and national courts "shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, art. 9(1). However, Article 9 further provides that the Tribunal "shall have primacy over national courts." *Id.* at art. 9(2). "At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal . . . ." *Id.*

12. *See Activities of the Tribunal*, 1994 ICTY Y.B. 24, 26. *See also* Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic, Prosecutor v. Tadic, No. IT-94-1-D, (Nov. 8, 1994) (acting pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 3.

bunal for the Former Yugoslavia (ICTY) Statute, respectively.[15] The indictment alleged that between May and August 1992, Tadic had, *inter alia*, murdered, raped, and assaulted numerous victims, many of them at the Omarska detention facility used by the Bosnian Serbs to intern Muslims and Croats.[16]

Tadic made his first appearance before the Tribunal on 26 April 1995, entering a plea of not guilty to all charges.[17] Subsequently, Tadic filed a motion attacking the Tribunal's jurisdiction on three grounds: (1) the Security Council lacked the power to establish the Tribunal, such that its establishment was unlawful;[18] (2) the primacy jurisdiction conferred upon the Tribunal had no basis in international law;[19] and (3) the Tribunal lacked subject-matter jurisdiction because the crimes alleged—grave breaches, violations of the laws or customs of war, and crimes against

---

13. Before it could remand custody of Tadic to the Tribunal, however, Germany had to enact implementing legislation. Germany enacted such legislation on 10 April 1995; the legislation entered into force the following day. *See State Cooperation*, 1995 ICTY Y.B. 317, 319. Tadic arrived in The Hague, where the Tribunal sits, on 25 April 1995. *See, e.g.*, William Drozdiak, *War Crimes Tribunal Arraigns 1st Suspect; Bosnian Serb Pleads Not Guilty to Charges That He Killed Muslims at Detention Camp*, WASH. POST, April 27, 1995, at A31.

14. *See infra* note 43.

15. *See* Prosecutor v. Tadic, No. IT-94-1 (Feb. 10, 1995) (Indictment) [hereinafter Tadic Indictment], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 27. Articles 2, 3, and 5 of the ICTY Statute give the Tribunal the power to prosecute grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, and crimes against humanity, respectively. *See* ICTY Statute, *supra* note 11, arts. 2, 3, and 5.

16. *See* Tadic Indictment, *supra* note 15. The Tribunal prosecutor subsequently twice amended the indictment. The first amended indictment alleged that Tadic had committed additional crimes of a similar nature at two other detention facilities, Truopolje and Keratem, and extended the period covered to December 1992. *See* Prosecutor v. Tadic, No. IT-94-1 (Aug. 25, 1995) (Indictment (First Amended)) [hereinafter Tadic Indictment (First Amended)], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 243. The amended indictment also alleged persecution on political, racial, and/or religious grounds, as a crime against humanity, and deportation, as both a crime against humanity and a grave breach. *See* Tadic Indictment (First Amended), at 243. Later, the Tribunal prosecutor again amended the indictment to delete the allegations of deportation contained in the First Amended Indictment. *See* Prosecutor v. Tadic, No. IT-94-1-T (Indictment (Second Amended)) (Dec. 14, 1995) [hereinafter Tadic Indictment (Second Amended)], *reprinted in* JUDICIAL DECISIONS, *supra* note 3, at 335.

17. *See, e.g.*, Drizdiak, *supra* note 13, at A31.

18. *See* Tadic Appeal, *supra* note 3, para. 26.

19. *See id*. para. 50.

humanity—apply only to international armed conflict, whereas the conflict at issue was internal.[20]

The Trial Chamber dismissed Tadic's motion as it related to primacy and subject-matter jurisdiction, but concluded it lacked the competence to rule on the validity of the Tribunal's establishment.[21] As to the primacy of the Tribunal over national courts, the Trial Chamber held that Tadic, not being a state, lacked standing to raise the issue,[22] and that the Tribunal's establishment by the Security Council pursuant to Chapter VII of the United Nations (U.N.) Charter eviscerated any alleged right to be tried by national courts pursuant to national laws.[23]

The Trial Chamber also dismissed Tadic's claim that the Tribunal's jurisdiction under Articles 2, 3, and 5 of the ICTY Statute was limited to crimes committed in the context of an international armed conflict, that the conflict at issue was internal, and that the Tribunal therefore lacked subject-matter jurisdiction.[24] In disposing of this claim, the Trial Chamber determined that the crimes covered by all three articles were applicable in both internal and international armed conflicts.[25] Consequently, the Trial Chamber concluded that it had jurisdiction regardless of the nature of the conflict.[26]

Following the Trial Chamber's dismissal of Tadic's motion challenging the Tribunal's jurisdiction, the Appeals Chamber granted Tadic's motion for an interlocutory appeal on the issue of jurisdiction.[27]

---

20. *See id*. para. 65.

21. *See id*. para. 2.

22. *See id*. para. 55. The Trial Chamber also noted that the two states with the greatest interest in Tadic's prosecution, Germany and Bosnia-Herzegovina, had accepted the Tribunal's jurisdiction. *See id.* para. 56. Further, the court noted that the crimes charged were serious breaches of international humanitarian law that transcended the interests of any one state. *See id.* para. 58.

23. *See id*. paras. 61-63. This alleged right derives from the theory of *jus de non evocando*, the notion in some legal systems that an accused should not be removed from the court that has jurisdiction over him. The goal is to protect against the creation of special courts, for the prosecution of politically-charged offenses, that lack traditional due process rights. *See id*. para. 62.

24. *See id*. para. 65.

25. *See id*. para. 65.

26. *See id*. para. 65.

27. *See id*. para. 1.

III. Holding of the Appeals Chamber

Whereas the Trial Chamber had declined to rule on the validity of the Tribunal's establishment,[28] the Appeals Chamber held that the Security Council had properly established the Tribunal.[29] In reaching this conclusion, the court found that the Security Council established the Tribunal pursuant to its wide discretionary powers under Chapter VII of the U.N. Charter.[30] Additionally, the Appeals Chamber decided that the Tribunal was established in accordance with the rule of law, that is, in accordance with international standards of procedural fairness.[31]

As to the primacy of the Tribunal, the Appeals Chamber rejected the Trial Chamber's disposition of the issue on the basis that Tadic lacked standing.[32] However, the court rejected Tadic's challenge on the grounds that the crimes alleged were internationally significant, and that the absence of primacy could result in forum shopping and potentially a windfall to the accused.[33]

The Appeals Chamber next tackled Tadic's claim that the Tribunal's subject-matter jurisdiction under Articles 2, 3, and 5 of the ICTY Statute was limited to crimes committed during an international armed conflict.[34] Upon concluding that the crimes alleged were committed in the context of an armed conflict,[35] the court further concluded that the conflicts in the former Yugoslavia had both internal and international aspects[36] and that the Security Council intended that the Tribunal's subject-matter jurisdic-

28. *See supra* note 21 and accompanying text.
29. *See* Tadic Appeal, *supra* note 3, paras. 28-48.
30. *See id*. paras. 28-40.
31. *See id*. paras. 41-47.
32. Using somewhat harsh language, the Appeals Chamber stated that:

> Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of state sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of state sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

Id. para. 55.

tion extend to both types of conflicts.[37] With respect to the specific articles in question the Appeals Chamber held, contrary to the Trial Chamber's decision, that Article 2 of the ICTY Statute applied only to offenses committed during international armed conflicts.[38] However, the Appeals Chamber upheld the Trial Chamber's decision that Articles 3 and 5 of the

---

33. The Appeals Chamber observed that:

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.
>
> . . . .
>
> Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is there would be a perennial danger of international crimes being characterised as "ordinary crimes" or proceedings being "designed to shield the accused", [sic] or cases not being diligently prosecuted.

Id. para. 58 (citations omitted).

34. Recall that Articles 2, 3, and 5 of the ICTY Statute give the Tribunal the power to prosecute grave breaches, violations of the laws or customs of war, and crimes against humanity, respectively. *See supra* note 11 and accompanying text.

35. *See* Tadic Appeal, *supra* note 3, para. 70.

36. *See id*. para. 77.

37. *See id*. para. 78.

38. *See id*. para. 84. The United States position was that "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." *Id.* para. 83 (quoting an *amicus curiae* brief submitted by the United States). Some commentators have criticized this portion of the Appeals Chamber's holding. *See, e.g.*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); George Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

ICTY Statute applied to offenses committed during both internal and international armed conflicts.[39]

In the process, the Appeals Chamber took a very expansive view of Article 3 of the ICTY Statute, holding:

> Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of Common Article 3 *and other customary rules on internal conflicts*; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, [that is], agreements which have not turned into customary international law.[40]

The court then engaged in a lengthy discussion of the development of customary law in the field of internal armed conflict, maintaining that various principles of the law of war now apply in the context of such conflicts.[41] Indeed, the Appeals Chamber concluded, "it cannot be denied that customary rules have developed to govern internal strife."[42]

IV. Analysis

For the military practitioner, the most significant aspect of the Appeals Chamber's decision is its conclusion that some of the rules and principles governing international armed conflict now apply to internal armed conflict as a matter of customary law. Prior to *Tadic*, the law of war applicable to internal armed conflict consisted almost entirely of Common Article 3 to the Geneva Conventions of 1949[43] and Additional Protocol II to the Geneva Conventions.[44] In *Tadic*, however, the Appeals Chamber maintained that the distinction between international and internal armed conflict has increasingly become blurred, such that rules of customary law

39. *See* Tadic Appeal, *supra* note 3, paras. 137, 142.
40. *Id.* para. 89 (emphasis added).
41. *Id.* paras. 96-127.
42. *Id.* para. 127.

have emerged to regulate internal armed conflict.[45] According to the Appeals Chamber, these rules include, *inter alia*,

> protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in the hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[46]

Still, the court noted two limitations on the migration of rules and principles that traditionally governed international armed conflict into the sphere of internal armed conflict:

> (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essense of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[47]

The significance of the Appeals Chamber's decision becomes especially apparent when considering the route by which the court arrived at its outcome in light of U.S. policy regarding compliance with the law of war.[48]

Citing the difficulty of discerning the operational conduct of forces in the field, the Appeals Chamber relied primarily on "such elements as offi-

---

43. Geneva Conventions of 12 August 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.T.S. 3114, 75 U.N.T.S. 3 [hereinafter Geneva Conventions]. The Geneva Conventions consist of: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. "Common Article 3" refers to Article 3, which is identical in all four of the Geneva Conventions.

44. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol II].

45. *See* Tadic Appeal, *supra* note 3, para. 97.

46. *Id.* para. 127.

47. *Id.* para. 126.

48. *See infra* notes 61-62 and accompanying text.

cial pronouncements of States, military manuals and judicial decisions"[49] in deciding that state practice reflected the crystallization of customary law in the arena of internal armed conflict.[50] To this end, the court cited statements by governments,[51] resolutions of the League of Nations and the

49. Tadic Appeal, *supra* note 3, para. 99.

50. While he embraced the court's conclusions, Professor Theodor Meron criticized its reliance on official pronouncements to the exclusion of operational practice.

> One may ask whether the Tribunal could not have made a greater effort to identify actual state practice, whether evincing respect for, or violation of, the rules. Difficult as such efforts are, they could have reinforced the Tribunal's substantive appraisals of principles and rules of customary international law. Without some significant discussion of operational practice, it may be difficult to persuade governments to accept the Tribunal's vision of some aspects of customary law.

Meron, *supra* note 38, at 240.

51. *See, e.g.*, Tadic Appeal, *supra* note 3, para. 100 (citing the British government's protests in 1938 against the targeting of non-combatants during the Spanish Civil War, which had elements of both an internal and international armed conflict); *id.* para. 105 (citing the stated commitment in 1964 of the government of the Democratic Republic of Congo to refrain from attacking civilians and to respect the Geneva Conventions during the civil war, and urging the rebels to do the same); *id.* para. 117 (citing the El Salvadoran government's declaration in 1987 that, while it did not consider Additional Protocol II to the Geneva Conventions of 1949 applicable to El Salvador's civil war, it would nonetheless comply with the provisions of the Protocol).

United Nations,[52] declarations of the European Union,[53] instructions and statements by insurgent groups,[54] and national military manuals.[55]

To be sure, the task of discerning customary international law "is more of an art than a scientific method."[56] Principles of customary international law consist of both a quantitative element (the practice of states) and a qualitative element (a sense of legal obligation typically referred to as *opinio juris*).[57] Even when state practice can be empirically documented, the more difficult task of satisfying the *opinio juris* element remains.[58] Often, state practice is not accompanied by any formal expression of *opinio juris*.[59] Indeed, none of the state pronouncements cited by the Appeals Chamber expressed a *legal* obligation to apply principles and rules governing the conduct of international armed conflict to internal armed conflict.[60] Still, the court seemed to conclude that such pronounce-

52. *See, e.g., id.* para. 101 (citing the League of Nations's adoption of a resolution in 1938 condemning the bombing of civilian populations during both the Spanish Civil War and Sino-Japanese War); *id.* paras. 110-12 (citing resolutions adopted by the United Nations General Assembly in 1968 and 1970 as declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind).

53. *See, e.g., id.* para. 113 (citing a 1990 declaration by the European Community, regarding the internal conflict in Liberia, recognizing the applicability of principles of international humanitarian law to the protection of civilians in internal armed conflicts); *id.* para. 115 (citing a 1995 declaration by the European Union, regarding the civil war in Chechnya, deploring the violations of international humanitarian law with respect to civilians).

54. *See, e.g., id.* para. 102 (citing Mao Tse-Tung's instructions in 1947 to the Chinese Peoples' Liberation Army not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms"); *id.* para. 107 (citing the 1988 commitment by El Salvadoran rebels (the FMLN) to comply with Common Article 3 of the Geneva Conventions and Additional Protocol II).

55. *See, e.g., id.* para. 106 (citing the 1967 "Operational Code of Conduct for the Nigerian Armed Forces," which regulated the conduct of military operations against rebels and provided that the armed forces were duty bound to respect the Geneva Conventions and protect civilians and civilian objects); *id.* para. 118 (quoting the German Military Manual of 1992 which provides that "[m]embers of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts"). This provision in the German Military Manual is strikingly similar to expressions of U.S. policy regarding compliance with the law of war. *See infra* notes 61-62 and accompanying text.

56. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44 (2d ed. 1993).

57. *See supra* note 5.

58. "Without *opinio juris*, there may exist only a history lesson more or less devoid of legal significance." JANIS, *supra* note 56, at 46.

59. *See id.* at 47.

60. *See supra* notes 51-55 and accompanying text.

ments evidenced both practice and *opinio juris* by implication. In light of the U.S. policy on compliance with the law of war, the Appeals Chamber's reasoning has serious implications for the conduct of U.S. operations outside the context of an international armed conflict.

The Department of Defense (DOD) Law of War Program provides that all members of the U.S. armed forces must "comply with the law of war during all armed conflicts, *however such conflicts are characterized*, and with the principles and spirit of the law of war during all other operations."[61] The Chairman of the Joint Chiefs of Staff Instruction that implements the DOD Law of War Program repeats this mandate.[62] Neither articulation expresses a legal obligation to adhere to the law of war during internal armed conflicts (or "other operations"); indeed, the U.S. policy is couched as just that: mere policy. Policy declarations to the contrary notwithstanding, however, the *Tadic* decision easily leads to the conclusion that the United States is now bound by customary law to apply the law of war in internal armed conflicts, if not all operations.

Before *Tadic* at least, characterizing state practice as mere "policy" could not rise, without the additional qualitative element of *opinio juris*, to the level of a pronouncement of customary international law. *Tadic* seriously diminishes the strength of such a characterization, however. This is all the more evident in light of the striking similarity between the language of the U.S. policy, as expressed in *DOD Directive 5100.77* and *Chairman Joint Chiefs of Staff Instruction 5810.01A*, and the provision of the German Military Manual relied on by the Appeals Chamber as evidence of customary law.[63] Indeed, the doctrine expressed by the United States, as the world's only true superpower, as to the applicability of the law of war to internal armed conflict and other operations outside the context of international armed conflicts can only be seen as figuring prominently in the development of customary international law.[64]

In light of the *Tadic* decision, the nature of U.S. policy on compliance with the law of war, as mere policy or reflective of current customary inter-

61. DOD DIR. 5100.77, *supra* note 6, para. 5.3.1 (emphasis added).

62. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, para. 5a. (27 Aug. 1999) [hereinafter CJCSI 5810.01A] ("The Armed Forces of the United States will comply with the law of war during all armed conflicts [however] such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.").

63. *See supra* note 55.

national law, is unclear. However, the United States faces a choice: either acknowledge the increased role of the principles and rules of the law of war in the context of internal armed conflict, or resist the expansion of customary law by even more strenuously articulating the lack of *opinio juris* in its current policy. The former will place the United States on the vanguard of customary law; the latter, while keeping options open for the time being, may in a future operation lead to allegations of violations of international humanitarian law, and condemnation.

V. Conclusion

In *Prosecutor v. Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia confirmed the resolve of the international community to contend with offenses committed not only during international armed conflicts, but during internal armed conflicts as well. At the same time, the court recognized a significantly expanded role for customary law in the context of internal armed conflict, creating serious implications for the future conduct of U.S. operations. While the United States may continue to characterize compliance with the law of war during all operations, including those that do not occur in the context of an international armed conflict, as a matter of policy rather than legal obligation, such a characterization may now be meaningless in light of the *Tadic* decision. In the future, the United States may no longer have the luxury of selecting those operations in which, because of military necessity or for other reasons, it does not apply the whole law of war. Indeed, doing so could expose decision-makers and service members alike to allegations of

---

64. *See, e.g.*, Meron, *supra* note 38, at 249.

> A broader question . . . concerns the weight to be assigned to the practice of various states in the formation of the international customary law of war. I find it difficult to accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and interests, *inter alia*, have an equal role in this regard. . . . I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but *through policies expressed, for example in military manuals*.

Id. (emphasis added). One can only wonder why the Appeals Chamber did not cite previous versions of DOD DIR. 5100-77 and CJCSI 5810.01A containing provisions virtually identical to those in the current documents.

violations of the laws and customs of war and, conceivably, individual criminal responsibility.

DURESS AS A DEFENSE TO WAR CRIMES AND CRIMES AGAINST HUMANITY—

PROSECUTOR V. DRAZEN ERDEMOVIC

MAJOR STEPHEN C. NEWMAN, U. S. MARINE CORPS[1]

I. Introduction

Imagine yourself a young soldier fighting an unpopular and dirty little war. You aren't fighting for your country, as patriotism doesn't much appeal to your character. Neither are you fighting for a cause, since none of the causes associated with this particular conflict are especially appealing to you. You fight for two reasons alone. First, you fight because you have to. You have been impressed into service by forces outside of your control. Second, you fight because it pays the bills. Every penny you earn is quickly dispatched home to support your wife and baby. Now imagine that in the course of this dirty little war, you have been taken prisoner. Over the course of several weeks you are systematically beaten and tortured for no apparent reason. You have also witnessed some of the most horrific scenes of death ever imaginable. Your captors are really quite ruthless, and seem to take pleasure in their work. Today you are once again beaten. Following a brief period of unconsciousness, you awake to see the yellowed teeth of the camp commandant smiling over your face. He pulls you to your feet and drags you out into the courtyard where a young woman stands bound and gagged to a tall pole. You watch as a camp guard beats her with a metal bar until she is on the verge of death. With a single command, the commandant stops the gruesome scene. You

---

1. U.S. Marine Corps. Presently assigned as the Operational Law Attorney, United Nations Command (UNC), Combined Forces Command (CFC), United States Forces, Korea (USFK), and as Staff Judge Advocate, U.S. Marine Corps Forces, Korea. B.A. 1986, Taylor University, Upland, Indiana; J.D. 1990, Capital University Law School, Columbus, Ohio; 1996, Marine Corps Amphibious Warfare School, Marine Corps Base, Quantico, Virginia; LL.M. 2000, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Previous assignments include Staff Judge Advocate, 13th Marine Expeditionary Unit (Special Operations Capable), Deputy Staff Judge Advocate, 1st Force Service Support Group, I Marine Expeditionary Force, Camp Pendleton, California, Trial Counsel, Defense Counsel, and Legal Assistance Officer, Marine Corps Logistics Base, Barstow, California. This article was submitted in partial completion of the Master of Laws degree requirements for the 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

notice that in one hand he holds a knife, in the other a .45 caliber pistol. He hands you the knife and tells you to kill the woman tied to the pole. If you refuse, he threatens to use that knife to gouge out your eyes. "If you fail to do as I say, you will never see your family again," he chides, "but do not worry, as I will gladly pay them a visit on your behalf when this war is over. Besides, if you don't kill the girl, I certainly will."

Despite pleading guilty to a violation of the laws or customs of war, young Drazen Erdemovic never faced a situation like the one described in the hypothetical above.[2] But the consequences of his behavior led the Presiding Judge in the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) to raise concerns similar to those in the hypothetical when making his argument in favor of the defense of duress.[3] As reflected by the graphic at the Appendix to this article, he was not in the majority. Nonetheless, the lesson of this case is that the defense of duress to war crimes and crimes against humanity is far from dead. The majority viewed it as interesting information for consideration on sentencing. A strong minority, however, argued vociferously that it is, in fact, a *bona fide* defense under international law.[4]

II. The Facts

The Erdemovic case results from the continuing strife in the former Republic of Yugoslavia (FRY). The facts reveal a young Croat, twenty-three years of age, who only reluctantly participated in the conflict.[5] He

---

2. Prosecutor v. Erdemovic, No. IT-96-22-Y (March 5, 1998) (Sentencing Judgment, Trial Chamber II), *available at* http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj980305e.htm.

3. *Erdemovic*, No. IT-96-22-Y, at 32 (Oct. 7, 1997) (Appeals Chamber, Cassese, J., dissenting in the findings but concurring in the result) [hereinafter Minority Opinion], *available at* http://www.un.org/icty/erdemovic/appeal/judgment/erd-adojcas971007e.htm.

4. All five Judges concurred in refusing to acquit the accused, but their reasons were so divergent that four opinions were issued. These were: (1) the dissenting opinion of Judge Cassese; (2) the joint separate opinion of Judges McDonald and Vohrah; (3) the dissenting opinion of Judge Stephen; and (4) the dissenting opinion of Judge Li. While Judge Li concurred with Judges McDonald and Vohrah that duress should not be a defense, this was not the focus of his opinion. Nonetheless they best reflect the "majority" opinion. The author therefore refers to the McDonald/Vohrah opinion as the majority.

5. *Erdemovic*, No. IT-96-22-Y, at 38 (Nov. 29, 1996) (Sentencing Judgment, Trial Chamber I) [hereinafter Sentencing Judgment I], *available at* http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj961129e.htm.

began his military service in December 1990 as part of the Yugoslav Army. During that time he worked side by side with various soldiers of differing ethnic backgrounds. Following discharge from the army in 1992, he received a summons to join the army of Bosnia and Herzegovina. He had ignored an earlier summons, but this time he reported as ordered. In November 1992, he left the army, but was later mobilized into the police force of the Croatian Defense Council (HVO). His concern for others of different ethnicity resulted in an arrest and severe beating. He had helped some Serbian women and children return home. Following this he left the HVO and sought his own escape. He went to the Republic of Srpska and Serbia in search of travel papers to Switzerland for both he and his wife. When this failed to materialize, he wandered about Serbia for five months, trying his best to stay out of the war. In April 1994, he found himself broke and in need of a job. He decided to join the Bosnian Serb Army for two reasons. First, he wanted to provide for his growing family. Second, he sought some level of status as a Croat among a largely Serbian populace. He specifically joined the 10th Sabotage Unit because of its relative ethnic diversity.[6]

In October 1994, however, the character of the 10th Sabotage Unit changed. A new commander was appointed, and the ranks became filled with soldiers of more nationalist stripe. Erdemovic claimed to have lost rank at this time for refusing to carry out a mission he considered too dangerous to civilians.[7] But he continued to muddle through until 16 July 1995 when he received some mysterious orders. He and seven other members of his unit were directed to prepare for an undisclosed mission. It was only when they arrived at the Branjevo farm at Pilica that the purpose of the mission was revealed—the systematic extermination of Muslim men. Erdemovic balked at the orders, but was threatened with death. "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you." Fearing for his life and for the safety of his wife and new baby, Erdemovic obeyed.[8] Busloads of Muslim men began to arrive shortly thereafter.

---

6. *Id.* at 22, 28. The 10th Sabotage Unit was mostly made up of Serbs, but did include some Croats, one Slovene and one Muslim. *Id.*

7. *Id*. at 23. Erdemovic claimed to have the rank of "lieutenant or sergeant," and that he had previously commanded a small group within the 10th Sabotage Unit. Part of his claim of duress is related to this loss, in that he claimed to no longer have the authority to refuse the orders of his superiors. *Id.*

8. *Id*.

At the same time an even more dramatic scene unfolded around Srebrenica. After the fall of the United Nations (U.N.) safe haven, hundreds of unarmed civilians surrendered to the Bosnian Serb army. The men were segregated from the women. All males between the ages of seventeen and sixty were placed on busses and taken to the farm at Pilica. Upon arrival, these civilians were divided into groups of ten and escorted to a field next to the farm buildings. At that point, Drazen Erdemovic and seven other members of his unit shot them in the back with automatic weapons. By his own account, Erdemovic killed somewhere between ten and one hundred Muslim men that day.[9] But the day was not yet over. Once these men had been exterminated, Erdemovic's squad received orders to report to the Pilica public building where five hundred more Muslim men stood captive. Once again he refused the order to kill. This time, however, three other members of his squad agreed with him, and the order was rescinded.[10] With the scene thus set, the ICTY was faced with the challenge of deciding Erdemovic's fate. In the course of doing so they addressed one of the most interesting, yet questionable, defenses available—that of duress.

III. The "Majority" Opinion - Judge McDonald and Judge Vohrah

On 29 May 1996, Erdemovic was indicted on two counts, one for crimes against humanity and a second alternative count for violations of the laws or customs of war. In November 1996, he plead guilty before the trial court to one count of a crime against humanity. Taking note of the "[e]xtreme necessity arising from duress and other orders from a superior" as one of many mitigating circumstances, the court accepted his plea and sentenced him to ten years imprisonment.[11] Immediately lodging an appeal against the sentencing judgement, the Appellate Chamber took the matter under consideration. On 7 October 1997 they issued their decision. The court identified five major issues presented by Erdemovic's appeal.

---

9. *Id*. In total, approximately 1200 men were killed. *Id.* at 21.

10. *Id*. Other soldiers did massacre these men. *Id.* at 27. Shortly after these events, another member of the 10th Sabotage Unit tried to kill Erdemovic and two of his friends. Severely wounded, he ended up in a Belgrade military hospital where he met and confided in a member of the press. Two days later he was arrested by the State Security Services of the Republic of Serbia. Arriving in The Hague on 30 March 1996, he immediately confessed to the murders and provided key evidence against other war criminals. *Id*. at 24.

11. Sentencing Judgement I, *supra* note 5, at 25, 29.

The most critical of the five, and the one that caused the greatest split in the court, was the issue of duress as a defense.[12]

The majority found the nature of Erdemovic's plea intimately tied to the possibility that statements he made in the course of his testimony raised the defense of duress. This required the court to examine whether or not duress, thus raised, presents an absolute defense to charges like those presented against the accused. The court first determined that the portion of the Statute of the International Tribunal related to guilty pleas was vague and imprecise. They could not make a decision based on the statute alone. This being the case, they turned to the international law arena for some on-point guidance. Finding no compelling precedent amongst the entire body of international law, the majority then began an extensive examination of precedent from different authorities, including the domestic legislation of

---

12. *Erdemovic*, No. IT-96-22-Y, at 10 (Oct. 7, 1997) (Appeals Chamber Judgment), *available at* http://www.un.org/icty/erdemovic/appeal/judgment/erd-aj971007e.htm. Five issues were identified by the court: (1) acquittal; (2) sentence revision; (3) an inquiry to determine if Erdemovic made an informed, unequivocal plea; (4) whether duress should be considered a complete defense to such crimes, or only a factor considered in mitigation; and (5) whether the matter should be remitted to the trial court for rehearing. The court unanimously rejected Erdemovic's appeal for acquittal, and by a vote of 4 to 1 denied his request for sentence revision. The court also determined that Erdemovic's plea was not informed by a vote of 4 to 1. The issue of duress as a defense split the court. Three judges viewed duress as purely a matter for mitigation while two opined that it might be a complete defense. The vote in favor of a rehearing was 4 to 1. *Id.*; *see also infra* Table 1.

13. *Erdemovic*, No. IT-96-22-Y, at 25-37 (Oct. 7, 1997) (Appeals Chamber, Joint Separate Opinion of McDonald, J. and Vohrah, J.) [hereinafter Majority Opinion]. They did so by examining their own rules in the light of the Vienna Convention on the Law of Treaties. Article 32 of that Convention provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id. at 2 (quoting Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331). Consequently, the Appeals Court examined a variety of sources in their quest to determine if duress is an absolute defense to crimes such as the one charged in the present

various states across the globe.[13] After an exhaustive description of the various statutes and holdings throughout the world, they concluded that:

> After the above survey of authorities in the different systems of law and exploration of the various policy considerations which we must bear in mind, we take the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. . . . In the result, we do not consider the plea of the Appellant [as equivocal because] duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.[14]

A closer reading of this opinion reveals the policy behind this decision. The majority clearly stated that they were concerned about "the message" this decision would send to commanders in the field. Viewing the role of international humanitarian law as guidance for the conduct of combatants and commanders on the ground, they stated:

> There must be legal limits as to the conduct of combatants and their commanders in armed conflict. In accordance with the spirit of international humanitarian law, we deny the availability of duress as a complete defence to combatants who have killed innocent persons. In so doing, we give notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives.[15]

It therefore appears that, regardless of the legal foundations of their decision, they had their goal in mind long before issuing their opinion. It was merely a matter of finding the correct legal avenue of approach to reach their conclusion. By doing so, the court avoided the rather unpleasant prospect that other, more culpable, suspects may receive the benefit of a

---

13. (continued) case. These sources included British military manuals, the Manual for Courts-Martial, domestic case law of the United States and other nations, and the domestic legislation of both civil and common law states. *Id.*

14. *Id*. at 45.

15. *Id.* at 42. In reaching their decision, the majority rejected out of hand significant case law to the contrary on which Presiding Judge Cassese relied heavily. They rejected this case law because of its relative value as precedent. *Id.* at 19. Judge Cassese takes this issue head on in his opinion, which is discussed *infra* at Part IV.

duress defense in the future. Instead the court chose the easy way out, ignoring the issue of duress until sentencing.[16] Analysis of duress in mitigation is much less difficult to swallow than possibly acquitting an individual accused of crimes against humanity. By putting the issue off until sentencing, they removed a significant burden from the trial court, and avoided having to decide sticky issues related to the relative value of lives. Presiding Judge Cassese, however, was not afraid of that challenge.

IV. The "Minority" Opinion (Judge Cassese, Judge Stephen)[17]

The minority opinion provides strong argument for those sympathetic to duress as a complete defense. Judge Cassese begins by attacking the majority's reliance on national law concepts, strongly objecting to their automatic incorporation into the body of international law. In penning his opinion, Judge Cassese cited three "fundamental considerations" supportive of his objection. "First, the traditional attitude of international courts to national law notions suggest that one should explore all the means available at the international level before turning to national law."[18] In other words, the approach of the majority failed to abide by the traditional approach followed by most international jurists. Instead of exhausting all means available at the international law level, in the opinion of Judge Cassese, the majority unnecessarily ignored significant international deci-

---

16. *Id*. In confronting the difficult issue of proportionality (in the majority's opinion, a balancing of harms weighing the potential wrong in the killing of innocents against the possibility that both the perpetrator and the innocents may both be killed) they stated:

> These difficulties are clear where the court must decide whether or not duress is a defence by a straight answer, 'yes' or 'no'. Yet, the difficulties are avoided somewhat when the court is instead asked not to decide whether or not the accused should have a complete defense but to take account of the circumstances in the flexible but effective facility provided by mitigation of punishment.

Id.

17. While Judge Stephen did, indeed, draft his own separate and dissenting opinion, it tracks with that of Presiding Judge Cassese, which is slightly more thorough. Therefore, while citation to the "minority opinion" refers to the opinion written by Judge Cassese, the "minority opinion" is, in fact, that of both Judges Cassese and Stephen.

18. Minority Opinion, *supra* note 3, at 3.

sions on the issue of duress.[19] But other aspects of the majority opinion also concerned him.

In his second challenge to the majority, Judge Cassese, pointed out that the "consideration militating in favour of using great circumspection before transposing national law notions into international law is inextricably bound up with the very subject matter under discussion."[20] Put plainly, this means that international law is an amalgamation of the laws from various jurisdictions. At the same time, however, international law takes great pains to ensure that this body of law does not favor the laws of one system over another. The clear implication is that the opinion of the majority violates this principle. Placing favor of one system over another led to his third challenge to the majority.

His third reason for discouraging the mechanical integration of domestic legislation into the international arena is the danger this poses to the specificity of the proceedings at bar. He pointed out that, while international judicial proceedings are easily distinguishable from their intrastate counterparts, they are also extremely dependent on the cooperation of the states under their jurisdiction. The blind integration of one states' system over that of its neighbor is likely to cause confusion and consternation among those groups upon which the international judicial system is dependent for support. The states, after all, have "sway and control" over those subject to international proceedings. The result is significant misapprehension and confusion within the international jurisdiction of the court.[21] Judge Cassese concluded his analysis with the following proposition:

> Any time international provisions include notions and terms of art originating in national criminal law, the interpreter must first determine whether these notions or terms are given a *totally autonomous* significance in the international context, [that is]

---

19. *Id*. at 3, 11-28. He later pointed out exactly what the majority ignored—significant and persuasive international court decisions supportive of duress as a complete defense. Judge Cassese began by identifying cases directly addressing duress as a defense. In particular he relied on the *Einsatzgruppen* case, also known as the *Trial of Otto Ohlendorf et al*., *reprinted in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950). The majority rejected this case, and many similar cases, out of hand as having little value as precedent. They questioned the source of authority for this court, determining that it was not the equivalent of an international tribunal. Majority Opinion, *supra* note 13, at 19. Judge Cassese reached a different conclusion. Minority Opinion, *supra* note 3, at 17.

20. Minority Opinion, *supra* note 3, at 4.

21. *Id*. at 5.

> whether, once transposed onto the international level, they have acquired a new lease of life, absolutely independent of their original meaning. If the result of this enquiry is in the negative, the international judge must satisfy himself whether the transplant onto the international procedure entails for the notion or term an *adaptation* or *adjustment* to the characteristic features of international proceedings. This exploration should be undertaken by examining whether the general context of international proceedings and the object of the provisions regulating them delineate with sufficient precision the scope and purpose of the notion and its role in the international setting. Only if this enquiry leads to negative conclusions is one warranted to draw upon national legislation and case-law and apply the national legal construct or terms as they are conceived and interpreted in the national context.[22]

Having thus taken issue with the fundamental process adopted by the majority in reaching their decision, Judge Cassese then discussed the specific issues raised by the *Erdemovic* appeal. While agreeing with the majority that Erdemovic's plea was not informed, he based his decision on evidence indicating that the defense of duress had been raised by comments of the accused. Based on his study of international law, he found that no specific rule on duress as a complete defense had yet emerged. He therefore relied on the general rule of duress, stating that: "In logic, if no exception to a general rule be proved, then the general rule prevails."[23] He identified the general rule as having four strict conditions, each of which must be met before the defense may be satisfied.[24]

The first of these conditions requires that the act charged be done under an immediate threat of severe and irreparable harm to life or limb. The threat must be immediate, real, and perceivable. It cannot be speculative or trivial. Second, there must be no other adequate means of averting the evil conduct. If the accused has some other means at his disposal to avoid taking the action, he must do so. Judge Cassese's third condition requires a proportionality analysis. This is a balancing test, weighing the evil associated with committing the crime against the evil associated with not committing the crime. In other words, the remedy should not be disproportionate to the evil, or the lesser of two evils should be chosen.

22. *Id*. (emphasis in original text).
23. *Id.* at 7.
24. *Id.* at 8, 9.

Finally, the situation leading to duress must not have been voluntarily brought about by the person coerced; the accused must take no action indicating support for the coerced activity. Of the four conditions, clearly the minority opinion placed the most weight on the proportionality analysis, since that is the heart of the duress issue.[25]

Judge Cassese pointed out that, where the underlying offense involves the killing of innocents, the most difficult to satisfy of these four criteria is proportionality.[26] He envisioned a situation not unlike that proposed by the hypothetical at the beginning of this note.[27] Recall that the prisoner in the hypothetical had been directed to kill an innocent woman. As motivation, the lives of his family were placed in jeopardy. Were he to commit the crime and later be charged, the issue of duress would no doubt arise. Based on their integration of certain national legal principles into the body of international law, the majority would be interested in the facts and circumstances surrounding the actions of the accused only in relation to determining an appropriate sentence. Under the minority view, however, merely raising these facts in the course of a guilty plea would be sufficient to require inquiry into duress as a complete defense. The question is not so much whether the defense will work. That is a matter for the trial court to decide. Rather the question is whether, as

---

25. *Id.* at 9.

26. *Id*. at 29. Judge Cassese stated that:

> Perhaps—although that will be a matter for the Trial Chamber or a Judge to decide—it will *never* be satisfied where the accused is saving his own life *at the expense of* his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others . . . .

Id.

27. *Id.* at 32. Judge Cassese asked the reader to consider the following:

> An inmate of a concentration camp, starved and beaten for months, is then told after a savage beating, that if he does not kill another inmate, who has already been beaten with metal bars and will certainly be beaten to death before long, then his eyes will, then and there, be gouged out. He kills the other inmate as a result. Perhaps a hero could accept a swift bullet in his skull to avoid having to kill, but it would require an extraordinary—and perhaps impossible—act of courage to accept one's eyes being plucked out. Can one truly say that the man in this example *should have allowed his eyes to be gouged out* and that he is a *criminal* for not having done so? *Id.* (emphasis in original text).

a matter of fundamental fairness, the accused should be allowed to offer a plea that, by its very nature, raises the possibility that his behavior is legally excusable. In application to the hypothetical situation described above, duress may or may not relieve the accused of criminal responsibility for his conduct.[28] Judge Cassese would likely say that, even if the defense fails to result in acquittal, the trial court is better off. The judge now has all the necessary information on the record for consideration on sentence.

The primary difference between these two opinions is that the majority based its decision on policy concerns. The minority, however, based its determination on precedent of international law. If one appreciates the concept of an "activist" court, he may well find the majority opinion more persuasive. A strict interpretationist, however, may find the policy-driven decision-making of the court a bit disturbing.

V. The Wildcard – Judge Li

It appears that Judge Li was the swing vote in this case. Had circumstances been only slightly different, this note would discuss why duress is now a complete defense to war crimes or crimes against humanity. But Judge Li based his decision on one factor, and one factor alone—judicial economy.[29]

Judge Li got around the whole issue of duress by accepting the plea of Erdemovic as both equivocal and informed. Judge Li freely admitted that the criteria for duress might be present in Erdemovic's testimony, but the entire purpose behind providing information regarding duress was mitigation. Erdemovic's motivation in raising such matters was not for defense, but only to try and get a more lenient punishment. Judge Li placed greater emphasis on the motivation of the defendant, and therefore

---

28. Judge Cassese would place significant weight on the inevitability of the circumstances. In this hypothetical, if the death of the woman is inevitable, regardless of the actions of the accused, then it is more likely that the actions meet the proportionality test. In application to Erdemovic, the men he killed would have died anyway. Additionally, he would have died with them. Instead of having 1200 dead, the result would be 1201 dead. In balancing the two evils, the lesser evil seems to be that which results in the least amount of death. *Id.*

29. *Erdemovic*, No. IT-96-22-Y, at 8 (Oct. 7, 1997) (Appeals Chamber, Separate and Dissenting Opinion of Li, J.), *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojli971007e.htm.

ignored the larger issue of whether duress can be a complete defense. He opined that, merely as a matter of judicial economy, the Appellate Chamber should have reassessed Erdemovic's sentence. He pointed out the illogic of sending the matter back to the trial court for subsequent rehearing on sentence when the Appellate Chamber had all the information necessary to make the sentencing decision.[30]

Judge Li makes good sense from the perspective of judicial economy. But at the same time his opinion dedicates nearly five pages to a discussion of duress as a complete defense. While he clearly states his support for the majority opinion, he then goes out of his way to dismiss the entire issue as being moot. Like the majority, Judge Li took the easy way out. Since the accused raised duress only as a matter of mitigation, he was not forced to establish precedent one way or the other. While agreeing that duress cannot be a complete defense, this is *dicta* when viewed in the light of Judge Li's decision regarding the manner in which the defendant raised the issue. Judge Li therefore avoided making the difficult choice between approving or dismissing the concept of duress as a defense.

VI. Conclusion

The question remains whether our hypothetical prisoner should be given the opportunity to present duress as a complete defense. In the eyes of the majority, the answer is clearly no. They base this on important policy considerations, including the fear that allowing such a defense may encourage heinous conduct committed by radical elements in the world. So long as an individual soldier or commander can point up the chain of command, he has a valid defense to the most distasteful of crimes. The minority, however, would permit him to raise the defense at trial. They would, in fact, *sua sponte* withdraw his plea of guilty and enter a plea of not guilty on his behalf. Judge Li, on the other hand, would look to see how the defendant raised the matter of duress. If he raised it solely as a matter of mitigation, he would limit his consideration of such evidence thereto. While indicating his inclination to agree with the majority, however, his answer to the ultimate question of duress as a complete defense is less than compelling.

At least for the moment, the issue of duress as a defense is settled. But one may justifiably inquire into its future, since the decision clearly leaves

30. *Id.*

room for the possibility that it may be seen again, at least in the context of sentencing. More significantly, however, the result in this case was decided by one vote. A different panel may place more emphasis on prior decisions by other international tribunals. The language of the minority opinion certainly provides hope for others in Erdemovic's shoes. But the impact of the decision is greater than that.

The most important and lasting impact of the majority decision is its foundation in policy. This is also the point of greatest concern for the future. The courts' apparent willingness to search through voluminous reams of state legislation and practice in order to find a legal basis for their decision is significant. Such a pursuit degrades the value of decisions by other international tribunals. But the more grave concern is the source of state legislation and practice. These are rules and regulations that are not written with the international defendant in mind. Applying them to situations like that of Drazen Erdemovic is not unlike forcing the cliché square peg in the equally hackneyed round hole. Furthermore, the range of sources consulted by the court in reaching its decision included the U.S. *Manual for Courts-Martial* and British military regulations. The courts' willingness to examine such a divers range of publications means that virtually any regulation, order, or directive, published by military sources may become part of the body of international law.

This trend is not likely to end here. It therefore becomes critical that everything the U.S. military writes, every order it publishes, and every manual it issues, be scrutinized for consistency with U.S. policy in the area of international and operational law. No longer will it be sufficient to ask "is this consistent with the Constitution of the United States." It now must be determined what impact military rules and regulations may have when considered by international tribunals. Authors of such documents should be aware of the possible impact of their penmanship. In sum, the matter of duress as a defense to crimes like those committed by Drazen Erdemovic is far from dead. But the lasting impact of the decision is much greater. It reaches as far as the pen on your desk.

Appendix

Erdemovic Appellate Court Decision

	Cassese, J. (presiding)	Stephen, J.	Vohrah, J.	McDonald, J.	Li, J.
Acquittal of Accused	II. No	No	No	No	No
Revise Sentence?	No	No	No	No	Yes
Was Plea Informed?	No	No	No	No	Yes
Duress as a Defense	Yes	Yes	A. No	No	No
Remit for Rehearing?	Yes	Yes	Yes	Yes	No
Type of Opinion?	Separate & Dissenting	Separate & Dissenting	Joint Separate with McDonald	Joint Separate with Vohrah	Separate & Dissenting

PROSECUTOR V. ZEJNIL DELALIC (THE CELEBICI CASE)

JENNIFER M. ROCKOFF[1]

This note summarizes the International Criminal Tribunal for the Former Yugoslavia (ICTY) decision, *Prosecutor v. Zejnil Delalic, et al.* (The Celebici case).[2] The case concerns the prosecution of four individuals alleged to have worked as guards or as supervisors in the Celebici prison-camp. The ICTY held these individuals liable either in their individual capacity or under the theory of superior responsibility for many, although not all, of the allegations charged.

I. Introduction

The indictment concerned horrific events alleged to have occurred during 1992 at Celebici prison-camp, a detention facility in the village of Celebici located in the Konjic municipality in central Bosnia and Herzegovina.[3] It charged the four accused with grave breaches of the Geneva Conventions of 1949 under Article 2 of the governing statute of the ICTY (Statute), and with violations of the laws or customs of war under Article 3 of the Statute.[4]

Two of the defendants, Esad Landzo and Hazim Delic, were charged primarily with individual criminal responsibility pursuant to Article 7(1) of the Statute.[5] Landzo, also known as "Zenga," allegedly worked as a guard at the Celebici prison-camp from May to December 1992.[6] The indictment charged him as a direct participant with the following crimes under international humanitarian law: willful killing and murder; torture

---

1. Law Clerk, The Honorable Albert V. Bryan, Jr., Federal District Judge for the Eastern District of Virginia; J.D., 2000, University of Virginia School of Law; B.A., 1995, Princeton University. The author would like to thank Major Geoffrey S. Corn, Major Michael L. Smidt and Mrs. Ann Rockoff for their encouragement and assistance.

2. Prosecutor v. Delalic, No. IT-96-21-T (Nov. 16, 1998) (Celebici case), *available at* http://www.un.org/icty/ (Tribunal Cases, Judgment).

3. *Id.* ¶ 3.

4. *Id.*

5. *Id.* ¶ 5.

6. *Id.* ¶ 6.

and cruel treatment; and causing great suffering or serious injury and cruel treatment.[7] Hazim Delic was alleged to have been the deputy commander of the camp from May to November 1992 and commander from November to December 1992.[8] He was charged both as a direct participant and as a superior with command responsibility.[9] In particular, Delic was charged with the following crimes under international humanitarian law: willful killing and murder; torture and cruel treatment; inhuman treatment and cruel treatment; causing great suffering or serious injury; and cruel treatment, unlawful confinement of civilians; and plunder of private property.[10]

The other defendants, Zdravko Mucic and Zejnil Delalic, were charged primarily as superiors with responsibility for crimes committed by their subordinates pursuant to Article 7(3) of the Statute.[11] Delalic was purported to have had authority over the Celebici prison-camp and its personnel.[12] He allegedly coordinated the activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from April to September 1992; from June to November 1992, he also served as Commander of the First Tactical Group of the Bosnian Army.[13] Mucic, also known as "Pavo," was presumed to have been the commander of the Celebici prison-camp from May to November 1992.[14] In light of their positions of superior authority, Delalic and Mucic were charged with having known or having had reason to know that their subordinates were mistreating the detainees in the prison-camp.[15] Further, Delalic and Mucic were charged with failing to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.[16] In their capacities as superiors at the prison-camp, Delalic and Mucic were charged with the following crimes under international humanitarian law: willful killing and murder; torture and cruel treatment; causing great suffering or serious injury and cruel treatment; inhuman and cruel treatment; unlawful confinement of civilians; and plunder of private property.[17]

---

7. *Id.* ¶¶ 6-10.
8. *Id.* ¶ 11.
9. *Id.* ¶ 12.
10. *Id.* ¶¶ 12-18.
11. *Id.* ¶ 5.
12. *Id.* ¶ 19.
13. *Id.*
14. *Id.* ¶ 20.
15. *Id.* ¶ 21.
16. *Id.*
17. *Id.* ¶¶ 21-28.

The Trial Chamber initially dealt with several "procedural issues," such as the disclosure of the witnesses' identities and the admissibility of certain evidence, including: statements made by the accused prior to trial; videotapes seized by the Austrian police; a letter purportedly written by Mr. Mucic; and evidence of the prior sexual conduct of the victims of sexual assault.[18] After resolving these and other issues relating to the regulation of the proceedings, the Tribunal found that the Prosecution had presented sufficient evidence to allow a reasonable tribunal to convict,[19] and thus denied the Defense's requests for dismissal of all counts of the Indictment.[20]

II. Background and Preliminary Factual Findings

Historical and Geographical Background of the Socialist Federal Republic of Yugoslavia (SFRY)

The Tribunal began its judgment with a detailed description of events as they existed in 1992. In assessing the background situation, the Tribunal afforded substantial weight to several government-produced documents, including: resolutions of the United Nations Security Council and General Assembly; the Final Report of the United Nations Commission of Experts; reports of the United Nations Secretary-General; and declarations and statements from the European Community and the Conference on Security and Cooperation in Europe.[21]

According to the Tribunal description, Tito's attempts to unify the many nationalities living in the SFRY began to unravel on Tito's death in 1980.[22] Shortly after he died, distinct Serbian and Croatian governments developed.[23] By 1990, subsequent to a referendum by the Krajina Serbs on self-autonomy, clashes rapidly arose between the Krajina Serbs and the Croatian authorities.[24] At this time, Croatia included territory with historical links to Serbia and contained a significant population of Serbs. By late 1990 and into 1991, further moves towards independence were made in Croatia, and ethnic conflicts intensified.[25] By the end of 1991, the United

18. *Id.* ¶¶ 52, 63, 70.
19. *Id.* ¶ 82.
20. *Id.* ¶¶ 81-82.
21. *Id.* ¶ 90.
22. *Id.* ¶ 91, 96.
23. *Id.*
24. *Id.* ¶ 98.

Nations became involved.[26] In February 1992, the Security Council established the United Nations Protection Force to monitor the cease-fire which was signed in late 1991.[27] Within the following year, the SFRY was dissolved into its respective ethnic parts.[28]

According to the Tribunal, the armed conflict in Bosnia and Herzegovina, characterized by "ethnic cleansing" and massive displacements of local populations, was the most protracted of all the conflicts taking place during this period.[29] The Konjic municipality, in particular, "was of strategic importance as it housed lines of communication from Sarajevo to many other parts of the State [and] constitut[ed] a supply line for the Bosnian troops."[30] For these and other reasons, including its perceived importance to the Bosnian Croats and the existence of various military facilities manned by the opposition, Konjic found itself in the midst of increasing armed conflict. By mid-April 1992, Konjic had been effectively surrounded and cut-off by armed Serb forces.[31] Croat and Muslim soldiers fought to provide access routes to Sarajevo and drive the Serbs out of the Konjic municipality. As part of these military operations, many members of the Serb population were arrested and housed in the newly-created Celebici prison facility.[32]

The Celebici prison-camp first received inmates in the latter part of April 1992.[33] Detainees were mainly men, transferred from various locations.[34] The Tribunal described the environment at the camp:

> It is clear that an atmosphere of fear and intimidation prevailed at the prison-camp, inspired by the beatings meted out indiscriminately upon the prisoners' arrest, [their] transfer to the camp and their arrival. Each of the former detainees who testified before the Trial Chamber described acts of violence and cruelty which they themselves suffered or witnessed and many continue today

---

25. *Id.* ¶ 100.
26. *Id.* ¶ 103.
27. *Id.*
28. *Id.* ¶¶ 105-06.
29. *Id.* ¶ 107.
30. *Id.* ¶ 123.
31. *Id.* ¶ 133.
32. *Id.* ¶ 141.
33. *Id.* ¶ 146.
34. *Id.* ¶ 147.

> to sustain the physical and psychological consequences of these experiences.[35]

The last prisoners left the Celebici prison-camp on 9 December 1992.[36]

III. Applicable Law

A. General Principles of Interpretation

In order to resolve disputes regarding the interpretation of its Statute and Rules, the Court discussed at length the various methods traditionally used to interpret international treaties and conventions.[37] It then concluded that it would interpret its Statute by focusing on the goals of the Statute and the social and political considerations that gave rise to its creation.[38] In this respect, the Tribunal noted it was established in response to the "kinds of grave violations of humanitarian law . . . [that] continue to occur in many other parts of the world, and continue to exhibit new forms and permutations."[39]

B. Applicable Provisions of the Statute

The Tribunal then explored the meaning of Articles 1-7 of its Statute.[40] Article 1 confines the Tribunal to "concerning itself with 'serious violations of international humanitarian law' committed within a specific location and time-period."[41] The Tribunal found these temporal and geographical requirements to have been met in this case. The Defense, however, argued that the crimes charged were not "serious" violations of international humanitarian law.[42] Instead, the Defense argued that the crimes were mere "lessor violations" more appropriately subject to prosecution by national courts.[43] Further, Mr. Landzo presented a selective

---

35. *Id.* ¶ 150.
36. *Id.* ¶ 157.
37. *Id.* ¶¶ 160-69.
38. *Id.* ¶ 170.
39. *Id.*
40. U.N. Doc. S/25704, annex, arts. 1-9 (1993), *available at* http://www.un.org/icty/basic/statut/ statute.htm.
41. *Delalic*, No. IT-96-21-T, ¶ 173.
42. *Id.* ¶ 175.
43. *Id.*

prosecution claim arguing that he was but one of thousands of individuals who might have been prosecuted for similar offences committed in the former Yugoslavia.[44]

The Tribunal responded to these arguments raised by the Defense. First, the Tribunal found that it was not intended to concern itself with persons in positions of military or political authority.[45] Then, the Tribunal held that Article 9 granted the Tribunal concurrent jurisdiction with national courts.[46] In answer to the Defense's argument that the crimes charged were not "serious" violations of international humanitarian law, the Tribunal declared that: "to argue that these are not crimes of the most serious nature strains the bounds of credibility."[47] Lastly, the Tribunal found that Mr. Landzo was not a singular indicted individual, but rather that the Prosecutor had issued indictments against numerous others.[48]

C. General Requirements for the Application of Articles 2 and 3 of the Statute

Next, the Tribunal tackled the general prerequisites for the application of the international laws of war. First, there must be an "armed conflict".[49] The Tribunal adopted the test formulated in the case of *The Prosecutor v. Dusko Tadic* (*Tadic Jurisdiction Decision*): there must be protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[50] The Tribunal found this test satisfied.[51] Additionally, for purposes of finding "armed conflict," the Tribunal noted it was not required to find such conflict in the Konjic municipality itself, but rather need only look to the larger territory of which

44. *Id.*
45. *Id.* ¶ 176.
46. *Id.* ¶ 177.
47. *Id.* ¶ 178.
48. *Id.* ¶ 179.
49. *Id.* ¶ 182.
50. *Id.* ¶ 183 (quoting Prosecutor v. Tadic, No. IT-94-1-AR72 (Oct. 2, 1995) (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)).
51. *Id.* ¶ 192.

Konjic formed a part.[52] The Tribunal further found a clear nexus between the armed conflict and the crimes allegedly committed by the accused.[53]

The Tribunal next addressed the two conditions required by Article 2 of its Statute: "the alleged offences [must be] committed in the context of an *international* armed conflict [and] the alleged victims [must be] '*persons protected*' by the Geneva Conventions."[54] In principal, the Tribunal agreed with the *Tadic* decision that customary law has extended the "grave breaches" provisions of the Geneva Conventions to internal armed conflicts.[55] However, the Tribunal made no actual finding on whether Article 2 of the Statute can be applied only in instances of international armed conflict, or whether this provision is also applicable to internal armed conflicts.[56] Rather, the Tribunal easily concluded that the armed conflict occurring in Bosnia and Herzegovina was international as of the date of its recognition as an independent state, 6 April 1992.[57] The Tribunal explored whether the conflict became internal upon the withdrawal of the external forces,[58] but ultimately determined that the international armed conflict continued throughout the whole of 1992.[59]

Having concluded that the armed conflict was international in nature, the Tribunal then tackled whether the victims were "protected persons" as defined by the Fourth Geneva Convention on Civilians[60] or the Third Geneva Convention on Prisoners of War.[61] The Fourth Geneva Convention defines "protected" persons as: persons "in the hands of a party to the conflict or occupying power of which they are not nationals."[62] Here, the issue was whether the victims were of the same nationality as their captors such that they would then necessarily fall outside the protections of the Fourth Geneva Convention.[63] For purposes of its discussion, the Tribunal

52. *Id.* ¶ 185.
53. *Id.* ¶ 197.
54. *Id.* ¶ 201 (emphasis added).
55. *Id.* ¶ 202.
56. *Id.* ¶ 235.
57. *Id.* ¶ 214.
58. *Id.* ¶ 215.
59. *Id.* ¶ 234.
60. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 72 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
61. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 72 U.N.T.S. 135.
62. *Delalic*, No. IT-96-21-T ¶ 236 (citing Fourth Geneva Convention, *supra* note 60).

explained that, even if the State of Bosnia and Herzegovina had granted nationality to the Bosnian Serbs, Croats, and Muslims in 1992, there would still be an insufficient link between the Bosnian Serbs and the State to consider them Bosnian nationals in the present case.[64] Rather, the Bosnian Serbs had clearly expressed their wish to be a part of the Federal Republic of Yugoslavia (FRY) and engaged in armed conflict on behalf of the FRY forces.[65] Thus, the Tribunal concluded that Bosnian Serb civilians were "protected" under the Fourth Geneva Convention when detained by Bosnian government forces.[66]

> [I]t is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been "protected persons" within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.[67]

The Tribunal further rationalized that, in accordance with the development of human rights as applied to modern conflicts, "it would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4. . . . "[68] Having thus found that the victims were "persons protected" under the Fourth Geneva Convention and having determined that individuals protected by the Fourth Convention necessarily fell within the protections of the Third, the Tribunal did not consider it necessary to discuss whether the victims were "prisoners of war" under the Third Geneva Convention.[69]

D. Article 3 of the Statute

Next, the Tribunal addressed the nature of the prohibitions of Common Article 3 of the Geneva Conventions and their incorporation into Arti-

63. *Id.* ¶ 241.
64. *Id.* ¶ 259.
65. *Id.*
66. *Id.* ¶ 261.
67. *Id.* ¶ 265.
68. *Id.* ¶ 266.
69. *Id.* ¶ 276.

cle 3 of the Statute. The Tribunal limited its discussion on the expansion of the laws of war by essentially agreeing with the conclusion of the *Tadic* tribunal: Article 3 of the Statute guarantees that the Tribunal's jurisdiction is broad enough to cover violations of Common Article 3 whether or not they occur within an international or an internal armed conflict.[70]

> This Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal . . . . While 'grave breaches' *must* be prosecuted and punished by all States, 'other' breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[71]

Furthermore, the Tribunal denied that applying individual criminal responsibility to violations of Common Article 3 would amount to the creation of ex post facto law.[72] As support, the Tribunal cited the provisions of the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina in April 1992, under which the accused would have been held individually criminally responsible under their own national laws.[73] Thus, having concluded that an international armed conflict existed in Bosnia and Herzegovina during the relevant time period and that the victims of the alleged offenses were "protected persons," the Tribunal further found Article 3 of the Statute applicable to each of the crimes charged on the basis that those crimes also constituted violations of the laws or customs of war that are substantively prohibited by Common Article 3 of the Geneva Conventions.[74]

E. Individual Criminal Responsibility Under Articles 7(1) and 7(3) of the Statute

The Tribunal next explained the principle of individual criminal responsibility under Article 7(1) of the Statute. The principle, commonly known as the command responsibility doctrine, extends responsibility

70. *Id.* ¶ 300.
71. *Id.* ¶¶ 306, 308.
72. *Id.* ¶ 312.
73. *Id.*
74. *Id.* ¶ 317.

beyond those who directly commit the crimes. The tribunal quoted the Report of the Secretary-General: "All persons who participate in the planning, preparation, or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible."[75] The Tribunal concluded that such a principle, holding military commanders and other persons occupying positions of superior authority criminally responsible for the unlawful conduct of their subordinates, is a well-established norm of international customary law.[76]

The Tribunal outlined the degree of participation necessary to be considered criminally responsible. As an initial matter, individual responsibility results regardless of whether the commander undertook positive acts or omissions.[77] "Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates."[78] The Tribunal cited Article 87 of Additional Protocol I as imposing this affirmative duty on superiors.[79]

In setting out the requirements to establish individual responsibility for acts that do not constitute a direct performance of the criminal violation, the Tribunal held:

> [The] *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the commission of the illegal act." The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering committing, or otherwise aiding and abetting in the commission of a crime."[80]

---

75. *Id.* ¶ 319 (quoting Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), Feb. 13, 1995, U.N. Doc. S/1995/134, para. 54).

76. *Id.* ¶ 333.

77. *Id.*

78. *Id.*

79. *Id.* ¶ 334 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 87, 1125 U.N.T.S. 3).

Further, the Tribunal defined "aiding and abetting" to include "all acts of assistance that lend encouragement or support to the perpetration of an offense and which are accompanied by the requisite *mens rea*."[81] Such assistance need not occur at the same time and place as the actual commission of the offense, nor must it be physical; it may include merely psychological support.[82] Additionally, a pre-existing plan to engage in criminal conduct is unnecessary.[83]

As to the superior responsibility for failure to act, the Tribunal found three prerequisites for the application of Article 7(3) of the Statute:

> (1) the existence of a superior-subordinate relationship;
>
> (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[84]

The Tribunal tackled these elements individually. It noted that the requirement of a superior-subordinate relationship becomes more problematic in situations such as that of the former Yugoslavia, where the formal command structure had broken down and the interim structure was ambiguous and ill-defined.[85] Despite this lack of clarity, the Tribunal stressed that commanders within the informal structures may be held criminally liable for their failure to prevent and punish the crimes of persons who are in fact under their control.[86] "The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[87]

Rejecting any formal designation as a prerequisite to command responsibility, the Tribunal held that "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-pos-

---

80. *Id.* ¶ 326.
81. *Id.* ¶ 327.
82. *Id.*
83. *Id.* ¶ 328.
84. *Id.* ¶ 346.
85. *Id.* ¶ 354.
86. *Id.*
87. *Id.*

session, of powers of control over the actions of subordinates."[88] Such responsibility may arise through *de facto* as well as *de jure* powers of control.[89] Thus, superiors may be held liable "for their failure to prevent or punish criminal acts committed by persons not formally under their authority in the chain of command,"[90] including "persons over whom their formal authority under national law is limited or non-existent."[91] The Tribunal emphasized that, in accordance with the customary law doctrine of command responsibility,[92] Article 7(3) applies not only to military but also to civilian leaders, political leaders and other civilian superiors in positions of authority.[93] In conclusion, the Tribunal summarized:

> [I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, . . . the doctrine extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[94]

Article 7(3) establishes liability only where the superior knew or had reason to know that his subordinates were about to or had committed

---

88. *Id.* ¶ 370.

89. *Id.*

90. *Id.* ¶¶ 372-76 (citing United States v. Wilhelm List, *reprinted in* XI TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (1950) [hereinafter TWC]; United States v. Wilhelm von Leeb, *reprinted in* XI TWC 462; United States v. Oswald, *reprinted in* V TWC 258; United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5012).

91. *Id.* ¶ 376.

92. *Id.* ¶¶ 359-62. Here the Tribunal outlined previous Tribunal decisions including the International Military Tribunal for the Far East (Tokyo Tribunal) as well as the decision by the Superior Military Government Court of the French Occupation Zone in Germany (citing THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, *reprinted in* 20 The Tokyo War Crimes Trial (R. John Pritchard & S. Zaide eds., 1981); The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others (Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany), *reprinted in* XIV TWC, *supra note* 90, app. B).

93. *Id.* ¶ 356.

94. *Id.* ¶ 378.

crimes under the Statute. The Tribunal interpreted this provision to encompass situations where the superior either:

> (1) had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute; or
>
> (2) had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[95]

The Tribunal then listed a number of factors to consider in determining whether the commander had actual knowledge, and noted that such knowledge may not be presumed but must be established through circumstantial evidence.[96] Where the superior did not have actual knowledge but "had reason to know," the Tribunal dictated the principle that "a superior is not permitted to remain willfully blind to the acts of his subordinates."[97]

> There can be no doubt that a superior who simply ignored information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.[98]

The standard for liability in the latter situation arises where specific information was available to the superior that would have put him on notice of the offenses committed by his subordinates. "It is sufficient that the supe-

---

95. *Id.* ¶ 383. The Tribunal determined that this Article 7(3) provision ought to be interpreted in accordance with the *mens rea* standard established by Article 86 of Additional Protocol I. The Tribunal concluded that the Article 86 provision required that a superior may be held responsible only if information was in fact available which would have put that superior on notice. *Id.* at ¶ 393.

96. *Id.* ¶ 386.

97. *Id.* ¶ 387.

98. *Id.*

rior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."[99] The Tribunal noted that a commander should not be asked to do the impossible, and thus superior responsibility should only apply to situations in which the commander failed to take measures that were within his powers, that is, "within his material possibility."[100] The Tribunal ended by briefly discussing the issue of causation, but concluded that there is no requirement for proof of causation as a separate element of superior responsibility.[101]

F. Elements of the Offenses

After a discussion on the construction and interpretation of criminal statutes, the Tribunal proceeded to examine the specific elements of the offences alleged in the indictment.

1. Willful Killing and Murder

First, the Tribunal addressed the charges of "willful killing" and "murder". As an initial matter, the Tribunal found those terms to be qualitatively the same.[102] The Tribunal then quickly defined the *actus reus:* "the death of the victim as a result of the actions of the accused."[103] The *mens rea* garnered a more lengthy discussion. Ultimately, the Tribunal concluded that the *mens rea* for willful killing and murder is satisfied when the accused demonstrates an intention to kill, or inflict serious injury in reckless disregard of human life.[104]

---

99. *Id.* ¶ 393. The Tribunal noted the standard thus applied is the standard that existed in 1992. The Tribunal recognized that the provision on the responsibility of military commanders in the Rome Statute of the International Criminal Court differs by holding commanders criminally responsible "for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control." *Id.*

100. *Id.* ¶ 395.

101. *Id.* ¶ 398.

102. *Id.* ¶ 422.

103. *Id.* ¶ 424.

104. *Id.* ¶ 439.

2. Offenses of Mistreatment

The Indictment alleged the following various forms of mistreatment, not resulting in death:

> (1) *torture*: a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognized by Article 3(1)(a) of the Geneva Conventions;
>
> (2) *rape as torture*: a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognized by Article 3(1)(a) of the Geneva Conventions;
>
> (3) *willfully causing great suffering or serious injury*: a grave breach of the Geneva Conventions punishable under Article 2(c) of the Statute;
>
> (4) *inhuman and cruel treatment*: a violation of the laws or customs of war punishable under Article 3 of the Statute and recognized by Article 3(1)(a) of the Geneva Conventions.[105]

The Tribunal recognized that none of these offences was defined in the Geneva Conventions and therefore looked to the relevant customary international law to decipher their elements.[106]

a. Torture

For both internal and international armed conflicts, the Geneva Conventions prohibit the torture of persons not taking an active part in the hostilities.[107] Referring to the numerous conventions and declarations against torture, the Tribunal easily found the prohibition on torture to be a norm of customary international law.[108] After accepting the definition of torture contained in the Torture Convention of 1984, the Tribunal considered the

105. *Id.* ¶ 440.
106. *Id.* ¶ 441.
107. *Id.* ¶ 446.
108. *Id.* ¶ 452.

"requisite level of severity of pain or suffering, the existence of a prohibited purpose, and the extent of the official involvement that are required in order for the offence of torture to be proven."[109] The Tribunal began by noting the inherent difficulty in determining a threshold level of severity beyond which inhuman treatment becomes torture. After detailing various European Court and European Commission of Human Rights decisions along with Human Rights Committee findings, the Tribunal found that most cases of torture involve positive acts although omissions may also constitute torture.[110] Beyond this conclusion, the Tribunal failed to find an exact level of severity to which the pain and suffering must rise.[111]

In its summary, the Tribunal listed the elements of torture to include:

> (1) An act or omission that causes severe pain or suffering, whether mental or physical,
>
> (2) Which is inflicted intentionally,
>
> (3) And for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
>
> (4) And such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[112]

This last requirement "extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law."[113]

---

109. *Id.* ¶ 460.
110. *Id.* ¶ 468.
111. *Id.* ¶ 469.
112. *Id.* ¶ 494.
113. *Id.* ¶ 474.

b. Rape

After defining rape and discussing its express prohibition in international law, the Tribunal focused on whether rape, a form of sexual assault, could be considered torture. The Tribunal defined rape to "constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive."[114] In determining whether rape could be deemed torture, the Tribunal examined the findings of other international judicial and quasi-judicial bodies as well as relevant United Nations reports. Ultimately, the Tribunal held that whenever rape or other forms of sexual violence meets the above listed elements of torture, then such sexual violence shall constitute torture, in the same way as any other acts meeting the torture criteria.[115] The Tribunal issued a strong pronouncement on the despicable nature of rape which "strikes at the very core of human dignity and physical integrity."[116]

c. Willfully Causing Great Suffering or Serious Injury to Body or Health

The Tribunal analyzed the circumstances in which actions cause great suffering or serious injury to body or health. After discussing the Commentary to the Fourth Geneva Convention, the Tribunal found that causing such suffering or injury

> constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.[117]

d. Inhuman Treatment

After concluding that the prohibition on inhuman (or inhumane) treatment is a norm of customary international law, the Tribunal explored how

114. *Id.* ¶ 479.
115. *Id.* ¶ 496.
116. *Id.* ¶ 495.
117. *Id.* ¶ 511.

the Geneva Conventions, the Hague Conventions and the Additional Protocols, their Commentaries and other adjudicative bodies treat this prohibition.[118] Based on this analysis, the Tribunal found:

> [I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. . . . Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Conventions fall.[119]

Ultimately, the Tribunal determined that whether an act "constitutes inhuman(e) treatment is a question of fact" to be judged in light of the entirety of the particular case.[120]

e. Cruel Treatment

After considering Common Article 3, Article 4 of Additional Protocol II, and various human rights instruments, the Tribunal defined cruel treatment to be "treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions."[121] The Tribunal further required that such treatment be an intentional act or omission which, judged objectively, is deliberate and not accidental.[122]

f. Inhumane Conditions

Lastly, the Tribunal addressed the alleged existence of inhumane conditions in the Celebici prison-camp and whether such a concept could be considered as being incorporated into the offences of willfully causing great suffering or serious injury to body or health or cruel treatment.[123]

---

118. *Id.* ¶ 517.
119. *Id.* ¶ 543.
120. *Id.* ¶ 544.
121. *Id.* ¶ 551.
122. *Id.* ¶ 552.
123. *Id.* ¶ 554.

The Tribunal first defined "inhumane conditions" as a factual description of the general environment of the detention premises and the treatment meted out to the prisoners.[124] The Tribunal then quickly disposed of the issue by qualifying "inhumane conditions" as a factual determination to which the legal standards found for the above listed offences must be applied.[125]

3. Unlawful Confinement of Civilians

Article 2(g) of the ICTY Statute punishes the unlawful confinement of civilians as a grave breach of the Geneva Conventions, recognized in Article 147 of the Fourth Geneva Convention.[126] The Tribunal first addressed when civilians could be lawfully confined and what requirements need be fulfilled for such confinement to be considered lawful. Parties to a conflict may lawfully confine civilians under Article 27 of the Fourth Geneva Convention as "measures of control and security."[127] However, resort to this measure is restricted to "absolute necessity, based on the requirements of State security, . . . and only then if security cannot be safeguarded by other, less severe means."[128] Thus, internment of civilians is permissible only in limited cases and subject to the strict procedural rules contained primarily in Articles 42 and 43 of the Fourth Geneva Convention.[129] Examples of instances when the confinement of civilians may be deemed absolutely necessary include subversive activity carried on inside the territory of a party to the conflict, or actions of direct assistance to an opposing party that may threaten the security of the former. In such a case, a nation may intern people or place them in assigned residences if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.[130]

The Tribunal qualified this latter statement by clarifying that the mere fact that a person is a national of, or aligned with, the opposition does not automatically authorize interning that individual or placing him or her in assigned residence.[131] Rather, there must be good reason to think that the

124. *Id.* ¶ 556.
125. *Id.*
126. *Id.* ¶ 563.
127. *Id.* ¶ 574.
128. *Id.* ¶ 571.
129. *Id.* ¶ 574.
130. *Id.* ¶ 576.
131. *Id.* ¶ 577.

person concerned, by his or her activities, knowledge or qualifications, poses a real threat to the security of the nation.[132] Such determinations must be contained on a case-by-case rather than a collective basis.[133]

4. Plunder

In the final pages of this part of the decision, the Tribunal examined the accusation against two of the Defendants alleging the plunder of money, watches, and other valuable property belonging to persons detained in the Celebici prison-camp.[134] The Tribunal began by noting that current international law protects not only civilians but civilian property rights as well.[135] Article 47 of the Hague Regulations formally forbids pillage.[136] The Tribunal found that this prohibition "is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory."[137] Rather than considering the offence of plunder in the abstract, the Tribunal left further analysis of the issue to the particular charges contained in the indictment.[138]

IV. Factual and Legal Findings

The Tribunal offered a brief explanation of the nature of the evidence offered and the burdens of proof required. It then went through an individual accounting of crimes charged against each of the Defendants.

A. Superior Responsibility of Zejnil Delalic

To begin with, the Tribunal addressed whether Zejnil Delalic was in a position of superior authority sufficient to meet the conditions for the imposition of criminal responsibility pursuant to Article 7(3) of the

132. *Id.*
133. *Id.* ¶ 578.
134. *Id.* ¶ 584.
135. *Id.* ¶ 587.
136. *Id.*
137. *Id.* ¶ 590.
138. *Id.* ¶ 592.

Statute.[139] The Tribunal disagreed with the Prosecution's argument that a chain of command is not a necessary element for superior authority.[140] Rather, the Tribunal found actual control of the subordinate to be the necessary link in the superior-subordinate relationship.[141]

Ultimately, the Court found that prior to 18 May 1992, during which time Delalic was employed in a ministerial capacity responsible for the transportation of weapons and was not a member of the unit that took over the facility in Celebici, there was no evidence to assume that Delalic operated as a person of superior authority.[142] Delalic had no political or military authority vested upon him at that time.[143] From 18 May to 30 July 1992, Delalic served as "coordinator of the Konjic Municipality Defense Forces" and was empowered to "directly co-ordinate the work of the defense forces of the Konjic Municipality and the War Presidency."[144] In relation to this position, the Tribunal held: "The meaning of the word 'co-ordination' implies mediation and conciliation. The expression does not connote, and cannot reasonably be construed to mean, command authority or superior authority over the parties between which he mediates."[145] The Tribunal determined that there was no evidence that Zejnil Delalic, as co-ordinator, had responsibility for the operations of the Celebici prison-camp and its personnel or that he was in a position of superior authority to the camp personnel.[146] Even after his appointment on 27 July 1992, as commander of "all formations" of the armed forces of Bosnia and Herzegovina in the area including Konjic, the Tribunal maintained that Delalic did not acquire any command authority or responsibility over the Celebici prison-camp and its staff.[147] As such, Delalic was without the ability to issue orders, including orders appointing individuals to the Celebici prison-camp staff and relating to the strengthening of intelligence (orders relied upon by the Prosecution to establish Delalic's command authority).[148]

The Tribunal then discussed the validity and probative value of the letters and videos seized at the premises of the Inda-Bau company in

---

139. *Id.* ¶ 605.
140. *Id.* ¶ 647.
141. *Id.*
142. *Id.* ¶¶ 649, 657.
143. *Id.*
144. *Id.* ¶ 659.
145. *Id.* ¶ 660.
146. *Id.* ¶ 686.
147. *Id.* ¶ 697.
148. *Id.* ¶ 700.

Vienna, a firm with which Delalic was alleged to have had close links.[149] After studying these "Vienna Documents," the Tribunal concluded that these exhibits failed to provide reliable evidence of the command authority that Delalic alledgedly had over the prison-camp at Celebici and its personnel.[150]

B. Superior Responsibility of Zdravko Mucic

Because of his asserted position as commander of the Celebici prison-camp, the Indictment charged Zdravko Mucic with responsibility as a superior for all of the offences alleged.[151] The indictment alleged that, since Mucic had responsibility for the operation of the camp, he was in a position of superior authority to all camp guards and to those other persons who entered the camp and mistreated detainees.[152] Because of his failure to take the necessary and reasonable measures to prevent the alleged violations of the Statute, Mucic was responsible for all the crimes set out in the indictment, pursuant to Article 7(3) of the Statute.[153]

The Tribunal began by addressing Mucic's main defense: the absence of a written and formal appointment for the exercise of his superior authority.[154] The Tribunal rejected this argument as an absolute defense by noting that a formal appointment of authority is unnecessary to establish a superior-subordinate relationship.[155] Rather, "the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."[156] The Tribunal then found that Mucic was the *de facto* commander exercising actual authority over the Celebici prison-camp, its personnel and its detainees during the relevant time periods.[157] Further, the Tribunal held that the evidence supported a finding that Mucic had actual knowledge that the guards under his command were committing crimes.[158] In fact, Mucic testified

149. *Id.* ¶ 704.
150. *Id.* ¶ 718.
151. *Id.* ¶ 722.
152. *Id.* ¶ 724.
153. *Id.*
154. *Id.* ¶ 733.
155. *Id.* ¶ 736.
156. *Id.*
157. *Id.* ¶ 752.
158. *Id.* ¶ 769.

that he had personally witnessed the abuse of detainees.[159] The Tribunal further noted that:

> [C]rimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him, notwithstanding his knowledge that Hazim Delic, his deputy, had a penchant and proclivity for mistreating detainees. There is no doubt that Mr. Mucic was fully aware of the fact that the guards at the Celebici prison camp were engaged in violations of international humanitarian law.[160]

After finding that Mucic had the requisite knowledge, the Tribunal determined that he had failed to "take reasonable or appropriate action to prevent crimes committed within the Celebici prison-camp or punish the perpetrators thereof."[161] In conclusion, on the basis of the principle of superior responsibility, the Tribunal found Mucic criminally responsible for the acts of the Celebici prison-camp personnel.[162]

C. Superior Responsibility of Hazim Delic

Along with Mucic, Delic was charged with being in a position of superior authority to all camp guards and to those who entered the camp and mistreated the detainees.[163] The Prosecution alleged that Delic had knowledge of the violations committed by his subordinates but failed to take reasonable and necessary measures to prevent such acts or to punish the perpetrators.[164]

The Tribunal began by addressing whether a superior-subordinate relationship existed: "whether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command."[165] Despite witness

---

159. *Id.*
160. *Id.* ¶ 770.
161. *Id.* ¶ 772.
162. *Id.* ¶ 776.
163. *Id.* ¶ 777.
164. *Id.*
165. *Id.* ¶ 800.

testimony that Delic ordered guards to mistreat the prisoners, the Tribunal found that the Prosecution failed to establish, beyond a reasonable doubt, that Delic had the power to issue orders or to punish the criminal acts of his subordinates.[166] Rather, the Tribunal found that the evidence merely indicated a degree of influence possessed by Delic but determined that such "influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and is not, on the facts before the Trial Chamber, of itself indicative of the superior authority of Mr. Delic sufficient to attribute superior responsibility to him."[167]

D. Factual and Legal Findings Relating to Specific Events Charged in the Indictment

After reviewing the superior-responsibility position of the Defendants, the Tribunal then conducted a case-by-case examination of each of the acts alleged. The Tribunal addressed the sufficiency of the evidence provided, and when applicable, whether superior responsibility existed. In some of the cases, the Tribunal accorded individual criminal responsibility even where the accused himself was not the actor. The Tribunal stated: "Individual criminal responsibility arises where the acts of the accused contribute to, or have an effect on, the commission of the crime and these acts are performed in the knowledge that they will assist the principal in the commission of the criminal act."[168]

For some charges, the Tribunal found indirect evidence sufficient to establish guilt. For example, even though the witnesses to the murder of Scepo Gotovac could not see the person or persons actually beating him, the Tribunal accepted evidence of what was heard and what was believed to be happening inside.[169] On the other hand, when discussing the murder of Simo Jovanovic, the Tribunal refused to ascribe guilt on the basis of mere voice recognition by the single witness.[170] Where the witness testi-

166. *Id.* ¶ 810.
167. *Id.* ¶ 806.
168. *Id.* ¶ 842.
169. *Id.* ¶¶ 820-21.
170. *Id.* ¶ 844.

monies conflicted on fundamental aspects of the alleged events, the Tribunal would also deny guilt.[171]

For the majority of the alleged murder charges, the Tribunal found at least one of the accused guilty. In surmising the beating of sixty-year old Bosko Samoukovic, which resulted in his death half an hour after the cessation of the beatings, the Tribunal commented: "Such a brutal beating, inflicted on an old man and resulting in his death, clearly exhibits the kind of reckless behavior illustrative of a complete disregard for the consequences which this Trial Chamber considers to amount to willful killing and murder."[172]

As concerned the rape charges, the Tribunal noted that according to sub-Rule 96(i) of the Rules, no corroboration of the testimony of a victim of sexual assault is required as long as the victim's testimony is credible and compelling.[173] Highlighting the devastating psychological effects of repeated rapes, the Tribunal quoted rape victim, Ms. Cecez, as testifying that: "psychologically and physically I was completely worn out. They kill you psychologically."[174] The purpose of such rapes, according to the Tribunal, was to "intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."[175] Additionally, the Tribunal held that rape inflicted because of an individual's gender represented a form a discrimination which constituted a prohibited purpose for the offense of torture.[176]

The Tribunal continued to analyze the long list of horrid violations of customary international law. The list included not only torture and rape but also such inhumane acts as those involving the use of electrical devices, forcing persons to commit fellatio with each other, and forcing a father and son to beat each other repeatedly.[177] In a subsection entitled "atmosphere of terror," the Tribunal summarized:

> [I]t is already clear that the detainees in the Celebici prison-camp were continuously witnessing the most severe physical abuse being inflicted on defenseless victims. . . . It is clear that, by their

171. *Id.* ¶ 872.
172. *Id.* ¶ 855.
173. *Id.* ¶ 936.
174. *Id.* ¶ 938.
175. *Id.* ¶ 941.
176. *Id*.
177. *Id.* ¶¶ 1049-70.

> exposure to these conditions, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse. This psychological terror was compounded by the fact that many of the detainees were selected for mistreatment in an apparently arbitrary manner, thereby creating an atmosphere of constant uncertainty.[178]

The Tribunal then addressed the inadequate living conditions and found that the detainees in the Celebici prison-camp were deprived of adequate food and water, medical care, as well as sleeping and toilet facilities.[179] The Tribunal refused to accept the Defense's assertions that these conditions resulted from lack of available resources.[180] Instead, the Tribunal found the inadequate provisions combined with the atmosphere of terror to constitute the offence of cruel treatment under Article 3 of the Statute and willfully causing great suffering or serious injury to body or health under Article 2.[181]

Lastly, the Tribunal addressed the charge of unlawful confinement of civilians. Although the Tribunal recognized that some of the detainees may have possessed weapons which could have been used, or were in fact used, against the forces of Bosnia and Herzegovina, other detainees were entirely innocent and their confinement could not have been "justified by any means."[182] Furthermore, the Tribunal found the continued confinement of even lawful detainees to have violated Article 43 of the Fourth Geneva Convention by failing to abide by the procedural requirements outlined therein.[183] The Tribunal dismissed the charges of plunder as specified in the indictment for failing to rise to the level of a "serious" violation of international humanitarian law sufficient to satisfy the meaning within the Statute.[184]

E. Diminished Responsibility

In its concluding section, the Tribunal addressed the defense of diminished responsibility raised by Esad Landzo.[185] The Tribunal noted

178. *Id.* ¶¶ 1086-87.
179. *Id.* ¶¶ 1096, 1100, 1105, 1108, 1111.
180. *Id.* ¶ 1118.
181. *Id.* ¶ 1121.
182. *Id.* ¶¶ 1131-32.
183. *Id.* ¶ 1135.
184. *Id.* ¶ 1154.

that such a defense is more likely to be accepted when there is evidence of a mental abnormality.[186] The Tribunal attacked the evidence presented, Landzo's testimony in particular, and ultimately denied him this defense.[187]

V. Sentencing

In the penultimate section of the decision, the Tribunal addressed factors relevant to the sentencing of the Defendants. The Tribunal detailed the applicable provisions of the Statute and Rules and then explored general theories on sentencing, including issues of retribution, protection of society, rehabilitation, and deterrence. The Tribunal concluded by examining, on a case-by-case basis, the factors relevant to the sentencing of each of the individual Defendants. Zejnil Delalic was found not guilty of all counts, but the other Defendants were found guilty of multiple counts. Zdravko Mucic, Esad Landzo, and Hazim Delic were sentenced respectively to seven, fifteen, and twenty years confinement.[188]

---

185. *Id.* ¶ 1156.
186. *Id.* ¶ 1170.
187. *Id.* ¶ 1186.
188. *Id.* ¶ 1285.

BLACK HAWK DOWN[1]

REVIEWED BY MAJOR TYLER J. HARDER[2]

> *By midnight the rescue convoy was getting close. The men pinned down listened to the low rumble of nearly one hundred vehicles, tanks, APC's (armored personnel carriers), and Humvees. The thunderclap of its guns edged ever closer. . . . It was the wrathful approach of the United States of America, footsteps of the great god of red, white, and blue.*[3]

Black Hawk Down is a riveting account of the "biggest firefight involving American soldiers since Vietnam."[4] This book recreates the relatively obscure conflict known as the Battle of the Black Sea.[5] The short but intense clash between Task Force Ranger and Somali militia (clansmen) in Mogadishu, Somalia, on 3 October 1993, took the lives of eighteen American soldiers. The passage quoted above refers to the pinned down soldiers of Task Force Ranger awaiting rescue by the Quick Reactionary Force (QRF) convoy (made up of Malaysian, Pakistani, and 10th Mountain Division personnel) on 4 October 1993.[6] Mark Bowden successfully places the reader in the African city of Mogadishu and in the midst of authentic guerrilla warfare. Bowden's work is an excellent job of investigative journalism, and although this book reads like fiction, he has arguably written the most accurate accounting of this event to date.

The mission for Task Force Ranger on 3 October 1993 was to capture several senior leaders of warlord Mohamed Farrah Aidid's clan. The Rangers were to air assault into a crowded downtown area of Mogadishu (the Bakara Market or Black Sea area) in the middle of the afternoon, set

---

1. MARK BOWDEN, BLACK HAWK DOWN (1999).

2. United States Army. Written while assigned as a student, 48th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BOWDEN, *supra* note 1, at 258.

4. *Id.* at 331.

5. This battle derives its name from the area in which it was fought, a downtown area of Mogadishu known as the Black Sea. It has also been referred to as the Battle of Bakara Market. *See* Donna Miles, *Farewell to Somalia*, SOLDIERS, May 1994, at 24.

6. The U.S. military's presence in Somalia was part of a United Nations effort to provide food to starving Somalis during a time of civil war. The effort, Operation Provide Hope, began in December 1992 and ended in March 1994.

up a perimeter, and secure a city block. Delta Force soldiers would then storm the building on the secured block that, according to intelligence sources, contained the senior leaders. Once Aidid's clansmen were captured, an awaiting convoy of trucks and Humvees would retrieve the entire assault force and return to base.

The Black Hawk helicopters, considered by the Americans to be all but invincible in this third-world environment, were suddenly proven vulnerable as the Somali militia successfully shot the Black Hawks out of the sky with rocket propelled grenades (RPGs). The first helicopter to be hit by an RPG crashed only three blocks from the initial assault, and the members of the assault force and a combat search and rescue team were able to get to the crash site and quickly secure it. Soon after, however, a second Black Hawk (piloted by Chief Warrant Officer Michael Durant[7]) was struck with an RPG and crashed several blocks further away in the opposite direction from the first crash site. The task force was unable to reach the second crash site and the original plan disintegrated as thousands of angry Somali civilians and armed Somali clansmen converged on the assault force, the convoy, and Durant's downed helicopter.

The book presents, with vivid description, the horrors of combat. The task force convoy was exposed to heavy Somali gunfire throughout its failed attempts to retrieve the assault force from the first crash site and was eventually forced to return to base. The assault force found itself pinned down at the first crash site fighting through the night, waiting for the QRF rescue convoy to reach them, while two Delta Force soldiers[8] died at the second crash site courageously trying to save Durant and the other survivors of his crew.

In his epilogue, the author states that he wrote this book for the American soldiers that fought in Mogadishu. When he initially began working on the book in 1996, he wanted "simply to write a dramatic account of the battle."[9] He started the project because the story of ninety-nine American soldiers pinned down overnight in an ancient African city fighting for their lives fascinated him. He states, "I wanted to combine the authority of a

---

7. The infamous videotape showing Chief Warrant Officer Michael Durant's swollen and battered face was seen on CNN soon after the American pilot was taken hostage by Somali clansmen.

8. Master Sergeant Gary Gordon and Sergeant First Class Randy Shughart, received posthumous Medals of Honor for their failed attempt to keep the Somali crowds from reaching Chief Warrant Officer Durant and his crew.

9. BOWDEN, *supra* note 1, at 331.

historical narrative with the emotion of the memoir, and write a story that read like fiction but was true."[10] Once he started this project, however, another purpose inspired its completion.

During his investigative research, Bowden expected to find an official history and after action review of the battle, but he instead discovered that the military had not shown any such interest in analyzing and critiquing the operation. It was as though the Army sought to forget the entire experience; possibly because the battle, although arguably successful from a military perspective, was perceived by most as a failure. The overall failure of the United Nations operation may have contributed somewhat, but certainly the eighteen U.S. fatalities and the disturbing images of dead American soldiers being dragged through the streets of Mogadishu must have served an even greater part in creating this perception of failure. Bowden became driven by a desire to explain that, while the battle may be viewed as a failure, the soldiers did not fail in their mission. The task force *did* accomplish its mission; they successfully captured Aidid's senior leaders. And in terms of pure numbers, the American death toll of eighteen was minute when compared to the Somali death toll of over five hundred.

The author's desire to address this common perception of failure certainly contributes to a quality product. His account appears to be an extremely accurate and lucid description of events. The news of the battle as reported by many sources merely provided the audience with snapshots of the entire story. *Black Hawk Down* provides a complete version of what happened. It also provides a convincingly correct version.

Although this book is inconsistent with other reports in certain details, even with reputable military magazines like *Soldiers* (the official U.S. Army magazine) and *The NCO Journal* (published by the U.S. Army Sergeants Major Academy), Bowden's account of events seems more persuasive because of his thorough research. For example, the sequence of events leading up to Durant's capture is significantly different. Delta Force snipers Master Sergeant Gary Gordon and Sergeant First Class Randy Shughart volunteered to drop into the crash site to try and protect Durant and his crew until ground troops could arrive. They were both killed by Somali gunfire. *Soldiers* magazine and *The NCO Journal* both indicate SFC Shughart was shot and killed first and MSG Gordon returned to Durant's side to hand him a weapon and to wish him luck before he

10. *Id.*

(MSG Gordon) too was killed.[11] Based upon his research, Bowden concludes the roles of the two NCOs were incorrectly reversed.

Bowden's investigative research is what makes *Black Hawk Down* so persuasive. His research includes extensive interviews of approximately 100 participants, both Americans and Somalis. Relying on this first-hand information, the actual videotape and recorded radio conversation of the battle,[12] and dozens of books and articles, he pieces together the events of the battle in convincing detail. By the end of the book, little doubt is left in the reader's mind that his version is the most credible.

Arguably, the greatest strength of this book is the inclusion of the personal observations and perspectives of the Somalis. Bowden tells the story one piece at a time, moving the reader from scene to scene, often retelling an event two and three times from different participants' recollection. Because the story is told through the eyes of both Americans and Somalis, the reader is forced to empathize with everyone, to include the clansmen. The reader is placed in an objective role as an observer and is given the opportunity to evaluate the Somali perspective and better understand their situation. He writes about one Somali citizen and his experience with a Black Hawk loudly hovering above his house one night while he lay in bed with his pregnant wife. She asks him to feel her stomach; "[h]e felt his son kicking in her womb, as if thrashing with fright."[13] He also relates how a baby was blown out of its mother's arms and down the street by a Black Hawk's rotors. These powerful images force the reader to understand why the Somalis came to despise the Americans.

The author's writing enables the reader to visualize the scenes. He describes events in vivid detail to give the reader clear, searing images of the gruesome chaos and extreme emotion experienced by all participants, Americans and Somalis alike. For instance, he describes an RPG striking a truck in the convoy by writing:

> It rocketed in from the left, severing Kowalewski's left arm and entering his chest. It didn't explode. The two-foot-long missile embedded itself in Kowalewski, the fins sticking out his left side

---

11. *See* Heike Hasenauer, *Medals of Honor,* SOLDIERS, July 1994, at 4; *Medal of Honor Awarded to Two NCO Heroes,* NCO J., Fall 1994, at 3.

12. The entire fifteen-hour battle was videotaped from surveillance aircraft in the air over Mogadishu. The author was able to view this video as well as the recorded and transcribed radio messages that took place during the battle.

13. BOWDEN, *supra* note 1, at 76.

> under his missing arm, the point sticking out the right side. . . . The cab was black from smoke and Othic could see the rocket fuse glowing from what looked like inside [Kowalewski]."[14]

The one aspect of this book that possibly detracts from its accuracy is the limited contribution of the Delta Force participants. As Bowden acknowledges, it was difficult for him to get information from the highly-covert special operations unit. He relies almost exclusively on MSG Paul Howe, the only Delta Force operator that agreed to be interviewed, as his source of information regarding the elite unit and its views. He spends considerable time encasing Delta Force in an aura of mystique, and while his portrayal of Delta Force soldiers as highly experienced, fearless, confident, "super soldiers" may be accurate, some of the author's conclusions about Delta Force are questionable. Referring to Delta Force, he writes, "[t]he army would not even speak the word 'Delta.' If you had to refer to them, they were 'operators,' or 'The Dreaded D.' The Rangers, who worshiped them, called them D-boys."[15] Based upon the way Bowden presents the two perspectives, the Deltas' and the Rangers', a reader lacking in military experience would likely conclude the Delta perspective to be more accurate. Careful reading, however, lends to the conclusion that MSG Howe was critical of everyone and somewhat bitter about many aspects of the operation. This colored his perspective, and may explain why he chose to discuss his experiences with the author in the first place.

Black Hawk Down is an invaluable tool for commanders at all levels. While this book was not intended to be a military guide on leadership, it does provide plenty of fodder from which one can extract and develop important leadership lessons. As previously mentioned, Bowden's purpose was to write about the Battle of the Black Sea in an interesting, yet accurate, fashion. He admittedly knows very little about the military and has no military experience of his own to draw upon, so he deliberately chooses not to participate in a critical analysis of the military leadership involved, at any level. He has no political or military agenda to advance; he simply chooses to write about the battle. However, it is from his brilliant illumination of the battle itself that the reader is able to establish useful leadership and management principles for all levels of command. A

14. *Id.* at 127.
15. *Id.* at 33.

few examples at the small unit, the task force, and the high command authority levels follow.

At the small unit level, this book is a testament to the fact that war is truly chaotic, and chaotic situations demand leadership. And where leadership is lacking, others will be required to come forward to provide it. In this battle, there is little doubt the Special Forces unit provided an important stabilizing factor for the less experienced and younger Ranger soldiers. During the fight one of the Delta soldiers, noticing the fear of a young Ranger noncommissioned officer, winked at him and said: "'It's all right. We're coming out of this thing, man.' It calmed [the Ranger]. He believed [the Delta soldier]."[16] The book also provides examples of how combat stress can affect various military relationships. One such example is how the Ranger commander, Captain Steele, was unwilling to communicate with the Delta commander, Captain Miller. It was never intended that the Delta soldiers and the Rangers fight together as one unit, so no clear chain of command had been established between the two elements. When the situation required one fighting force, the two officers failed to work together.[17]

The book also raises numerous issues crucial to military leadership at the task force level. The inability of the observation helicopters to direct the ground convoy to the crash site; the tremendous amount of time it took the QRF to assemble and coordinate with the Pakistani and Malaysian forces; the lack of American armor in Somalia; the lack of riot control agent authorization; the unbelievable helplessness of superior American forces when it came to rescuing the downed pilots; these are all examples of the troubling issues raised by this battle. The failure of the leadership to anticipate and address these issues, and the underlying reasons for that failure, can unquestionably provide invaluable leadership lessons to future task force commanders.

A last example of leadership lessons presented by this book is the political strategy employed by the Americans in attempting to end the civil unrest in Somalia. The strategy was to capture the clan warlord, Aidid. Many felt his removal would stop the fighting and allow the establishment of a legitimate democratic government, while others felt such a plan was

16. *Id.* at 176.

17. At least in this case, the lack of communication between the captains did not appear to have any substantial effect on the soldiers or the situation; nonetheless, the leadership value of this situation remains.

destined for failure. There is much evidence from the author's interviews of the Somalis to support this latter view. The Americans went to Somalia to provide protection and to help starving people. As it turned out, the very people Americans went to help, the Somalis, hated the Americans for being there. The history of the warring clans runs deep within all Somalis and it was unlikely that removing Aidid from the picture would have brought stability and peace to Somalia. Indeed, the author notes that Aidid has since been killed by the continued fighting and Somalia is still engaged in civil war. As Bowden convincingly states, "[i]n the end, the Battle of the Black Sea is another lesson in the limits of what force can accomplish."[18]

Early in the book the author refers to a prophetic memo written by the Task Force Ranger commander, Major General William Garrison, wherein he states, "if we go into the vicinity of the Bakara Market, there's no question we'll win the gunfight, but we might lose the war."[19] It appears that is what happened. After the firefight, President Clinton beefed up the American military presence in Somalia for several months; but obviously recognizing the unpopular feeling most Americans had towards this United Nations operation, he completely pulled the American military out of Somalia within six months. As Bowden concludes in his epilogue, "Mogadishu has had a profound cautionary influence on U.S. military policy ever since."[20] The author believes the Battle of the Black Sea is directly responsible for the abrupt end to the United Nations effort to bring stability to Somalia, the resignation of the Secretary of Defense, Les Aspin, and the destruction of the promising career of the task force commander, General Garrison. Although some of these conclusions may be debatable, one can hardly argue that the Battle of the Black Sea was a watershed event in U.S. foreign policy.

This book is a must read for everyone. A truly fascinating account of modern war, this book may very well prove incorrect Bowden's conclusion that "[t]heir fight was neither triumph nor defeat; it just didn't matter."[21] *Black Hawk Down* not only provides a gripping and entertaining account of American soldiers in combat, but it also presents the basis for an excellent study of the "biggest firefight involving American soldiers since Vietnam."[22]

---

18. BOWDEN, *supra* note 1, at 342.
19. *Id.* at 21.
20. *Id.* at 334.
21. *Id.* at 346.
22. *Id.* at 331.

EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II[1]

REVIEWED BY COLONEL FRED L. BORCH III[2]

What impact did the U.S. occupation of Japan have on the Japanese? Was it a positive experience? Did the Japanese affect their American occupiers in any way? *Embracing Defeat: Japan in the Wake of World War II* offers answers to these questions, and this makes it a "must read" for judge advocates interested in World War II and its aftermath. Additionally, author John W. Dower's balanced perspective and insightful analysis make his award-winning book[3] just as important reading for contemporary military leaders, diplomats, and political decision-makers with an interest in Asia and the Pacific. This is because the nature of today's Japan—and its role on the Pacific Rim—cannot be understood without examining the U.S. occupation of that island nation from 1945 to 1952.

The war between Japan and America lasted three years and eight months; the occupation of the defeated country lasted almost twice as long. Consequently, at least from the Japanese perspective, World War II did not really end until 1952. Moreover, during the six years and eight months from August 1945 to April 1952, no major political, administrative, or economic decisions were made without United States approval. No public criticism of the American occupation force was allowed. Finally, because Japan had no sovereignty and thus no diplomatic relations, no Japanese were allowed to travel overseas until the occupation was almost over. Consequently, there is a strong argument that the occupation had a greater impact on Japanese life and society than the war itself.

Unlike post-war Germany and Austria, divided as they were between the United States, France, Britain, and the Soviet Union, the "focused intensity that came with America's unilateral control of Japan" permitted

---

1. JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II (1999).

2. Judge Advocate General's Corps, U.S. Army. Currently a student at the Naval War College, Newport, Rhode Island.

3. *Embracing Defeat* has won the Pulitzer Prize, National Book Award for Non-Fiction, the *L.A. Times* Book Prize in History, the Bancroft Prize, the John K. Fairbank Prize of the American Historical Association, the PEN/New England L. L. Winship Award, and the Mark Lynton History Prize.

the United States to impose a truly remarkable "root-and-branch" program of demilitarization and democratization. As *Embracing Defeat* explains, this truly all-encompassing program brought revolutionary change to Japanese culture and society.

Future peace and stability required that the imperial Japanese forces be disarmed and demilitarized. Only democratization, however, could prevent the reemergence of militarization. At the same time, instilling democratic thinking in the Japanese people would counteract the rising influence of communism. While the Potsdam Declaration had sketched the overall goals of the occupation, the details of this demilitarization and democratization were left to General Douglas MacArthur as Supreme Commander for the Allied Powers. This resulted from both the "Europe-first" focus of policymakers in Washington and MacArthur's imperial personality. In any event, MacArthur was the "indisputable overlord of occupied Japan,"[4] and his monopoly on policy and power gave him—and the roughly 1500 military and civilian bureaucrats who worked for him—virtually unbridled discretion to remake Japan. They alone decided the form and substance of the remarkable political, economic, and spiritual changes that would be called a "democratic revolution from above."[5]

As Dower shows, MacArthur and his underlings determined the shape that "stern justice" for war criminals would take. Similarly, he and this cadre of reformers determined the extent of "just reparations" for the destruction wrought by the Japanese against their now victorious enemies, and the form that demilitarization of the economy would take. Perhaps most importantly, the ideas of MacArthur and his staff shaped a key component of the American occupation agenda: the removal of all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. This included the establishment of freedom of speech, religion, and thought, as well as respect for fundamental human rights. To a very real extent, the occupation would end when MacArthur decided that a "peacefully inclined and responsible government" existed in accordance with the "freely expressed will of the Japanese people."[6]

Central to molding the Japanese people into good American-style democrats was establishing a democratic form of government. As MacArthur and his reformers decided that the existing Meiji Constitution of

4. *Id.* at 205.
5. *Id.* at 69.
6. *Id.* at 75.

1890 was "incompatible with the healthy development of responsible democratic government,"[7] a new document was drafted. The resulting constitution, written in six days, was truly a remarkable instrument. Filled with Anglo-American and European democratic ideals, it even included a provision affirming the "essential equality of the sexes"—a right not explicitly found in the U.S. Constitution.[8] But the truly revolutionary provision was Article 9, in which Japan forever renounced belligerency as a sovereign right of the state.[9] While some modifications would be made before the new constitution came into effect on 3 May 1947, the "renunciation of war" provision remained. It is unique in the history of national constitutions. As *Embracing Defeat* shows, however, the great irony of the way in which democratization, including the constitution, was imposed upon the Japanese is that the process was so undemocratic. While the victors preached democracy, they ruled by fiat. Their reformist agenda rested on the assumption that Western culture and its values were superior to those of Asia and Japan.

While the United States did impose sweeping change upon Japanese culture and society, not all changed for the Japanese. In fact, to some extent the occupation reinforced rather than altered some aspects of Japanese life. For example, unlike the practice of direct military government adopted in Germany, the American occupation of Japan was conducted indirectly through existing organs of government. That is, as they lacked the linguistic and technocratic capacity to govern the Japanese directly, MacArthur and his staff were forced to implement their revolution from above through two of the most undemocratic institutions of imperial Japan: the bureaucracy and the throne. Consequently, whether supervising developments in finance, labor, economics, and science, or revising the constitution, electoral system, courts, and civil service, the Americans exercised their authority through Japanese agencies and administrators. Not surprisingly, this had the long-term effect of strengthening the civilian bureaucracy and the power of the technocratic elite. As a result, long after the Americans had ceased to rule and the Japanese were regularly electing their leaders, government bureaucrats exercised a power unusual in a democracy.

Judge advocates will be particularly interested in *Embracing Defeat*'s critical examination of General MacArthur's involvement in the Interna-

7. *Id.* at 346.
8. *Id.* at 369.
9. *Id.* at 347.

tional Military Tribunal for the Far East. While some criminal proceedings involving so-called Class B and C defendants were held outside Japan, the "Tokyo War Crimes Trials" of the Class A defendants—Japanese policymakers charged with "crimes against peace" and "crimes against humanity"—were the most important, and best known. Dower convincingly shows that MacArthur's decision that the emperor would not be charged—or even linked to the war crimes charged against high ranking Japanese politicians and military leaders—irreparably damaged the proceedings themselves. After all, if Emperor Hirohito were not even *morally* responsible for the repression and violence carried out in his name and with his endorsement, how could the Japanese people be made to accept moral responsibility for the death and destruction wrought by the imperial Japanese forces? The War Crimes Trials had the unintended affect of strengthening the feelings of victimization, and retarding the Japanese willingness to accept responsibility. This was one unintended consequence of the "embrace" between the occupied and the occupier.

The great strength of *Embracing Defeat* is its extensive use of Japanese language sources. Whereas other English language accounts of the U.S. occupation from 1945 to 1952 rely almost exclusively on American documentary material, Professor Dower's intimate knowledge of Japanese politics, society, and culture allow him to examine Japan's transformation from an empire to a democracy as no historian has done previously. Some of his sources are unexpected. In one section, for example, he examines games played by Japanese children. He then explains that, in early 1946, the most popular activities among small boys and girls were make-believe games in which children held a mock black market and played prostitute and customer.[10] These games were a barometer of the obsessions of Japanese adults; a reflection of the life faced by their fathers and mothers. In another section of *Embracing Defeat*, Professor Dower reveals how the Japanese government, through loans and police support, encouraged businessmen to open "Recreation and Amusement Associations" (RAA). These were houses of prostitution, and were believed to be necessary as a buffer to protect the chastity of the "good" women of Japan from the sexual appetites of the American victors.[11] While the RAA lasted only a few months before being abolished by occupation authorities as "undemocratic," this experiment in formal public prostitution is fascinating, as is Dower's discussion of the Japanese perspective on the ubiquitous fraternization of the victors with Japanese women. In discussing this and other

10. *Id.* at 111.
11. *Id.* at 127.

issues, the author also frequently uses Japanese cartoon art to illustrate his points and support his analysis, which provides a unique window into the psychology of the Japanese people.

All in all, Professor Dower concludes in *Embracing Defeat* that the political and cultural revolution ushered in by the American occupation was a positive event. Nearly fifty years later, democratization and demilitarization remain firmly rooted in Japan, and the Japanese people are better for it. But not all old ideas and beliefs were swept away, and the value of Professor Dower's book is that it explains just how this could happen. Consequently, those who read *Embracing Defeat* will understand how Emperor Hirohito could claim in a 1975 interview that, looking at Japanese values "from a broad perspective," there had been no change between prewar and postwar Japan.[12] That same reader will also better appreciate why, only a few months ago, Japanese Prime Minister Yoshiro Mori said that "Japan is a divine nation with the emperor at its core, and we want the [Japanese] people to recognize this."[13]

A final point: in discussing the comprehensive political, economic, social, and cultural ramifications of the U.S. occupation of Japan, Professor Dower never allows his book to gloss over the effect the occupation had on the men, women, and children who lived though it. He captures "a sense of what it meant to start over in a ruined world by recovering the voices of people at all levels of society."[14] This reveals the Japanese perspective on life under the victors which, in turn, tells us something about ourselves as Americans. This is because, in embracing the Japanese and trying to re-create them in our own image and likeness, we Americans necessarily revealed—to the Japanese and the world—what we thought America and being American was all about.

---

12. *Id.* at 556.

13. Howard W. French, *Japan Ruling Party Wary of Prime Minister's Gaffes*, INT'L HERALD TRIB., May 27-28, 2000, at 1.

14. DOWER, *supra* note 1, at 25.

LINCOLN'S MEN:

HOW PRESIDENT LINCOLN BECAME FATHER TO AN ARMY AND A NATION[1]

REVIEWED BY MAJOR MARY J. BRADLEY[2]

> *His riding I can compare to nothing else than a pair of tongs on a chair back, but notwithstanding his grotesque appearance, he has the respect of the army.*[3]

This quote from a soldier in the 83rd Pennsylvania Regiment demonstrates the strength of William C. Davis's *Lincoln's Men*. In this engaging narrative, the author uses primary sources as the foundation for examining the growth of the image of Lincoln as "Father Abraham"[4] among Union soldiers during the Civil War. Never in the plethora of works on Lincoln has an author so fully explored the spiritual bond between Lincoln and the Union soldier.[5] Davis brings his skills as an expert Civil War historian[6] to this unique and unexamined area of history. Davis's narrow scope, combined with the well-developed theme, makes *Lincoln's Men* an innovative and compelling study that is worthwhile reading for any Civil War enthusiast or Lincoln aficionado. Despite the book's strengths, however, its nar-

---

1. WILLIAM C. DAVIS, LINCOLN'S MEN: HOW PRESIDENT LINCOLN BECAME FATHER TO AN ARMY AND A NATION (2000).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. DAVIS, *supra* note 1, at 68. This review contains many quotes from Union soldiers that appeared in *Lincoln's Men.* Many of the quotes contain spelling and grammatical errors. Following Davis's lead, "[a]s long as the soldier's meaning is clear, no attempt has been made to correct his spelling and capitalization or to intrude pedantic paraphernalia like '[sic]'." *Id.* at xii. Davis left the errors "to share [the soldiers'] wonderfully inventive means of expressing themselves." *Id.* Reading the original quote without correction or distraction will assist the reader to understand the colloquial phrases and level of education of the soldier.

4. *Id*. *passim.* Davis adopts the name "Father Abraham" to signify the relationship between Lincoln and the Union soldier. It first appeared during the Civil War as a favorable nickname for President Lincoln, and can be found in many of the quotes throughout *Lincoln's Men*.

5. *Id.* at 293 (bibliography).

6. Davis is a two-time Pulitzer Prize nominee and the author of more than twenty-five books on the Civil War.

row scope results in limited usefulness to the casual reader looking for a history lesson.

This review first commends Davis on the strength of his primary theme, but criticizes him on the weakness of the secondary theme, which analogizes Lincoln to the Biblical Abraham. Second, this review explores the positive and negative aspects of using primary sources as a foundation for historical exploration. Third, it discusses the benefits and detriments of the book's limited scope. Finally, this review explores the leadership lessons derived from *Lincoln's Men*.

Davis introduces the primary theme of *Lincoln's Men* in the subtitle of the book—*How President Lincoln Became Father to an Army and a Nation*. Davis develops his theme by presenting Lincoln in various roles throughout his presidency: reviewing official, skillful politician, comforter of wounded, merciful protector of the unjustly condemned, emancipator of slaves, inspirational leader, and deified legend. With each successive role, Lincoln is further transformed in the eyes of the soldier from "Old Abe"[7] to "Father Abraham." Davis discusses Lincoln's various roles by logically organizing *Lincoln's Men* into chapters that reflect each of these roles. Davis finds support for his theme in various sources, but primarily relies upon quotes from the Union soldiers themselves: "I am getting to regard Old Abe almost as a Father—to almost venerate him—so earnestly do I believe in his earnestness, fidelity, honesty & Patriotism."[8]

Davis suggests that the image of Lincoln as "Father Abraham" develops with each Union soldier for different reasons at different times. For some, Lincoln became "Father Abraham" the first time he reviewed their regiment after they reported in response to his initial call for volunteers before the Civil War began. The transformation did not occur for others until Lincoln emancipated the slaves. By the end of the Civil War, all soldiers who recognized Lincoln's genuine care and concern for the soldiers and the Union referred to him as "Father Abraham." Upon his assassination, the love of the soldiers for their "Father" was apparent: "No man, not

---

7. DAVIS, *supra* note 1, at 57 (explaining that "Old Abe" was a less than favorable nickname for Lincoln that the Union soldiers used in the beginning of the Civil War).

8. *Id.* at 226 (quoting a Union soldier).

even Grant himself, possesses the entire love of the army as did President Lincoln."[9]

Davis presents a balanced discussion of the familial theme, however; he did not neglect those letters and diaries that present an unfavorable view of Lincoln. Some soldiers could not forgive Lincoln for removing McClellan as their general. Other soldiers felt that Lincoln had turned the conflict into a war over the slavery issue: "If I had known, I would never have joined. The Emancipation Proclamation is unconstitutional."[10] Some soldiers even used the Emancipation Proclamation as an excuse for deserting. Even upon his assassination, some soldiers felt his death was justified. "Old Abe is killed and I do not care a damn . . . . He was an abolitionist and he had been the cause of thousands of innocent men being killed."[11]

While Davis supports his primary theme, he does not effectively present his secondary one, which analogizes Lincoln to the Biblical Abraham. Seemingly as an afterthought, Davis begins each chapter with a biblical quote about Abraham. Through these quotes, Davis implies that Lincoln is worthy of comparison to Abraham. Davis wishes the reader to analogize Lincoln and Abraham by equating their experiences and their paternal roles. Rather than developing and supporting this theme, Davis merely confuses the reader by failing to expand on these introductory quotes. He does not develop or test the theme that Lincoln was to the Union what Abraham was to the people of Israel. This concept could be the theme of an entirely separate book on Lincoln. The reader could skip these quotes without losing the strength of the primary theme in *Lincoln's Men*.

Secondary theme aside, Davis uses primary sources to support the familial metaphor. His extensive list of primary sources includes: diaries, collections of letters, published and unpublished memoirs, presidential orders, congressional notes, newspaper articles, biographies, monographs, and special studies. Davis admits that despite the overwhelming available sources, the average Union soldier only referred to Lincoln occasionally. Their references to Lincoln were primarily about the command and review, the Emancipation Proclamation, the enlistment of black

9. *Id.* at 243.

10. *Id.* at 101 (quoting an Ohio lieutenant who was court-martialed and sentenced to a dismissal for making this statement).

11. *Id.* at 240 (quoting a quartermaster).

soldiers, the 1864 presidential election campaign, and the draft. The typical soldier was more likely to write about the weather and the food. From the numerous sources, however, Davis manages to capture the essence of the soldiers' feelings about their President, and their President's feelings about them.

Davis's skill as a historian is evident in his ability to turn the occasional references to Lincoln into a cohesive narrative. His finest skill is his ability to interweave poignant quotes to support his theme. While a historian can report that the soldiers often found humor in Lincoln's appearance on horseback, the truly gifted historian can pull from countless sources the perfect quote to exemplify a fact or paint a picture. For example, Davis discovered this descriptive quote written by a soldier from the 5th Wisconsin Regiment: "Lincoln was an excellent rider, but upon this occasion he seemed utterly to disregard his horse, looking intently, kindly at the men, waving his hat as he rode along."[12]

Davis depicts the soldiers' faith in Lincoln by using their own words. "What a depth of devotion, sympathy, and reassurance were conveyed through his smile."[13] "No *one* man in this Country has so many supporters as Old Abe . . . Let Abraham Lincoln say the *Word*, then let *every man* wither Abolishonist, Proslaverites, Fanatics, Radicals, Moderates or Conservatives of what ever Party or Distinction, hold up both hands and with one unanimous voice say *Amen.*"[14] Davis's skillful use of soldiers' quotes highlights the narrative of *Lincoln's Men.*

Davis did not limit himself to primary sources from soldiers. He read Lincoln's official and personal documents to capture his thoughts and feelings about the Union soldiers. Additionally, Davis read letters and documents written by Lincoln's friends, advisors, and critics. Using these sources as a foundation for the historical exploration gives the reader the confidence in Davis's logical conclusions about the relationship between Lincoln and the Union soldiers during the Civil War.[15]

Using primary sources alone cannot definitively support the theme, however. While Davis captures the thoughts and feelings of some soldiers, his research is necessarily limited to the literate soldier[16] who wrote and preserved these documents. Many of the soldiers did not write diaries or

12. *Id.* at 68.
13. *Id.* at 69.
14. *Id.*

letters home; rather, they "vented their opinions around the campfire."[17] The sampling of primary sources that is available and practical to use represents the opinions of a very small percentage of Union soldiers.

Civil War historians have also questioned the completeness and truthfulness of many primary sources.[18] Many soldiers voiced adoration for Lincoln in their postwar memoirs not included in their wartime correspondence. Davis suggests that many soldiers edited their diaries, letters, and memoirs to remove any negative opinions they expressed. Because of the passage of time and change in attitudes following Lincoln's death, no historian can identify the exact impressions of all of the soldiers during the Civil War.

While Davis captures the Union soldiers' relationship with Lincoln using all available sources, the actual scope of the analysis is very narrow and does not provide details of the war outside the scope of the defined theme. When reading *Lincoln's Men*, the reader should not expect to learn

---

15. Despite the use of primary sources, one reviewer noted errors within the book. Michael Burlingame, *Book Review: Lincoln's Men: How President Lincoln Became Father to an Army and a Nation*, CIVIL WAR HISTORY, Sept. 1, 1999, at 275.

> Davis's discussion of the soldiers is far stronger than his treatment of their commander in chief. His treatment of Lincoln's prepresidential years is riddled with errors (e.g., "His opposition to the [Mexican] war cost him reelection in 1849." His "grandfather had not been a soldier of the Revolution." He had "two years of intermittent schooling." In 1832 he reenlisted in the militia because "he had missed his chance to continue running for the legislative seat.").
>
> More serious errors occur in chapters on Lincoln's presidency. Amazingly, Davis ignores Lincoln's last public address, in which he explicitly endorsed suffrage for black Union veterans. He accepts as genuine the letter to Gen. James S. Wadsworth endorsing universal suffrage, a document that most Lincoln authorities regard as spurious. He fails to note that the famous letter of condolence to the Widow Bixby was almost certainly written by Lincoln's secretary John Hay and not by the president.

Id. (citations omitted). While this reviewer felt the errors were substantial, unless the reader is a true scholar of Lincoln, the errors will not be noticed. These errors reinforce the conclusion that *Lincoln's Men* should not be used as a primary biography of Lincoln.

16. DAVIS, *supra* note 1, at x. Davis notes that approximately seventy percent of the soldiers were literate.

17. *Id.* at xi.

18. *See generally id.* at x-xii (providing information and criticism of the Civil War period primary sources).

the history of Civil War battles, generals, politics, or logistics. Relying solely on *Lincoln's Men* for biographical information on Lincoln, the reader would think that Lincoln spent his entire presidency reviewing troops, signing court-martial clemency orders, and visiting hospitals. In defense of Davis, he does not state or imply that *Lincoln's Men* will be anything more than an examination of the relationship between Lincoln and the Union soldier.

Without a previous understanding of the Civil War, the reader cannot fully appreciate the significance of certain battles such as Gettysburg and Antietam. While it is not necessary for every book on the Civil War to explain fully the military aspects, the reader will not understand the significance of Lincoln's actions without this background.

Davis limits his discussion of Civil War battles to their role in Lincoln's political decisions. For example, Davis mentions the battle of Antietam as a qualified victory for the Union. Davis did not explore the battle itself—the movement of the troops, the decision-making process of the generals, and the bloody nature of the conflict. Instead, Davis mentions Antietam as the Union victory that would give Lincoln the political support of the Union he needed to announce the preliminary Emancipation Proclamation.[19]

The narrow focus on the relationship between Lincoln and the Union soldier, however, has the positive effect of focusing the reader squarely on Lincoln's skill as a leader. Early in the war, Lincoln discovered that his true leadership role was not to manage the battles or the troops, but to inspire and motivate—to focus the soldiers on the reason for the fight and to instill the confidence of the importance of the individual soldier. Leaders know that the state of their subordinates' morale can affect mission accomplishment. Lincoln's leadership ability contributed significantly to the "sustaining resolve" that maintained the heroic morale of the Union soldier during the Civil War.

Lincoln's success as an inspirational and motivational leader is most evident in the folklore developed by citizens and soldiers, even while the Civil War was raging and Lincoln had not yet been assassinated. Upon

19. *Id.* at 92 ("Only the authority of a battlefield triumph there could back his proclamation with the moral authority it needed.").

hearing of Lincoln's call for volunteers, a soldier wrote a poem that describes the citizens and soldier's support of Lincoln:

> We are coming Father Abraham, three hundred thousand more,
> From Mississippi's winding stream and from New England's shore,
> We leave our plows and workshops, our wives and children dear,
> With hearts too full for utterance, with but a silent tear;
> We dare not look behind us, but steadfastly before,
> We are coming, Father Abraham, three hundred thousand more.[20]

Upon his death, soldiers remembered Lincoln with Christ-like sentiment. "They succeeded in killing the Son but the father liveth."[21]

The Christ-like image manifested itself in the stories that likened Lincoln's acts to miracles. Of note was the poem *The Sleeping Sentinel*, which turned the real-life grant of clemency to William Scott into a fictional account. Lincoln did grant clemency to a soldier who faced death for sleeping while on watch; that soldier was later killed in action. The truth became the basis for embellished and romanticized books, plays, and movies.

The qualities that soldiers and citizens saw as saintliness derive from Lincoln's genuine compassion for the soldiers' welfare combined with his immense skill as a politician, who understood the nature of leadership with exceptional acuity. Lincoln became "Father Abraham" not by sitting in Washington behind closed doors. Rather, Lincoln met with the soldiers in their camps, in his office, in the hospitals, and on the campaign trail. Stories of Lincoln's mercy and charity reached his soldiers through stories in newspapers and magazines, not to promote his political interests but to strengthen the morale of his army and its commitment to the Union cause. Lincoln's personal and apparent concern for the soldiers motivated and inspired them to continue the fight. The reader discovers, through insight into the Union soldiers' opinions, that Lincoln is a stronger, more effective *military* leader than previously discerned.

Davis supports his conclusions about Lincoln's skill as a leader and the strength of the relationship between Lincoln and the Union soldiers by weaving insightful quotes into a well-written narrative. While casual readers will not find *Lincoln's Men* difficult to read or uninteresting, they

20. *Id.* at 73.
21. *Id.* at 244.

should not rely on it as their primary history of the Civil War or complete biography of President Lincoln. Despite its limits, *Lincoln's Men* is recommended to the reader with a background on the Civil War who is looking to develop a more complete understanding of Lincoln and his role in the war. Foremost, *Lincoln's Men* fills a void in Civil War scholarship with its fresh perspective into the relationship between Lincoln and the Union soldier.

ON KILLING[1]

REVIEWED BY MAJOR ROBERT BOWERS[2]

You run swiftly across a muddy field with rifle in hand, bayonet fixed. Before you runs another man in a different uniform. He abruptly wheels to face you and your eyes meet at the moment you forcefully thrust the bayonet into him. With wide eyes fixed upon yours, he gurgles words in a foreign tongue through blood as he sinks to his knees to die. At this moment, you think that he is old enough to be a father.

What did you think as you pursued him? How did you feel as you impaled him? What effect will this have on your mental state tomorrow, and years from now? Multiplied by all the other combatants experiencing similar stimuli, how will this impact the entire force? If you have never contemplated the psychology of the act of killing, you will after reading this book.

For an institution whose livelihood revolves heavily around killing, the military seems to devote scant attention to how this act impacts those who do it. However, in *On Killing*, author Lieutenant Colonel Dave Grossman takes great strides to focus readers on the impact of killing. He describes his work as "[a]n attempt to conduct a scientific study of the act of killing within the Western way of war and of the psychological and sociological processes and prices exacted when men kill each other in combat."[3]

In an ambitious undertaking of momentous significance, the author deftly moves through diverse chapters, each warranting a book of its own. The overall effect is a smooth, riveting, and thought-provoking commentary on the act of killing. This review provides a synopsis of *On Killing*, discusses its strengths and weaknesses, criticizes the book's final chapter, and raises leadership lessons imparted by Grossman's commentary.

Grossman begins his exploration with S. L. A. Marshall's World War II study found in *Men Against Fire*, which revealed remarkably that a mere

---

1. DAVE GROSSMAN, ON KILLING (1995).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. GROSSMAN, *supra* note 1, at xxix.

15% of line infantry who saw targets in combat actually fired their weapons at them. Grossman observes an intraspecies reluctance to kill your fellow man if you are among the 98% nonsociopaths that perceives a resistance to the act of killing. The resistance occurs between the human forebrain, where reasoning and the conscience occur, and the midbrain, which is impulsive, reactive, and indistinguishable from animals. Without negative connotation, the 2% sociopaths ("natural soldiers") are described as men well in control of their faculties who simply do not experience the normal resistance to killing or the resultant psychiatric trauma associated with extended periods of combat. The reactions imbedded in the midbrain through repetitive training kick in when one becomes literally "scared out of their wits," causing the reasoning process in the forebrain to stop. Grossman provides startling examples that seem to support the notion that man will avoid killing when possible: for instance, he uses the rigorously trained Prussians of the 1700s who had a 60% hit rate for targets seventy-five yards away during training but who performed miserably against live targets a mere thirty yards away in the Battle of Belgrade; he also recounts the Vicksburg night battles where companies exchanged repeated volleys from fifteen steps apart without a single casualty. Grossman attributes the increase in the number of U.S. soldiers firing their weapons from Marshall's 15% to Vietnam's 90% to the change from use of known distance targets to the instant gratification of pop up targets, hence conditioning soldiers akin to Pavlov's conditioning of laboratory dogs.

From the above general topic Grossman next introduces the concept that all men possess a finite well of fortitude. The well of fortitude diminishes depending on the weight of: the burden of the duty to kill; the actual killing event; and the stress of being a target to be killed. The rate at which the well is drawn from depends on the impact of the emotional stimuli. Those who receive the most stimuli, usually line infantry, deplete their wells the soonest. At some point unknown, each man will drain his well dry and become a psychiatric casualty. At times during World War II, the U.S. Army could not replace fast enough those soldiers evacuated as psychiatric casualties. Various factors impact the degree to which the stimuli are felt. Generally, the more dehumanized the target and less personal the situation is, then less impact will result from the killing. Factors include cultural distance (for example, the belief that the only good Indian is a dead Indian), mechanical distance (for example, a green blob on a night vision scope versus a plainly visible man), and physical distance (for example, the difference between hand-to-hand knife fighting and dropping bombs from a mile above). The more personal or intimate the emotional impact,

the more draining it is upon the well of fortitude. Numerous studies revealing that men in combat fight out of a desire to be held in esteem by their comrades and leaders, to participate in the group accomplishments, and to avoid the shame and guilt of not supporting the group are also discussed.

From the topic of fortitude, the author proceeds to describe the mechanisms that enable atrocity and techniques that some militaries have adopted to increase the killing efficiency of their servicemen. For most killers, there is a series of emotional responses associated with the act. One feels trepidation and perhaps reluctance beforehand; exhilaration at the time of the kill; guilt or remorse afterwards; and rationalization over time. The nature and circumstances of the act may affect the intensity and duration of each of these responses. As mentioned earlier, there were many psychiatric casualties during World War II, but the incidence of Post Traumatic Stress Disorder afterwards was de minimis. Vietnam was the opposite. The author attributes that to a rationalization and acceptance phase manifested through such acts as the praise of society, the conducting of parades, and the awarding of medals after World War II but not after Vietnam. Convincingly, the author proposes that crew-served weapons are the greatest casualty producers on the battlefield because there is a mutual surveillance process that overcomes the individual's innate reluctance to kill, and because of the diffusion of responsibility and group absolution after the killing.

Grossman's last and culminating point is to take what he has established in the previous chapters and extrapolate that violent media and interactive video games are conditioning the youth of society to be less resistant to killing in much the same way that military training practices have conditioned soldiers. His point is that popular culture's adoption of desensitizing techniques is behind the increased homicide rates among the young, and that society may expect more unless they understand how this has occurred and work to reverse it.

With little fanfare, the author is endearing as a humble yet competent pioneer in an understudied subject. Proclaiming at the book's beginning that, "[t]o neglect it is to indulge it,"[4] he launches into this novel study. He provides his credentials as a present Professor of Military Science at Arkansas State University, a former instructor of psychology at West Point, and as a lieutenant colonel of Infantry qualified as an airborne

4. *Id.*

ranger. While this indicates some background relevant to the topic, he acknowledges he has no personal experience in killing. But if not this author, then whom?

The greatest strengths of the book are the convincingly articulated theories put forth by the author and supported by extensive research as evidenced by the bibliography. Some works, such as S. L. A. Marshall's *Men Against Fire*, are renown in military circles while other works are obscure. Much of the book's success is the simple consolidation of these disparate but related matters into one source. In each chapter the author supports his thesis with pertinent anecdotes. Most of these anecdotes draw from secondary sources, the works of other authors who have touched upon the nature of war but not specifically upon the psychology of the individual doing the killing.

Less satisfying and perhaps the greatest weakness of the book is the dearth of primary sources. While this book was written on the heels of United States involvement in Grenada, Panama, the Gulf War, and Mogadishu, none of these sources are tapped. There is no shortage of service members with killing experience. Admittedly, these conflicts were of short duration. While that limited combat exposure and resultant mental state wouldn't qualify them for some parts of the book, their killing experiences more than qualifies them for other parts of the book. The author instead cryptically relies on "hundreds" of veterans "who have shared secrets with me."[5] He imparts that they must remain anonymous. For a book that started off purporting to be a "scientific study,"[6] this methodology does not appear sound. The author refers throughout the book to conversations he had with audience members after speaking engagements, discussions over a beer at a Veterans of Foreign Wars bar, or other similar circumstances. Furthermore, he relies heavily on the "experiences" of alleged veterans contributing to a forum-style column in bygone issues of *Soldier of Fortune* Magazine. The inability to measure the credibility of

5. *Id*. at xi. It is sometimes impossible to distinguish whether a source is first hand or second hand. For example, on page 256 the author discusses a source named Bill Jordan. Jordan's opinion is important in supporting the author's opinion, but it is unclear what Jordan's status is. I found eighteen sources clearly identifiable as first hand throughout the book.

6. *Id*. at xxix.

the sources detracts from reader confidence in theories that otherwise seem sound.

Despite the lack of faith engendered by unverifiable sources of dubious credibility, the technique of putting forth theories supported by well-researched anecdotes works through the beginning chapters. The merit of the ideas outweighs the credibility problem of the sources. However, the final chapter's thesis that popular culture's adoption of military desensitizing techniques is behind the increase in the rising rate of violent behavior among youth may be a step too far. Where the previous chapters were sound theories supported by secondary sources, the final chapter comes off as merely unsupported speculation.

Theories on the underlying causes of escalating youth violence abound and while this book was written in 1995, the issue remains current and controversial. To the detriment of this last chapter, it is apparent that there is precious little support for these conclusions. The author puts forth the basic premise that the gratuitous violence prevalent in media today conditions youth to overcome what once was a natural resistance to killing, in much the same way that pop-up targets conditioned soldiers. Sitting with sodas and snacks on the sofa with the movie or videogame before them, the youth of today associate the pain and suffering of others with their own immediate gratification. While the author does put forth a good case that this dynamic is certainly a factor, his lack of credible sources and neglect of other dynamics[7] make his final point of a cause and effect relationship unpersuasive.

Recalling next that the author's purpose statement provided that this was a study of the act of killing within the Western way of war, he nowhere qualifies that phrase. On the contrary, he incorporates anecdotes from a wide range of differing and distinctly non-Western conflicts, from Japanese bayonet practice with live Chinese prisoners to the Tutsi victims of Hutus begging to be shot by a bullet as opposed to being hacked to pieces by a machete. Do legions of Japanese suffer Post Traumatic Stress Disorder? Do the machete wielding Hutu butchers lie awake at night with

7. Both presidential candidates in the 2000 election raised media violence marketed to underage audiences as an issue on the heels of the 11 September 2000 Federal Trade Commission release of a report finding that the entertainment industry ignores its own rating schemes to sell to this group. However, no report has conclusively demonstrated the degree, if any, to which this dynamic is a cause of youth violence. The breakdown of the nuclear family and the lack of a sense of community in contemporary society are examples of other plausible contributing dynamics.

heavy consciences? Are these episodes fairly encompassed in the "Western way of war?" The author's own adherence to his defined scope or, alternatively, expanding to embrace these types of events would enhance the book.

Inaccuracies also exist in the book. While discussing the depersonalizing rationalizations that enable killing, the author uses a sniper's statement as a supporting anecdote: "You don't like to hit ordinary troops, because they're usually scared draftees or worse. . . . The guys to shoot are the big brass."[8] This passage implies that target selection is arbitrary rather than doctrinal, which for trained snipers it is not.[9] In another instance, the author described how superior training could overcome one's innate reluctance to kill, offering as a supporting anecdote that the Mogadishu battle produced eighteen U.S. soldiers killed versus an estimated 364 Somalis.[10] He neglected to mention that most Somali casualties were attributable not to the better-trained U.S. dismounts, but to helicopter gunship fire, and that many of those Somali casualties were noncombatant collateral damage.[11]

Alarmingly for a judge advocate, the law of war is mentioned only twice, and then only briefly and with questionable accuracy.[12] These eas-

---

8. GROSSMAN, *supra* note 1, at 109.

9. U.S. DEP'T OF ARMY, FIELD MANUAL 23-10, SNIPER TRAINING (17 Aug. 1994), and its ancestry consistently prescribe a doctrinal target selection process with little room for discretion as suggested by the source. Factors in descending order are: threat to sniper team; probability of first round hit; certainty of target identification; and target effect on enemy. Accordingly, target priorities in descending order are: enemy snipers; dog tracking teams; scouts; officers; noncommissioned officers; vehicle commanders and drivers; and communications personnel.

10. *Id*. at 258.

11. MARK BOWDEN, BLACK HAWK DOWN (1999) (describing how the less-than-discriminate close air support of electric gun equipped AH 6 "Little Bird" helicopters inflicted the preponderance of Somali casualties).

12. *Id.* at 203, 263. The author discusses a Geneva Convention prohibition on targeting personnel with white phosphorous, when this prohibition actually comes from the Hague Convention. He also confuses the issue of how prisoners must be treated with the requirement to take them, which are two entirely distinct issues. *Id.* at 203. The author also states that the Geneva Conventions (plural) were established in 1864. *Id*. at 263. While some discussion on the wounded and sick in the field was initiated at the first Geneva Convention (singular) in 1864, the four Conventions (plural) commonly referred to as the Geneva Conventions were not "established" until 12 August 1949. *See* U.S. DEP'T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE (December 1956).

ily correctible inaccuracies inspire one to wonder what other inaccuracies slipped in.

Assuming that the theories put forth are correct, the military has much work to do. Trainers must understand how their curriculum, from pugil sticks to stress cards, affect the psychology of those they aspire to train to fight. Tacticians and personnel managers must plan soldier use with an appreciation that they are psychologically perishable. To preserve this resource, troop strengths must be maintained so that forces with the greatest stimuli exposure can rotate in such a manner that they are best able to stave off depletion of their wells of fortitude. Failure to do so in times of war may have catastrophic consequences. If the killing occurs at the intimate ranges where the psychological impact is greatest, such as in cities, that is a planning factor. Weapon systems that give the greatest standoff minimize the psychological impact of killing, and a military should maximize such weapon use accordingly. This is especially true in an ethnically-mixed military where it is not permissible to dehumanize the enemy by fostering cultural distance (another viable way of minimizing impact). Psychological testing should be implemented to identify the two percent sociopathic "natural soldiers" and place them where they may best be used. For all defense counsel representing soldiers affected by the stresses of combat, an individual's stimuli exposure and resultant psychological state would be crucial evidence in mitigation and extenuation.

By any fair sense of proportion, this book's merits vastly outweigh its deficiencies. One is left with the aftertaste that this was an overdue broach in an area of momentous significance. It offers much to an array of readers. *On Killing* offers a fascinating breach into a taboo and uncomfortable, yet central and overlooked subject. The reader will be profoundly moved upon completion and will undoubtedly contemplate the book's import long thereafter.

RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS[1]

REVIEWED BY LIEUTENANT COMMANDER R. A. CONRAD[2]

> *Jerom died on February 13, 1996, ten days shy of his fourteenth birthday. The teenager was dull, bloated, depressed, sapped, anemic, and plagued by diarrhea. He had not played in fresh air for eleven years. As a thirty-month-old infant, he had been intentionally infected with HIV . . . .*[3]

Rattling the Cage begins with the story of Jerom, a chimpanzee. By introducing Jerom, author Steven Wise encourages readers to find the chimpanzee akin to an abused, tortured child who has been criminally infected with the Human Immunodeficiency Virus (HIV). However, this compelling introduction is the last significant glimpse the reader has of the "stars"(and heart) of the book until chapters nine and ten. Disappointingly, Wise chooses the wrong road to his destination and attempts to cross a wide chasm without any plans for first building a bridge, or at least using the one already constructed—current animal welfare laws—to help him get there.

The author's thesis is stated simply and clearly on page four: "This book demands legal personhood for chimpanzees and bonobos."[4] His proposal for "legal personhood" for chimpanzees and bonobos[5] is a mere starting point in his quest to secure fundamental civil rights, on a piece-

---

1. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

2. United States Navy. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. WISE, *supra* note 1, at 1.

4. *Id.* at 4.

5. Bonobos are pygmy chimpanzees.

meal basis, for a variety of animals[6] on the basis of "autonomy," meaning exhibiting some evidence of a "mind."[7]

Wise focuses, oddly, on these changes springing forth from common law decisions, rather than through the more logical legislative process.

> The decision to extend common law personhood to chimpanzees and bonobos will arise from a great common law case. Great common law cases are produced when great common law judges radically restructure existing precedent in ways that reaffirm bedrock principles and policies.[8]

He fails to devote even a single chapter to the success or failure of existing animal protection laws, which have provided the substance of his law practice and constituted his area of expertise for the last twenty years,[9] to justify the need for such a radical change. Further, his conviction in his own thesis becomes suspect when he refers to his own proposal as an "experiment."[10]

To support his thesis, Wise embarks on a meandering journey through history and multiple disciplines. His impressive research[11] delves into the law, history, medicine, religion, literature, and several scientific disciplines. He analogizes the development of animal rights to similar developments in the areas of slavery, unborn fetuses, the mentally ill, humans in vegetative states, periods of human genocide, and normal child development.[12] He even makes a comparison to an artificial intelligence robot named COG.[13]

Wise expends considerable effort trying to establish the intelligence and "humanity" of chimpanzees and bonobos—their "qualifications," if you will, for legal personhood. While the result makes fascinating read-

---

6. Specifically, he lists other primates, dolphins, whales, elephants, parrots, and dogs. WISE, *supra* note 1, at 268-69.

7. *Id.* at 268.

8. *Id.* at 270.

9. In addition to practicing animal protection law, Steven Wise teaches "Animal Rights Law" at Harvard Law School, Vermont Law School, John Marshall Law School and at Tufts University School of Veterinary Medicine. *Id.* at Book Jacket.

10. *Id.* at 118.

11. The book contains 1325 footnotes.

12. WISE, *supra* note 1, at 239-66.

13. *Id.* at 268.

ing, the effort is largely wasted given his radical thesis. These chapters comprise the best segment of the book and would provide the most convincing argument for strengthening animal welfare laws, if that were his focus. Indeed, he makes an extremely convincing case for the striking similarities between primates and humans, highlighting the impressive capability of chimpanzees and bonobos to actually communicate intelligently and meaningfully with humans.[14] Despite this evidence, however, Wise admits that there is substantial disagreement even among the scientists who work with chimpanzees, bonobos and other animals, as to their "consciousness" and thus any claim to humanity.[15]

More significantly, the people most likely to read this book—animal lovers—do not need the hard sell approach. Animal lovers throughout the world already think of their pets as integral parts of their families and know from experience how very special they are.[16] Animal lovers will tell anyone who listens that their pets have personalities; that they can think and reason; that they are capable of pure, unconditional love; and that to abuse, neglect, or treat them inhumanely is criminal behavior. The scientists who work with primates and other animals, who recognize their special intelligence and qualities, likewise do not need convincing. Those who disagree will not be convinced no matter how many pages of passionate argument Wise sets before them. What this group of readers does need, however, is

---

14. *Id.* at 239-66.

15. *Id.* at 179-237.

16. Meet Kayla and Molly. Kayla is eight years old, has beautiful blue eyes, and is petite in every way except personality. She can be the sweetest little girl you have ever met, endlessly entertaining with her athletic, if less than graceful, acrobatics. Yet she has a temper and, when angry, she assaults your eardrums with bloodcurdling screams. She suffers from asthma. Her spells can come at any time, unbidden, but are generally triggered when she gets upset or scared, and will break your heart every time. Kayla cries when I leave for work each day and runs to greet me at the door each night.

Brown-eyed Molly is six, stunningly beautiful, extremely smart, sensitive, and adores bunny rabbits. She loves long walks, a wide variety of games, any activity in the water, and sleeping late. She is outgoing and makes friends easily. She, too, hates it when I leave in the morning, but her mourning is quiet and solitary, as she tucks herself away in her room. When I get home, she meets me at the door with unbridled enthusiasm, barely able to contain herself until I can empty my arms and embrace her in a hug.

Kayla is a sealpoint Siamese cat and Molly is a Dalmatian. They are two of my three pets and, for all intents and purposes, my "children."

a comprehensive survey of the success or failure of current animal welfare legislation.

Finally, by advocating such sweeping changes by means of inspired common law judges willing to make radical changes in the law, Wise ignores the reality of the modern legal system. Today, most laws are made by legislatures, not courts. He also ignores the obvious: no matter how great their "human-like" qualities, animals simply are not human. Even most animal lovers, who fight steadfastly for the strongest animal welfare laws and for harsh criminal penalties for those who abuse animals, will not buy into the notion of instant legal personhood for animals. There is substantial intermediate legal ground that must be covered first.

Curiously, Wise devotes no meaningful arguments, positive or negative, to the success or failure of existing animal welfare laws. He states, "[w]ithout legal personhood, one is invisible to civil law. One has no civil rights. One might as well be dead."[17] Yet he offers no arguments, no data, no facts, no succession of legal failures, to support this statement. He also argues, "until humans learn to fight for them or write for them, nonhuman animals will never have any rights."[18] Yet he and others, as well as organizations like the American Humane Society, American Society for the Prevention of Cruelty to Animals, People for the Ethical Treatment of Animals, and many others, are doing just that. Wise does not adequately recognize these efforts.

It is beyond the scope of this review to comment on all of the animal welfare laws in existence, but a quick search on the Internet reveals the sheer breadth of coverage.[19] News stories substantiate the high level of interest in animal rights and welfare, as well as the effects of legal and public pressure where abuses are found.[20] Recent congressional hearings specifically target the ethical use of chimpanzees in biomedical research.[21] In

17. *Id.* at 4.

18. *Id.* at 14.

19. *See, e.g., Animal Law: Subject Matter Index*, Northwestern School of Law of Lewis and Clark College, *at* http://www.lclark.edu/~alj/table-subjects.html (last visited Nov. 8, 2000).

20. Examples include finding homes for the Air Force "Space Chimps" and Navy bottlenose dolphins specially trained for important military missions. Again, there are numerous stories available online on both of these subjects, such as *Space Chimps: The Forgotten Veterans*, MSNBC, *available at* http://www.msnbc.com/news/167403.asp (last visited Nov. 8, 2000). Several news stories on United States and Russian use of bottlenose dolphins for military exercises and missions can be found at numerous online sources, dating from 1989 through 2000.

fact, these very laws and processes comprise the bedrock that Wise has relied upon in his practice over the past twenty years in defending animal rights.[22] Yet, throughout 270 pages, there is no significant discussion of these laws.[23]

Though not plainly stated, the catalyst for Wise's plea for legal personhood for chimpanzees and bonobos is an attempt to thwart their lawful use—like Jerom's—in biomedical research. The abusive conditions to which such animals are subjected are a mere sidelight, beyond functioning as an effective "grabber" for his book. While there is no excuse for keeping any animal in an inhumane environment, there are valid arguments for using animals in biomedical research. Such research has resulted in cures for horrible diseases, vaccines to save human lives, and many other medical benefits. Wise fails miserably to explore (and refute) this legitimate subject area.[24]

Wise leaves open the extension of legal personhood beyond chimpanzees and bonobos.[25] Except for establishing the criteria that other animals granted such status should have "minds," he provides no guidelines for making such future extensions.[26] He also concedes that not all animals have "minds," and thus not all animals have a right to legal personhood.[27] Yet, in this concession, he is guilty of discrimination and hypocrisy that highlight the primary fallacy of his argument: where to draw the line. In effect, he is stating that some animals really are animals and deserve to be treated as animals, with no rights, while other animals are essentially human, or at least deserving of human-like status and rights.

Wise fails to discuss two additional key points: (1) the long and short-term implications of endowing various species of animals with legal personhood; and (2) how conferring legal personhood to any animal is magically going to solve the underlying problems. At one extreme, armed with fundamental civil rights, it is conceivable that animals might eventually "sue" their owners (through advocates, of course) for all kinds of triv-

---

21. *Chimpanzees and Biomedical Research: Hearing of the Health and Environment Subcommittee of the House Commerce Committee*, 106th Cong. (2000), *available at* http://www.lexis.com.

22. WISE, *supra* note 1, at Book Jacket.

23. He gives a brief, dismissive discourse on anti-cruelty statutes. *Id.* at 43-45.

24. *Id.* at 239-66.

25. *Id.* at 267-70.

26. *Id.*

27. *Id.*

ial indiscretions beyond serious abuse or neglect addressed by existing laws. Finally, if the current animal welfare laws are inadequate, the solution is not to create instant fundamental rights, but to strengthen the current laws by more vigorously pursuing violations and increasing punishments. Legal personhood is not going to work a miraculous change in how certain animals are viewed and treated. The process needs to be incremental, buttressed by education and public support through legislation. It is then the province of the courts to see that the laws are enforced fairly.

We need animal welfare legislation. We need to ensure the humane treatment of animals. We especially need to ensure adequate habitability and humane treatment for those animals sacrificed in biomedical and other experiments deemed necessary for studying, curing, and preventing diseases. These issues are well settled and no longer in dispute. Much of our legislation appropriately provides for criminal penalties for violation of animal welfare laws. We need to enforce existing laws better and we need to improve on those laws where they are deficient. But until we have taken these steps and they have failed, until we have built the bridge over the chasm, we cannot simply leap to the other side without concern for the long and short-term consequences. If, and when, the time comes for sweeping change, it must be through the democratic, legislative process, if it is to have any broad application or meaning. Wise quotes with disapproval a long-standing principle of sound jurisprudence from an 1890's case in Ireland:

> The law is, in some respects, a stream that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advancement on defined rights and engagements; if these are to be altered—if new rights and engagements are to be created—that is the province of legislation and not decision.[28]

Yet, this long-standing principle is precisely how most legal change comes to be and how such change earns widespread legitimacy.

As a final observation, the book is littered with distracting spelling and grammatical errors. The more glaring examples follow:

- "the U.S. Supreme Court agreed that *a women* has an immunity. . ."[29]

---

28. *Id.* at 108 (citation omitted).
29. *Id.* at 58 (emphasis added).

- "automattically"[30]
- "capicity"[31]
- "legal rules that even a . . . Judge could mechanically."[32] (mechanically what?)
- "Mine *can only experienced by me*, yours by you."[33]
- "Siena will start to understand *that that* her toy dog will appear differently. . ."[34]
- "There is little evidence that we humans think in the language *they* know."[35]
- "But if Michael beats me *by scores* 100 points. . ."[36]
- "Chimpanzees who learn abstract symbols can engage in a kind of mathematics *that is advance upon* the primitive ability of human infants to add and subtract small integers."[37]
- "All learned the words they wanted to learn*ed*. . ."[38]
- "the difficulty of the *tast* is not widely understood. . ."[39]

The book is simply too ambitious and premature. Wise has done an amazing job of cataloguing the historical treatment of animals, from Biblical times through the present, with one glaring exception: glossing over the current status and effectiveness of animal welfare legislation. This is a critical foundational underpinning that cannot simply be cast aside with minimal comment. If the current laws are not working, or do not go far enough, then the reasons need to be explored so that the problems can be addressed. Wise has the experience and knowledge to take this step, yet for reasons unexplained he chooses not to. The result is an incomplete journey, unfulfilled expectations, and an unsupported conclusion.

Wise's greatest contribution through the book is his summary of the phenomenal gains made with primates. He shows how, through human enculturation, their intelligence and capabilities thrive. Their lives—and ours—are enriched because of the experience. Not only can primates be taught to communicate with humans, they can also teach their young what

30. *Id.*
31. *Id.* at 61.
32. *Id.* at 117.
33. *Id.* at 126 (emphasis added).
34. *Id.* at 152 (emphasis added).
35. *Id.* at 158 (emphasis added).
36. *Id.* at 178 (emphasis added).
37. *Id.* at 188 (emphasis added).
38. *Id.* at 227 (emphasis added).
39. *Id.* at 229 (emphasis added).

they have learned. Primates clearly have a lot to teach us, but not yet as our equals.

SON THANG: AN AMERICAN WAR CRIME[1]

REVIEWED BY MAJOR DAVID D. VELLONEY[2]

> *[H]e told them to go out and get some, to pay the motherf—rs back, to pay them back good. To shoot everything that moved. To shoot first and ask questions later and to give them no slack. . . . If the killer team . . . saw anyone moving along the trail, . . . if they saw anyone cutting across a rice paddy, . . . they were to shoot these people.*[3]

First Lieutenant Ron Ambort exhorted five of his company's marines to "Get Some" before they left on patrol for Son Thang on the night of 19 February 1970. The young B Company commander's choice of words, "get some," echoed the motto of the 1st Battalion, 7th Marines, and fit in with the battalion's "body count mentality." Immediately following Ambort's pep talk, Lance Corporal Randy Herrod led the five-man patrol, known as a "killer team," toward the small hamlet. The patrol encountered neither enemy soldiers nor hostile fire that evening. Yet, less than an hour after receiving Ambort's briefing, Herrod gave the order: "Shoot them! Kill them all! Kill all of them bitches!"[4] Upon hearing the order, the killer team opened fire on six noncombatant Vietnamese women and children. The murderous scene repeated itself twice in the next few minutes, leaving sixteen women and children dead.

Four general courts-martial resulted from the incident. A panel of officers convicted Private Michael A. Schwarz of premeditated murder and sentenced him to confinement for life. A panel of officer and enlisted members convicted Private First Class Samuel G. Green, Jr., of unpremeditated murder and sentenced him to five years in confinement. Another officer panel acquitted Lance Corporal Randy Herrod, and a military judge acquitted Private First Class Thomas R. Boyd. The government granted Private First Class Michael S. Krichten immunity in exchange for his tes-

---

1. GARY SOLIS, SON THANG: AN AMERICAN WAR CRIME (1997).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SOLIS, *supra* note 1, at 94 (quoting Article 32 testimony of Captain Charles E. Brown, Jr.).

4. *Id*. at 47.

timony against the other members of the killer team and declined to court-martial Lieutenant Ambort following his Article 32 pretrial investigation.

Gary Solis's fast-paced narrative and detailed case study of the Son Thang killings describe the challenges faced by Marine Corps commanders and judge advocates as they attempted to apply the reformed 1969 version of the Uniform Code of Military Justice (UCMJ) in the wartime environment of Vietnam. The author concludes that the Son Thang courts-martial were a failure. Solis combines master story-telling skills with extensive experience as a Marine Corps commander, accomplished historian, and legal scholar to chronicle what can best be described as the Marine Corps' equivalent of the My Lai massacre. Interestingly, Army Lieutenant William L. Calley was charged with murdering 109 noncombatant Vietnamese civilians only three months before the Son Thang killings. Calley's crimes occurred less than twenty-five miles from Son Thang, and the worldwide publicity regarding the My Lai case made it well known to the marines involved in the Son Thang incident. By reading *Son Thang*, students of international and criminal law, military lawyers, and small unit commanders will gain vast insight into the leadership and legal challenges faced during Vietnam when commanders attempted to enforce the law of war and punish alleged war crimes using the UCMJ. Although Solis approaches the incident with somewhat of a prosecutorial bias, this easy to read and historically informative book should find its way onto all judge advocates' and junior officers' reading lists.

This book review first addresses the author's qualifications and writing style. Second, the review examines the book's strengths, including its organization and flow, use of maps and pictures, character development, and documentation and use of sources. Third, the review identifies the author's pervading prosecutorial bias. Last, the review discusses the book's weaknesses, including its inconsistent conclusion regarding inexperienced counsel and its tendency to raise issues without completing any meaningful analysis.

Solis's background, including his experience as a military officer and as a professor, makes him uniquely qualified to write about the Son Thang killings. Solis entered the Marine Corps in 1963 and served as an amphibian tractor company commander in Vietnam starting in 1966. Following law school, he served as a judge advocate in the Marine Corps. Before retiring in 1989, he participated in more than 750 courts-martial either as prosecutor or as military judge. His last few years in the military were spent at the Marine Corps Historical Center writing a history of the Marine

Corps' military law experience in Vietnam. After retiring, Solis moved to London, England, where he earned a doctorate in the law of war at the London School of Economics. He taught British criminal law in London for three years and then joined the Department of Law at the United States Military Academy at West Point in 1996.[5] Solis's résumé indicates why *Son Thang* so effectively combines historical documentation and research with blunt and militant organization and reasoning. Because Solis occasionally approaches his audience as a professor would a student, the reader often feels like he is learning yet never able to grasp exactly what questions will show up on the exam. His collegial approach does, however, foster a desire to learn more about the command climate, combat environment, and political atmosphere surrounding the Son Thang killings, as well as the legal landscape involved in handling the tragedy.

Son Thang's greatest strength is its organization and flow. Solis effectively uses chapter breakdowns and section headings to keep the reader focused as he weaves through complex fact patterns, background information, political considerations, and analyses from different legal disciplines. The historical background and introduction of the commanders he provides in Chapter 1 assists the reader in understanding the nature of the environment in which the young Americans found themselves before leaving on patrol to Son Thang. In Chapter 2, Solis starts to develop the book's main characters, the members of the killer team. Separate chapters dealing with the patrol, investigation, pretrial proceedings, individual trials, and post-trial process aid the reader in keeping information straight. However, Solis is not content to write a dry book heavy on organization and recitation of facts. He effectively weaves in scenes from the various courts-martial throughout the book. In fact, *Son Thang* starts in the courtroom, emphasizing Solis's ultimate purpose of evaluating the military justice system's failure to achieve just results. He also adds an element of suspense by refraining from discussing the results of the trials until he chronologically reaches the point in the story where the panel or judge announces the verdict.

Other tools used by Solis that add to the book's organizational strength include maps and pictures. He effectively uses maps to assist in setting the geographical scene and military areas of operation at the time of the killings.[6] Solis's use of pictures and captions helps the reader understand the characters that he so capably develops throughout the

5. *Id*. at xiv.
6. *Id*. at 7, 10, 32, 111.

book.[7] The pictures also assist his explanation of some of the interesting dynamics between various actors in the theater of operations. For instance, he demonstrates the unique dynamic of the prosecutors and defense attorneys living and working in close proximity in the combat environment by including a picture showing all the key military attorneys being sworn in together as special court-martial judges.[8] Pictures depicting Herrod with his defense attorneys, the press, and First Lieutenant Oliver North also demonstrate visually the circumstances surrounding his court-martial.[9] When telling and analyzing this compelling true story, Solis effectively combines his legal acumen, impeccable organizational skills, and obvious ability to spin a yarn.

The masterful story-telling aspect of *Son Thang* is best exhibited through the well-developed characters. All the major participants in the drama come to life as Solis describes their family histories, educational experiences, and military careers. He intersperses the development of the killer team members throughout the story, climaxing with each marine's interaction with his defense attorney at trial and testimony on the stand. Though he often leaves policy questions unanswered throughout the book, Solis never leaves a character hanging. He concludes each patrol member's individual saga with intricate details regarding his return to family and civilian life following his discharge from the Marine Corps. Solis quickly establishes Lance Corporal Herrod as the story's primary antagonist. He even makes use of Herrod's own book, *Blue's Bastards*, to develop the patrol leader's critical attitude toward the military justice system. Interestingly, First Lieutenant Oliver North was a key defense witness for Herrod, and Solis indicates that North paints a very different picture of Herrod in his book, *Under Fire*.[10] Solis generally describes the members of the killer team as "young, uneducated, battle-weary Marines with troubled pasts."[11] He uses their backgrounds and haphazard selection for the killer team to identify leadership failures that may have led to the unfortunate killings.[12]

The minor characters are also well developed. In fact, the cast of characters as a whole resembles one that might be chosen for a fictional

---

7. *Id*. *passim.*

8. *Id*. at 79.

9. *Id*. at 220, 242, 257.

10. *Id*. at 200, 228.

11. John P. Marley, *SON THANG: An American War Crime*, 44 NAVAL L. REV. 301 (1997) (book review).

12. SOLIS, *supra* note 1, at 24-28.

Hollywood Vietnam War movie.[13] As mentioned above, the now famous Lieutenant Colonel Oliver North testified at Herrod's trial regarding his good character and heroic actions in saving North's life. Also playing a supporting role was eventual Secretary of the Navy James Webb.[14] While in law school, Secretary Webb took a personal interest in Green's case and was instrumental in helping to upgrade Green's dishonorable discharge to a general discharge. Solis introduces the military judge for three of the trials, Lieutenant Colonel Paul St. Amour, in the opening pages of the book. By developing the personality of the "irascible but practical"[15] marine early on, Solis identifies one of the most important sources he used to reach his eventual conclusions regarding deficiencies in the military justice system. Solis thanks St. Amour in his preface, and the numerous quotes used in the book from letters St. Amour wrote to Solis indicate how much the author relied on the judge's impressions. In Chapter 1, Solis also introduces Major Richard E. Theer, the battalion operations officer and investigator who uncovered the war crimes. The sheer number of endnotes in *Son Thang* attributing credit to letters or conversations with Theer indicates the importance Solis placed on his opinions. Lieutenant Colonel Charles G. Cooper, the hard-charging battalion commander, who eventually reached the rank of Lieutenant General in the Marine Corps and testified for the defense at all four trials, is developed in a negative light right from the start. Perhaps this treatment results from over-reliance on Theer's account.[16] Whether the negative persona for Cooper is justified or not, his role as a secondary antagonist, along with the popular and aggressive Lieutenant Louis R. Ambort, make for an intriguing story. Their role as commanders also leads to a compelling discussion by Solis of command responsibility and the "obedience to orders" defense under the law of war.[17]

Solis's research, documentation, and use of available sources are excellent. Most quotations and descriptions come directly from one of three verbatim records: the joint killer team Article 32 pretrial investigation and the written sworn statements considered by the Article 32 investigating officer, the Ambort Article 32 pretrial investigation, or the record of trial from *United States v. Schwarz*.[18] Although the *Green* record of trial

13. *Id*. at x.

14. *Id*. at 283-91.

15. *Id*. at 109.

16. *Id*. at 239. In a letter to the author, Theer expressed that he was "incensed" at Cooper's participation in the trials. Solis does not address whether he thinks this might have influenced Theer's recollection of the events.

17. *Id*. at 57-59, 94-101, 154-58, 172-75, 207-09, 267-75.

18. *Id.* at 301.

was lost and the Herrod and Boyd acquittals were not transcribed, Solis makes effective use of press reports and letters from St. Amour, Theer, and other first-hand witnesses to piece together his facts. He also uses secondary sources, but he tempers his reliance on them by either directly or indirectly discussing their potential biases. The use of actual court-martial and pretrial investigation testimony adds significant credibility to the narrative. Solis's style and ability to clearly communicate the story, by integrating the documented facts, make what would otherwise be dry legal hearings come alive as realistic courtroom and investigative drama.

Although Solis is perhaps the most qualified person to write a narrative and analysis of the Son Thang killings, an honest review of the book must point out that he bases his ultimate conclusion that the trials were a failure on a somewhat biased assumption. From the very beginning, he assumes that justice demanded guilty verdicts and stiff sentences for Herrod and the other marines on the killer team. The very name of the book includes the phrase "*An American War Crime*." Also, when discussing the defense case in Herrod's court-martial, Solis entitles the section "Defending the Indefensible."[19] If one assumes that the marines were guilty, then Solis's conclusions about the system logically follow from the fact that the courts acquitted Herrod and Boyd. However, given that the purpose of the trials was to determine guilt or innocence, Solis reaches his conclusions too easily. He contends that the "results betray" that the military justice system carried out its prosecutorial function "deficiently."[20] Although, the four Son Thang cases resulted in widely different verdicts and seemingly inequitable findings of guilt, the reader will find that Solis's prosecutorial bias and assumption of guilt tend to color his perspective as he develops his thesis. Brigadier General Edwin H. Simmons's comments in the foreword are the first indication of a potential bias: "Solis decided that he liked criminal law and liked being a prosecutor. He never defended an accused then or later."[21] Solis bases his conclusion that the Son Thang trials were a failure more on his belief that Herrod and Boyd should have been convicted than a belief that the four results should have been similar. Solis likely would have reached the same conclusion if all four trials resulted in findings of not guilty because of his assumption that the soldiers were in fact guilty. He gives little credence to any defense arguments regarding the difficulty of the young marines' situation and the established norms within the unit. As a strict matter of international law, Solis may be

19. *Id.* at 235.
20. *Id*. at 294.
21. *Id*. at xiv.

right, but a more objective analysis from the defense perspective would have added to the book's value. Perhaps justice in the wartime confusion of Vietnam demanded the acquittals and the clemency reducing Green's and Schwarz's sentences to one year. There is no question that the varied results demand analysis and explanation. From the defenseless noncombatants' perspective, the facts are heinous and inexcusable. Solis offers a number of well-reasoned and logical conclusions, but an overarching assumption of guilt clouds his methodology. His conclusions are best understood if one realizes from the beginning that he approaches the trials and his analysis of the killings with a prosecutorial bias.

One of Solis's conclusions is inconsistent with his pervading assumption throughout the book that justice demanded guilty verdicts. He concludes that one "deficiency" of the justice system that led to the results was the relative inexperience of the prosecutors who handled the Son Thang cases. He then also fixes responsibility for the Schwarz and Green convictions on their military defense attorneys. Inexperience may have, and probably did, affect the outcomes of the trials to some extent. However, to label all four trials as failures based on the inexperienced counsel does not appear logical, given his assumption that all the defendants deserved to be found guilty. Solis attempts to correct the inconsistency in the third to last paragraph of the book by stating, "The loss of the Herrod and Boyd cases and, for that matter, the convictions of Schwarz and Green, cannot fairly be laid at the doorstep of the 'losing' lawyers."[22] However, the book has already articulated conclusions that cannot be explained away by the last minute caveat.

Solis's strength as an experienced educator in raising issues for consideration and discussion also leads to another weakness in the book. He opens discussions on a number of topics in the midst of his narrative and fails to complete any meaningful or comprehensive analysis to substantiate his conclusions. Examples include his editorial comments regarding racial inequities in the Marine Corps,[23] his discussion of the dual supervisory role of staff judge advocates over both prosecutors and defense attorneys,[24] the folly of and problems with the replacement system in Vietnam,[25] the lack of sentencing guidelines in the UCMJ,[26] and the problems with Project 100,000 and the enlistment of Category IV personnel

22. *Id.* at 299.
23. *Id.* at 210.
24. *Id.* at 112, 216.
25. *Id.* at 202.
26. *Id.* at 209.

(individuals with very low general classification test scores).[27] Perhaps the most telling example of Solis's penchant for opening a discussion without completing the analysis or fully developing a suggestion comes at a critical juncture in the book's conclusion. He spends one paragraph giving a general description of "field general courts-martial" under British military law and suggests that such a system would eliminate some of the difficulties of applying the UCMJ in a wartime scenario.[28] However, without any further analysis or developed comparison, he moves on to his suggestion that the military implement multi-service war crime teams. With Solis's experience teaching criminal law in Britain, he certainly could have more fully developed the suggestion for field general courts-martial.

Son Thang is at its best when Solis is narrating the story. There are valuable lessons to be learned from reading the book. Junior officers and judge advocates would do well to consider the actions of their counterparts in the Son Thang tragedy and attempt to avoid their mistakes. Ever the professor, Gary Solis provides readers with not only a detailed history, but also a tool for instructing and discussing how best to enforce the law of war within the parameters of the military justice system.

---

27. *Id.* at 116-17.
28. *Id.* at 297.